

SECOND CIRCUIT REVIEW

Expert Analysis

A Non-Categorical Approach To Federal Restitution

Last month, the U.S. Court of Appeals for the Second Circuit declined to construe a federal criminal statute by looking to the elements of a predicate criminal offense, choosing instead to focus on the defendant's underlying conduct supporting the criminal conviction. Despite the prevalence of elements-based approaches in immigration and in cases involving the Armed Career Criminal Act, the court charted a different path in construing "offense against property" under the Mandatory Victims Restitution Act (the MVRA). In *United States v. Razzouk*, 976 F.3d 250 (2d Cir. 2020), Circuit Judges John M. Walker Jr. and Susan L. Carney and District Judge John G. Koeltl,



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sitting by designation, unanimously held that the categorical approach should not apply to federal restitution orders and that district courts should look to the facts and circumstances underlying a conviction in deciding whether to impose a restitution remedy for crimes against property. In so holding, the Second Circuit joined the Fourth and Eleventh Circuits. See *United States v. Ritchie*, 858 F.3d 201, 210 (4th Cir. 2017); *United States v. Collins*, 854 F.3d 1324, 1334 (11th Cir. 2017).

Background and District Court Proceedings

Appellant, Sassine Razzouk, was convicted of bribery and tax

evasion arising out of his actions as a manager in the electrical design engineering department of Con Edison between 2007 and 2011. *Razzouk*, 976 F.3d at 252. Razzouk admitted to exploiting his position for the benefit of a company run by one of his friends, which obtained Con Edison contracts, assistance in bidding, and payments Razzouk lacked authority to approve in exchange for bribes. Razzouk's scheme ultimately diverted approximately \$6 million in overpayments from Con Edison. Razzouk pleaded guilty to one count of accepting bribes in connection with an organization receiving federal funds, in violation of 18 U.S.C. §666(a)(1)(B), and three counts of tax evasion, in violation of 26 U.S.C. §7201.3, for failing to report the bribery payments. In addition to being sentenced to a term of imprisonment, Razzouk was ultimately ordered to pay almost

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\$9 million in restitution to Con Edison and its insurer. The district court based its restitution order on the determination that Razzouk's conviction involved a "crime against property," which made restitution mandatory under the MVRA.

The Mandatory Victims Restitution Act of 1996

The MVRA requires restitution for victims of certain federal crimes, including "any offense against property" that is "committed by fraud or deceit in which [a victim] has suffered a ... pecuniary loss." 18 U.S.C. §§3663A(a)(1), (c)(1). The Second Circuit has adopted a generally expansive interpretation of the restitution rights of victims under the MVRA, which include corporations. See, e.g., *United States v. Parnell*, 959 F.3d 537, 540 (2d Cir. 2020) (holding that victims may recoup all losses caused by a fraudulent scheme, even if they occurred outside the limitations period for the underlying offense).

Corporate victims, however, are different from unsophisticated victims of fraud, and the jurisprudence reflects that reality. For example, corporate victims cannot recoup two types of expenses that they routinely incur as a result of covered

offenses: the cost of internal investigations (at least where the government did not request the investigation) and the cost of the corporation's involvement in bankruptcy proceedings related to covered offenses. See *United States v. Lagos*, 138 S. Ct. 1684, 1688, 1690 (2018). Additionally, the Second Circuit has sought to limit "windfall awards" through causation analysis

The Second Circuit's decision in 'Razzouk' continues a trend in favor of authorizing restitution by applying a non-categorical approach to the crimes-against-property provision of the MVRA.

that has particular bite in the context of arms-length transactions accompanied by risk disclosures. See *United States v. Calderon*, 944 F.3d 72, 97 (2d Cir. 2019) (denying restitution to corporations that "independently enter into risky financial enterprises through no fault of the fraudsters"). Relatedly, the Second Circuit recently concluded that restitution was not owed to corporate defendants that were sufficiently implicated in the underlying wrongdoing and benefited by virtue of their employees' wrongful acts within the scope of employment. See

Fed. Ins. Co. v. United States, 882 F.3d 348, 367-69 (2d Cir. 2018) (denying restitution to company that entered into deferred prosecution agreement in connection with employee's bribery).

Razzouk continues these trends by construing the MVRA in a victim-friendly fashion, recognizing that "crimes against property" may take myriad forms, including some unique to wrongdoing by corporate employees that affects corporate victims. To reach that conclusion, the court contrasted its construction of other statutes that—unlike the MVRA's offense-against-property provision—require application of an elements-based "categorical approach."

The Second Circuit Opinion In 'Razzouk'

In an opinion authored by Judge Carney, joined by Judge Walker Jr. and by Southern District Judge Koeltl, the Second Circuit construed the MVRA as authorizing judges to "look to the facts and circumstances of the offense of conviction" to determine if a restitution order must be entered under §3663A(a)(1). *Razzouk*, 976 F.3d at 255-56. "The plain text of the statute," the court explained,

“suggests that the way the crime is carried out is relevant” because it expressly specifies that crimes against property include offenses “committed by fraud or deceit.” See *id.* at 255 (citing 18 U.S.C. §3663A(c)(1)(A)(ii)). That interpretation resolved a question the court had left open in *United States v. Battista*, 575 F.3d 226, 230-31 (2d Cir. 2009). And it was consistent with the court’s reading of the U.S. Supreme Court’s decision in *Taylor v. United States* as distinguishing between statutory references to “generic” crimes requiring “a focus on the crime’s elements,” and statutes using the word “committed,” which suggested a “focus on the manner of commission.” *Id.* (citing 495 U.S. 575, 599-601 (1990)).

The Second Circuit also identified “subtle signals” of congressional intent to allow a fact-specific analysis. Crucially, the court contrasted the language of the offense-against-property provision, which “ma[de] no mention of the elements of any generic crime and provide[d] no other signal that examination of such elements serves its purpose,” with the language of a neighboring provision authorizing restitution for “crime[s] of violence” that incorporated such crimes’ definition under

18 U.S.C. §16, a provision that expressly alluded to a crime’s elements. *Id.* at 255. The court reasoned that “Congress could have used such an ‘elements’ formulation when it described an ‘offense against property’; that [Congress] did not suggest that we should treat the difference as intentional and significant.” *Id.* Further, in light of the MVRA’s broad remedial purpose, the court declined to limit restitution to those offenses that include acts against property among their elements. *Id.*

Having concluded that the MVRA’s crime-against-property provision does not require a categorical approach, the court affirmed the district court’s determination that restitution was due on the ground that Razzouk’s scheme “deprived Con Edison of a property interest—a pecuniary interest—in the form of payments” made to Razzouk’s friend’s company “for which Con Edison received no consideration.” *Id.* at 257. The court also rejected other challenges to the calculations underlying the restitution order, but nevertheless vacated and remanded the district court’s judgment so that the court could consider the impact of the U.S. Supreme Court’s decision in *Lagos* on certain expenses that were included

among the losses covered by the order. *Id.* at 257-58.

Conclusion

The Second Circuit’s decision in *Razzouk* continues a trend in favor of authorizing restitution by applying a non-categorical approach to the crimes-against-property provision of the MVRA, thereby making restitution contingent on the manner in which the offense was committed rather than on the crime’s elements. The decision also signals that, despite the prevalence of the categorical approach in the immigration and sentencing contexts, courts may be receptive to arguments that other criminal (if not civil) statutes call for case-specific approaches. More concretely, corporations whose employees engage in bribery to the detriment of the corporation, as in *Razzouk*, may be entitled to restitution.