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Property and Mortgage Fraud Under the Mandatory Victims Restitution Act: What is Stolen and When is it Returned?

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PROPERTY AND MORTGAGE FRAUD UNDER THE MANDATORY VICTIMS RESTITUTION ACT: WHAT IS STOLEN AND WHEN IS IT RETURNED?

ABSTRACT

The United States Circuit Courts of Appeals are split on how to calculate restitution in a criminal loan fraud situation where collateral is involved. This trend is best illustrated in cases involving mortgage fraud. The split stems from disagreement over how to account for the lender's receipt of collateral property. The Third, Seventh, Eighth, and Tenth Circuit Courts of Appeals consider the property returned when the person defrauded receives cash from the sale of collateral property. The Second, Fifth, and Ninth Circuits deem the property returned when the lender takes ownership of the collateral property. This Note argues that the former conception of the offset value ought to govern. This Note also supports a view of property that considers the lender's lost opportunity from fraud. Even when restitution is mandatory, the governing rule should take into account the alternative investment the lender would have made if there had been no fraud.

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INTRODUCTION

The U.S. housing and financial industries have been at the forefront of national attention since the dramatic and economically crippling events of 2008.[1] Six years later there is still much left to discuss and discover. In the wake of the collapse of the U.S. housing market, the intense press coverage of mortgage fraud might make it seem like a recently discovered fad.[2] However, the temptation to fool a bank has probably long existed: say the right words in the right way and walk away with a pile of money as a loan from a bank. Over five hundred years ago Niccolo Machiavelli dedicated *The Prince* to a scion of one of the world's greatest financial institutions in history, Lorenzo de' Medici.[3] Machiavelli argued that cunning and deceit were required to succeed in life, and that "it is necessary ... to be a great pretender and dissembler. Men are so simple-minded and so controlled by their immediate needs that he who deceives will always find someone who will let himself be deceived."[4] Machiavelli's statements on the powers of duplicity likely would not have been news to a man who was both a politician and member of a banking family; politicians thrive on perception and banks practically breathe on truth and trust.

Banks historically have gone to great lengths to avoid suffering from deception. The Medici Bank, like all others, would not have existed very long had it been deceived regularly. Indeed, fraud was a major source of the Medici Bank's ultimate demise.[5] Today, a misrepresentation to a bank presents the same bargain as it always has: cash for relatively minimal work at the price of dishonesty and the risk of getting caught. However, now, the necessary deception comes in different forms with more evocative monikers:

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[1] *See generally* ANDREW ROSS SORKIN, TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM FROM CRISIS—AND THEMSELVES (2009); Sue Kirchhoff, *Greenspan Takes One on the Chin, Admits Flaws in System*, USA TODAY (Oct. 24, 2008, 2:05 AM), http://usatoday30.usatoday.com/money/economy/2008-10-23-greenspan-congress_N.htm (quoting a statement of Alan Greenspan to Congress) ("A critical pillar to market competition and free markets did break down.... I still do not fully understand why it happened."); Micha el Lewis, *The End*, PORTFOLIO MAGAZINE (Nov. 11, 2008), *available at* http://www.er.ethz.ch/inspire/end; *This American Life: The Giant Pool of Money*, NATIONAL PUBLIC RADIO (May 9, 2008), http://www.thisamericanlife.org/radio-archives/episode/355/the-giant-pool-of-money.

[2] *See* Joe Nocera, *The Mortgage Fraud Fraud*, N.Y. TIMES, June 2, 2012, at A21; Joe Nocera, *In Prison For Taking A Liar Loan*, N.Y. TIMES, Mar. 26, 2011, at B1.

[3] NICCOLO MACHIAVELLI, THE PRINCE 5 (Peter Bondanella trans. & ed., Oxford World's Classics 2005) (1532).

[4] *Id.* at 61.

[5] *E.g.*, NIALL FERGUSON, THE ASCENT OF MONEY 47 (2008) (explaining that fraud was a major cause of the Medici Bank's undoing).

strawbuyers, phantom sales, property flip fraud, double skimming, equity skimming, etc.

How should we deal with someone who intentionally misleads a bank into making him/her a loan? Should we care whether there was any intent to repay the loan? Should we only focus on punishment or should we keep an eye towards helping the defrauded victim? If so, how should we account for property posted as collateral that is subsequently taken by the lender? When property was posted as collateral in consideration for the loan, how should that offset the obligations of the criminal? The Mandatory Victims Restitution Act (MVRA)[6] addresses these issues in federal court.

This Note attempts to explain why stolen property returned under the MVRA should be valued for restitutionary damage purposes when the subsequent foreclosure sale by the bank occurs, and not when title passes to the bank as is done in some circuits. This former approach has recently been persuasively adopted by the Seventh Circuit in the case *United States v. Robers*.[7] The Supreme Court has granted certiorari and will hear arguments late February 2014. This Note argues that the law should punish fraud more harshly by adopting a broader conception of what is stolen by the fraud. Courts should recognize that mortgage fraud causes legitimate investment opportunities to go unfunded. As such, the definition of property stolen should include the investment opportunities that were forgone because of the fraud. This view of property does not allow any guidance from considering what would occur in a civil action, as some courts suggest doing. This view also presents potential problems with the MVRA's bar on damages that are speculative or consequential.

I. BACKGROUND

A. Mortgages

The banking industry can be a place rife with the allure of opportunity to profit from deception. This is the same reason that the famous thief Willie Sutton is mythologized to have responded when asked, "why he robbed banks: 'Because that's where the money is.'"[8] The allure of theft exists from both outside and within banks. The Savings and Loan Crisis in the 1980s shows fraud and illegality can be perpetrated within the bank.[9] The

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[6] Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132 § 201, 110 Stat. 1214, 1227 (codified as amended at 18 U.S.C. § 3663A (2012)).

[7] *See* United States v. Robers, 698 F.3d 937, 942 (7th Cir. 2012) (cert. granted, arguments and decision pending).

[8] Robert Polito, *Gentleman Outlaw*, N.Y. TIMES, Nov. 4, 2012, at BR18.

[9] *See generally* WILLIAM K. BLACK, THE BEST WAY TO ROB A BANK IS TO OWN ONE: HOW CORPORATE EXECUTIVES AND POLITICIANS LOOTED THE S&L INDUSTRY (2005).

crisis was marked by "many notorious examples of how [the] system was abused by unscrupulous S&L owners reporting high current income on ADC loans while milking the institution of cash in the form of dividends, high salaries, and other benefits."[10]

A major part of the banking industry, and indeed the American economy, is centered on mortgages, accounting for a total of $13.2 trillion in outstanding loans as of the second quarter of 2012.[11] For comparison, the Gross Domestic Product of the United States is in the area of $16 trillion.[12]

The idea of a mortgage is simple and ancient,[13] found in every system of law that we know.[14] A mortgage is a security interest in property.[15] The security interest gives the lender comfort that if the loan is not repaid, there is at least real property as collateral.[16] This simple arrangement can become clouded through contracts so complicated that even renowned judges have given up reading them; however, that aspect is nothing new either.[17] Long ago, a mortgage, or "dead pledge," described a loan where the lender received payments, but did not apply those payments to reduce debt on the property, instead keeping them as profit.[18] Those types of loans were considered usurious, and though not illegal, were viewed "as unjust and dishonest" thus nullifying the pledge.[19]

Although the traditional mortgage arrangement has a long tradition, mortgages play a relatively new and critical role in today's economy.[20] Also,

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[10] 1 FED. DEPOSIT INS. CO., *The Savings and Loan Crisis and Its Relationship to Banking*, HISTORY OF THE EIGHTIES—LESSONS FOR THE FUTURE 167, 184 (1997), http://www.fdic.gov/bank/historical/history/167_188.pdf.

[11] BD. OF GOVERNORS OF THE FED. RESERVE SYS., MORTGAGE DEBT OUTSTANDING (June 2013), *available at* http://www.federalreserve.gov/econresdata/releases/mortoutstand/mortoutstand20130630.htm.

[12] THE WORLD BANK, GDP (CURRENT US $), *available at* http://data.worldbank .org/indicator/NY.GDP.MKTP.CD?order=wbapi_data_value_2011+wbapi_data_value+wbapi_data_value-last&sort=desc (last visited Jan. 12, 2014).

[13] *See* H.W. Chaplin, *The Story of Mortgage Law*, 4 HARV. L. REV. 1, 1 (1890).

[14] *Id.*

[15] *See id.*

[16] *See id.* at 1–2.

[17] *See id.* at 2. ("[I]n our form of giving security on real estate to secure a common debt, or otherwise to provide assurance, we find a contract so artificial and so difficult of apprehension as to elude definition."). *See also* David Lat, *Do Lawyers Actually Read Boilerplate Contracts? Richard Posner and Evan Chesler Don't; Do You?*, ABOVE THE LAW (June 22, 2010, 2:42 PM), http://abovethelaw.com/2010/06/do-lawyers-actaully-read-boilerplate-contracts-judge-richard-posner-doesnt-do-you/ (reporting that Judge Posner simply signed his home equity loan without reading it).

[18] Chaplin, *supra* note 13, at 8.

[19] *Id.*

[20] *See* ROBERT J. SHILLER, THE SUBPRIME SOLUTION: HOW TODAY'S GLOBAL FINANCIAL CRISIS HAPPENED AND WHAT TO DO ABOUT IT 1 (2008).

the process of both obtaining and granting a mortgage is very different. Banks used to make individual decisions on mortgages directly and held the mortgage for the duration of the loan.[21] The process was much more intimate than we see today.

Today, from the consumer perspective, the process usually begins with an entity known as a mortgage originator.[22] Mortgage originators play a vital role. A mortgage originator is the term given to the institution initially approving and making a loan.[23] The loan, or the right to receive payments, is then sold to another institution.[24] Sometimes the originators are banks, and other times they are mortgage specialists,[25] who only originate mortgages and process payments.

The process of obtaining a mortgage has become more impersonal and data-driven over the decades.[26] Mortgages are evaluated and rated by easily measured criteria and metrics.[27] No evaluation or weight is given to the possibility that someone may just seem subjectively untrustworthy, as could have happened in the past.[28] The resulting rating assigned to a mortgage application corresponds to the likelihood of the loan not being repaid, also known as default, given the applicant's income, credit history, etc.[29]

> The mortgage-writing business runs on narrow profit margins and high volume. For efficiency's sake the quality classification system uses a few easily measured criteria. How much does the applicant make compared to his mortgage payment? How much is the mortgage compared to the assessed value of the home? How big is the down payment? What is the borrower's credit score, etc.?[30]

This evaluation process "leave[s] out a lot of detail,"[31] but has the benefit of simplicity and control. The mortgage originators are very focused on "the numbers" and are "perfectly aware that any given borrower who shows up as a low risk 'by the numbers' may turn out to be a very bad risk because of misfortune or even dishonesty."[32] A former Bear Stearns executive stated,

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[21] *See* ANDREW REDLEAF & RICHARD VIGILANTE, PANIC: THE BETRAYAL OF CAPITALISM BY WALL STREET AND WASHINGTON 13 (2010).
[22] *See id.* at 12.
[23] *Id.*
[24] *Id.* at 13.
[25] *Id.* at 12.
[26] *See id.* at 12–13.
[27] *Id.* at 12.
[28] *See id.* at 12–13.
[29] *Id.* at 12.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 12–13; *see* James Charles Smith, *The Structural Causes of Mortgage Fraud*, 60 SYRACUSE L. REV. 473, 477 (2010).

"We as an industry cannot eliminate fraud entirely .... We can and do continue to develop systems and detection techniques that evolve with the complexity of criminal schemes."[33]

Once an originator makes the loan, the loan is often sold into a larger assemblage of mortgages.[34] Fannie Mae and Freddie Mac, quasi-government entities, have been the largest players in this resale market for a long time, buying up wide swaths of mortgage pools that originated elsewhere.[35] "For all practical purposes, the mortgage originators ... were sales offices for Fannie, Freddie and the big banks."[36] Once sold into large, diversified pools, the mortgages as a whole should "benefit [from] the law of large numbers."[37] Mortgage fraud, therefore, is generally perpetrated by misrepresenting some of those easily measured characteristics of a loan.[38]

B. Mortgage Fraud

Essentially, mortgage fraud is lying to the bank to get money, or, as some have called it, "bank robbery without a gun."[39] The Federal Bureau of Investigation (FBI) defines mortgage fraud as a "material misstatement, misrepresentation, or omission relied on by an underwriter or lender to fund, purchase, or insure a loan."[40] Loan origination fraud is by far the most common type of mortgage fraud that the FBI encounters.[41] Obtaining a loan through misrepresentation harms the value of the loan from the instant the loan is approved.[42] Regardless of whether actual default occurs, the risk of the loan being in default (based on those easy-to-measure metrics) does not comport with its value because the loan is based on lies.

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[33] Michael Corkery, *Fraud Seen as a Driver in Wave of Foreclosures*, WALL ST. J., Dec. 21, 2007, at A1.

[34] REDLEAF, *supra* note 21, at 13.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 14.

[38] *See id.* at 12; Smith, *supra* note 32, at 477.

[39] Ann Fulmer, *Burning Down the House: Mortgage Fraud and the Destruction of Residential Neighborhoods* 1 (U.S. Dept. of Justice, Working Paper, 2010), http://permanent.access.gpo.gov/lps123353/229912.pdf.

[40] FED. BUREAU OF INVESTIGATION, 2010 MORTGAGE FRAUD REPORT YEAR IN REVIEW, *available at* http://www.fbi.gov/stats-services/publications/mortgage-fraud-2010 (last visited Jan. 12, 2014) [hereinafter MORTGAGE FRAUD REPORT].

[41] *Id.* (showing that among the nine schemes the FBI identifies, loan origination accounted for sixty-two percent of FBI cases concerning mortgage fraud, followed by title/escrow/settlement, and real estate investment).

[42] *See* Tomasz Piskorski, Amit Seru & James Witkin, *Asset Quality Misrepresentation by Financial Intermediaries: Evidence From RMBS Market* 3–4 (Columbia Bus. Sch., Working Paper No. 13-7, 2013), *available at* http://ssrn.com/abstract=2215422.

The FBI further identifies two categories of mortgage loan origination fraud: fraud for property and fraud for profit.[43] The two are mainly distinguished by the purposes of the loan applicant, who would be the fraudster.[44] Fraud for property occurs when the misrepresentation and intent of the loan are motivated by the purchase of property as a primary residence.[45] This is the garden-variety loan application lie, and usually only one loan is involved.[46] It is done to upgrade a lifestyle by getting a bigger loan than the bank would have otherwise authorized.[47] Fraud for profit is a more nefarious and serious crime. It usually involves several loans and more elaborate schemes "perpetrated to gain illicit proceeds from property sales. Gross misrepresentations concerning appraisals and loan documents are common ... and participants are frequently paid for their participation."[48] Fraud for profit is fraud for property "on steroids."

Loan origination fraudsters use several elaborate schemes with equally elaborate names used to obtain funds from a mortgagee (the bank or mortgage originator). Occupancy fraud concerns a misrepresentation about how the property will be used.[49] For example, the applicant might claim the property will be a primary residence when it is really an investment property.[50] Or, the applicant may apply for a home intending for another to live there.[51] A builder bailout happens when a builder uses fraudulent schemes to rid himself of his inventory, such as secretly offering a buyer excessive incentives like "'no money down'" or "closing cost assistance" while concealing those incentives from the lender.[52] "Buy and Bail" occurs when a buyer who already owns a home that has suffered a decrease in value, obtains a second mortgage while still current on the first with no intent of continuing to pay the first.[53] Chunking happens when a third party acts as a borrower's agent and uses the identity of an innocent borrower to apply and obtain many more

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[43] MORTGAGE FRAUD REPORT, *supra* note 40.
[44] *See id.*
[45] *Id.*
[46] *Id.*
[47] *See id.*
[48] *Id.*
[49] *See* DEP'T OF THE TREASURY FIN. CRIMES ENFORCEMENT NETWORK, ADVISORY NO. FIN-2012-A009 1 (2012), http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2012-A009.pdf.
[50] *Id.*
[51] *Id.*
[52] FED. FIN. INSTS. EXAMINATION COUNCIL, THE DETECTION AND DETERRENCE OF MORTGAGE FRAUD AGAINST FINANCIAL INSTITUTIONS: A WHITE PAPER, 13 (2010) http://www.ffiec.gov/exam/Mtg_Fraud_wp_Feb2010.pdf [hereinafter FFIEC WHITE PAPER] .
[53] *Id.* at 16.

loans than were agreed to by the borrower.[54] This scheme usually requires assistance from an appraiser, broker, or title company representative to avoid having to bring money to multiple closings.[55] A phantom sale occurs when an individual falsely transfers title to a property (for example a fictitious quit claim deed) and uses that as security to obtain a mortgage.[56]

The schemes are constantly changing,[57] but the goal is always the same: to "find someone who will let himself be deceived"[58] and make off with the money.

C. Mortgage Fraud Prosecuted Under Federal Law

Although there is no specific federal law against mortgage fraud, there are several federal criminal laws that ensnare mortgage fraudsters. For example, the Real Estate Settlement Procedures Act of 1974 requires a mortgage applicant to make a statement to the federal government in the form of a HUD-1 Statement.[59] The HUD-1 Statement brings the fraud within the scope of Title 18, U.S. Code, § 1001, which prohibits misrepresentation to the federal government.[60] The Wire Fraud statute can also capture mortgage fraud.[61] Under 18 U.S.C. § 1343, wire fraud applies when fraud is used to obtain funds that are then wired across state lines from the lender's bank to the closing agent's bank.[62] Similarly, mail fraud becomes available as a prosecutorial weapon when misrepresentations are mailed to the bank under 18 U.S.C. § 1341.[63] Furthermore, depending on the scheme to defraud, criminal conspiracy charges often become a possibility, especially with straw buyer schemes and other large fraud-for-profit situations.[64]

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[54] *Id.* at 7.

[55] *Id.* at 18.

[56] *Id.* at 34.

[57] *See* Brady Dennis & Danielle Douglass, *Mortgage Settlement Fuels New Scams*, WASH. POST, Sept. 27, 2012, at A12 (statement of Patrick Madigan, assistant Iowa Attorney General) ("[Mortgage Fraud schemes are] like a game of Whac-a-Mole .... You hit one and four more pop up.").

[58] MACHIAVELLI, *supra* note 3, at 61.

[59] Philip J. Vacco, *RESPA and Avoiding Mortgage Fraud: What Goes on the HUD Settlement Statement?*, 96 ILL. B.J. 248, 250 (2008).

[60] Thomas N. Palermo, *Going "Cocoanuts": Looking at Modern Mortgage Fraud*, 57 FED. LAWYER 38, 39 (June 2010) (citing United States v. Wilkins, 308 F. App'x 920 (6th Cir. 2009), *aff'g* United States v. Wilkins, No. 1:06-CR-76-02, 2007 U.S. Dist. LEXIS 20633 (E.D. Tenn. Mar. 22, 2007)).

[61] Palermo, *supra* note 60, at 39; *see* Chris Olwell, *$10 Million in Restitution Ordered in Mortgage Fraud*, NEWS HERALD (Jan. 29, 2013), http://www.newsherald.com/news/crime-public-safety/10-million-in-restitution-ordered-in-mortgage-fraud-1.86333.

[62] Palermo, *supra* note 60, at 39.

[63] *Id.*

[64] *Id.*

Determining prison sentencing for mortgage fraud can be somewhat problematic, but, as shown below, it is less of a problem than when determining restitution awards. Because mortgages can change hands frequently, it can be difficult to satisfy the Sentencing Guidelines requirement that there be a victim at trial, sometimes it can simply be hard to determine who exactly that victim is.[65] A sentence is determined mainly by the size of the loss caused by the fraud.[66] This results in the somewhat odd consequence that similar criminal actions can receive different sentences depending on the health of the housing market. If the value of the housing market has appreciated since the fraud, then the crime is punished less severely.

After a bank discovers it is a victim of fraud and has taken ownership of the property but has not yet sold it, there is still not yet a clear loss for the purposes of the Sentencing Guidelines. The home must be sold under the Sentencing Guidelines to determine the loss.[67] Yet, in the grey area when the bank has yet to sell the property, the Sentencing Guidelines allow the court to "make a reasonable estimate of the loss" at the time of sentencing.[68] For example, in a calculation to determine the loss from fraud a court might start with the value of the loan, which would be what the bank gave over to the fraudster, minus the fair market value of the home, as determined by an appraiser at the time of sentencing.[69] Regardless of whether there were market shifts between the fraud and the sentencing, courts rightly seem to attribute all losses in home value to the fraudsters.[70] This can make sentencing relatively harsh when housing prices fall and relatively lenient when prices rise.[71] The calculation of loss under the Sentencing Guidelines does not establish loss for the purposes of criminal restitution.[72]

Despite this uneven outcome resulting from unclear sentencing guidelines, putting a fraudster in jail does not directly benefit the lender, as the lender is likely to still be out a significant sum of money. As such, restitution can often help the lender recover funds in a more fruitful, direct way.

II. RESTITUTION

Restitution can be a difficult subject to discuss because the word has taken on many different meanings. "Restitution" can refer both to a cause of

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[65] *Id.* at 40 (citing U.S. SENTENCING GUIDELINE MANUAL § 2B1.1, cmt. n.1 (2007) (defining a victim as any person who sustained any part of actual loss)).

[66] *Id.*

[67] U.S. SENTENCING GUIDELINE MANUAL § 2B1.1, cmt. n.3(C) (2007).

[68] *Id.*

[69] *Id.*

[70] *See, e.g.*, United States v. Robers, 698 F.3d 937, 943 (7th Cir. 2012).

[71] Palermo, *supra* note 60, at 41 ("[A]s any practitioner involved in federal white-collar prosecutions can tell you, cases without losses are not prosecuted frequently.").

[72] *See* United States v. Gallant, 537 F.3d 1202, 1247 (10th Cir. 2008).

action and a remedy.[73] Even when considered as a remedy the word can be interpreted in different ways. Traditionally, restitution was a tool of equity courts that focused on fairness by attempting to undo wrongs.[74] "Restitution" often refers to remedies based on unjust enrichment.[75] Where, for example, a contract was entered in to by one of the parties with no intent to perform, an unjust enrichment remedy would attempt to return the consideration given by the wronged, performing party.[76] In that situation, restitution is often appropriate to return to the faithfully performing party what the lying party received. This is perhaps most often and best seen in the contract context.

Restitutionary remedies in the civil context have traditionally focused on the defendant's gain to determine what should be owed to the plaintiff.[77] Damages do just the opposite and focus on plaintiff's loss. According to the Restatement of Restitution (Third), where a defendant is enriched by a money payment, as in a mortgage fraud situation, the measure of restitution should be "the resulting increase in the defendant's net assets ...."[78] In mortgage fraud, that would seem to amount to the exact value of the loan received, or the amount received over and above the lower amount the fraudster would have received without any deception. While this type of language appears to fit the mortgage fraud situation, it is not the type of restitution at issue. Criminal restitution is entirely different. For the rest of this Note, "restitution" will be used to refer to the criminal context, in which, "restitution is not only a means of making a victim whole, but also serves punitive and rehabilitative purposes."[79]

A. Federal Criminal Restitution

A federal court cannot order restitution unless authorized by statute.[80] Federal courts have only relatively recently been able to impose orders of restitution in a meaningful way.[81] Congress has gradually made it clear that restitution should be a regular part of the sentencing process.

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[73] BLACK'S LAW DICTIONARY 1428 (9th ed. 2009).

[74] *Id.*

[75] *Id.*

[76] *See* Fed. Ins. Co. v. First Nat'l Bank of Boston, 633 F.2d 978, 983 n.7 (1st Cir. 1980).

[77] BLACK'S LAW DICTIONARY 1428 (9th ed. 2009).

[78] RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 49(2); *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1(b) ("Broadly speaking, an ineffective transaction for these purposes is one that is *nonconsensual*.").

[79] United States v. Hardy, 707 F. Supp. 2d 597, 603 (W.D. Pa. 2010).

[80] United States v. Hicks, 997 F.2d 594, 600 (9th Cir. 1993) (quoting United States v. Casamento, 887 F.2d 1141, 1177 (2d Cir. 1989)) ("'A federal court has no inherent power to order restitution.'"); United States v. Elkin, 731 F.2d 1005, 1010 (2d Cir. 1984); *see also* United States v. Keith, 754 F.2d 1388, 1391 (9th Cir. 1985) (explaining that restitution orders may only compensate for the kinds of harms enumerated in the statute).

[81] Catharine M. Goodwin, *The Imposition of Restitution in Federal Criminal Cases*, 62 FED. PROBATION 95, 95 (1998) ("In fact, until 1982 restitution could not be imposed as a

The Victim and Witness Protection Act of 1982 (VWPA) is a milestone statute that gave federal courts the discretionary authority to order restitution "as a separate component of a federal criminal sentence."[82] It was passed "'to address the unmet needs of crime victims.'"[83] The Act's existence owes much to the Victim's Rights Movement. In 1972 that movement was accelerated by the controversial Supreme Court decision in *Linda R.S. v. Richard D.*[84] There, the Court decided that a mother of a child born out of wedlock did not have standing to enjoin the district attorney and force him to prosecute a "deadbeat dad" for violating a law requiring the payment of child support.[85] The case explained "that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.... [I]n American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."[86] In other words, a third-party citizen, even if a victim of the defendant, is ignored by criminal prosecutions. Criminal actions are to be viewed as only concerning the state and the accused. The Court however did leave the door open to the possibility that such standing for a victim could be created by statute.[87]

Congress responded to this opportunity by passing the VWPA.[88] Reporting the bill to the full Senate, the Senate Judiciary Committee stated:

> The principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time. It holds that, whatever else the sanctioning power of society does to punish its

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separate component of a federal criminal sentence, but only as a condition of probation pursuant to the Federal Probation Act of 1925 (FPA)." (citation omitted)).

[82] *Id.*; Catherine M. Goodwin, *Restitution in Federal Criminal Cases: Summary Training Outline*, U.S. SENTENCING COMM'N 3 (2001), http://www.ussc.gov/Education_and_Training/Online_Learning_Center/Supporting_Materials/Restitution-in-Federal-Criminal-Cases.pdf.

[83] Alexander J. Sisemore, Note, *Straying from the Written Path: How the Supreme Court Eviscerated the Plain Meaning of the MVRA's Ninety-Day Deadline Provision and Legislated from the Bench in* Dolan v. United States, 64 OKLA. L. REV. 211, 214 (2012) (quoting Peggy M. Tobolowsky, *Restitution in the Federal Criminal Justice System*, 77 JUDICATURE 90, 90 (1993)).

[84] 410 U.S. 614 (1973); *History of Victims' Rights*, NAT'L CRIME VICTIMS LAW INST. (2011), *available at* http://law.lclark.edu/centers/national_crime_victim_law_institute/about_ncvli/history_of_victims_rights/ ("The legal impetus for the Modern Crime Victims' Rights Movement was, in part, the 1973 United States Supreme Court decision in Linda R.S. v. Richard D., 410 U.S. 614 (1972).").

[85] 410 U.S. at 619.

[86] *Id.*

[87] *Id.* at 617.

[88] S. REP. NO. 97-532, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2536.

> wrongdoers, it should also ensure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being.[89]

The victim was gradually getting a voice in the criminal courtroom.

In 1990, the Supreme Court concluded in *Hughey v. United States* that the VWPA authorized restitution for "loss caused [only] by the conduct underlying the offense of conviction establishes the outer limits of a restitution order."[90] Shortly after the *Hughey* decision, Congress responded by amending the VWPA to include more specific offenses, but ostensibly agreed with the Supreme Court's recent decision when it left unchanged the *Hughey* requirement that restitution must be tied to the offense charged and loss caused by the offense.[91]

One exception to the causal connection required in *Hughey* between the loss recovered in restitution and the offense charged concerns "scheme, conspiracy, or pattern of criminal activity...."[92] Harm done through those activities does not need to be direct as is otherwise required.[93] In the 1990s, Congress pushed for more restitution by taking discretion away from the courts.[94] Congress first made restitution a requirement in certain instances with the Child Support Recovery Act in 1992.[95] Next, Congress identified other specific crimes for restitution in 1994: violence against women, domestic violence, sexual exploitation of children, sexual abuse, and telemarketing.[96] Finally, in 1996, Congress overhauled the VWPA and created the Mandatory Victims Restitution Act (MVRA).[97]

B. Mandatory Victims Restitution Act (MVRA)

Through its actions in the 1990s, Congress demonstrated dissatisfaction with the courts' utilization of the discretionary restitution granted by the VWPA.[98] During the passage of the MVRA, the Senate Judiciary Committee noted that "significant strides have been made since 1982 toward a more victim-centered justice system, much progress remains to be

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[89] *Id.*

[90] 495 U.S. 411, 420 (1990).

[91] Goodwin, *Imposition of Restitution*, *supra* note 81, at 95.

[92] Goodwin, *Imposition of Restitution*, *supra* note 81, at 98.

[93] Goodwin, *Imposition of Restitution*, *supra* note 81, at 99; 18 U.S.C.A. § 3663(a)(1)(A) (West 2013).

[94] Goodwin, *Imposition of Restitution*, *supra* note 81, at 95.

[95] *Id.* at 96.

[96] Goodwin, *Restitution in Federal Criminal Cases*, *supra* note 82, at 3.

[97] Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, § 201, 110 Stat. 1214, 1227 (codified as amended at 18 U.S.C. § 3663A (2012)).

[98] *See id.*

made .... According to the 1994 Annual Report of the United States Sentencing Commission, during fiscal year 1994, Federal courts ordered restitution in only 20.2 percent of criminal cases."[99] The MVRA is more unyielding and rigid than the laws it replaced. The loose framework of the VWPA was erased with the new mandate requiring restitution for certain crimes.[100] But at the same time, the new law "'significantly limit[ed]' a sentencing court's discretion in determining the amount of restitution."[101] The MVRA limits the focus of criminal restitution to losses resulting from property damage or loss, bodily injury, and death.[102] The MVRA also rendered the financial situation of the defendant irrelevant in the determination of the restitution amount, which previously could have been a mitigating factor.[103]

1. Causation and Victim

The MVRA contains a causation requirement by outlining how a victim is identified. It states that a "'victim' means a person directly and proximately harmed as a result of the commission of an offense...."[104] This allows for restitution to be invoked "'only for losses directly resulting from the defendant's offense.'"[105] This exception has been understood to mean that "Congress meant restitution to compensate the victim for his or her loss, and [the Supreme Court] explained that this was the reason 'restitution is tied to the loss *caused by* the offense of conviction.'"[106] The offense leading to the conviction "must have caused a loss for which a court may order restitution, but the loss cannot be too far removed from that conduct."[107] Some examples where a court found cause are a police vehicle damaged in a chase after a

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[99] S. REP. NO. 104-179, at 13 (1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 926 (breaking down crimes by percentage ordering restitution: "27.9 percent of all murders, 28.2 percent of all kidnappings, 55.2 percent of all robberies, and 12.5 percent of all sexual-abuse cases.").

[100] Mandatory Victims Restitution Act § 204.

[101] United States v. Martinez, 610 F.3d 1216, 1230 (10th Cir. 2010) (quoting United States v. Bright, 353 F.3d 1114, 1121 (9th Cir. 2004)); Heidi M. Grogan, Comment, *Characterizing Criminal Restitution Pursuant to the Mandatory Victims Restitution Act: Focus on the Third Circuit*, 78 TEMP. L. REV. 1079, 1079–80 (2005).

[102] 18 U.S.C.A. § 3663(A)(3)(b)(1)–(3) (West 2013).

[103] United States v. Williams, 128 F.3d 1239, 1241 (8th Cir. 1997).

[104] 18 U.S.C.A. § 3663(a)(2) (West 2013).

[105] United States v. Morgan, 376 F.3d 1002, 1014 (9th Cir. 2004) (quoting United States v. Koenig, 952 F.2d 267, 275 (9th Cir. 1991) (quoting United States v. Kenney, 789 F.2d 783, 784 (9th Cir.1986)).

[106] United States v. Hardy, 707 F. Supp. 2d 597, 603 (W.D. Pa. 2010) (citing Hughey v. United States, 495 U.S. 411, 418 (1990)).

[107] United States v. Gamma Tech Indus., Inc., 265 F.3d 917, 928 (9th Cir. 2001).

robbery,[108] a bystander shot by a police officer,[109] and investigative and clean up costs from a Clean Air Act offense.[110]

The MVRA's causation requirement bars consequential damages.[111] A person killed from an unlawfully sold handgun is not considered a causal victim in restitution with respect to the seller of the handgun.[112] Any restitution award must have a direct causal connection to the crime for which the defendant is convicted.[113] In the mortgage lending situation, the bank becomes a victim when fraud causes a pecuniary loss.[114]

The court *should* inquire into whether but-for the defendant's lies the bank would have made the loan at all. If the loan would still have been made, but at a higher rate to compensate for the concealed risks, then the bank (victim) would only be entitled to the incremental profits from the increased rate.[115] The bank or lender would not be able to claim that but-for the fraud the loan would not have been made, therefore it would not be entitled to the amount of the loan in restitution. "Fraud for property" situations seem to be a more likely fit for this scenario than schemes for profit. The elaborate lies in "fraud for profit" schemes are likely so significant that the bank would have never made a loan.

The MVRA mandates two specific exceptions from when restitution should not be awarded: when the number of victims is so large that payment

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[108] Catherine M. Goodwin, *Handout: Key Restitution Cases*, U.S. SENTENCING COMM'N 2 (June 2012), http://www.ussc.gov/Education_and_Training/Annual_National_Training_Seminar/2012/2_Key_Restitution_Cases.pdf (citing U.S. v. Washington, 434 F.3d 1265, 1266 (11th Cir. 2006)).

[109] *Id.* (citing United States v. Metzger, 233 F.3d 1226, 1227 (10th Cir. 2000)).

[110] *Id.* (citing United States v. Phillips, 367 F.3d 846, 846 (9th Cir. 2004)).

[111] *See* United States v. Morgan, 376 F.3d 1002, 1014 (9th Cir. 2004) (holding that the district court did not abuse its discretion in ordering "opportunity cost" interest and finance charges in calculating its restitution order).

[112] Goodwin, *Handout: Key Restitution Cases*, *supra* note 108, at 5.

[113] United States v. Radi, 340 F. App'x 401, 403 (9th Cir. 2009) (quoting United States v. Baker, 25 F.3d 1452 (9th Cir. 1994)) ("[T]he district court is only authorized 'to order restitution for the losses caused by the specific conduct underlying the offense of conviction.'"); United States v. Cutter, 313 F.3d 1, 7 (1st Cir. 2002) ("[R]estitution should not be ordered if the loss would have occurred regardless of the defendant's misconduct underlying the offense of conviction. Second, restitution is inappropriate if the conduct underlying the conviction is too far removed, either factually or temporally, from the loss."); *see* United States v. Nossan, 647 F.3d 822, 828 (8th Cir. 2011) (affirming an order of restitution against a drug dealer for funeral expenses to be paid to the estate of a drug overdose victim).

[114] United States v. Yeung, 672 F.3d 594, 603 (9th Cir. 2012).

[115] United States v. Berger, 473 F.3d 1080, 1107 (9th Cir. 2007) (deciding a non-mortgage loan, the court held "[t]hat fact was taken into account by the district court, which did not attribute the lending banks' entire loss to the fraud. Instead, the district court properly focused only on the amount of loss attributable to the falsified Borrowing Certificates.").

would be impracticable or when the calculation becomes too burdensome.[116] Both of these exceptions could be at play in the mortgage fraud arena because of how mortgages are involved in structured finance and the complications involved in calculating what the bank has lost because of the fraud, especially in the situation when the loan still would have been made. Defining a victim this way does not determine the amount of harm inflicted upon the victim. The MVRA includes other provisions to calculate what the fraudster owes.[117]

2. Value of the Property

Measuring the value of restitution requires precision: too little restitution awarded and the MVRA is not satisfied, because the victim is not made whole. But similarly, too high an award will overcompensate the victim. The Act does not allow the victim to obtain a windfall or double recovery.[118] The Act has a specific provision dealing with property damage.[119] Where property is involved, the Act reads:

> (b) The order of restitution shall require that such defendant—
> (1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—
> (A) return the property to the owner of the property or someone designated by the owner; or
> (B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—
> (i) the greater of—
> (I) the value of the property on the date of the damage, loss, or destruction; or
> (II) the value of the property on the date of sentencing, less
> (ii) the value (as of the date the property is returned) of any part of the property that is returned;[120]

The court in U.S. v. Boccagna synthesizes the statute succinctly:

> Thus, the MVRA unambiguously tells a court *what* to value (the property lost; the property returned) and even *when* to value it (in the case of the

[116] Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132 § 204, 110 Stat. 1214, 1229 (codified as amended at 18 U.S.C. § 3663A (2012)); S. REP. NO. 104-179, at 19 (1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 932 ("[I]t is the committee's intent that highly complex issues related to the cause or amount of a victim's loss not be resolved under the provisions of mandatory restitution.").

[117] Mandatory Victims Restitution Act § 204.

[118] United States v. Louper-Morris, 672 F.3d 539, 566 (8th Cir. 2012) (citing United States v. Frazier, 651 F.3d 899, 904 (8th Cir. 2011) ("[T]he MVRA does not allow victims to obtain double recovery or a windfall through restitution."); United States v. Ruff, 420 F.3d 772, 775 (8th Cir. 2005).

[119] Mandatory Victims Restitution Act § 204.

[120] 18 U.S.C.A. § 3663(3)(b)(1) (West 2013).

> loss value, property is evaluated "on the date of the damage, loss, or destruction," ... or "on the date of sentencing," ... whichever is greater; in the case of offset value, property is evaluated "as of the date the property is returned," ... The statute is silent, however, on the question of *how* the referenced property is to be valued.[121]

Courts have thought of property in the banking situation as only the money begotten through fraud.[122] However, to serve the purposes of the MVRA and fully compensate the victim, courts should not end the inquiry of what was stolen with the loan amount.

The damaged property in the mortgage fraud situation is more than just the money stolen: the bank's business has suffered. Capital is a crucial ingredient in the business model of a bank.[123] Money, or capital, is a key input for the bank to be productive; it's analogous to factory machinery at an automobile plant or any other manufacturer. Accordingly, thinking of the loss in this way means that a victim should be entitled to the profits he would have made if he had used the machinery, as well as owned the machinery itself. The bank's business operation was directly harmed when the defendant schemed to divert funds from their rightful place. In other words, the courts in their quest to make victims whole should be more willing to include the opportunities forgone because of the theft.

This conception of property and the restitution award must conform to the requirements of actual loss to the victim caused by the offense charged.[124] The First Circuit has developed a two prong test to determine directness of losses:

> *First:* Restitution should not be ordered in respect to a loss which would have occurred regardless of the defendant's conduct.... *Second:* Even if but for the causation is acceptable in theory, limitless but for causation is not. Restitution should not lie if the conduct underlying the

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[121] United States v. Boccagna, 450 F.3d 107, 114 (2d Cir. 2006) (citations omitted).

[122] United States v. James, 564 F.3d 1237, 1246 (10th Cir. 2009); United States v. Adams, 19 Fed. App'x 33, 35 (4th Cir. 2001) (holding that the MVRA is inapplicable because there was no pecuniary loss suffered when the defendant committed criminal copyright infringement because the stolen property was confiscated before it could be sold).

[123] *See* United States v. Robers, 698 F.3d 937, 955 (7th Cir. 2012) (rehearing and suggestion for rehearing en banc denied Nov. 28, 2012) ("The property damaged by Robers's fraud was capital and to recoup that capital, Fannie Mae and then MGIC had to incur numerous expenses to safeguard, keep up, and dispose of the collateral that secured the loan.").

[124] U.S.C.A. § 3663A; United States v. Fair, 699 F.3d 508, 518 (D.C. Cir. 2012); United States v. Fallon, 470 F.3d 542, 548 (3d Cir. 2006) (citing Quillen, 335 F.3d 219, 222 (3d Cir. 2003)) (quoting Gov't of V.I. v. Davis, 43 F.3d 41, 45 (3d Cir.1994)) (recognizing "that under the MVRA 'restitution must be ... based upon *losses directly resulting* from [the defendant's criminal] conduct.'").

> offense of conviction is too far removed, either factually or temporally, from the loss.[125]

Alternatively, a restitution amount can be agreed to through a plea agreement.[126]

It is important to notice that this analysis neglects another victim of mortgage origination fraud: the applicant on the margin. This person either did not get a loan at all, or paid more for the loan, or was approved for a smaller loan. Although this victim is likely unidentifiable,[127] she exists in theory. Even though lenders have immense financial resources, they are not unlimited, which means fraud necessarily takes away from those who are honest. These victims will likely never see restitution because they themselves have no real way to know that fraud has thwarted their loan application.

The First Circuit explains that the "purpose of restitution is not to punish the defendant, but to make the victim whole again by restoring to it the value of the losses it suffered as a result of the defendant's crime.... This is necessarily a backward-looking inquiry that takes into account what actually happened...."[128]

Viewing property in this way requires a consideration of the "opportunity cost" of the bank deciding to make a loan based on false information. Because of the fraud, the bank did not use investment Plan B. The fraudster stepped in and thwarted that. So the loss to the bank is the expected present discounted value of payments the bank would have received under its plan B. While this is not an example of contract damages, where the bank gets the benefit of the bargain in the mortgage agreement, the fraudster denies the bank the benefit of the bargain that it otherwise would have made. It is easy to imagine a scenario where a small bank, for example, is considering two investments: the fraudster's mortgage loan and a stock purchase. If the stock goes "gangbusters," should not the lender be entitled to the stock gains that it otherwise would have earned? In a sense, part of the property lost is the alternative investment. The focus must be entirely on the victim, and thus, not at all on what the defendant gained.

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[125] United States v. Vaknin, 112 F.3d 579, 589 (1st Cir. 1997).

[126] United States v. Thomas, 862 F. Supp. 2d 19, 23 (D.D.C. 2012).

[127] United States v. Catoggio, 326 F.3d 323, 328 (2nd Cir. 2003) (holding that the district court did not commit plain error in holding that a racketeering defendant injured 10,000 victims that were identifiable).

[128] *See* United States v. Innarelli, 524 F.3d 286, 293–94 (1st Cir. 2008) (citing United States v. Cornier-Ortiz, 361 F.3d 29, 42 (1st Cir. 2004)); *see also* United States v. Galloway, 509 F.3d 1246, 1253 (10th Cir. 2007) (holding that criminal restitution cannot be based on defendant's gain); United States v. George, 403 F.3d 470, 474 (7th Cir. 2005) (holding that "[r]estitution must be based on the victim's loss rather than the offender's gain.").

Many courts have held that damages under the MVRA should mirror what would happen in civil litigation.[129] This seems incompatible with the MVRA. A civil litigation action in the mortgage fraud context would likely be based on unjust enrichment, which necessarily focuses on what the defendant improperly acquired.[130] This is directly counter to the MVRA's allowance that stolen property be returned to the victim.[131] It does not say that profits or gains from the stolen property should be disgorged from the defendant, which is a real possibility in an equitable restitution action. Also, the other remedies likely available for mortgage fraud in civil litigation could be held in an equitable lien, constructive trust, or rescission. It may be helpful to think of criminal restitution in this context as similar to the rescission of a contract, restoring the parties back to where they were before the loan.[132]

3. *Offset*

The MVRA requires that the victim's judgment be reduced by any part of the property that is returned.[133] Without accounting for property returned, the victim would recover more in damages than was caused by the fraud. Circuits disagree on how to account for the property returned.[134] The sequence of events would unfold as follows: the fraudster defaults on the home revealing the fraud, the bank then has the right to take possession and sell the property under the mortgage agreement.[135] These two actions taken by the bank,

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[129] *E.g.*, United States v. Behrman, 235 F.3d 1049, 1052, 1054 (7th Cir. 2000) ("[T]he recovery to which [the victim] would have been entitled in a civil suit against the criminal.... Congress required judges to include this remedy in a criminal judgment to avoid the need for the victims of crime to file separate civil suits litigation that, given the preclusive effect of the criminal judgment, would have an inevitable outcome. A civil remedy included with a criminal judgment does not make it a penalty for a crime that must be established beyond a reasonable doubt; otherwise it would not be possible to apply the law of preclusion (or grant summary judgment) in an ordinary civil suit seeking restitution."); United States v. Martin, 195 F.3d 961, 968 (7th Cir. 1999) (noting that "the [MVRA] seeks to engraft a civil remedy onto a criminal statute, giving the victim of the crime the recovery to which he would have been entitled in a civil suit against the criminal....").

[130] Grogan, *supra* note 101, at 1079.

[131] 18 U.S.C.A. § 3663(b)(1)(A) (West 2013).

[132] *See, e.g.*, Richard R.W. Brooks & Alexander Stremitzer, *Beyond* Ex Post Expediency—*An* Ex Ante *View of Rescission and Resitituion*, 68 WASH & LEE L. REV. 1171 (2011).

[133] 18 U.S.C.A. § 3663(b)(1)(B) (West 2013).

[134] *Compare* United States v. Holley, 23 F.3d 902, 915 (5th Cir. 1994) (holding that a property is returned when it is deeded back to a financial institution), *with* United States v. Robers, 698 F.3d 937, 953 (7th Cir. 2012) (holding that the value of a property is returned according to the amount recouped when it is sold).

[135] *See supra* Part I.A.

taking possession and then selling, are the fault lines between the circuit courts in determining when the property has actually been returned to the lender. Foreclosure is another word for executing on the security interest.[136] Consider the non-fraudulent foreclosure situation. Foreclosure can take many forms. One form is the judicial sale, conducted by the court.[137] Another older way is strict foreclosure.[138] "The prevailing procedure of strict foreclosure simply terminated the debtor's redemption period and vested title in the mortgagee. The mortgagee thus obtained the benefit of the property's value over the debt amount. The English equity courts began to require foreclosure by sale to prevent this inequity."[139] In today's standard foreclosure proceedings, the borrower's indebtedness "is reduced by the foreclosure sale proceeds, less costs of sale."[140] "Depressed value on the sale date and higher value at a prior or subsequent date are not judicially cognizable" in the foreclosure setting.[141] And furthermore, foreclosure sales generally do not reflect the full value of the property.[142]

In the criminal restitution context, the valuation of the property is more complicated than in the normal foreclosure setting. Some courts hold that the value of the property is reduced or offset when the bank takes possession of the real estate collateral.[143] The Ninth Circuit has held the exact opposite in a non-mortgage situation where revolving credit was obtained and secured by collateral.[144] However, another set of circuits held that the bank's damages are only offset when money is received from the sale of the real property.[145]

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[136] *See* Robert M. Washburn, *The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales*, 53 S. CAL. L. REV. 843, 845 (1980).

[137] *See id.* at 846.

[138] *E.g.*, *id.*

[139] *Id.*

[140] *Id.* at 846 ("[D]eficiency judgments are generally based automatically on the sale price."); *id.* at 858 ("The court's inquiry into the adequacy of the foreclosure sale price is limited by two well-established principles: valuation of foreclosed property occurs at the date of the foreclosure sale, and the sale price is conclusive of the property's value.").

[141] *Id.* at 858.

[142] *See id.* at 848.

[143] *E.g.*, United States v. Yeung, 672 F.3d 594, 605 (9th Cir. 2012) (holding that the value of the property should be measured from the date that the title was assigned to the bank, not from the later date of the property's sale); United States v. Boccagna, 450 F.3d 107, 120 (2d Cir. 2006) (remanding the case to determine the fair market value at the time of title transfer); United States v. Holley, 23 F.3d 902, 915 (5th Cir. 1994) (holding that when a home is deeded back to a financial institution, the value of the home acts as a "partial return").

[144] *See* United States v. Berger, 473 F.3d 1080, 1108 (9th Cir. 2007) (affirming the district court's decision to "[discount] by the percentage the lending banks recovered when they foreclosed on Craig Electronics' collateral.").

[145] United States v. Robers, 698 F.3d 937, 955 (7th Cir. 2012) (holding that the value of the property returned is the value of the amount of money recovered at the property's

When the property is considered as it is in the Ninth Circuit, it is clear that the bank getting the home is not the property that was stolen.[146]

III. PROPERTY AS NOT ONLY THE LOAN, BUT ALSO AS OPPORTUNITY COST

After a victim has been identified, losses suffered must be proven to have been a result of the offense.[147] The government must prove a victim's loss under a preponderance of the evidence standard.[148] Congress advised the courts that calculating restitution under the MVRA should not be an arduous process.[149] Viewing property as suggested in this Note above may render a restitution calculation very complex. However, there are calculation rules created by the courts that will simplify and expedite the process. First, the court may resolve any uncertainty in favor of the victim.[150] Also, "absolute precision is not required."[151] The calculation can only be based on actual loss,[152] without reference to a defendant's gain.[153]

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sale); United States v. Statman, 604 F.3d 529, 538 (8th Cir. 2010) (holding that the district court did not err when they used the foreclosure sale price to measure restitution rather than the assessed value of the property); United States v. James, 564 F.3d 1237, 1246 (10th Cir. 2009) (holding that the district court did not err in measuring restitution by the amount of the foreclosure sale, minus the mortgage amount); United States v. Himler, 355 F.3d 735, 745 (3d Cir. 2004) (holding that the district court did not err in determining restitution at a set amount, minus the amount of the future recoupment from the sale of the property).

[146] *See Robers*, 698 F.3d at 942 ("Under the plain language of the statute, what matters is when at least part of the cash was returned to the victims—not when the victims received title to the houses securing the loans. And the cash was returned to the victims only when the collateral houses securing the loans were eventually resold."); *James*, 564 F.3d at 1238 ("[T]he foreclosure sale amount more accurately measured mortgage holder's loss.").

[147] 18 U.S.C.A. § 3664(e) (West 2013).

[148] *Id.*

[149] S. REP. NO. 104-179, *supra* note 99, at 19 ("In all cases, it is the committee's intent that highly complex issues related to the cause or amount of a victim's loss not be resolved under the provisions of mandatory restitution. The committee believes that losses in which the amount of the victim's losses are speculative, or in which the victim's loss is not clearly causally linked to the offense, should not be subject to mandatory restitution.").

[150] *E.g.*, United States v. Berger, 473 F.3d 1080, 1108 (9th Cir. 2007) (citing United States v. Gordon, 393 F.3d 1044, 1048 (9th Cir. 2004) ("To achieve the goal of making crime victims whole, the MVRA permits 'district courts to engage in an expedient and reasonable restitution process, with uncertainties resolved with a view toward achieving fairness to the victim.'").

[151] United States v. Burdi, 414 F.3d 216, 221 (1st Cir. 2005).

[152] *E.g.*, United States v. Reynolds, 432 F.3d 821, 823 (8th Cir. 2005) (holding that restitution may only be granted based on actual loss).

[153] *E.g.*, United States v. Galloway, 509 F.3d 1246, 1253 (10th Cir. 2007) (holding that criminal restitution cannot be based on defendant's gain); United States v. George, 403

The Tenth Circuit has held that restitution under the MVRA cannot be based upon speculation.[154] In one case, a defendant was convicted of excavating property in violation of the Archaeological Resources Protection Act (ARPA). The appeals court held that restitution based on what a hypothetical dig would have cost the government would be speculative, and not based on the victim's actual loss.[155]

The conception of property that this Note proposes is not speculative. It starts with the assumption that, without any other evidence, the stolen capital would have earned a market rate of return. This is the same as when restitution for stolen lobsters was calculated simply by multiplying the number of lobsters stolen by the market price at the time they were stolen.[156] However, when there is additional evidence pointing to an alternative investment that would have been made with sufficient certainty, then it would not be speculative to give up the value of the investment that would have occurred up to the date of judgment. For example, if a small bank was considering loaning the fraudster money or investing in Apple stock, then the bank should be able to realize the return from the investment in Apple stock that it would have made.

The aspects that may be deemed to be speculative are whether the victim would have indeed made the investment and when the investment gains would have been realized. However, with enough evidence a prosecutor may be able to convince the court that any speculation would be no greater than in any other situation, since "any disputes concerning the amount of loss are to be resolved by the court by a preponderance of the evidence."[157] The burden "of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government."[158] After all, neither lost wages nor future lost wages are considered consequential damages.[159] Return on a specific investment that was thwarted does not seem much

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F.3d 470, 474 (7th Cir. 2005) (holding that "[r]estitution must be based on the victim's loss rather than the offender's gain").

[154] *See* United States v. Quarrell, 310 F.3d 664, 680 (10th Cir. 2002) (holding that restitution must be based on actual loss and not speculative loss).

[155] *Id.*

[156] *See* United States v. Bengis, 631 F.3d 33, 41 (2d Cir. 2011).

[157] *Quarrell*, 310 F.3d at 681 (citing 18 U.S.C. § 3664(e) (2002)).

[158] 18 U.S.C.A. § 3664(e) (West 2013).

[159] *See* United States v. Cienfuegos, 462 F.3d 1160, 1168–69 (9th Cir. 2006) (holding that speculative losses are incompatible with the MVRA); United States v. Atl. States Cast Iron Pipe Co., 612 F. Supp. 2d 453, 486 (D.N.J. 2009) (holding that in no case should the prospect of insurance compensation or other possible compensation be considered when determining restitution). *But see* Moore v. United States, 178 F.3d 994, 1001 (8th Cir. 1999) (awarding restitution to a bank customer who suffered lost wages as a result of witnessing an attempted bank robbery).

more speculative than those situations. Whether the alternative investment would have been made should be an evidentiary question.

Courts have been reluctant to wade into speculative waters. For example, in *United States v. Chalupnik*, a defendant pleaded guilty to misdemeanor copyright infringement.[160] The victim was in the business of selling DVDs and CDs by mail.[161] The victim arranged with the post office that undeliverable discs should simply be thrown away, since it was cheaper for the victim to manufacture another disc rather than to reship and restock an undelivered one.[162] The defendant, a janitor at the post office, took the undelivered, discarded discs from the post office trash and sold them at used record stores.[163] The District Court ordered two years probation and restitution equal to his documented sales, which equaled $78,818.[164] The District Court reasoned that restitution was awarded because the defendant had deprived the victim of "the option of returning the CD's to the market or destroying them."[165] The Eighth Circuit held that the government did not prove any actual loss, "proof of lost sales, like proof of lost profits, may not be 'based entirely upon speculation.'"[166] The restitution award was vacated.[167] While the District Court's restitution award may have been appropriate under the equitable conception of restitution, the MVRA requires that restitution be based on the victim's loss, not the defendant's gain.[168]

A similar case, *United States v. Hudson*, involved counterfeit Microsoft software.[169] The Tenth Circuit vacated a restitution award that the District Court based on loss of a sale "that Microsoft would have made ... had Defendant not sold ... counterfeit Microsoft products."[170] The Tenth Circuit found no support for the contention that the defendant thwarted a future sale, and was unable to see how the restitution award was anything but a windfall for Microsoft."[171]

The mortgage situation can be distinguished from the *Hudson* and *Chalupnik* cases because a financial firm will be able to provide more documentary evidence than in either of the above situations. The courts in

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[160] United States v. Chalupnik, 514 F.3d 748, 750 (8th Cir. 2008).
[161] *Id.* at 750.
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.* at 751.
[166] *Id.* at 755 (quoting United States v. Young, 272 F.3d 1052, 1056 (8th Cir. 2001)).
[167] *Id.* at 750.
[168] *Id.* at 754.
[169] 483 F.3d 707, 708 (10th Cir. 2007).
[170] *Id.* at 710.
[171] *Id.*

each of those cases focused on a lack of provable loss.[172] Banks are more likely to be able to provide the necessary documentation.

A. Procedure

The "procedure for issuance and enforcement" for a criminal restitution award is established in 18 U.S.C. § 3664.[173] The procedure entitles the victim to a lien on a defendant's property, as would occur in a civil matter.[174] If the restitution determination becomes difficult, the court has the option to "refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a *de novo* determination of the issue by the court."[175] The government only needs to prove restitution damages by presenting a preponderance of the evidence.[176] The court also, within its discretion, may determine whether the restitution payment should be made in installments or in one lump-sum.[177]

Courts have found it wise to identify victims even if there is little likelihood that they will be repaid with a restitution award because 18 U.S.C. § 3664(d)(5) allows a victim to recover in the event that a defendant "unexpectedly inherit[s] money, win[s] the lottery, or otherwise strike[s] it rich."[178] The statute entitles the victim to a court order of full restitution regardless of the defendant's financial circumstances.[179]

B. Consequential Damages Are Barred

Consequential damages are barred under the MVRA.[180] Consequential damages as understood by the common law, are "losses 'beyond those which naturally and directly flow' from the defendant's conduct."[181] A Second Circuit case has held that it was not plain error for the trial court to award restitution for taxes and foreclosure expenses.[182]

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172 *Chalupnik*, 514 F.3d at 750; *Hudson*, 483 F.3d at 708.
173 18 U.S.C.A. § 3664 (West 2013).
174 § 3664(d)(2)(A)(v).
175 § 3664(d)(6) (emphasis added).
176 § 3664(e).
177 § 3664(f)(3)(A).
178 United States v. Grimes, 173 F.3d 634, 639 (7th Cir. 1999).
179 § 3664(f)(1)(A).
180 *Supra* notes 102–105 and accompanying text.
181 United States v. Donaghy, 570 F. Supp. 2d 411, 429 (E.D.N.Y. 2008) (quoting United States v. Boccagna, 450 F.3d 107, 120 (2d Cir. 2006)).
182 *Boccagna*, 450 F.3d at 120.

However, if the defendant is convicted of conspiracy, scheme or pattern of criminal activity, an award of restitution under the MVRA may include losses for acts of related conduct for which the defendant was not convicted.[183] Conspiracy opens the door to restitution beyond the convicted crime.

IV. Policy Considerations

A potential criticism of offsetting the defendant's liability to the victim by requiring the victim to sell collateral property is that it does not incentivize efficient sale of property. The same criticism applies in the foreclosure context: offsetting the bank's loss at the time of sale encourages the bank to sell the house quickly, at a fire sale price to get the remainder of its principal in a judgment against the defendant.[184] Similarly, a fire sale price can harm all other residents in the neighborhood in the form of decreased property values. The defendant is likely going to jail, rendering repayment in the short-term extremely unlikely. The bank knows this, and prefers a higher sale price over increased jail time for the fraudster.

In the mortgage fraud context, the offset rule only matters in a practical sense when the value of the home changes between the bank's receipt of ownership and the sale price. Saddling the bank with the decrease in value of the home does not capture the entire loss caused by the defendant. If the price of the home increases between receipt and sale, the offset could cover the entire principal loan. The criminal would still be liable for lost profits, but his liability is decreased, just as it would be in the normal default situation. The criminal restitution then is somewhat subject to the vagaries of the market. The offset at receipt rule does not decrease this impact, but instead changes when valuation in the market is made.

There is the clear policy implication that including the opportunity cost of the bank in the stolen property value would in theory make it more costly to engage in mortgage fraud. However, there may not be much of a deterrent effect, as mortgage fraudsters will unlikely ever possess the funds necessary to make their victims whole under either view of property.

Conclusion

Mortgage fraud has a long history. The way banks do business today has changed how criminals conduct mortgage fraud. Restitution has only relatively recently been applied to mortgage fraud situations. The Mandatory Victims Restitution Act requires the criminal to pay what the victim has

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[183] 18 U.S.C.A. § 3663(A)(a)(2) (West 2013).

[184] Washburn, *supra* note 136, at 848.

lost. Congress has made it clear that victims are to be given more consideration by federal courts than in previous cases.

The criminal restitution action is not brought by the victim, but by the government prosecutor. In the mortgage fraud context, courts have been split on how to account for the home returned to the bank; is it valued at the date of sale or when the bank takes possession? In the non-fraud context, the home is valued as the equivalent of the price received by the bank. In the restitution context under the MVRA, the home should also be valued when the bank sells it.

The MVRA defines a victim as someone who is directly harmed by the commission of a criminal offense.[185] As this Note argues, courts must recognize that property stolen in mortgage fraud is not limited to just the loan. The bank has also lost an investment opportunity it would have made had it not been for the fraud. Accordingly, a fraudster should restore to the bank the profits it would have earned from the alternative investment.

Determining the victim and calculating restitution, while similar in analysis, should be kept distinct. The victim is simply someone who is directly and proximately harmed by the convicted criminal conduct. Calculating restitution under the MVRA is specifically outlined in the text and requires determining the "property lost." It then requires any property given back to the victim is to be valued on the date it is returned. Viewing the property this way is in line with the Seventh Circuit's admonition that the word "property" must hold the same meaning throughout the statute.[186]

The bar of speculative damages is a real risk to implementing this concept of what is stolen. But, the bank must still prove, by a preponderance of the evidence, all it would have gained without the fraud.

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[185] 18 U.S.C.A. § 3663A(a)(2) (West 2013).

[186] *See* United States v. Robers, 698 F.3d 937, 942 (7th Cir. 2012), *reh'g denied en banc* (Nov. 28, 2012).

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