

Ongoing Issues in Restitution in 2015

[SEE *FEDERAL CRIMINAL RESTITUTION*, BY CATHARINE M. GOODWIN, 2015 ED., THOMSON REUTERS]

1. Developments since *Paroline v. U.S.*, 134 U.S. 1710 (2014) (child porn):

Court's methodology of determining the Restitution upheld as comports with the *Paroline* "factors" in *U.S. v. Rogers*, 758 F.3d 37, 39 (1st Cir. 2014).

2. Developments since *Roberts v. U.S.*, 134 S.Ct. 1854 (2014) (mortgage fraud):

Different rules for downstream lenders: *U.S. v. Howard*, 784 F.3d 745 (10th Cir. 2015); *U.S. v. Beacham*, 774 F.3d 267 (5th Cir. 2014); *U.S. v. Luis*, 765 F.3d 1061, 1067 (9th Cir. 2014)

3. Inclusion of victim's participation costs, per 18 USC 3663(b)(4) and 3663A(b)(4):

(Note: Victims' attorneys fees & costs may be property loss (b)(1) +/- or (b)(4) participation costs); see e.g., *U.S. v. Cuti*, 766 F.3d 199 (2d Cir. 2014); *U.S. v. Battista*, 575 F.3d 226 (2d Cir. 2009).

4. Determining the Restitution amount and type:

Restitution solely as a condition of supervision for non-title 18, non-violent offenses: See, e.g., *U.S. v. Kumar*, 750 F.3d 563 (6th Cir. 2014) (making false report to the U.S. Coast Guard).

What is a property offense? See, e.g., *U.S. v. Luis*, 765 F.3d 1061, 1067 (9th Cir. 2014).

What is the difference between the "VWPA" (3663) and the "MVRA" (3663A)? Little if anything, but more courts use this terminology for the statutes, not the legislative Acts. See, e.g., *U.S. v. Hosking*, 567 F.3d 329, 332 n. 2 (7th Cir. 2009); *U.S. v. Edwards*, 595 F.3d 1004, 1014 (9th Cir. 2010); *U.S. v. Doering*, 759 F.3d 862 (8th Cir. 2014).

When does an offense involve fraud or deceit? See, e.g., *U.S. v. Battista*, 575 F.3d 226, 234 n. 7 (2d Cir. 2009) (corrupt NBA official).

Guideline loss compared to Restitution loss? See, e.g., *U.S. v. Farano*, 749 F.3d 658 (7th Cir. 2014); *U.S. v. Certified Environmental Services, Inc.*, 753 F.3d 72, 102 (2d Cir. 2014).

Court cannot offset Restitution for forfeited property: See, e.g., *U.S. v. Joseph*, 743 F.3d 1350, 1355 (11th Cir. 2014).

Defendant's compensation as property loss to victim-employer: See, e.g., U.S. v. Bahel, 662 F.3d 610, 647 (2d Cir. 2011).

5. Procedural issues:

When is the record sufficient to support a court's estimation of R? See, e.g., U.S. v. Baldwin, 774 F.3d 711, 728 (11th Cir. 2014). See also, U.S. v. Seignious, 757 F.3d 155 (4th Cir. 2014) (Upheld on plain error review because the record was sufficient, despite court made no findings on record regarding actual losses to specific victims that were indicated on a sealed worksheet).

When will the plea agreement support restitution to non-victims per statutory exception? See, e.g., U.S. v. Doering, 759 F.3d 862 (8th Cir. 2014).

Is 18 U.S.C. §3664(o) the exclusive listing of post-sentencing changes to a restitution order? See, e.g., U.S. v. Wyss, 744 F.3d 1214 (10th Cir. 2014).

Can a victim speak to the court in the absence of defense counsel? See, e.g., U.S. v. Yamashiro, 788 F.3d 1231 (9th Cir. 2015).

Is a judgment deferring restitution final for appeal purposes of the other parts of the sentence? See, e.g., U.S. v. Muzio, 757 F.3d 1243 (11th Cir. 2014) (J. Tjoflat dissented).

6. Victim CVRA petitions under 18 USC 3771:

See, e.g., *In re Her Majesty the Queen in Right of Canada*, 785 F.3d 1273 (9th Cir. 2015) (petition by Canada denied because Canada was a victim of a scheme that was different from, but which proceeded parallel to, and was similar to, the scheme underlying the defendant's conviction of fraudulent obtaining fuel credits under the Clean Air Act).