

Federal Criminal Restitution:

Basic Steps and Recent Issues

Catharine M. Goodwin

USSC, New Orleans

September 2015



Overview: basic principles of federal criminal restitution:

- Statutory authority & criteria
- Most restitution orders are:
 - a separate, 20+ yr sentence
 - mandatory
- Criteria for victims and harms are different than for GL economic loss or civil damages



Main Statutory Provisions in Title 18

- **§ 3663A(a)(2)**: Mandatory R; victims “directly and proximately” harmed; violent offenses, and property/fraud crimes in title 18.
- **§ 3663**: “Discretionary” R (D’s \$ relevant to whether to impose, not to how much); presumption for full R if any; other title 18 offenses, drug offenses, condition-restitution.
- **§ 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*” w/o regard to defendant’s \$. **Applies to all R orders (§3556).**

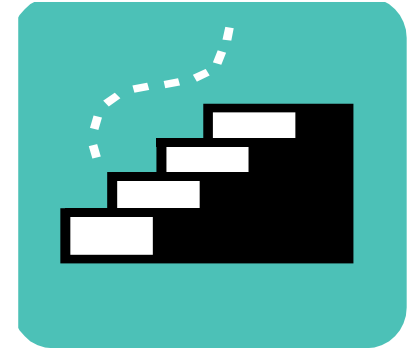
4-STEPS in determining restitution:



- **Step 1** – ID the *offense of conviction* (OC)
- **Step 2** – ID the *victims* of that OC
- **Step 3** – ID the harms (actual loss) *caused* to the victims by the OC (that are *compensable*)
- **Step 4** – *Quantify* (measure) the harms

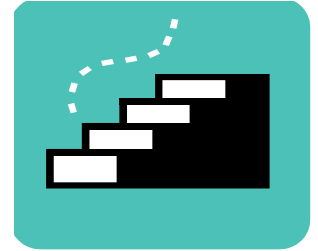


Step 1: ID the Statutory Offense of Conviction (OC)



- The OC determines –
 1. IF the restitution is a separate *Sentence*
[Yes, if the OC is covered by a restitution statute]
 2. IF the restitution is *Mandatory* or *Discretionary*
[Depends on which statute the OC is covered by]
 3. WHAT the outer limits (scope) of the OC conduct will be for the remaining Steps 2-4

Step 2: ID the Victims of the Offense of Conviction (OC)



Statutory bases:

a) “The loss caused by the conduct underlying the [OC] establishes the *outer limits* of a restitution order.” Hughey v. U.S., 495 U.S. 411, 413 (1990). Still good law!

b) ID of victims and their losses must be specific: Restitution is authorized for an offense “in which an *identifiable* victim ... suffered a *physical injury or a pecuniary loss*.” § 3663A(c)(1)(B).

Note: Must be victims of the Defendant’s conduct as part of the offense of conviction, not merely of related conduct.

“Victim” defined:

- Pre-1996 (MVRA) § 3663: a “*victim of the offense;*” the offense “*resulted in*” loss to the victim.
- Post-MVRA §§ 3663, 3663A: A person “*directly and proximately harmed*” by the offense.
- § 2259: a person “*harmed as a result of* [an offense in this chapter].”
- Supreme Court: all above require proximate cause standard of causation. *Paroline v. U.S.*, 134 S.Ct. 1710 (2014).

Step 3: ID the compensable harms caused by the OC



MAIN PART OF STEP 3 IS CAUSATION:

**THE HARM MUST BE CAUSED BY THE DEFENDANT'S
OFFENSE CONDUCT:**

The victims are “*directly and proximately*” harmed by the offense (3663 and 3663A); “*harmed as a result of the [D’s] commission*” of the offense (2259).

“The loss *caused* by the conduct underlying the [OC] establishes the outer limits of a restitution order.”
Hughey v. U.S., 495 U.S. 411, 413 (1990).

Supreme Court on Causation

- Rejects victim's argument that a D be responsible for entire "aggregately caused" harm:
 - "Bedrock principle" that R should reflect the consequences of the *D's own conduct* (citing *Hughey*, 495 U.S. at 416 (1990));
 - Ds are responsible for the "consequences and gravity of their own conduct."
 - Proper causation standard is **proximate cause**.
Paroline v. U.S., 134 S.Ct. 1710 (2014).
See also generally, Burrage v. U.S., 134 S.Ct. 881 (2014).

Proximate Causation:

Proximate harm must meet 2 criteria:

1) factual causation: the harm would not exist “but for” the defendant’s offense conduct; AND

2) legal causation: the harm was reasonably foreseeable to the defendant at the time of the offense.

Supreme Court on Proximate Cause

- “. . . a defendant generally may not be convicted unless his conduct is both 1) the actual cause, and 2) the “legal” cause (often called the ‘proximate cause’) of the result.”
- Statutory language triggering proximate cause includes: “caused by,” “resulting from,” “as a result of,” “incurred by,” and similar terms.

Burrage v. U.S., 134 S.Ct. 881, 887 (2014) (causation);
Paroline v. US, 134 S.Ct. 1710 (2014) (child porn); and
Robers v. US, 134 S.Ct. 1854 (2014) (mortgage fraud).

COROLLARY PART OF STEP 3: COMPENSABILITY

THE (CAUSED) HARM MUST ALSO BE *COMPENSABLE* AS RESTITUTION

- Some compensable harms are **listed** in the statute, but many others are **not listed**.
- Harms are compensable IF they
 - a) were **proximately caused** by the defendant's offense, **and**
 - b) represent **actual loss** to the victim.

Note: Losses increasingly include victim's costs and attorneys fees (either as directly caused harm +/- or as a cost of victim's participation).

Restitution is only compensable for *ACTUAL LOSS to the victim:*

Restitution is *Not* compensable for:

- intended loss,
- pain & suffering,
- invasion of privacy,
- emotional distress, or
- the defendant's gain.

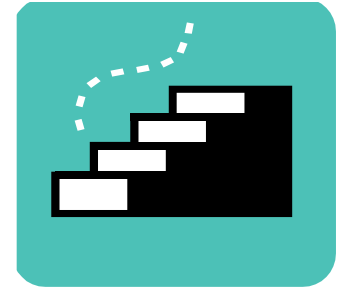
[Some codified exceptions: the defendant's gain from human trafficking; the value of the victim's time for ID theft.]

A case involving compensable costs of remedying intangible harms (close call):

- D introduced counterfeit version of victim-company's drug into market;
- R upheld for victim's costs for remedying harm to its product & reputation, & for preventing harm to the public;
- BUT the court noted: still tied to out-of-pocket (actual) costs; is not an estimate of intangible harm.

U.S. v. Shengyang Zhou, 717 F.3d 1139 (10th Cir. 2013).

Step 4: Quantifying the Harms



- Court must determine harms *specifically*;
- Must be supported by *facts in the record*;
- Cannot be based on generalized, speculative or “market harm” (e.g. copyright infringement cases);
- Statutory rules for *When* harms are measured, but often not *How* harms should be measured;
- Fundamental rule: ***Restore*** the victim to his or her pre-offense condition.

*Reminder: R must be “offset” – reduced -
for any value D returned to the Victim*

- For example:
- The **value** of real estate collateral “returned” to the victim on a fraudulent mortgage loan =
- the **sale price** of the property at the ultimate foreclosure sale, *not* its fair market value at the time of the initial forfeiture.
- *Robbers v. U.S.*, 134 S.Ct. 1710 (2014).
- Subsequent cases: different rule for “downstream” purchasers. (See handout)

Amount Resulting from the STEP-Analysis:

- Represents the “full amount of each victim’s losses” per § 3664(f)(1).
- Imposed in all mandatory restitution cases (§ 3663A and specific statutes);
- Presumptively imposed in all “discretionary” restitution cases (§ 3663 or as a condition).



Supreme Court on the final restitution determination:

- “The resulting amount is the ‘proximate result of the offense’ ... and thus the ‘full amount’ of such losses that should be awarded.”
- The court should then set an appropriate payment schedule based on the defendant’s financial resources.
- *Paroline v. U.S.*, 134 S.Ct. 1710, 1728 (2014).

The plea agreement sometimes permits more restitution than otherwise authorized (by the “steps”)

- § 3663(a)(3) - “to any extent” p’s agree;
- §§ 3663A(a)(3) & 3663(a)(1)(A) – to “other than the victim” of the offense if p’s agree.
- *Agreement must be very specific.*



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

- Generally tracks the same language regarding victims and restitution as in the restitution statutes;
- Not an authorization for any additional restitution;
- Codified the right to “full and timely restitution as provided in law” (18 U.S.C. § 3771(a)(6)).

Victims' CVRA Rights (continued):

- **But** the CVRA can enhance a victim's ability to provide information to the court and to seek restitution.
- It includes the right to file a petition for mandamus with the appellate court if the court denies any of the codified rights (18 U.S.C. § 3771(d)(3)).
- Some restitution case law is based on a victim's petition and/or a defendant's appeal, or both (e.g. child porn S.Ct. *Paroline* case).

Restitution in Cases Involving the Possession of Child Pornography:

- Problem: 100's of cases; awards ranging from 0 - \$3+ million; mean of \$15,000; median of \$3,000;
- Key Issue: Does §2259 “*as a result of*” (rather than “*directly and proximately harmed*”) require proximate cause? Or is it a lower standard?
- Circuit split: 5th Cir: No prox cause required and total aggregated harm possible (\$3 mil); all other circuits: proximate cause required. Mixed results re some or no R.

Summary of Paroline v. U.S., 134 S.Ct. 1710 (2014):

- S. Ct. decided 5th Cir and found the statute requires proximate cause criteria.
- 5-Justice majority took middle ground between all or nothing R; statute requires the court to determine some restitution.
- Rejects aggregated harm approach of victim/govt as too extreme for criminal law.
- Court offers own “relative” aggregated harm approach with its own suggested “factors.”

The Paroline “Factors”

- “# of past criminal defendants;
- Prediction of # of future defendants;
- Reasonable estimate of broader # involved;
- Whether D reproduced or distributed images;
- Whether D had any connection to the initial production of the images;
- # of images of victim the D possessed;
- Other facts relevant to defendant’s “relative causal role.”

Other considerations:

- Safe approach: R = harm done to victim by her knowledge of the case, such as post-offense counseling (see, e.g., *U.S. v. McDaniel*, 631 F.3d 1204 (11th Cir. 2011), and post-*Paroline* *U.S. v. Rogers*, 758 F.3d 37, 39 (1st Cir. 2014)).
- Not yet addressed: victim participation expenses as an additional form of R in §§ 3663(b)(4) and 3663A(b)(4). See, e.g., *U.S. v. Amato*, 540 F.3d 153 (2d Cir. 2008) (*non-CP context*).

Congressional Help Still Needed

- All 9 Justices in *Paroline* see problems with statute (18 U.S.C. § 2259).
- 3 Dissenters: “The statute as written allows no recovery. We ought to say so, & give Congress a chance to fix it.”
- Ideas offered by some courts:
 - Specific restitution criteria in the statute; precedents are human trafficking, drug labs, ID theft;
 - Statutory damages (e.g. civil damages in 2252);
 - Fines diverted to special fund for CP victims;
 - Directives to Commission to establish a restitution schedule; establish restitution range.

See 2-page handout of recent notable cases in federal criminal restitution

EXCERPTED FROM 2015 EDITION OF
FEDERAL CRIMINAL RESTITUTION,
BY CATHARINE M. GOODWIN,
THOMSON REUTERS
PUBLISHED AUGUST 2015.