The Imposition of Restitution in Federal Criminal Cases

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(with table of cases and practice addendum added)

The issues surrounding the imposition and collection of restitution in federal criminal cases generate an increasing number of questions from probation officers, and consistently fuel a significant amount of litigation. Three previous articles on restitution have appeared in this column (1989,[1] 1990,[2] and 1992[3]), but the issues previously discussed are primarily still active and largely unresolved,[4] and new issues have arisen with subsequent amendments to the federal statutes in 1994 and, especially, in 1996. The Office of General Counsel receives a significant number of questions regarding both the imposition and enforcement of restitution orders, and the intent of this article is to review case law and to suggest a series of steps that might be helpful for officers involved in making recommendations on the imposition of restitution.

Probation officers are advised to note both the legal principles described, and the cases cited in the text as well as the notes. Cases from an officer's circuit are naturally helpful, but so are other cases, where the facts or issues are similar to the case before the officer's court. For this reason, brief factual summaries are often provided for cases in the text and notes. However, there is no substitute for a direct review of a case itself, when determining if it is helpful. While it might be helpful to use appropriate case law to support certain points, officers should be careful not to rely on cases with significantly different fact patterns, because many restitution issues are extremely fact-specific. For this reason, a case in another circuit, but with facts similar to those in the case before the court, probably provides more assistance to the court than one with dissimilar facts in the same circuit as the sentencing court. Also, the officer needs to be aware of whether a different form of a restitution statute was used in a particular case than that which applies to the case before the court. This is especially important given the numerous changes made to the restitution statutes during the 1990's.

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[1]"Looking at the Law," Adair, *Federal Probation*, May 1989, pp. 85-88, discussed early cases on a defendant's ability to pay - and whether restitution orders can be subsequently modified - two still active issues.

[2]"Looking at the Law," Adair, *Federal Probation*, September 1990, pp. 66-71, primarily discussed the Supreme Court case of Hughey, infra.

[3]"Looking at the Law," Adair, *Federal Probation*, December 1992, pp. 68-72, discussed the aftermath of Hughey, infra, as well as the issues raised by the 1990 statutory amendments on conspiracies or schemes and plea agreements.

[4]A helpful memorandum was sent to all probation officers dated September 1, 1995, by the Administrative Office of the United States Courts, titled "Update to Probation Officers on the Imposition and Collection of Fines and Restitution." It will be updated in future months, in light of subsequent legislation, and will contain a discussion and case law on restitution issues beyond the scope of this article, such as the consideration of a defendant's ability to pay in imposing discretionary restitution, in setting payment schedules, , and in enforcing restitution orders.

This article proposes a 4-step analysis to help probation officers determine the victims of, and compensable losses incurred from, an offense for restitution purposes. Those steps involve 1) the determination of whether restitution is mandatory or discretionary, 2) the identification of victims of the offense, 3) the determination of victim's harms caused by the offense, and 4) the determination of which of those harms are compensable as restitution. The article then briefly reviews the ways in which the statute allows certain plea agreement provisions to affect the imposition of restitution.

I. The History of Restitution in Federal Criminal Cases

> *"The principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time. It holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also insure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well being."*[5]

Putting this simple principle into practice in federal criminal cases is far easier to contemplate than to achieve. Despite the universally recognized benefits of restitution, a federal sentencing court has no inherent authority to order restitution. Rather, the court's authority stems purely from statutory sources. In fact, until 1982 restitution could not be imposed as a separate component of a federal criminal sentence, but only as a condition of probation pursuant to the Federal Probation Act of 1925 (FPA),[6] and was completely within the discretion of the court. By 1982, Congress wanted to give courts authority to impose restitution other than merely as a condition of probation,[7] and passed the Victim Witness Protection Act of 1982 (VWPA),[8] now codified at 18 U.S.C. §§ 3663-3664. The VWPA, as amended, is the primary statutory source for restitution as a separate component of a federal sentence. This is confirmed by the sentencing guidelines, which provide that the court is to "enter a restitution order if such order is authorized under 18 U.S.C. §§ 3663-3664."[9]

Thus, the VWPA ultimately determines the court's authority to issue a restitution order in a federal criminal case. The scope of this statutory restitution was clarified in 1990 in Hughey v. U.S., in which the Supreme Court held that the language of the VWPA, which authorizes courts to compensate

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[5]U.S. v. Webb, 30 F.3d 687, 689 (6th Cir. 1994) (citing legislative history of the VWPA, S.Rep. No. 532, 97th Cong., 2nd Sess. 1, 30 (1982), reprinted in 1982 U.S.C.C.A.N. 2515, 2536.

[6]Codified at 18 U.S.C. § 3651-3656, repealed November 1, 1987.

[7]Senate Judiciary Report for the VWPA: "As simple as the principle of restitution is, it lost its priority status in the sentencing procedures of our federal courts long ago. Under current law, 18 U.S.C. § 3651, the court may order restitution for actual damage or loss, but only as a part of a probationary sentence." S.Rep. No. 532, 97th Cong., 2nd Sess. 1 (1982) *reprinted in* 1982 U.S.C.C.A.N. 2515.

[8]Pub. L. No. 97-291, 96 Stat. 1248 (1982), originally codified at §§ 3579, 3580.

[9]U.S.S.G. §5E1.1(a)(1).

victims "harmed as a result of the offense" (emphasis added),[10] limits restitution to "the loss caused by the specific conduct that is the basis of the offense of conviction."[11] Ever since the "Hughey limitation," however, Congress has steadily expanded restitution, and has recently made restitution mandatory in most cases.

In 1990, as a response to Hughey, Congress passed amendments to the VWPA[12] which slightly broadened restitution by expanding the scope of the offense for restitution purposes. The amendments did not, however, change the fact that restitution under the VWPA is limited to the offense of conviction. One 1990 amendment authorized courts to impose restitution to victims directly harmed by the defendant's criminal conduct within a scheme, conspiracy, or pattern of conduct, so long as the scheme, conspiracy, or pattern is an element of the offense of conviction.[13] Another 1990 amendment authorized the court to order restitution as agreed by the parties in the plea agreement.[14] When and how these amendments can be applied is still being litigated, to some extent.

In 1992, Congress enacted the first mandatory restitution provision, the Child Support Recovery Act (CSRA).[15] In 1994 it passed the Violence Against Women Act,[16] which added mandatory restitution for four specific offenses in title 18.[17] The VWPA was also amended to authorize reimbursement to victims for expenses involved in participating in the investigation and prosecution of the case.[18] Finally, on April 24, 1996, Congress significantly amended the VWPA by passing the Mandatory Victims Restitution Act of 1996 (MVRA).[19] The MVRA added § 3663A, which now requires mandatory restitution for certain offenses, such as crimes of violence and title 18 property offenses. The MVRA also expanded discretionary restitution by creating "community restitution" for

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[10]§ 3663A(a)(2). An identical provision was later added for mandatory restitution at § 3663A(a)(2).

[11]495 U.S. 411, 413 (1990).

[12]Crime Control Act of 1990 (Pub. L. No. 101-647, 101 Stat. 4863, Nov. 29, 1990).

[13]§ 3663(a)(2). An identical provision was later added for mandatory restitution at § 3663A(a)(2).

[14]§§ 3663(a)(3) and 3663(a)(1)(A). In 1996 § 3663A(3) (identical to § 3663(a)(3)) was added for mandatory restitution.

[15]Pub. L. No. 102-521, 106 Stat. 340 (1992), codified at 18 U.S.C. § 228. The Act mandated that courts impose restitution (of child support payments due) in all convictions of willful failure to pay past due child support.

[16]The Act was part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1904 (1994).

[17]Sexual abuse (§ 2241-2245; restitution at § 2248); sexual exploitation of children (§ 2251-2258; restitution at § 2259); domestic violence (§ 2261-2262; restitution at § 2264); and telemarketing fraud (§ 1028-1029 and § 1341-1345; restitution at § 2327).

[18]§ 3663(b)(4). An identical provision was added in 1996 for mandatory restitution at § 3663A(b)(4).

[19]Title II of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), effective April 24, 1996.

victimless drug offenses in § 3663(c). The MVRA potentially broadened the definition of "victim" for both discretionary and (the new) mandatory restitution, by changing "victim of the offense" to "person directly and proximately harmed as a result of the commission of an offense."[20] It is not known yet whether courts will interpret "directly and proximately" as slightly expanding the imposition of restitution or not, but restitution will presumably still be limited primarily to the "offense" of conviction. Finally, the MVRA strengthened the imposition and enforcement provisions at § 3664 for all restitution orders.

Ex Post Facto Issues. After each amendment to the VWPA, the circuits disagreed among themselves whether the amendment could be applied to offenses committed prior to its enactment without violating the *ex post facto* clause of the U.S. Constitution.[21] While this issue is no longer frequently encountered regarding earlier amendments, it is currently being litigated regarding the MVRA. Our office and the Department of Justice have advised that the procedural portions of the MVRA are applicable, as indicated in the Act,[22] to convictions entered after its enactment. However, the substantive provisions -- those that cause the restitution amount to be higher or that convert discretionary to mandatory imposition -- are only applicable to offenses completed on or after the date of the Act (April 24, 1996).

Most courts that have considered the issue have agreed that the substantive provisions of the MVRA are subject to *ex post facto* constraints.[23] Further, two courts have held that, where the offense continued past the date of the MVRA, restitution may be based on pre-Act conduct as well as the post-Act conduct.[24] However, the Seventh Circuit has held that the *ex post facto* restriction does not apply to the MVRA because restitution is not a criminal penalty.[25] On the same rationale, the Eighth Circuit held that repayment of child support under the CSRA (18 U.S.C. § 228) is not subject to

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[20]See § 3663A(a)(2) for mandatory restitution, and § 3663(a)(2) for discretionary restitution. Everything about the MVRA indicates that Congress intended to expand restitution, but courts have not yet analyzed what effect, if any, these particular terms might have.

[21]This clause, at Article 1, § 9, clause 3, has been interpreted to prohibit the application of a law which increases the primary penalty for conduct after its commission.

[22]The MVRA states that it "shall, to the extent constitutionally permissible, be effective for sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment" (April 24, 1996).

[23] U.S. v. Williams, 128 F.3d 1239 (8th Cir. 1997); U.S. v. Baggett, 125 F.3d 1319 (9th Cir. 1997); U.S. v. Siegel, 153 F.3d 1256 (11th Cir. 1998); U.S. v. Thompson, 113 F.3d 13, 15 n.1 (2d Cir. 1997) (in *dictum*); and U.S. v. Edwards, 162 F.3d 87 (3d Cir. 1998).

[24]Williams, supra. See also, U.S. v. Jackson, (unpub.) 149 F.3d 1185 (table), 1998 WL 344041 at 2 (6th Cir. (Ky.)).

[25]U.S. v. Newman, 144 F.3d 531 (7th Cir. 1998). Also, the Sixth Circuit, in an unpublished opinion, held that the MVRA is not subject to the *ex post facto* constraints because the same award could be imposed as discretionary restitution. U.S. v. Ledford (unpub.) 127 F.3d 1103, 1997 WL 659673 (6th Cir. 1997) (Note: unpublished cases are not citable for authority; also, the result here might be different under other facts.)

ex post facto considerations.[26]

II. The Determination of Victims and Compensable Harms for Restitution

Restitution requires a different analysis than other sentencing considerations under the guidelines, with which courts have more frequent experience. This, combined with the many changes to the restitution statutes, have lead to much litigation and numerous reversals of restitution orders.[27] Moreover, relatively few defendants have the financial resources to pay restitution.[28] Therefore, it is important that restitution orders be well founded and enforceable wherever possible. This article suggests four steps that would be useful to probation officers in determining what restitution should and can be recommended:

1) *Step One:* Determine whether restitution is discretionary or mandatory;
2) *Step Two:* Identify the victims of the offense of conviction;
3) *Step Three:* Identify the harms to those victims caused by the offense of conviction; and
4) *Step Four:* Identify those harms that are compensable as restitution.

It is important that these steps be followed in sequence, particularly with regard to identifying victims *before* considering harms, in order to avoid considering harms to persons who are not victims of the offense of conviction, as required by the VWPA. It is a process of elimination, or narrowing, beginning with the scope of the offense of conviction as the outside limit for victim identification, with each step narrowing the focus eventually to harms that are compensable as restitution.

A. *Step One*: Determine Whether Restitution is Mandatory or Discretionary

The first step is to determine whether restitution is mandatory or discretionary in any particular case, because there are significant differences between the two that impact on the determination of restitution. Restitution is mandatory for those kinds of offenses listed in § 3663A(c), in which an identifiable victim has suffered a physical injury or economic loss.[29] It is also mandatory for a few

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[26]U.S. v. Crawford, 115 F.3d 1397, 1403 (8th Cir.), cert denied (1997).

[27]Interestingly, few if any courts have been reversed on appeal for not imposing restitution, which indicates courts' efforts to compensate victims of crime. Of the few cases to which the MVRA applies,there still have been no reversals of courts' failure to impose restitution.

[28]Both a fine and restitution are mandated by the guidelines, to the extent of a defendant's ability to pay. U.S.S.G. §§ 5E1.1 and 5E1.2. Yet, in FY 1997, both restitution and a fine were imposed in only 2.3% of federal cases, restitution only was imposed in 17.5%, and a fine only was imposed in 16.4%. Thus, in 63.9% of federal criminal cases there was no financial penalty imposed.

[29]§ 3663A(a)(1) provides that the court "shall" order restitution for those offenses listed in § 3663A(c), "notwithstanding any other provision of law..." The listed offenses are crimes of violence (defined in 18 U.S.C. § 16), title 18 property offenses, and tampering with consumer products (18 U.S.C. § 1365).

specific title 18 offenses.[30] The vast majority of federal offenses with identifiable victims now require mandatory restitution. After imposing full restitution, the court can consider the defendant's ability to pay in setting the payment schedule.[31] The one statutory exception to the imposition of mandatory restitution in the specified offenses applies only to title 18 property offenses, where the number of identifiable victims is so large that restitution is impracticable, or where complex factual issues would complicate or prolong sentencing and outweigh the need to impose restitution.[32]

However, restitution is still discretionary for those offenses listed in section 3663(a)(1)(A),[33] which include any other title 18 offenses not specified in § 3663A,[34] drug offenses with or without identifiable victims, and title 49 air piracy offenses. It is also still discretionary when imposed solely as a condition of supervision. In deciding whether to impose discretionary restitution, the court must consider not only the harm to the victim(s), but also the defendant's present and future ability to pay the restitution (to be discussed in a future memorandum) and "such other factors as the court deems appropriate."[35]

The exceptions to imposing discretionary restitution are broader than those applicable to mandatory restitution, and apply in *any* discretionary restitution case. These include: if the defendant cannot pay the restitution,[36] if the determination would unduly complicate or prolong the sentencing,[37] or if the restitution would likely interfere with forfeiture.[38] However, it is arguable, although yet-untested, that once the court decides to impose discretionary restitution, it must impose the full amount, based on § 3664(f)(1)(A), added by the MVRA, which states, *"In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the*

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[30]See statutes listed at note 17, supra.

[31]§ 3664(f)(3)(B).

[32]§ 3663A(c)(3).

[33]Discretionary restitution applies to a title 18 conspiracy (§ 371) to commit a non-title 18 offense. Thus, while title 26 tax offenses are not covered, a title 18 conspiracy to commit such an offense would allow a court to impose restitution under the VWPA. See e.g., U.S. v. Helmsley, 941 F.2d 71, 101 (2d Cir. 1991), cert denied, 112 S.Ct. 1162 (1992).

[34]§§ 3563(b)(2) (for probation), 3583(d) (for supervised release). Such restitution is still subject to the criteria of the VWPA involving victims and harms. See, Gall v. U.S., 21 F.3d 107 (6th Cir. 1994). However, such orders are rare, and although they might be more easily changed, as a condition, it is unclear whether they would survive the period of supervision.

[35]§ 3663(a)(1)(B). While performing this balancing test, the court must also remain faithful to the purposes of sentencing. U.S. v. Lampien, 89 F.3d 1316, 1323 (7th Cir. 1996).

[36]§ 3663(a)(1)(B)(i).

[37]§ 3663(a)(1)(B)(ii).

[38]§ 3663(c)(4).

court and without consideration of the economic circumstances of the defendant." Also, a preference for full restitution may be inferred from the fact that, if a court does not order restitution, or only orders partial restitution, it must include reasons in the Statement of Reasons, pursuant to § 3553(c).

B. *Step Two*: Identify the Victims of the Offense of Conviction

The government has the burden of proving the harm suffered by the victims for restitution purposes by a preponderance of the evidence.[39] Any dispute as to the proper amount or type of restitution is also resolved by the court by a preponderance of the evidence.[40] The determination of harm for restitution purposes must begin with the identification of the victims, to avoid including harm to persons other than to victims of the offense of conviction.

1. Scope of the Offense. The most important thing for probation officers to remember regarding restitution is that the scope of the offense for restitution victims is narrower than that for relevant conduct under the sentencing guidelines. Despite the changes to the VWPA in the last decade, the basic rule announced in Hughey, that restitution is only authorized for victims of the offense of conviction, remains intact. In fact, the rule could be said to have been fortified by the fact that, in subsequent amendments to the VWPA, Congress has chosen not to change the language of the VWPA that focuses on the "offense of conviction" for restitution purposes.[41] The "loss caused by the conduct underlying the offense of conviction establishes the outer limits of a restitution order."[42]

Therefore, a restitution determination begins with an examination of the scope of the offense of conviction. For example, a bank robbery includes acts in furtherance of taking property belonging to the bank from a person, by force or violence. It does not, however, include car theft that might have been committed in preparation for the robbery, although the car theft may be part of relevant conduct for guideline purposes.[43] Victims for restitution purposes are only those who are harmed by the

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[39]§ 3664(e); U.S. v. Angelica, 951 F.2d 1007, 1010 (9th Cir. 1991).

[40]§ 3664(e).

[41]Noted in Gall v. US, 21 F.3d 107, 112 (6th Cir. 1994) (conc. op. by J. Jones). For both discretionary and mandatory restitution, a victim is a "person. . . harmed as a result of the offense." §§ 3663A(a)(2) and 3663(a)(2).

[42]U.S. v. Welsand, 23 F.3d 205, 207 (8th Cir. 1994) (citing Hughey, supra, 495 U.S. at 420); see also, U.S. v. Baker, 25 F.3d 1452, 1457 (9th Cir. 1994).

[43]Note, however, that restitution can also sometimes be broader than relevant conduct. For example, restitution can include some compensable harms that are generally not computed in relevant conduct, such as costs of medical, psychological, or physical treatment or therapy and funeral expenses where there has been a physical injury or death, and victims' costs of participating in the investigation and prosecution of the case. Also, restitution can be increased after sentencing with the discovery of new losses, and some special restitution statutes (e.g., § 2264, domestic violence) allow compensation for "all harms," which might be even broader than relevant conduct. Finally,

conduct of the offense of conviction. "The definition of victim provided in [the VWPA] is much narrower than the one in the guidelines, and it is § 3663 - not the guidelines - that governs the authority of a sentencing court to require restitution."[44] The guidelines define "offense" as "the offense of conviction and all relevant conduct under §1B1.3,"[45] and relevant conduct includes acts committed in preparation for, or in avoidance of detection of, the offense, and foreseeable, jointly undertaken acts of others. Moreover, computation of "loss" in economic crimes for guideline sentencing can be based on such factors as gain to the defendant or intended loss; these are generally not included in computing harm for restitution purposes, although gain can sometimes indicate what portion of a larger loss is attributable to a defendant.[46] Restitution is most comparable to unrecovered, actual loss.[47] Where courts rely on relevant conduct to determine restitution, the restitution order is often vacated on appeal.[48]

Appellate courts have been very conservative in identifying victims of the offense for restitution. For example, in U.S. v. McArthur,[49] the defendant shot someone coming out of a bar, and was charged with violating § 924(c) and with possessing a firearm unlawfully. He was acquitted of the § 924(c) offense, but convicted of the possession charge, and the court ordered restitution for medical costs to the victim of the shooting. But the order was vacated because the Eleventh Circuit held there could be no victim of a mere possession charge.[50] Similarly, in U.S. v. Cobbs,[51] the defendant was convicted of possessing 89 unauthorized credit cards and of using one card, and the court imposed restitution for the use of all the cards. However, the Eleventh Circuit vacated the restitution order, holding that there was no loss from the conviction for possessing the cards, and only the count of using

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sometimes parties can agree to broader restitution than could otherwise be ordered, as discussed below.

[44]U.S. v. Blake, 81 F.3d 498, 506 n.5 (4th Cir. 1996) (J. Wilkins).

[45]U.S.S.G. §1B1.1, comment. (n.1(l)).

[46]See, e.g., U.S. v. Berardini, 112 F.3d 606 (2d Cir. 1997), where the telemarketing conspiracy caused $27 million loss, but, because the defendant gained $39,271 during his participation in the conspiracy, that figure was used (and agreed to) by the defendant for restitution purposes. The issue on appeal involved whether the court could impose restitution to yet-unlocated victims, as discussed below.

[47]See, e.g., U.S. v. Jimenez, 77 F.3d 95 (5th Cir. 1996) (holding that while gain to a defendant is sufficient to show intent to defraud, the VWPA requires a real or actual loss to the victim); U.S. v. Badaracco, 954 F.2d 928 (3d Cir. 1992).

[48]See, e.g., U.S. v. Stoddard, 150 F.3d 1140 (9th Cir. 1998); U.S. v. Jimenez, 77 F.3d 95 (5th Cir. 1996).

[49]108 F.3d 1350 (11th Cir. 1997).

[50]The court may have been reluctant to consider the shooting because of the acquittal. (Also, the result may have been different if the alleged date and time of possession had clearly included the time of the shooting. See discussion in Hayes, infra, 32 F.3d at 172-3, discussed below.) But a shooting victim *is* a victim of a felon in possession charge for guideline purposes. See United States v. Kuban, 94 F.3d 971 (5th Cir. 1996).

[51]967 F.2d 1555 (11th Cir. 1992).

the one card could support restitution. There have been two similar cases in the Fifth Circuit involving credit cards, as well.[52] And, in the Fourth Circuit, in U.S. v. Broughton-Jones,[53] where the defendant was convicted of lying to the grand jury about a fraud transaction, the court rejected the government's argument that the fraud conduct was inextricably intertwined with the perjury conviction, and vacated a restitution order to the fraud victim. The court noted that, while it is conceivable for there to be a victim of perjury (e.g., where the perjury had the effect of delaying government efforts to recover stolen or defrauded money), in this case the fraud victim was not a victim of the perjury.[54]

Another Fourth Circuit case, U.S. v. Blake,[55] provides an excellent illustration of the difference between determining victims for guideline sentencing and for restitution. The defendant was convicted of using stolen credit cards, and he admitted he had targeted elderly women in order to take their purses and use their cards. The sentencing court imposed the vulnerable victim guideline enhancement, and ordered restitution for both the use of the cards, and the cost to the elderly women for replacing their purses and wallets. The defendant appealed, claiming the elderly women were not victims for either guidelines or restitution purposes. The court upheld the vulnerable victim enhancement, because the guidelines broadly define an offense as "an offense of conviction and all relevant conduct."[56] This would include conduct "in preparation" for the offense, such as the targeting of the elderly women. However, the court vacated the portion of the restitution order for the cost of the women's purses and wallets, even though it believed the result to be "poor sentencing policy." The elderly women were not "victims" of the offense of "using" the credit cards, for restitution purposes.[57]

2. Who Can Be a Victim? The VWPA refers to victims as "persons." However, "person" is defined in the federal code to "include . . . unless the context indicates otherwise . . . corporations,

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[52]U.S. v. Jimenez, 77 F.3d 95 (5th Cir. 1996) and U.S. v. Hayes, 32 F.3d 171 (5th Cir. 1994). In Hayes, the defendant was convicted of possessing stolen mail (credit cards), and a restitution order for use of the cards was vacated. The court, in dicta, said one factor it considered was that the offense of conviction (possession) did not include the dates on which the card was used, implying that if the use-dates had been included, the court may have reached a different result. Id. At 172-3. (The 1990 scheme/conspiracy provision was not discussed.)

[53]71 F.3d 1143 (4th Cir. 1995).

[54]Id. at 1149 and n.3.

[55]81 F.3d 498 (4th Cir. 1996).

[56]U.S.S.G. §1B1.1, citing §1B1.3.

[57]Id. at 506. The Fourth Circuit has recently clarified that in Blake any pattern or scheme was not "specifically included" as an element of the offense of conviction (see discussion below). United States v. Sadler, (unpub.), 1998 WL 613821. It should be noted that there are a few cases where courts, sometimes using a heightened standard due to a lack of objection at sentencing, have allowed restitution to victims apparently beyond the offense. See, e.g., U.S. v. Moore, 127 F.3d 635 (7th Cir. 1997), in which the defendant was convicted of possession of unauthorized or counterfeit credit cards, and a restitution order to vendors for the use of the cards was upheld, using a "plain error" standard on appeal.

companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals,"[58] and restitution has frequently been ordered for such entities.[59] Although the government is not mentioned in the code definition, the context of the VWPA indicates the government can be a victim. For example, the statute directs that the government receives payment when it is a victim after individual victims are paid.[60] The government has frequently been awarded restitution in criminal cases.[61]

Victims may receive restitution even if not named in the indictment, and even where other victims are so named. For example, the mother of a kidnapping victim could receive restitution for her lost wages.[62] The victim can be a successor in interest, such as a government agency that insured the victim bank's accounts.[63] The right to restitution can be assigned by the victim to another party, such as a secured creditor, who may have actually suffered the loss.[64] However, the victim cannot waive restitution because it is not solely a right of the victim. Thus, restitution generally is not limited by a civil suit or settlement agreement.[65] There can be more than one victim of an offense, and sometimes one victim suffers direct harms while another suffers more indirect harms from the offense. For example, when a company pays bonuses to its employees based on a defendant's submission of false financial statements to a bank, the bank *and* the company are both victims of the offense.[66] Similarly, a court

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[58]1 U.S.C. § 1.

[59]The following courts are among those that have refuted early claims that restitution under the VWPA could not be awarded to entities other than persons: U.S. v. Kirkland, 853 F.2d 1243 (5th Cir. 1988); U.S. v. Youpee, 836 F.2d 1181 (9th Cir. 1988); U.S. v. Dudley, 739 F.2d 175 (4th Cir. 1984).

[60]§ 3664(i).

[61]See, e.g., U.S. v. Malpeso, 115 F.3d 155 (2d Cir. 1997); U.S. v. Reese, 998 F.2d 1275 (5th Cir. 1993); Ratliff v. U.S., 999 F.2d 1023 (6th Cir. 1993); U.S. v. Daddato, 996 F.2d 903 (7th Cir. 1993); U.S. v. Jackson, 982 F.2d 1279 (9th Cir. 1992) (IRS); U.S. v. Ruffen, 780 F.2d 1493 (9th Cir. 1986), cert denied, 479 U.S. 963; U.S. v. Helmsley, 941 F.2d 71 (2d Cir. 1991) (IRS); and U.S. v. Burger, 964 F.2d 1065, 1071 (10th Cir. 1992) (FDIC and RTC).

[62]In U.S. v. Haggard, 41 F.3d 1320 (9th Cir. 1994), the court noted that nothing in the VWPA restricts the availability of restitution to the victim specified in the offense of conviction, and that in a case such as this, "in which a defendant deliberately targets an unsuspecting family as the victim of his crimes, the defendant may be held to answer for the family's loss of income" in keeping with the Hughey rule that the loss must have been caused by the offense of conviction. Id. at 1329 and n.6.

[63]U.S. v. Smith, 944 F.2d 618 (9th Cir. 1991), cert denied, 503 U.S. 951.

[64]In U.S. v. Berman, 21 F.3d 753 (7th Cir. 1994), a government agency was a secured creditor of the direct victim organization. The court found that a victim can assign the right of restitution to anyone he or she wants. Id. at 758.

[65]United States v. Cloud, 872 F.2d 846 (9th Cir. 1989), cert denied, 493 U.S. 1002 (1989) (civil settlement between the victim and the defendant does not limit restitution); United States v. Savoie, 985 F.2d 612 (1st Cir. 1993). However, the victim would not be compensated twice; rather, the defendant could be ordered to pay whoever compensated the victim. §§ 3664(j)(1) and (2).

[66]Kok v. U.S., 17 F.3d 247 (8th Cir. 1994).

may order restitution to a third party that compensates the victim for loss caused by the defendant,[67] although such a provider is to receive payment after all other victims are paid, pursuant to § 3664(j)(1). The defendant has the burden of establishing any offset from restitution that, for example, the victim received in a civil suit for the "same loss" that is the subject of restitution.[68]

Sometimes questions arise regarding how specific the court must be in naming victims in the judgment. One instructive case is U.S. v. Seligsohn,[69] in which the Fifth Circuit upheld restitution to the Internal Revenue Service, insurance companies, union benefit funds, and numerous individual homeowners, who were all victimized by the defendant. The court said, where the victims are numerous and difficult to identify, the sentencing court should name whatever victims it can, and otherwise describe or define the victim class specifically enough to provide appropriate guidance to the government in identifying them.[70] In U.S. v. Berardini, the First Circuit upheld a restitution order that included (unnamed) victims that were identified but not yet located by the time of sentencing, and for whom a fund was to be maintained by the Clerk of the Court for the 20-year term of enforcement, in case the victims came forward.[71]

3. Conspiracies and Schemes. One of the 1990 amendments to the VWPA expanded the definition of victim, which could also be viewed as broadening the scope of the offense of conviction, to include, *"in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern."*[72] While two circuits had already interpreted the offense of conviction under the VWPA to include the conspiracy or scheme of which it was a part,[73] most circuits had not done so. The 1990 amendment allows the court to "look to the *scope of the indictment* in order to determine whether it *details a broad scheme* encompassing transactions

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[67]In U.S. v. Koonce, 991 F.2d 693 (11th Cir. 1993), a restitution order was upheld to a business forced to reimburse the post office for stolen money orders. See also, U.S. v. Malpeso, 126 F.3d 92 (2d Cir. 1997), where the FBI was compensated for providing witness protection and transportation expenses to the victim, as a third party provider.

[68]In United States v. Crawford, 162 F.3d 550 (9th Cir. 1998), the defendant failed to prove the civil suit award was intended to cover funeral expenses, for which restitution was ordered.

[69] 981 F.2d 1418 (3d Cir. 1992).

[70]Id. at 1424. However, the court must be careful not to leave the determination of the victims to the discretion of the government or probation. Here the appellate court remanded to allow the court to more specifically name those victims.

[71]112 F.3d 606, 609 (2nd Cir. 1997). The defendant had agreed to his gain as the determining loss figure for his part in the much-larger telemarketing conspiracy, but contested the court's authority to award restitution beyond the located victims.

[72]§ 3663(a)(2). An identical provision was provided for mandatory restitution as part of the MVRA at § 3663A(a)(2).

[73]See, U.S. v. Stouffer, 986 F.2d 916, 928-9 (5th Cir. 1993) and U.S. v. Bennett, 943 F.2d 738, 740 (7th Cir. 1991).

beyond those alleged in the counts of conviction."[74] Note that the offense of conviction need not be a conspiracy, so long as it contains a conspiracy, scheme or pattern as an element.

Varied interpretations of when VWPA amendments apply can make the study of cases on restitution confusing at times. For example, after passage of the 1990 "scheme" amendment, there was a split among the circuits as to whether it could be applied to offenses committed prior to its passage. Therefore, there are cases decided well after 1990 that do not allow restitution for acts outside the offense of conviction, even if part of the same scheme or conspiracy.[75] These offenses were probably committed prior to the 1990 amendment, in a circuit that did not allow the amendment's retroactive application. Courts now generally uphold restitution for all victims of the scheme, so long as the scheme or conspiracy is described or incorporated in the offense of conviction.[76]

If a conspiracy is among the offenses of conviction, or if the criminal conduct is alleged and proven as a scheme, the court will be able to identify restitution victims more broadly than if the offense is charged and alleged only as a substantive, isolated offense. Therefore, again, the nature of the proof (if tried) or the allegation in the indictment or plea agreement may be significant. For example, in U.S. v. Jackson[77] the offenses of conviction included conspiracy to possess and utter unauthorized securities (checks), and possession of unauthorized credit cards and identification documents. The court ordered restitution to persons from whom the purses and identification documents were stolen. However, in contrast to the results of Blake, Hayes, and Cobbs, supra, the Eighth Circuit upheld the order, even though the defendant was not convicted of theft or conspiracy to commit theft, because the court found the evidence at trial proved that theft of the documents and cards was "in furtherance" of the check

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[74]U.S. v. Manzer, 69 F.3d 222, 230 (8th Cir. 1995)(emphasis added) (quoting U.S. v. Welsand, 23 F.3d 205,7 (8th Cir.) cert denied, 115 S.Ct. 641 (1994). In Manzer, the defendant was ordered to pay restitution for 270 cloned cable TV units, although he was convicted of only a few in the count of conviction.

[75]See, e.g., U.S. v. Sharp, 941 F.2d 811, 815 (9th Cir. 1991) and U.S. v. Seligsohn, 981 F.2d 1418, 1421 (3d Cir. 1992). The split is discussed in *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues*, September 1998, Federal Judicial Center, pp. 182-3.

[76]See, e.g., U.S. v. Hensley, 91 F.3d 274, 276-8 (1st Cir. 1996) (restitution valid for victim of scheme even though government did not learn of victim until after defendant's plea); U.S. v. Berardini, 112 F.3d 606, 609-612 (2d Cir. 1997) (restitution valid when ordered to include as yet unidentified victims of telemarketing scheme who may be located in the future); U.S. v. Silkowski, 32 F.3d 682 (2d Cir. 1994) (restitution valid for acts beyond statute of limitations); U.S. v. Henoud, 81 F.3d 484, 489 (4th Cir. 1996) (restitution valid for all victims of scheme, not just those named in indictment); U.S. v. Pepper, 51 F.3d 469, 473 (5th Cir. 1995) (restitution valid for victims of mail fraud unnamed in indictment, where indictment described duration of scheme and methods used); U.S. v. Jewett, 978 F.2d 248, 252-3 (6th Cir. 1992); U.S. v. Brothers, 955 F.2d 493, 496 n.3 (7th Cir. 1992); U.S. v. Welsand, 23 F.3d 205, 207 (8th Cir.), cert denied, 115 S.Ct. 641 (1994)(restitution valid for acts beyond statute of limitations); U.S. v. Rice, 38 F.3d 1536, 1545 (9th Cir. 1994) (restitution valid for victims of scheme even though not named in indictment); U.S. v. Sapp, 53 F.3d 1100, 1105 (10th Cir. 1995), cert denied, 116 S.Ct. 796 (1996)(restitution valid to bank that suffered loss, even though defendant's false statements were to another bank).

[77]155 F.3d 942 (8th Cir. 1998).

writing scheme, organized and run by the defendant.

The inconsistent results may be the product of different interpretations among the circuits, or they may illustrate the effect of more thorough allegations and/or proof, or the Jackson[78] result may simply be an anomaly.[79] At any rate, other courts may be more likely to arrive at the Jackson result in the future, using a "proximately-" harmed analysis under the MVRA. One thing is certain, however: where a probation officer is recommending restitution for conduct beyond the offense of conviction, the officer should be able to articulate how the conduct is part of a scheme, pattern, or conspiracy that is an element of the offense of conviction.

There are also, however, some restrictions on restitution orders involving schemes or conspiracies which may be important. First, the statutory passage involving conspiracies or schemes authorizes restitution for "*the defendant's* criminal conduct in the course of the scheme, conspiracy, or pattern."[80] While courts have not generally focused on this point, presumably the scope extends only to the defendant's conduct. However, this probably includes the conduct of others that was foreseeable to, and jointly undertaken by, the defendant, consistent with relevant conduct considerations for jointly undertaken criminal conduct.[81] At any rate, the court must make an individualized determination for each defendant regarding restitution.[82] For example, in U.S. v. Neal,[83] where the defendant was only convicted of accessory after the fact, but received the same (full) restitution order as all other defendants, the First Circuit vacated the order because there was no basis in the record to determine if the defendant was responsible for the total loss caused by the conspiracy or not. However, as the Ninth Circuit held in U.S. v. Baker, restitution is not automatically less for a defendant convicted of accessory after the fact, even though the possible fine and imprisonment are less than for the underlying offense, because there is no such restriction on restitution.[84]

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[78]These references are to U.S. v. Jackson, 155 F.3d 942 (8th Cir. 1998), involving stolen drivers' licenses, which is being compared to the Blake case. [Note: There are three other Jackson cases cited herein: U.S. v. Jackson, (unpub.) 149 F.3d 1185, 1998 WL 344041 (6th Cir. 1998) (involving *ex post facto*); U.S. v. Jackson, 982 F.2d 1279 (9th Cir. 1992) (IRS as victim); U.S. v. Jackson, 978 F.2d 903 (5th Cir.), cert denied 508 U.S. 945 (1992) (book or movie revenues).]

[79]The Jackson result is somewhat further complicated by the fact that the Jackson court applied the MVRA language of "directly and proximately" in a pre-MVRA case, saying it had no effect on the result.

[80]§§ 3663(a)(2) and 3663A(a)(2) (emphasis added).

[81]U.S.S.G. §1B1.3(a)(1)(B).

[82]This may be similar to the individual determination required for the amount of drugs involved in drug conspiracies for mandatory minimum purposes. See "Determining Mandatory Minimum Penalties in Drug Conspiracy Cases," Goodwin, *Federal Probation*, Goodwin, March 1995, pp. 74-78, and cases cited therein.

[83]36 F.3d 1190, 1199 (1st Cir. 1994).

[84]25 F.3d 1452, 1456 n.5 (9th Cir. 1994).

Also, the acts for which restitution is imposed must be part of the *same* scheme or conspiracy as the offense of conviction. The Eleventh Circuit vacated a restitution order in U.S. v. Ledesma,[85] where the defendant was convicted of conspiring to export two stolen cars, and the sentencing court had imposed restitution to be paid to the owners of the stolen cars. The appellate court held that the exportation was not part of the same conspiracy as the vehicle theft.

Finally, acquitted counts can present some unique concerns, particularly with regard to schemes and conspiracies. For example, where some counts of bank fraud are acquitted, restitution may not be ordered for victims of those counts *if* the acquittal is interpreted to mean that the conspiracy did not include the acts charged in the acquitted counts.[86] On the other hand, there is no blanket prohibition on imposing restitution for acquitted counts, and there are situations where courts have imposed restitution for losses to victims associated with acquitted counts, particularly if the scheme or conspiracy of conviction encompasses activity that was not covered by the acquittal.[87]

Sometimes an appellate court analyzes the plea colloquy to determine what the defendant understood, and what the scope of the offense of conviction was, for restitution purposes. While it is safer to make restitution determinations based on the written record and the evidence, it may be helpful to know that such additional information can confirm or refute other indications in the record regarding whether the offense extended beyond the acts stated in the offense of conviction. For example, in U.S. v. Obasohan,[88] the offense of conviction alleged a conspiracy to traffic in counterfeit credit cards, and the indictment named one specific credit card, "among others." The Eleventh Circuit upheld the restitution order for the defendant's trafficking of counterfeit credit cards beyond the one named in the indictment, as conduct "in furtherance" of the conspiracy. It also noted that the defendant was told at the plea that he would be held responsible for any cards he trafficked in during the conspiracy, and that evidence was presented at sentencing of the additional acts committed by the defendant as part of the conspiracy.[89]

Obasohan is instructive for another reason, as well: In order for information to assist the probation officer in formulating a recommendation to the court, it must get to the officer prior to the completion of the presentence report. Therefore, officers are should be alert to the kind of evidence needed to determine restitution order, such as that in Obasohan, and should ask the parties for their positions and supporting evidence during the presentence stage.

C. *Step Three*: Identify Victims' Harms That Were Caused by the Offense

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[85]60 F.3d 750, 751 (11th Cir. 1995).

[86]U.S. v. Kane, 944 F.2d 1406 (7th Cir. 1991).

[87]U.S. v. Chaney, 964 F.2d 437 (5th Cir. 1992); U.S. v. Farkas, 935 F.2d 962 (8th Cir. 1991).

[88]73 F.3d 309 (11th Cir. 1996)(per curiam).

[89]Id. at 311, n. 3.

After having identified the victims of the offense for restitution purposes, the next step is to consider the harms suffered by those victims "as a result of the offense of conviction." Having first identified the victims of the offense enables officers to avoid recommending restitution for harms suffered by non-victims (i.e. victims of relevant conduct outside the offense of conviction). The government has the burden of proving harm to the victim(s) by a preponderance of the evidence (§ 3664(e)). The good news is that, although courts are extremely conservative in defining victims for restitution (as discussed above), courts are likely to take a broader view of both, what harms were caused to those victims by the offense conduct, and which harms are compensable as restitution.

Causation. Probation officers should remember that when determining harms to the victims, whom the officer has already identified, the main consideration is whether the harm was caused by the offense conduct. However, the VWPA does not provide a causation standard, and the Supreme Court, in Hughey, supra, simply defined restitution as "the amount of loss sustained by any victim as a result of the offense."[90] Nor has Congress provided a definitive causation standard after Hughey. The cases have established that a pure "but for" standard of cause-and-effect sweeps too broadly.[91] The First Circuit devised a modification of a "but for" standard to determine which losses to a bank were caused by the defendant's fraud, for restitution purposes:

> *"We hold that a modified but for standard of causation is appropriate for restitution under the VWPA. This means, in effect, that the government must show not only that a particular loss would not have occurred but for the conduct underlying the offense of conviction, but also that the causal nexus between the conduct and the loss is not too attenuated (either factually or temporally). The watchword is reasonableness. A sentencing court should undertake an individualized inquiry; what constitutes sufficient causation can only be determined case by case, in a fact-specific probe."* [92]

Restitution orders have been vacated if the connection between the offense conduct and the harm is not close enough. For example, the Ninth Circuit held that a defendant convicted of tax fraud

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[90]495 U.S. at 413.

[91]A pure "but for" standard would include any downstream effects of an act, even if there were also other causes. This is extremely broad and would include, for example, holding a rapist responsible for harm to a rape victim from a hospital fire, which is too broad for criminal responsibility. See, U.S. v. Marlatt, 24 F.3d 1005 (7th Cir. 1994).

[92]U.S. v. Vaknin, 112 F.3d 579, 590 (1st Cir. 1997). The court rejected an "unbridled but for" causation standard for restitution. "While it is true that for want of a nail the kingdom reputedly was lost...it could hardly have been Congress' intent to place the entire burden on the blacksmith." Id. at 588. The defendant owed the victim bank for some loans not procured by fraud, but had paid some loans that had been procured by fraud. Restitution could only be ordered for outstanding fraudulent loans. See also, U.S. v. Campbell, 106 F.3d 64 (5th Cir. 1997) (bank repossessed collateral on defendant's fraudulent loan and got more for it than the value of the loan, but defendant had other, unpaid loans with the bank that were legitimate; no restitution could be imposed).

could not be ordered to pay restitution for the amount outstanding on an automobile loan for which he used proceeds from the fraud[93]; and, where the (Doctor) defendant was convicted of filing false insurance claims, the Third Circuit held he could not be ordered to pay restitution to a patient who became addicted to painkillers obtained during the doctor's scheme and had lost his job - because the patient was not the victim of the defendant's filing of false insurance claims.[94]

The MVRA. In 1996, the MVRA added the words "directly and proximately" to describe how restitution victims are harmed by the offense of conviction,[95] but there have been no cases analyzing the effect of these terms. "Proximately" invokes the concept of "proximate cause," which, in contract and tort law, means that conduct must be at least a "substantial factor" in causing an injury before liability is found.[96] This seems to be the concept behind the requirement in civil racketeering[97] cases where, in order to sue for treble damages, the plaintiff must prove that the defendant's conduct was a "proximate cause" of plaintiff's injury.[98] However, "proximate cause" usually involves the concept of "foreseeability," which, like the "substantial factor" aspect of "proximate cause," limits liability that would otherwise be too broad if based purely on "but for" (direct) causation.[99]

The concept of "foreseeability" is not unknown to criminal law. "Foreseeable" acts of others in jointly undertaken conduct are attributable to the defendant's relevant conduct under the sentencing guidelines.[100] Also, the Sentencing Commission has been considering and testing a reformed definition of "loss" for guideline purposes that contains a "foreseeability" concept.[101]
In these respects, "proximately" might be viewed as intended to exclude indirect consequences of an

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[93]U.S. v. Riley, 143 F.3d 1289 (9th Cir. 1998).

[94]U.S. v. Kones, 77 F.3d 66 (3d Cir. 1996), cert denied, 117 S.Ct. 172.

[95]The victim is one who is "directly and proximately" harmed (§§ 3663A, 3663), or "directly" harmed by conspiracies, schemes, and patterns, or harmed as a "proximate result of the offense" in some special restitution statutes, such as § 2327 (telemarketing).

[96]See, e.g., Beck v. Prupis , 162 F.3d 1090 (11th Cir. 1998) (defining "proximate cause" in the civil RICO context).

[97]Racketeer Influenced and Corrupt Organizations Act (RICO), provides for civil liability (18 U.S.C. § 1964) or criminal liability (18 U.S.C. § 1963). The RICO Act has the same causation requirement as the Clayton Act (15 U.S.C. § 15) for securities fraud cases.

[98]See, e.g., Beck, supra and Holmes v. Securities Investor Protection Corporation, 112 S.Ct. 1311, 1312 (1992).

[99]See, Palsgraf v. Long Island Restitution. Co., 162 N.E. 99 (N.Y. 1928). The famous case features the majority opinion, written by Justice Cardozo, in favor of a foreseeability criteria for tort liability, whereas the minority opinion just as persuasively argues for more of a "substantial factor" and direct "but for" tort standard. States to this day base their tort standard on one view or the other of "proximate cause," as described in Palsgraf.

[100]U.S.S.G. §1B1.3(a)(1)(B).

[101]See, "Coping With 'Loss': A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines," Bowman, 51 Vanderbilt L.Rev. 461 (1998), for influential discussion of the reasons behind the reform effort.

offense from restitution. However, case law even prior to the MVRA generally did not allow for restitution for indirect, "consequential," harms from an offense. For example, restitution has been held *not* to include a bank fraud victim's costs of reconstructing bank statements and borrowing money to replace stolen funds.[102]

The calculation of harm for restitution sometimes involves some of the same issues as computation of "loss" for guideline sentencing, and can get complicated. Sometimes an estimation of the loss is imkposed as restitution. For example, the Ninth Circuit held that an illegal alien smuggled into the country by the defendant who was forced to work as a maid under slave conditions was entitled to restitution based on the difference between the minimal wages paid to her and what she should have earned.[103] The Sixth Circuit held that a victim is entitled to the retail value, as opposed to actual cost, of goods which the defendant acquired by fraud and then sold (at retail prices).[104] The Tenth Circuit case of U.S. v. Diamond provides an example of how complex restitution computations can be where there are complex financial transactions, and illustrates the importance of the government being able to prove that the loss resulted from the offense conduct, rather than related conduct which contributed to the loss.[105]

Restitution usually cannot include routine costs that might otherwise have been borne by the victim. For example, in U.S. v. Menza,[106] the defendant was convicted of manufacturing methamphetamine after his homemade meth lab exploded, damaging his apartment and injuring him. The court ordered restitution for the cost to the government for disposing of numerous chemicals (legal, illegal, and unknown) and to the landlord for cleaning costs, but the Seventh Circuit vacated the order and remanded for the court to determine which costs were directly caused by the meth lab offense, and which were routine costs to the landlord and the government. On the other hand, some courts have refused to require sentencing courts to engage in tedious fact finding where there may be a few non-restitution costs mixed into a large number of items,[107] or when calculating loss is extremely difficult.[108] Similarly, restitution orders for "buy money" (money given to defendants by the government in reverse stings) have been struck because they are viewed as routine costs in investigating and prosecuting a case (or that the government is not a "victim" harmed by the offense - which leads to the same

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[102]U.S. v. Schinnel, 80 F.3d 1064, 1070 (5th Cir. 1996).

[103]US v. Sanga, 967 F.2d 1332 (9th Cir. 1992). Similarly, a police chief was ordered to repay the city one year of his 4-years' salary, as restitution for taking bribes. United States v. Sapoznik, 161 F.3d 117 (7th Cir. 1998).

[104]US v. Lively, 20 F.3d 193 (6th Cir. 1994).

[105]US v. Diamond, 969 F.2d 961 (10th Cir. 1992).

[106]137 F.3d 533 (7th Cir. 1998).

[107]See, U.S. v. Tencer, 107 F.3d 1120 (5th Cir. 1997) and U.S. v. Seligsohn, 981 F.2d 1418, 1421 (3d Cir. 1992).

[108]US v. Davis , 60 F.3d 1479, 1485 (10th Cir. 1995).

result).[109] Likewise, restitution orders for victims' attorneys' and investigation fees have been invalidated as not "caused" by the offense.[110] Note, however, that these results may be slightly different after the 1994 amendment allowing restitution for victims' costs for participating in the investigation and prosecution of the case, discussed below.

The more likely interpretation of the addition of the term "proximately" is that it will expand, or broaden, the scope of restitution slightly beyond that currently accepted by the courts. Every other provision of the MVRA indicates a clear congressional intent to maximize the imposition and enforcement of restitution, to the extent possible. The concept of foreseeability can logically support liability for harms that might otherwise be considered indirect. An expansive approach is further supported by other congressional amendments, such as the 1994 amendment authorizing restitution for such "indirect" costs as child care, lost income and transportation associated with victims' participation in the investigation and prosecution of a case (discussed under compensable harms, below).

Thus, an analysis that takes into account the MVRA's addition of the terms "directly and proximately" may ultimately slightly broaden the narrow interpretation of direct harm formulated by Hughey, and may allow courts to award restitution to victims where the victim-identification or compensable-harm determination is otherwise a close one. Such "grey areas" might include, for example, the shooting victim in McArthur, supra, the credit card use-victims in cases like Hayes, supra, (especially where the date of possession includes the dates of use), or perhaps the elderly theft victims in Blake, supra. Such an expansion may also support restitution for psychological counseling where the "injury" is less obvious, such as that in Haggard,[111] discussed below. However, it should be clear that the interpretation of "proximate" has not yet been tested in the courts. Moreover, the VWPA language upon which Hughey was based regarding the "offense" has remained substantially unchanged, so any expansion in the identification of victims or harms will most likely be incremental.

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[109]U.S. v. Cottman, 142 F.3d 160 (3d Cir. 1998); U.S. v. Khawaja, 118 F.3d 1454 (11th Cir. 1997); U.S. v. Meachum, 27 F.3d 214 (6th Cir. 1994); U.S. v. Gall, 21 F.3d 107 (6th Cir. 1994); U.S. v. Gibbons, 25 F.3d 28 (1st Cir. 1994). But see, U.S. v. Daddato, 996 F.2d 903 (7th Cir. 1993), which would allow an order to reimburse the "buy money" not as restitution, but as a discretionary condition of supervision. See also, dissent in Cottman.

[110]U.S. v. Mullins, 971 F.2d 1138 (4th Cir. 1992); U.S. v. Diamond, 969 F.2d 961 (10th Cir. 1992). See also, U.S. v. Sablan, 92 F.3d 865, 870 (9th Cir. 1996) (no restitution for costs of victim bank meeting with FBI).

[111]US v. Haggard, 41 F.3d 1320 (9th Cir. 1994).

D. *Step Four*: Identify Those Harms That are Compensable as Restitution

Restitution is a statute-based penalty, so most courts have interpreted the harms listed in restitution statutes to be the only harms compensable as restitution. For example, specific kinds of restitution are listed in the VWPA for when there is "damage to or loss or destruction of property of a victim,"[112] or when there is "bodily injury to a victim."[113] Psychiatric and psychological care is only listed for when the victim suffers "bodily injury."[114] Most courts have read the statutory listing of harms to be exclusive of other remedies,[115] with only a few exceptions.[116]

However in other respects, once victims of the offense are properly identified, appellate courts are generally willing to try to find statutory authorization to uphold restitution orders for harms caused to those victims. This is especially true where the sentencing court ties the award to pertinent language in the VWPA or a specific restitution statute. This is especially important for probation officers to remember, when formulating recommendations regarding restitution. For example, in the early case of U.S. v. Keith,[117] the defendant was convicted of assault with intent to rape, and the victim suffered bodily injury. The VWPA allows compensation where there is bodily injury for costs for "nonmedical care and treatment,"[118] and the Ninth Circuit upheld a restitution order for the cost of the victim's air fare for a visit to her family, as "nonmedical care and treatment" for the victim's trauma, caused by the defendant's offense conduct. Years later, the same court, in U.S. v. Hicks, praised the Keith order as an example of a sentencing court taking "pains to fit the restitution order into the language of the statute."[119] In Hicks, however, the court vacated a restitution order for psychological counseling for IRS employees who were in buildings bombed by the defendant but who did not suffer bodily injury, because the sentencing court made no effort to expressly tie the restitution to a statutory harm.

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[112] § 3663(b)(1) and § 3663A(b)(1).

[113] § 3663(b)(2) and § 3663A(b)(2).

[114] §§ 3663(b)(2), 3663A(b)(2).

[115] See, U.S. v. Husky, 924 F.2d 223 (11th Cir. 1991)(court could not order restitution to compensate the rape victim for pain and suffering; the list of compensable expenses in the VWPA is exclusive); U.S. v. Hicks, 997 F.2d 594 (9th Cir. 1993)(restitution could not include the cost of psychological counseling for IRS employees targeted by the defendant's bombings); U.S. v. Dayea, 73 F.3d 229 (9th Cir. 1995)(lost income could not be ordered as restitution where the victim did not suffer bodily injury).

[116] See U.S. v. Haggard, , 41 F.3d 1320 (9th Cir. 1994), upholding award for psychological treatment for the kidnapping victim's mother (discussed below).

[117] 754 F.2d 1388, 1393 (9th Cir.), cert denied, 474 U.S. 829 (1985).

[118] § 3663(b)(2)(A) includes "... nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment."

[119] 997 F.2d 594, 601 (9th Cir. 1993).

Two other cases that illustrate courts' willingness to uphold restitution for harms suffered by victims of an offense include one prior to the MVRA and one after. In U.S. v. Haggard,[120] the Ninth Circuit upheld a restitution order to compensate the mother of a kidnapping victim for lost income, even though it conceded the VWPA requires a bodily injury before psychological harm can be compensated. The court also gave an indication (in *dicta)* of a plausible perspective from which to argue that "physical injury" could be interpreted to include such "injuries" as nausea, bronchitis and a recurring eye infection, if as a result of trauma from the defendant's conduct.[121]

More recently, in U.S. v. Akbani,[122] the Eighth Circuit upheld a restitution order to a victim bank for attorneys' fees, reasoning that, although where there is damage to or loss of property attorneys' fees are not listed as a compensable harm, where there is no loss of or damage to property the listed harms do not apply. Also, it noted that "there is no blanket prohibition in the VWPA against inclusion of attorneys' fees," and "the VWPA requires only that the restitution ordered by the district court be based on losses 'caused by the specific conduct that is the basis for the offense of conviction.'"[123]

Congress made it easier to award what might otherwise be seen as "indirect" costs to victims in 1994 by enacting an amendment to the VWPA that reads, *"(4) in any case, [the court can] reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense."*[124] Although restitution harms are primarily those that are directly caused by the offense, as discussed above, this provision allows compensation for some "indirect" harms. A recent case that illustrates reliance on this provision is U.S. v. Malpeso,[125] in which the Second Circuit upheld a restitution order to the FBI to cover costs in relocating a victim. The court noted the 1994 amendment would have authorized restitution for the relocation costs if the victim had borne his own expenses, and the court could compensate the FBI for those expenses - especially since the statute also allows the court to order restitution to third parties who compensate victims harmed by the offense.[126]

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[120]41 F.3d 1320 (9th Cir. 1994).

[121]Id. at 1329 and n.7. (The court used the "plain error" standard, because the defendant did not object to the restitution order at sentencing, which gives the sentencing court a greater benefit of the doubt in the analysis.)

[122]151 F.3d 774 (8th Cir. 1998).

[123]Id. at 779-780 (citing U.S. v. Marsh, 932 F.2d 710, 712 (8th Cir. 1991), quoting Hughey). The Akbani court was also using a "plain error" standard of review.

[124]§ 3663(b)(4). An identical provision was included in the MVRA for mandatory restitution at § 3663A(b)(4).

[125]126 F.3d 92 (2d Cir. 1997).

[126]§ 3664(f)(1)(B).

In a recent Second Circuit case, U.S. v. Hayes.[127] the court relied on language in one of the special restitution statutes, as well as the 1994 provision regarding investigation and prosecution costs to the victim. It upheld a restitution order for the victim's housing costs, even though the victim lived with her parents while fleeing the defendant, on the rationale that restitution is authorized to a third party that compensates a victim for harms from the offense. The defendant was convicted of crossing state lines in violation of a protective order, for which restitution is required.[128] The restitution order also included costs to the victim for obtaining a protective order, and the defendant argued that the costs were incurred prior to the actual offense conduct, and thus not caused by it. But the Second Circuit upheld the restitution order because the special statute requires restitution for the "full amount of the victim's losses as determined by the court,"[129] and specifically mentions "costs incurred in obtaining a civil protection order" and "any other losses suffered by the victim as a proximate result of the offense."[130] Perhaps most interestingly, regarding the chronology of events, the court said that Congress did not intend restitution to be restricted to the dates of the offense conduct, because it authorized restitution for victims' costs incurred in the investigation and prosecution, which are incurred *after* the offense conduct.

Courts' willingness to compensate bona fide victims of offenses where possible may also be partly due to their longstanding familiarity with the FPA which, since 1925, simply stated that restitution could be imposed (as a condition of probation) "for actual damages or loss caused by the offense for which conviction was had."[131] There was no listing of compensable harms that could be read as a limitation on what could be compensated. In addition, the treatment of offenses committed between 1982 and 1987, when both the VWPA and the FPA were available, further illustrates courts' willingness to uphold restitution orders where possible. In such cases, where the sentencing court did not specify which authority it relied upon in imposing restitution, appellate courts upheld the order if *either* statutory authority supported it. For example, while courts generally presumed that the order was pursuant to the VWPA if not imposed solely as a condition,[132] in those few cases where the FPA better supported the restitution order, as it did regarding compensable harms, the restitution was upheld

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[127]135 F.3d 133 (2d Cir. 1998).

[128]§§ 2262 and 2264.

[129]§ 2264(b)(1).

[130]§§ 2264(b)(3)(E) and (F). Also, like the other special title 18 mandatory restitution statutes (§§ 2248, 2259, and 2327), it cross-references the VWPA. Presumably, either could be used to support restitution orders, and they are not mutually exclusive, but rather are complementary to each other - consistent with Congress' clear intent to maximize restitution.

[131]18 U.S.C. § § 3651, repealed. See U.S. v. Vance, 868 F.2d 1167, 1170 (10th Cir. 1989) (citing leading cases in each circuit on compensating harm under the FPA).

[132]See e.g., U.S. v. Chaney, 964 F.2d 437, 451 (5th Cir. 1992); U.S. v. Cook, 952 F.2d 1262, 1264 (10th Cir. 1991); U.S. v. Kress, 944 F.2d 155, 158 (3d Cir. 1991), cert denied, 502 U.S. 1092 (1992); and U.S. v. Padgett, 892 F.2d 445, 448 (6th Cir. 1989).

under the FPA.[133]

The message to probation officers making recommendations on restitution is to make every effort to tie each part of any restitution award to a compensable harm specified by the VWPA and/or any applicable specific mandatory restitution statute. When this is done, the order is likely to be upheld, so long as the harm was suffered by a victim of the offense of conviction.

III. The Effect of Plea Agreement Provisions on the Imposition of Restitution

After determining what restitution could lawfully be imposed in a case based on the principles discussed above, the officer should carefully review the plea agreement to determine if it allows restitution to be imposed for a greater amount than would otherwise be authorized. One court has recommended that scrutinizing the plea agreement should be the *first* step in determining restitution in a case.[134] However, because more restitution may sometimes be lawfully imposed than what the defendant agrees to pay, officers should not stop with the plea agreement.

Courts have interpreted Rule 11, Federal Rules of Criminal Procedure, to require that the defendant be advised at the plea of the possibility of a restitution order, or, if not, at least of the possibility of a fine as great as any restitution ultimately ordered.[135] The VWPA and MVRA provisions regarding plea agreements, however, appear intended to expand restitution beyond what might otherwise be imposed, and it is in those contexts that probation officers should be aware of the provisions and the case law.

There are three provisions in the VWPA that involve plea agreements with which probation officers should be familiar. Two were enacted as part of the Crime Control Act of 1990. Section 3663(a)(3) reads, *"The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement"*[136] (emphasis added). This provision allows the parties to agree to a restitution order that "overrides" other constraints on restitution in two ways. First, the court can impose restitution in any offense, even if it is not one for which restitution would otherwise be authorized under the VWPA. This has been used to support restitution for offenses outside of title

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[133]In U.S. v. Landrum, 93 F.3d 122 (4th Cir. 1996), for example, the court upheld an order for psychological treatment even though there was no bodily injury, which could be upheld under the FPA but not the VWPA.

[134]U.S. v. Broughton-Jones, 71 F.3d 1143 (4th Cir. 1995).

[135]United States v. Crawford, 162 F.3d 550 (9th Cir. 1998); US v. Fox, 941 F.2d 480, 484 (7th Cir. 1991), cert denied, 112 S.Ct. 1190 (1992); U.S. v. Miller, 900 F.2d 919, 921 (6th Cir. 1990); U.S. v. Padin-Torres, 988 F.2d 280, 283-4 (1st Cir. 1993).

[136]There is no identical provision for mandatory restitution in § 3663A, perhaps because full restitution is presumed to be imposed in all such cases, anyway.

18.[137] Second, the court can impose restitution to the extent to which the parties agree. For example, this provision was used to uphold a restitution order where the defendant agreed to pay restitution for losses from dismissed counts that might not otherwise have supported restitution.[138]

Prior to 1990, some courts had prohibited the imposition of restitution to victims outside the offense of conviction, even where the defendant agreed to the amount in a plea agreement.[139] A second provision added in 1990, § 3663(a)(1)(A), addressed this: *"The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense."*[140] Finally, in 1996, § 3663A(c)(2) was added as part of the MVRA. It allows the court to impose mandatory restitution for an offense not listed in § 3663A, if the plea agreement specifically states that a mandatory restitution offense gave rise to the plea agreement.

Some cautions regarding plea agreements apply. Where the plea agreement merely states that the government will ask the court for a certain amount of restitution, the provision will probably not be read as a specific agreement by the defendant to pay that amount.[141] Likewise, a simple statement of an understanding that the court may order restitution for any victim of the offense of conviction will not allow the court to impose any restitution beyond what could otherwise be imposed for that offense.[142] An oral acknowledgment by the defendant at the plea that he or she could be ordered to pay restitution will not be considered an agreement by the defendant to pay restitution, where the plea agreement is silent (and particularly where it contains an "integration clause," stating it constitutes the entire agreement between the parties).[143] However, where the plea agreement is general, e.g., restitution will

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[137]See, e.g., U.S. v. Soderling, 970 F.2d 529, 534 (9th Cir. 1992), cert denied, 508 U.S. 952 (1993); U.S. v. Guthrie, 64 F.3d 1510, 1514 (10th Cir. 1995). Without such an agreement, restitution cannot be ordered under the VWPA, for example, for non-violent offenses not in title 18, such as title 12 equity skimming offenses. U.S. v. Aguirre, 926 F.2d 409 (5th Cir. 1991).

[138]U.S. v. Thompson, 39 F.3d 1103, 1105 (10th Cir. 1994).

[139]See discussion in 1997 Federal Sentencing Guidelines Handbook, Haines, editor, at p. 658; US v. Guardino, 972 F.2d 682 (6th Cir. 1992); US v. Soderling, 970 F.2d 529 (9th Cir. 1992).

[140]A similar provision, § 3663A(3), applies to mandatory restitution. The circuits disagreed whether the 1990 amendments could be applied to previously committed offenses. For example, in U.S. v. Silkowski, 32 F.3d 682 (2d Cir. 1994), the Second Circuit held a plea agreement was applicable where the defendant entered into the plea agreement after the 1990 amendment was enacted, even though a significant portion of the loss occurred as a result of conduct committed prior to the amendment. See also, U.S. v. Arnold, 947 F.2d 1236, 1237 (5th Cir. 1991). But see, U.S. v. Snider, 957 F.2d 703 (9th Cir. 1992). However, the amendments have been in place long enough now to be generally applicable to cases currently being sentenced.

[141]See discussion, for example, in US v. Ramilo, 986 F.2d 333 (9th Cir. 1993); U.S. v. Baker, 25 F.3d 1452 (9th Cir. 1994); US v. Soderling, 970 F.2d 529, 531 (9th Cir. 1992) (per curiam).

[142]U.S. v. Guthrie, 64 F.3d 1510 (10th Cir. 1995).

[143]U.S. v. Broughton-Jones, 71 F.3d 1143 (4th Cir. 1995); U.S. v. Guthrie, 64 F.3d 1510 (10th Cir. 1995).

be determined by the court, or where the amount of restitution is uncertain, some courts have been willing to examine transcripts of the plea and sentencing hearings to determine whether the parties actually agreed at those later stages to a specific sum of restitution.[144]

The general rule is that a restitution order will be upheld under these provisions so long as the agreements are specific.[145] The Ninth Circuit cited an example of the level of specificity required: The defendant agrees "...to make restitution for the losses stemming from [the two offenses in the information] and from the other five transactions, all in return for the government's agreement not to prosecute [the defendant] for offenses arising out of the other five transactions."[146] Another example is an agreement upheld by the Second Circuit that specifically provided that restitution need not be limited to the counts of conviction, and which had a separate rider that explained the scope and effect of the agreed upon restitution.[147]

Despite the requirement for specificity, probation officers report that the most commonly encountered plea agreement provision is still a statement that the defendant agrees to pay full restitution for the offense, which, as the case law indicates, permits the imposition of nothing beyond that which could otherwise be imposed, according to the principles involving victims and harms discussed above. As one frustrated appellate court said, after painstakingly analyzing the plea agreement and the transcripts of both the plea and sentencing hearings, "the government would be well advised to give greater consideration to the impact of the VWPA and Hughey in future plea negotiations where it seeks restitution of a specific amount from a defendant pursuant to a plea agreement."[148] Moreover, the MVRA added a note to 18 U.S.C. § 3551 which provides that, the Attorney General shall ensure that "in all plea agreements . . . consideration is given to requesting that the defendant provide full restitution to all victims of all charges contained in the indictment or information, without regard to the counts to which the defendant actually pleaded." Whether that ever comes to pass or not, it can only be suggested that probation officers review whatever plea agreement provisions there are, to determine if they support any broader restitution than can otherwise be imposed using the principles described in steps one through four, above.

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[144]U.S. v. Schrimsher, 58 F.3d 608, 610 (11th Cir. 1995); U.S. v. Silkowski, 32 F.3d 682, 689 (2d Cir. 1994); and U.S. v. Lavin, 27 F.3d 40, 42 (2d Cir. 1994).

[145]See, e.g., U.S. v. Barrett, 51 F.3d 86, 89 (7th Cir. 1995); U.S. v. Osborn, 58 F.3d 387, 388 (8th Cir. 1995)(restitution based on dismissed charges because of agreement); U.S. v. Soderling, 970 F.2d 529, 532-34 (9th Cir. 1992)(per curiam)(restitution upheld for losses outside of conviction); U.S. v. Thompson, 39 F.3d 1103, 1105 (10th Cir. 1994)(same); U.S. v. Schrimsher, 58 F.3d 608, 610 (11th Cir. 1995)(per curiam)(restitution for three stolen vehicles valid for offense involving only two, because of agreement).

[146]US v. Soderling, 970 F.2d 529, 531 (9th Cir. 1992).

[147]US v. Rice, 954 F.2d 40, 41 (2d Cir. 1992).

[148]Silkowski, supra, 32 F.3d at 689.

IV. Conclusion

It would be prudent for every probation officer involved in writing presentence reports to carefully review §§ 3663, 3663A, and 3664 in their entirety - even if the officer was familiar with the VWPA prior to 1996 - because the MVRA made so many changes. It would also be a good idea to maintain restitution reference materials, such as a copy of the statutes, the September 1995 AO memorandum, this article, and any other memoranda or references on restitution. Next, the officer needs to be mindful of the principles discussed herein involving the specific language of the restitution statutes regarding the scope of the offense, harm caused by the offense, and harms that are compensable as restitution, and to consider using the four steps suggested above in determining victims and harms for restitution purposes. In applying these principles and steps, it would be wise to consider the yet-untested effect of the terms added by the MVRA that might redefine the scope of victims and harms for restitution under the VWPA, as amended by the MVRA.

Hopefully, understanding these principles will help officers to make the best possible restitution recommendations to their courts.

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