

White Collar Crime - USA

Restitution Orders: Summary of Applicable Standards

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The legal tests for identifying victims' entitlement to restitution, losses that may be included in a restitution calculation and victims' costs that are recoverable through a restitution order can be confusing because each test evaluates a related set of factors in different ways. This update outlines the provisions of the Mandatory Victims' Restitution Act and examines the legal tests for determining the proper scope of a restitution order. While this update primarily cites case law from the Ninth Circuit, the general legal principles are common to most other appellate jurisdictions.

Mandatory versus Discretionary Orders

A court may exercise its discretion in imposing restitution as part of a criminal sentence for certain offences that are defined in the Victim and Witness Protection Act.⁽¹⁾ Under the Mandatory Victims' Restitution Act, a court must impose restitution as part of the sentence for any convictions that involve fraud or deceit and for certain other enumerated crimes.⁽²⁾ However, there are two notable exceptions to the mandatory imposition of restitution. A court is not required to impose restitution where: (i) the number of identifiable victims is too large for restitution to be practicable; or (ii) the complexities in determining factual issues related to restitution would unduly impose upon the sentencing process.⁽³⁾ Since white collar crimes typically involve allegations of fraud or deceit, most white collar sentences should include an order that the defendant pay restitution to the victims. The language in the Victim And Witness Protection Act and the Mandatory Victims' Restitution Act on whether imposing restitution is discretionary and the offences that are covered by each act are virtually identical. Because of the similarities of these statutes, the courts have decided to interpret them similarly.⁽⁴⁾

Scope

The identity of victims and the amounts of their losses subject to a restitution order are initially identified for the court in pre-sentence report.⁽⁵⁾ The government is required to consult with all of the defendant's victims (to the extent that is practicable) and then make a report to the probation officer, identifying the victims and their loss amounts subject to restitution.⁽⁶⁾ The probation officer is required to contact any known victims and inform them of the defendant's case and the estimated losses subject to restitution.

A victim has the opportunity to submit information to the probation officer regarding his or her losses and the amount of restitution that he or she believes should be ordered for his or her benefit.⁽⁷⁾ While the victim does not have the right to a hearing on the amount of restitution, the government is required to prove the amount of loss for each victim.⁽⁸⁾ A victim who disagrees with the government's assessment of restitution has no standing to appear separately in the criminal proceedings.⁽⁹⁾ The court must resolve any factual disputes regarding restitution based on the preponderance of evidence. The court may determine only which losses are subject to

restitution. It must then order restitution “to each victim in the full amount of each victim’s losses ... and without consideration of the economic circumstances of the defendant”, regardless of whether the restitution is being ordered under the Victim and Witness Protection Act or the Mandatory Victim’s Restitution Act.⁽¹⁰⁾ The court’s obligation to assign restitution properly remains independent of whether all victims and losses have been properly identified by the government, even if the court’s determinations are at variance with a plea agreement.⁽¹¹⁾

Victims

The Mandatory Victims’ Restitution Act defines a ‘victim’ as a “person directly and proximately harmed as a result of the offence”. When the crime contains elements of a “scheme, conspiracy or pattern of criminal activity”, the victim is defined by a slightly broader standard to include “any person directly harmed by the defendant’s criminal conduct in the course of the scheme, conspiracy, or pattern”.⁽¹²⁾ A victim need not have been identified in the conviction counts or the charging instrument to be included in an order of restitution.⁽¹³⁾

Restitution may also be ordered for the benefit of certain other parties. It may be directed to non-victims who are agreed upon by the parties to a plea agreement.⁽¹⁴⁾ Where the victim has received payment from a third party for losses caused by the criminal conduct, the court is required to order that the appropriate portion of the restitution be directed to that third party as compensation for the payments.⁽¹⁵⁾

Losses

Restitution is limited to those losses “directly resulting” from the defendant’s criminal conduct.⁽¹⁶⁾ ‘Directly resulting’ means that “the conduct underlying the offence of conviction must have caused a loss for which the court may order restitution, but the loss cannot be too far removed from that conduct”.⁽¹⁷⁾

Although restitution may compensate a victim only for actual losses caused by the defendant’s criminal conduct, “the primary and overarching goal of the Mandatory Victims’ Restitution Act is to make victims of crime whole”.⁽¹⁸⁾ These general concepts have led to a broadly defined set of tests to determine when a victim’s loss can be included in an order for restitution.

Adopting a test from the First Circuit, the Ninth Circuit determined that restitution will be ordered for losses (i) that “would not have occurred but for the conduct underlying the offence of conviction”; and (ii) where “the causal nexus between the conduct and the loss is not too attenuated (either factually, or temporally)”.⁽¹⁹⁾ “The causal chain may not extend so far, in terms of the facts or the time span, as to become unreasonable.”⁽²⁰⁾ A court may base restitution on reasonable estimates of the loss.⁽²¹⁾ The method for computing losses in a criminal restitution case is separate and distinct from the method used to compute losses under the Sentencing Guidelines.⁽²²⁾

Compensable Losses Not Directly Tied to the Criminal Conduct

While losses need not be strictly tied to the offence conduct, “they may be at least one step removed” from it:⁽²³⁾

“The 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.”⁽²⁴⁾

Restitution may be awarded for losses that have been affected by outside forces where “the defendant’s conduct – and his or hers alone – directly resulted in the loss”.⁽²⁵⁾ For example:

- a victim may be compensated for potential contamination of his or her merchandise where criminal conduct obscures quality control for that merchandise;⁽²⁶⁾
- where a defendant obtained products through a criminal scheme, restitution was not limited to the costs of manufacturing those products. The victim’s loss included the normal mark-up for profit, since those products would have been sold at market value;⁽²⁷⁾
- restitution may include pre-judgment interest where lost interest was one component of the victim’s loss;⁽²⁸⁾
- kickback payments made to employees of a victim contractor to steer business to certain defendants were recoverable because “it is not unreasonable to assume that a natural result of paying kickbacks is inflation of the charges in order to make the scheme profitable for the payer of the kickbacks”;⁽²⁹⁾ and
- kickback payments received by the defendant from unindicted subcontractors may also be recoverable in a criminal restitution order since the defendant received the payments while acting as the victim’s agent.⁽³⁰⁾ Unless otherwise agreed, an agent who makes a profit “in connection with transactions conducted by him or her on behalf of the principal” is under a duty to “give such profit to the principal”. This rule is applicable even though the defendant’s profit was not at the victim’s expense;⁽³¹⁾

Criminal Scheme or Conspiracy

In 1990, Congress expanded the limits of restitution to include “losses to persons harmed in the course of the defendant’s scheme even beyond the counts of conviction”.⁽³²⁾ When the crime of conviction “includes a scheme, conspiracy, or pattern of criminal activity” as an element of the offence, the restitution order “may include acts of related conduct for which the defendant was not convicted”.⁽³³⁾

Restitution may extend to losses caused by acts beyond those described in the conviction counts only when the crime involves a scheme, conspiracy or pattern of criminal conduct. For example:

- restitution may be ordered for all losses associated with a fraudulent scheme, even though the defendant pleaded guilty to participating in only a portion of that scheme;⁽³⁴⁾
- restitution is not limited to losses that stem from conduct that shares a common objective with the criminal scheme;⁽³⁵⁾
- where a conviction count states that a scheme occurred “until at least” a specified date, it is fully consistent with the factual basis of the conviction to include losses which occurred after that date in a restitution order;⁽³⁶⁾ and
- where a pattern of criminal conduct continued after a conspiracy had ended, it is proper to include losses that occurred after the end of the conspiracy.⁽³⁷⁾

Compensable Victim Costs

Restitution may also be awarded for costs that the victim “incurred as a direct and foreseeable result of the defendant’s wrongful conduct”.⁽³⁸⁾ These reimbursable costs have included:

- the costs for clean-up and repairs to property for damage caused by the defendant during his or her criminal conduct;⁽³⁹⁾
- a victim’s costs for remediation, even though they were expended after the criminal scheme had ended;⁽⁴⁰⁾ and
- attorneys’ fees and investigation costs that are “incurred by private parties as a direct and foreseeable result of the defendant’s wrongful conduct”.⁽⁴¹⁾

The amount for restitution shall be set without regard for a victim’s ability to receive compensation from insurance or some other third party.⁽⁴²⁾ A victim’s failure to mitigate losses cannot be considered against it when determining the amount of restitution. “A crime victim is not required to mitigate damages.”⁽⁴³⁾ The inefficacy of a victim company’s internal controls cannot be considered as a waiver of rights or ratification of criminal conduct that exploits those inefficacies.⁽⁴⁴⁾

Effect of a Civil Judgment

The existence of a settlement agreement between the defendant and a victim has no effect on whether an order for restitution will be imposed as part of a defendant’s sentence.⁽⁴⁵⁾ This is true even when the victim and defendant voluntarily agree that a settlement “constitutes full and immediate restitution – fully settling the victim’s claim against the defendant”.⁽⁴⁶⁾ A victim may not limit the court’s ability to order restitution because criminal restitution is not intended to advance an individual victim’s legal rights, but exists as a means of advancing the state’s penal objectives of deterrence, rehabilitation and retribution.⁽⁴⁷⁾

Offsetting Losses

The court must reduce the compensable losses in a restitution order for any recovery that the victim otherwise because a victim should not be able to receive double recovery for his or her losses.⁽⁴⁶⁾ Restitution must be reduced by any amounts that the victim receives for the same losses in any federal civil proceeding or in certain state civil proceedings.⁽⁴⁷⁾ This is true regardless of whether the damages were paid by the defendant or by a third party unrelated to the defendant’s criminal conduct.⁽⁴⁸⁾ It is immaterial that a set-off for damages paid by a third party would materially benefit the defendant.

Other Issues

Where there are multiple defendants, the court may assign joint and several liability to all defendants for the full amount of the restitution. Alternatively, it may apportion liability for the full amount of restitution between the defendants based upon its assessment of each defendant’s financial condition and relative culpability in causing the victim’s losses.⁽⁴⁹⁾ However, such apportionment is not mandatory.⁽⁵⁰⁾ The court may also consider the defendant’s financial condition in setting a payment schedule for the restitution.⁽⁵¹⁾

Comment

When analyzing a client's potential exposure to or benefit from a restitution order, the first step should be to determine whether the conviction is for crimes that leave restitution orders to the sound discretion of the trial court (18 USC Section 3663(c)), or whether the conviction counts require a court to impose restitution as part of a sentence (18 USC Section 3663A(c)). After a court decides to impose restitution, the analysis for identifying victims and determining the proper amounts of restitution is the same regardless of whether the court was able to use its discretion in deciding to impose restitution.

The width of the class of entities that can be considered victims and the losses that can be included in a restitution order will be determined as a function of the nexus between the criminal conduct and any harms that are alleged to have resulted from that conduct.

While civil settlements have no bearing upon whether restitution will be ordered in a criminal case and are not determinative of the amount of restitution, there is nothing to prevent a court from considering the amount of a civil settlement in quantifying the harms that are subject to restitution.

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Endnotes

- (1) 18 USC Section 3663(c).
- (2) 18 USC Section 3663A(c).
- (3) 18 USC Section 3663A(c)(3).
- (4) *United States v Brock-Davis*, 504 F3d 991, 996 (9th Circuit 2007).
- (5) 18 USC Sections 3664(a) and (d).
- (6) 18 USC Section 3664(d)(1).
- (7) 18 USC Sections 3664(d)(2)(A)(iii) and (vi).
- (8) 18 USC Section 3664(e).
- (9) *United States v Gamma Tech Industries, Inc*, 265 F3d 917, 923 (9th Circuit 2000).
- (10) 18 USC Section 3664(f)(1)(A).
- (11) *Gamma Tech Industries, Inc*, 265 F3d at 925.
- (12) 18 USC Section 3663A(a)(2).
- (13) *United States v Brock-Davis*, 504 F3d 991, 999 (9th Circuit 2007); accord *United States v Rice*, 38 F3d 1536, 1545 (9th Circuit 1994).
- (14) 18 USC Section 3663A(a)(3).
- (15) 18 USC Section 3664(j)(1).
- (16) *United States v Koenig*, 952 F2d 267, 275 (9th Circuit 1991).
- (17) *Gamma Tech Industries, Inc*, 265 F3d at 928.
- (18) *United States v Brock-Davis*, 504 F3d 991, 998 (9th Circuit 2007).
- (19) *Gamma Tech Industries, Inc*, 265 F3d at 928, quoting *United States v Vaknin*, 112 F3d 579, 590 (1st Circuit 1997).

- (20) *Gamma Tech Industries, Inc*, 265 F3d at 928.
- (21) See *United States v Follett*, 269 F3d 996, 1002 (9th Circuit 2001) (noting that future losses could be subject to restitution where they could be determined by reasonable estimates).
- (22) *United States v Davoudi*, 172 F3d 1130, 1135 (9th Circuit 1999).
- (23) *Gamma Tech Industries, Inc*, 265 F3d at 928.
- (24) *Gamma Tech Industries, Inc*, 265 F3d at 928.
- (25) *Brock-Davis*, 504 F3d at 1000-1001.
- (26) See *United States v Rice*, 38 F3d 1536, 1540-41 (9th Circuit 1994) (determining that restitution for the value of entire batches of merchandise was proper where defendant intermingled potentially unsafe merchandise into those batches).
- (27) *Rice*, 38 F3d at 1544.
- (28) *United States v Smith*, 944 F2d 618, 626 (9th Circuit 1991); accord *United States v Gordon*, 393 F3d 1044, 1059 (9th Circuit 2004).
- (29) *Gamma Tech Industries, Inc*, 265 F3d at 928.
- (30) *Gamma Tech Industries, Inc*, 265 F3d at 928.
- (31) *Ibid* at 929.
- (32) *United States v Brock-Davis*, 504 F3d 991, 998-999 (9th Circuit 2007).
- (33) *Brock-Davis*, 504 F3d at 999.
- (34) *United States v Grice*, 319 F3d 1174, 1178-1179 (9th Circuit 2003).
- (35) See *Rice*, 38 F3d at 1543 (where the defendant bribed employees of test company in order to obtain false test reports, restitution may be assigned for value of product samples that the bribed employees provided to the defendant free of charge).
- (36) *Rice*, 38 F3d at 1543.
- (37) See *ibid* at 1545 (restitution could be awarded for losses that occurred after a bribery conspiracy ended where they were caused by bribed employees continuing to favour the bribe-giving defendant with free samples).
- (38) *United States v Phillips*, 367 F3d 846 (9th Circuit 2004).
- (39) See *Brock-Davis*, 504 F3d at 997 (a motel owner was entitled to restitution for costs associated with repair and cleaning of rooms used by the defendant as a laboratory for manufacturing crystal methamphetamine because those costs were a result of the criminal conduct and were foreseeable).
- (40) See *Rice*, 38 F3d at 1545 (costs for quality control testing of merchandise incurred after a criminal conspiracy ended may be included in a restitution order where the criminal acts made the quality control testing necessary).
- (41) *United States v Waknine*, 543 F3d 546, 558 (9th Circuit 2008); accord *United States v Gordon*, 393 F3d 1044, 1056-1057 (9th Circuit 2004).
- (42) 18 USC Section 3664(f)(1)(B).
- (43) *United States v Rice*, 38 F3d 1536, 1542 (9th Circuit 1994).
- (44) See *Rice*, 38 F3d at 1544 (the lack of adequate internal controls does not constitute waiver or ratification where the victim did not know that the criminal conduct was occurring).

(45) *United States v Cloud*, 872 F2d 846, 854 (9th Circuit 1989).

(46) *Id.*

(47) *Id.*

(48) *United States v Stanley*, 309 F3d 611, 613 (9th Circuit 2002).

(49) 18 USC Section 3664(j)(2).

(50) *Stanley*, 309 F3d at 613.

(51) 18 USC Section 3664(h).

(52) *United States v Booth*, 309 F3d 566, 576 (9th Circuit 2002).

(53) 18 USC Section 3664(f)(2).

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