

Restitution Is Often Overlooked as a Punishment for Criminals

By Antonio R. Sarabia II

Sometimes it seems hard to find anything that large corporations and poor people have in common. But it turns out there is one surprising common trait: They are soft on criminals. Actually, it is not the shareholders and poor who have made this choice. It is legal aid counsel and corporate management who are showing kindness to criminals, without fully considering the consequences to their respective constituents, shareholders and the poor. It is remarkable that two such different groups would share a common oversight.

Although the moral indignation of letting criminals off easily applies equally to both groups, the numbers are much bigger when it comes to the corporate kindness to criminals. For example, Apple, Motorola and Dell bought flat-panel monitors from foreign vendors. The Justice Department investigated

collusion between these flat-panel vendors and filed criminal antitrust charges against some large ones: Hitachi, Sharp and LG Display. These manufacturers looked at the evidence and decided to plead guilty with a vengeance. Just look at the agreed fines in 2008: LG Display paid \$400 million; Sharp's fine was \$120 million; and Taiwan's Chunghwa paid \$65 million.

Apple, Motorola and Dell knew that some of their biggest vendors admitted stealing from them in a gigantic way. All they needed to do was seek restitution in federal court — no trial, no discovery, no management depositions (in fact, no depositions at all), no years-long diversion of management focus on a tangled civil case, just big money. Federal restitution laws are quite strong, primarily the Mandatory Victims Restitution Act and the Victim and Witness Protection Act. U.S. attorneys have no power to waive victims' right to restitution. In the 9th Circuit, the companies

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could even recover the attorney fees spent on obtaining restitution. The recession was already deep in 2008, so one would assume there is no way these well-managed companies would leave huge restitution on the table. But they did.

OK, one may say, in 2009 we are even deeper in recession. Surely this kindness to criminals would stop. But no. Hitachi agreed to pay a \$31 million fine for price-fixing on panels it sold to Dell. Dell did not seek one penny of restitution for its shareholders, though its stock and finances have seen rosier days.

In fact, there is a history of leaving big dollars in criminals' hands and not putting them in shareholders' pockets in the tech business. Take 2006 — that year Elpida (owned by Hitachi and NEC) pled guilty to price-fixing DRAM (a type of computer memory) that it sold to Dell, IBM and Hewlett-Packard. Not a small matter, the fine was \$10 million. Even though there was clearly great harm and a foul, none of these victims sought restitution.

The tech kindness to criminals is not limited to foreign vendors. It also extends to former executives who have backdated stock options, costing their former employers mind-boggling attorney fees, accounting fees, SEC fines and punitive settlements in class actions. Broadcom has incurred more than \$100 million in fees (some of it paid by insurers). It continues to pay for defense of three officers facing criminal securities charges

and a nasty civil backdating case. While some of these officers have immense personal wealth, there is no sign that Broadcom will make a move to recover the huge restitution it could recover if there is a plea or conviction.

Another backdating victim, Brocade, has been much more proactive, but it took the very costly route of filing a derivative action against its former officers. In this expensive litigation, it may have come out even or slightly ahead on recovery from the former officers of their legal defense fees. But it probably recovered nothing or very little on the \$160 million it paid to settle the civil backdating litigation, let alone the fees incurred in defending that case. One of its officers has been convicted and another may be retried, but again, no sign of trying to take the relatively easy route of victim restitution to get part of this money back for its shareholders.

The tech industry is not alone in having backdating problems. KB Homes also has an extremely wealthy former officer who is facing criminal backdating charges, ex-CEO Bruce Karatz. KB Homes is facing a very tough and expensive backdating class action. Its former head of human resources, Gary Ray, already pled guilty to a criminal backdating, paid a \$500,000 fine, but there has been no restitution payment to victim KB Home. To the contrary, KB Home probably paid a lot of attorney fees for the former head of human resources and likely continues to pay some or all of Karatz's fees.

any of these companies have astute general counsel with outstanding outside counsel to advise them on these high-profile matters. That these valuable restitution rights are not being utilized could be a deliberate decision, but more likely it is a product of the advice being received. In the backdating cases, corporate counsel are likely to hear from their civil litigation counsel and the civil and criminal defense counsel representing the officers. The civil litigation counsel, focused on strategies to minimize civil liability, are not thinking of recovery for the company nor are they conversant with criminal victim restitution. The civil and criminal defense counsel representing the officers are focused on defending their clients and assisting the officers in getting their fees paid by the companies



— these defense counsel certainly will not be reminding the companies of their right to restitution from their client. Corporate counsel is in a vacuum of advice about criminal restitution.

It is worth keeping in mind that the sums in these cases are so big, the potentially huge restitution might well trickle down as increased profits and increased stock price, to the benefit of retirees and others holding these stocks.

As deserving, if not more than the pensioners holding tech stocks, are the poor living in uninhabitable buildings. Cities such as Los Angeles bring criminal cases and get convictions against wealthy but vicious landlords. These landlords profit from letting tenants live in illegal squalor while they collect rent. Admirably, a variety of outstanding legal aid organizations file suits against these landlords. Yet sadly, not one legal aid organization in Los Angeles or Orange counties has realized that, instead of devoting years and a lot of resources to relatively costly civil cases against convicted landlords, they could use California's state-of-the-art victim restitution laws against them.

The civil suits seek to recover economic losses for horrible living conditions. But these same losses

can be recovered using victim restitution in a fraction of the time, at a fraction of the cost and with no trial, no discovery and no depositions.

Typically these criminal landlords will engage in scorched earth litigation in the civil courts. The civil judges must evaluate every motion even-handedly, with no benefit of the doubt either way. If these tenant victims were to venture into criminal court, however, they would find judges who already know they are dealing with a convicted criminal and are eager to make sure that fair restitution is provided to victims. Finally, these fine legal aid attorneys would discover that they can also recover their fees — and generally a much higher percentage of the fees than in civil cases. Not only will they be able to help the tenant victims far more efficiently, they will also find more money in their coffers to help other worthy clients.

Corporate management and legal aid attorneys should realize that victim restitution, in federal and state courts, can really benefit shareholders, as well as those who cannot afford shares.

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