

2016
Annual National
Seminar

Restitution Tips: Statutes & Guidelines, Procedural Issues, and Common Mistakes

The need to provide restitution to any victims of the offense is one of the seven factors a judge must consider in imposing a sentence (18 U.S.C. § 3553(a)(7)). Restitution is governed primarily by statutes. In the last few years, circuit courts have remanded restitution orders for a variety of reasons. This document highlights the key federal statutes and guidelines governing restitution as well as recent cases addressing these issues.

Main Statutes & Guidelines

18 U.S.C. § 3663A
(Mandatory Victim Restitution Act)

18 U.S.C. § 3663
(Discretionary Restitution Act)

18 U.S.C. § 3664
(Procedures for enforcement of Restitution)

18 U.S.C. § 2259
(Mandatory Restitution in Sex Offenses)

18 U.S.C. § 3583 (e)
(Condition of Supervised Release)

§5E1.1
(Restitution)

Time to Order Restitution

90 day deadline to order restitution.

Exception to 90 days: If the court makes clear to parties before the deadline that it intends to order restitution.

Amount of Restitution

Court shall order restitution to each victim in the full amount of each victim's losses determined by the court and without consideration of the defendant's ability to pay.

A court considers the defendant's financial circumstances only in specifying the manner and schedule of payment, not in deciding how much restitution to order (18 U.S.C. § 3664(f)(1)(A)).

A restitution order may direct the defendant to make a single lump-sum payment, partial payments at specified intervals, in kind payments, or a combination.

Court - not the probation officer - must determine the payment schedule.

Practice Pointers

Do not rely on loss calculation under the guidelines to determine restitution.

Generally, the court cannot rely on relevant conduct to determine restitution.

Determine when a defendant has joined a conspiracy.

Determine who is a "victim" for purposes of restitution.

The parties may agree to restitution in a plea agreement.

Of Note

Courts may order restitution as a condition of probation or supervised release even if not required under the MVRA. This also applies to offenses under Title 26 (*e.g.* tax offenses).

The government can continue to collect restitution even after the period of supervised release has expired.

In a case that has as an element a scheme, conspiracy, or pattern of activity, restitution can be imposed for victims not in the indictment so long as they are victims of the scheme of which defendant is convicted, and the charge describes the nature and duration of the scheme.

The statute sets a 90 day deadline to order restitution (see 18 U.S.C. § 3664(d)(5)) but there is an exception: *U.S. v. Dolan*, 130 S. Ct 2533 (2010) "A sentencing court that misses the 90-day deadline nonetheless retains the power to order restitution – at least where, as here, the sentencing court made clear prior to the deadline's expiration that it would order restitution, leaving open (for more than 90 days) only the amount."

