

named in a 33-count indictment. Hays was charged in 24 of the 33 counts. Three additional counts were added by a superseding indictment. On September 20, 1993, Hays pleaded guilty to counts one and seven.

Pursuant to the written terms of the plea agreement, Hays agreed "to make restitution in an amount to be determined by the Court for any losses caused by [his] activities at Victoria Savings Association, and [he] further agree[d] to make such restitution as a condition of [his] supervised release if so ordered by the Court." At arraignment, the court cautioned Hays that his sentence could include a requirement that he pay several million dollars in restitution.

In the presentence investigation report ("PSR"), the probation officer found that Hays caused Victoria Saving Association ("VSA") and its subsidiary to expend \$1.216 million by creating a "rabbi trust"¹ and purchasing an annuity to provide deferred compensation for Hays's benefit. At the time of the purchase VSA was under a supervisory agreement not to directly or indirectly increase executive compensation. However, at Hays's request, the Board of Directors of VSA and its subsidiaries voted to provide him with an annuity that would pay him \$150,000.00 per year for life, beginning at age 55, with \$100,000 annual benefit to his wife for her life if he predeceased her.

Although the purchase of the annuity was not the subject of

¹ A rabbi trust is a grantor trust with significant tax advantages because both the initial payment and the interest earned on the trust are taxable to the employer.

Hays's indictment, the probation officer concluded it represented a fraudulent act on Hays's part, resulting in a substantial loss of cash at a time VSA was experiencing deterioration in the quality of assets. The probation officer also noted that if the Court were to determine that the annuity was obtained fraudulently, Hays could be ordered to waive any claim to the present value of the annuity and convey the annuity back to the RTC, VSA's conservator.

Hays objected to the inclusion of the rabbi trust in the PSR. He alleged that the rabbi trust involved a civil matter irrelevant to the criminal indictment, that it was not created by a fraudulent act, and that it was irrelevant to the preparation of the PSR.

At sentencing, the district court found that the rabbi trust was fraudulently obtained and included it in the restitution order.² Hays was subsequently sentenced to 41 months imprisonment

² In the judgment and commitment order, the court made the following specific findings regarding the rabbi trust held by Hays:

The Court finds that the defendant, by his activities, caused additional loss to Victoria Savings Association by causing Victoria Savings Association to expend \$1.216 million to create a rabbi trust and to purchase an annuity for defendant's exclusive benefit to provide him with deferred compensation for the rest of his life. The Court finds that the defendant caused Victoria Savings Association to take these actions for his benefit at a time when Victoria Savings Association was operating under a supervisory agreement not to directly or indirectly increase executive compensation.

The Court finds that the defendant agreed in his plea bargain agreement to make restitution for any losses caused by his activities at Victoria Savings Association. In return for this promise, the United States Attorney agreed not to prosecute the defendant for any other offenses set forth in the superseding indictment or for any other fraudulent acts committed

and three years of supervised release. The court imposed \$25,000.00 fine and ordered that Hays be held jointly and severally liable with other defendants to pay \$26,333,487.00 in restitution. He was also ordered to pay the then-present value of the annuity held in the rabbi trust (\$1,800,000.00) as partial payment of the total restitution of \$26,333,487.

ANALYSIS³

Hays contends that the district court illegally included the rabbi trust in its restitution order even though the trust was not listed in the indictment or otherwise involved in Hays's conspiracy to defraud VSA. The question whether restitution may be awarded in a particular case is a legal question and is reviewed *de novo*. *United States v. Chaney*, 964 F.2d 437, 451 (5th Cir. 1992). The quantum is reviewed for abuse of discretion. *Id.* at 451-52. Title 18 U.S.C. § 3663 authorizes federal courts, when sentencing defendants convicted of certain offenses, to order "that the defendant make restitution to any victim of such offense." Generally, restitution is limited to losses caused by the specific conduct underlying the offense of conviction.⁴

Nevertheless, pursuant to § 3663(a)(3) a sentencing court may

by the defendant which relate to Victoria Savings Association or its subsidiaries or affiliates.

³ Hays waived his right to appeal his sentence; however, that waiver applied only to his sentence of imprisonment. The government does not dispute that the waiver does not apply to the order of restitution.

⁴ See *United States v. Stouffer*, 986 F.2d 916, 928 (5th Cir.), *cert. denied*, ___U.S.___, 114 S.Ct. 115, 126 L.Ed.2d 80 (1993).

"order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.'" *United States v. Stout*, 32 F.3d 901, 905 n.5 (5th Cir. 1994); see also *United States v. Arnold*, 947 F.2d 1236, 1237-38 (5th Cir. 1991) (defendant agreed to pay \$669,390 in restitution in plea agreement).

Hays agreed to make restitution in an amount to be determined by the court for any losses caused by his activities at VSA. In consideration for his promise, the government agreed to refrain from prosecuting Hays for any other offenses giving rise to the indictment, or resulting from any fraudulent acts committed by him related to VSA. The Tenth Circuit's decision in *United States v. Thompson*, 39 F.3d 1103 (10th Cir. 1994), is instructive on this point. The Court in *Thompson* held that, pursuant to § 3663(a)(3), when the defendant "knowingly bargains to make full restitution in exchange for dismissal of other pending counts of an indictment, it should be presumed the bargain was made with its consequences in mind." *Id.* at 1105.⁵ Considering the government's agreement not to pursue convictions for Hays's other fraudulent activities, we must conclude that Hays considered the financial burden a fair exchange for the penal advantage gained.

Hays argues, however, that his restitution agreement was

⁵ See *United States v. Marsh*, 932 F.2d 710, 712-13 (8th Cir. 1991) (plea agreement provided for restitution of full amount of loss to victims); *United States v. Soderling*, 970 F.2d 529, 532-34 (9th Cir. 1992) (defendant could be ordered to pay restitution for losses stemming from offenses other than offenses of conviction, if defendant agreed to such in the plea agreement), *cert. denied*, ___U.S.___, 113 S.Ct. 2446, 124 L.Ed.2d 663 (1993).

nullified by the following provision of the plea agreement:

It is understood and accepted that the binding terms of this agreement under Rule 11(e)(1)(C) govern only the sentence of imprisonment. Any order of restitution, fine and the terms of supervised release shall be left to the discretion of the Court, and each party to this agreement reserves the right to advocate any position with respect to these issues.

The above provision immediately precedes the provision addressing restitution, which reads: "I agree to make restitution in an amount to be determined by the Court for any losses caused by my activities at Victoria Savings Association, and I further agree to make such restitution as a condition of my supervised release if so ordered by the Court."

Plea agreements are contractual in nature and are construed accordingly. *United States v. Asset*, 990 F.2d 208, 215 n.6 (5th Cir. 1993). Construing the provision regarding Hays's imprisonment as nullifying his promise to pay restitution for the losses caused by his activities violates the presumption that parties intend every clause to have some effect.⁶ At the time he entered into the agreement, Hays understood that the restitution order could require him to pay back several million dollars.⁷ At the time that he entered the guilty plea, the interest earned on the rabbi trust was being paid into the registry of the district court. Thus, Hays

⁶ See *Chapman v. Orange Rice Milling Co.*, 747 F.2d 981, 983 (5th Cir. 1984) (this Court examines the "*entire writing* in an effort to harmonize and give effect to *all the provisions* of the contract so that none will be rendered meaningless." (citation omitted)).

⁷ See *Asset*, 990 F.2d at 216 (the agreement is judged according to the defendant's reasonable understanding at the time he entered the plea).

cannot contend that the possibility that the restitution order could include the rabbi trust was beyond his reasonable understanding at the time he entered his guilty plea.

Hays next contends that his due process rights were violated because the rabbi trust was included in the restitution order without a hearing concerning whether it was fraudulently obtained. Title 18 U.S.C. § 3663 does not require a separate hearing in order for the district court to determine whether restitution should be ordered and the amount thereof. *United States v. Rochester*, 898 F.2d 971, 981 (5th Cir. 1990). Hays raised his objections to the payment of the rabbi trust as restitution in his objections to the PSR. The district court heard arguments from both Hays and the government concerning availability of the trust. Therefore, we find that Hays received all of the process he was due.⁸

Hays next contends that the district court failed to consider his ability to pay restitution. In imposing a restitution order, the district court "shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate." 18 U.S.C. § 3664(a).

An order of restitution will be reversed on appeal only when the defendant shows that it is probable that the court failed to consider a mandatory factor and the failure to consider the mandatory factor influenced the court. The Court's failure to follow the statutory requirements is reviewed for abuse of discretion.

⁸ *Rochester*, 898 F.2d at 981.

United States v. Reese, 998 F.2d 1275, 1280-81 (5th Cir. 1993) (internal citation omitted). The defendant bears the burden of showing that he lacks the financial ability to pay restitution. 18 U.S.C. § 3664(d).

Sentencing courts are required to consider a defendant's ability to pay but are not required to make explicit findings on that issue. *United States v. Barndt*, 913 F.2d 201, 204 (5th Cir. 1990). In this case, Hays did not object to the findings of the probation officer concerning Hays's ability to repay restitution, which the district court adopted. Under these circumstances, the court was not required to iterate these findings on the record. See *United States v. Mitchell*, 876 F.2d 1178, 1183 (5th Cir. 1989).

Hays's final contention is that the district court abused its discretion in imposing the restitution amount. The court held Hays to be jointly and severally liable with five other defendants to pay \$26,333,487 in restitution.

The defendant bears the burden of showing that he lacks the financial ability to pay restitution. 18 U.S.C. § 3664(d). A defendant's "indigency at the time restitution is ordered is not a bar to the requirement of restitution." *United States v. Ryan*, 874 F.2d 1052, 1054 (5th Cir. 1989); see also *United States v. Stafford*, 896 F.2d 83, 84 (5th Cir. 1990). In *Ryan*, we adopted the reasoning of other circuits in cases involving significant restitution orders and indigent defendants:

[T]he Victim and Witness Protection Act does not prohibit restitution in such instances; and a defendant's financial situation may well change in the future, making him able to pay some if not all the restitution ordered.

Even some payment in the future, no matter how miniscule it might be in relation to the victim's loss, would be in keeping with the philosophy of the Act.

874 F.2d at 1054.

The probation officer noted in the PSR that, although Hays had a negative net worth, he did have some liquid assets, including IRAs and bank accounts. The PSR also noted that Hays had been quite successful in his professional endeavors, which included his position as senior manager for North American Financial Corporation; president, CEO, and director of VSA; president of Sessions Mortgage Company; and his involvement in industrial development for the Corpus Christi, Texas, Chamber of Commerce. Based on Hays's tax returns, the PSR listed the following earnings: \$487,760 in 1989, \$547,121 in 1990, \$175,114 in 1991, and \$123,344 in 1992.

Considering Hays's proven earnings ability, the relief that may result because the restitution is shared severally as well as jointly, and the likelihood that Hays might make some payment in the future, we find that the district court did not abuse his discretion.

CONCLUSION

For the reasons articulated above, the sentence imposed by the district court is AFFIRMED.