

Federal Criminal Restitution:

Basic Steps, Key Provisions, and Developing Issues

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USSC, New Orleans, June 2010



Overview: basic principles

- Statutory criteria
- A separate (20+ yr) sentence
- Mandatory for most offenses
- Different criteria than relevant conduct or guideline “loss”



Overview: Historical Mileposts

1. Federal Probation Act (FPA) – 1925
2. Victim Witness Protection Act (VWPA) – 1982
3. Mandatory Victims Restitution Act (MVRA) – 1996
4. Crime Victims Rights Act (CVRA) – 2004



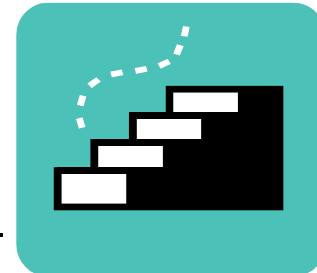
Overview: Main Statutory Provisions

- *18 U.S.C. §§ 3663, 3663A and 3664*
- *§§ 3663A(a)(2) and 3663(a)(2)*: A victim is a person “directly and proximately” harmed by the offense
- *§ 3664(f)(1)*: “In each order of restitution, the court shall order restitution to each victim in the *full amount of each victim’s losses*” (without regard to defendant’s financial circumstances)

4-STEPS in determining restitution:

- **Step 1** -- What is the *offense of conviction* (OC)?
- **Step 2** – Who are the *victims* of the OC?
- **Step 3** – What harms were: a) *caused* by the OC, and b) *statutorily compensable*?
- **Step 4** – How should the harms be *measured*?

Step 1: What is the Statutory Offense of Conviction (OC)?

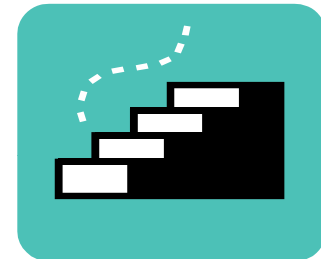


The Offense of Conviction determines –

1. Whether restitution is a separate *Sentence*
 - It is a sentence if the OC is listed in a restitution statute
2. Whether it is *Mandatory* or *Discretionary*
 - *Depending on which statute the OC is listed in*
3. The outer limits (scope) of the criminal conduct for Steps 2-4

Step 2: Who are the Victims of the Offense of Conviction (OC)?

- Victims are those harmed by the OC:
 - Hughey v. U.S., 495 U.S. 411 (1990)
- A victim is a person “*directly and proximately harmed*” by the OC:
 - 18 U.S.C.A. §§ 3663(a)(2) and 3663A(a)(2)
- Where the OC “*involves as an element*” a scheme or conspiracy, a victim is directly harmed by the conduct in the course of the scheme or conspiracy.



Step 3: What harms were : a) *caused by the OC, and* b) *statutorily compensable?*

Caused by the offense of conviction:

- Caused to the victims of the OC;
- “Proximately” caused or “reasonably foreseeable;”
- Routine costs excluded (not caused);
- Often includes victims’ fees and costs;
- Costs “ascertainable” at sentencing.



Step 3: (continued)

Compensable (authorized) by statute:

- Some are **listed** as types of harms caused by some kinds of offenses, such as:
 - § 3663A(b)(2) – medical services relating to bodily injury; or
 - § 3663(b)(6) – time spent remediating harm from identity theft.
- Some are **listed** for costs incurred participating in the case, such as:
 - § 3663A(b)(4) - lost income or child care

Step 3: (continued)

- Some are **unlisted** but compensable if they are determined to be “*proximately caused*” by the offense and *foreseeable*, such as:
 - victims’ attorneys fees
 - harms to victims’ families (§3663A(a)(2))
 - ascertainable future losses (§3664(d)(5))
- Restitution is **not** compensable - even if “caused” - for harms not part of the victim’s actual loss, such as:
 - pain & suffering, defendant’s gain, or intended loss

Step 4: How are the Harms Measured?

The harms must be *Measured* (given a specific value):

- Determinations are very fact-based;
- Retail/wholesale or market/replacement value issues determined by **caselaw**;
- Usual goal: to “restore” the victim;
- Timing rules in the **statute** for fluctuating values.

RESULT of the 4 STEPS:

Amount is the “full amount of each victim’s losses” (§ 3664(f)(1)):

- **Imposed in all mandatory restitution cases (§ 3663A or specific statutes);**
- **Presumptively imposed for discretionary restitution (§ 3663 or as a condition).**



Plea agreement may sometimes permit more restitution than otherwise authorized:

- § 3663(a)(3) - “to any extent;”
- § § 3663A(a)(3) & 3663(a)(1)(A) – to “other than the victim” of the offense.

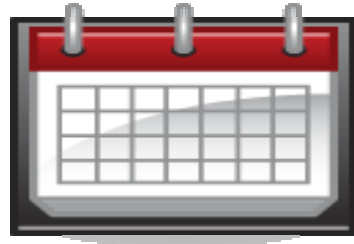


Recent development: Collection from the Defendant's Pension Plan

- MVRA trumps ERISA provisions;
- Restitution collected where D has “current, unilateral right” to receive payments.
- See, e.g., U.S. v. Novak,
476 F.3d 1041
(9th Cir. 2007)



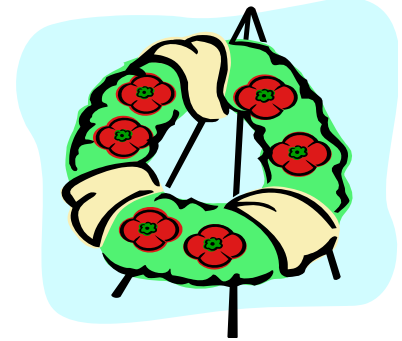
Strong Trend: Setting A Payment Plan at Sentencing



- Most courts now require a schedule to be set at sentencing (based on § 3664(f)(2)).
 - But see: U.S. v. Sawyer, 521 F.3d 792 (7th Cir. 2008)
- Useful trend: impose schedule *and* impose in full, due or payable immediately
 - See, U.S. v. Serawop, 317 F.Supp.2d 1285 (DUt2004)

Possible expanded scope of restitution: Deceased Victims' Future Lost Income

- Directly: where victims' families are “proximately” harmed in being deprived of victim's future lost income:
 - *U.S. v. Cienfuegos*, 462 F.3d 1160 (9th Cir. 2006)
- Vicariously: the victim's family/estate/representative can “assume” the victims' rights under the statute
 - §§ 3663(a)(2) and 3663A(a)(2)



Key three-part procedural provision: § 3664(d)(5)



- Victims' discovery of new losses, post-sentencing – show cause w/in 60 days;
- Order should include future costs that are “ascertainable” at sentencing; and
- Option of 90-day delay in determining restitution.

Key provisions on the defendant's financial resources



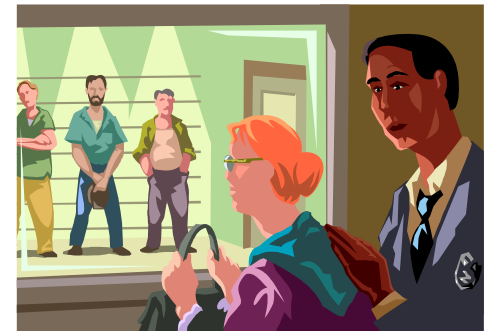
- § 3664(d)(3): Information to be disclosed for PSR
 - includes assets *owned or controlled* as of arrest
- § 3664(f)(2): Relevant to manner of payment
 - includes *jointly controlled* assets [and earnings and obligations of defendant]

Victims = Current Hot-Button Issue in Restitution Law

- Older statute sometimes overlooked:
 - § 3664(l) permits different payment schedules for different victims, based on
 - Type and amount of each victim's loss, and
 - The economic circumstances of each victim.
- New statute regarding ID theft victims:
 - § 3663(b)(6) – value of the time spent by a victim of ID theft to remediate intended or actual harm from the offense.

Longstanding Victims' Rights re Restitution (still apply)

- Petition court re newly discovered losses;
- Notify court of material change in defendant's financial circumstances;
- Right to allocution (re some offenses);
- BUT may not enforce restitution in the criminal case.



New Victims Rights Under the 2004 CVRA (18 U.S.C. § 3771)

- Same definition of “crime victim” as under restitution statutes.
- Such victims have the Right:
 - To notice;
 - To be present at any court proceeding;
 - To be “*reasonably heard at any public proceeding in the district court involving release, plea, sentencing*” or parole proceeding;

Victims' CVRA Rights (continued)

- To “*reasonably confer*” with the prosecutor;
- To be free from “*unreasonable delay*” in proceedings;
- To file a 72-hour mandamus appeal if the court denies any of these rights.

Issue: Are CVRA “victims” the same as MVRA
“victims?”

Case law developing substantive & procedural issues.

Supreme Court Case: *U.S. v. Dolan* – June 2010

- Does the court have the authority to impose restitution after the 90-day period in § 3664(d)(5)?
- Does it matter if the defendant waived or caused the delay?
- Conflict between defendant's procedural rights and victims' substantive rights.

Fun Case Full of Restitution Issues: “The Case of the Crooked NBA Referee”



- NBA is the “victim;”
- Restitution includes referee’s salary, travel expenses, some of NBA’s attorneys fees; but not costs of “public response;”
- Scope of conspiracy includes some, but not all, prior similar acts;
- Some restitution apportioned among defendants, some imposed jointly and severally.
- [*U.S. v. Donaghy, 570 F.Supp.2d 411 \(E.D.N.Y. 2008\)*](#)