WikiLeaks Document Release

http://wikileaks.org/wiki/CRS-RS22708

February 2, 2009

Congressional Research Service

Report RS22708

Restitution in Federal Criminal Cases: A Sketch

Charles Doyle, American Law Division

August 22, 2007

Abstract. Federal courts may not order a defendant to pay restitution to the victims of his or her crimes unless authorized to do so. Several statutes supply such authorization. For instance, federal courts are statutorily required to order victim restitution when sentencing a defendant for a felony that constitutes either a crime of violence or an offense against property, including fraud or deceit proscribed in title 18 of the United States Code. The obligation exists even if the defendant is indigent, and restitution must take the form of in-kind or installment payments. Moreover, a court may not order restitution as required by the statute and then grant the defendant remission of restitution. Ordinarily, however, restitution is available only to victims who have suffered a physical injury or financial loss as a direct and proximate consequence of the crime of conviction, and only to the extent of their losses. In addition, federal courts are permitted to order victim restitution when sentencing a defendant for various controlled substance and aviation safety offenses, or any felony proscribed in Title 18 of the United States Code for which restitution is not mandatory. Moreover, a federal court may make restitution a condition of probation or supervised release.

WikiLeaks

Restitution in Federal Criminal Cases: A Sketch

Charles Doyle
Senior Specialist in American Public Law

August 22, 2007

http://wikileaks.org/wiki/CRS-RS22708

Congressional Research Service
7-5700
www.crs.gov
RS22708

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

Federal courts may not order a defendant to pay restitution to the victims of his or her crimes unless authorized to do so. Several statutes supply such authorization. For instance, federal courts are statutorily required to order victim restitution when sentencing a defendant for a felony that constitutes either a crime of violence or an offense against property, including fraud or deceit proscribed in title 18 of the United States Code. The obligation exists even if the defendant is indigent, and restitution must take the form of in-kind or installment payments. Moreover, a court may not order restitution as required by the statute and then grant the defendant remission of restitution. Ordinarily, however, restitution is available only to victims who have suffered a physical injury or financial loss as a direct and proximate consequence of the crime of conviction, and only to the extent of their losses. In addition, federal courts are permitted to order victim restitution when sentencing a defendant for various controlled substance and aviation safety offenses, or any felony proscribed in Title 18 of the *United States Code* for which restitution is not mandatory. Moreover, a federal court may make restitution a condition of probation or supervised release.

When restitution is to be ordered, a probation officer prepares a report after gathering information from victims, the government, and the defendant. The parties receive copies of the report and may contest its recommendations. The court has considerable discretion as to the manner and scheduling of restitution payments, but the authority may not be delegated to probation or prison officials. Furthermore, the order must provide for full restitution for all victims unless the sheer number of victims or the complications of a given case preclude such an order.

This is an abridged version of a longer report, CRS Report RL34138, *Restitution in Federal Criminal Cases*, without the footnotes and citations to authority found in the longer report. Related reports include CRS Report RL34139, *Criminal Restitution Proposals in the 110th Congress*, available in an abridged version as CRS Report RS22709, *Criminal Restitution in the 110th Congress: A Sketch*, all by Charles Doyle.

http://wikileaks.org/wiki/CRS-RS22708

Contents

Contacts

http://wikileaks.org/wiki/CRS-RS22708

Background

The Victim and Witness Protection Act of 1982 (VWPA) vested federal courts with discretion to order restitution in any criminal case arising out of Title 18 of the *United States Code* or in air piracy cases. The Violent Crime Control and Law Enforcement Act of 1994 established mandatory restitution as a feature of the federal criminal prohibitions on sexual abuse, sexual exploitation of children, and domestic violence. The Mandatory Victim Restitution Act (MVRA) portion of the Antiterrorism and Effective Death Penalty Act of 1996 made mandatory restitution a consequence of conviction in most serious federal criminal cases (i.e., crimes of violence and crimes against property, including fraud).

Victims

The federal restitution statutes address three questions: Who qualifies as a victim? What crimes trigger restitution authority? What type of injuries or losses does restitution cover? As originally cast, Section 3663 (VWPA) authorized restitution for "any victim" of any crime proscribed in Title 18 of the *United States Code*, but did not define "victim." The Supreme Court read the statute narrowly and held that it authorized restitution only for the crime of conviction; it did not authorize restitution for related charges dropped as part of a plea agreement. Congress responded almost immediately with a more explicit statement of Section 3663's coverage. It replicated and enlarged that statement when it enacted Section 3663A six years later.

Sections 3663 and 3663A authorize restitution orders for the benefit of the victims of the crime of conviction. They augment who may be considered a victim, including persons other than those directly and proximately harmed as a result of the commission of an offense. Sections 3663 and 3663A explain that the term *victim* includes someone harmed by a scheme, conspiracy, or pattern of activity that is an element of the crime of conviction, and twice describe the circumstances under which representatives and others may stand in the shoes of a victim. Finally, sections 3663 and 3663A permit restitution orders for the benefit of anyone identified in a plea agreement.

Absent either a plea bargain or a scheme, conspiracy, or pattern, there must be a close, unbroken connection between a defendant's crime of conviction and the victim's harm. A person is a victim for purposes of sections 3663 and 3663A if he or she has been "directly and proximately harmed" as a consequence of the crime of conviction. A person has not been directly and proximately harmed if his or her injury is only remotely attributable to the crime of conviction or attributable at least in part to an intervening cause unrelated to that offense. The definition of a *victim* for purposes of restitution under sections 3663 and 3663A expands when the crime of conviction has as an element a conspiracy or a scheme or pattern of misconduct. In the case of conspiracy, a defendant may be compelled to make restitution both for the harm caused by his or her own misconduct and for the harm of the foreseeable crimes of his coconspirators. As for the scheme and pattern exception, most federal crimes do not list schemes or patterns among their elements, although the mail fraud, wire fraud, and racketeering statutes do. Thus, in such cases, restitution may include the losses incurred from a different episode of the scheme than the one mentioned in the indictment. Yet the scheme must be the same; victims entitled to restitution do not include those harmed by an otherwise identical scheme but different in time or place than the crime of conviction The courts are divided of what statutes qualify as "scheme, conspiracy or pattern" laws. Some courts say the scheme or pattern must be an element of the crime of conviction; it is not enough that the defendant's crime involves contrivance or repeated related criminality. Others

http://wikileaks.org/wiki/CRS-RS22708

say it is enough; the statute proscribing the crime of conviction need not use the words "scheme" or "conspiracy" or "pattern."

Although sections 3663 and 3663A employ the same definition of *victim*, they do not authorize restitution for the same crimes. The list of crimes for which Section 3663 permits restitution supplements the list for which Section 3663A demands restitution.

Crimes: Section 3663A (Mandatory Restitution)

The mandatory restitution of Section 3663A applies upon conviction for (1) a crime of violence, as defined in Section 16; (2) an offense against property under title 18, or under Section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit; or (3) an offense described in Section 1365 (relating to tampering with consumer products). Three restrictions apply to the mandatory restitution authorized for defendants convicted of the predicate offenses listed in Section 3663A(c)(1)(A). First, there must be an identifiable victim who has suffered physical injury or a pecuniary loss. Second, in the case of the property damage/fraud predicates, restitution need not be ordered when the number of victims makes an order impractical. Third, again in the case of property damage/fraud predicates, restitution need not be ordered when the complexity that restitution would introduce into the sentence process would represent an undue burden. A few other federal statutes authorize restitution. Most apply the procedures that govern sections 3663 and 3663A to a narrower range of crimes but a wider range of losses than sections 3663 and 3663A and their attendant enforcement procedures might otherwise permit.

Section 3663 (Discretionary Restitution)

Section 3663 authorizes restitution when a defendant has been convicted of a crime proscribed under Title 18 of the *United States Code*. It also authorizes restitution when a defendant is convicted of any of several trafficking offenses under the Controlled Substances Act, or of any air safety prohibitions. Finally, restitution may be ordered on the basis of any crime under the laws governing probation and supervisory release generally. Thus, a federal district court may order restitution as a condition of either probation or supervised release, even with respect to crimes for which restitution is not authorized under any of these sections or under sections 3663 or 3663A.

Losses

The losses for which restitution may be ordered depend on the statute under which restitution is ordered. Sections 3663 and 3663A make separate provisions for property losses and personal injuries. They call for the return of the property if that provides full victim restitution, and otherwise for compensatory payments. Section 3663 separately authorizes restitution for state agencies in certain trafficking cases if there is no other identifiable victim. Neither section authorizes restitution for a victim's costs associated with the investigation and prosecution of the offense in property loss cases.

Personal Injuries

Sections 3663 and 3663A have parallel provisions governing the restitution for personal injuries that permit, or in the case of Section 3663A require, compensation for medical expenses,

http://wikileaks.org/wiki/CRS-RS22708

rehabilitation, lost income, prosecution participation costs, and funeral expenses in the event the victim is killed. The medical expenses covered by a restitution order may include those paid on the victim's behalf by a third party, and may include the costs of psychiatric and psychological treatment when the victim has suffered a physical injury. Restitution for lost income extends to both past and future lost income. Both sections authorize restitution for a victim's costs associated with the investigation and prosecution of the offense. Awards for investigative and prosecutorial participation may include relocation expenses for threatened victims, compensation for wages lost while the victim assisted in the investigation, and attorneys' fees related to the child recovery efforts of the victim of an international parental kidnaping. The sections mention child care, attendance at judicial proceedings, and other matters that bespeak a human victim, but the courts have made it clear that other victims are likewise entitled to restitution under the provisions. Governmental entities may be entitled to restitution awards when they are the victims of a qualifying offense, but not for the costs of investigating and prosecuting the offense.

Procedure

http://wikileaks.org/wiki/CRS-RS22708

Section 3664 supplies the procedure that governs the issuance of restitution orders authorized in Title 18 of the *United States Code* in most instances. The procedure begins upon the conviction of a defendant for a predicate offense, at which point the court directs the probation service to investigate and prepare a report identifying each victim of the offense and the extent of their injuries, damages, or losses. The section calls for prosecutors to provide the probation officer with pertinent information. The officer is also to ask victims to detail the extent and specifics of their predicate crime-related losses. The defendant is obliged to give the officer a complete description of his or her financial situation. The probation officer's report is presented to the court, the defendant, and the prosecutor. The court resolves contested restitution issues by a preponderance of the evidence following a hearing, at which the prosecution bears the burden of establishing the existence and extent of the victims' losses and the defendant bears the burden of questions regarding his or her finances.

Section 3664 is precise when it describes how the court must frame the restitution order. The order must envision full compensation for the losses of each victim without regard to the financial circumstances of the defendant. In its calculation of the amount, manner, and schedule of payment for each victim, however, the court is to consider the defendant's assets, anticipated future income, and other financial obligations. Compensation may be made in lump sum, in-kind payments; installments; or any combination of such methods of payment. In-kind payments may take the form of a return of lost property, replacement in-kind or otherwise, or personal services. When the defendant's financial condition precludes any alternative, the order may call for nominal periodic payments. Several courts have emphasized the importance of the court's close attention to the restitution payment schedule by prohibiting sentencing courts from initially ordering that restitution be paid immediately when it is readily apparent that the defendant is unable to do so, thereby effectively leaving the task of establishing a payment schedule to the probation officer or the Bureau of Prisons.

The court may not take into account the fact that a victim may have been compensated by insurance, forfeiture, civil litigation, or any other alternative form of compensation of his or her injury, loss, or damage. When the government and the probation officer have been unable to determine the full extent of victim losses within 10 days prior to sentencing, they are obligated to inform the court. The court is then to set a date for the final determination of victim losses within

90 days of sentencing. Victims have a limited option to present claims for restitution relating to undiscovered losses thereafter.

There has been more than a slight difference of opinion among the lower federal appellate courts as to how these provisions should be applied, particularly in cases where the time lines have not been observed. Some courts view the time limits as jurisdictional and deny lower courts the authority to order restitution beyond the statutory limits. Some consider them akin to statutes of limitation and permit the time periods to be tolled. Others see the time limits as a device designed for the benefit of victims, not defendants, and for them, the failure to honor the time limits warrants no relief as long as the victim (or the government in the interest of the victim) has no objection and the defendant is given the opportunity to contest. The courts are likewise divided over the question of whether the court may order restitution to be paid to the Crime Victims Fund if the victim refuses to accept it. Should the court determine that more than one defendant contributed to the victim's loss, it may apportion restitution accordingly, or it may make the defendants jointly and severally liable. When defendants are made jointly and severally liable, each is liable for the entire amount, but the victim is entitled to no more than what is required to be made whole, regardless of what portion each of the defendants ultimately contributes. Section 3664(i) declares that when it comes to restitution, the United States is to be served last. The provision is cited most often to confirm that under the appropriate circumstances, the government and its departments and agencies may be considered victims for restitution purposes. Where the government is not a victim, however, the forfeiture laws may operate to deplete any assets from which restitution might otherwise have been paid. On the other hand, the defendant is not entitled to have the restitution award offset by the value of the forfeited property, unless the victim is the governmental entity for whose benefit the property is confiscated.

Section 3664(j) permits a court to order restitution to third parties who, as insurers or otherwise, have assumed some or all of the victim's losses, although in such cases, the victim must be fully compensated first. Section 3664(j) also supplies the only explicit offset for the defendant's restitution obligations. A restitution award may be reduced after issuance by any amounts that the victim later receives in the course of related federal or state civil litigation. Nevertheless, the victim, the defendant, or the government may seek to have a restitution order amended to reflect the defendant's changed economic circumstances. The changed economic circumstances envisioned in Section 3664(k) do not include anticipated future changes nor a later, better-informed understanding of the defendant's financial condition at the time of sentence.

There are several means to enforce a restitution order. When restitution is a condition of probation or supervised release, failure to make restitution may provide the grounds for revocation. Moreover, a restitution order operates as a lien on the defendant's property that remains in effect for 20 years. The government may also use garnishment and the other collection mechanisms of the Federal Debt Collection Procedures Act to enforce a restitution order. A victim may also use a restitution order to secure a lien against the defendant's property to ensure the payment of restitution. In addition, the victims' rights provisions of 18 U.S.C. 3771 entitle a victim to "full and timely restitution as provided in law," a right the section makes enforceable through a liberalized form of mandamus. In most instances, the victim may also sue the defendant based on the conduct that led to his conviction and the issuance of the restitution order. During the course of such civil litigation, the defendant may be precluded from denying the facts that formed the basis of his conviction.

http://wikileaks.org/wiki/CRS-RS22708

Abatement

In a criminal law context, the lower federal courts have generally taken the view that the death of a defendant at any time prior to the determination of his or her final direct appeal abates all underlying proceedings; appeals are dismissed as moot, convictions are overturned, indictments are dismissed, and abated convictions cannot be used in related civil litigation against the estate—all as if the defendant was never criminally charged. It might seem from this that a restitution order would abate as well, but there is no consensus among the lower federal courts on the issue.

Author Contact Information

Charles Doyle
Senior Specialist in American Public Law
cdoyle@crs.loc.gov, 7-6968

http://wikileaks.org/wiki/CRS-RS22708