

# ***Restitution in Federal Criminal Cases***

## ***Summary Training Outline***

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*by*

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## **A. History of Federal Restitution Law**

- 1925 Federal Probation Act (FPA)** - Restitution imposable only as condition of supervision
- 1982 Victim Witness Protection Act (VWPA)** - 18 U.S.C. §§ 3579, 3580  
Restitution as a separate component of sentence  
Discretionary restitution - court must balance harm with defendant's ability to pay
- 1984 Sentencing Reform Act** - Recodified VWPA at §§ 3663 and 3664; reaffirmed restitution as one of several, separate components of a sentence.
- 1990 *Hughey v. U.S.*** - S. Ct. allows restitution only for harm caused by offense of conviction

### **Post-Hughey Amendments to VWPA:**

- 1) restitution for scheme, pattern, conspiracy - if element of offense (§ 3663(a))
- 2) parties can agree to restitution to any extent, in any case (§ 3663(a)(3))
- 3) parties can agree to restitution to other than victims of offense (§ 3663(a)(1)(A))

- 1992 Mandatory restitution for Child Support Recovery Act (CSRA)** - 18 U.S.C. § 228
- 1994 Mandatory restitution for certain title 18 offenses, such as violence against women, exploitation of children, and telemarketing:**  
§ 2248 (for §§ 2241-2245, sexual abuse)  
§ 2259 (for §§ 2251-2258, sexual exploitation of children)  
§ 2264 (for §§ 2261-2262, domestic violence)  
§ 2327 (for §§ 1028-1029 and §§ 1341-1345, telemarketing)

### **Amendment to VWPA:**

Restitution for victims' lost income, transportation, child care, and other expenses related to participation in investigation and prosecution of case - § 3663(b)(4).

- 1996 Mandatory Victims Restitution Act (MVRA)** - amended §§ 3663 and 3664; amended debt collection statutes (§ 3611 et. seq. and § 3571 et. seq.); created § 3664A (mandatory restitution for most non-drug federal offenses); victims "directly and proximately" harmed by the offense; "full amount of each victim's losses" at § 3664(f)(2); stronger imposition and enforcement procedures.
- 1998 Deadbeat Parents Act of 1998** - changes to CSRA (18 U.S.C. § 228), clarifying mandatory nature of restitution for past due support obligations.

## **B. 5-Steps in Determining Victims and Harms for Restitution in Federal Criminal Cases**

### ***Step One:***

**Identify the Offense of Conviction (in order to determine:)**

- a) whether restitution is mandatory or discretionary**
- b) whether restitution can be imposed as separate sentence or only as a condition of supervision**
- c) what the scope of the offense is, for steps 2 and 3.**

### ***Step Two:***

**Identify the Victims of the Offense of Conviction.**

### ***Step Three:***

**Identify Victims' Harms Caused by the Offense of Conviction.**

### ***Step Four:***

**Determine Which Harms (and/or costs) are Statutorily Compensable as Restitution.**

### ***Step Five:***

**Determine if the Plea Agreement Broadens Restitution.**

## ***Step 1: Identify the Offense of Conviction***

### **A. *[In Order to] Determine Whether Restitution is Mandatory or Discretionary for the Offense***

#### **I. Mandatory Restitution**

- The court “shall” impose full restitution, without consideration of defendant's ability to pay. Offenses covered:

##### **A. Offenses listed in § 3663A(c)**

- Crimes of violence (as defined in 18 U.S.C. § 16)
- All property offenses under title 18
- Controlled substance manufacturing offenses (21 U.S.C. § 856(a))
- Tampering with consumer products (18 U.S.C. § 1365)

##### **B. Specific title 18 provisions:**

- Sexual abuse (§§ 2241-2245; restitution at § 2248)
- Sexual exploitation of children (§§ 2251-2258; restitution at § 2259)
- Domestic violence (§§ 2261-2262; restitution at § 2264)
- Telemarketing fraud (§§ 1028-1029 and §§ 1341-1345; restitution at § 2327)
- Child Support Recovery Act (§ 228) [different criteria]
- Human trafficking (18 U.S.C. § 1953)
- (See also: 21 U.S.C. § 853(q))

##### **C. Implicit presumption for full restitution in *all* cases with an identifiable victim:**

- Court must state reason if full restitution is not imposed, in Statement of Reasons. § 3553(c).
- § 3664(f)(1)(A) provides: “In each order of restitution, the court shall order restitution to each victim in the full amount of each victim’s losses . . . without consideration of the economic circumstances of the defendant.”
- Guidelines require restitution to be imposed for the full amount of the victim’s loss as condition of supervision in *any* case with an identifiable victim. (U.S.S.G. §5E1.1(a)(2))

## **II. Discretionary Restitution**

• Court “may” impose restitution, but must balance it with consideration of the defendant’s financial resources (§ 3663(a)(1)(B)(i)). Offenses covered:

### **A. Offenses listed in § 3663(a)(1)(A) (if not covered by § 3663A):**

- All other title 18 offenses;
- Drug offenses with or without identifiable victims; and
- Air piracy (title 49)

### **B. Any other offense - where imposed solely as a condition of supervision (§§ 3563(b)(2) or 3583(d))**

## **B. *[In Order to] Determine Whether Restitution is Authorized as a Separate Sentence or Only as a Condition of Supervision***

### **I. Restitution is generally imposed as a separate component of the sentence where it is:**

#### **A. Imposed under a restitution statute**

- §§ 3663 (VWPA) or § 3663A (added by the MVRA), or

#### **B. Imposed under a specific restitution statute**

#### **C. Characteristics:**

- It automatically becomes condition of probation (§ 3563(a))
- It survives supervision if imposed in this manner

### **II. May be imposed *solely* as a condition in offenses where not available as a separate component of the sentence**

- Expires when the supervision term ends.
- May be imposed for *any* offense
- Otherwise, same criteria as any other restitution order

## **C. *[In Order to] Determine the Scope of the Offense of Conviction for Applying Steps 2 and 3 (Determining victims and harms)***

## ***Step 2: Identify Victims of the Offense of Conviction***

*Under Federal Restitution Statutes: Restitution Victims Must be Victims Harmed by Conduct of the Offense of Conviction*

Statutory definitions of restitution victims:

(mandatory or discretionary restitution, generally):

*“For purposes of this section, the term ‘victim’ means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered...”* § 3663A(a)(2) and § 3663(a)(2).

(mandatory or discretionary restitution involving scheme, etc.):

*“...including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, a victim is a person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.”* § 3663A(a)(2) and § 3663(a)(2).

(specific title 18 offenses):

*“...losses suffered by the victim as a proximate result of the offense.”* Title 18 special restitution statutes (§§ 2248, 2259, 2264, and 2327).

## Selected Case Law on Identifying Victims (Step 2)

### A. Tied to offense of conviction:

1) **Offense: Possession of stolen credit cards** (18 U.S.C. § 1029(a)(3)): No restitution for use of the cards. U.S. v. Hayes, 32 F.3d 171 (5th Cir. 1994); U.S. v. Jimenez, 77 F.3d 95 (5th Cir. 1996); U.S. v. Cobbs, 967 F.2d 1555 (11th Cir. 1992); U.S. v. Mancillas, 172 F.3d 341 (5th Cir. 1999) (post-MVRA, reaffirming Hayes and Jimenez).

2) **Offense: Use of stolen credit cards** (18 U.S.C. § 1029(a)(1)): No restitution for theft of the purses to get the cards. U.S. v. Blake, 81 F.3d 498 (4th Cir. 1996); explained in U.S. v. Sadler (unpub.), 1998 WL 613821 (4th Cir.).

### B. Some variance on how courts apply conspiracy/scheme provision:

*Compare* U.S. v. Blake, 81 F.3d 498 (4th Cir. 1996) (restitution for scheme only when element of the offense), *with* U.S. v. Jackson, 155 F.3d 942 (8th Cir. 1998); U.S. v. Manzer, 69 F.3d 222, 230 (8th Cir. 1995); U.S. v. Welsand, 23 F.3d 205, 207 (8th Cir.), *cert denied*, 115 S.Ct. 641 (1994) (determine scheme by looking to scope of facts at trial and in indictment). See also, U.S. v. Moore, 127 F.3d 635 (7th Cir. 1997), allowing restitution to “use” victims for possession offense (using plain error standard).

### C. 3 Cases Involving Firearms:

1) Court *cannot* impose restitution to individual shot by the defendant with the gun for offense of felon in possession offense (U.S. v. McArthur, 108 F.3d 1350 (11th Cir. 1997));

2) Court *can* impose restitution for robbery victim of underlying offense because it was “integral” to the 924(c) offense of conviction (U.S. v. Smith, 182 F.3d 733 (10th Cir. 1999)); and

3) *Compare*, for guideline purposes: shooting victim *is* vulnerable victim of relevant conduct for felon in possession offense: U.S. v. Kuban, 94 F.3d 971 (5th Cir. 1996).

### D. Identification of Numerous Victims:

U.S. v. Grimes, 173 F.3d 634 (7th Cir. 1999), court should identify as many victims as possible and utilize the 90-day continuance provision (§ 3664(d)(5) for that purpose, if needed. See also, for issues regarding 90-day continuance: U.S. v. Stevens, 211 F.3d 1 (2d Cir. 2000) and U.S. v. Vandenberg, 201 F.3d 805 (6th Cir. 2000).



### ***Step 3: Identify Victims' Harms Caused by the Offense of Conviction***

#### **Statutory terms on causation of restitution harms:**

- [the victim is] “*directly and proximately*” harmed (for §§ 3663A, 3663)
- [the victim is] harmed as a “*proximate result* of the offense,” and “full amount of victim’s losses” (for special restitution on statutes in title 18)
- [the court shall impose restitution for] “*the full amount* of each victim’s losses” (for all restitution orders in § 3664(f)(1))

### **Selected Case Law on Causation (Step 3)**

#### **No restitution for routine costs to the government:**

U.S. v. Cottman, 142 F.3d 160 (3d Cir. 1998). No restitution to government for “**buy money**” because it is routine cost of prosecuting case.

#### **Reasonable estimate is sufficient:**

U.S. v. Sapoznik, 161 F.3d 117 (7<sup>th</sup> Cir. 1998). Reasonable to estimate value of lost services from corrupt police chief in portion of years of good v. bad service.

#### **May include related intervening causes:**

U.S. v. Meksian, 170 F.3d 1260 (9<sup>th</sup> Cir. 1999). Harm from intervening causes may be included if it is directly related to the offense of conviction. Here the bad environmental report was not related to defendant’s false statement in obtaining the loan. (4 fact scenarios analyzed). But unrelated intervening causes not included (in loss - same analysis would apply for restitution): U.S. v. Hicks, 217 F.3d 1038 (9<sup>th</sup> Cir. 2000) (loss did not include decreased value of property resulting from criminal acts of victim’s foreclosure agent; good analysis of “proximate cause”).

#### **Loss includes reasonably foreseeable harm resulting from inherently dangerous offense:**

U.S. v. Metzger, 233 F.3d 1226 (10<sup>th</sup> Cir. 2000). Injury to bystander by off-duty police officer was reasonably foreseeable result of inherently dangerous offense of bank robbery. Good

analysis of reasonable foreseeability in loss context; would probably apply to restitution analysis as well.

**Provisions may be combined to support restitution order:**

U.S. v. Hayes, 135 F.3d 133 (2d Cir. 1998). Restitution upheld for victim's legal costs incurred prior to defendant's interstate travel to violate protection order, based on "full amount of losses" in special statute combined with fact restitution not restricted to harms incurred during offense, i.e. victims' costs participating in the case.

## ***Step 4: Determine Which Harms (and/or Costs) Are Statutorily Compensable as Restitution***

### **I. Harms authorized for Restitution by 18 U.S.C. §§ 3663A(b) or 3663(b)**

#### **A. Which *harms* to the victims caused by the offense are statutorily compensable as restitution?**

##### **In offense resulting in damage to, loss, or destruction of victim's property --**

Return of the property, or greater of value of property on date of offense or sentencing, less its value (if any) when returned to victim. §§ 3663A(b)(1); 3663(b)(1).

##### **In offense resulting in bodily injury to a victim --**

Cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including non-medical care and treatment and necessary physical and occupational therapy and rehabilitation; and income lost by the victim as a result of the offense. §§ 3663A(b)(2); 3663(b)(2).

##### **In offense resulting in bodily injury and death of a victim --**

Pay cost of necessary funeral and related services. §§ 3663A(b)(3); 3663(b)(3).

##### **In each restitution order, the court shall order restitution for**

“the full amount of each victim's losses” (§ 3664(f)(1))

#### **B. What *costs* to the victim are compensable as restitution?**

##### **In any case --**

Victim's costs for lost income, necessary child care, transportation, and other expenses related to participation in the investigation and prosecution of the offense or attendance at proceedings related to the offense. § 3663A(b)(4); 3663(b)(4).

### **II. Harms/Costs Authorized for Restitution by Special Restitution Statutes:**

The defendant shall pay the “full amount of the victim's losses” (§§2327, 2248, 2259, and 2264) which includes:

“*all losses suffered by the victim as a proximate result of the offense.*” (18 U.S.C. §§ 2327(2),(3), telemarketing); or  
specific, inclusive list of harms, e.g., psychiatric or psychological care, transportation, temporary housing, and child care, lost income, attorneys' fees, and any other losses suffered by the victim as a “*proximate result of the offense.*” (18 U.S.C. §§ 2248(3), 2259(3), and 2264(3)).

## **Selected Case Law on Compensable Harms/Costs**

### **(Step 4)**

*Key: Tie restitution imposed to statutory compensatory language*

#### **“Lost wages” for victim with bodily injury:**

Restitution upheld for annual leave used by victim, as “lost wages.” U.S. v. Jacobs, 167 F.3d 792 (3d Cir. 1999),

#### **“Full amount of the victim’s losses” . . . “proximately resulting” in special restitution statutes (for psychiatric care):**

Restitution upheld under § 2259 (sexual abuse of a child) for “full amount” of victim’s losses “proximately resulting” from the offense for in-patient psychiatric care of 14 year old victim. U.S. v. Crandon, 173 F.3d 122 (3d Cir. 1999),

#### **Combination of statutory provisions to support restitution for victim’s costs:**

Restitution upheld for FBI’s costs in relocating victim, based on combination of restitution for victim’s costs in participating in case and restitution to third parties who compensate victims for their harms (or costs). U.S. v. Malpeso, 126 F.3d 92 (2d Cir. 1997).

#### **Replacement value to “restore” victim:**

Replacement value was appropriate (rather than lower fair market value) for lost property that is unique (here, a century-old church was destroyed by arson). This value better provides a fair equivalent to property lost. Replacement cost used modern construction cost, on same site, with same design. U.S. v. Shugart, 176 F.3d 1373 (11<sup>th</sup> Cir. 1999); U.S. v. Simmonds III, 235 F.3d 826 (3d Cir. 2000) (same for personal furniture items).

#### **Future harms compensable if ascertainable at sentencing:**

Restitution upheld for future mental health counseling for victim of sexual exploitation of child because “ascertained” at sentencing with reasonable certainty; also, § 3664(d)(5), future discovery of losses, indicates intent to reach post-sentencing harms. U.S. v. Laney, 189 F.3d 954 (9<sup>th</sup> Cir. 1999); U.S. v. Julian, 242 F.3d 1245, 1247 (10<sup>th</sup> Cir. 2001) (same).

## ***Step 5: Determine if the Plea Agreement Broadens Restitution***

### **I. Statutory provisions that allow more restitution to be imposed than could otherwise be legally imposed, pursuant to steps 1-4:**

*If the parties agree, pursuant to a plea agreement, the court can order*

- a) Restitution in **any** criminal case **to the extent** agreed to by the parties in the plea agreement (§ 3663(a)(3)); [should, by implication, be available for mandatory restitution cases as well];
- b) Restitution to persons **other than the victim of the offense** (§§ 3663A(a)(3) and 3663(a)(1)(A)); and
- c) **Mandatory restitution for non-qualifying offense**, if the parties agree that the plea agreement resulted from a qualifying offense (§ 3663A(c)(2)).

### **II. Application of above provisions:**

*General “agreements” or “understandings” are ineffective.*

For example, provisions stating that -

the defendant knows the court can impose, restitution, or  
the defendant knows the government will ask for restitution, or  
the defendant “agrees to pay full restitution” for the offense,

do not authorize the court to impose more restitution than would otherwise be authorized for the offense of conviction.

*See, e.g., U.S. v. Phillips*, 174 F.3d 1074 (9<sup>th</sup> Cir. 1999).

*Agreement must be a specific, binding agreement between the parties.*

*Statutory directive to the government:*

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.” Commentary notes, § 3551 (added by MVRA).

## **C. Relevant Conduct and Restitution Compared**

### **I. The Offense of Conviction is Broader for Relevant Conduct Than for Restitution**

The purpose of Relevant Conduct is to account for the *culpability* of the defendant and the (potential) *seriousness* of the offense; U.S.S.G. § 1B1.3 defines the “offense” to include:

- acts in preparation of the offense
- acts in avoidance of detection of the offense
- acts in same course of conduct or common scheme or plan as offense.
- includes intended or attempted harms
- includes property that is recovered or returned

Also, gain can sometimes be used instead of loss.

However, the purpose of restitution is more focused: to *restore* the victim to his or her pre-offense condition; thus, its scope is limited to:

- loss caused by the offense of conviction (including the scheme, pattern, or conspiracy if an element of the offense); does not include acts in preparation, or those in avoidance of detection gain cannot substitute for the loss.
- loss is further limited to actual, unrecovered loss (and certain costs)

### **II. Restitution Sometimes Includes Specific Harms (and Costs) that are not Included in Relevant Conduct**

Restitution can include psychological counseling, medical or physical therapy or treatment; and if death results, restitution is authorized for funeral expenses.

“In any case,” restitution is authorized for the victim’s costs involved in participating in the investigation and prosecution of the case, including transportation, child care, and lost income.

Restitution can sometimes be increased after sentencing, such as when new losses are discovered (§ 3664(d)(5)); or it can include future harms that can be sufficiently ascertained at sentencing (see, e.g., U.S. v. Laney, 189 F.3d 954 (9<sup>th</sup> Cir. 1999)).

## **D. Listing of Restitution Articles**

1. *"Update on Selected Restitution Issues,"* Goodwin, Federal Probation, June 2001.

[Recent cases on the 5-steps, including extended discussion of "schemes"; juvenile cases; multiple defendants; multiple victims; civil settlements]

2. *"Imposition and Enforcement of Restitution,"* Goodwin, Federal Probation, June 2000.

[Focuses on issues regarding ability to pay, imposition, and enforcement of restitution orders]

3. *"The Imposition of Restitution in Federal Criminal Cases,"* Goodwin, Federal Probation, December 1998.

[Introduction of the 5-step analysis for determining victims and harms for restitution]

4. *"The Perplexing Problem with Criminal Monetary Penalties in Federal Courts,"* Furgeson, Goodwin, and Zucker, Review of Litigation, vol. 19, No. 2, Spring 2000, pp. 167-191.

[Focuses on issues regarding manner of imposition, e.g. whether the court must set a payment schedule; precedes new 2000 judgment form, which should assist with these issues]