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Restitution in Federal Criminal Cases

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Summary

Federal courts may not order a defendant to pay restitution to the victims of his or her crimes unless authorized by statute to do so. Several statutes supply such authorization. For instance, federal courts are statutorily required to order victim restitution when sentencing a defendant either for an offense against property, including fraud or deceit, proscribed in Title 18 of the *United States Code* or for a crime of violence. The obligation exists even if the defendant is indigent, and restitution must take the form of in-kind, lump sum, or installment payments. Federal courts are permitted, but not required, to order victim restitution when sentencing a defendant for any offense proscribed in Title 18 for which restitution is not required. Federal courts are permitted to order victim restitution when sentencing a defendant for various controlled substance and aviation safety offenses. In addition, a federal court may order restitution pursuant to a plea bargain or as a condition of probation or supervised release.

As a general rule, 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. Several provisions governing restitution following conviction for particular crimes permit awards for types of losses that might not otherwise be permitted under the general restitution provisions. For example, the Identity Theft Enforcement and Restitution Act of 2008 (18 U.S.C. 3663(b)(6)) authorizes restitution orders to compensate victims for the cost of remediating the intended or actual harm caused by certain identity theft violations. The courts are divided over the extent to which a defendant convicted of possession of child pornography may be ordered to make restitution to the child depicted in the material.

When restitution is to be ordered, a probation officer gathers information from victims, the government, the defendant, and other sources for a report to the court. 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.

Under the abatement doctrine, when a defendant dies before his or her appeal has become final, the law treats the indictment and conviction as though they had never happened. The conviction is vacated and the indictment dismissed. The courts do not agree on whether the doctrine also reaches unfulfilled obligations under a restitution order.

This report is available in an abridged form—without footnotes, citations to most authorities, or appendixes—as CRS Report RS22708, *Restitution in Federal Criminal Cases: A Sketch*. Related reports include CRS Report RL33679, *Crime Victims' Rights Act: A Summary and Legal Analysis of 18 U.S.C. 3771*, by (name redacted), available in abridged form as CRS Report RS22518, *Crime Victims' Rights Act: A Sketch of 18 U.S.C. 3771*, by (name redacted).

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Introduction

Federal courts may not order a defendant to pay restitution to the victims of his or her crimes unless authorized to do so.¹ Two general statutes authorize restitution. One, 18 U.S.C. 3663, permits it for certain crimes.² The second, 18 U.S.C. 3663A, requires it for other crimes.³ In addition, several individual restitution statutes authorize awards for particular offenses. In addition, federal courts may order restitution as a condition of probation or supervised release.⁴ Section 3664 supplies the procedure under which the restitution orders are imposed.

In the case of mandatory restitution, federal courts must order victim restitution when sentencing a defendant for a felony that constitutes either

- a crime of violence;⁵
- an offense against property, including fraud or deceit proscribed in Title 18;⁶
- maintaining a drug-involved premise;⁷
- animal enterprise terrorism;⁸
- failure to provide child support;⁹
- human trafficking;¹⁰
- sexual abuse;¹¹
- sexual exploitation of children;¹²
- stalking or domestic violence;¹³
- copyright infringement;¹⁴

¹ *United States v. Montalvo-Cruz*, 745 F.3d 583, 585 (1st Cir. 2014); *United States v. Freeman*, 741 F.3d 426, 431 (4th Cir. 2014); *United States v. Berkowitz*, 732 F.3d 850, 853 (7th Cir. 2013); *United States v. Church*, 731 F.3d 530, 535 (6th Cir. 2013); *United States v. Fair*, 699 F.3d 508, 512 (D.C. Cir. 2012); *United States v. Espinoza*, 677 F.3d 730, 732 (5th Cir. 2012); *United States v. Zangari*, 677 F.3d 86, 91 (2^d Cir. 2012).

² Section 3663 is sometimes referred to as the Victim and Witness Protection Act or (VWPA).

³ Section 3663A is sometimes referred to as the Mandatory Victim Restitution Act or MVRA.

⁴ 18 U.S.C. 3663(a)(3), 3663A(a)(3), 3563(b)(2), 3583(d).

⁵ 18 U.S.C. 3663A(a), (c).

⁶ *Id.*

⁷ 21 U.S.C. 856; 18 U.S.C. 3663A(a), (c).

⁸ 18 U.S.C. 43(c).

⁹ 18 U.S.C. 228(d)(the court must order restitution for misdemeanor child support offenses as well).

¹⁰ 18 U.S.C. 1593.

¹¹ 18 U.S.C. 2248.

¹² 18 U.S.C. 2259(the court must order restitution for misdemeanor child sexual exploitation offenses as well).

¹³ 18 U.S.C. 2264(the court must order restitution for misdemeanor stalking/domestic violence offenses as well).

¹⁴ 18 U.S.C. 2323.

- telemarketing fraud;¹⁵ or
- amphetamine or methamphetamine offenses.¹⁶

The obligation exists even if the defendant is indigent, and restitution must take the form of in-kind, lump sum, or installment payments.¹⁷ Moreover, a court may not avoid the obligation by issuing a restitution order and then granting the defendant remission of restitution.¹⁸ When not required, federal courts are permitted to order restitution for various controlled substance and aviation safety offenses, as well as for any offense proscribed in Title 18 of the *United States Code* for which restitution is not already mandatory.¹⁹ Ordinarily, 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.²⁰

Background

Restitution has a diverse pedigree. Grounded in fairness²¹ and often thought of as an equitable remedy,²² its antecedents can as easily be found in law as in equity.²³ As its name implies, restitution restores the victim to the status quo ante, that is, making the depleted victim whole

¹⁵ 18 U.S.C. 2327.

¹⁶ 21 U.S.C. 853(q).

¹⁷ 18 U.S.C. 3664(f).

¹⁸ *United States v. Roper*, 462 F.3d 336, 337-40 (4th Cir. 2006).

¹⁹ 18 U.S.C. 3663.

²⁰ 18 U.S.C. 3663A(b), 3663(b), 3563; *United States v. Walker*, 746 F.3d 300, 308 (7th Cir. 2014) (“The purpose of the MVRA is to ensure that victims recover the full amount of their losses, but nothing more”); *United States v. Maynard*, 743 F.3d 374, 378 (2d Cir. 2014); *United States v. Freeman*, 741 F.3d 426, 434 (4th Cir. 2014) (“Persuaded by our sister circuits’ reasoning, we join them in holding that awards of restitution ordered as a condition of supervised release must compensate only for the loss caused by the specific conduct that is the basis of the offense of conviction”); *United States v. Isgar*, 739 F.3d 829, 842 (5th Cir. 2014); *In re Local #46 Metallic Lathers Union*, 568 F.3d 81, 85 (2d Cir. 2009); *United States v. Stennis-Williams*, 557 F.3d 927, 930 (8th Cir. 2009); *United States v. Boring*, 557 F.3d 707, 713 (6th Cir. 2009).

A defendant may agree in a plea bargain to pay restitution to an extent not otherwise authorized, 18 U.S.C. 3663(a)(3), 3663A(a)(3); *United States v. Winans*, 748 F.3d 268, 270 (6th Cir. 2014); *United States v. Bennis*, 740 F.3d 370, 377 (5th Cir. 2014); *United States v. Davis*, 714 F.3d 809, 815 (4th Cir. 2013); *United States v. Moore*, 703 F.3d 562, 573 (D.C. Cir. 2012).

²¹ “[A]lthough restitution of property obtained under a contract which was illegal, because *ultra vires*, cannot be adjudged by force of the illegal contract, yet, as the obligation to do justice rests upon all persons, natural and artificial, if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation,” *Rankin v. Emigh*, 218 U.S. 27, 35 (1910).

²² “‘Equitable relief’ can also refer to those categories of relief that were typically available in equity (such as injunction, mandamus, and *restitution*, but not compensatory damages),” *Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993)(emphasis added); see also Seavey, *Problems in Restitution*, 7 OKLAHOMA LAW REVIEW 257, 257 (1954) (“Restitution is the equitable principle by which one who has been enriched at the expense of another, whether by mistake, or otherwise, is under a duty to return what he has received or its value to the other”).

²³ Murphy, *Misclassifying Monetary Restitution*, 55 SMU LAW REVIEW 1577, 1598-1607 (2002); IV BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 356 (1769) (“[I]f any person be convicted of larceny by the evidence of the party robbed, he shall have full restitution of his money, goods, and chattels, or the value of them out of the offender’s goods, if [he] has any, by the writ to be granted by the justices. And this writ of restitution shall reach the goods so stolen, notwithstanding the property of them is endeavoured to be altered by sale in market overt”)(transliteration supplied).

again.²⁴ Restitution has been a feature of the federal system of criminal justice for over a century. In its earliest form, some federal judges claimed it as a component of their inherent authority to grant probation and suspended sentences.²⁵ Then in 1916, the Supreme Court held that the lower federal courts had no inherent power to suspend sentences.²⁶ Congress responded by granting the courts explicit authority to suspend sentences and to place defendants on probation.²⁷ In doing so, the courts were permitted to require probationers “to pay in one or several sums a fine imposed at the time of being placed on probation and ... to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and ... to provide for the support of any person or persons for whose support” they were “legally responsible.”²⁸ This authority continued essentially unchanged for more than 50 years.²⁹ Even though the federal courts enjoyed no other power to order restitution in a criminal case,³⁰ the authority was “infrequently used and indifferently enforced.”³¹

Congress found this situation unsatisfactory.³² Thus, in the Victim and Witness Protection Act of 1982 (VWPA), it vested federal courts with the general discretion to order restitution in any criminal case arising out of a crime proscribed in Title 18 of the *United States Code* or in air piracy cases.³³ In the Violent Crime Control and Law Enforcement Act of 1994, Congress established mandatory restitution as a consequence of conviction for the federal crimes of sexual abuse, sexual exploitation of children, and domestic violence.³⁴ Then, in the Mandatory Victim Restitution Act (MVRA) portion of the Antiterrorism and Effective Death Penalty Act of 1996, Congress made mandatory restitution a consequence of conviction for most of the serious federal crimes (i.e., crimes of violence and, when proscribed in Title 18 of the *United States Code*, crimes against property, including fraud).³⁵

²⁴ *Firefighters v. Stotts*, 467 U.S. 561, 582 n.15 (1984) (“[F]ederal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victim ...”); *United States v. Hudson*, 483 F.3d 707, 710 (10th Cir. 2007) (“The purpose of restitution is ... to ensure that victims, to the greatest extent possible, are made whole for their losses”).

²⁵ H.Rept. 68-1377 at 3 (1925) (“[T]he United States district courts suspended sentence in many instances, and certain courts used a form of probation, though without legislative authority, placing defendant under the supervision of state probation officers or volunteers.” State probation officers worked under systems in which “greatly increased sums [were] collected for fines, restitution, and especially family support”).

²⁶ *Ex parte United States*, 242 U.S. 27, 51-2 (1916).

²⁷ P.L. 68-596, 43 Stat. 1259 (1925).

²⁸ 43 Stat. at 1260.

²⁹ 18 U.S.C. 3651 (1976 ed.) (“While on probation and among the conditions thereof, the defendant—May be required to pay a fine in one or several sums; and May be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and May be required to provide for the support of any persons for whose support he is legally responsible”).

³⁰ *United States v. Elkins*, 731 F.2d 1005, 1010-11 (2d Cir. 1984) (a federal court has no inherent power to order restitution; the authority must be conveyed by statute); S.Rept. 97-532, at 30 (1982) (“Current law does not contain a provision covering an order of restitution as a part of any sentence other than probation”).

³¹ *Id.*

³² “Crime victims and their advocates have called on state legislators to restore restitution to its proper place in criminal law. They point out that the average dollar losses victims suffer total hundreds of dollars, not thousands, and that most ex-offenders, not just those on probation, have some means to undo the financial harm they have done. There is no reason to believe that victims of federal crimes do not have the same grievances,” *id.*

³³ P.L. 97-291, 96 Stat. 1253 (1982); now found as amended at 18 U.S.C. 3663.

³⁴ P.L. 103-322, 108 Stat. 1904, 1906, 1928 (1994), 18 U.S.C. 2248, 2259, and 2264, respectively.

³⁵ P.L. 104-132, 110 Stat. 1227 (1996), 18 U.S.C. 3663A.

Constitutional Considerations

Restitution's varied lineage—equitable and legal, civil and criminal—has spurred a number of constitutional challenges over the years. Some initially saw restitution as an alternative to civil litigation on behalf of the victims of crime. If this were the case, defendants claimed that they should enjoy a Seventh Amendment right to have a jury determine the facts upon which a restitution order was based. Their challenges came to naught. The Supreme Court held that the Seventh Amendment extends only to civil actions similar to those tried before a jury when the Amendment was ratified in 1791.³⁶ The lower courts rejected the Seventh Amendment challenges either because they concluded that restitution was a criminal rather than a civil sanction or because, at common law, restitution was not a matter presented to a jury; in some cases, the challenges were rejected for both reasons.³⁷

However, if restitution is a criminal sanction, must it observe the constitutional restrictions on sanctions, such as the proscriptions on ex post facto laws, excessive fines, and cruel and unusual punishments? If the Seventh Amendment right to a jury trial in civil cases has no bearing, what of the Sixth Amendment right to a jury trial in criminal cases?

On the question of retroactive application of new laws and the ex post facto clause, there is no consensus among the lower federal appellate courts, although a majority take the position that the clause applies and, consequently, exposure to increased restitution liability may not be applied retroactively.³⁸

The scant case law available on the issue indicates that the Eighth Amendment's excessive fines clause, as well as its cruel and unusual punishment clause, mark the outer bounds of the courts' restitution authority.³⁹ These limitations, however, impose no real impediments. They condemn fines and punishments that are grossly disproportionate;⁴⁰ restitution, by definition under federal law, must be precisely proportionate to the harm caused by the offense.⁴¹

³⁶ *Tull v. United States*, 481 U.S. 412, 417-18 (1987).

³⁷ *United States v. Florence*, 741 F.2d 1066, 1067-68 (8th Cir. 1984); *United States v. Statterfield*, 743 F.2d 827, 836-37 (11th Cir. 1984); *United States v. Brown*, 744 F.2d 905, 910-11 (2d Cir. 1984); *United States v. Keith*, 754 F.2d 1388, 1391-392 (9th Cir. 1985); *United States v. Watchman*, 749 F.2d 616, 617 (10th Cir. 1984); *United States v. Palma*, 760 F.2d 475, 479-80 (3d Cir. 1985); *United States v. Gomer*, 764 F.2d 1221, 1228-229 (7th Cir. 1985).

³⁸ *United States v. Leahy*, 438 F.3d 328, 335 (3d Cir. 2006)(ex post facto clause applies); accord, *United States v. Grice*, 319 F.3d 1174, 1177 (9th Cir. 2003); *United States v. Schulte*, 264 F.3d 656, 662 (6th Cir. 2001); *United States v. Siegel*, 153 F.3d 1256, 1260 (11th Cir. 1998); *United States v. Bapack*, 129 F.3d 1320, 1327 n.13 (D.C. Cir. 1997); *United States v. Williams*, 128 F.3d 1239, 1241 (8th Cir. 1997); *United States v. Thompson*, 113 F.3d 13, 15, n.1 (2d Cir. 1997); *United States v. Rico Industries, Inc.*, 854 F.2d 710, 714 (5th Cir. 1988); contra, *United States v. Baldwin*, 414 F.3d 791, 800 (7th Cir. 2005); *United States v. Nichols*, 169 F.3d 1255, 1279-280 (10th Cir. 1999). See also *United States v. Gupta*, 572 F.3d 878, 891 (11th Cir. 2009)(“Although the Mandatory Act ordinarily does not apply to offenses that occurred before it became effective ... the Act applies to conspiratorial offenses that began before that date but concluded after it”); *United States v. Williams*, 612 F.3d 500, 511 (6th Cir. 2010)(“[T]he MVRA applies to crimes that occurred prior to and continued past the effective date of the MVRA ... this application does not violate Ex Post Facto Clause”).

³⁹ *United States v. Newsome*, 322 F.3d 328, 342 (4th Cir. 2003); *United States v. Dubose*, 146 F.3d 1141, 1148 (9th Cir. 1998).

⁴⁰ *United States v. Bajakajian*, 524 U.S. 321, 337 (1998)(“If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional” under the excessive fines clause); cf., *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003)(noting that for purposes of the cruel and unusual punishments clause, the “gross disproportionality principle” is the appropriate standard but that the factors that evidence such imbalance are less easily (continued...)

As for the Sixth Amendment right to jury trial and the Fifth Amendment right to conviction only on proof beyond a reasonable doubt, the Supreme Court held in a series of cases beginning with *Apprendi v. New Jersey*⁴² and culminating in *United States v. Booker*,⁴³ that the Sixth Amendment right to a jury trial and the Fifth Amendment right to due process require that “any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”⁴⁴

This might seem to pose a problem for federal restitution procedures under which restitution is determined by the court (not a jury) on the basis of a preponderance of the evidence (not beyond a reasonable doubt). Nevertheless, the lower federal appellate courts have rejected arguments that the *Apprendi* line of cases clouds the validity of a restitution order under such circumstances—either because they do not consider restitution a criminal sanction and thus see no Fifth or Sixth Amendment concerns or because they feel the restitution statutes fail to set the “statutory maximum” necessary to trigger *Apprendi* concerns.⁴⁵ None of the other due process or equal protection challenges appear to have survived appellate scrutiny thus far.⁴⁶

(...continued)
identified).

⁴¹ *United States v. Alexander*, 679 F.3d 721, 731 (8th Cir. 2012); *United States v. Newell*, 658 F.3d 1, 35 (1st Cir. 2011); *United States v. Boring*, 557 F.3d 707, 713 (6th Cir. 2009); *United States v. Parker*, 553 F.3d 1309, 1323 (10th Cir. 2009); *United States v. Arledge*, 553 F.3d 881, 899 (5th Cir. 2008); *United States v. Boccagna*, 450 F.3d 107, 117 (2d Cir. 2006); *United States v. Gordon*, 393 F.3d 1044, 1060 (9th Cir. 2004); *United States v. Dawson*, 250 F.3d 1048, 1050 (7th Cir. 2001).

⁴² 530 U.S. 466 (2000).

⁴³ 543 U.S. 220 (2005).

⁴⁴ *United States v. Booker*, 543 U.S. at 244; see also *Apprendi v. New Jersey*, 530 U.S. at 490.

⁴⁵ *United States v. Day*, 700 F.3d 713, 732 (4th Cir. 2012) (“Prior to *Southern Union* [decided on June 21, 2012, and holding that applies to criminal fines], every circuit to consider whether *Apprendi* applies to restitution held that it did not.... As the Sixth Circuit aptly explained ... ‘restitution is not subject to *Apprendi* because the statutes authorizing restitution, unlike ordinary penalty statutes, do not provide a determinate statutory maximum.’ That logic was sound when written before *Southern Union* and it remains so today”); see also *United States v. Green*, 722 F.3d 1146, 1151 (9th Cir. 2013) (holding that *Southern Union* does not justify repudiation of the circuit’s *Apprendi* restitution precedents); *United States v. Read*, 710 F.3d 219, 231 (5th Cir. 2012); pre-*Southern Union* restitution cases include *United States v. Lewis*, 557 F.3d 601, 615 (8th Cir. 2009); *United States v. Bonner*, 522 F.3d 804, 806-807 (7th Cir. 2008); *United States v. Reifler*, 446 F.3d 65, 118 (2d Cir. 2006); *United States v. Leahy*, 438 F.3d 328, 331 (3d Cir. 2006); *United States v. Garza*, 429 F.3d 165, 170 (5th Cir. 2005); *United States v. Visinaiz*, 428 F.3d 1300, 1316 (10th Cir., 2005); *United States v. Sosebee*, 419 F.3d 451, 461 (6th Cir. 2005); *United States v. Antonakopoulos*, 399 F.3d 68, 83 (1st Cir. 2005). Cases reaching the same conclusion but decided between *Apprendi* and *Booker* include *United States v. DeGeorge*, 380 F.3d 1203, 1221 (9th Cir. 2004); *United States v. Wooten*, 377 F.3d 1134, 1144-145 (10th Cir. 2004).

⁴⁶ E.g., *United States v. Battles*, 745 F.3d 436, 461 (10th Cir. 2014) (the procedure afforded the defendant notice and opportunity to contest sufficient to satisfy due process); *United States v. Pole*, 741 F.3d 120, 128 (D.C. Cir. 2013) (same); *United States v. Torres*, 703 F.3d 194, 204 (2d Cir. 2012) (“Eight other Circuits to have considered orders of forfeiture and restitution in the face of ‘double recovery,’ due process-type challenges have affirmed their concurrent imposition”); *United States v. Veerapol*, 312 F.3d 1128, 1134 (9th Cir. 2002) (notice and opportunity to contest sufficient); *United States v. Dubose*, 146 F.3d 1141, 1147 (9th Cir. 1998) (no due process or equal protection infirmity); *United States v. Craig*, 181 F.3d 1124, 1129 (9th Cir. 1999) (notice sufficient to satisfy due process); *United States v. Smith*, 944 F.2d 618, 622 (9th Cir. 1991) (restitution procedure, which afforded the defendant fewer discovery options than he would have enjoyed had the victim brought a civil action on the same grounds, did not offend due process); *United States v. Gomer*, 764 F.2d 1221, 1229 (7th Cir. 1985) (defendant received adequate notice and opportunity to contest); *United States v. Palma*, 760 F.2d 475, 477-79 (3d Cir. 1985) (restitution procedure met the demands of due process and equal protection); *United States v. Keith*, 754 F.2d 1388, 1392 (9th Cir. 1985) (no due process violation in light of defendant’s opportunity to contest); *United States v. Florence*, 741 F.2d 1066, 1068-69 (8th Cir. 1984) (continued...)

Victims

The various 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, §3663 (VWPA) authorized restitution for “any victim” of any crime proscribed in title 18 of the *United States Code*, but did not define the term “victim.”⁴⁷ The Supreme Court read the statute narrowly and concluded that restitution might only extend to harm attributable to the crime of conviction.⁴⁸ Congress endorsed this view almost immediately with a more explicit statement of §3663’s coverage.⁴⁹ It replicated and enlarged that statement when it enacted §3663A six years later.⁵⁰

Sections 3663 and 3663A authorize restitution orders for the benefit of the victims of the crime of conviction,⁵¹ and expressly define the term “victim” (i.e., “a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered”).⁵² A victim is also someone harmed by a scheme, conspiracy, or pattern of activity that is an element of the crime of conviction.⁵³ And, a victim may be someone whom the government and the defendant agree in a plea bargain is entitled to restitution.⁵⁴

(...continued)

(sentencing hearing evidentiary standards satisfied due process).

⁴⁷ 18 U.S.C. 3579 (1982 ed.). The original section was redesignated as 18 U.S.C. 3663 as part of the 1984 Sentencing Reform Act, P.L. 98-473, 98 Stat. 2010 (1984).

⁴⁸ *Hughey v. United States*, 495 U.S. 411, 422 (1990). Hughey was originally charged with several counts of credit card fraud. He pleaded guilty to a single count, but the trial court ordered restitution to the issuing bank for losses identified in the counts that had been dropped as part of the plea agreement. The Court disagreed, “The plain language of VWPA makes clear that the District Court’s restitution order in this case was unauthorized. Petitioner pleaded guilty only the charge that he fraudulently used the credit card of Hershey Godfrey. Because the restitution order encompassed losses stemming from alleged fraudulent uses of cards issued to persons other than Godfrey, such portions of the order are invalid,” *id.*

⁴⁹ P.L. 101-647, 104 Stat. 4863, 4931 (1990), 18 U.S.C. 3663(a)(2) (1988 ed. & Supp. II).

⁵⁰ P.L. 104-132, 110 Stat. 1227, 1229 (1996), 18 U.S.C. 3663(a)(2), 3663A(a)(2)(1994 ed. & Supp. II).

⁵¹ 18 U.S.C. 3663(a)(1)(A) (“... that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim’s estate.... ”); 3663A(a)(1) (“... that the defendant make restitution to any victim of the offense, or if the victim is deceased, to the victim’s estate”).

⁵² 18 U.S.C. 3663(a)(2), 3663A(a)(2).

⁵³ *Id.* (“... 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 ... ”); *United States v. Jinwright*, 683 F.3d 471, 486 (4th Cir. 2012)(internal citations and quotation marks omitted)(“[T]he district court did not therefore err by ordering restitution for losses caused by acts for which the defendant was not convicted. Rather, the district court properly looked to the specific conduct underlying the offense of conviction, meaning all acts comprising the scheme to defraud”); *United States v. Brown*, 665 F.3d 1239, 1252 (11th Cir. 2011) (“[R]estitution orders for conduct closely related to the offense of conviction are appropriate under either §3663 or §3663A, in addition to the specific conduct for which the defendant was convicted”); *United States v. Jones*, 641 F.3d 706, 714 (6th Cir. 2011)(“In the context of mail fraud convictions, we have read this statutory definition of ‘victim’ to allow for restitution for the loss attributable to all the victims of a defendant’s scheme to defraud, even when the defendant was not indicted or convicted of fraud with respect to each victim”); see also *United States v. Spencer*, 700 F.3d 317, 234 (8th Cir. 2012); *United States v. Locke*, 643 F.3d 235, 247 (7th Cir. 2011); *United States v. Paul*, 634 F.3d 668, 676-77 (2d Cir. 2011).

⁵⁴ 18 U.S.C. 3663(a)(3), 3663A(a)(3).

Harm is directly caused by the defendant's offense of conviction when the harm would not have occurred but for that misconduct.⁵⁵ Directly caused harm is proximately caused when there is no attenuation between the crime and the harm; when the harm and but-for misconduct are closely, not remotely, related in time and fact.⁵⁶ The presence of an intervening cause of the harm may suggest a want of either direct causation, or proximate causation, or both. The presence of an intervening cause will defeat an assertion of direct and proximate harm unless intervening cause is related to or a foreseeable consequence of the offense of conviction.⁵⁷ As the Supreme Court explained in the context of one of the specialized restitution statutes,

As a general matter, to say one event proximately caused another is a way of making two separate but related assertions. First, it means the former event caused the latter.... Every event has many causes, however, and only some of them are proximate.... So to say that one event was a proximate cause of another means that it was not just any cause, but one with a sufficient connection to the result. The idea of proximate cause.... is a flexible concept, that generally refers to the basic requirement that there must be some direct relation between the injury asserted and injurious conduct alleged.... Proximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct. A requirement of proximate cause thus serves, inter alia, to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity.⁵⁸

The definition of a victim for purposes of restitution under §§3663 and 3663A expands when the crime of conviction has as an element a conspiracy or a scheme or pattern of misconduct.⁵⁹ In the case of conspiracy, a defendant may be compelled to make restitution both for the harm caused by

⁵⁵ *United States v. Fallon*, 470 F.3d 542, 549 (3d Cir. 2005) (“Restitution should not be ordered in respect to a loss which would have occurred regardless of the defendant’s conduct”); *United States v. Cutter*, 313 F.3d 1, 7 (1st Cir. 2002).

⁵⁶ *United States v. Swor*, 728 F.3d 971, 974 (9th Cir. 2013)(internal quotation marks and citations omitted) (“We have interpreted the similarly worded [VWPA] to require that the government 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). Although there may be multiple links in the causal chain between the defendant’s offense conduct and the victim’s specific losses, the chain may not extend so far as to become unreasonable. Moreover, any intervening cause must be directly related to the defendant’s conduct”); *United States v. Robertson*, 493 F.3d 1322, 1344 (11th Cir. 2007)(internal quotation marks and citations omitted) (“We have never defined the phrase ‘directly and proximately,’ but we agree with the definitions that our sister circuits have adopted. 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 connection between the conduct and the loss is not too attenuated (either factually or temporally)”; *United States v. Fallon*, 470 F.3d at 549 (“Even if but for causation is acceptable in theory, limitless but for causation is not. Restitution should not lie if the conduct underlying the offense of conviction is too far removed, either factually or temporally, from the loss”); *United States v. Cutter*, 313 F.3d at 7.

⁵⁷ *United States v. Peterson*, 538 F.3d 1064, 1075 (9th Cir. 2008) (“Defendant’s conduct need not be the sole cause of the loss, but any subsequent action that contributes to the loss, such as an intervening cause must be directly related to the defendant’s conduct. We have approved restitution awards that included losses at least one step removed from the offense conduct itself, but the causal chain may not extend so far, in terms of the facts or the time span, as to become unreasonable. The main inquiry for causation in investigation cases is whether there was an intervening cause, and if so, whether this intervening cause was directly related to the offense”)(internal citations and quotation marks omitted); *United States v. Robertson*, 493 F.3d at 1334 (“[W]e agree with the definitions that our sister circuits have adopted ... see also *United States v. Donaby*, 349 F.3d 1046, 1054 (7th Cir. 2003) (‘victim under the Restitution Act harmed by likely and foreseeable outcome of the crime’”).

⁵⁸ *Paroline v. United States*, 134 S.Ct. 1710, 1720 (2014)(internal citations and quotation marks omitted).

⁵⁹ 18 U.S.C. 3663(a)(2); 3663A(a)(2); *United States v. Napier*, 463 F.3d 1040, 1046 (9th Cir. 2006) (“Restitution may go beyond the offense of conviction under certain conditions if the offense of conviction contains an element of a scheme, conspiracy or pattern of criminal activity”).

his or her own misconduct and for the harm caused by the foreseeable misconduct of his or her coconspirators.⁶⁰

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.⁶¹ In such cases, restitution may include the losses incurred from a different episode of the scheme than the one mentioned in the indictment.⁶² 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.⁶³

The courts are divided over which statutes qualify as “scheme, conspiracy or pattern” laws. Some 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.⁶⁴ Others say it is enough;

⁶⁰ *United States v. Battista*, 575 F.3d 226, 232 (2d Cir. 2009); *United States v. Rand*, 403 F.3d 489, 495 (7th Cir. 2005); *United States v. Riley*, 335 F.3d 919, 932 (9th Cir. 2003); *United States v. Solares*, 236 F.3d 24, 26(1st Cir. 2000); *United States v. Osborne*, 332 F.3d 1307, 1314 (10th Cir. 2003) (“[T]he losses caused by the entire conspiracy, not just the losses caused by those acts committed by the defendant, can be attributed to the defendant when the district court orders restitution.

⁶¹ 18 U.S.C. 1341 (mail fraud), 1343 (wire fraud); 18 U.S.C. 1962 (racketeer influenced and corrupt organization (RICO) offenses).

⁶² *United States v. Wirth*, 719 F.3d 911, 917 (8th Cir. 2013)(“[V]ictim restitution may be ordered for criminal conduct that is part of a broad scheme to defraud, without regard to whether the defendant is convicted for each fraudulent act in the scheme”); *United States v. Johnson*, 440 F.3d 832, 850 (6th Cir. 2006)(“Stone does not dispute that one element of a RICO offense and a RICO conspiracy is a pattern of criminal activity ... The district court could therefore award restitution to any victim harmed by the defendant’s criminal conduct in the course of the RICO activity”); *United States v. Belk*, 435 F.3d 817, 819 (7th Cir. 2006)(“The crime covered by §1341 is the scheme to defraud, not (just) the mailings that occur in the course of the scheme. This indictment laid out, and the jury convicted Belk of, a multi-year scheme to defraud Rogge’s brokerage. The eight mailings [listed in the indictment] were just overt acts. Restitution for the whole scheme is in order”); *United States v. Dickerson*, 370 F.3d 1330, 1342 (11th Cir. 2004) (“Therefore, we hold that where a defendant is convicted of a crime of which a scheme is an element the district court must under 18 U.S.C. 3663A, order the defendant to pay restitution to all victims for the losses they suffered from the defendant’s conduct in the course of the scheme even where such losses were caused by conduct outside of the statute of limitations”); *United States v. Grice*, 319 F.3d 1174, 1177 (9th Cir. 2003)(“When a charged crime involves a scheme to defraud, the court can base restitution under the VWPA on related conduct for which the defendant was not convicted”); *United States v. Bright*, 353 F.3d 1114, 1120 (9th Cir. 2004)(“Bright similarly pled guilty to multiple counts of mail fraud, thus acknowledging his participation in a scheme to defraud. The district court therefore properly ordered restitution for losses caused by the dismissed conduct related to this scheme”); but see *United States v. Polichemi*, 219 F.3d 698, 714 (7th Cir. 2000) (defendant convicted of a scheme to defraud may nevertheless not be ordered to pay restitution to victims harmed by conduct for which he was acquitted).

⁶³ *United States v. Hinojosa*, 484 F.3d 337, 343 (5th Cir. 2007)(restitution may not be ordered for the victims of a different scheme); *United States v. Inman*, 411 F.3d 591, 595 (5th Cir. 2005)(“Here, Inman’s restitution order under the MVRA was based, in part, on transactions that were not alleged in the indictment and occurred over two years before the specified temporal scope of the indictment. Thus, the district court plainly erred”); *United States v. Flaschberger*, 408 F.3d 941, 943 (7th Cir. 2005)(“Losses from the years preceding the scheme alleged in the indictment must be subtracted from the [restitution] award”).

⁶⁴ *In re Local #46 Metallic Lathers Union*, 568 F.3d 81, 87 (2d Cir. 2009)(“[T]he ‘scheme, conspiracy, or pattern of criminal activity’ must be an ‘element’ of that ‘offense’ [for which the defendant was convicted] in order for the conduct in the course of the scheme or conspiracy to be considered as a basis for determining compensation harm”); *United States v. Farish*, 535 F.3d 815, 826 (8th Cir. 2008)(“The charge of aiding and abetting did not have a ‘scheme, conspiracy, or pattern of criminal activity’ as an element, and so the Bauers, State Farm and Rosedale Dodge [—all victims of the underlying arson offense—] would not have been victims under the MVRA”); *United States v. Maturin*, 488 F.3d 657, 661-62 (5th Cir. 2007)(“Both the statutory language of MVRA and this court’s prior decisions make it plain that a defendant’s conviction on one count can support a broad restitution award encompassing additional losses *only* if the count of conviction requires proof of a scheme, conspiracy or pattern of criminal activity as an element”) (emphasis of the court); *United States v. Napier*, 463 F.3d 1040, 1046 (9th Cir. 2006); *United States v. Davenport*, 445 (continued...)

the statute proscribing the crime of conviction need not use the words “scheme,” or “conspiracy,” or “pattern.”⁶⁵

Sections 3663 and 3663A describe, with somewhat overlapping grants of authority, the circumstances under which representatives and others may stand in the shoes of a victim.⁶⁶ A court may also order restitution pursuant to a plea bargain for “victims” who would not otherwise qualify.⁶⁷

Although a victim must be a “person” and governmental entities are ordinarily not considered persons,⁶⁸ state, local, and federal governmental entities are entitled to restitution orders when they otherwise qualify as victims of a crime under §§3663 and 3663A.⁶⁹

(...continued)

F.3d 366, 373-74 (4th Cir. 2006)(“Davenport pleaded guilty to fraudulent use of an access device in violation of 18 U.S.C.A. 1029(a)(5). The elements of this offense are: (1) an intent to defraud.... Because Davenport’s offense does not ‘involve[] as an element a scheme, conspiracy, or pattern,’ the only question is whether the victims identified by the government were ‘directly and proximately harmed’ by the offense of conviction”); *United States v. Randle*, 324 F.3d 550, 556 (7th Cir. 2003).

⁶⁵ *United States v. Oladimeji*, 463 F.2d 152, 159 (2d Cir. 2006)(“Section 1029(a)(3) includes as an element that the possession [of stolen credit cards] be ‘with intent to defraud.’ Intent to defraud is a ‘scheme,’ as used in §3663A(a)(2)”); *United States v. Osborne*, 332 F.3d 1307, 1314 (10th Cir. 2003) (“Even when a defendant is not formally convicted of conspiracy, a district court may order a restitution amount for the relevant conduct of others that may be attributed to him” (speaking of defendant who as one of a group of defendants pleaded guilty to bank fraud but not conspiracy)).

⁶⁶ The dual coverage involves deceased victims. One section permits an order of restitution to the victim’s estate if the victim is deceased, 18 U.S.C. 3663(a)(1)(A) (“... that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim’s estate.... ”); 3663A(a)(1) (same). In different language, a second permits orders for the representatives of the deceased and of underage or incapacitated victims as well, 3663(a)(2)(“... In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim’s estate, another family member, or any other person appointed as suitable by the court, may assume the victim’s rights under this section, but in no event shall the defendant be named as such representative or guardian”); 3663A(a)(2)(same).

⁶⁷ 18 U.S.C. 3663(a)(1)(A)(“... The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victims of the offense”); 3663A(a)(2) (“The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victims of the offense”).

⁶⁸ Under the Dictionary Act, “[i]n determining the meaning of any Act of Congress, *unless the context indicates otherwise* ... the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, associations, and joint stock companies, as well as individuals,” 1 U.S.C. 1 (emphasis added); see also *United States v. United Mine Workers*, 330 U.S. 258, 275 (1947)(“The Act does not define ‘persons.’ In common usage that term does not include the sovereign, and statutes employing it will ordinarily not be construed to do so”). Of course, human beings are persons even when victimized while acting in an official capacity, *United States v. Holthaus*, 486 F.3d 451, 458 (8th Cir. 2007)(finding that “bankruptcy trustees qualify as victims under the statute if their compensation is negatively impacted by a debtor’s misrepresentation,” after the defendant argued that trustees could not be considered “persons” for restitution purposes).

⁶⁹ *United States v. Butler*, 694 F.3d 1177, 1184 (10th Cir. 2012)(Kansas); *United States v. Newell*, 658 F.3d 1, 30 (1st Cir. 2011)(various defrauded federal agencies); *United States v. Bryant*, 655 F.3d 232, 253 (3d Cir. 2011)(state medical school); *United States v. Bengis*, 631 F.3d 33, 40-1 (2d Cir. 2011)(South Africa); *United States v. Refert*, 519 F.3d 752, 759 (8th Cir. 2008)(Department of Health and Human Services); *United States v. Mickle*, 464 F.3d 804, 810-11 (8th Cir. 2006)(Minnesota); *United States v. Leahy*, 464 F.3d 773, 793 (7th Cir. 2007)(Chicago); *United States v. Woodard*, 459 F.3d 1078, 1087-88 (11th Cir. 2006)(Atlanta); *United States v. Senty-Haugen*, 449 F.3d 862, 865 (8th Cir. 2006)(U.S. Internal Revenue Service); *United States v. Washington*, 434 F.3d 1265, 1268-270 (11th Cir. 2006)(Ormond Beach police department); *United States v. Ekanem*, 383 F.3d 40, 42-3 (2d Cir. 2004)(U.S. Department of Agriculture); *United States v. Phillips*, 367 F.3d 846, 862-64 (9th Cir. 2004)(U.S. Government); *United States v. Vaknin*, 112 F.3d 579, 591 (1st Cir. 1997)(Federal Deposit Insurance Corp.). In a fraud case, restitution to the government should be set at the amount the government “paid minus the amount that would have been paid in the absence of fraud,” *United States* (continued...)

On the other hand, although the courts enjoy authority to order restitution paid to family members on behalf of the victims of crime,⁷⁰ it is unclear whether the victimization of one member of a family constitutes victimization of its other members sufficient to warrant a restitution order for the benefit of a victim's family members in their own name.⁷¹

Other Restitution Statutes

At one time, the lower federal appellate courts are divided over whether under §2259 a restitution order following conviction for possession of child pornography required the government to show that the subject of child pornography has sustained losses proximately caused by the possession offense.⁷² Thereafter, the Supreme Court concluded that “[r]estitution is therefore proper under §2259 only to the extent that the defendant’s offense proximately caused a victim’s losses.”⁷³

Crimes

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

(...continued)

v. *Petruk*, 484 F.3d 1035, 1038 (8th Cir. 2007); *United States v. Leahy*, 464 F.3d 773, 794 (7th Cir. 2006).

⁷⁰ 18 U.S.C. 3663(a)(2), 3663A(a)(2).

⁷¹ *United States v. Wilcox*, 487 F.3d 1163, 1176-178 (8th Cir. 2007)(restitution may not include income lost by the mother of a rape victim under the theory that the child’s mother was likewise a victim of the crime, but may include reimbursement to the mother for the cost of transporting the child to receive crime-necessitated medical treatment); *United States v. Hayward*, 359 F.3d 631, 642 (3d Cir. 2004)(upholding a restitution order for parents whose children had been transported to London for illicit sexual purposes with the terse observation that the parents “incurred reasonable costs in obtaining the return of their victimized children from London and in making their children available to participate in the investigation and trial. The restitution order will therefore be affirmed”); see also *United States v. Douglas*, 525 F.3d 225, 254 (2d Cir. 2008)(affirming a restitution order to compensate the father of a murdered victim for the annual leave the father used to assist in the investigation and attend court proceedings. Before rejecting the defendant’s contention that annual leave could not be considered lost income, the court observed without further comment that the defendant had “conceded that Morgan Sr. clearly is a victim within the meaning of the MVRA”); *United States v. Nossan*, 647 F.3d 822, 828 (8th Cir. 2011)(“The district court did not focus on the potential victims in Gunderson’s family who purportedly paid the costs of Gunderson’s funeral and burial, and who requested the restitution [in the amount of \$22,626.40]. We focus on the issues addressed by the district court”).

⁷² Compare *In re Amy Unknown*, 697 F.3d 306, 330 (5th Cir. 2012)(“[W]e reject the approach of our sister circuits and hold that §2559 imposes no generalized proximate cause requirement before a child pornography victim may recover restitution from a defendant possessing images of her abuse”) with *United States v. Burgess*, 684 F.3d 445, 457 (4th Cir. 2012)(“We ... conclude that nothing in the text or structure of the restitution statute [§2259] affirmatively indicates that Congress intended to negate the ordinary requirement of proximate cause for an award of compensatory damages. Rather, the statute’s language, which defines a victim as one ‘harmed as a result of a commission’ of a defendant’s acts, invokes the well-recognized principle that a defendant is liable only for harm that he proximately caused”); *United States v. Evers*, 669 F.3d 645, 658 (6th Cir. 2012)(“The majority of the circuits that have addressed this issue have held that a showing of proximate cause is a necessary element of all claims for restitution sought under §2259(b)(3) ...”); *United States v. Kearney*, 672 F.3d 81, 95 (1st Cir. 2012); *United States v. McGarity*, 669 F.3d 1218, 1267 (11th Cir. 2012); *United States v. Aumais*, 656 F.3d 147, 153-54 (2d Cir. 2011); *United States v. Monzel*, 641 F.3d 528, 535 (D.C. Cir. 2011).

⁷³ *Paroline v. United States*, 134 S.Ct. 1710, 1722 (2014).

Section 3663A (Mandatory Restitution)

The mandatory restitution of §3663A applies upon conviction for

- a crime of violence, as defined in §16;
- an offense against property under 18 U.S.C., or under §416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;
- an offense described in §1365 (relating to tampering with consumer products); or
- an offense under §670 (relating to theft of medical products).⁷⁴

Section 16 describes a crime of violence as either “(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

As a matter of application, the courts have found that threats,⁷⁵ extortion,⁷⁶ assault,⁷⁷ harboring an illegal alien,⁷⁸ burglary,⁷⁹ and arson⁸⁰ are crimes of violence for purposes of §3663A and that false statement offenses are not.⁸¹ Elsewhere, the Supreme Court has explained that “crime of violence as defined by §16” does not include crimes committed negligently or accidentally, such as driving under the influence.⁸² Other courts have said that the term “crime of violence” does not encompass possession of a pipe bomb,⁸³ reckless vehicular assault,⁸⁴ or simple misdemeanor assault,⁸⁵ but does include such crimes as unauthorized use of a vehicle.⁸⁶

The controlled substance offense that carries with it a restitution requirement under §3663A (21 U.S.C. 856) consists of maintaining a place where controlled substances are manufactured, stored, or used.⁸⁷

⁷⁴ 18 U.S.C. 3663A(c)(1)(A).

⁷⁵ *United States v. Haileselassie*, 668 F.3d 1033, 1034-35 (8th Cir. 2012); *United States v. DeLaFuente*, 353 F.3d 766, 770-71 (9th Cir. 2003).

⁷⁶ *United States v. Waknine*, 543 F.3d 546, 555 (9th Cir. 2008)(RICO conspiracy—extortion predicate offense).

⁷⁷ *United States v. Schmidt*, 675 F.3d 1164, 1167 (8th Cir. 2012); *United States v. Martinez*, 486 F.3d 1239, 1248 (11th Cir. 2007).

⁷⁸ *United States v. Bonetti*, 277 F.3d 441, 451-52 (4th Cir. 2002).

⁷⁹ *United States v. Juvenile, G.Z.*, 144 F.3d 1148, 1149 (8th Cir. 1998).

⁸⁰ *United States v. Patrick V.*, 359 F.3d 3, 9 (1st Cir. 2004).

⁸¹ *United States v. Dorcely*, 454 F.3d 366, 376 (D.C. Cir. 2006).

⁸² *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004); see also *United States v. Daye*, 571 F.3d 225, 232 (2d Cir. 2009)(noting for the same reason that reckless manslaughter and driving while intoxicated are not crimes of violence as defined in Section 16).

⁸³ *United States v. Hull*, 456 F.3d 133, 138-41 (6th Cir. 2006).

⁸⁴ *Garcia v. Gonzales*, 455 F.3d 465, 468-69 (4th Cir. 2006).

⁸⁵ *United States v. Villegas-Herndandez*, 468 F.3d 874, 878-85 (5th Cir. 2006).

⁸⁶ *Brieva-Peraez v. Gonzales*, 482 F.3d 356, 359-60 (5th Cir. 2007).

⁸⁷ Most other controlled substance offenses come within the purview of §3663.

The property damage/fraud predicate in §3663A must involve a violation proscribed under title 18 of the *United States Code* rather than an offense found in another title.⁸⁸ Yet, the general conspiracy provision in title 18 can provide the necessary basis for a mandatory restitution order when the defendant is convicted of conspiracy to commit property damage in violation of a federal law found outside of title 18.⁸⁹

The product tampering offense consists of tampering with a product or its labeling that affects interstate or foreign commerce or spreading false rumors that such a product is contaminated.⁹⁰ Section 670 outlaws the theft of, or unlawful trafficking in, pre-retail medical products.⁹¹

Limitations

Three qualifications temper the mandatory restitution requirements facing defendants convicted of the predicate offenses listed in §3663A(c)(1)(A). First, there must be an identifiable victim who has suffered a physical injury or a pecuniary loss.⁹² Second, in the case of the property damage/fraud predicates,⁹³ restitution need not be ordered when the number of victims makes an order impractical.⁹⁴ Third, again in the case of property damage/fraud predicates, restitution need not be ordered when the complexity that restitution would introduce into the sentencing process would represent an undue burden.⁹⁵

⁸⁸ 18 U.S.C. 3663A(c)(1)(A)(ii); *United States v. Chalupnik*, 514 F.3d 748, 755 (8th Cir. 2008).

⁸⁹ *United States v. Quarrell*, 310 F.3d 664, 677 (10th Cir. 2002) (“The Quarrells also argue the MVRA is inapplicable because a violation of ARPA, 16 U.S.C. 470ee, is not an offense ‘under this title,’ referring to Title 18. However, the Quarrells were also convicted of conspiracy under 18 U.S.C. 371, which is an offense under Title 18. The Quarrells’ conspiracy conviction satisfied the ‘under this title’ requirement of the MVRA”); accord, *United States v. Butler*, 694 F.3d 1177, 1183 (10th Cir. 2012); *United States v. Minneman*, 143 F.3d 274, 284 (7th Cir. 1998); *United States v. Helmsley*, 941 F.2d 71, 101 (2d Cir. 1991).

⁹⁰ 18 U.S.C. 1365.

⁹¹ 18 U.S.C. 670.

⁹² 18 U.S.C. 3663A(c)(1)(B); *United States v. Edwards*, 728 F.3d 1286, 1291 (11th Cir. 2013); *United States v. Green*, 722 F.3d 1146, 1148 (9th Cir. 2013); *United States v. Zhou*, 717 F.3d 1139, 1152 (10th Cir. 2013).

⁹³ The number of victims and complexity of restitution limitations are only available to defendants convicted of property damage/fraud predicate offenses; they are not available to other defendants subject to mandatory restitution under §3663A, *United States v. Cienfuegos*, 462 F.3d 1160, 1168 (9th Cir. 2006); *United States v. Murray*, 700 F.3d 241, 243 (5th Cir. 2012).

⁹⁴ 18 U.S.C. 3663A(c)(3)(A) (“This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—(A) the number of identifiable victims is so large as to make restitution impracticable”); *United States v. Murray*, 700 F.3d 241, 244 n.19 (5th Cir. 2012). This does not necessarily mean that restitution is barred for identifiable victims simply because other victims may be unidentifiable, *United States v. Grimes*, 173 F.3d 634, 639 (7th Cir. 1999).

⁹⁵ 18 U.S.C. 3663A(c)(3)(B) (“This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that ... (B) determining complex issues of fact related to the cause or amount of the victim’s losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process”); *United States v. Anderson*, 741 F.3d 938, 954 (9th Cir. 2013) (“Ultimately, however, it is the government’s burden to establish that the victim suffered an actual loss in a quantifiable amount. Where the alleged loss is not quantifiable to any degree of certainty, the government’s burden has not been satisfied, and no restitution should be ordered”); see also *United States v. Malone*, 747 F.3d 481, 486 (7th Cir. 2014); *United States v. Murray*, 700 F.3d 241, 244 (5th Cir. 2012); *United States v. Martinez*, 690 F.3d 1083, 1089 (8th Cir. 2012).

Other Restitution Statutes

A few other federal statutes authorize restitution. All but the animal enterprise statute, require it. Most apply the procedures that govern §§3663 and 3663A to a narrower range of crimes but a wider range of losses than §§3663 and 3663A and their attendant enforcement procedures might otherwise permit. Numbered among these provisions are

- 18 U.S.C. 43 (animal enterprise);
- 18 U.S.C. 228(d) (restitution child support cases);
- 18 U.S.C. 1593 (restitution in cases under chapter 77 relating to peonage, slavery, and trafficking in persons);
- 18 U.S.C. 2248 (restitution in cases under chapter 109A relating to sexual abuse);
- 18 U.S.C. 2259 (restitution in cases under chapter 110 relating to sexual exploitation of children);
- 18 U.S.C. 2264 (restitution in cases under chapter 110A relating to domestic violence and stalking);
- 18 U.S.C. 2323(c) (restitution in copyright infringement cases);
- 18 U.S.C. 2327 (restitution in telemarketing fraud cases); and
- 21 U.S.C. 853(q) (restitution in controlled substances cases involving amphetamine and methamphetamine offenses).

Section 3663 (Discretionary Restitution)

Section 3663 authorizes restitution when the defendant has been convicted of a crime proscribed under title 18 of the *United States Code*.⁹⁶ It comes into play when the mandatory restitution statutes do not control. It also authorizes restitution when the defendant is convicted of any of several trafficking offenses under the Controlled Substances Act, or of any of a few air safety prohibitions.⁹⁷

Finally, as noted earlier, a court may order restitution with respect to any crime consistent with a plea agreement⁹⁸ or as a condition of either probation⁹⁹ or supervised release,¹⁰⁰ even with respect to crimes for which restitution is not authorized under §§3663 or 3663A.¹⁰¹

⁹⁶ 18 U.S.C. 3663(a)(1)(A).

⁹⁷ *Id.* The specific controlled substance and air piracy predicates include 21 U.S.C. 841 (trafficking), 848(a) (continuing criminal enterprises), 849 (trafficking at truck stops), 856 (maintaining a place where controlled substances are manufactured, stored, or used), 861 (using a child in a trafficking enterprise), 863 (trafficking in drug paraphernalia); and 49 U.S.C. 5124 (tampering with the labeling on hazardous cargo), 46312 (unlawfully transporting hazardous material), 46502 (air piracy), and 46504 (interfering with a flight crew).

⁹⁸ 18 U.S.C. 3663(a)(3), 3663A(a)(3).

⁹⁹ 18 U.S.C. 3563(b)(2) (“The court may provide ... As further conditions of a sentence of probation ... that the defendant ... (2) make restitution to a victim of the offense under §3556 (but not subject to the limitation of §3663(a) or 3663A(c)(1)(A) [which limit the crimes covered by §§3663 and 3663A]”). Probation is a sentencing option following conviction for any federal crime other than a crime for which probation is specifically prohibited or other than any class A or class B felony (i.e., any federal crime that has a maximum penalty of less than 25 years), 18 U.S.C. 3561(a), 3581. (continued...)

Losses

Restitution is a creature of statute. A court may order reimbursement only for those losses authorized by statute. Sections 3663 and 3663A recognize three categories of reimbursable losses: property losses, losses relating to bodily injuries, and losses relating to participation in the investigation or prosecution of the victimizing offense.

Property Loss or Damage

Sections 3663 and 3663A

Sections 3663 and 3663A have essentially identical restitution provisions: both call for the return of the property, if that provides full victim restitution.¹⁰² If not, restitution takes the form of compensatory payments.¹⁰³ As a general rule, victims are entitled only to be made whole; unlike the sentencing guidelines which calculate sentence enhancements based on both actual and intended losses,¹⁰⁴ the restitution statutes permit awards only for actual losses.¹⁰⁵ It is often not the

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The once-mandatory and now advisory Sentencing Guidelines, however, limit probation to crimes having a sentencing range of 6 to 12 months or less, U.S.S.G. §5B1.1(a), ch.5A (Sentencing Table). Nevertheless, a court may order restitution as a condition of probation, *United States v. Oceanpro Industries, Ltd.*, 674 F.3d 323, 330-31 (4th Cir. 2012); *United States v. Batson*, 608 F.3d 630, 636 (10th Cir. 2010).

¹⁰⁰ 18 U.S.C. 3583(d) (“The court may order, as a further condition of supervised release ... any condition set forth as a discretionary condition of probation in §3563(b)(1) through (b)(10) ...”). The court may impose a term of supervised release with respect to any federal crime for which it imposes a term of imprisonment, 18 U.S.C. 3583; *United States v. Cadet*, 664 F.3d 27, 34 (2d Cir. 2011); *United States v. Gibbs*, 578 F.3d 694, 696 (7th Cir. 2009).

¹⁰¹ *United States v. Hassebrock*, 663 F.3d 906, 923 (7th Cir. 2011) (“The government acknowledges that restitution is not permitted pursuant to 18 U.S.C. 3663 or 18 U.S.C. 3663A.... However, a district court may impose restitution ... as a condition of probation, see 18 U.S.C. 3563(b)(2), or as a condition of supervised release, see 18 U.S.C. 3583(d)”); *United States v. Love*, 431 F.3d 477, 479-80 (5th Cir. 2005); *United States v. Butler*, 297 F.3d 505, 518 (6th Cir. 2002); *United States v. Frith*, 461 F.3d 914, 919-21 (7th Cir. 2006) (restitution, however, must be limited to losses directly caused by the offense of conviction); but see *United States v. Cottman*, 142 F.3d 160, 169-70 (3d Cir. 1998) (a defendant cannot be ordered to pay restitution for the money used in a government sting since the sting money was a cost of investigation and not a property loss; as a consequence the government cannot be considered a “victim” for purposes of the VWPA under such circumstances); *United States v. Cook*, 406 F.3d 485, 489 (7th Cir. 2005) (return of the government’s sting money is more appropriately accomplished as a condition of supervised release); *cf.*, *United States v. Bevilacqua*, 447 F.3d 124, 126-29 (1st Cir. 2006) (trial court had no authority to order a perjury defendant to pay the costs of investigation and prosecution).

¹⁰² 18 U.S.C. 3663(b)(1) (“The order may require that such defendant—(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—(A) return the property to the owner of the property or someone designated by the owner; or (B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—(i) the value of the property on the date of the damage, loss, or destruction, or (ii) the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned”); see also 18 U.S.C. 3663A(b)(1) below.

¹⁰³ 18 U.S.C. 3663A(b)(1) (“The order of restitution shall require that such defendant—(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—(A) return the property to the owner of the property or someone designated by the owner; or (B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—(i) the greater of—(I) the value of the property on the date of the damage, loss, or destruction; or (II) the value of the property on the date of sentencing, less (ii) the value (as of the date the property is returned) of any part of the property that is returned”); see also 18 U.S.C. 3663(b)(1) above.

¹⁰⁴ U.S.S.G. §2B1.1 and accompanying *Application Note 3*; *United States v. Lacey*, 699 F.3d 710, 721 (2d Cir. (continued...))

fact of a reimbursable loss, but its measure, that challenges the courts. Nevertheless, the types of reimbursable property losses contemplated by §§3663(b)(1) and 3663A(b)(1) include things like the salary of a faithless employee,¹⁰⁶ or the insurance replacement costs of a stolen car,¹⁰⁷ or the losses visited upon a loan guarantor by a mortgage fraud scheme.¹⁰⁸ Circumstances dictate whether attorneys' fees qualify as reimbursable property losses. The strongest arguments for recovery seem to attend those cases in which the scurrilous litigation is an integral part of the crime of conviction.¹⁰⁹ On the other hand, the courts seem less receptive when restitution is

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2012)(“We note that unlike the loss calculation for the purposes of sentencing, which may incorporate a merely intended loss in order to punish a culpable defendant, restitution is designed to make the victim whole, and must therefore be based only on the actual loss caused by the scheme”); *United States v. Alexander*, 679 F.3d 721, 731 (8th Cir. 2012).

¹⁰⁵ *United States v. Zangari*, 677 F.3d 86, 91 (2d Cir. 2012)(internal quotation marks and citations omitted)(“Because the purpose of restitution is essentially compensatory, and because the MVRA itself limits restitution to the full amount of each victim’s loss, a restitution order must be tied to the victim’s actual, provable loss”); *United States v. Louper-Morris*, 672 F.3d 539, 566 (8th Cir. 2012); *United States v. Harvey*, 532 F.3d 326, 339 (4th Cir. 2008)(“We and other circuits have interpreted this language [18 U.S.C. 3664(f)(1)A)] to require that an order of restitution be based on ‘actual loss,’ rather than ‘intended loss’”(citing cases from the First, Second, Third, Fourth, Fifth, Seventh, and Tenth Circuits).

The Identity Theft Enforcement and Restitution Act, however, recognizes restitution awards for either the actual or intended harm caused by certain identity theft offenses (violations of either 18 U.S.C. 1027(a)(7) or 1028A(a)), 18 U.S.C. 3663(b)(6). Moreover, a plea agreement may call for restitution that §§3663 and 3663A would not otherwise allow, 18 U.S.C. 3663(a)(3), 3663A(a)(3).

¹⁰⁶ *United States v. Bahel*, 662 F.3d 610, 648-49, 650 (2d Cir. 2011)(“[T]he money the U.N. paid in the form of his salary was plainly ‘property’ that belonged to the U.N., at least some of which the U.N. lost as a result of Bahel’s offense [receiving kickbacks from U.N. contractors], since the U.N. paid him for his honest services, which is what he failed to provide.... [We] find that requiring Bahel to repay less than 10% of his total salary was a conservative estimate of the costs of the fraud with respect to his salary”), citing, *United States v. Crawley*, 533 F.3d 349 (5th Cir. 2008), and *United States v. Saopoznik*, 161 F.3d 1117 (7th Cir. 1998) in accord; see also *United States v. Hunter*, 618 F.3d 1062, 1066 (9th Cir. 2010)(holding restitution in amounts paid by former employers as salary and benefits to the defendant convicted for stealing the identity of a registered nurse and using to gain employment).

¹⁰⁷ *United States v. Burks*, 678 F.3d 1190, 1198-198 (10th Cir. 2012).

¹⁰⁸ *Roberts v. United States*, 134 S.Ct. 1854, 1856 (2014)(“A provision in the statute says that, when return of the property lost by the victim is ‘impossible, impracticable, or inadequate,’ the offender must pay the victim ‘an amount equal to ... the value of the property’ less ‘the value (as of the date the property is returned) of any part of the property that is returned.’ §3663A(b)(1)(B). The question before us is whether ‘any part of the property’ is ‘returned’ when a victim takes title to collateral securing a loan that an offender fraudulently obtained from the victim. We hold that it is not. In our view, the statutory phrase ‘any part of the property’ refers only to the specific property lost by a victim, which, in the case of a fraudulently obtained loan, is the money lent. Therefore, no ‘part of the property’ is ‘returned’ to the victim until the collateral is sold and the victim receives money from the sale. The import of our holding is that a sentencing court must reduce the restitution amount by the amount of money the victim received in selling the collateral, not the value of the collateral when the victim received it”); *United States v. Alexander*, 679 F.3d 721, 731 (8th Cir. 2012)(“[T]he entity directly and proximately harmed as a result of the commission of Alexander’s offense was HUD, which guaranteed Alexander’s loan. The restitution amount included sums paid by HUD for the following costs: the unpaid principal (\$130,590.99), interest owed on the loan (\$8,862.16), the amount expended to obtain and acquire [(foreclose on)] the property (\$9,870.83), and other remaining costs associated with the sale of property (\$13,789.70). By taking the sum total of these costs (\$163,113.68), and subtracting the amount that HUD ultimately sold the house for (\$50,000.00), the district court found the amount of restitution owed to HUD was \$113,113.68.... [W]e decline to find that interest payments and other reasonable foreseeable expenses incurred by HUD were not compensable under the MVRA”).

¹⁰⁹ E.g., *United States v. Elson*, 577 F.3d 713, 727 (6th Cir. 2009)(“We agree with the district court’s conclusion that the attorney fees Bourke sustained defending himself against the fraudulent lawsuits are recoverable. It is undisputed that a central part of the conspiracy was ‘to engage in sham lawsuits’ (J.A. 132), including deceptive litigation techniques such as controlled depositions and collusive filings in civil court. The time and resources Bourke spent defending the lawsuits directly resulted from the filing of collusive lawsuits by Elson and his co-conspirators in furtherance of the (continued...)”).

sought as a property loss under either §3663(b)(1) or §3663A(b)(1) in order to compensate a victim for the costs of civil litigation filed against the offender.¹¹⁰

Section 3663, unlike its counterpart, permits the court to order those convicted of crime-assisting identity theft or aggravated identity theft to pay for the costs incurred by their victims to remedy the actual or intended harm associated with the offense.¹¹¹

Section 3663(c) also authorizes community restitution in the form of awards apportioned between state victim assistance agencies and state agencies dedicated to the reduction of substance abuse.¹¹² The court may order restitution in certain drug trafficking cases where there are no identifiable victims, capped by the amount of the fine that the court may impose for commission of the offense.¹¹³ Moreover, at least one court has held that the section authorizes restitution only in those cases where the court actually imposes a fine as well; if the court fails to impose a fine, it may not order community restitution.¹¹⁴ Section 3663 expressly provides for restitution for the remedial effects of the victims of identity theft committed in relation to other offenses¹¹⁵ and for

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scheme to conceal assets from and to frustrate the collection efforts of Schultz creditors such as Bourke. Accordingly, the portion of Bourke's fees related to defending himself against fraudulent lawsuits is recoverable. *See United States v. Havens*, 424 F.3d 535, 539 (7th Cir. 2005) (upholding inclusion of attorney fees 'paid [by an identity fraud victim] to counsel or other experts for dealing with the banks and credit agencies in the effort to correct her credit history and repair the damage to her credit rating' in the restitution order").

¹¹⁰ *United States v. Robers*, 698 F.3d 937, 954 (7th Cir. 2012) ("This court has held that attorney's fees expended in pursuing litigation are not recoverable"); *United States v. Elson*, 577 F.3d at 726 ("Where an offense involves damages to loss of property, the MVRA restricts restitution to the replacement value of the property.... In cases involving such offenses, several circuits have held that district court lacks authority ... to order restitution for attorney fees and similar "consequential damages involved in determining the amount of the loss or in recovering those funds"), citing, *United States v. Schnell*, 80 F.3d 1064, 1071 (5th Cir. 1996); *Government of the Virgin Islands v. Davis*, 43 F.3d 41, 44-5 (3d Cir. 1994).

As discussed in a moment, attorneys' fees unavailable as a property loss under §3663(b)(1) or §3663A(b)(1) may be reimbursable when related to participation in the investigation or prosecution of the offense under §3663(b)(4) or §3663A(b)(4).

¹¹¹ 18 U.S.C. 3663(b)(6) ("(b) The order may require that such defendant ... (6) in the case of an offense under §§ 1028(a)(7) or 1028A(a) of this title, pay an amount equal to the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense").

Section 1028(a)(7) condemns whoever "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law." Section 1028A condemns similar misconduct committed during and in relation to a number of other designated federal offenses.

¹¹² 18 U.S.C. 3663(c) ("(1) Notwithstanding any other provision of law ... when sentencing a defendant convicted of an offense described in ... 21 U.S.C. 841, 848(a), 849, 856, 861, 863), in which there is no identifiable victim, the court may order that the defendant make restitution in accordance with this subsection. (2)(A) An order of restitution under this subsection shall be based on the amount of public harm caused by the offense, as determined by the court in accordance with guidelines promulgated by the United States Sentencing Commission.... (3) Restitution under this subsection shall be distributed as follows: (A) 65 percent of the total amount of restitution shall be paid to the State entity designated to administer crime victim assistance in the State in which the crime occurred. (B) 35 percent of the total amount of restitution shall be paid to the State entity designated to receive Federal substance abuse block grant funds ...").

¹¹³ 18 U.S.C. 3663(c)(1), 3663(c)(2)(B).

¹¹⁴ *United States v. Mansoori*, 304 F.3d 635, 677 (7th Cir. 2002).

¹¹⁵ 18 U.S.C. 3663(b)(6).

state agencies in certain drug trafficking cases if there are no other identifiable victims.¹¹⁶ Section 3663A has no comparable provision.

Individual Restitution Sections

The individual restitution sections fall within two categories. One group focuses on restitution for the victims of crimes involving property damage or loss; the other on restitution for the victims of crimes involving personal injury. Among the first group, only the copyright infringement statute adopts by cross reference the mandatory restitution provisions of §3663A.¹¹⁷ Each of the others follows the same general pattern as §3663A but adds at least one unique feature of its own.

The child support restitution section, 18 U.S.C. 228(d), adopts the procedures of §3663A upon conviction for interstate evasion of child support orders.¹¹⁸ The amount of restitution that must be awarded is determined by reference to a state court support order or by other governing state law¹¹⁹ and, as such, may include the interest on overdue support payments¹²⁰ and support owed after children have reached their majority.¹²¹

The peonage restitution section, 18 U.S.C. 1593, uses the common definition of “victim”¹²² and affords victims of human trafficking offenses¹²³ a wide range of compensation that, unlike §§3663 and 3663A, includes the economic benefits derived from the victim’s services and a catch-all clause ensuring compensation for predicate crime-related injuries and losses.¹²⁴

¹¹⁶ 18 U.S.C. 3663(c)(1)(“Notwithstanding any other provision of law (but subject to the provisions of subsections (a)(1)(B)(i)(II) and (ii)(D)), when sentencing a defendant convicted of an offense described in §401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841[drug trafficking], 848(a)[continuing criminal enterprise], 849[drug trafficking at truck stops], 856 [maintaining drug-involved premises], 861 [using children in a drug operation], 863 [trafficking in drug paraphernalia]), in which there is no identifiable victim, the court may order that the defendant make restitution in accordance with this subsection”).

¹¹⁷ 18 U.S.C. 2323(c)(“When a person is convicted of an offense under §506 of Title 17 or §2318, 2319, 2319A, 2319B, or 2320, or chapter 90 of this title, the court, pursuant to §§3556, 3663A, and 3664 of this title, shall order the person to pay restitution to any victim of the offense as an offense against property referred to in §3663A(c)(1)(A)(ii) of this title”).

¹¹⁸ 18 U.S.C. 228(d)(“Upon a conviction under this section, the court shall order restitution under Section 3663A in an amount equal to the total unpaid support obligation as it exists at the time of sentencing”); *United States v. Hanna*, 630 F.3d 505, 512 (7th Cir. 2010).

¹¹⁹ 18 U.S.C. 228(f)(3)(“[T]he term ‘support obligation’ means any amount determined under a court order or an order of an administrative process pursuant to the law of a State or of an Indian tribe to be due from a person for the support and maintenance of a child or of a child and the parent with whom the child is living”).

¹²⁰ *United States v. Gill*, 264 F.3d 929, 931-33 (9th Cir. 2001).

¹²¹ *United States v. Molak*, 276 F.3d 45, 51 (1st Cir. 2002).

¹²² 18 U.S.C. 1593(c)(“As used in this section, the term ‘victim’ means the individual harmed as a result of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or a representative of the victim’s estate, or another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named such representative or guardian”).

¹²³ Chapter 77 of Title 18 of the *United States Code* houses the following criminal prohibitions: 18 U.S.C. 1581 (peonage), 1582 (vessels in the slave trade), 1582 (enticement into slavery), 1584 (sale into involuntary servitude), 1585 (transportation or sale of slaves), 1586 (service on vessels in the slave trade), 1587 (possession of slaves aboard a vessel), 1588 (transportation of slaves from the U.S.), 1589 (forced labor), 1590 (human trafficking), 1591 (sex trafficking), 1592 (documentation in aid of trafficking).

¹²⁴ *In re Sealed Case*, 702 F.3d 59, 66 (D.C. Cir. 2012)(“Section 1593 requires that the defendant pay the victim ‘the full amount of the victim’s losses,’ *id.* §1593(b)(1) defined as the sum of two components: (1) ill-gotten gains plus (2) (continued...)”).

The telemarketing fraud restitution statute, 18 U.S.C. 2327, originally enacted two years before the passage of the mandatory restitution provisions of §3663A, once had highly individualistic features.¹²⁵ It has since been amended so that its provisions more closely track those of the general restitution provisions for losses caused by predicate crimes.¹²⁶

The methamphetamine statute, 21 U.S.C. 853(q), covers the cleanup cost of closing down illicit amphetamine and methamphetamine production sites.¹²⁷ At one time, the section applied only to those convicted of manufacturing offenses and consequently reached convictions for attempted manufacture but not for possession with intent to distribute.¹²⁸ The USA PATRIOT Improvement and Reauthorization Act amended the section so that it now authorizes restitution upon conviction for offenses involving possession, possession with intent to distribute, or manufacture of amphetamine and methamphetamine.¹²⁹

The animal enterprise interference section, 18 U.S.C. 43(c), permits a sentencing court to order a defendant convicted of violating its proscriptions to pay restitution for specific kinds of damage

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the ‘full amount of the victim’s losses’); *United States v. Kuo*, 620 F.3d 1158, 1164 (9th Cir. 2010); *United States v. Sabhnani*, 599 F.3d 215, 254-55 (2d Cir. 2010): 18 U.S.C. 1593(b)(3)(emphasis added)(“As used in this subsection, the term ‘full amount of the victim’s losses’ has the same meaning as provided in §2259(b)(3) and shall in addition include the greater of the gross income or value to the defendant of the victim’s services or labor or the value of the victim’s labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. 201 et seq.)”). Section 2259(b)(3) (emphasis added) defines “full amount of the victim’s losses” to include “any costs incurred by the victim for—(A) medical services relating to physical, psychiatric, or psychological care; (B) physical and occupational therapy or rehabilitation; (C) necessary transportation, temporary housing, and child care expenses; (D) lost income; (E) attorneys’ fees, plus any costs incurred in obtaining a civil protection order; and (F) any other losses suffered by the victim as a proximate result of the offense.”

¹²⁵ 18 U.S.C. 2327 (1994 ed.).

¹²⁶ “(a) *In general*—Notwithstanding §3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution to all victims of any offense for which an enhanced penalty is provided under §2326.

“(b) *Scope and nature of order*.—(1) *Directions*.—The order of restitution under this section shall direct the defendant to pay to the victim (through the appropriate court mechanism) the full amount of the victim’s losses as determined by the court pursuant to paragraph (2). (2) *Enforcement*.—An order of restitution under this section shall be issued and enforced in accordance with §3664 in the same manner as an order under §3663A. (3) *Definition*.—For purposes of this subsection, the term ‘full amount of the victim’s losses’ means all losses suffered by the victim as a proximate result of the offense. (4) *Order mandatory*—(A) The issuance of a restitution order under this section is mandatory. (B) A court may not decline to issue an order under this section because of—(i) the economic circumstances of the defendant; or (ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

“(c) *Victim defined*—In this section, the term ‘victim’ has the meaning given that term in §3663A(a)(2),” 18 U.S.C. 2327.

¹²⁷ 21 U.S.C. 853(q)(“The court, when sentencing a defendant convicted of an offense under this subchapter or subchapter II of this chapter involving the manufacture, *the possession, or the possession with intent to distribute*, of amphetamine or methamphetamine, shall—(1) order restitution as provided in §§3612 and 3664 of Title 18; (2) order the defendant to reimburse the United States, the State or local government concerned, or both the United States and the State or local government concerned for the costs incurred by the United States or the State or local government concerned, as the case may be, for the cleanup associated with the manufacture of amphetamine or methamphetamine by the defendant *or on premises or in property that the defendant owns, resides, or does business in*; and (3) order restitution to any person injured as a result of the offense as provided in §3663A of Title 18”)(language added by the USA PATRIOT Improvement and Reauthorization Act of 2006 in italics).

¹²⁸ *United States v. Gramling*, 417 F.3d 891, 895-96 (8th Cir. 2005)(attempt); *United States v. Lachowski*, 405 F.3d 696, 698-700 (8th Cir. 2005)(possession).

¹²⁹ Sec. 743, P.L. 109-177, 120 Stat. 272 (2006).

(i.e., the cost of repeating disrupted experiments, the loss of farm income, and the costs of economic disruption).¹³⁰

Personal Injuries

Sections 3663 and 3663A

Sections 3663 and 3663A have parallel provisions governing the restitution for personal injuries that permit or, in the case of §3663A require, compensation for medical expenses,¹³¹ lost income,¹³² rehabilitation,¹³³ and funeral expenses in the event the victim is killed.¹³⁴

The medical expenses covered by a restitution order may include those paid on the victim's behalf by a third party,¹³⁵ and may include the costs of psychiatric and psychological treatment when the victim has suffered a physical injury.¹³⁶ Restitution for lost income extends to both past and future lost income.¹³⁷

¹³⁰ 18 U.S.C. 43(c) (“An order of restitution under §3663 or 3663A of this title with respect to a violation of this section may also include restitution—(1) for the reasonable cost of repeating any experimentation that was interrupted or invalidated as a result of the offense; (2) for the loss of food production or farm income reasonably attributable to the offense; and (3) for any other economic damage, including any losses or costs caused by economic disruption, resulting from the offense”). Note that §43 outlaws misconduct involving either property damage, personal injury, or both.

¹³¹ “[A]n amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment,” 18 U.S.C. 3663(b)(2)(A), 3663A(b)(2)(A); e.g., *United States v. Ahidley*, 486 F.3d 1184, 1189-190 (10th Cir. 2007).

¹³² 18 U.S.C. 3663(b)(2)(C), 3663A(b)(2)(C); *United States v. Douglas*, 525 F.3d 225, 254 (2d Cir. 2008).

¹³³ “[A]n amount equal to the cost of necessary physical and occupational therapy and rehabilitation,” 18 U.S.C. 3663(b)(2)(B), 3663A(b)(2)(B).

¹³⁴ “... [A]n amount equal to the cost of necessary funeral and related services,” 18 U.S.C. 3663(b)(3), 3663A(b)(3); *United States v. Douglas*, 525 F.3d at 253-54 (2d Cir. 2008).

¹³⁵ *United States v. Church*, 731 F.3d 530, 535 (6th Cir. 2013); *United States v. Johnson*, 400 F.3d 187, 199-201 (4th Cir. 2005) (“Under the MVRA, a district court properly orders restitution to be paid to a third party when the party bears the cost of providing necessary medical care to a victim of a covered offense who suffered bodily injury as a result of the offense”), quoting *United States v. Cliatt*, 338 F.3d 1089, 1091 (9th Cir. 2003); see also *United States v. Schmidt*, 675 F.3d 1164, 1169 (8th Cir. 2012); *United States v. Church*, 731 F.3d 530, 536-37 (6th Cir. 2013).

¹³⁶ *United States v. Reichow*, 416 F.3d 802, 805-6 (8th Cir. 2005); *United States v. Follet*, 269 F.3d 996, 1001 (9th Cir. 2001); *United States v. Husky*, 924 F.2d 223, 226 (11th Cir. 1991). Physical injury is ordinarily a necessary prerequisite for recovery for psychological harm, *United States v. Maynard*, 743 F.3d 374, 380 (2d Cir. 2014). No such physical injury is required, however, when restitution is ordered under the authority of individual probation or sexual abuse provisions although sexual abuse statute may impose greater limits on payments to third parties, *United States v. Follet*, 269 F.3d at 998-1001 (sexual abuse victim); *United States v. Landrum*, 93 F.3d 122, 125-26 (4th Cir. 1996)(probation).

¹³⁷ *United States v. Cienfuegos*, 462 F.3d 1160, 1163-169 (9th Cir. 2006); *United States v. Oslund*, 453 F.3d 1048, 1062-63 (8th Cir. 2006)(but explaining that in a given case complications associated with calculating the value of income lost by a murder victim might justify a refusal to award them). Note, however, that while the Ninth Circuit held that restitution for future income can be awarded to the estate or representative of a deceased victim, *United States v. Cienfuegos*, 462 F.3d at 1163-169, it had previously held that the wife of a deceased victim was not entitled to restitution for the victim's lost income *in her own right* unless she also suffered a physical injury as consequence of the offense, *United States v. Dayea*, 73 F.3d 229, 231-32 (9th Cir. 1995).

Other Restitution Statutes

Prior to passage of the general mandatory restitution authority in §3663A, Congress authorized restitution for three related small sets of offenses. Those authorizations, found in 18 U.S.C. 2248, 2259 and 2264, require the courts to order restitution following conviction for an offense proscribed in chapters 109A (sexual abuse), 110 (sexual exploitation of children), and 110A (domestic violence and stalking), respectively.¹³⁸ Other than their designation of predicate offenses, the sections are identical. They each

- insist on restitution of the “full amount of the victim’s losses,”¹³⁹
- define “victims” in much the manner of §§3663 and 3663A,¹⁴⁰
- supply a list of losses for which restitution must be ordered,¹⁴¹
- make it clear that neither the defendant’s poverty nor victim compensation from other sources absolves the court of its obligation to order restitution,¹⁴² and
- otherwise adopt the procedural mechanisms used for restitution under Section 3663A.¹⁴³

Unlike §§3663 and 3663A, the three sections on their face do not require bodily injury of the victim as a precondition for the award of the cost of psychiatric treatments. They also have a catch-all clause that has no counterpart in either §§3663 or 3663A.¹⁴⁴ On the other hand, unlike §§3663 and 3663A, they do not authorize payments to third parties to reimburse them for crime-related treatment of a victim.¹⁴⁵

¹³⁸ The crimes in chapters 109A, 110 and 110A of Title 18 consist of those proscribed in 18 U.S.C. 2241 (aggravated sexual abuse), 2242 (sexual abuse), 2243 (sexual abuse of a minor or ward), 2244 (abusive sexual contact), 2251 (sexual exploitation of children), 2251A (selling or buying children), 2252 (material involving sexual exploitation of children), 2252A (child pornography), 2252B (misleading Internet domain names), 2252C (misleading Internet words or digital images), 2257 (record keeping requirements), 2257A (simulated sexual conduct records), 2258 (failure to report child abuse), 2260 (overseas production child pornography for the U.S.), 2260A (sex offender registration), 2261 (interstate domestic violence), 2262 (interstate stalking), 2261 (violation of protection orders).

¹³⁹ 18 U.S.C. 2248(b)(1), (b)(4)(A); 2259(b)(1), (b)(4)(A); 2264(b)(1), (b)(4)(A).

¹⁴⁰ “For purposes of this section, the term ‘victim’ means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim’s estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian,” 18 U.S.C. 2248(c), 2259(c), 2264(c).

¹⁴¹ “For purposes of this subsection, the term ‘full amount of the victim’s losses’ includes any costs incurred by the victim for—(A) medical services relating to physical, psychiatric, or psychological care; (B) physical and occupational therapy or rehabilitation; (C) necessary transportation, temporary housing, and child care expenses; (D) lost income; (E) attorneys’ fees, plus any costs incurred in obtaining a civil protection order; and (F) any other losses suffered by the victim as a proximate result of the offense,” 18 U.S.C. 2248(b)(3), 2259(b)(3), 2264(b)(3).

¹⁴² “(B) A court may not decline to issue an order under this section because of—(i) the economic circumstances of the defendant; or (ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source,” 18 U.S.C. 2248(b)(4)(B), 2259(b)(4)(B), 2264(b)(4)(B).

¹⁴³ “An order of restitution under this section shall be issued and enforced in accordance with §3664 in the same manner as an order under §3663A,” 18 U.S.C. 2248(b)(2), 2259(b)(2), 2264(b)(2).

¹⁴⁴ “For purposes of this subsection, the term ‘full amount of the victim’s losses’ includes any costs incurred by the victim for ... (F) any other losses suffered by the victim as a proximate result of the offense,” 18 U.S.C. 2248(b)(3), 2259(b)(3), 2264(b)(3).

¹⁴⁵ *United States v. Johnson*, 400 F.3d 187, 199-201 (4th Cir. 2005); *United States v. Follet*, 269 F.3d 996, 998-1001 (9th (continued...))

Cost of Victim Participation in Investigation and Prosecution

Sections 3663 and 3663A cover a victim’s lost income, as well as necessary child care expenses, transportation costs, and other expenses associated with his or her participation in the investigation and prosecution of the crime, regardless of whether the resulting injury is to person or to property.¹⁴⁶ A number of courts seem to share the view of that “investigation costs—including attorneys’ fees—incurred by private parties as a direct and foreseeable result of the defendant’s wrongful conduct may be recoverable” under §§3663(b)(4) or 3663A(b)(4).¹⁴⁷ At least one appellate court, however, has concluded that those sections do not permit “restitution for the costs of an organization’s internal investigation, at least when (as here) the internal investigation was neither required nor requested by the criminal investigators or prosecutors.”¹⁴⁸

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 corporations and other legal entities are likewise entitled to restitution under the provisions.¹⁴⁹ 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.¹⁵⁰

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Cir. 2001)(also noting that §§3663 and 3663A “although broader in these respects than §2248, are narrower in another. Under §3663(b)(2)(A) and §3663A(b)(2)(A), restitution orders can cover psychological care only when there has been a bodily injury, while restitution orders under §2248 are subject to no such limitation”).

¹⁴⁶ The restitution order must “in any case, 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,” 18 U.S.C. 3663(b)(4), 3663A(b)(4).

¹⁴⁷ *United States v. Gordon*, 393 F.3d 1044, 1057 (9th Cir. 2004); *United States v. Stennis-Williams*, 557 F.3d 927, 930 (8th Cir. 2009)(“[P]rivately incurred investigative costs constitute foreseeable losses that are directly caused by the defendant’s fraudulent conduct”); *United States v. Hosking*, 567 F.3d 329, 332 (7th Cir. 2009)(“The bank’s investigation was clearly an important part of the ‘investigation ... of the offense’ in this case. It led to the determination of the actual amount embezzled and therefore the costs of that investigation may be included in the restitution award under §3663A(b)(4)”; *United States v. Elson*, 577 F.3d 713, 727-28 (6th Cir. 2009)(“Based on the reasoning set forth in *Stennis-Williams* [and quoted above], Bourke’s attorney fees are recoverable under §3663A(b)(4). Like the estate in *Stennis-Williams*, Bourke sustained significant costs and fees in discovering and investigating the numerous layers of shell corporations and nominees related to Schultz’s fraud. While Bourke did not investigate the fraud as part of the government’s prosecution of Elson and his co-conspirators, Bourke’s costs and fees constitute foreseeable losses that were directly caused by the conspiracy’s act of concealing Schultz’s assets from creditors such as Bourke”).

¹⁴⁸ *United States v. Papagno*, 639 F.3d 1093, 1095 (D.C. Cir. 2011); see also *United States v. Maynard*, 743 F.3d 374, 381 (2d Cir. 2014)(“A bank’s production of wanted posters after a robbery occurred is ... gratuitous.... [T]he police had an ongoing investigation and did not seek the bank’s cooperation in postering the neighborhood ...”).

¹⁴⁹ *United States v. Bahel*, 662 F.3d 610, 647-48 (2d Cir. 2011)(U.N. expenses paid a law firm to investigate an employee’s kickback scheme); *United States v. Phillips*, 477 F.3d 215, 224 (5th Cir. 2007)(costs incurred by the University of Texas in conducting a computer damage and systems evaluation and contacting individuals whose biographical information and Social Security numbers were stolen from the University’s computer system); *United States v. Gordon*, 393 F.3d 1044, 1056-57 (9th Cir. 2004)(cost of company investigation into computer records of an embezzling employee).

¹⁵⁰ *United States v. Phillips*, 367 F.3d 846, 863 (9th Cir. 2004)(in affirming an order to pay restitution to the Environmental Protection Agency for investigation and cleanup costs relating to the offense for which the defendant was convicted, the court noted, “[to] determine whether the Government may receive restitution, we must explore the dividing line between criminal investigation costs (which are not recoverable) and other investigation costs (which are recoverable)”; *United States v. Haileselassie*, 668 F.3d 1033, 1037 (8th Cir. 2012), citing in accord, *United States v. Salcedo-Lopez*, 907 F.2d 97, 98 (9th Cir. 1990), and *United States v. Meza*, 137 F.3d 533, 539 (7th Cir. 1998)(“It is well established that the costs [to governmental entities] of investigating and prosecuting an offense are not direct losses for (continued...)”).

Awards for investigative and prosecutorial participation have included relocation expenses for threatened victims;¹⁵¹ compensation for wages lost while the victim assisted in the investigation;¹⁵² and attorneys' fees related to the recovery of the victim of international parental kidnapping.¹⁵³

Procedure

Except to the limited extent otherwise provided in the individual authorization statutes, §3664 supplies the procedure that governs the issuance of restitution orders.¹⁵⁴ Upon conviction of a defendant, 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.¹⁵⁵ Prosecutors are to provide the probation officer with pertinent information.¹⁵⁶ The officer is also to ask victims to detail the extent and specifics of their predicate crime-related losses.¹⁵⁷ The defendant is obliged to give the officer a complete description of his or her financial situation.¹⁵⁸

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which restitution may be ordered”).

¹⁵¹ *United States v. Malpeso*, 126 F.3d 92, 94-5 (2d Cir. 1997).

¹⁵² *Moore v. United States*, 178 F.3d 994, 1001 (8th Cir. 1999).

¹⁵³ *United States v. Cummings*, 281 F.3d 1046, 1052-53 (9th Cir. 2002).

¹⁵⁴ 18 U.S.C. 3664(a) (“For orders of restitution under this title... ”); each of the individual provisions also contains a corresponding cross reference, 18 U.S.C. 43(c), 228(d), 1593(b)(2), 2248(b)(2), 2259(b)(2), 2264(b)(2), 2323(c), 2327(b)(2), 21 U.S.C. 853(q)(1) (“The court ... shall—(1) order restitution as provided in §§3612 and 3663 of Title 18”). Section 3612 provides the procedure for the collection of restitution once it has been ordered.

¹⁵⁵ 18 U.S.C. 3664(a) (“For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court”); *Dolan v. United States*, 560 U.S. 605, 612-13 (2010); *United States v. Zaic*, 744 F.3d 1040, 1042 (8th Cir. 2014); *United States v. Edwards*, 728 F.3d 1286, 1295 (11th Cir. 2013); *United States v. Grant*, 715 F.3d 552, 554 n.1 (4th Cir. 2013).

¹⁵⁶ 18 U.S.C. 3664(d)(1) (“Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution”).

¹⁵⁷ 18 U.S.C. 3664(d)(2) (“The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable—(A) provide notice to all identified victims of—(i) the offense or offenses of which the defendant was convicted; (ii) the amounts subject to restitution submitted to the probation officer; (iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim’s losses; (iv) the scheduled date, time, and place of the sentencing hearing; (v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and (vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim’s losses subject to restitution; and (B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi)”). *United States v. Stoerr*, 695 F.3d 271, 279 (3d Cir. 2012). “But the fact that the victims did not claim a loss does not mean that they did not sustain a loss, and where, as here, restitution is governed by the MVRA, a victim’s decision not to participate in the sentencing process does not relieve the defendant from having to pay restitution,” *United States v. Zangari*, 677 F.3d 86, 96 (2d Cir. 2012).

¹⁵⁸ 18 U.S.C. 3664(d)(3) (“Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant’s dependents, and such other information that the court requires relating to such other factors as the court deems appropriate”); *United States v. Yousef*, 327 F.3d 56, 165 (2d Cir. 2003); *United States v. Manning*, 526 F.3d 611, (continued...)

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 evidence¹⁵⁹ following a hearing, at which the prosecution bears the burden of establishing the existence and extent of the victim's losses,¹⁶⁰ and the defendant bears the burden on questions regarding his or her finances and the extent to which the defendant has compensated the victim for the losses.¹⁶¹ The court may conduct a hearing or task the probation officer to secure additional information and resolve disputes.¹⁶²

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.¹⁶³ In its calculation of the 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.¹⁶⁴ Compensation may be made in a lump sum, in-kind payments, installments, or any combination of such methods of payment.¹⁶⁵ In-kind payments may take the form of a return of lost property, replacement in-kind or otherwise, or personal services.¹⁶⁶ When the defendant's financial condition precludes any alternative, the order may call for nominal

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620 (10th Cir. 2008); *United States v. Smiley*, 553 F.3d 1137, 1145 (8th Cir. 2009).

¹⁵⁹ 18 U.S.C. 3664(e); *United States v. Pole*, 741 F.3d 120, 128 (D.C. Cir. 2013); *United States v. Gushlak*, 728 F.3d 184, 195 (2d Cir. 2013); *United States v. De Leon*, 728 F.3d 500, 506-507 (5th Cir. 2013); *United States v. Kieffer*, 681 F.3d 1143, 1171 (10th Cir. 2012); *United States v. Kearney*, 672 F.3d 81, 92 (1st Cir. 2012).

¹⁶⁰ 18 U.S.C. 3664(e); *Roberts v. United States*, 134 S.Ct. 1854, 1859 (2014); *United States v. Freeman*, 741 F.3d 426, 435 (4th Cir. 2014); *United States v. Edwards*, 728 F.3d 1286, 1296 (11th Cir. 2013); *United States v. Fair*, 699 F.3d 508, 513 (D.C. Cir. 2012); *United States v. Chaika*, 695 F.3d 741, 747 (8th Cir. 2012).

¹⁶¹ 18 U.S.C. 3664(e); *United States v. Malone*, 747 F.3d 481, 486 (7th Cir. 2014); *United States v. De Leon*, 728 F.3d 500, 506 (5th Cir. 2013); *United States v. Bryant*, 655 F.3d 232, 254 (3d Cir. 2011) (“[W]here offsets are claimed, such as for compensation that the victim gets from other sources ... it is the defendant's burden to prove those offsets”).

¹⁶² 18 U.S.C. 3664(d)(4); *United States v. Edwards*, 728 F.3d 1286, 1295 (11th Cir. 2013); *United States v. Adetiloje*, 717 F.3d 1030, 1040 (8th Cir. 2013). The court may also call upon the services of a magistrate judge or special master, 18 U.S.C. 3664(d)(6).

¹⁶³ 18 U.S.C. 3664(f)(1)(A); *United States v. Joseph*, 743 F.3d 1350, 1353-354 (11th Cir. 2014); *United States v. Perry*, 714 F.3d 570, 577 (8th Cir. 2013); *United States v. Turner*, 718 F.3d 226, 236 (3d Cir. 2013).

Nevertheless, victims are not entitled to more than full compensation; restitution may not be ordered for amounts in excess of the victim losses, *United States v. Chemical & Metal Industries, Inc.*, 677 F.3d 750, 752 (5th Cir. 2012) (“The general rule is that the statute does not authorize a restitution order that exceeds the victim's losses. As one court explained, ‘an order of restitution that exceeds the victim's actual losses or damages is an illegal sentence’”), quoting, *United States v. Middlebrook*, 553 F.3d 572, 579 (7th Cir. 2009); see also *United States v. Rizk*, 660 F.3d 1125, 1137 (9th Cir. 2011); *United States v. Frazier*, 651 F.3d 899, 904 (8th Cir. 2011); *United States v. Pescatore*, 637 F.3d 128, 139 (2d Cir. 2011).

¹⁶⁴ 18 U.S.C. 3664(f)(2); *United States v. Sanchez-Maldonado*, 737 F.3d 826, 828-29 (1st Cir. 2013); *United States v. Grant*, 715 F.3d 552, 558 (4th Cir. 2013); *United States v. Dann*, 652 F.3d 1160, 1179 (9th Cir. 2011).

¹⁶⁵ 18 U.S.C. 3664(f)(3)(A); *United States v. Frazier*, 651 F.3d 899, 905 (8th Cir. 2011) (method of payment should be specified in the order); *United States v. Palmer*, 643 F.3d 1060, 1066-67 (8th Cir. 2011) (intervals must be specified and not contingent); *United States v. Jaffe*, 417 F.3d 259, 265 (2d Cir. 2005); *United States v. Wilson*, 416 F.3d 1164, 1170 (10th Cir. 2005); *United States v. Sensmeier*, 361 F.3d 982, 990 (7th Cir. 2004).

¹⁶⁶ 18 U.S.C. 3664(f)(4); *United States v. Simmonds*, 235 F.3d 826, 832 (3d Cir. 2000) (since restitution may take the form of replacement, a district court may validly consider replacement costs in assessing a victim's losses); *but see*, *United States v. Fazal-Ur-Raheman-Fazal*, 355 F.3d 40, 53-6 (1st Cir. 2004) (a defendant guilty of international parental kidnaping cannot be ordered to make restitution in the form of a return or transfer of the kidnapped children to their mother either as property or as a service under §3663(f)(4): “Children are not ‘property’ nor is their transfer a ‘service,’ and we decline the invitation to hold otherwise”).

periodic payments.¹⁶⁷ 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.¹⁶⁸

When it sets the restitution owed by the defendant, the court may not take into account the fact that a victim may have been compensated by insurance or any other alternative form of compensation of his or her injury, loss, or damage.¹⁶⁹ The amount of a restitution order may later be reduced to account for compensatory damages for the same loss recovered in a civil action.¹⁷⁰

When the government and the probation officer have been unable to determine the full extent of victim losses within 10 days of sentencing, they are obligated to inform the court.¹⁷¹ The court is then to set a date, no later than 90 days after sentencing, for the final determination of victim losses.¹⁷² Thereafter, victims have a limited option to present claims for restitution relating to undiscovered losses.¹⁷³

The Supreme Court has resolved a circuit split over how these provisions should be applied, particularly in cases where the timelines have not been observed.¹⁷⁴ It held in *Dolan* that a

¹⁶⁷ 18 U.S.C. 3664(f)(3)(B); *United States v. Wirth*, 719 F.3d 911, 917-918 (8th Cir. 2013); *United States v. Day*, 418 F.3d 746, 758 (7th Cir. 2005).

¹⁶⁸ *Ward v. Chavez*, 678 F.3d 1042, 1049-50 (9th Cir. 2012) (“[W]e explicitly oppose[] a district court’s attempt to minimize its responsibility to set a restitution schedule by ordering ‘immediate’ payment. Such an arrangement effectively transfers the district court’s responsibility for setting a restitution schedule to the probation office, which is inconsistent with the statute”); In this vein, the Ninth Circuit has observed that “The circuits have split over how to interpret the MVRA and to what extent it permits delegation of restitution scheduling duties. The First, Second, Third, Sixth, Eighth, Tenth and Eleventh Circuits have all held that a district court must set a restitution repayment schedule, and those that have reached the issue have concluded ... that court may not simply order immediate payment and leave to the BOP the task of setting the actual schedule.... In contrast, the Fourth, Fifth, and Seventh Circuits have held that a judgment of conviction need not contain a schedule of restitution payments to be made during the period of incarceration,” *United States v. Lemoine*, 546 F.3d 1042, 1048 n.4 (9th Cir. 2008). The Ninth Circuit permits a district court to order immediate restitution where the defendant has the resources at hand to comply, but in other instances holds that, “the district court—not BOP, nor Probation—must set a repayment schedule in the judgment of conviction in order to discharge its responsibilities under MVRA”; *United States v. Ahidley*, 486 F.3d 1184, 1191-193 (10th Cir. 2007); *United States v. Thigpen*, 456 F.3d 766, 771 (7th Cir. 2006).

¹⁶⁹ 18 U.S.C. 3664(f)(1)(B); *United States v. Malone*, 747 F.3d 481, 488 (7th Cir. 2014). Section 3664(f)(1)(B), however, imposes no limitation on the discretion of the court to §3663A(c)(3) decline to order restitution because of the impracticality or the complexity of task, *United States v. Gallant*, 537 F.3d 1202, 1253 (10th Cir. 2008)(emphasis in the original) (“[W]hile the complexity exception in §3663A addresses *whether* a court must provide a restitution award to a victim, the prohibition of §3664(f)(1)(B) relates to *how much* restitution should be awarded once the sentencing court has determined that an award is required”).

¹⁷⁰ 18 U.S.C. 3664(j)(2).

¹⁷¹ 18 U.S.C. 3664(d)(5).

¹⁷² 18 U.S.C. 3664(d)(5).

¹⁷³ 18 U.S.C. 3664(d)(5).

¹⁷⁴ *Dolan v. United States*, 560 U.S. 605 (2010). Prior to *Dolan*, some courts viewed the time limits as jurisdictional and denied lower courts the authority to order restitution beyond the statutory limits, *United States v. Kapelushnik*, 306 F.3d 1090, 1093-94 (11th Cir. 2002); *United States v. Jolivet*, 257 F.3d 581, 584 (6th Cir. 2001). Some considered them akin to statutes of limitation and permitted the time periods to be tolled, *United States v. Terlingo*, 327 F.3d 216, 219 (3d Cir. 2003); *United States v. Reano*, 298 F.3d 1208, 1212-213 (10th Cir. 2002); *United States v. Stevens*, 211 F.3d 1, 5 (2d Cir. 2000). Still others saw the time limits as a device designed for the benefit of victims, not defendants, and for them the failure to honor the time limits warranted no relief as long as the victim (or the government in the interest of the victim) had no objection and the defendant was given the opportunity to demonstrate any adverse impact, (continued...)

sentencing court may determine the extent of a victim's losses and order restitution after the expiration of the statutory 90-day deadline, as long as the defendant was aware beforehand that the court intended to order restitution.¹⁷⁵

Victims may assign their right to receive restitution payments to Crime Victims Fund,¹⁷⁶ but there is no consensus over whether the court may order restitution to be paid to the Crime Victims Fund on its own initiative if the victim refuses to accept it.¹⁷⁷

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.¹⁷⁸ 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.¹⁷⁹

There had been a difference of opinion over whether joint and severable liability may be imposed other than with respect to co-defendants.¹⁸⁰ The Supreme Court has recently provided some

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United States v. Cienfuegos, 462 F.3d 1160, 1162-163 (9th Cir. 2006); *United States v. Johnson*, 400 F.3d 187, 199 (4th Cir. 2005); *United States v. Chael*, 389 F.3d 35, 48-50 (1st Cir. 2004); *United States v. Douglas*, 525 F.3d 225, 252-53 (2d Cir. 2008); *United States v. Balentine*, 569 F.3d 801, 804-807 (8th Cir. 2009); *United States v. Dolan*, 571 F.3d 1022, 1031 (10th Cir. 2009), *aff'd*, 560 U.S. 605 (2010).

¹⁷⁵ *Dolan v. United States*, 560 U.S. at 608; see also *United States v. Fumo*, 655 F.3d 288, 321-22 (3d Cir. 2011), citing *Dolan* (“[O]ther circuits have concluded, based on the statute’s purpose in protecting victims, that the 90-day ‘deadline’ for determining the victim’s losses does not bar a court from ordering restitution even after 90 days as long as there is no substantial prejudice to the defendant. This holding has since been affirmed by the Supreme Court”).

¹⁷⁶ 18 U.S.C. 3664(g); *United States v. Edwards*, 595 F.3d 1004, 1013 (9th Cir. 2010).

¹⁷⁷ *United States v. Speakman*, 594 F.3d 1165, 1174-178 (10th Cir. 2010) (the court has no authority to order restitution paid to Crime Victims Fund when the victim refuses to accept restitution); *United States v. Pawlinski*, 374 F.3d 436, 539-41 (7th Cir. 2004) (except pursuant to a plea bargain or on assignment by a victim, the court has no authority to award restitution to the Crime Victims Fund); *United States v. Johnson*, 378 F.3d 230, 245 (2d Cir. 2004) (“Hunter also urges us to vacate the District Court’s restitution award on the basis that it was error for the District Court to assign Felix’s interest in restitution, should Felix renounce it, to the Crime Victims Fund. Hunter argues that §3664(g)(2) provides the statutory authority to assign interest in restitution only to victims, and that the Court therefore had no authority to do so. We disagree”).

¹⁷⁸ 18 U.S.C. 3664(h) (“If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim’s loss and economic circumstances of each defendant”); *United States v. Sanchez-Mandonado*, 737 F.3d 826, 828 (1st Cir. 2013); *United States v. Zangari*, 677 F.3d 86, 96 (2d Cir. 2012) (Section 3664(h) “provide[s] for restitution payable by all convicted co-conspirators in respect to damage suffered by all victims of a conspiracy, regardless of the facts underlying counts of conviction in individual prosecutions”); *United States v. Rozin*, 664 F.3d 1052, 1066 (6th Cir. 2012).

¹⁷⁹ *United States v. Scott*, 270 F.3d 30, 52 (1st Cir. 2001) (“If the defendants are each made liable for the full amount, but the victim may recover no more than the total loss, the implication is that each defendant’s liability ends when the victim is made whole, regardless of the actual contributions of individual defendants”); *United States v. Nucci*, 364 F.3d 419, 423 (2d Cir. 2004); *United States v. Adeniji*, 221 F.3d 1020, 1029 (7th Cir. 1999). Other courts reach the same result—victims are not entitled to the enforcement of joint and several restitution orders beyond the point of full recovery—by reading together §§3664(f)(1)(A) (full amount of victim’s losses) and 3664(j)(2) (restitution offset by subsequent victim recovery in civil litigation), *United States v. Dawson*, 250 F.3d 1048, 1050 (7th Cir. 2001); *United States v. Stanley*, 309 F.3d 611, 613 (9th Cir. 2002).

¹⁸⁰ *In re Amy Unknown*, 701 F.3d 749, 770 (5th Cir. 2012), *vac’d and rem’d* on other grounds *sub nom.*, *Paroline v. United States*, 134 U.S. 1710 (2014) (“And although the D.C. Circuit has expressed that it is ‘unclear ... whether joint and several liability may be imposed on defendants in separate cases,’ [*United States v. Monzel*, 641 F.3d 528, 539 (D.C. Cir. 2011)], nothing in §3664 forbids it, either expressly or through implication; the fact that it conforms well to this (continued...)”).

clarification as to how courts should deal with restitution when those who are not co-defendants are responsible for a substantial portion of the victim's losses.¹⁸¹ The defendant in the case viewed child pornography of which the victim was the subject. To hold the defendant liable for all of the victim's losses attributable to production, distribution, and viewing of the material might contravene the proscriptions of the Eighth Amendment's excessive fines clause, the Court suggested.¹⁸² Rather, it held that the defendant's restitution order should be calculated to reflect his relative contribution to the harm caused.¹⁸³

Section 3664(i) declares that when it comes to restitution, the United States is to be served last.¹⁸⁴ 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.¹⁸⁵ When the government is not a victim, the defendant is not entitled to have the restitution award offset by the value of any forfeited property.¹⁸⁶ There may be some question

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context supports its application"); *United States v. Laraneta*, 700 F.3d 983, 992-93 (7th Cir. 2012) ("That section authorizes the sentencing court to make liability for restitution joint and several 'if the court finds that more than 1 defendant has contributed to the loss of a victim,' 18 U.S.C. 3664(h), and there is only one defendant in this case. So there is no statutory authorization for what the district court did here [when it ordered joint and several restitution].... On the basis both of practical considerations and the absence of statutory authorization, the Second Circuit in another case involving Amy held that contribution is not permissible unless the defendants from whom contribution is sought are defendants in the same case as the defendant seeking contribution. *United States v. Aumais*, 656 F.3d [147, 155-56 (2d Cir. 2011)]").

¹⁸¹ *Paroline v. United States*, 134 S.Ct. 1710 (2014). The case arose under one of the special restitution statutes, 18 U.S.C. 2259, which but for its individual features is governed by the provisions of 18 U.S.C. 3663A and 3664, 18 U.S.C. 2259(b)(2).

¹⁸² *Paroline v. United States*, 134 S.Ct. at 1725-726 ("The reality is that the victim's suggested approach would amount to holding each possessor of her images liable for the conduct of thousands of other independently acting possessors and distributors with no legal or practical avenue for seeking contribution. That approach is so severe it might raise questions under the Excessive Fines Clause of the Eighth Amendment").

¹⁸³ *Id.* at 1727 ("In this special context, where it can be shown both that a defendant possessed a victim's images and that a victim has outstanding losses caused by the continuing traffic in those images but where it is impossible to trace a particular amount of those losses to the individual defendant by recourse to a more traditional causal inquiry, a court applying §2259 should order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses. The amount would not be severe in a case like this, given the nature of the causal connection between the conduct of a possessor like Paroline and the entirety of the victim's general losses from the trade in her images, which are the product of the acts of thousands of offenders. It would not, however, be a token or nominal amount. The required restitution would be a reasonable and circumscribed award imposed in recognition of the indisputable role of the offender in the causal process underlying the victim's losses and suited to the relative size of that causal role. This would serve the twin goals of helping the victim achieve eventual restitution for all her child-pornography losses and impressing upon offenders the fact that child-pornography crimes, even simple possession, affect real victims").

¹⁸⁴ 18 U.S.C. 3664(i) ("... In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution"); *United States v. Witham*, 648 F.3d 40, 45 (1st Cir. 2011); *United States v. Williams*, 612 F.3d 500, 510 (6th Cir. 2010).

¹⁸⁵ *United States v. Mateos*, 623 F.3d 1350, 1370 (11th Cir. 2010); *United States v. Senty-Haugen*, 449 F.3d 862, 865 (8th Cir. 2006); *United States v. Ekanem*, 383 F.3d 40, 43 (2d Cir. 2004).

¹⁸⁶ *United States v. Joseph*, 743 F.3d 1350, 1353 (11th Cir. 2014) ("[U]nder the plain language of the MVRA and the applicable forfeiture provisions, the district court had no authority to offset the amount of restitution owed to the IRS by the amount of the funds Joseph forfeited to the government"); *United States v. Carter*, 742 F.3d 440, 446 (9th Cir. 2014) ("[D]efendants may be required to pay restitution and [to] forfeit the same amounts. And a defendant has no right to a credit against a restitution order equal to any part of the amount forfeited. However, the Government may choose to assign forfeited proceeds to victims"); *United States v. Adetiloje*, 716 F.3d 1030, 1041 (8th Cir. 2013).

whether the same thing can be said when the government is both the victim of the offense and the recipient of the forfeited property.¹⁸⁷

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.¹⁸⁸ It also permits a court to reduce an earlier restitution order by any amounts that the victim later receives in the course of related federal or state civil litigation.¹⁸⁹

The victim, the defendant, or the government may petition to have a restitution order's payment schedule amended to reflect the defendant's changed economic circumstances.¹⁹⁰ The changed economic circumstances envisioned in §3664(k) do not include anticipated future changes¹⁹¹ or a later, better-informed understanding of the defendant's financial condition at the time of sentence.¹⁹² Nor does the section provide defendants with a mechanism with which to later challenge the legality of their restitution orders.¹⁹³

¹⁸⁷ *United States v. Joseph*, 743 F.3d at 1353; *United States v. Perry*, 714 F.3d 570, 578-79 (8th Cir. 2013)(declining to address the "complex and difficult issues" raised by "the question of whether funds forfeited to the government should offset a criminal restitution to the government as victim in order to avoid a double recovery by the United States); *United States v. Taylor*, 582 F.3d 558, 567-68 (5th Cir. 2009)("Several courts have found that the plain language of the MVRA does not require that restitution be offset against amounts forfeited to the government.... Generally, courts decline to offset restitution when there is no evidence that doing so would result in double recovery to the victim.... Courts that permit offset of restitution have done so only after finding that forfeited funds have been remitted to the victims in lieu of restitution").

¹⁸⁸ 18 U.S.C. 3664(j)(1); *United States v. Douglas*, 525 F.3d 225, 254 (2d Cir. 2008); see also *United States v. Church*, 731 F.3d 530, 535 (6th Cir. 2013)("[P]erpetrators of crimes of violence must pay the total amount of the cost of their victim's medical expenses, not just those the victim personally incurred").

¹⁸⁹ 18 U.S.C. 3664(j)(2). The courts, however, tend to read the section broadly as part of general intent to compensate victims fully but not to award them a windfall, see e.g., *United States v. McDaniel*, 398 F.3d 540, 554-55 (6th Cir. 2005)("[T]he restitution statutes do not permit victims to obtain multiple recoveries for the same loss. See 18 U.S.C. 35664(j)(2)"); *United States v. Joseph*, 743 F.3d 1350, 1354 (11th Cir. 2014); *United States v. Malone*, 747 F.3d 481, 486 (7th Cir. 2014). Yet, the defendant bears the burden of establishing that the civil recovery corresponds to the injury for which restitution was ordered, *United States v. Calbat*, 266 F.3d 358, 365 (5th Cir. 2001).

¹⁹⁰ 18 U.S.C. 3664(k)("A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require"); *United States v. Grant*, 715 F.3d 552, 554 (4th Cir. 2013).

Section 3664 deals specifically with one change in the defendant's financial circumstances by requiring that he apply any windfall he receives while in prison to his obligation to make restitution, 18 U.S.C. 3664(n)("If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed").

¹⁹¹ *United States v. Vanhorn*, 399 F.3d 884, 886 (8th Cir. 2005)(defendant's desire to begin saving while in prison for the future costs of medical treatment provided at government expense pending his release does not constitute a change in economic circumstances for purposes of §3664(k)).

¹⁹² *United States v. Grant*, 235 F.3d 95, 100 (2d Cir. 2000)("[I]t cannot be that a court's later understanding that it had sentenced a defendant without full knowledge of his assets alone constitutes a material change in economic circumstances. A change of the sort contemplated by the statute is identified by an objective comparison of a defendant's financial condition before and after a sentence is imposed"); *United States v. Wjys*, 744 F.3d 1214, 1219 (10th Cir. 2014)("If the district court determines a material change in defendant's financial circumstances has occurred, subsection (k) authorizes the court to adjust the payment schedule as the interests of justice require. Neither subsection (continued...)

There are several means to enforce a restitution order. Section 3664(m) declares that restitution orders may be enforced in the manner used to collect fines or “by all other available and reasonable means.”¹⁹⁴ When restitution is a condition of probation or supervised release, failure to make restitution may provide the grounds for revocation.¹⁹⁵ Moreover, a restitution order operates as a lien in the name of the United States on the defendant’s property that remains in effect for 20 years.¹⁹⁶ The government may also use garnishment and the other collection mechanisms of the Federal Debt Collection Procedures Act (FDCPA) to enforce a restitution order.¹⁹⁷ A victim may use a restitution order to secure a lien in his own name against the defendant’s property to ensure the payment of restitution.¹⁹⁸ 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, enforceable in the face of legally insufficient restitution order through a liberalized form of mandamus in some circuits.¹⁹⁹

(...continued)

(k) nor any other provision of §3664, however, authorizes a reduction in the amount of restitution ordered”).

¹⁹³ *McGere v. Martinez*, 627 F.3d 933, 937 (3d Cir. 2010), citing in accord, *United States v. Diggs*, 578 F.3d 318, 320 (5th Cir. 2009); and *Matheny v. Morrison*, 307 F.3d 709, 711-12 (8th Cir. 2002).

¹⁹⁴ 18 U.S.C. 3664(m)(A)(i), (ii); see also *United States v. Carter*, 742 F.3d 440, 445 (9th Cir. 2014)(internal citations omitted)(“An order of restitution may be enforced by the United States in the manner provided in subchapter C of chapter 227 [relating to fines] and subchapter B of chapter 229 of this title. Chapter 229 provides that the United States may enforce a judgment imposing a fine in accordance with the practices and procedures for the enforcement of a civil judgment under Federal law or State law, and generally, a judgment imposing a fine may be enforced against all property or rights to property of the person fined”).

¹⁹⁵ 18 U.S.C. 3583(e)(3), 3565(a); *United States v. Melton*, 666 F.3d 513, 517 (8th Cir. 2012)(“A defendant’s failure to put forth a good faith effort to seek employment to pay a restitution judgment is a valid ground for revoking a supervised release”).

¹⁹⁶ 18 U.S.C. 3613(c).

¹⁹⁷ *United States v. Witham*, 648 F.3d 40, 41 (1st Cir. 2011)(“[T]he MVRA authorizes the United States to invoke FDCPA procedures to enforce all restitution orders, including those in favor of private-party victims”); *United States v. Hosking*, 567 F.3d 329, 334-35 (7th Cir. 2009)(“The MVRA authorizes the government to enforce a restitution order through a series of specific means including ‘all other available and reasonable means.’ 18 U.S.C. §3664(m)(1)(A)(ii). And again, §3613(a) provides that the United States may enforce a judgment against ‘all property or rights to property of the person fined,’ ‘notwithstanding any other Federal law.’.... Moreover, §3613 treats a restitution order under the MVRA like a tax liability. This means that any property that the IRS can reach to satisfy a tax lien, a sentencing court can also reach in a restitution order. See 18 U.S.C. §3613(c); *United States v. Irving*, 452 F.3d 110, 126 (2d Cir. 2006)”; *United States v. Novak*, 476 F.3d 1041, 1044 (9th Cir. 2007)(For enforcement of restitution orders, 18 U.S.C. 3664(m)(1)(A)(i) and 3613(f) authorize recourse to the fine collection authority of §3613. For collection of unpaid fines, 18 U.S.C. 3613(a) authorizes the use of the practices and procedures available for enforcement of a civil judgment. The Federal Debt Collection Procedure Act is available for such purposes, 28 U.S.C. 3001).

¹⁹⁸ 18 U.S.C. 3664(m)(1)(B)(“At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State”).

¹⁹⁹ 18 U.S.C. 3771(a)(6), (d)(3). Mandamus is an extraordinary form of judicial review which is only rarely granted. In the case of §3771, however, since Congress had designated mandamus as the principal avenue of review, some courts have declined to use the usual mandamus review standard but instead have reviewed victims’ mandamus petitions for enforcement of §3771 under an abuse of discretion standard, *United States v. Monzel*, 641 F.3d 528, 532-33 (D.C. Cir. 2011)(parenthetical phrases omitted)(“There is a circuit split on the standard of review for mandamus petitions brought under the CVRA [Crime Victims’ Rights Act]. Three circuits apply the traditional mandamus standard urged by Monzel and the government. See *In re Acker*, 596 F.3d 370, 372 (6th Cir. 2010); *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008); *In re Antrobus*, 519 F.3d 1123, 1125 (10th Cir. 2008). Four do not. See *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1017-18 (9th Cir. 2006); *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 563-64 (2d Cir. 2005); see also *In re Steward*, 552 F.3d 1285, 1288-289 (11th Cir. 2008); *In re Walsh*, 229 Fed. Appx. 58, 2007 WL 1156999, at *2 (3d Cir. (continued...))

In most instances, a victim may also sue the defendant based on the conduct that led to the 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 the conviction.²⁰⁰

Section 3664(o) provides that the court's restitution order constitutes a final order notwithstanding the fact it may later be corrected, modified, or appealed under various court rules and statutory provisions.²⁰¹ This does not mean that the district court may later reduce a restitution order in the absence of specific authority.²⁰² Nor does it convey appellate rights upon third parties who claim a right to restitution for expenses necessarily incurred on behalf of a victim.²⁰³

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.²⁰⁴ It might seem from this that a restitution

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2007). We think the best reading of the statute favors applying the traditional mandamus standard"); see also *In re WellCare Health Plans, Inc.*, ___ F.3d ___, ___*3 (11th Cir. June 13, 2014)(traditional mandamus standard); *In re Stake Center Locating, Inc.*, 731 F.3d 949, 951 (9th Cir. 2013)(abuse of discretion standard). Even under the more demanding standard, a victim may be entitled to mandamus relief from the denial of a right to full restitution, e.g., *In re Amy Unknown*, 701 F.3d 749, 773 (5th Cir. 2012), vac'd and rem'd on other grounds sub nom., *Paroline v. United States*, 134 S.Ct. 1710 (2014).

²⁰⁰ 18 U.S.C. 3664(l).

²⁰¹ 18 U.S.C. 3664(o) ("A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that— (1) such a sentence can subsequently be— (A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title; (B) appealed and modified under section 3742; (C) amended under subsection (d)(5); or (D) adjusted under section 3664(k), 3572, or 3613A; or (2) the defendant may be resentenced under section 3565 or 3614"); see also *United States v. Wyss*, 744 F.3d 1214, 1218 (10th Cir. 2014) ("Defendant offers no persuasive argument that might suggest any of § 3664(o)'s enumerated exceptions apply to his case, and for good reason. None of them authorized the district court to reduce Defendant's restitution over three years after his sentencing. Section 3742 addresses sentencing appeals. Section 3664(d)(5) addresses losses unascertainable at the time of sentencing. Section 3664(k) addresses the manner in which restitution shall be paid. Section 3572 addresses the imposition of a fine in relation to restitution. Section 3613A addresses the effect of a default in restitution payments. Section 3565 addresses revocation of probation. And §3614 addresses resentencing upon a failure to pay restitution. This leaves only Fed. R. Crim. P. 35, which permits a district court to 'correct a sentence that resulted from arithmetical, technical, or other clear error'"); *United States v. Grant*, 715 F.3d 552, 556-58 (4th Cir. 2013).

²⁰² *Id.* at 1218.

²⁰³ *United States v. Stoerr*, 695 F.3d 271, 278 (3d Cir. 2012).

²⁰⁴ *Durham v. United States*, 401 U.S. 481, 48-82 (1971) ("The status of abatement caused by death on direct review has recently been discussed by the Court of Appeals for the Eighth Circuit in *Crooker v. United States*, 325 F.2d 318. In reviewing the case that court concluded that the lower federal courts are unanimous on the rule to be applied: death pending direct review of a criminal conviction abates not only the appeal but also all proceedings had in the prosecution from its inception.... We believe they have adopted the correct rule").

The Supreme Court later cryptically called the vitality of *Durham* into question when it announced that, "The Court is advised that the petitioner died at New Bern, N.C., on November 14, 1975. The petition for certiorari is therefore dismissed. To the extent that *Durham v. United States*, 401 U.S. 481 (1971), may be inconsistent with this ruling, *Durham* is overruled," *Dove v. United States*, 423 U.S. 325, 325 (1976). The lower federal courts apparently understand *Dove* to mean that death during the pendency of a certiorari petition does not abate the underlying proceedings, but that otherwise the statement from *Durham* remains in effect, see *United States v. Pogue*, 19 F.3d 663, (continued...)

order would abate as well, but there is no consensus among the lower federal courts on the issue.²⁰⁵

Statutory Text

18 U.S.C. 3663. Order of restitution

(a)(1)(A) The court, when sentencing a defendant convicted of an offense under this title, Section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), or Section 5124, 46312, 46502, or 46504 of Title 49, other than an offense described in Section 3663A(c), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate. 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.

- (B)(i) The court, in determining whether to order restitution under this section, shall consider—
- (I) the amount of the loss sustained by each victim as a result of the offense; and
 - (II) the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.
- (ii) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

(2) For the 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 including, in the case of an

(...continued)

665 (D.C. Cir. 1994), quoting the statement from *Durham* and citing post-*Dove* findings in accord from the Second, Fourth, Fifth, Seventh, Eighth, Tenth and Eleventh Circuits.

²⁰⁵ *United States v. Volpendesto*, ___ F.3d ___, ___*5 (7th Cir. June 6, 2014)(internal quotation marks and citations omitted)("The rule of abatement terminates criminal proceedings *ab initio*, vacating the conviction entered against the defendant. Under the doctrine of abatement *ab initio* the defendant stands as if he never had been indicted or convicted. The absence of a conviction precludes imposition of the restitution order against defendant or his estate pursuant to §3663. The fact that criminal restitution serves a compensatory purpose does not enable it to be imposed in the absence of a final conviction"); *United States v. Rich*, 603 F.3d 722, 729 (9th Cir. 2010)(internal citations and quotation marks)("The Restitution Order must be abated because the defendant is no longer a wrongdoer once his conviction has abated. Just as it is inappropriate to impose restitution on a living individual who was never indicted or convicted, so it is inappropriate to impose restitution on the estate of a deceased individual who, in the eyes of the law, was never indicted or convicted"); *Estate of Parsons*, 367 F.3d 409, 415 (5th Cir. 2004)(en banc)("[R]egardless of its purpose, the order of restitution cannot stand in the wake of Parsons's death. Because he now is deemed never to have been convicted or even charged, the order of restitution abates *ab initio*"); *United States v. Logal*, 106 F.3d 1547, 1552 (11th Cir. 1997)("Under the doctrine of abatement *ab initio*, however, the defendant stands as if he never had been convicted. The absence of a conviction precludes imposition of the restitution order against Kuczek or his estate pursuant to §3663"); *United States v. Wright*, 160 F.3d 905, 909 (2d Cir. 1998) ("Leslie having died prior to the completion of his prison term, however, his restitutionary payments will never come due ... the time for him to commence making payments can never arrive, the retention of the restitution order would be an act of futility. We therefore conclude that the order of restitution should be abated. We leave for another day such questions as whether an order that makes restitution payable immediately should generally survive the death of the defendant during the pendency of his direct appeal as of right...."); *United States v. Lay*, 456 F.Supp.2d 869, 875 (S.D. Tex. 2006); *contra*, *United States v. Christopher*, 273 F.3d 294, 299 (3d Cir. 2001)("We are persuaded that abatement should not apply to the order of restitution in this case, thus, it survives against the estate of the deceased convict"); *United States v. Dudley*, 739 F.2d 175, 178 (4th Cir. 1984).

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. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

(b) The order may require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing,

less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim including an offense under chapter 109A or chapter 110—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services;

(4) in any case, 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;

(5) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate; and

(6) in the case of an offense under Sections 1028(a)(7) or 1028A(a) of this title, pay an amount equal to the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense.

(c)(1) Notwithstanding any other provision of law (but subject to the provisions of subsections (a)(1)(B)(i)(II) and (ii), when sentencing a defendant convicted of an offense described in Section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863), in which there is no identifiable victim, the court may order that the defendant make restitution in accordance with this subsection.

(2)(A) An order of restitution under this subsection shall be based on the amount of public harm caused by the offense, as determined by the court in accordance with guidelines promulgated by the United States Sentencing Commission.

(B) In no case shall the amount of restitution ordered under this subsection exceed the amount of the fine which may be ordered for the offense charged in the case.

(3) Restitution under this subsection shall be distributed as follows:

(A) 65 percent of the total amount of restitution shall be paid to the State entity designated to administer crime victim assistance in the State in which the crime occurred.

(B) 35 percent of the total amount of restitution shall be paid to the State entity designated to receive Federal substance abuse block grant funds.

(4) The court shall not make an award under this subsection if it appears likely that such award would interfere with a forfeiture under chapter 46 or chapter 96 of this title or under the Controlled Substances Act (21 U.S.C. 801 et seq.).

(5) Notwithstanding Section 3612(c) or any other provision of law, a penalty assessment under Section 3013 or a fine under subchapter C of chapter 227 shall take precedence over an order of restitution under this subsection.

(6) Requests for community restitution under this subsection may be considered in all plea agreements negotiated by the United States.

(7)(A) The United States Sentencing Commission shall promulgate guidelines to assist courts in determining the amount of restitution that may be ordered under this subsection.

(B) No restitution shall be ordered under this subsection until such time as the Sentencing Commission promulgates guidelines pursuant to this paragraph.

(d) An order of restitution made pursuant to this section shall be issued and enforced in accordance with Section 3664.

18 U.S.C. 3663A. Mandatory restitution

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the 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 including, 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. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—

(i) the greater of—

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—

(A) that is—

- (i) a crime of violence, as defined in section 16;
- (ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;
- (iii) an offense described in section 1365 (relating to tampering with consumer products); or
- (iv) an offense under section 670 (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

- (A) the number of identifiable victims is so large as to make restitution impracticable; or
- (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with Section 3664.

18 U.S.C. 3664. Procedure

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

(d)(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable —

(A) provide notice to all identified victims of—

- (i) the offense or offenses of which the defendant was convicted;
- (ii) the amounts subject to restitution submitted to the probation officer;
- (iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;
- (iv) the scheduled date, time, and place of the sentencing hearing;
- (v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and
- (vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(f)(1)(A) 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 court and without consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to Section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of—

(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

(B) projected earnings and other income of the defendant; and

(C) any financial obligations of the defendant; including obligations to dependents.

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

(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(4) An in-kind payment described in paragraph (3) may be in the form of—

(A) return of property;

(B) replacement of property; or

(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

(g)(1) No victim shall be required to participate in any phase of a restitution order.

(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

(j)(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of the State.

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

(l) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(m)(1)(A)(i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that—

(1) such a sentence can subsequently be—

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and Section 3742 of chapter 235 of this title;

(B) appealed and modified under Section 3742;

- (C) amended under subsection (d)(5); or
- (D) adjusted under Section 3664(k), 3572, or 3613A; or
- (2) the defendant may be resentenced under Section 3565 or 3614.

(p) Nothing in this section or Sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.

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