

FEDERAL CRIMINAL RESTITUTION

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RUSSELL BUTLER - EXPERIENCE

- ▶ Attorney for crime victims
- ▶ Litigated restitution issues in federal and state courts on behalf of crime victims
- ▶ Teaches Rights of Crime Victims class in law school

WHAT IS THE PURPOSE OF RESTITUTION?

PURPOSES OF RESTITUTION

- ▶ Compensate victims for out-of-pocket losses
- ▶ Make offenders accountable for the consequences of their criminal conduct
- ▶ Restorative justice

HISTORICAL BACKGROUND RESTITUTION

- ▶ Restitution is statutory
- ▶ Authorized as a discretionary power of the court regarding probation
- ▶ Authorized as a discretionary power of the court regarding the defendant's sentence
- ▶ Made mandatory under certain circumstances
- ▶ Became a right of the victim

HISTORICAL BACKGROUND RESTITUTION

- ▶ Restitution provisions are scattered through the federal code
- ▶ Restitution provisions now incorporated in sentencing guidelines
- ▶ While attempts have been to interlineated the various provisions, the result is not always clear

VICTIMS RIGHTS INCLUDING FOR RESTITUTION - 18 U.S.C. § 3771(A):

- ▶ Victims have rights to:
- ▶ Be informed;
- ▶ Be present;
- ▶ Be reasonably heard at any public proceeding regarding the case;
- ▶ Full and timely restitution as provided by law;
- ▶ Be treated with fairness and with respect for the victim's dignity and privacy.

HOW VICTIMS CAN ASSERT THEIR RIGHT TO RESTITUTION?

While victim is not a party to the case, victims can under 18 U.S.C. 3771(d):

- “The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a).”

HOW VICTIMS CAN ASSERT THEIR RIGHT TO RESTITUTION?

While victim is not a party to the case, victims can under 18 U.S.C. 3771(d):

- “The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime ...”

HOW VICTIMS CAN ASSERT THEIR RIGHT TO RESTITUTION?

While victim is not a party to the case, victims can under 18 U.S.C. 3771(d):

- “If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. “

HOW VICTIMS CAN ASSERT THEIR RIGHT TO RESTITUTION?

While victim is not a party to the case, victims can under 18 U.S.C. 3771(d):

- Limitations on mandamus relief not applicable regarding restitution...

“This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.”)

DO VICTIMS KNOW ENOUGH TO ASSERT THEIR RIGHT TO RESTITUTION?

- Do *pro se* victims know that they have a right to restitution and if so what that means?
- Do *pro se* victims know what can be claimed as restitution?
- How many *pro se* victims do you believe would know how to assert their right to restitution in a U.S. District Court or to take a mandamus to the court of Appeals if they feel their rights are denied?

DO VICTIMS HAVE THEIR OWN ATTORNEYS TO ASSIST WITH ASSERTING THEIR RIGHT TO RESTITUTION?

- How many victims have their own attorneys who would assist them in asserting assert their right to restitution in a U.S. District Court or to take a mandamus to the court of Appeals if they feel their rights are denied?

WHO HAS WHAT ROLES AND RESPONSIBILITIES REGARDING VICTIMS AND THEIR RIGHT TO RESTITUTION?

- U.S. Attorneys?
- U.S. Probation?
- Judges?
- Other?

OBLIGATION OF COURTS

- *18 U.S.C., 3771(b)(1)* In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). [(a)(6) is restitution]
- **USSG § 6A1.5 - Victims; Rights** – “In any case involving the sentencing of a defendant for an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in 18 U.S.C. § 3771 and in any other provision of Federal law pertaining to the treatment of crime victims.”

OBLIGATION OF U.S. ATTORNEYS

- **18 U.S.C. § 3664 (d) : (US Attorney)** “(1) “Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.”

OBLIGATION OF U.S. PROBATION # 1

18 U.S.C. § 3664(a)

(Mandatory) : Court shall order probation office to document restitution information.

OBLIGATION OF U.S. PROBATION # 2

- ▶ **§ 3664 (d) : (US Probation)** (2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable—
 - (A) provide notice to all identified victims of—
 - (i) the offense or offenses of which the defendant was convicted;
 - (ii) the amounts subject to restitution submitted to the probation officer;
 - (iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

OBLIGATION OF U.S. PROBATION # 3

▶ **§ 3664 (d) : (US Probation)** ... notice to all identifiable victims of

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

**DOES WHAT THE STATUTE INDICATES FOR ROLES
AND RESPONSIBILITIES IN FACT OCCUR?**

ISSUE – VICTIMS DO NOT KNOW WHAT LOSSES MAY BE COMPENSABLE UNDER RESTITUTION STATUTE

- ▶ Victims needed to be informed regarding what losses may be claimed as restitution.
- ▶ Otherwise, court will not know the full amount of the loss.

MEANING OF “ RESTITUTION AS PROVIDED BY LAW”

By law includes:

- Statutes
- Guidelines
- Case law

STATUTORY PROVISIONS IN TITLE 18

§ 3663A: Mandatory Restitution for offenses of:

(A) (i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856 (a)), including any offense committed by fraud or deceit;

(iii) an offense described in section 1365 (relating to tampering with consumer products); or

(iv) an offense under section 670 (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

STATUTORY PROVISIONS IN TITLE 18

§ 3663: **Discretionary** restitution - Title 18 offenses and certain drug offenses.

- More offenses
- More damages

STATUTORY PROVISIONS IN TITLE 18

Procedures applicable to restitution –

§ 3664

§ 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”

STATUTORY PROVISIONS IN TITLE 18 - PROBATION

§ 3563(a) (Mandatory) : “The court shall provide, as an explicit condition of a sentence of probation ...(2) for a felony, that the defendant also abide by at least one condition set forth in subsection (b)(2) or (b)(12) (with certain exceptions) (6) that the defendant ... make restitution in accordance with sections 2248, 2259, 2264, 2327, 3663, 3663A, and 3664;

§ 3563 (b)(1) (Discretionary) : “The court may provide, as further conditions of a sentence of probation, ...

§ 3563 (b)(2) make restitution to a victim of the offense under section 3556 but not subject to the limitation of section 3663 (a) or 3663A (c)(1)(A).”

STATUTORY PROVISIONS IN TITLE 18 – SUPERVISED RELEASE

§ 3583 (d) (Discretionary): ... The court may order, as a further condition of supervised release, to the extent that such condition ... any condition set forth as a discretionary condition of probation in section 3563 (b) ... (i.e. it incorporates restitution provisions in the probation law.)

GUIDELINES PROVISIONS – SUPERVISED RELEASE/PROBATION

§ 5D1.3 (a)(6) Restitution is a mandatory condition of supervised release.

§ 5B1.3 (a)(6) Restitution is a mandatory condition of probation.

§ 5E1.1 (a) In the case of an identifiable victim, the court shall -
(1) enter a restitution order for the full amount of the victim's loss, if such order is authorized under 18 U.S.C. § 1593, § 2248, § 2259, § 2264, § 2327, § 3663, or § 3663A, or 21 U.S.C. § 853(q); or (2) impose a term of probation or supervised release with a condition requiring restitution for the full amount of the victim's loss, if the offense is not an offense for which restitution is authorized under 18 U.S.C. § 3663(a)(1) but otherwise meets the criteria for an order of restitution under that section.

RESTITUTION EXCEPTION

18 U.S.C. § 3664(a) - “If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.”

But 18 U.S.C. § 3771 (a)(2) “In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.”

TIMING RELATED TO RESTITUTION

- ▶ **18 U.S.C. § 3664(d)(5)** - May defer restitution to a period of 90 days after sentencing.
- ▶ But per *Dolan v. United States*, 560 U.S. 605 (2010), failure to determine restitution within ninety days does not invalidate restitution.
- ▶ But per **18 U.S.C. § 3664(d)(5)** if the victim subsequently discovers further restitution losses, “the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order.”

CASE EXAMPLE # 1

United States v. Bermudez (D. MD, Criminal No. WMN-06-0135)

- ▶ Victim was assaulted by two fellow postal workers.
- ▶ One defendant filed false criminal charges against victim in State court.
- ▶ Victim paid attorney to represent him to defend false criminal charges.
- ▶ Court ordered defendant to pay restitution to include the amount victim paid to defend false criminal charges.

CASE EXAMPLE # 2

United States v. McPherson, 2010 U.S. Dist. LEXIS 64143 (S.D. Ohio Jan. 29, 2010)

- ▶ Victim was a victim of fraud.
- ▶ Counts related to victim were dismissed.
- ▶ Fraud was related to scheme.
- ▶ Defendant alleged that victim received benefits from defendant and therefore restitution should be denied or reduced.
- ▶ Court orders restitution for full amount of victim loss.

CASE EXAMPLE # 3

United States v. Serawop, 505 F.3d 1112
(10th Cir. Utah 2007)

- ▶ Victim was killed.
- ▶ Restitution was sought for future lost wages.
- ▶ Court ordered expert to determine amount of restitution
- ▶ Court ordered full amount of future earnings

CASE EXAMPLE # 4

United States v. Battista, 575 F.3d 226 (2d Cir. N.Y. 2009)

- ▶ Defendant convicted of gambling.
- ▶ Defendant claimed that the National Basketball Association was not a victim.
- ▶ Defendant claimed NBA's attorneys fees were not subject to restitution.
- ▶ Court found NBA was a victim and that attorneys' fees were recoverable as "other expenses" under restitution statute.

COLLECTION OF RESTITUTION – FALLING THROUGH THE CRACKS

- ▶ Restitution ordered after original judgment and commitment order – failure to send to Bureau of Prisons?
- ▶ Inmate earnings in Bureau of Prisons – does court specify amount that can be collected?
- ▶ U.S. Attorney's Financial Litigation Units – is information on defendant's earning received quick enough to prevent dissipation of assets?
- ▶ Victims can record judgments in state courts – does any one tell the victims of this option and the benefit to record? See 18 U.S.C. § 3664(m)(i)(B) - At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment.

COLLECTION OF RESTITUTION – FALLING THROUGH THE CRACKS

- ▶ **Pay attention to standard and special conditions of supervised release and probation – e.g.**
- ▶ §5D1.3 (c)(15) Supervised release standard condition - the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessments.
- ▶ §5B1.3 (d)(3) Probation – Special condition - If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine -- a condition requiring the defendant to provide the probation officer access to any requested financial information.

COLLECTION OF RESTITUTION – FALLING THROUGH THE CRACKS

- ▶ **18 U.S.C. § 3664(n) – Bureau of Prisons** - If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

TAKE AWAY POINTS

- ▶ *Restitution is a right of the victim*
- ▶ *Victims need to know to document their full economic loss so that court has complete information for the determination of restitution*
- ▶ *Follow through is needed to prevent defendant from ignoring the requirement to pay restitution.*

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Questions???

*Problems with
restitution???*

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