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Federal Corner: How Much Restitution Should a Defendant Be Required to Make for a Dead Dog? - By F. R. Buck Files Jr.

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I thought that I had some understanding of restitution issues in federal criminal cases until I was appointed to represent Doyle Randall Paroline on the restitution issue in a possession of child pornography case. For more than five years, I lived with the issue until the Supreme Court resolved it in Paroline's favor. *Paroline v. United States*, 134 S.Ct. 1710 (2014). Stanley Schneider was with me for almost all of those five years, and Casie Gotro joined us later on.

Because of this experience, restitution issues have intrigued me. I learned early on the importance of working with the AUSAs of the Financial Litigation Unit (FLU) of the United States Attorney's Office for the Eastern District of Texas here in Tyler and with other FLU lawyers. In the Eastern District of Texas, FLU attorneys can influence the contents of plea agreements. The prepayment of restitution is always looked on favorably by AUSAs and by United States District Judges. Such prepayment gives the defense lawyer the opportunity to argue that the client has shown a super acceptance or extraordinary acceptance of responsibility.

In fraud cases, defendants can be ordered to pay huge amounts of restitution. In two cases that I concluded recently, one of my clients made a prepayment of partial restitution in the amount of more than \$500,000; in another, a prepayment of almost \$250,000. Each client had a better resolution because of these prepayments.

The United States Courts of Appeal look very closely at the restitution issues that come before them, without regard to the dollar amount of the restitution order. On November 6, 2018, a panel of the United States Court of Appeals for the Eighth Circuit held that the restitution order for the payment of \$1,000 for the loss of a dog killed in a car accident was improper. *United States v. Bagley*, ___F.3d___, 2018 WL 5795778 (8th Cir. Nov. 6, 2018) [Panel: Circuit Judges Wollman, Loken, and Colloton. Opinion by Loken. Colloton filed an opinion, concurring in part and dissenting in part].

[The Facts in *Bagley*]

Stephen D. Bagley was an unsuccessful and unlucky carjacker. He stole an automobile at gunpoint and drove off with the owner's dog (Mister) in the back seat. He then caused a multi-vehicle accident that resulted in his being arrested and the officers finding Mister dead inside the automobile. Mister's owner filed a victim impact statement and sought restitution in the amount of \$14,999 for the "loss of life to Mister, a 4-year-old terrier that [he] raised from a puppy.?"

Mr. Bagley was charged with carjacking and firearms offenses and entered into a written plea agreement with the Government. United States District Judge Howard F. Sachs of the Western District of Missouri sentenced Mr. Bagley to 70 months' imprisonment and ordered him to pay \$1,000 as restitution for the death of Mister. Mr. Bagley gave notice of appeal as to the restitution order.

Judge Loken's opinion reads, in part, as follows:

[The Statutory Basis for Restitution in This Case]

As to restitution for the death of Mister, we conclude that restitution is properly based on the provision of the MVRA addressing lost or destroyed property. *See generally Andrews v. City of West Branch*, 454 F.3d 914, 918 (8th Cir. 2006). The MVRA provides that if the return of lost property is impossible, as in this case, the victim is entitled to payment of "the value of the property" on the date of destruction or sentencing, whichever is greater. 18 U.S.C. §3663A(b)(1)(B). To measure the value of destroyed property, other circuits have concluded "that fair market value generally provides the best measure to ensure restitution in the "full amount" of the victim's loss, but that "replacement value" is an appropriate measure . . . where the fair market value is either difficult to determine or would otherwise be an in-ade-quate or inferior measure of the value necessary to make the victim whole." *United States v. Kaplan*, 839 F.3d 795, 802 (9th Cir. 2016); *accord Frazier*, 651 F.3d at 908. *Congress provided that "replacement costs" of lost animals is the proper measure of restitution for victims of violent offenses against animal enterprises, 18 U.S.C. §43(d)(3), which strongly suggests that replacement value is the proper measure under §3663A(b)(1)(B) for loss of a valued pet such as Mister* [emphasis added].

[The Government Presented No Evidence as to the Amount of Loss]

However, the government presented no evidence of replacement cost or value, only a speculative estimate of the costs associated with raising Mister [emphasis added].

* * *

[Conclusion]

Therefore, we conclude that the amount of restitution awarded for Mister was also unsupported by evidence and must be reversed. We note that the district court relied on restitution orders in cases involving sexual exploitation of a child in determining that the evidence was sufficient, but the statutory basis for such an award is not the same as an award for lost property. *Compare* 18 U.S.C. §2259, *with* 18 U.S.C. §3663A [emphasis added].

* * *

Interestingly, there was a dissent by Judge Colloton that reads, in part, as follows:

[The Victim's Claim for Restitution]

When appellant Bagley carjacked his victim's vehicle, Bagley ended up killing the victim's dog. The victim informed the court, via the probation office, that his losses included "a 4-year-old Terrier that I raised from a puppy," and claimed a loss amount of \$14,999. The district court thought \$15,000 was "a pretty wild overestimate" for the loss of the dog, but was "reluctant just to ignore it as speculative," and decided to award \$1,000.

* * *

[Judge Colloton's Position]

I would affirm this modest award for the death of the victim's dog. I agree with the court that an award is authorized under 18 U.S.C. §3663A(b) for the value of the property lost by the victim. Although the government surely could have made a better record on the cost of acquiring and raising a dog, *see, e.g., American Society for the Prevention of Cruelty to Animals, Pet Care Costs*, [3] https://www.asPCA.org/sites/default/files/pet_care_costs.pdf (last visited Oct. 25, 2018) (estimating \$1,471 as "first year total" cost and \$737 as "annual total" cost of caring for a small dog), the court did receive the victim's assertion about the amount of loss, *see* PSR ¶ 16, and no contrary evidence from Bagley.

A victim's testimony alone, if credible, presumably would be sufficient to sustain an award in the amount claimed, for a victim who raised a dog is in a position to know the cost of replacing his lost property.

* * *

[Conclusion]

In light of the latitude that we have allowed district courts in making restitution estimates, and the substantial discount applied to the victim's own estimate, I would uphold the award. I see nothing in the text of §3663A that would forbid the use of estimates that are permitted in sexual exploitation cases under 18 U.S.C. §2259.

My Thoughts

- This is a case that will never make it to the Supreme Court; however, it is worth reading because it illustrates that restitution requests are not automatically agreed to by United States District Judges, and that restitution orders entered by United States District Judges are not always approved by our Courts of Appeal.
- This is what is worth remembering about restitution issues: As a FLU attorney pointed out to me, United States Probation Officers are seldom lawyers. Often, they believe that restitution is appropriate when there is no statutory basis for ordering it. *Always* look carefully at the PSR's recommendation as to the amount of restitution, if any, that the defendant should be responsible for? and the basis for it.

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