

Case o' the Week

A little memo on a big case.

From: Steven Kalar, Federal Public Defender, N.D. Cal. FPD Date: Monday, Oct. 17, 2016
Re: *United States v. Kaplan*, 2016 WL 5859856 (9th Cir. Oct. 7, 2016): **Restitution:** Ninth upholds higher restitution calculation, with “replacement value” method basis

Players: Decision by D.J. Ezra, joined by Judges Hawkins and McKeown.

Facts: Kaplan and his co-defendant, Strycharske, were attempting to manufacture hash oil. *Id.* Fumes from the process ignited and exploded, blowing out their apartment’s wall and lighting “significant portions of the building complex in flames.” *Id.* Six victims were injured; one later died. *Id.* The pair plead guilty to identical plea agreements, and the court departed upwards from a high-end of thirty months, to three years custody. *Id.* The court ordered roughly \$2.7 million in restitution. *Id.* at *2. On appeal, the pair contested \$40,000 of the restitution order, arguing that the court improperly used “replacement value” to calculate restitution. *Id.*



“Could we skip the prosecution and get on to the sentencing phase?”
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Issue(s): “Kaplan and Strycharske appeal their . . . judgment of restitution . . . on the ground that the district court erred by calculating the restitution award using replacement value instead of fair market value.” *Id.* at *1.

Held: “This Court now joins our sister circuits in concluding that fair market value generally provides the best measure to ensure restitution in the ‘full amount’ of the victim’s loss, but that ‘replacement value’ is an appropriate measure of destroyed property under § 3663A(b)(1)(B) where the fair market value is either difficult to determine or would otherwise be an inadequate or inferior measure of the value of a fungible commodity with a viable market, like precious metals, coffee, lumber, currency, wheat, or event marijuana. . . . It is within the district court’s discretion to determine the proper method of calculating the value of such property when ordering restitution pursuant to 18 U.S.C. § 3663A.” *Id.* at *3.

Of Note: It is easy to dismiss this odd case, with its beef over \$40k from a \$2.7 million restitution order. But buried within *Kaplan* is a new Ninth rule. As the Court explains, “How to measure the value of destroyed property when calculating a restitution award is a matter of first impression in this circuit.” *Id.* at *2. Should restitution is to be determined by *fair market value* (the yard-sale price of an old toaster), or by *replacement value* (Amazon’s price for a new toaster replacement?) *Id.* The Mandatory Victim Restitution Act (MVRA) is silent on which method to use. *Id.* As noted above, the Ninth now adopts the circuit trend: the district court has discretion. Be mindful of this new Ninth MVRA rule – as noted last week, DOJ has money on its mind. *See blog entry here:* <http://circuit9.blogspot.com/2016/10/case-o-week-new-lo-bar-for-forfeiture.html>. *Kaplan’s* coming, to a restitution hearing near you.

How to Use: There are limits to discretion. The Ninth explains, “Where property is personal or unique, or neither fungible nor easily sold on a viable market, district courts should be permitted the discretion to make victims whole by determining an appropriate measure of value under the circumstances of the case before them.” *Id.* *4. An appropriate use of “replacement value?” “[C]lothes, furniture, and home appliances.” *Id.* However, *Kaplan* does not hold that “replacement value” is appropriate for all property. Challenge AUSAs and PO’s who overstate the scope of *Kaplan*, and keep tackling valuation methods: room to fight remains.

For Further Reading: “Justice Department report blasts San Francisco Police.” *See* https://www.washingtonpost.com/world/national-security/justice-department-report-blasts-san-francisco-police/2016/10/12/becb841c-90a2-11e6-a6a3-d50061aa9fae_story.html In a remarkable 432-page report, DOJ lambasts the S.F.P.D. for its use of force, bias, community policing practices, accountability measures, and its collection and maintenance of data. The full D.O.J. report is available here: <https://ric-zai-inc.com/Publications/cops-w0817-pub.pdf> Meanwhile, Justice and the USAO are not appealing Judge Chen’s historic *Armstrong* discovery order, requiring discovery of information relating to (what we’ve alleged) are race-based enforcement of drug offenses in San Francisco. *See* <http://circuit9.blogspot.com/2016/07/case-o-week-better-lender-than-borrower.html> What awaits the deeply troubled SF Police Department, as the need for real structural reform becomes increasingly clear? Ask Oakland and L.A. *See* <http://www.mercurynews.com/2016/07/13/oakland-police-in-13th-year-of-federal-oversight/>