

WHAT'S MONEY GOT TO DO WITH IT: *ROBERS V. UNITED STATES* AND COLLATERAL UNDER THE MANDATORY VICTIMS RESTITUTION ACT OF 1996

TORI M. BENNETTE*

I. INTRODUCTION

Each year banks and other lenders make numerous loans to borrowers based on ostensibly accurate information only to learn that much of the information is fraudulent.¹ In fact, the breadth and depth of mortgage loan origination fraud has been immense.² Between 2006 and 2010, borrowers obtained more than \$80 billion in mortgage loans by using fraudulent application data.³ Lenders who are fraudulently induced into making loans can seek relief under the Mandatory Victims Restitution Act of 1996 (MVRA).⁴ The MVRA governs federal criminal restitution and provides that in cases of crimes resulting in the loss of a victim's property, restitution is mandatory.⁵

In *Robers v. United States*,⁶ the Supreme Court will consider whether a defendant who has fraudulently obtained a loan, and thus owes restitution to the lender under the MVRA, returns any part of the loan money by giving the lenders the collateral securing the loan.⁷ Petitioner Benjamin Robers asks the Court to hold that the return of

* J.D. Candidate, 2015, Duke University School of Law. I would like to thank Professor Elisabeth D. de Fontenay, Ravi Patel, Todd Noelle, and Brianna Strange for their assistance in connection with this note.

1. See, e.g., FIN. CRIMES INTELLIGENCE UNIT, FED. BUREAU OF INVESTIGATION, 2010 MORTGAGE FRAUD REPORT, at 4 (2011), available at <http://www.fbi.gov/stats-services/publications/mortgage-fraud-2010/mortgage-fraud-report-2010>.

2. *Id.*

3. *Id.*

4. See Mandatory Victims Restitution Act of 1996, 18 U.S.C.A. § 3663A (West 2014).

5. 18 U.S.C.A. §§ 3663A(a)(1), (b)(1) (West 2014).

6. *Robers v. United States*, No. 12-9012 (U.S. argued Feb. 25, 2014).

7. Brief for Petitioner at i, *Robers v. United States*, No. 12-9012 (U.S. Dec. 13, 2013).

houses that served as collateral for loans made to him constitutes a return of at least part of the loan money to those lenders.⁸ Both sides agree that under the MVRA, courts must reduce the restitution award by “the value . . . of any part of the property that is returned.”⁹ But they disagree regarding the question of what constitutes “the *property* that is returned.”¹⁰

Robers argues that “the property returned” is the value of the houses at the time of foreclosure because that is the time the properties are surrendered or returned to the lenders¹¹—the *collateral as returned property* rule. On the other hand, the government argues that only the eventual cash proceeds obtained when the properties are resold count because cash—not collateral—is the property that was fraudulently obtained, and cash is what needs to be returned¹²—the *cash as returned property* rule. Answering this question, the Seventh Circuit, siding with the government, held that the value of the property returned (that is, the defendant’s restitution obligation “offset value”) is the eventual cash proceeds from the resale of the property—the cash as returned property rule.¹³

In *Robers*, the Supreme Court will ultimately decide what constitutes “the *property* that is returned” for purposes of calculating the defendant’s restitution offset value. Based on the MVRA’s plain meaning and its strong purpose to make the victim whole,¹⁴ the Court will likely conclude that “the property that is returned” for offset value purposes is the property originally fraudulently obtained, which in this case was cash—not the houses which served as collateral for the cash. The property fraudulently obtained is only returned upon the recoupment of cash proceeds obtained when the collateral houses are resold.

II. FACTUAL BACKGROUND

In 2004, Benjamin Robers participated in a mortgage-fraud scheme devised and carried out by several co-conspirators.¹⁵ The co-

8. *Id.* at 2.

9. *United States v. Robers*, 698 F.3d 937, 939 (7th Cir. 2012) (quoting 18 U.S.C. § 3663A(b)(1) (2006)), *cert. granted*, 134 S. Ct. 470 (Oct. 21, 2013).

10. *Id.* (emphasis added).

11. *See id.*

12. *Id.*

13. *Id.*

14. *Id.* at 943.

15. Brief for Petitioner, *supra* note 7 at 7.

conspirators collected “consulting fees” from prospective home sellers under the guise that they could maximize the value of the sellers’ homes.¹⁶ As part of the scheme, the co-conspirators arranged for “straw buyers” to purchase the homes by obtaining loans from lenders based on false loan applications.¹⁷ The co-conspirators recruited Robers as a straw buyer for two homes in Walworth County, Wisconsin.¹⁸ Robers materially misrepresented his “income, qualifications, and intent to live in the houses and repay the mortgages.”¹⁹ Based on these fraudulent loan applications, Robers secured loans and wired the money to settlement companies who closed the loans.²⁰ Robers received \$500.00 for each loan for his role in the scheme.²¹

When Robers defaulted on both loans, the lenders (or their successors-in-interest) foreclosed on the houses, taking title to them at sheriff’s foreclosure sales in 2006.²² Ultimately, these lenders resold the properties in 2007 and 2008 for substantially less than the loan amounts.²³

In May 2010, the government charged Robers with conspiracy to commit wire fraud.²⁴ Robers ultimately pleaded guilty.²⁵ Based on information presented by the government at the sentencing hearing, the district court ordered Robers to pay approximately \$219,000.00 in restitution.²⁶ This restitution calculation consisted of the loan amounts, plus additional expenses incurred to maintain the collateral properties—approximately \$491,000.00—less the net cash proceeds obtained from resale of the properties—approximately \$272,000.00—for a total restitution award of approximately \$219,000.00.²⁷

16. *Id.*

17. *Id.*

18. *Id.* at 8–9.

19. *United States v. Robers*, 698 F.3d 937, 940 (7th Cir. 2012), *cert. granted*, 134 S. Ct. 470 (Oct. 21, 2013).

20. *Id.*

21. *See id.*

22. Brief for the Petitioner, *supra* note 7, at 9–10.

23. *See id.* at 10.

24. *Id.*

25. *United States v. Robers*, 698 F.3d 937, 940 (7th Cir. 2012), *cert. granted*, 134 S. Ct. 470 (Oct. 21, 2013).

26. *See id.* at 941. Robers’s co-conspirators “were also ordered to pay restitution in the same amounts and the restitution awards were all entered with joint and several liability.” *Id.*

27. *Id.* at 940–41. Specifically, the court’s restitution calculation consisted of the following: Robers’s original mortgage note on one property was \$330,000.00, and the property sold for \$164,000.00, resulting in a loss of \$166,000.00. The successor lender for the other property bought the mortgage note for \$159,214.91, incurred additional expenses maintaining the

III. LEGAL BACKGROUND

A. Statutory Language and Purpose of the MVRA

The MVRA requires defendants convicted of certain fraud crimes (such as the one committed by Robers) to make full restitution to their victims.²⁸ In the event of a crime that deprives a victim of *property*, the statute further requires the defendant to return the property to the victim, unless the return is “impossible, impracticable, or inadequate.”²⁹ When the return is not possible, the defendant must pay to the victim an amount equal to the value of the property but is given credit for “*the value (as of the date the property is returned) of any part of the property that is returned.*”³⁰

The statute’s “primary and overarching” purpose is “to compensate victims for their losses” and make them whole again.³¹ To this end, the MVRA provides in relevant part that a court *shall* order repayment to each victim restitution in the full amount of the victim’s losses as determined by the court without consideration of the financial circumstances of the defendant.³² Additionally, the court cannot take into account any compensation received by the victim from any source in determining the restitution amount.³³

But the MVRA is not meant to provide windfalls.³⁴ While the MVRA requires that courts calculate restitution awards to include

property in the amount of \$1,646.20, and recovered net proceeds after the resale of the property in the amount of \$107,908.93, resulting in an overall loss of \$52,952.18. Hence, the court ordered Robers to pay a total restitution amount of \$218,952.18, consisting of the \$166,000.00 and \$52,952.18 losses. *Id.*

28. See 18 U.S.C.A. § 3663A(a)(1), (c)(1)(A)(ii); § 3664(f)(1)(A) (West 2014).

29. § 3663A(b)(1)(B).

30. § 3663A(b)(1)(B)(ii) (emphasis added).

31. See, e.g., *United States v. Robers*, 698 F.3d 937, 943 (7th Cir. 2012) (internal citations omitted), *cert. granted*, 134 S. Ct. 470 (Oct. 21, 2013); see also *Dolan v. United States*, 560 U.S. 605, 612 (2010) (stating that the MVRA’s purpose is “to assure that victims of a crime receive full restitution”); *United States v. Simmonds*, 235 F.3d 826, 831 (3d Cir. 2000) (describing the MVRA as having “the primary and overarching goal . . . to make victims of crime whole, to fully compensate these victims for their losses and to restore these victims to their original state of well-being”).

32. See 18 U.S.C.A. § 3664(f)(1)(A) (West 2014) (emphasis added).

33. See § 3664(f)(1)(B).

34. Brief for Petitioner, *supra* note 7 at 38; *Robers*, 698 F.3d at 944 (explaining that “[t]he MVRA ensure[s] that victims recover the full amount of their losses, but nothing more”) (quoting *United States v. Newman*, 144 F.3d 531, 542 (7th Cir. 1998)); see also *United States v. Smith*, 156 F.3d 1046, 1057 (10th Cir. 1998) (“A district court may not order restitution in an amount that exceeds the loss caused by the defendant’s conduct. Such a restitution order would amount to an illegal sentence.”) (internal quotation marks omitted).

the full amount of the victims' losses,³⁵ the statute also requires the courts to reduce the restitution awards by the value of any property (or any part of the property) the defendant returns.³⁶ Consequently, under the MVRA, while courts must fully compensate victims for their losses, they cannot over-compensate them.³⁷

B. Circuit Split on What Constitutes the Property Returned under § 3663A(b)(1)(B)(ii) of the MVRA for Purposes of Reducing the Restitution Award

The federal circuit courts are split on what constitutes “the property returned” under § 3663A(b)(1)(B)(ii) of the MVRA for purposes of calculating the offset value or reduction in the restitution award.³⁸ The Ninth, Fifth, and Second Circuits have held that the offset value of the property returned is based on the estimated fair market value of the collateral on the date of foreclosure³⁹—treating the collateral as the returned property. However, the Third, Eighth, and Tenth Circuits have concluded that the offset value of the property returned is based on the cash proceeds recouped upon resale of the collateral⁴⁰—treating the cash as the returned property.

The Ninth Circuit's decision in *United States v. Smith*⁴¹ exemplifies the use of the “collateral as returned property” rule. In *Smith*, the victim lent money to the defendant based on the defendant's fraud.⁴² When the defendant defaulted, the lender foreclosed on the collateral real estate.⁴³ The defendant asserted that the district court erred in not giving him credit for the value of the property at the time the victim lender took possession of it at the foreclosure sale.⁴⁴

The Ninth Circuit agreed,⁴⁵ holding that a restitution order must reduce the victim's loss by the “value (*as of the date the property is returned*) of any part of the property that is returned.”⁴⁶ The court

35. See 18 U.S.C.A. § 3663A (West 2014); 18 U.S.C.A. § 3664(f)(1)(A).

36. See, e.g., 18 U.S.C.A. § 3663A(b)(1)(B)(ii).

37. See *United States v. Robers*, 698 F.3d 937, 946 (7th Cir. 2012), *cert. granted*, 134 S. Ct. 470 (Oct. 21, 2013).

38. See *id.*

39. *Id.*

40. *Id.* at 951.

41. 944 F.2d 618 (9th Cir. 1991).

42. *Id.* at 620.

43. *Smith*, 944 F.2d at 620–21.

44. *Id.* at 625.

45. *Id.*

46. *Id.* (quoting 18 U.S.C. § 3663(b)(1)(B) (1988)).

based its decision on its previous holding⁴⁷ in *United States v. Tyler*.⁴⁸ In *Tyler*, the defendant pleaded guilty to theft of timber and was ordered to pay restitution.⁴⁹ Because the timber was recovered on the same day as the theft, the Ninth Circuit concluded that “[a]ny reduction in [the timber’s] value stems from the government’s decision to hold the timber during a period of declining prices, not from Tyler’s criminal acts.”⁵⁰ Therefore, the Ninth Circuit held that the value of the property “as of the date the property was returned” equaled the amount lost when the timber was stolen.⁵¹ And, consequently, the measure of restitution under 18 U.S.C. § 3579(b)(1)(B), the predecessor to § 3663(b)(1)(B) of the MVRA, was zero, and no restitution was owed.⁵²

But *Tyler* is distinguishable from *Smith* because in *Tyler* the property returned was the same as the property stolen, i.e., the timber, whereas in *Smith*, the property fraudulently obtained was cash and the property returned was real estate. Despite this key distinction, however, the Ninth, Fifth, and Second Circuits, applying *Smith*, have all endorsed the collateral as returned property rule.⁵³

On the other hand, the Third, Eighth, and Tenth Circuits have all held that the restitution obligation offset value should be based on the cash as returned property rule.⁵⁴ For example, in *United States v. James*⁵⁵ the defendant pleaded guilty to wire fraud for involvement in a scheme to purchase homes by obtaining fraudulent mortgage loans.⁵⁶ When the defendant failed to pay the loans, the property securing the loans was foreclosed upon, and the mortgage holders

47. *See id.* at 625.

48. 767 F.2d 1350 (9th Cir. 1985).

49. *Id.* at 1351.

50. *Id.* at 1352.

51. *Id.* at 1352–53.

52. *See id.*

53. *See* *United States v. Robers*, 698 F.3d 937, 949–50 (7th Cir. 2012), *cert. granted*, 134 S. Ct. 470 (Oct. 21, 2013).

54. *See* *United States v. Himler*, 355 F.3d 735, 745 (3d Cir. 2004) (holding that the district court did not abuse its discretion in entering a restitution order that would be reduced by the future proceeds from the real estate’s sale); *United States v. James*, 564 F.3d 1237, 1246–47 (10th Cir. 2009) (upholding the district court’s restitution order that calculated the total loss by subtracting the eventual resale price of the collateral real estate from the initial loan proceeds); *United States v. Statman*, 604 F.3d 529, 538 (8th Cir. 2010) (upholding the district court’s use of the eventual proceeds from a foreclosure sale as the offset value); *Robers*, 698 F.3d at 951–53 (discussing the Third, Eighth, and Tenth Circuit property restitution cases and explaining that they all concluded the offset value is determined based on the eventual cash proceeds recouped following resale of the property).

55. 564 F.3d 1237 (10th Cir. 2009).

56. *Id.* at 1239–40.

suffered a financial loss.⁵⁷ The district court reduced the defendant's restitution judgment, but only by the eventual resale price of the collateral real estate.⁵⁸

In upholding the award, the Tenth Circuit noted that, under the MVRA, *how to value* the property returned is not specified.⁵⁹ Rather, sentencing courts can utilize discretion in valuing the property as appropriate in a given case.⁶⁰ The court noted that the MVRA demonstrates this by providing, in relevant part, a “court shall order restitution . . . in the full amount of each victim's losses *as determined by the court.*”⁶¹ Importantly, the court further pointed out that the approach used to best measure the value of the property returned should reflect the purpose of restitution, which is to “ensure that victims, to the greatest extent possible, are made whole for their losses.”⁶² Relying on the purpose of restitution, the court held that the cash as returned property is the appropriate manner for determining the mortgage holder's actual loss.⁶³

Similarly, in *United States v. Statman*,⁶⁴ the Eighth Circuit upheld the cash as returned property rule.⁶⁵ The court emphasized that “[t]he intended beneficiaries of the MVRA[] . . . are the victims, not the victimizers.”⁶⁶ Therefore, the court held that net proceeds recouped after resale of the property “provided a fair and adequate representation of the [mortgage holder's] loss and satisfied the overarching goal of the MVRA, to make [the victim] whole.”⁶⁷ The key distinguishing factor in the split is whether the circuit courts chose to rely on the sentencing courts' discretion in determining that the best method for calculating the offset value, taking into account the legislative purpose behind the MVRA, is the cash as returned property rule.

57. *Id.*

58. *Id.* at 1242.

59. *Id.* at 1245.

60. *Id.* at 1245 (citations omitted).

61. *Id.*

62. *Id.* at 1246 (quoting *United States v. Parker*, 553 F.3d 1309, 1323 (10th Cir. 2009)).

63. *Id.* at 1246.

64. 604 F.3d 529 (8th Cir. 2010).

65. *Id.* at 537–38.

66. *Id.* at 538 (quoting *United States v. Gordon*, 393 F.3d 1044, 1053 (9th Cir. 2004) (internal quotation omitted)).

67. *Id.*

IV. HOLDING

On appeal, Robers argued that the offset value for the restitution award should not be based on the cash as returned property rule.⁶⁸ Rather, the statute's plain language allows the court to reduce restitution by the value of the collateral real estate as of the foreclosure date; the foreclosure date value is the value "as of the date the property is returned," which complies with the statutory language.⁶⁹ Robers further argued that by not using the property values on the actual foreclosure dates, the court wrongly held him responsible for the decline in the properties' values from the time of foreclosure to the time of resale; the restitution award was too high.⁷⁰

Contrastingly, the government finds the plain language of the MVRA supports a restitution award that can only be reduced by the cash value of the collateral received at resale because cash—in the form of loan money—is the property that was taken, and cash is only returned at resale.⁷¹ Robers's appeal to the Seventh Circuit challenged only the calculation of the restitution award.⁷²

The Seventh Circuit in *Robers* followed the Third, Eighth, and Tenth Circuits holding "the offset value is the eventual cash proceeds recouped [when the property is resold] following a foreclosure sale."⁷³

The Seventh Circuit based its decision on the plain meaning of the MVRA.⁷⁴ The MVRA states that the defendant should be given an offset for "the value (as of the date the property is returned) of any part of the property that is returned."⁷⁵ Thus, the court reasoned that "the property," for purposes of determining offset value, must mean "the property stolen," and the property originally stolen was cash.⁷⁶ Therefore "[s]ome amount of cash is the only way part of the property

68. *United States v. Robers*, 698 F.3d 937, 942 (7th Cir. 2012), *cert. granted*, 134 S. Ct. 470 (Oct. 21, 2013).

69. *Id.* (quoting 18 U.S.C. § 3663A(b)(1)(B) (2006)).

70. *See id.*

71. *Id.*

72. *Id.* at 941. Although at the district court level Robers argued that his minor role in the offense and his limited economic circumstances should reduce the restitution amount, he did not make those arguments on appeal. *Id.* at 941 n.3. As part of his challenge on appeal to the restitution amount, however, he did contend that the inclusion of certain consequential or incidental expenses are not recoverable under the MVRA. *Id.* at 941.

73. *Id.* at 939.

74. *Id.*

75. 18 U.S.C.A. § 3663A(b)(1)(B)(ii) (West 2014).

76. *Robers*, 698 F.3d at 939.

can be returned.”⁷⁷

The court explained that cash and real estate are not the same; cash is liquid and real estate is not.⁷⁸ “The victim-lender was defrauded out of cash and wants cash back; the victim does not want the houses and they do not, in any way, benefit from possessing title to the houses until they are converted into cash upon resale”⁷⁹—one cannot be given for the other.

The court concluded that its holding is consistent with both the goals of the MVRA and the general concept of restitution: “to fully compensate these victims for their losses and to restore these victims to their original state of well-being.”⁸⁰ If the offset amount was not based on the eventual cash proceeds, the victims might not be made whole.⁸¹ The eventual sales proceeds could be, as in this case, “woefully inadequate to fully compensate the victims for their loss and to put them in the position they would have been absent the fraud.”⁸²

Though acknowledging that its conclusion conflicts with the Ninth, Fifth, and Second Circuits, the court noted that no pertinent case from those circuits independently addressed the specific question of what constitutes “the property” under § 3663A(b)(1).⁸³ The prior court decisions had all relied on *Smith*, which in turn improperly relied on *Tyler*; *Tyler* addressed the theft of government owned timber—there was no question of “what” the property returned was. The *Smith* case did not address the same type of property at issue in *Tyler*, and therefore reliance was improper. The Seventh Circuit determined that the Ninth, Fifth, and Second Circuit decisions were based on an improper treatment of the statute.⁸⁴

77. *Id.*

78. *Id.* at 942.

79. *Id.*

80. *Id.* at 943 (quoting *United States v. Boccagna*, 450 F.3d 107, 115 (2d Cir. 2006)).

81. *Id.*

82. *Id.*

83. *Id.* at 946.

84. *Id.*

V. ARGUMENTS

A. *Robers's Arguments*

Robers first argues that the plain text and structure of the MVRA require that he receives an offset for the collateral real estate's value when the lender takes title.⁸⁵ Further, Robers contends that use of the word "returned" in the offset provision permits a defendant to give substitute property.⁸⁶ If Congress had not intended such, it "could have used a more specific phrase such as the property reclaimed by the victim, but did not."⁸⁷ Robers asserts that "[t]he word 'return' has a broad reach. . . . '[R]eturn' means 'to repay or pay back in some similar way, esp[ecially] with something similar.'"⁸⁸

According to Robers, under the structure of § 3663A(b)(1), a defendant is required to return the property originally taken from the victim.⁸⁹ However, § 3663A(b)(1)(B), containing the offset provision, applies when the return of the property originally lost is "impossible, impracticable, or inadequate;"⁹⁰ therefore, Congress intended for this provision to cover cases in which substitute property has been returned.⁹¹ "If 'property' in that provision referred only to the property originally lost . . . then the offset provision would apply only in rare cases"; Congress did not intend for this provision to be so narrowly applied.⁹²

Section 3664, the procedural provision covering the issuance and enforcement of restitution orders under the MVRA, also supports a broader reading of § 3663A(b)(1)(B). Section 3664 permits "replacement property" to be an acceptable "in-kind" return of property.⁹³ Specifically, Robers states that "[s]ection 3664(f)(3)(A) provides that a restitution order may require 'a single, lump-sum payment, partial payments at specified intervals, *in-kind payments*, or a combination of' types of payments."⁹⁴ Additionally, § 3664(f)(4) permits an in-kind payment to be in the form of either the "return of

85. Brief for the Petitioner, *supra* note 7, at 14.

86. *Id.*

87. *Id.* (internal quotation marks omitted).

88. *Id.* at 18 (citation omitted).

89. *See id.* at 22.

90. *Id.* (quoting 18 U.S.C. § 3663A(b)(1)(B)(ii) (2006)).

91. *Id.* at 21–22.

92. *Id.* at 23.

93. *Id.* at 25.

94. *Id.* at 26 (quoting § 3664(f)(3)(A) (2006)).

property” or “replacement of property” or, if the victim consents, the performance of services.⁹⁵ This demonstrates Congress’s intent to give defendants latitude in the type or form of property returned to the victim by not requiring them to return the exact property.⁹⁶ Moreover, Robers argues that the allowance of replacement property under § 3664 indicates Congress’s intent to provide judges flexibility in tailoring restitution orders.⁹⁷ Permitting replacement property under the offset provision in § 3663A(b)(1)(B) furthers this goal.

A narrow reading of the offset provision should be avoided because reading the provision more broadly to include replacement property eliminates the possibility of the defendant paying for losses he did not proximately cause.⁹⁸ The MVRA, as well as fundamental principles of criminal and tort law, provide that a defendant is responsible only for losses “directly and proximately caused by the course of [his] conduct.”⁹⁹ A narrow reading of the offset provision would allow for a reduction in the restitution award only by the houses’ values at resale rather than at foreclosure, meaning “the defendant must pay for any decline in the houses’ values between the time the lenders foreclose and the time the lenders resell.”¹⁰⁰ Yet, as Robers contends, “a defendant’s false loan application is rarely the ‘direct,’ ‘unbroken’ cause of those losses.”¹⁰¹ Instead, such decline in values result from “[o]ther ‘independent,’ ‘intervening’ causes.”¹⁰² If the houses drop in value, it is due to a market decline that is largely “unforeseeable” and thus a “‘superseding’ cause of the losses.”¹⁰³ Alternatively, Robers claims that the lenders themselves are responsible for the losses in market values of the houses since the lenders controlled how promptly to sell the houses after the foreclosure sales.¹⁰⁴ Thus, even if Robers’s fraud was a cause of the losses, it was certainly not the proximate cause.¹⁰⁵

Additionally, Robers argues that the Seventh Circuit’s narrow reading of the offset provision negates well-established tenets of state

95. *Id.*

96. *Id.*

97. *Id.* at 27.

98. *Id.* at 28.

99. *Id.* (citation omitted).

100. *Id.* at 29.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 29–30.

105. *Id.* at 30.

mortgage and foreclosure laws.¹⁰⁶ The mortgage and foreclosure “law dictates that when a lender forecloses and takes title to the property, foreclosure law values the property as of the date the lender takes title, not as of the date the property is sold.”¹⁰⁷ When the lender waives its right to a deficiency judgment, as Robers’s lenders did, the lenders have accepted “the real estate collateral as a replacement for the loan proceeds.”¹⁰⁸ “Taking title to the property is thus a common means of getting a ‘return’ of the loan proceeds.”¹⁰⁹ Thus, the Seventh Circuit’s ruling that the offset value must be the cash recouped from the property’s resale, and that cash is what the lender actually wants, “turns the concept of collateral on its head.”¹¹⁰ Robers urges that, “[a]s this case demonstrates, lenders often want nothing but the collateral—and contractually bind themselves to seek only the collateral.”¹¹¹ Therefore, the Court should not presume Congress intended “to establish a regime at complete odds with the common and state law practices of awarding compensatory damages in such situations.”¹¹²

Robers argues that the Seventh Circuit’s ruling undermines the statutory purpose of the MVRA.¹¹³ Specifically, because “[t]he MVRA’s purpose is to make victims whole without granting them windfalls,”¹¹⁴ the Seventh Circuit’s ruling creates the dual risk of both under-compensating and over-compensating victims.¹¹⁵ Robers explains that in some cases victims would not have resold the collateral houses before the sentencing of the defendant.¹¹⁶ In those instances, the court has two choices: (1) refuse to order restitution, which does not compensate the victim at all; or (2) “order restitution for the *full* outstanding loan amount,”¹¹⁷ which will give the victim a

106. *Id.*

107. *Id.* at 32.

108. *Id.* “[B]oth lenders in this case, like many other foreclosing lenders, elected to waive their rights to a deficiency judgment. This meant that the lenders accepted the collateral as *full satisfaction* of their claims: they could not receive, and did not expect to receive, any further recovery against Mr. Robers beyond the foreclosed houses.” *Id.* at 34.

109. *Id.* at 33.

110. *Id.* at 33–34.

111. *Id.* at 34.

112. *Id.*

113. *Id.* at 38.

114. *Id.* (citing *United States v. Louper-Morris*, 672 F.3d 539, 566 (8th Cir. 2012)).

115. *Id.* at 39.

116. *Id.*

117. *Id.*

windfall if he later sells the house.¹¹⁸

B. Government's Arguments

Addressing first the plain text meaning of the MVRA, the government argues that when a crime covered under the MVRA results in a victim's loss of property, the MVRA requires the defendant to return the lost property to the victim.¹¹⁹ If the return of the lost property in full is not possible, however, the MVRA requires the defendant to pay for the value of the lost property and allows an offset for the value of "any part of the property" that is returned to the victim.¹²⁰ Here, the victims lost *money*, and no "part of the property" that was lost was returned to them until they recouped money from selling the collateral.¹²¹ Further, § 3663A(b)(1) addresses the treatment of property lost by a victim, and every reference to "the property," including § 3663A(b)(1)(B)(ii)'s reference to "any part of the property that is returned," is a reference to the property that was lost, not to any substitute or replacement property.¹²²

According to the government, Robers errs in interpreting the statutory text, and further, the structure of the statute lends no support to his interpretation. Read in context, the reference in § 3663A(b)(1) to property that is "returned" plainly references the property that was lost because of the defendant's criminal conduct.¹²³

Additionally, the government argues this meaning is consistent with § 3663A(b)(1)(B)'s structure and application to instances in which the return of the lost property is "impossible, impractical, or inadequate."¹²⁴ Section 3663A(b)(1)(B)(i) addresses scenarios in which none of the property can be returned, and § 3663A(b)(1)(B)(ii) addresses scenarios in which some, but not all, of

118. *Id.* Robers contends as well that the rule of lenity should be applied here if the Court does not agree that the text and structure of the offset provision plainly requires offsets to restitution for the return of collateral. *Id.* at 40. Robers argues that almost every defendant who makes an in-kind return of collateral or other property would obtain a lower offset value under the Seventh Circuit's ruling. *Id.* at 41. Moreover, even if the returned property is converted into cash, Robers asserts that the value would depend on conditions beyond the defendant's control, such as market status and the victim's investment decisions, and the rule of lenity was designed to avoid exactly such uncertain and unforeseeable punishments. *Id.*

119. See Brief for the United States at 13, *Robers v. United States*, No. 12-9012 (U.S. June 3, 2013).

120. *Id.* at 13–14.

121. *Id.* at 16.

122. *Id.* at 14.

123. *Id.* at 18.

124. *Id.* at 20–21.

the lost property can be returned or in which the return of the original property is inadequate to compensate the victim for some reason, such as when the property is damaged.¹²⁵ Nevertheless, the government argues that throughout both subparagraphs, “the property” referred to is always the property that was lost.¹²⁶

In support of its reading of the plain meaning of § 3663A(b)(1)(B), the government argues that this interpretation is consistent with the overall structure of the MVRA.¹²⁷ For example, § 3663A governs the substantive calculation of the restitution amount, while § 3664 governs the procedures and enforcement of the restitution obligation;¹²⁸ as such, different considerations are properly taken into account under each of these sections of the statute.¹²⁹ Although a court may order, pursuant to § 3664, that a defendant satisfy his restitution obligation with substitute property, a court may *not* grant an offset for substitute property when calculating the restitution amount owed under § 3663A.¹³⁰

Additionally, the government asserts that its interpretation of § 3663A promotes the MVRA’s purpose of ensuring that the victim is fully compensated or restored.¹³¹ A victim fraudulently deprived of money, as here, is not fully compensated or restored to her original state until she gets that money back.¹³² A victim of mortgage fraud has every incentive to maximize the money she receives from foreclosed real estate. The government notes that “[b]ecause most defendants lack significant financial resources with which to promptly pay a restitution award,” a victim has no assurance that she will otherwise recover the money.¹³³ Moreover, if the foreclosed real estate sells for a gain, that gain will inure to the benefit of both the victim and the defendant in the form of a higher offset.¹³⁴ Under Robers’s view—that the ultimate sales price cannot be credited against the restitution obligation—“the victim must bear the full burden of any loss in value while the defendants will enjoy the benefit of any gain.”¹³⁵

125. *Id.*

126. *See id.*

127. *Id.* at 22.

128. *Id.*

129. *See id.* at 22–23.

130. *Id.* at 23–24.

131. *Id.* at 24.

132. *Id.* at 24–25.

133. *Id.* at 37.

134. *See id.* at 28–29.

135. *Id.* at 11.

Further, the government criticizes Robers's argument that he did not both directly and proximately cause the decline in the value of the collateral real estate between the time of foreclosure and resale. The government argues the chain of causation is clear and direct: but for Robers's fraud, the lenders would not have loaned him the money, taken title to the houses upon Robers's default, or sold the houses in a declining market.¹³⁶ Robers's criminal conduct directly and proximately caused the victims' losses and attributed to any relevance that the declining market might have had on lowering the offset calculation.¹³⁷

The government discounts Robers's reliance on the principles of mortgage and foreclosure law, asserting that the MVRA's provisions apply broadly and "notwithstanding any provision of mortgage law that may govern the state-law rights of lenders."¹³⁸ Hence, because the MVRA's provisions do not just apply to mortgage fraud, its provisions should not be "distorted" to accommodate mortgage law principles.¹³⁹

VI. ANALYSIS AND LIKELY DISPOSITION

The question presented to the Supreme Court is whether a defendant, who has fraudulently obtained a loan and thus owes restitution under 18 U.S.C. § 3663A(b)(1)(B), returns "any part" of the loan money by giving the lenders the collateral securing the loan.¹⁴⁰ The answer turns on what is meant by "the *property* that is returned" in the statute. Both Robers and the government claim to rely on the plain language of the MVRA; yet, they arrive at different conclusions as to what constitutes "the property"—conclusions that yield a stark difference in the amount of restitution Robers owes.¹⁴¹

136. *Id.* at 35.

137. *Id.* at 35–36.

138. *Id.* at 38–39.

139. *Id.* at 37–38. The government also asserts that the rule of lenity does not apply in this case because it is a tie-breaking rule that only applies if, "at the end of the process of construing what Congress has expressed . . . there is grievous ambiguity or uncertainty in the statute." *Id.* at 41. Here, the rule of lenity, argues the government, does not apply because the statutory text is not ambiguous at all. *Id.* at 42.

140. Brief for the Petitioner, *supra* note 7, at i.

141. Robers contends that the restitution award should be reduced by the houses' higher values in 2006 when he "surrendered" (returned) the properties to the lenders through state foreclosure proceedings, rather than by the lower values in 2007 or 2008 when the lenders resold the houses. *Id.* at 12. Robers asserts if the higher values are used and his minor role in the offense is taken into account (in other words, the restitution obligation is apportioned), his total restitution amount should be \$4,800.00, as opposed to the \$218,952.18 calculated by the government. *Id.*

The Court will likely begin its analysis by examining the relevant statutory text of the MVRA to determine whether the meaning of the statute is plain. Rules of statutory construction require that consideration be given to whether a certain interpretation gives rise to a consistent meaning of a phrase throughout a statute.¹⁴² Following this principle, the Seventh Circuit concluded “the property” in the MVRA always means the stolen property—in this case, cash.¹⁴³ By contrast, under Robers’s interpretation, “the property” refers to two different things within the same section of the MVRA: the original fraudulently-obtained loan in the first part of § 3663A(b)(1)(B); and the returned collateral securing the loans in the latter part of that section.¹⁴⁴ Robers cannot have it both ways. The Court will likely agree with the Seventh Circuit that “the property” must have a consistent meaning within the statute, and certainly within the same section of the statute. In this case, the Court will most likely find that the property in § 3663A(b)(1) of the MVRA refers to the fraudulently-obtained cash.

This result stems from the simple explanation that these two types of property—cash and collateral—are not interchangeable. Collateral cannot be given to the victim-lenders in lieu of cash any more than, as the government argued, the victim of a stolen necklace can be given a stamp collection in exchange for the necklace.¹⁴⁵

The Court will likely also consider the overall structure of the MVRA in determining the meaning of the phrase “the property.” Robers points out that pursuant to § 3664(f) of the MVRA, a court can permit a defendant to satisfy a restitution obligation with in-kind payments, including replacement property.¹⁴⁶ He fails to explain, however, that the relevant subsection of § 3664(f), allowing for the replacement property, relates to specifying the manner and schedule for *paying* the restitution order, not *determining the amount* of the restitution obligation.¹⁴⁷ In § 3663A, the section actually governing determination of the restitution amount,¹⁴⁸ there is no mention of credit for in-kind payments or replacement property relative to

142. See *United States v. Robers*, 698 F.3d 937, 942–43 (7th Cir. 2012) (citations omitted).

143. *Id.* at 942.

144. *Id.*

145. Brief for the United States, *supra* note 119, at 15.

146. See *supra* notes 90–92 and accompanying text.

147. See 18 U.S.C.A. § 3664(f)(2), (f)(3)(A), (f)(4)(B) (West 2014); see also *supra* Part V.B.

148. See 18 U.S.C.A. § 3663A (West 2014); see also Brief for the United States, *supra* note 119, at 22.

determining the amount of restitution. This is because Congress did not intend to allow such payments to be included in the calculation of defendant's offset for purposes of reducing the restitution obligation amount under § 3663A.¹⁴⁹ As the government clearly states, “[s]ection 3663A ties the amount of restitution to the amount of loss a victim suffers because of a defendant's crime. Section 3664 dictates how a court may ensure that a defendant actually pays the amount due under Section 3663A.”¹⁵⁰ Therefore, in-kind payments, including in the form of replacement property, are reserved as a means of how the defendant may pay the restitution obligation. The only offset given for purposes of calculating the restitution amount is for any part of the property that is returned,¹⁵¹ and here that property is cash.

The clear statutory purpose of the MVRA will guide the Court in reaching its decision. The “primary and overarching” goal of the MVRA is to fully compensate victims, make them whole, and return them to their original status, all without providing them a windfall.¹⁵² Thus, the Court will likely construe the statutory text in a way that best serves the MVRA's given purpose—that is, the Court will determine whether the cash as returned property rule or the collateral as returned property rule better serves to make the victim whole.

Inherent in making that determination, the Court will decide which method of valuing property best serves to fully compensate the victim and return her to her original status. Various methods of valuing property exist, such as fair market value, assessed or appraised value, foreclosure credit-bid value, and value at resale following foreclosure (which is the cash as returned property rule).¹⁵³ None of these methods of appraisal, however, except the value of cash obtained at resale after foreclosure, reflect how much the victim-lender will receive in actual cash—the very thing loaned to defendants, expected to be received from defendants, and now, as a result of defendant's crime, required in restitution in accordance with the text and purpose of the MVRA.

149. Brief for the United States, *supra* note 119, at 23.

150. *Id.* at 22.

151. See 18 U.S.C.A. § 3663A(b)(1)(B)(ii).

152. *Robers*, 698 F.3d at 943–44.

153. Brief for the United States, *supra* note 119, at 25–26.

The fair market value, the appraised value, and the foreclosure credit-bid value¹⁵⁴ cannot each serve as a determinant for the actual eventual cash that a victim-lender might receive when the property is later sold. The only way to know with certainty what value the property returned will actually realize in dollars to the victim-lender is to measure it by the eventual cash proceeds that are recouped upon resale of the collateral property.

In a mortgage fraud case such as *Robers*, using the cash as returned property rule seems to best serve the purpose of the MVRA by making victims of crimes whole to the greatest extent possible.¹⁵⁵ If values are increased and the property sells for a higher amount than is owed, the victim-lender would not be entitled to a restitution award. If values decline, then the victim-lender would be due a restitution award based on the difference between what was owed and what was actually received after resale of the property. In the infrequent scenario in which the collateral real estate has not resold before the defendant's sentencing (statistics indicate that in most cases the properties sell prior to defendant's sentencing and restitution order),¹⁵⁶ the sentencing court could otherwise sentence the defendant but postpone the final determination of the victim's losses until ninety days after the sentencing.¹⁵⁷ If the sale has not occurred within the ninety days after sentencing, the Supreme Court has established precedent for permitting the sentencing court to go beyond the ninety-day timeframe to enter an order of restitution,¹⁵⁸ provided the sentencing court timely and explicitly reserves the right to do so.¹⁵⁹

154. Fair market value is the price a willing seller and buyer agree to in the open market. *Id.* at 25. Appraised value is the value a third party assigns based on certain market variables. *Id.* at 26. Foreclosure credit-bid value is the value used by a lender (against the credit amount due) that is typically just enough to win the bid and obtain title to the property at a foreclosure if there are no other bidders or if the lender deems all other bids too low. *Id.*

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

156. Brief for the United States, *supra* note 119, at 27–28; see also Elizabeth Renuart, *Toward a More Equitable Balance: Homeowner and Purchaser Tensions in Non-Judicial Foreclosure States*, 24 LOY. CONSUMER L. REV. 562, 570 n.47 (2012) (indicating that in 2006 banks sold about 50 percent of properties bought at foreclosure within six months and close to 80 percent within a year).

157. 18 U.S.C.A. § 3664(d)(5) (West 2014).

158. Brief for the United States, *supra* note 119, at 28 (citing *Dolan v. United States*, 560 U.S. 605, 611 (2010)).

159. *Dolan*, 560 U.S. at 608. Interestingly, however, Chief Justice Roberts, joined by Justices Stevens, Scalia, and Kennedy, wrote a strong dissent stating that, other than the express ninety-day exception, any order of restitution under the MVRA must be made at sentencing. *Id.* at 622 (Roberts, CJ dissenting). Remaining to be seen is whether the Court in deciding *Robers*

The Court will not likely be persuaded by Robers's argument that the Seventh Circuit's ruling does not comport with state mortgage or foreclosure laws since the MVRA applies much more broadly than to just mortgage fraud. Thus, as the government suggests, the Court should not give special meaning to § 3663A(b)(1)(B)(ii)'s reference to a return of "any part of the property" in the mortgage-fraud context because the meaning of the phrase should be consistent across the MVRA's applications.¹⁶⁰ Neither mortgage nor foreclosure laws address the meaning of the phrase, "any part of the property" in § 3663A(b)(1)(B)(ii), further evidence that the MVRA's provisions are not particular to mortgage or foreclosure laws.¹⁶¹ Therefore, the district court properly calculated Robers's restitution amount irrespective of any state mortgage law or foreclosure practice that may govern lenders' rights.

Likewise, the Court will probably reject Robers's argument that he did not proximately and directly cause all his victims' losses. Proximate cause principles should have no impact on the offset calculation in § 3663A(b)(1)(B)(ii). The government convincingly argues Robers's fraudulent conduct indisputably initiated the chain of events that directly and proximately caused the victim-lenders to lose the original loan amounts he borrowed from them.¹⁶² And these are the losses for which Robers should provide restitution. Principles of causation do not factor into the determination of when "any part of the property" that was lost is returned to a victim.¹⁶³

This conclusion is supported by *United States v. Paul*.¹⁶⁴ There, the Second Circuit held in a securities fraud case that a decline in the value of collateral stock due to market forces was irrelevant to the restitution offset calculation since the stock was only collateral for the fraudulently-obtained loans.¹⁶⁵ The court concluded that "[t]he loss to the brokerage houses resulted from [defendant's] inducement of the loans, and it is for this loss that [defendant] must provide

sees this issue as a loose end that needs to be re-visited, and, if so, how it will attempt to tie up such loose end.

160. Brief for the United States, *supra* note 119, at 38.

161. *Id.*

162. *Id.* at 34.

163. *Id.*

164. 634 F.3d 668 *cert. denied*, 132 S. Ct. 538 (2011).

165. *Id.* at 678.

restitution.”¹⁶⁶

Additionally, Robers’s argument that the victims’ retention of the collateral after foreclosure resulted in an intervening event that broke the causal chain will likely not hold up. There appears to be no support in the record indicating that the lenders could have resold the properties as soon as they acquired them after foreclosure.¹⁶⁷ Additionally, commonplace knowledge about the mortgage industry dispels the notion that lenders can resell foreclosed properties promptly after foreclosure.¹⁶⁸ Moreover, as explained by the Seventh Circuit, “[t]he decline in the real estate market does not mitigate [Robers’s] fraud Absent Robers’s fraud, the decline in the real estate market would have been irrelevant The declining market only became an issue because of Robers’s fraud.”¹⁶⁹

Finally, Robers should not receive credit against his restitution award on the grounds that the decline in the housing market was unforeseeable. government “A defendant who fraudulently obtains loan proceeds and then depends on the foreclosure of the collateral to partially compensate his victims for their loss predictably (and by his own volition) ties the amount of restitution he will have to pay to the health of the housing market.”¹⁷⁰ Therefore, that the housing market might decline should have been a distinct, foreseeable possibility.

VII. CONCLUSION

In sum, the statutory text, structure, and strong purpose of the MVRA will likely create a sufficient basis for the Supreme Court to uphold the Seventh Circuit’s ruling. The Court will likely determine that the property (or any part of it) returned, giving rise to an offset under § 3663A(b)(1)(B)(ii) of the MVRA, refers to the fraudulently-obtained property—in this case, the cash. Valuing the property returned based on the eventual cash proceeds received at resale after foreclosure provides the most certainty for making the victim-lenders whole and thus fulfilling the purpose of the MVRA.

The Court will likely endorse the cash as returned property rule;

166. Brief for the United States, *supra* note 119, at 34 (quoting *Paul*, 634 U.S. at 678).

167. See Brief for the United States, *supra* note 119, at 36.

168. *Id.* (citations omitted) (“A bank with [real-estate-owned] inventory is faced with property it does not want to own, possible title, repair, lien, and tax issues that it must clear before it can sell, mounting maintenance costs, and other headaches.”).

169. *United States v. Robers*, 698 F.3d 937, 943–44 (7th Cir. 2012).

170. Brief for the United States, *supra* note 119, at 35–36.

however, it may also determine the need to re-address what happens if the property does not sell within ninety days after sentencing—the amount of time expressly granted to a sentencing court under the MVRA to delay the final determination of the victim’s losses and enter a restitution order.¹⁷¹

171. *See supra* note 152.