

2017
National
Seminar

Economic Crimes: Restitution

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. The Sentencing Guidelines' statement on restitution is found at §5E1.1.

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)
(Conditions of Supervised Release)

§5E1.1
(Restitution)

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.

Restitution can be imposed for victims in a case that has as an element a scheme, conspiracy, or pattern of activity, 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.”

General Principles

- Loss for the guidelines is not the same as restitution (exception for scheme, conspiracy, or pattern charged as such)
- Restitution does not include relevant conduct
- The purpose of restitution is to make the victim whole
- A victim is one who was directly and proximately harmed by the offense of conviction, and may include the government
- The parties may agree to more restitution in a plea agreement, which must be specifically worded
- Restitution may be ordered as a condition of Supervised Release
- 18 U.S.C. § 3664(d)(5) contains a 90-day deadline for ordering restitution
- Court may take longer than 90 days to determine the amount of restitution
- The defendant’s inability to pay is irrelevant to the restitution amount. 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))
- The Court (not the probation officer) sets the payment plan
- In the case of jointly undertaken criminal activity, the Court may apportion restitution or deem defendants jointly and severally liable



Common Restitution Pitfalls

- Insufficient factual finding
- Including losses outside of the offense of conviction, either for victims not harmed in the counts of conviction, or losses not caused by the offense of conviction
- In a conspiracy case, holding an individual liable for all losses caused by the conspiracy
- Awarding restitution to “non-victims”
- Not setting a payment schedule
- Failing to offset, or improperly offsetting, restitution award using forfeiture, value of services, recovered losses, etc.

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Loss Calculation	Restitution
Loss in a copyright/trademark infringement case is the retail value of the items times the number of items	Must be based on actual, provable loss to a victim of the offense of conviction
Gain may be used as an alternative measure of loss if loss cannot reasonably be determined	A defendant's gain cannot be used as a proxy for actual loss. If actual is too complex to determine, the court can decline to order it
Loss is the greater of actual or intended loss	Intended loss cannot be used
In a conspiracy case, may not include loss caused before the defendant joined	In a conspiracy case, may not include loss caused before the defendant joined
Generally intended to measure offense severity and offender culpability	The principle aim is to ensure that crime victims are made whole for their losses
An incorrect loss calculation is procedural error but may be harmless on appeal	A restitution award in an amount that exceeds actual loss is, in some circuits, an illegal sentence constituting plain error on appeal
The offense, for loss purposes, includes "all reasonably foreseeable acts and omissions of others in furtherance of [any] jointly undertaken criminal activity."	In a jointly undertaken criminal activity, the district court may apportion the full amount of restitution among multiple defendants "to reflect the level of contribution to the victim's loss and economic circumstances of the defendant."
Costs incurred by victims to aid the government in the prosecution and criminal investigation are excluded from loss calculation	Restitution can include reasonable costs, fees, and penalties
Special rules govern specific types of fraud offenses, for example loss in federal procurement cases	Calculation of restitution is consistent across case types – making the victim whole is the driving principle
Relevant conduct, which can include conduct outside the offense of conviction, is used to calculate loss	"Congress intended restitution to be precisely tied to the loss caused by the offense of conviction. Examination of the conduct constituting the commission of a crime only involves consideration of the conduct to which the defendant pled guilty and nothing else."
Unless in a binding plea agreement, the Court is not bound by the parties' calculation of loss before sentencing, even if uncontested	If a defendant explicitly agrees to pay restitution to victims outside the offense of conviction, the Court should impose it unless there is some independent reason not to (such as undue complication)
Loss under §2B1.1 does not require more than an estimate	Restitution requires an exact figure
Loss includes relevant conduct	The MVRA does not contemplate relevant conduct, but does require that "in a case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity" restitution for any person "directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern"
Should be reduced to account for money the victim received from the sale of collateral	Should be reduced to account for money the victim received from the sale of collateral
The causation requirement for loss calculation requires that the court take into account intervening events contributing to the loss, unless those events were reasonably foreseeable to the defendant	The causation requirement for restitution requires that the court take into account intervening events contributing to the loss, unless those events were reasonably foreseeable to the defendant
Bare assertions in the PSR without more, are insufficient evidence to prove loss	Bare assertions in the PSR without more, are insufficient evidence to prove restitution
The measure of loss to a downstream lender is "the difference between what the successor lender paid for the loan and the proceeds obtained from payments and sale of collateral"	Restitution requires determining which lenders in the chain of title suffered what loss. "If the victim only paid a fraction of [the principle amount] to obtain the loan on the secondary market" return of the principle amount to the victim would be a windfall
Victim - Guidelines	Victim - Restitution
§2B1.1, App. Note 1 - Victim means (A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense. Person includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.	A victim is a person proximately harmed as result of the commission of the offense
§2B1.1, App. Note 4(E) - Cases Involving Means of Identification.—For purposes of subsection (b)(2), in a case involving means of identification "victim" means (i) any victim as defined in Application Note 1; or (ii) any individual whose means of identification was used unlawfully or without authority.	

