

TURNING RESTITUTION UPSIDE-DOWN: THE MORTGAGE FRAUD RESTITUTION FORMULA AMIDST VOLATILE HOUSING PRICES

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I. INTRODUCTION

During the peak of the housing boom in Las Vegas, Russell,¹ a mortgage loan processor for a large bank, reviewed a mortgage application. Everything appeared to be in order: this particular type of mortgage loan required no income verification because the buyer had excellent credit and the home would be an owner-occupied property. Russell approved the loan for the bank.

Unbeknownst to Russell and the bank, the applicant was actually a “straw buyer,”² using his name and credit to buy the house at the insistence of his business partner, but not actually intending to live in the house. All the applicant had to do was sign a few documents and both the applicant and his business partner would profit from exploding housing prices. The applicant’s credit would allow the pair to purchase a single-family residence for \$295,000, and then, before the first mortgage payment came due, they would flip the property, that is, immediately sell the home, and profit from the home’s extraordinary short-term appreciation. The applicant never planned on living in the house nor making any mortgage payments, despite his execution of loan documents to the contrary.

Unfortunately, housing prices did not continue their fantastic escalation and the pair were unable to sell the home. Not surprisingly, neither the applicant nor his business partner made any mortgage payments and the home went into foreclosure. At the time of the home’s foreclosure, the house had a fair market value of \$265,000. However, the bank that relied on the applicant’s information had too many similarly situated properties at the time of the foreclosure and decided to keep the home in inventory until it could sell the home at a later date.

Meanwhile, the financial institution became suspicious of the applicant and realized he never even moved into the house, despite claiming on his Uniform Residential Loan Application that this would be an “owner-occupied”

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¹ This is a fictional story with corresponding fictional characters used for illustrative purposes only. No offense is meant to any person coincidentally named Russell.

² *Mortgage Fraud Terms, Participants, and Documents*, U.S. ATT’YS’ BULL., May 2010, at 32, 35.

property.³ Concerned with an increase in mortgage fraud, the lender tipped off authorities, who subsequently investigated and arrested the straw buyer and his business partner. Almost a year later, the partners pled guilty and were sentenced, *inter alia*, to pay restitution to the financial institution. At the time of sentencing, the home had a fair market value of \$145,000.⁴

The court ordered restitution based on the Mandatory Victims Restitution Act (MVRA) concerning fraud and property.⁵ The victim, in this case the bank, argued its amount of loss equaled \$295,000 (the amount originally borrowed) less the current fair market value of the property returned, \$145,000; thus, the court should order the defendants to pay restitution of \$150,000. On the other hand, the defendants argued that at the time the property was returned to the financial institution, the value of the home was \$265,000. And because the bank had *control* over the property since that point in time, and had the ability to sell it any time, the defendants should not be liable for the further declining market conditions. Thus, the defendants argued they only owed restitution of \$30,000. Alternatively, the judge could consider a third possibility: recent recommendations from US Sentencing Guidelines. Under these new guidelines, the court determines the fair market value of the home on the defendants' sentencing date.⁶ But, if the bank had not sold the home by that date, that fair market value would be based on the county's assessed value of the property. In Clark County, where Las Vegas is situated, the Assessor's Office updates property values annually⁷ and, depending on the specific time frame in this hypothetical, the assessment value can range from a lagging property assessment valuing the home at \$280,000 to a more current assessment valuing the home at \$125,000.

Which measure of restitution and subsequent calculation is best? That is, which value most adequately compensates the injured victim without unfairly burdening the defendants? The Ninth Circuit would side with the defendants in this case, having previously held that the value of the home on the date the bank gains control is the proper measure of restitution.⁸ Accordingly, the defendants in this case would be ordered to pay only \$30,000 in restitution. On the other hand, the Seventh Circuit would hold that the "property" stolen was

³ For an example of a Form 1003 Uniform Residential Loan Application, see *Uniform Residential Loan Application*, FANNIE MAE, https://www.fanniemae.com/content/guide_form/1003rev.pdf (last visited Feb. 21, 2014).

⁴ This illustration, while seemingly extreme, is comparable to the actual swings in housing prices in Las Vegas during the boom and bust. See, e.g., STEPHEN P.A. BROWN, UNLV CTR. FOR BUS. & ECON. RESEARCH, SOUTHERN NEVADA HOUSING MARKET SHOWS SIGNS OF RECOVERY 1 (2012), available at <http://cber.unlv.edu/commentary/CBER-28Nov2012.pdf>. For an impactful visual, see *Home Price Index for Las Vegas, Nevada*, ECON. RES. FED. RES. BANK ST. LOUIS, <http://research.stlouisfed.org/fred2/series/LVXRNSA> (last updated Feb. 25, 2014, 8:56 AM).

⁵ 18 U.S.C. § 3663A(c)(1)(A)(ii) (2012).

⁶ See *infra* Part IV (discussing Sentencing Guidelines for United States Courts).

⁷ NEV. REV. STAT. § 361.260 (2013), available at <http://www.leg.state.nv.us/NRS/NRS-361.html#NRS361Sec260>; Assessor: FAQ, CLARK COUNTY, NEV., <http://www.clarkcountynv.gov/depts/assessor/Pages/faq.aspx> (last visited Feb. 21, 2014).

⁸ See discussion of the Ninth Circuit method in Part III.A., *infra*; *United States v. Smith*, 944 F.2d 618 (9th Cir. 1991).

the money used to finance the home purchase, and not the actual home.⁹ Subsequently, the “property” is not returned to the victim until the bank sells the house and gets the entire amount it loaned to the defendants back. For that reason, if the bank sold the home by the sentencing date for \$145,000, the defendants would be ordered to pay \$150,000 in restitution. And if a judge considered the US Sentencing Guidelines, she would look to the local assessor’s office to determine the correct value. Thus, the amount of restitution a defendant pays depends on where the mortgage fraud takes place and whether the presiding judge considers the US Sentencing Guidelines. Accordingly, mortgage fraud restitution is not uniform throughout the United States.

This note discusses the circuit split in applying the Mandatory Victims Restitution Act of 1996 to mortgage fraud crimes—specifically, the difference in the mortgage fraud restitution formula. In Part I, I provide an introduction to mortgage fraud. In Part II, I provide background on the Mandatory Victims Restitution Act of 1996, which established a directive to courts to order restitution to identifiable victims. Further, the Act indicated, albeit imprecisely, that the restitution amount is based on the property’s value on the sentencing date, less the property’s “value” on the date the property is returned.

Regrettably, the Act does not provide a definition of the word “property,” which has resulted in a circuit split. Three circuit courts calculate the mandatory restitution as the property’s “value” based on the date the property is returned—that is, the property’s fair market value on that date. On the other hand, four circuits insist that the “value” of the property can only be determined when the bank actually sells that property. In Part III, I will discuss the circuit split where courts disagree on the “appropriate” restitution calculation.

In an effort to provide a uniform calculation, last year the US Sentencing Commission proposed changes to the US Sentencing Guidelines. While the Guidelines are only advisory and not mandatory, these recent amendments result in a third possible calculation that I discuss in Part IV.

Finally, in Part V, I critique each of the three imperfect approaches. In addition, I provide comparisons to various state foreclosure deficiency statutes as an illustration of alternative calculations. I conclude by proposing an amendment to the Mandatory Victim Restitution Act that, in the cases of collateralized loans obtained by fraud, defines “property” as the actual property fraudulently obtained: cash. In addition, I propose an additional “good faith” clause to the amendment to prevent banks from holding onto a foreclosed property longer than necessary. The sooner a property is sold, the sooner the bank recuperates some of its lost funds and the sooner a defendant knows the restitution amount he must pay.

A. *What is Mortgage Fraud?*

In the hypothetical above, the partners executed mortgage fraud by using the applicant’s name and credit as a “straw buyer.” That is, a person who

⁹ See discussion of the Seventh Circuit method in Part III.B, *infra.*; *United States v. Robers*, 698 F.3d 937, 939 (7th Cir. 2012), *cert. granted*, 134 S. Ct. 470 (2013).

allows his name to be used in the loan process but has no intention of actually making any mortgage loan payments.¹⁰

Mortgage fraud comes in a variety of forms. For example, a person commits loan origination fraud when he misrepresents or omits information on a loan application upon which an underwriter ultimately relies to write a loan.¹¹ Mortgage fraud can also occur with illicit programs aimed at current homeowners who are having trouble with their payments.¹² Lately, this type of foreclosure rescue fraud is increasing.¹³ These types of scams focus on homeowners on the verge of foreclosure. Criminals promise to “stop or delay the foreclosure process,” and, in return, homeowners sign over their property to the criminals.¹⁴

Mortgage fraud can also include “flopping.” Flopping occurs when a bank agrees to a short sale with the homeowner who then attempts to get the lowest price possible by purposefully damaging the soon-to-be-sold house.¹⁵ The house is then bought by an accomplice, cleaned up, and immediately flipped for a profit of upwards of 30 percent.¹⁶

In 2011, Nevada ranked second to Florida in the Mortgage Fraud Index (MFI), a ranking of states based on reported fraud and misrepresentation investigations.¹⁷ The FBI investigates mortgage fraud through Suspicious Activity Reports (SARs) filed by financial institutions.¹⁸ The number of mortgage fraud SARs filed in 2011 was 93,508. To put this in perspective, in 2003 the number of reports filed was less than 7,000.¹⁹ However, mortgage fraud may be decreasing: 2012 SARs are down 25 percent compared to the previous year.²⁰

¹⁰ *Mortgage Fraud Terms, Participants, and Documents*, *supra* note 2.

¹¹ FIN. CRIMES INTELLIGENCE UNIT, FED. BUREAU OF INVESTIGATION, 2010 MORTGAGE FRAUD REPORT: YEAR IN REVIEW 5 (2011), available at <http://www.fbi.gov/stats-services/publications/mortgage-fraud-2010/mortgage-fraud-report-2010>.

¹² *Id.*

¹³ FIN. CRIMES ENFORCEMENT NETWORK, U.S. DEP'T OF TREASURY, MORTGAGE LOAN FRAUD UPDATE 14 (Oct. 2012), available at http://www.fincen.gov/news_room/nr/files/MLFUpdateQ22012_FINAL508.pdf.

¹⁴ Press Release, Fin. Crimes Enforcement Network, U.S. Dep't of Treasury, SARs Regarding Foreclosure Rescue Scams Increase (Oct. 9, 2012), available at http://www.fincen.gov/news_room/nr/html/Q22012/20121009.html.

¹⁵ Les Christie, *Latest in Mortgage Fraud: Flopping*, CNNMONEY (Oct. 23, 2012, 6:22 AM), http://money.cnn.com/2012/10/23/real_estate/mortgage-fraud-flopping.

¹⁶ *Id.*

¹⁷ LEXISNEXIS RISK SOLUTIONS, THE LEXISNEXIS 14TH ANNUAL MORTGAGE FRAUD REPORT 8 (2012), available at http://mortgagefraudblog.com/images/stories/uploaded_docs/mari.pdf.

¹⁸ FIN. CRIMES SECTION, FED. BUREAU OF INVESTIGATION, FINANCIAL CRIMES REPORT TO THE PUBLIC: FISCAL YEARS 2010–2011, at 23 (2012), available at <http://www.fbi.gov/stats-services/publications/financial-crimes-report-2010-2011/financial-crimes-report-2010-2011.pdf>.

¹⁹ *Id.*

²⁰ Press Release, Fin. Crimes Enforcement Network, U.S. Dep't of Treasury, FinCEN 2012 SAR Data Reveals Drop in Suspected Mortgage Fraud (Aug. 20, 2013), available at http://www.fincen.gov/news_room/nr/html/20130820.html. However, it is important to note that it can take years for a mortgage fraud scheme to be discovered, which delays suspicious activity reporting. *Id.*

B. *Why Does Mortgage Fraud Matter?*

Mortgage fraud is a “significant contributor” to our economic crisis.²¹ Mortgage fraud has contributed to an increasing number of home foreclosures, decreasing home prices, and tightening of credit because of investor losses attributable to mortgage-backed securities.²² Further, “[t]he discovery of mortgage fraud via the mortgage industry loan review processes, quality control measures, regulatory and industry referrals, and consumer complaints lags behind economic indicators—often up to two years or more, with the impacts [of the fraud] felt far beyond these years.”²³ Undeniably, reports of mortgage fraud persist and are continually emphasized in the news.²⁴

Lenient underwriting standards and a booming housing market have shaped a perfect backdrop for fraud to thrive.²⁵ However, “[b]y 2007, real estate values began to fall and mortgage lenders began experiencing large losses due to fraud, reducing their ability to fund new mortgage loans.”²⁶

The economic implications of mortgage fraud are staggering. The actual dollar amount attributed to mortgage fraud is unknown, however in 2010 alone “more than \$10 billion in loans originated with fraudulent application data.”²⁷ Moreover, in fiscal year 2012, 70,291 SARs were filed with losses of \$2.69 billion.²⁸ And while the number of mortgage fraud instances has decreased, the dollar amounts involved in instances of fraud has increased.²⁹

C. *Why Restitution?*

Until the early 1980s, courts did not habitually consider restitution as part of sentencing guidelines.³⁰ In fact, if a court ordered restitution, it was usually based on the defendant’s ability to pay.³¹ The passage of the Victim and Wit-

²¹ Benjamin B. Wagner, *Why Mortgage Fraud Matters*, U.S. ATT’YS’ BULL., May 2010, at 1, 1.

²² *Id.*

²³ FIN. CRIMES INTELLIGENCE UNIT, *supra* note 11, at 6 n.a.

²⁴ See, e.g., Jeff German, *Homeowners Still at Risk*, LAS VEGAS REV. J., Dec. 14, 2012, at B1 (judge orders Las Vegas man to pay over \$320,000 in restitution for impersonating a mortgage agent and claiming he could provide mortgage relief to homeowners); Chris Olwell, *\$10 Million in Restitution Ordered in Mortgage Fraud*, NEWS HERALD (Jan. 29, 2013, 3:44 PM), <http://www.newsherald.com/news/crime-public-safety/10-million-in-restitution-ordered-in-mortgage-fraud-1.86333> (judge issued large restitution order for five defendants in straw buyer scheme). Financial institutions have also been accused of mortgage fraud. See, e.g., Danielle Douglas, *New York Sues Credit Suisse over Mortgages*, WASH. POST, Nov. 21, 2012, at A14.

²⁵ Wagner, *supra* note 21.

²⁶ *Id.*

²⁷ FIN. CRIMES INTELLIGENCE UNIT, *supra* note 11, at 6.

²⁸ *These Scams Hit Us Right Where We Live*, FED. BUREAU INVESTIGATION, http://www.fbi.gov/about-us/investigate/white_collar/mortgage-fraud/mortgage_fraud (last visited Feb. 21, 2014).

²⁹ Krista Franks Brock, *Mortgage Fraud Instances Decline, Per-Case Value Rises in Third Quarter*, MREPORT (Dec. 3, 2012), <http://www.themreport.com/articles/mortgage-fraud-instances-decline-per-case-value-rises-2012-12-03>.

³⁰ Matthew Spohn, Note, *A Statutory Chameleon: The Mandatory Victim Restitution Act’s Challenge to the Civil/Criminal Divide*, 86 IOWA L. REV. 1013, 1014 (2001).

³¹ U.S. GEN. ACCOUNTING OFFICE, GAO-01-664, CRIMINAL DEBT: OVERSIGHT AND ACTIONS NEEDED TO ADDRESS DEFICIENCIES IN COLLECTION PROCESSES 34 (2001).

ness Protection Act (VWPA) in 1982,³² its subsequent revision in 1986, and later the Mandatory Victims Restitution Act (MVRA) in 1996³³ empowered federal judges to order restitution to victims of certain crimes³⁴ without consideration of the defendant's ability to pay.³⁵ Unfortunately, victims receive only a fraction of the costs from crimes through restitution,³⁶ as not all defendants have the resources to pay the restitution and their income potential diminishes significantly once they are in jail. However, as courts consider both the MVRA and the frequently cited public policy argument for restitution (making the victim whole), courts consequently order restitution awards to mortgage fraud victims.³⁷ Indeed, "[v]ictims in mortgage fraud cases are statutorily entitled to restitution."³⁸

D. *The Split*

When a court convicts a defendant of mortgage fraud, and the defendant's return of the property alone is not enough to fully restore the identified victim, the court will try to offset this deficiency in one of two ways. The Second, Fifth, and Ninth Circuits determine restitution based on the property's fair market value the day the victim receives title to the property. The Third, Eighth, Tenth, and, most recently, Seventh Circuits hold the shortage is calculated based on the actual sale of the collateral real estate. Thus, the value of the property is unknown until the property has been sold and the lender receives the net proceeds. Consequently, this split "sets up a potential case for the U.S. Supreme Court to decide whether the MVRA requires a court to determine restitution based on the fair market value of collateral real estate on the date it is returned to a victim . . . or the cash value upon foreclosure sale."³⁹

II. THE MANDATORY VICTIMS RESTITUTION ACT OF 1996

Congress first enacted legislation in support of victims' rights with the Victim and Witness Protection Act of 1982 (VWPA).⁴⁰ The act included a broad provision for victim restitution.⁴¹ In considering the bill, the Committee on the Judiciary indicated that

³² Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248.

³³ 18 U.S.C. § 3663A (2012).

³⁴ Spohn, *supra* note 30, at 1015.

³⁵ FINES AND RESTITUTION IN FEDERAL COURTS 7-8 (Maxwell R. Silverstein ed., 2003).

³⁶ PEGGY M. TOBOLOWSKY ET AL., CRIME VICTIM RIGHTS AND REMEDIES 167 (2d ed. 2010). For example, the court ordered \$250 million in restitution against the convicted defendants from the World Trade Center bombings, but the four offenders have paid less than 0.0012 percent of that amount. U.S. GEN. ACCOUNTING OFFICE, *supra* note 31, at 35-36.

³⁷ See, e.g., *United States v. James*, 564 F.3d 1237, 1245-46, 1249 (10th Cir. 2009).

³⁸ Joseph T. Dixon, III, *Last but Not Least: Sentencing and Restitution*, U.S. ATT'YS' BULL., May 2010, at 28, 31.

³⁹ Joe Forward, *In Mortgage Fraud Case, Offset Value Based on Cash Recouped in Foreclosure Sale*, STATE BAR WIS. (Sept. 17, 2012), <http://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=10131>.

⁴⁰ OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 7 (2005), available at http://www.justice.gov/archive/olp/ag_guidelines.pdf.

⁴¹ Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 5, 96 Stat. 1248, 1253.

[t]he 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 wrongdoers, it should also insure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being.⁴²

However, while this report indicated the importance of requiring restitution, the Act only provided that a Court *may* order the defendant to pay restitution.⁴³

Congress expanded and amended legislation for victims in future legislation,⁴⁴ most notably in the Mandatory Victims Restitution Act of 1996.⁴⁵ Congress identified one of the primary purposes of the Act as “requiring Federal criminal defendants to pay full restitution to the identifiable victims of their crimes.”⁴⁶ In addition, Congress specifically made mandatory restitution applicable to fraudulent crimes against property.⁴⁷ Moreover, Congress explicitly identified the legislation’s purpose:

This legislation is needed to ensure that the loss to crime victims is recognized, and that they receive the restitution that they are due. It is also necessary to ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society. Finally, this legislation is needed to replace an existing patchwork of different rules governing orders of restitution under various Federal criminal statutes with one consistent procedure.⁴⁸

If restitution is appropriate, a court may only award it to identifiable victims. A federal crime victim is defined as “a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.”⁴⁹ Further, restitution is only applicable to crime victims when the defendant is actually convicted.⁵⁰ In addition, “[a] ‘victim’s’ participation in a fraudulent mortgage scheme . . . will generally exclude the victim from restitution.”⁵¹

It should also be remembered that restitution, “like all criminal sanctions . . . is a sanction of limited application.”⁵² Restitution is only complete, then, when payment of the obligation is complete.⁵³ In jurisdictions that allow “extended or nominal payment mechanisms,” which can prolong the repay-

⁴² S. REP. NO. 97-532, at 30 (1982).

⁴³ Victim and Witness Protection Act, § 5, 96 Stat. at 1253.

⁴⁴ OFFICE FOR VICTIMS OF CRIME, *supra* note 40.

⁴⁵ 18 U.S.C. § 3663A (2012).

⁴⁶ VICTIM RESTITUTION ACT OF 1995, S. REP. NO. 104-179, at 12 (1995).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 18 U.S.C. § 3771(e) (2012).

⁵⁰ CHARLES DOYLE, CRIME VICTIMS’ RIGHTS ACT 6 (2008).

⁵¹ Travis Burchart, *Victims of Mortgage Fraud Bar Themselves from Restitution*, LEXIS-NEXIS LEGAL NEWSROOM (March 31, 2011, 9:49 AM), <http://www.lexisnexis.com/legalnewsroom/real-estate/b-real-estate-law-blog/archive/2011/03/31/how-the-victims-of-mortgage-fraud-barred-themselves-from-restitution.aspx>. For example, if a mortgage loan processor participated in a straw buyer mortgage fraud scheme, a court would not consider the bank a victim because the bank participated in the scheme.

⁵² TOBOLOWSKY ET AL., *supra* note 36.

⁵³ *Id.*

ment,⁵⁴ the variable time value of money may cause any restitution to be technically incomplete, even once the balance is repaid in full.⁵⁵

Unfortunately, only 17.4 percent of measured property offenses resulted in criminal charges.⁵⁶ Where convictions of mortgage fraud do result, however, courts consider the language of the MVRA in awarding restitution:

The court may also order restitution The order may require that such defendant . . . return the property to the owner of the property . . . or . . . if return of the property . . . is impossible, impractical, or inadequate, pay an amount equal to the greater of . . . the value of the property on the date of the damage, loss, or destruction, or . . . the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned⁵⁷

Accordingly, when the return of the property is inadequate restitution, the MVRA states that the offset value must be determined as of the date the property is returned. However, the statute is silent as exactly *how* to measure the value of the property on that date.⁵⁸ Consequently, in the absence of clear guidelines, three possible formulas have arisen.⁵⁹

III. THE CIRCUIT SPLIT

With a lack of clarity in defining “property” in the MVRA, the circuit courts have split in their interpretations of restitution. Two circuits have followed the Ninth Circuit in determining that the value of the property is the fair market value on the date of the property’s return, arguing that once the property is returned to the victim, the victim has control over the property and may dispose of the property whenever it chooses. Accordingly, these courts calculate the fair market value of the property based on the date the property is returned rather than waiting for a later sale. Conversely, four circuits hold that the “property” can only be valued when the house is eventually sold and the proceeds are provided to the victim because cash, not real estate, was the actual property the defendants took from the victim.

A. *The Ninth Circuit Method*

A bank would say a restitution calculation can only be determined when the property is sold, but a defendant would argue that if a bank holds on to the property in a declining market, it is unfair for the defendant to pay more in restitution than what the property was worth when the victim regained control of it. The Ninth Circuit method considers the fairness of a bank refraining from selling a property immediately, and ultimately agrees with the defendant’s argument.

⁵⁴ *Id.* at 170.

⁵⁵ For an introduction to the time value of money concept, see generally JACK R. KAPOOR ET AL., *PERSONAL FINANCE* (10th ed. 2011).

⁵⁶ TOBOLOWSKY ET AL., *supra* note 36 (analyzing 2008 Uniform Crime Reports).

⁵⁷ 18 U.S.C. § 3663(a)(3) (2012) (emphasis added).

⁵⁸ *United States v. Boccagna*, 450 F.3d 107, 114 (2d Cir. 2006).

⁵⁹ See *infra* Part III (discussing the circuit split and two different calculation formulas); *infra* Part IV (discussing updated US Sentencing Guidelines addressing another possible calculation).

After the passage of the Victim and Witness Protection Act in 1982, the Ninth Circuit became the first circuit court to consider mortgage fraud restitution.⁶⁰ The court turned to an earlier decision in a timber theft case for property valuation guidance.⁶¹ In *United States v. Tyler*, the defendant was ordered to pay restitution for his theft of timber from a national forest.⁶² However, the victim, the federal government, did not sell the timber upon its seizure and in fact purposefully held onto the timber, claiming it needed the timber for evidentiary purposes in its case against Tyler.⁶³ During the period between the arrest and sentencing, timber prices declined.⁶⁴ The district court found that the amount of restitution equaled the difference of the timber's value from sentencing date and the higher value when defendant actually stole the timber.⁶⁵ The Ninth Circuit disagreed with the District Court and held that the defendant should not have an increased restitution when the victim decides to retain the property.⁶⁶ The court reasoned that the defendant's conduct did not cause the subsequent loss the government experienced and therefore restitution was properly calculated as the property's value on the date the victim regained control of the timber.⁶⁷

The Ninth Circuit subsequently applied this logic to a mortgage fraud context in *United States v. Smith*, where the defendant obtained loans secured by speculative real estate.⁶⁸ The court determined that the credit against restitution should be based on the value of the property on the date title is transferred to the victim.⁶⁹ The court noted, "[a]s of that date, the new owner had the power to dispose of the property and receive compensation."⁷⁰ Because the victim has control over the property's sale once the property is returned, "[v]alue should therefore be measured by what the financial institution *would have received in a sale as of that date.*"⁷¹

The *Smith* decision served as the "keystone for all of the subsequent decisions."⁷² The Ninth Circuit reinforced this valuation method in later cases.⁷³

⁶⁰ *United States v. Smith*, 944 F.2d 618, 621 (9th Cir. 1991).

⁶¹ *Id.* at 625.

⁶² *United States v. Tyler*, 767 F.2d 1350, 1351 (9th Cir. 1985).

⁶³ *Id.* at 1352.

⁶⁴ *Id.* at 1351.

⁶⁵ *Id.* Because this case was prior to the Mandatory Victims Restitution Act, the district court based its reasoning on 18 U.S.C. §§ 3651 and 3579. *Id.*

⁶⁶ *Id.* at 1352–53.

⁶⁷ *Id.* at 1352.

⁶⁸ *United States v. Smith*, 944 F.2d 618, 625 (9th Cir. 1991).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* (emphasis added).

⁷² *United States v. Robers*, 698 F.3d 937, 947 (7th Cir. 2012), *cert. granted*, 134 S. Ct. 470 (2013).

⁷³ *United States v. Davoudi*, 172 F.3d 1130, 1136 (9th Cir. 1999) (case remanded for restitution determination for value on date property returned rather than value at victim's sale of property); *United States v. Catherine*, 55 F.3d 1462, 1466 (9th Cir. 1995) (Ninth Circuit found trial court abused its discretion when it based restitution order on property's value on date of sale rather than value on date when property returned to victim); *United States v. Hutchison*, 22 F.3d 846, 849, 856 (9th Cir. 1993) (defendant who fraudulently secured home refinance loan had restitution order reduced to reflect the value on the date the property was returned to victim in consideration of declining Arizona market).

Further, in *United States v. Gossi*, the court elaborated on its prior decisions that value should be based on the date the victim has control over the property.⁷⁴ Specifically, the court noted that what comes with control of the property is the power to dispose,⁷⁵ which allows the victim to sell the property anytime and provides no immediate calculation of restitution. Subsequently, the court cited *Smith*, stating the “[v]alue should therefore be measured by what the financial institution would have received in a sale as of that date.”⁷⁶

Finally, this past year, the Ninth Circuit upheld its mortgage fraud restitution calculation in *United States v. Yeung*. In *Yeung*, the defendant enlisted five people in a scheme involving false information on straw buyers’ loan applications in order to purchase and refinance homes in Northern California during the booming housing market.⁷⁷ The district court considered a sentencing memo indicating that Yeung should pay restitution in the amount of the “outstanding principal balance on the defaulted loans less any money recovered from a sale of the properties used as collateral for the loans.”⁷⁸ Applying the US Sentencing Guidelines, rather than the MVRA, the district court ordered a restitution award in excess of \$1.3 million.⁷⁹ The Court of Appeals, however, indicated that a financial institution has control of the property either when the property is sold or when, citing *Smith*, the lender “had the power to dispose of the property and receive compensation,” and therefore restitution should be based on the fair market value on the date the property is returned.⁸⁰

One distinction in *Yeung*, however, involved a loan purchased on the secondary market.⁸¹ One of the loans had been sold from the originating lender to a loan purchaser at a discount. The court indicated that the “property” in such circumstances is the actual loan, and not the original real property.⁸² The court determined that the restitution calculation in this type of circumstance must consider how much the loan purchaser paid for the loan, “less the value of the real property collateral as of the date the victim took control of the collateral property.”⁸³

Further, the court disagreed with the district court’s calculation of one property’s value.⁸⁴ The district court determined the value of one of the properties as \$363,863—the amount the victim received from the property’s sale.⁸⁵ However, this sale did not occur until sixteen months after the victim took control of the property.⁸⁶ Accordingly, the court found the actual value should be determined from the date the victim took control of the property.⁸⁷

⁷⁴ *United States v. Gossi*, 608 F.3d 574, 577 (9th Cir. 2010).

⁷⁵ *Id.* at 578.

⁷⁶ *Id.* (quoting *Smith*, 944 F.2d at 625).

⁷⁷ *United States v. Yeung*, 672 F.3d 594, 597 (9th Cir. 2012).

⁷⁸ *Id.* at 599.

⁷⁹ *Id.*

⁸⁰ *Id.* at 601 (quoting *Smith*, 944 F.2d at 625).

⁸¹ *Id.* at 601–02.

⁸² *Id.* at 602.

⁸³ *Id.*

⁸⁴ *Id.* at 604–05.

⁸⁵ *Id.* at 604.

⁸⁶ *Id.*

⁸⁷ *Id.*

Two circuits follow the Ninth Circuit's restitution calculation. In both *United States v. Reese*⁸⁸ and *United States v. Holley*,⁸⁹ the Fifth Circuit maintained that a property's value is determined based on the date the collateral property is returned to the lender.⁹⁰ Further, in *Holley*, the Fifth Circuit specifically analogized the facts of *Holley* to the *Smith* case in subscribing to the Ninth Circuit calculation.⁹¹

Relatedly, in *United States v. Boccagna*,⁹² the Second Circuit performed an extensive analysis of how property value should be measured, ultimately agreeing with the Ninth and Fifth Circuits.⁹³ The *Boccagna* court noted that the MVRA does not define how to determine the value of property.⁹⁴ Instead, the court stated, the "law appears to contemplate the exercise of discretion by sentencing courts in determining the measure of value appropriate to restitution calculation in a given case."⁹⁵ The court found the property's sale price was lower than the fair market value and remanded the case to determine this value as part of the restitution calculation.⁹⁶

B. *The Seventh Circuit Method*

In contrast, four circuit courts presume the fair market value is determined only by the actual sale of the property. I have referred to this calculation as the Seventh Circuit method because of that court's recent decision in which it analyzed all circuit holdings to date.⁹⁷ However, these decisions begin outside of that circuit.

The Third Circuit, in *United States v. Himler*, observed that the return of the property would be inadequate to compensate the victim, and explicitly disagreed with the Ninth Circuit's view that value of the property is "as of the date the victim took control of [it]."⁹⁸ The court noted instead that real estate is an illiquid asset, and "is only worth what you can get for it."⁹⁹ Thus, the court held that restitution would equal the original loan amount, less the eventual amount

⁸⁸ *United States v. Reese*, 998 F.2d 1275, 1284 (5th Cir. 1993).

⁸⁹ *United States v. Holley*, 23 F.3d 902, 915 (5th Cir. 1994).

⁹⁰ *Reese*, 998 F.2d at 1284 (indicating that when the property has been returned to the lender, "the value of such property should constitute a partial return of the 'cash loan proceeds'"); *Holley*, 23 F.3d at 915. Citing the Ninth Circuit decision in *Smith*, the court agreed the value of the returned property "should therefore be measured by what the financial institution would have received in a sale as of that date. Any reduction in value after [the defendant] lost title to the property stems from a decision by the new owners to hold on to the property." *Id.* (quoting *United States v. Smith*, 944 F.2d 618, 625).

⁹¹ *Holley*, 23 F.3d at 915.

⁹² *United States v. Boccagna*, 450 F.3d 107 (2d Cir. 2006).

⁹³ *Id.* at 112 n.2.

⁹⁴ *Id.* at 114.

⁹⁵ *Id.* at 114–15. "Title 18 U.S.C. § 3664(f)(1)(A) states that a 'court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.'" *Id.* (emphasis in original).

⁹⁶ *Id.* at 119–20.

⁹⁷ *United States v. Robers*, 698 F.3d 937, 939 (7th Cir. 2012).

⁹⁸ *United States v. Himler*, 355 F.3d 735, 744–45 (3d Cir. 2004) (citing *United States v. Lomow*, 266 F.3d 1013, 1020 (9th Cir. 2001)).

⁹⁹ *Id.* at 745.

recovered from a sale.¹⁰⁰ Surprisingly in this case, waiting until the sale actually occurred resulted in the defendant paying less restitution than he would have if the fair market value had been used.¹⁰¹ The condominium in *Himler* sold for significantly more than its presumed value when title was transferred, due to favorable market conditions.¹⁰²

The Tenth Circuit, in *United States v. James*, also concluded that value is based on the actual foreclosure sales price and not an appraised value when the property is returned to the mortgage holder.¹⁰³ The court noted that the MVRA “generally uses the term ‘value,’ and does not limit calculation of ‘value’ only to the use of the ‘fair market value’ of the property at issue.”¹⁰⁴ Further, because the statute does not specifically mention value as being fair market value, there are other examples of value that may be appropriate, such as foreclosure sales price and replacement price.¹⁰⁵ The court subsequently noted that value can be a flexible concept, and a court with discretionary powers should keep in mind the purpose of restitution—to make the victim whole.¹⁰⁶ The court concluded, therefore, that the foreclosure sale price in that case reflected a more accurate measure of the victim’s loss.¹⁰⁷

Similarly, the Eighth Circuit, in *United States v. Statman*, used the foreclosure sale price of a fraudulently purchased bakery business in calculating the restitution award to a state’s small business-funding agency.¹⁰⁸ While the defendant wanted the court to consider the appraised value of the bakery, the court cited *James* and determined that a foreclosure sale price was a permissible calculation method.¹⁰⁹ The court also agreed with the Tenth Circuit; its decision aligns with the public policy concerns, which justify the existence of restitution in the first place—the need to make victims whole for the actual loss.¹¹⁰ While this case involved financial fraud, and not mortgage fraud *per se*, the chosen calculation method aligns this circuit with the sale-price camp.

Most recently, in *United States v. Robers*, the Seventh Circuit joined the Third, Eighth, and Tenth Circuits concluding “it is proper to determine the offset value [of property that is returned] based on the *eventual* amount recouped by the victim following sale of the collateral real estate.”¹¹¹ The court observed that because the victim loaned cash to the defendants to purchase the property, the cash was therefore the “property” taken, not a home.¹¹² Basing its opinion on the plain language of the MVRA, the Seventh Circuit decided that “‘property’ must mean the property originally taken from the victim,” the

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *United States v. James*, 564 F.3d 1237, 1246 (10th Cir. 2009).

¹⁰⁴ *Id.* at 1245.

¹⁰⁵ *Id.* at 1245–46.

¹⁰⁶ *Id.* at 1246.

¹⁰⁷ *Id.*

¹⁰⁸ *United States v. Statman*, 604 F.3d 529, 532, 538 (8th Cir. 2010).

¹⁰⁹ *Id.* at 538.

¹¹⁰ *Id.*

¹¹¹ *United States v. Robers*, 698 F.3d 937, 939 (7th Cir. 2012) (emphasis added).

¹¹² *Id.*

value can only be determined by the amount of cash returned to the victim from a sale.¹¹³

IV. YET ANOTHER PERSPECTIVE—US SENTENCING GUIDELINES

The US Sentencing Guidelines are advisory rules that set out uniform sentencing guidelines for various offenses.¹¹⁴ The Guidelines are not mandatory, and while judges have discretion in sentencing, courts must consider the Guidelines in determining a defendant's sentence.¹¹⁵ Moreover, a court of appeals reviewing a sentence that follows the Guidelines will consider the sentencing reasonable *per se*.¹¹⁶

Under these Guidelines, the factors considered when imposing a sentence include restitution to the victim.¹¹⁷ Further, the Guidelines state that, “[i]n the case of an identifiable victim, the court shall . . . enter a restitution order for the full amount of the victim's loss, if such order is authorized under 18 U.S.C. . . . § 3663.”¹¹⁸

The US Sentencing Commission annually reviews the current Guidelines and proposes amendments to reflect inadequacies in recent sentences.¹¹⁹ Recent revisions to the Guidelines, however, are not consistent with the latest Seventh Circuit decision in *Roberts*. In the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress issued a directive to the US Sentencing Guideline Commission to review and amend federal sentencing guidelines related to “persons convicted of fraud offenses relating to financial institutions or federally related mortgage loans and any other similar provisions of law.”¹²⁰ The amendment subsequently attempts to address the inconsistencies with Application Note 3(E) and “credits against loss rule,” which offsets a victim's loss by any credit the victim has already received.¹²¹ In general, the rule deducts the fair market value of the property returned to the victim from the amount of restitution the defendant is required to pay.¹²² In other words, the restitution is offset by the collateral's fair market value.

The Commission specifically addressed the situation that the circuit courts have wrestled with—when the victim gets the collateral back but has not disposed of the property, resulting in a problematic value calculation.¹²³ The Commission noted this and, in an attempt to provide uniform guidelines, it proposed two changes.¹²⁴ The first change established a specific date of the fair

¹¹³ *Id.* at 942.

¹¹⁴ U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2013).

¹¹⁵ *United States v. Booker*, 543 U.S. 220, 264–65 (2005).

¹¹⁶ *Rita v. United States*, 551 U.S. 338, 341 (2007).

¹¹⁷ 18 U.S.C. § 3553(a)(7) (2012).

¹¹⁸ U.S. SENTENCING GUIDELINES MANUAL § 5E1.1(a)(1) (2013).

¹¹⁹ U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2013).

¹²⁰ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1079A, 124 Stat. 1376, 2078 (2010).

¹²¹ Sentencing Guidelines for United States Courts, 77 Fed. Reg. 28,226, 28,228 (May 11, 2012) (codified at U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3(E) (2013)).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

market value determination: “the date on which the guilt of the defendant has been established.”¹²⁵ The second change “establishes a rebuttable presumption that the most recent tax assessment value of the collateral is a reasonable estimate of the fair market value.”¹²⁶ The Commission suggests that a court may consider the accuracy of this measure by examining factors such as how current the assessment is and the jurisdiction’s calculation process.¹²⁷

In sum, a court ordering restitution following these Guidelines would establish the value of the property based on the official date of the defendant’s guilt. In addition, if the property has been returned to the victim but remains unsold, a court will use the local tax assessor’s value of the property to determine the property’s value.

V. CRITIQUE OF THE THREE CALCULATIONS

The absence of a definition for the term “property” in the MVRA is the root of the different applications of the statute throughout the country. “When the court defines ‘property,’ the question is whether the statute refers to the property stolen or the property returned. They are not necessarily equivalent, particularly in the context of complex financial instruments”¹²⁸ However, as stated previously, the Act’s purpose is to make the victim whole, and no matter which formula is used, each calculation has the potential to not achieve this goal.

A. *The Ninth Circuit Method: Control as the Impetus*

There are several advantages to the Ninth Circuit mortgage fraud restitution calculation method, which holds that the fair market value should be calculated based on the date the property is returned to the financial institution victim. First, the date reflects the date that control over the property has been returned to the victims. Accordingly, the bank then has the power to dispose of the property at its discretion without additionally penalizing the defendant if the victim refrains from selling the property on that date. For example, a victim may decide to hold on to the property, as in *United States v. Tyler*¹²⁹ or *United States v. Smith*,¹³⁰ coincidental with a declining market. A victim may have too many properties in inventory to immediately put a particular property up for sale. Or a victim may be making a calculated business decision to retain the property for a certain period of time for accounting purposes. No matter the purpose behind the retention, it is unfair to place the additional penalty that coincides with declining real estate prices on the defendant who had no control or even influence over the property’s sale.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Sean T. Carnathan, *Circuits Split on Valuing Offset Against Criminal Restitution*, A.B.A. LITIG. NEWS (Nov. 19, 2012), http://apps.americanbar.org/litigation/litigationnews/top_stories/111912-criminal-restitution.html.

¹²⁹ *United States v. Tyler*, 767 F.2d 1350, 1352 (9th Cir. 1985).

¹³⁰ *United States v. Smith*, 944 F.2d 618, 625 (9th Cir. 1991).

Second, this specific date requires no guesswork when attempting to calculate the amount of restitution, which results in better efficiency. On the date the bank gets the property back, an appraisal can determine the property's fair market value. The court can immediately calculate the restitution amount with this figure. Waiting until the property actually sells could result in a delay of months or years to determine how much the actual proceeds from the sale are. As a result, the court has an almost immediate figure to apply to the calculation and can order the restitution award right away.

On the other hand, the Ninth Circuit calculation method has some considerable weaknesses. First, real estate is an illiquid asset,¹³¹ and determining fair market value of an illiquid asset is difficult. An appraisal only suggests what the house could sell for, not what the house actually will sell for. In addition, appraisals are based on historical data of home sales, and during sharp market increases or decreases an appraisal will not reflect the most up-to-date real estate prices.¹³²

Second, the recent housing bubble created an economic environment where home prices decreased at a radical rate. Traditionally, such sharp declines are not a concern with real estate over the long run because, while real estate prices fluctuate, they eventually trend upward.¹³³ However, in situations like the recent drops in home values, the victim-lender can be punished for the market decline, despite the fact the victim was actively trying to sell the property. In addition, amidst tightening credit conditions, fewer buyers may qualify to purchase a home. This results in too much supply, not enough demand, and consequently puts further downward pressure on home prices. The victim-lender is therefore penalized for market conditions beyond its control and consequently does not receive complete restitution.

Further, a victim financial institution is not in the business of selling homes; it is in the business of making collateralized mortgage loans for qualified buyers. Not only will the lender have costs associated with selling the home (for example, carrying costs or realtor commissions), the lender cannot make a sale magically happen, especially if the home is situated in a market flooded with other foreclosure sales.¹³⁴ Thus, when the lender eventually sells the home, it can potentially face a greater loss, an inequity beyond its control.

B. The Seventh Circuit Method: Cash Proceeds are the "Property"

As discussed in Part II, the Seventh Circuit, along with three other circuits, requires a sale of the property in order to establish the net proceeds offsetting a restitution award. These circuits distinguish that the property fraudulently

¹³¹ See *United States v. Himler*, 355 F.3d 735, 745 (3d Cir. 2004).

¹³² Marcie Geffner, *Home Appraisals Come Under More Scrutiny*, MSN REAL ESTATE, <http://realestate.msn.com/article.aspx?cp-documentid=24569959> (last visited Feb. 21, 2014).

¹³³ Sara Clemence, *Real Estate Vs. Stocks*, FORBES (May 27, 2005, 12:01 AM), http://www.forbes.com/2005/05/27/cx_sc_0527home.html.

¹³⁴ For example, consider if a lender attempted to put a home on the market in Las Vegas in the first quarter of 2011 where one in every thirty-one houses was in foreclosure. Melinda Fulmer, *Foreclosure Rates: 20 Cities with Highest Filings and State-by-State Rankings*, MSN REAL ESTATE, <http://realestate.msn.com/article.aspx?cp-documentid=28364347> (last visited Feb. 21, 2014).

obtained was the cash proceeds to finance a real estate purchase, not the actual home. Thus, this method recognizes the illiquidity of real estate and instead requires cash proceeds from a property's sale; therefore, no return of the property for restitution purposes occurs with just the transfer of title or "control" over the property.

In addition, this method provides a more exact amount to the restitution calculation. With an appraisal, a court only has an approximation of what the house is worth. With an actual sale, the court knows specifically what the home sold for, and also has information on the true net proceeds to the lender.

Finally, this method also provides a buffer of protection for a victim trying to sell a property in a declining housing market. If the victim is unable to sell the property immediately, and home prices continue to plummet, the victim will not be financially punished by an ensuing lower sales price of the property. Thus, by treating the property as cash proceeds and not calculating the restitution award until there is a sale of the property, this allows the victim to come closer to achieving full restitution because the funds returned are the original amount that was taken.

This calculation method, however, has some distinct disadvantages. First, calculating the amount of time a home will be on the market is a challenge. For example, in a downturn economy, is it appropriate for the defendants to wait for the home to sell for months or years? At what point should the restitution award sentence be official? Without an established time period for a requisite sale, there will be a decrease of both efficiency and certainty as the defendant will have to wait longer to find out what the value of the property is and therefore how much restitution is necessary.

In addition, what if the lender purposely holds on to the property longer than necessary? Indeed, victim banks could make a "business decision" to hold onto a property for years before attempting to sell.¹³⁵ This type of allowance does not encourage an efficient method of asset redistribution, which can delay economic recovery in a down economy. Further, what if the victim holds an improper foreclosure auction—for example, by failing to advertise the foreclosure sale—and subsequently purchases the home itself for an amount far lower than fair market value because of a (not surprising) lack of buyers? Should the lender be rewarded for its misbehavior? On the other hand, some would argue that between the two parties—a convicted criminal who attempted to defraud a financial institution and a more innocent lender who trusted the criminal borrower—the defendant should absorb the risk.

Further, it is possible in a booming housing market that a defendant will owe no restitution. For example, if the defendant fraudulently obtained a home loan for \$200,000 and the victim lender subsequently sold the property for \$205,000, the defendant will be absolved from restitution. However, if part of the goal of restitution is to make the victim whole, the victim is more than compensated in a booming housing market.

¹³⁵ Daniel Colbert, *Foreclosing Restitution: When Has a Lender's Property Been "Returned?"*, AM. CRIM. L. REV. (Nov. 26, 2013, 10:16 PM), [http://americancriminallawreview.com/Drupal/blogs/blog-entry/foreclosing-restitution-when-has-lender's-property-been--returned"-11-26-2013](http://americancriminallawreview.com/Drupal/blogs/blog-entry/foreclosing-restitution-when-has-lender's-property-been--returned).

Moreover, this type of calculation can have an adverse effect on other types of property. Knowing that the value of the property is not calculated until the item is actually sold, a criminal has little incentive to actually return the property. This would not be a concern for real property, but the same legal framework could be applied to other forms of collateral that can be moved and hidden, like cars. Thus, a thief can choose to hold on to the property or never return the property because of a lack of incentive to return it immediately. Accordingly, “[t]he decision is focused on the statute’s goal of making victims whole but potentially interferes with the statute’s goal of returning property to victims.”¹³⁶ Consequently, “[i]f a defendant is going to be on the hook for the offset amount regardless of when the property is sold, then why return the property? Also, the decision may have the unintended consequence of interfering with the marketplace”¹³⁷

Finally, the loan in question in these circumstances is for a collateralized asset. The actual home provided security to the lender. As such, the lender bore the risk when it made the loan; however, the lender also understood it could foreclose on the home in case of default. Thus, this cost of doing business is already accounted for and a victim lender understands this type of risk when providing mortgage loans.

C. *US Sentencing Guidelines: Local Property Assessment is the Real “Value”*

As discussed in Part IV, the US Sentencing Guidelines establish the date of valuation as the conviction date of the defendant. In addition, if the property has not sold by that date, the local property tax assessor’s value of the home is the value of the property for restitution calculation purposes. There are several advantages to this approach. First, if every circuit applied this approach, these guidelines would result in a uniform application throughout the country and would eliminate the conflicting restitution awards. In addition, this approach sets a number that can be calculated and independently verified. An individual could easily confirm the tax assessor’s value of the property and calculate the restitution.

Moreover, the Guidelines allow flexibility.¹³⁸ For example, if a court determines that an assessed value is too divergent from a property’s fair market value, the court has discretion to address these differences and assign a fair market value.¹³⁹

The Guideline method, however, has potential disadvantages. First, as previously noted, the assessed value may not be near the fair market value of the property, and a battle of experts may ensue as both the defendant and the victim claim otherwise. In addition, this discrepancy may afford too much discretion to judges when the goal of the Guidelines is to set a uniform policy.

¹³⁶ Carnathan, *supra* note 128.

¹³⁷ *Id.*

¹³⁸ Sentencing Guidelines for United States Courts, 77 Fed. Reg. 28,226, 28,228 (May 11, 2012) (codified at U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3(E) (2013)).

¹³⁹ *Id.*

In addition, this approach disregards the Seventh Circuit method recognizing that the property taken was the actual cash for the home loan. Instead, by relying on a tax assessor's value if the home remains unsold, the Commission determined that the "property" is the tangible real estate, and not the cash that was lent. Again, if the victim were unable to sell the home in a declining housing market, the restitution award would fail to compensate the victim for its true loss.

D. Alternative Methods of Calculation – State Deficiency Statutes

The problematic issue of fair market assessment is not unique to restitution. Every state and the District of Columbia have a deficiency statute, whereby a lender can obtain a deficiency judgment to recover the difference between a foreclosure sale price and the current outstanding balance owed on the mortgage loan.¹⁴⁰ Not every jurisdiction, however, calculates this deficiency in the same way. For example, Nevada calculates the home value based on the actual sale price, not the fair market value when the property is returned to the lender.¹⁴¹ However, the court may also consider the home's appraised value in its determination.¹⁴²

Some states maintain that a foreclosure sale price determines the value of the home when calculating a deficiency judgment.¹⁴³ In other words, these states determine that a property's value is only determined at the time of the property's sale. Therefore, this calculation is similar to the Seventh Circuit method whereby a property's value can only be determined following a sale of the real estate.

Other states consider the fair market value of the property when considering a deficiency judgment. States that consider the fair market value at the time the property is returned coincide with the Ninth Circuit calculation method. Notably, some of these states are states that have had a high number of foreclosures and are within the Ninth Circuit: for example, Arizona and California.¹⁴⁴

Other states provide that the courts have discretion to determine the appropriate value of the property.¹⁴⁵ This discretion is analogous to the alternative offered by US Sentencing Guidelines. This alternative is available when a court deems the property's assessed value is inappropriate and provides that a court has authority to consider other evidence in its determination of a property's value.

Thus, just as there is a lack of uniformity in the restitution calculation depending on which state you live in, there is a corresponding lack of uniformity regarding deficiency judgments. While most states follow the foreclosure

¹⁴⁰ See, e.g., RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 8.4 (1997).

¹⁴¹ NEV. REV. STAT. § 40.455(1) (2013).

¹⁴² NEV. REV. STAT. § 40.457(1) (2013).

¹⁴³ See, e.g., ARK. CODE ANN. § 18-49-105 (2012); D.C. CODE § 42-816 (2001); UTAH CODE ANN. § 78B-6-902 (West 2013); WASH. REV. CODE § 61.24.100(3)(a)(1) (2012).

¹⁴⁴ ARIZ. REV. STAT. ANN. § 33-814 (2013); CAL. CIV. PROC. CODE § 580a (West 2013). See also Fulmer, *supra* note 134 (showing that Arizona and California ranked second and third, respectively, in foreclosure filings in the first quarter of 2011).

¹⁴⁵ See, e.g., IDAHO CODE ANN. § 6-108 (2006); TENN. CODE ANN. § 35-5-118 (Supp. 2013).

sale approach recognizing the property's value can only be determined with an actual sale, this approach does not account for the amount of time a financial institution can choose to hold onto the property. It further fails to account for the lack of control a mortgagor has over the sale process. On the other hand, while the fair market approach recognizes the importance of the control aspect, this approach does not consider a mortgagee's potential inability to sell in a down economy.

E. Analysis

Restitution is founded primarily on the idea that the victim should be made whole for his property loss. The actual property that was defrauded from a victim in mortgage fraud is the money lent as part of the real estate transaction. Therefore, until the actual money is returned, equity has not been restored to the victim. However, equity also demands that a victim not take advantage of the criminal defendant and hold on to the returned real estate property longer than necessary to sell the real estate property. Therefore, there should be a limitation to ensure a victim does not unreasonably allow the property to languish. Accordingly, a "good faith" requirement should be included in any amendment to the MVRA, requiring a victim to sell the property to recoup funds with good faith. Thus, a defendant who believes a victim unfairly held onto a property for too long may petition the court to reduce the amount of restitution owed if the victim did not commence the sales process with good faith.

If Congress were to amend MVRA, it should provide a definition of the term "property" to help distinguish between properties at the different phases of a financial transaction. Because of the diverse types of financial fraud—e.g. mortgage fraud compared with securities fraud—the term "property" may have more than one meaning within these contexts, and may also change throughout the transaction. For instance, consider a scheming debtor who fraudulently obtained a margin loan to purchase both mortgage backed securities and corporate bonds. The property "stolen" initially in this case is the fraudulently obtained cash used to purchase the assets. However, after the margin loan is received, the property now consists of two types of financial instruments within the debtor's portfolio. Indeed, the property in its current form (financial assets) can be converted back to the form of the original property (cash). However, with the current definition of property, it is unclear if that conversion is even required.

The definition of property should state that "property" is defined as the specific or particular type of asset (such as cash) that the defendant secured from the victim. This way, the "property" returned to the victim (money) will be the same type of property stolen (money used to purchase the home). In addition, similar to many state statutes prohibiting insurance companies from operating in bad faith,¹⁴⁶ the Act should prohibit victim-lenders from operating in bad faith.

¹⁴⁶ See, e.g., NEV. REV. STAT. § 686A.310 (2013).

VI. CONCLUSION

Defendants, like the partners in the fictional story in the introduction, could face varied restitution awards depending on which state they commit the mortgage fraud in. This lack of a uniform approach results in inadequate restitution to victims. If the goal of the MVRA is to make victims whole, a more standardized and consistent calculation of restitution is required. Providing a definition of property in the MVRA would provide this uniformity. Further, requiring victims to act in good faith as they attempt to convert property back to the type of asset they were deprived of will help ensure defendants aren't unfairly punished.

