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Trial Notebook

Restitution represents important alternative to damages in fraud case



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In a commercial bribery case filed by the manufacturer of the “Mortal Kombat” video game, the 7th U.S. Circuit Court of Appeals reversed and remanded, setting out useful guidelines for invoking the alternative of restitution in cases where the profit from an intentional tort exceeds the amount of harm to the plaintiff. *Williams Electronics Games Inc. v. Garrity*, 2004 WL 909162 (7th Cir., April 29).

Two suppliers, Arrow and Milgray Electronics Inc., allegedly paid more than \$100,000 in cash bribes to one of Williams’ buyers, Greg Barry. One of the defendants, an employee of Arrow named James M. Garrity, allegedly paid \$78,000 in bribes to Barry.

The jury returned verdicts in favor of Arrow and Milgray, though it also issued a verdict of \$78,000 against Garrity. But the verdict for Arrow and Milgray on the fraud claims were reversed because of errors in the jury instructions (the focus of Tuesday’s Trial Notebook, the first of two articles on this case).

Here are some highlights of Judge Richard A. Posner’s analysis of the alternative remedy of restitution (with various omissions not noted in the quoted text):

“[I]n addition to seeking damages for the fraud perpetrated upon it, Williams asked the judge to impose a constructive trust in its favor on the profits that the defendants had made

from their bribery. The victim of commercial bribery, who usually as here is the principal of an agent who was bribed, can obtain by way of remedy either the damages that he has sustained (the damages remedy) or the profits that the bribe yielded (the restitution or unjust enrichment remedy). 2 Dan B. Dobbs, ‘Dobbs Law of Remedies, Damages-Equity-Restitution,’ section 10.6, p. 698 (2d ed. 1993). The total profits would consist of the bribe itself (received by Barry, of course, not by Garrity or Arrow), plus the revenue that the bribe generated for the briber, minus the cost of goods sold and any other variable costs incurred in making the sales that generated that revenue.

“Commercial bribery is a deliberate tort, and one way to deter it is to make it worthless to the tortfeasor by stripping away all his gain, since if his gain exceeded the victim’s loss a damages remedy would leave the tortfeasor with a profit from his act. The amount of the bribe paid is of course not a profit to the briber, but an expense, and it should not enter into the net profit calculation sketched above. It can be used as a minimum estimate of damages, however, on the theory that no one would pay a bribe who didn’t anticipate garnering net additional revenue at least equal to the amount of the bribe; and that additional revenue is, at least as a first approximation, an additional expense to the person whose agent was bribed.

“Arrow presumably jacked up its prices to Williams by at least \$78,000 to cover the cost of the bribes that it was paying Barry to swing business its way, as otherwise it would have lost, rather than made, money from

bribing him. The implication is that had it not been for the bribes, Arrow’s prices to Williams would have been at least \$78,000 lower. So that amount is a minimum estimate of the loss to Williams caused by Arrow’s bribing Barry.

“Restitution is available in any intentional-tort case in which the tortfeasor has made a profit that exceeds the victim’s damages (if the damages exceed the profit, the plaintiff will prefer to seek damages instead), whether or not the tort involved a breach of fiduciary duty, Douglas Laycock, ‘The Scope and Significance of Restitution,’ 67 Tex. L.Rev. 1277, 1286 (1989), though commercial bribery normally will involve such a breach.

“The only thing that turns on the precise character of the defendant’s wrongdoing is, in some cases, the availability of equitable as distinct from legal restitution. Just as damages can be obtained either in a suit at law, or in an equity suit, under the ‘cleanup’ doctrine, or by the imposition of a constructive trust on moneys wrongfully withheld from the plaintiff, or by surcharging a trustee for the losses that he has caused to the trust, so restitution, too, can be awarded in either a suit at law or a suit in equity.

“If as in this case the wrong consists of a breach of fiduciary obligation — the kind of breach traditionally actionable in suits in equity (fiduciary obligations were an invention of the English chancery court) — the usual form that restitution takes is to impress a constructive trust on the profits of wrongdoing, with the defendant the trustee and the plaintiff, of course,

continued...

the beneficiary.

“But if all that the plaintiff is seeking is a sum of money equal to the defendant’s profit, an order of restitution will do fine, and the device of a constructive trust is surplus; the device comes into its own only when the plaintiff is seeking title to specific property in the defendant’s hands. Which means, by the way, that the imposition of a constructive trust can be sought as an equitable remedy for a legal as well as an equitable wrong, just as, in a suit for damages for breach of contract, the court can order an equitable accounting if the computation of damages involves complexities that would baffle a jury.

“For completeness, we note that when restitution is sought in a law case and the plaintiff is not seeking to impress a lien on particular property, but just wants an award of profits, he cannot obtain a constructive trust, because there is no res (that is, no fund or other specific piece of property) for the trust to attach to. He can still get restitution in such a

case, but as a legal remedy for a legal wrong, not as an equitable remedy for a legal or an equitable wrong.

“Williams’ situation was in between. It was not seeking to impose a lien on particular property, so it had no basis for seeking a constructive trust. But the wrong for which it was seeking a remedy (properly described as restitution or, what is synonymous as a practical matter, an accounting for profits, rather than as the imposition of a constructive trust) was an equitable wrong, a breach of fiduciary obligation, and so Williams was entitled to seek equitable restitution.

“And therefore it could seek (legal) damages from a jury and then, if it thought it could obtain a larger recovery by way of restitution, an order of restitution from the judge, since equitable remedies are determined by judges rather than by juries.

“Of course it could not keep both damages and profits, only the larger of the two. And of course when an

equitable remedy is sought in conjunction with a legal remedy the legal claim is tried first and the jury’s findings bind the judge, in order to vindicate the right to a jury trial on legal claims.

“The jury having exonerated the defendants, the judge refused to order equitable relief; but since we are setting aside the jury’s verdict, the judge’s ruling on equitable relief falls with it. Again for completeness, we note that since restitution is a legal as well as an equitable remedy, Williams could have sought such relief from the jury.

“No one doubts that Williams was entitled to have a jury try its claim of fraud; despite the equitable origins of remedies for fraud, a suit complaining of fraud is treated as a case at law if a legal, rather than an equitable, remedy is sought, and since restitution is equally a legal and an equitable remedy, it can be sought from a jury in a fraud case.”