NCVLI
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Protecting, Enforcing, & Advancing Victims' Rights

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Fundamentals Of Victims' Rights: A Victim's Right to Restitution

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I. A Brief Historical Overview of Restitution

Restitution is "full or partial compensation paid by a criminal to a victim, not awarded in a civil trial for tort, but ordered as part of a criminal sentence or as a condition of probation." *Black's Law Dictionary* (9th ed. 2009).[1]

The use of restitution as a punitive sanction is not a recent development: "In ancient societies, before the conceptual separation of civil and criminal law, it was standard practice to require an offender to reimburse the victim or his family for any loss caused by the offense. The primary purpose of such restitution was not to compensate the victim, but to protect the offender from violent retaliation by the victim or the community. It was a means by which the offender could buy back the peace he had broken." Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 931, 933-34 (1984) (footnotes omitted).

The United States, too, has historically utilized restitution as a component of the criminal justice system. Indeed, "[m]any of the earliest penal codes in the United States included restitution provisions, and in 1913 the Supreme Court, in *Bradford v. United States*, sanctioned restitution as a condition on a pardon. By providing for restitution in the penal sections of state codes and authorizing it as a sentencing option in addition to fines or imprisonment or as a condition on parole or probation, today's legislatures have preserved restitution as a criminal penalty." *Id.* at 934.

II. Restitution is Supported by Multiple Rationales

Contemporary courts have articulated a number of different rationales justifying the imposition of an obligation of restitution on criminal defendants, ranging from punishment and deterrence to rehabilitation and compensation. In a New York case, the court described the connection between historical examples of restitution and the current understanding of its purposes:

> The concept of restitution is not new to the criminal justice system. Indeed, in many ancient societies offenders were routinely required to reimburse their victims for the losses they caused. In this State, restitution has been authorized as a condition of probation since 1910, and its use has long been advocated.
>
> While long available as a sanction, restitution has recently drawn

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> increased interest as an alternative to incarceration. Viewed from the perspective of punishing a defendant, restitution is recognized as an effective rehabilitative penalty because it forces defendants to confront concretely- and take responsibility for-the harm they have inflicted, and it appears to offer a greater potential for deterrence.

People v. Hall-Wilson, 505 N.E.2d 584, 585 (N.Y. 1987) (internal citations omitted). Expounding on the contemporary rationales for restitution, the Ninth Circuit has noted that the "primary and overarching goal" of the federal Mandatory Victim Restitution Act (MVRA), 18 U.S.C. § 3663A, "is to make victims of crime whole, to fully compensate these victims for their losses and to restore these victims to their original state of well-being." *United States v. Gordon*, 393 F.3d 1044, 1053 (9th Cir. 2004) (internal quotations, citations, and emphasis omitted). To provide another example, the Oregon Supreme Court views the rationale for imposing a duty of restitution as "penological: It is intended to serve rehabilitative and deterrent purposes by causing a defendant to appreciate the relationship between his criminal activity and the damage suffered by the victim." *State v. Dillon*, 637 P.2d 602, 606 (Or. 1981). Similarly, the Iowa Supreme Court observes that "[r]estitution serves multiple purposes. It compensates the victim . . . [and] is rehabilitative in nature." *State v. Bonstetter*, 637 N.W.2d 161, 166 (Iowa 2001) (internal citations and quotations omitted).

III. The Federal Government and All States Provide for the Right of Victims to Restitution in the Amount of Losses Caused by the Criminal Conduct

A number of different federal statutes allow for restitution to victims. In addition to the MVRA, which provides for mandatory restitution to victims of a number of different federal crimes, the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, affords victims "the right to full and timely restitution as provided in law." 18 U.S.C. § 3771(a)(6). The CVRA also requires the court to ensure that a crime victim is afforded his or her right to full and timely restitution. *Id.* at § 3771(b)(1). The Victim and Witness Protection Act (VWPA), 18 U.S.C. § 3663, also provides for (non-mandatory) restitution to victims. Other federal statutes, such as 18 U.S.C. § 1593, which mandates restitution for victims of peonage, slavery, and human trafficking, provide for restitution to victims of specific crimes.

In addition to the federal statutes governing restitution, all states provide for some sort of restitution to victims of crime.[2]

IV. Individuals Qualifying as Victims May Be Eligible for Restitution

A threshold issue facing individuals seeking restitution is whether they qualify as a "victim" under the applicable jurisdiction's statute(s). While many jurisdictions employ broad definitions of "victim," others are more restrictive in their language, and some individuals harmed by a defendant's criminal conduct may be barred from seeking restitution if they do not meet the legal definition of "victim." *See generally Fundamentals of Victims' Rights: An Overview of the Legal Definition of Crime "Victim" in the United States*, NCVLI Victim Law Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), November 2011. In addition, it is important to keep in mind that even so-called "victimless" crimes may nevertheless result in a "victim" who is legally entitled to restitution. *See Protecting the Victims of "Victimless" Crimes*, NCVLI Newsletter of Crime Victim Law, 14th Ed. (Nat'l Crime Victim Law Inst., Portland, Or.), July 2011, at 13-15. *See also, e.g., State v. Guilliams*, 90 P.3d 785, 789-90 (Ariz. Ct. App. 2004) (analyzing cases and noting that the right to restitution is not determined "by the label attached to the offense, but rather, by the scope the legislature intended to give the term 'victim' in the restitution statutes").

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V. Federal and State Restitution Statutes Allow for Recovery of a Broad Range of Losses

Although the wording employed by the various state and federal statutes varies in specificity, most statutes allow for the recovery of a broad range of losses resulting from a defendant's criminal conduct. For example, the MVRA explicitly allows for the recovery of: the value of property; the cost of necessary medical and related professional services; the cost of necessary physical and occupational therapy and rehabilitation; lost income; the cost of necessary funeral and related services; and necessary child care, transportation, and other expenses incurred during the victim's participation in the investigation/prosecution of the offense or attendance at court proceedings related to the offense. *See* 18 U.S.C. § 3663A(b).

Types of compensable losses often include not only those specifically enumerated in a statute, but also other expenditures incurred by a victim as a result of the criminal activity, even if they are unusual or uncommon. For example, the Minnesota Supreme Court has affirmed a restitution order for $147,251.27 compensating a mother for expenses incurred in connection with locating her children in Algeria and bringing them home, *State v. Maidi*, 537 N.W.2d 280 (Minn. 1995), and courts in California have affirmed restitution orders compensating victims for a broad range of expenses, including costs associated with a victim's purchase of a guard dog and enrollment in self-defense courses, traditional healing ceremonies and herbal medications, and even the installation of fences. *See In re Isaiah F.*, No A108434, 2005 WL 3047954 (Cal. Ct. App. Nov. 15, 2005) (affirming restitution order including, *inter alia*, expenses associated with the purchase of a guard dog and enrollment in a self-defense course); *People v. Keichler*, 29 Cal. Rptr. 3d 120 (Cal. Ct. App. 2005) (affirming restitution order for expenses relating to herbal medications and a traditional Hmong healing ceremony called Hublee); *People v. Quevedo*, No. F049371, 2007 WL 520333 (Cal. Ct. App. Feb. 21, 2007) (affirming restitution order for installation of a block fence around the home where the murder victim's children live).[3]

Practice Pointers

1. A victim's attorney practicing in federal court should be familiar with the applicable federal statutes (including restitution provisions beyond the MVRA and VWPA that may apply), as well as the case law of the relevant jurisdiction.

2. A victim's attorney practicing in state court should be familiar with the applicable criminal restitution statute(s), any constitutional amendments or victims' rights statutes acknowledging a victim's right to restitution, and the relevant case law. Often, articulations in a state's victims' bill of rights of a victim's entitlement to restitution or broad statements addressing the aims of victims' rights legislation will inform a court's analysis of the restitution statute(s). The analysis of a victim's right to restitution must be specific to the rights afforded by the applicable jurisdiction, and the practitioner may wish to utilize the jurisdiction's articulation of the rationale underlying its restitution statute(s) to support a victim's claim to restitution.

3. Entitlement to restitution is often dependent on whether an individual qualifies as a "victim" under the jurisdiction's relevant statute(s). Keep in mind that so-called "victimless" crimes may nevertheless result in a "victim" for the purpose of seeking restitution.

4. A victim's attorney should be sure to seek restitution for all losses incurred by the victim as a result of the defendant's criminal activity, even if these losses seem unusual or uncommon.

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[1] Restitution may be contrasted with compensation, which is money paid from the government to a victim, usually to cover certain out-of-pocket costs incurred as a result of a crime.

[2] *See, e.g.,* Ala. Code § 15-18-67 (2010); Alaska Stat. § 12.55.045 (2010); Ariz. Rev. Stat. Ann. § 13-603(C) (2010); Ark. Code Ann. § 5-4-205 (2010); Cal. Penal Code § 1202.4 (West 2010); Colo. Rev. Stat. § 18-1.3-603 (2010); Conn. Gen. Stat. § 53a-28 (2010); Del. Code Ann. tit. 11, § 4106 (West 2010); Fla. Stat. § 775.089 (2010); Ga. Code Ann. § 17-14-3 (2010); Haw. Rev. Stat. § 706-646 (2010); Idaho Code Ann. § 19-5304 (West 2010); 730 Ill. Comp. Stat. 5/5-5-6 (2010); Ind. Code § 35-50-5-3 (2010); Iowa Code § 910.2 (2010); Kan. Stat. Ann. § 21-4603d (2010); Ky. Rev. Stat. Ann. § 532.032 (West 2010); La. Code Crim. Proc. Ann. art. 895.1 (2010); Me. Rev. Stat. Ann. tit. 17-A, § 1323 (2010); Md. Code Ann., Crim. Proc. § 11-603 (West 2010); Mass. Gen. Laws ch. 276, § 87A (2010); Mich. Comp. Laws § 780.766 (2010); Minn. Stat. § 611A.04 (2010); Miss. Code Ann. § 99-37-3 (West 2010); Mo. Rev. Stat. § 595.200 (2010); Mont. Code Ann. § 46-18-241 (2010); Neb. Rev. Stat. § 29-2280 (2010); Nev. Rev. Stat. § 176.033 (2010); N.H. Rev. Stat. Ann. § 651:63 (2010); N.J. Stat. Ann. § 2C:43-3 (West 2010); N.M. Stat. Ann. § 31-17-1 (2010); N.Y. Penal Law § 60.27 (McKinney 2010); N.C. Gen. Stat. § 15A-1340.35 (West 2010); N.D. Cent. Code § 12.1-32-08 (2010); Ohio Rev. Code Ann. § 2929.18 (West 2010); Okla. Stat. tit. 22, § 991a (2010); Or. Rev. Stat. § 137.106 (2010); 18 Pa Const. Stat. § 1106 (2010); R.I. Gen. Laws § 12-28-5.1 (2010); S.C. Code Ann. § 17-25-322 (2010); S.D. Codified Laws § 23A-28-1 (2010); Tenn. Code Ann. § 39-11-118 (2010); Tex. Penal Code Ann. § 42.037 (West 2010); Utah Code Ann. § 77-38a-301 (West 2010); Vt. Stat. Ann. tit. 13., § 7043 (West 2010); Va. Code Ann. § 19.2-305.1 (West 2010); Wash. Rev. Code § 9A.20.030 (2010); W. Va. Code § 61-11A-4 (2010); Wis. Stat. § 973.20 (2010); Wyo. Stat. Ann. § 7-9-102 (West 2010).

[3] *See also United States v. Iron Cloud*, 312 F.3d 379 (8th Cir. 2002) (affirming restitution order for expenses relating to a traditional Native American giveaway ceremony); *United States v. Estep*, 378 F. Supp. 2d 763 (E.D. Ky. 2005) (affirming restitution order for, *inter alia*, expenses associated with driving a minor victim to and from a new elementary school not served by the bus system and expenses associated with divorcing defendant); *People v. T.R.*, No. D055049, 2010 WL 2332934 (Cal. Ct. App. June 10, 2010) (affirming restitution order covering the cost of a home security system); *People v. Baker*, 23 Cal. Rptr. 3d 871 (Cal. Ct. App. 2005) (affirming restitution order for the value of calves that would have been born to stolen cows during the period of the theft); *People v. Bryant*, 122 P.3d 1026 (Colo. App. 2005) (affirming restitution order for the victim's moving expenses, the charges incurred for the victim's early termination of his lease, and the victim's lost wages, where there was a specific outstanding threat against the victim); *People v. Lassek*, 122 P.3d 1029 (Colo. App. 2005) (affirming restitution order for travel expenses incurred by victim's family to attend an Air Force memorial service for deceased cadets); *People v. Dillingham*, 881 P.2d 440 (Colo. App. 1994) (affirming restitution order compensating victim for reward money offered in exchange for information leading to the return of his stolen property); *Santiago v. State*, 669 So. 2d 334 (Fla. Dist. Ct. App. 1996) (affirming restitution order for expenses incurred by victim to move her daughter out-of-state for safekeeping); *State v. Beechum*, 833 P.2d 988 (Kan. 1992) (affirming restitution order including cost of airfare to transport victim's minor son to live with his father following his mother's death); *Commonwealth v. Casanova*, 843 N.E.2d 699, 704 (Mass. App. Ct. 2006) (noting in dicta that lost tuition could be compensable in a restitution order, provided proof of casual connection is demonstrated); *State v. Tenerelli*, 598 N.W.2d 668 (Minn. 1999) (affirming restitution order including expenses relating to a traditional Hmong ceremony known as Hu Pling, which involves the sacrifice of live animals to heal the soul of someone who has been physically and emotionally harmed); *State v. Jaqua*, No. A008-1281, 2009 WL 3172133 (Minn. Ct. App. Oct. 6, 2009) (affirming restitution order for victim's and

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victim's son's travel and stay out-of-state, following death threats from defendant); *State v. Brewer*, 989 P.2d 407 (Mont. 1999) (affirming restitution order compensating employer for costs associated with hiring accounting firms, labor contractors, a software contractor, and a locksmith to repair damage arising out of former bookkeeper's forgery).

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