Imposition and Enforcement of Restitution

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A previous article in the December 1998 issue of *Federal Probation* suggested five steps for analyzing the issues involved in determining the restitution amount (i.e., determining what harms to victims are caused by the offense that are compensable as restitution).[1] Aside from that determination, however, there are additional legal and practical issues involved in imposing and enforcing restitution orders. How should a restitution order be imposed? What is the legal standard for determining a defendant's ability to pay? Which financial resources and assets can be included in the computation of what a defendant can pay? What, if any, assets might the court order to be liquidated in order to pay restitution? How can the court enforce restitution orders at sentencing and during supervision? What options are available to the court when a defendant does not pay restitution during supervision?

Although the Department of Justice (DOJ) has primary responsibility for the collection of criminal monetary penalties, officers can be very helpful in enforcing payment during periods of supervision of offenders. In 2000, the Judicial Conference will be asked to distribute, if approved by the Committee on Criminal Law, new *Monograph 114*, which will address policies and practices in the imposition and enforcement of criminal monetary penalties. This article is intended to provide the legal framework to assist officers in the imposition and enforcement of restitution.

I. Determining the Defendant's Ability to Pay Restitution

A. Relevance of Defendant's Ability to Pay

Once the court determines the restitution amount, the resulting amount is the restitution amount that the court must impose in mandatory restitution cases.[2] In discretionary restitution cases,[3] the restitution amount imposed is the result of balancing the harm with a consideration of the defendant's

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[1]Goodwin, "The Imposition of Restitution in Federal Criminal Cases," *Federal Probation*, Vol. 62, No. 2, December 1998, pp. 95-108.

[2]Offenses which mandate the imposition of the full restitution amount are those listed in § 3663A, and those for which the four specific title 18 mandatory restitution statutes are applicable (those statutes are §§ 2248, 2259, 2264, and 2327).

[3]Discretionary restitution is authorized as a separate order for any offense listed in § 3663. Discretionary restitution can be imposed only as a condition of supervision for *any* offense, pursuant to §§ 3563(b)(2)and 3583(d), so long as the restitution conforms to the other statutory criteria of restitution involving victims and harms, discussed in the December 1998 article.

ability to pay restitution for that harm. In deciding whether to impose discretionary restitution , the court must consider the statutory "factors" cited at § 3663(a)(1)(B)(i), which are: *"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, financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate."*

Determining the defendant's ability to pay is also relevant in determining the amount of a fine to impose, and it is relevant to determining the *manner of payment* of *any* restitution order, pursuant to title 18 U.S.C. § 3663(f)(2).[4]

B. Importance of the Presentence Report (PSR)

The PSR is the crucial first step in the determination of a defendant's ability to pay by the court. It is the primary source of information for the court to use in order to make the determination of the amount of discretionary restitution or the manner of payment for any restitution order. The Mandatory Victims Restitution Act of 1996 (MVRA)[5] made changes that strengthened the authority of courts (and officers working on behalf of the courts) to obtain financial information from and about the defendant, making the PSR even more important.

Section 3664(a), as amended by the MVRA, specifically requires that the PSR include, *"... 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."* In order to assist officers in providing this information to the court, new § 3664(d)(3), in unprecedentedly specific terms, directs the defendant to provide detailed financial information to the probation officer and the court:

> *"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."* (emphasis added)

The reference to assets *"owned or controlled by the defendant"* is new with the MVRA, and indicates that the court may have authority to reach assets controlled but not owned by the defendant,

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[4]All section (§) references henceforth refer to title18 unless otherwise indicated.

[5]The Act included amendments to §§ 3663 and 3664, to the Debt Collection Act (§ 3571 et.seq.) and other amendments, including those to Rule 32, Federal Rules of Criminal Procedure.

such as those, perhaps, in family members' names. The last phrase (*"and such other information..."*) provides very broad discretion for the court to require whatever financial information it requires in order to make the necessary imposition and/or payment determinations regarding restitution.

Section 3664(f)(2), added by the MVRA, also refers to "jointly controlled assets," in describing what the court must consider in deciding the method of payment of any restitution order: *"... (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."* (emphasis added)

In addition, another MVRA provision authorizes the court's collection of more information on the defendant's finances, where necessary, after the presentence report is completed. New § 3664(d)(4) provides, *"After viewing the report of the probation officer, the court may require additional documentation or hear testimony."* The court can receive such evidence in camera, if necessary to protect the privacy of the records.

The MVRA also made changes to Rule 32, Federal Rules of Criminal Procedure[6] that reflect an increasingly important role for the presentence report in the imposition of restitution. While pre-MVRA, Rule 32 had required the presentence report to contain a victim-impact statement (still present, at Rule 32(b)(4)(D)), the MVRA added two provisions to Rule 32 relating to restitution: a) Rule 32(b)(4)(F) requires that the PSR contain, *"in appropriate cases, information sufficient for the court to enter an order of restitution;"* and b) Rule 32(b)(1) directs the probation officer to prepare *"... a presentence investigation and report, or other report containing information sufficient for the court to enter an order of restitution, as the court may direct, shall be required in any case in which restitution is required to be ordered."* Therefore, in mandatory restitution cases, Rule 32 authorizes the court to ask the probation officer to submit a report regarding restitution, even where the presentence report has otherwise been waived.

C. The Presentence Report as "The Record."

The presentence report is crucial to ensuring a sufficient record for potential challenge on appeal, and it provides the necessary information upon which the court can base its findings.[7] Or, where the defendant does not object, the court's adoption of the presentence report can provide the

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[6]Hereinafter "Rule 32."

[7]The Second Circuit recently analyzed the purpose and function of the presentence report and the MVRA provisions requiring defendants to provide financial information to the probation officer and the court, in U.S. v. Conhaim, 160 F.3d 893 (2d Cir. 1998).

necessary record that the court has "considered" the defendant's financial resources.[8]

However, the courts have set out varying requirements on what the record must show regarding the court's consideration of the defendant's ability to pay. Some circuits have required the court to articulate special findings on the defendant's ability to pay,[9] while others have taken the position that so long as the "record reflects" the court considered the defendant's financial resources, no special findings are required.[10] Still other courts have taken a middle position - requiring findings only if the record does not otherwise provide an adequate basis for appellate review;[11] or only where the defendant objected to the restitution order at sentencing.[12] And in U.S. v. Ahmad, the Seventh Circuit applied a reverse-special findings rule, holding that because restitution is the norm, the court who *declines* to order full restitution must make explicit findings.[13]

A recent Fourth Circuit case, U.S. v. Aramony, further illustrates the importance of the presentence report. The court held that special findings are not necessary (although they are otherwise required in that circuit) *if* the court adopts the presentence report *and* the report contains adequate information on the defendant's financial resources to allow effective appellate review of the fine (the same standard would apply to discretionary restitution).[14] Unfortunately, the Aramony presentence report was inadequate, and the appellate court vacated the fine and remanded for the officer to prepare an updated presentence report reflecting the defendant's financial resources. The importance of the presentence report is dramatized even further by the fact that, as the dissent noted, there was evidence of the defendant's significant financial resources on the record, but because the presentence report did not incorporate that evidence, and the court made no special findings, the fine was remanded.[15]

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[8]See, e.g., U.S. v. Newman, 6 F.3d 623, 631 (9th Cir. 1993); U.S. v. Riebold, 135 F.3d 1226 (8th Cir. 1998).

[9]See, e.g., U.S. v. Tortora, 994 F.2d 79 (2d Cir. 1993); U.S. v. Logar, 975 F.2d 958, 961 (3d Cir. 1992); U.S. v. Graham, 72 F.3d 352 (3d Cir. 1995); U.S. v. Plumley, 993 f.2d 1140 (4th Cir. 1993); and U.S. v. Jackson, 978 F.2d 903, 915 (5th Cir. 1992) cert denied, 113 S.Ct. 2429 (1993); U.S. v. Owens, 901 F.2d 1457, 1459-60 (8th Cir. 1990; U.S. v. Korando, 29 F.3d 1114 (7th Cir. 1994); U.S. v. Hairston, 888 F.2d 1349, 1352-3 (11th Cir. 1989).

[10]See, e.g., U.S. v. Neal, 36 F.3d 1190, 1199 (1st Cir. 1994); U.S. v. Savoie, 985 F.2d 612, 618 (1st Cir. 1993); United States v. Gelb, 944 F.2d 52, 56 (2d Cir.1991); U.S. v. Blanchard, 9 F.3d 22, 25 (6th Cir. 1993); U.S. v. Riebold, 135 F.3d 1226 (8th Cir. 1997); U.S. v. Smith, 944 F.2d 618 (9th Cir. 1991) cert denied, 112 S.Ct. 1515 (1992); U.S. v. Kunzman, 54 F.3d 1522, 1532 (10th Cir. 1995); and U.S. v. Fuentes, 107 F.3d 1515 (11th Cir. 1997).

[11]See, e.g., U.S. v. Patterson, 837 F.2d 182, 183-4 (5th Cir. 1988); U.S.v. Gabriele, 24 F.3d 68 (10th Cir. 1994).

[12]U.S. v. Riebold, 135 F.3d 1226 (8th Cir. 1998) (reh. and suggestion for reh. den.).

[13]2 F.3d 245, 246-7 (7th Cir. 1993). But see Korando, supra.

[14]166 F.3d 655, 665 (4th Cir. 1999) (citing U.S. v. Castner, 50 F.3d 1267, 1277 (4th Cir. 1995) for a similar result).

[15]Id. at 666. The dissent would have upheld the fine based on the record.

Finally, in those cases where there appears to be insufficient information in the presentence report for the restitution determination, that there is now explicit authority for the court to require additional information, pursuant to §§ 3664(d)(3). This authority was no doubt inherent before, as illustrated by a Second Circuit case in which the court asked for additional information from the defendant on how she spent the proceeds of the offense.[16]

D. "Future Ability to Pay"

Where the defendant has any assets, the officer should consider recommending that full or partial payment of restitution be made immediately or soon after sentencing. However, even if the defendant is currently indigent the court may still impose discretionary restitution, because indigence is but one factor the court must consider.[17] The case law indicates that the court is authorized, even under these circumstances, to impose discretionary restitution based on an analysis of the defendant's "future ability to pay." The record must show *some indication* of the defendant's future ability to pay.[18] For example, the Tenth Circuit, in U.S. v. Kunzman, said, "the fact that a defendant is without financial resources at the time of sentencing is not a bar to a restitution order."[19]

There are two aspects to the analysis of future earnings, where applicable: a) the length of time into the "future" that is at issue, and b) the degree of certainty required in estimating a defendant's resources over that period of time. The cases have not discussed the length of time to be computed, and have, not surprisingly, focused primarily on the period over which the sentencing court has jurisdiction (imprisonment plus any supervision). However, the analysis of a defendant's future earnings should take into account the period of time the defendant will be obligated to pay the monetary penalty. While circuits split on how long this period was pre-MVRA, as discussed below, the MVRA clarified that financial penalties last for the later of either 20 years after sentencing or 20 years after any period of incarceration.[20] The government and the victim can enforce the obligation long past the sentencing court's jurisdiction. Therefore, where the amount of restitution depends on an ability to pay, the court should impose the amount the defendant is likely to be able to pay over the full life of the obligation. On the other hand, payment schedules should be set with the period of time in mind that the court can enforce those schedules (i.e. the period of supervision).

As for the degree of "certainty" of determining a future ability to pay, the cases have been highly

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[16] U.S. v. Porter, 90 F.3d 64, 66 (2d Cir. 1996) ("Porter II").

[17] See, e.g., U.S. v. Trigg, 119 F.3d 493 (7th Cir. 1999).

[18] See, e.g., U.S. v. Stoddard, 150 F.3d 1140, 1147 (9th Cir. 1998); U.S. v. Ahmad, 2 F.3d 245 (7th Cir. 1993).

[19] 54 F.3d 1522, 1532 (10th Cir. 1995) (summarizing cases on ability to pay).

[20] See, e.g., § 3613(b).

fact specific and have produced variable results. While the court need not find the defendant's future ability to pay to a certainty, some degree of probability is required, and the imposition of discretionary restitution or a fine cannot be based merely on chance.[21] There have been varying standards applied, however, even within the same circuit. For example, in U.S. v. Atkinson, the Second Circuit held that full restitution may be ordered even though "there may be little chance that it will ever be made,"[22] but in U.S. v. Porter, it held that there is no authorization for courts to impose "amounts that cannot be repaid without Hollywood miracles."[23] Further, several courts have applied a presumption for full restitution where the defendant's inability to pay is not clear, or there is some doubt on the issue.[24]

Some specific examples may illustrate courts' handling of the issue. The Ninth Circuit held it was not an abuse of discretion to impose restitution where the defendant was indigent but had an education and marketable job skills.[25] Where an indigent defendant had appointed counsel and the presentence report recommended no restitution or fine, the Sixth Circuit nonetheless upheld a fine and full restitution because the court found the defendant was probably concealing assets, and because the defendant's spouse earned income.[26] The Eighth Circuit upheld a large restitution order based on the defendant's high earning potential and proven business skills.[27] A restitution order for $944,055 was upheld by the Tenth Circuit where the court considered the value of the defendant's business, vacation homes, stocks, and liquidation of the husband's assets in bankruptcy.[28] The Seventh Circuit held that a restitution order against a defendant "who is currently unable to pay restitution" will not be vacated "if 'there is some likelihood' that he will acquire sufficient resources in the future."[29] Similarly, in another case the Seventh Circuit held that the defendant's ingenuity and capabilities in the fraud scheme justified a $5 million restitution order, where the defendant had a net worth of $17,000 and was working on a

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[21]U.S. v. Seale, 20 F.3d 1279, 1286 (3d Cir. 1994) (citing U.S. v. Logar, 975 F.2d 958 (3d Cir. 1992), involving a fine).

[22]788 F.2d 900, 904 (2d Cir. 1986).

[23]41 F.3d 68, 73 (2d Cir. 1994) ("Porter I"). This discrepancy and others were noted in U.S. v. Porter, 90 F.3d 64, 69 (2d Cir. 1996) ("Porter II").

[24]See, e.g., U.S. v. Porter, 90 F.3d 64, 69-70 (2d Cir. 1996), reciting at length the practical and legal benefits to the victim when restitution is imposed in full, and concluding there is a "... strong presumption in favor of full restitution." See also, U.S. v. Mattice, 186 F.3d 219, 231 (2d Cir. 1999); U.S. v. Ahmad, 2 F.3d 245, 247 (7th Cir. 1993) ("When there is doubt about ability to pay, the court should order restitution").

[25]U.S. v. Sablan, 92 F.3d 865, 871 (9th Cir. 1996). See also, U.S. v. English, 92 F.3d 909, 916-917 (9th Cir. 1996) (defendant was successful in the past and would likely be again).

[26]U.S. v. Blanchard, 9 F.3d 22 (6th Cir. 1993). See also, U.S. v. Lively, 20 F.3d 193 (6th Cir. 1994) (defendant capable of gainful employment at flea markets.

[27]U.S. v. Manzer, 69 F.3d 222, 229 (8th Cir. 1995).

[28]U.S. v. Rogat, 924 F.2d 983, 985 (10th Cir. 1991), cert denied, 499 U.S. 982.

[29]U.S. v. Viemont, 91 F.3d 946, 951 (7th Cir. 1996) (quoting United States v. Simpson, 8 F.3d 546, 551 (7th Cir.1993)).

computer science degree in prison.[30] And the First Circuit upheld a $1 million restitution award against a defendant with a negative net worth of $900,000, because the defendant had talents that could be directed to lawful activities.[31]

E. Spouse and Other Family Assets and Resources.

It is not uncommon for courts and officers to be confronted with defendants who claim no assets in his or her name, but who enjoy the benefits of, and access to, assets in family members' names. Based on new MVRA provisions, there should no longer be any ambiguity about the court's authority to order detailed financial information involving such assets from the defendant and/or family members. Moreover, even under pre-MVRA authority, when all restitution was discretionary, full restitution was upheld where defendants failed to provide financial information or provided false or misleading financial information.[32] This is consistent with the allocation of the burden on the defendant to prove his or her inability to pay, as well as with the new financial disclosure provisions introduced by the MVRA.

As discussed above, the MVRA expanded the description of what financial information the defendant is required to disclose to the court and the probation officer, and what financial "resources" the court can consider, in imposing restitution or determining the manner of payment. Examples include new § 3664(d)(3) that directs the defendant to provide an affidavit *"fully"* describing *"all assets owned or controlled by the defendant as of the date on which the defendant was arrested..."* (emphasis added), and new § 3664(f)(2) that directs the court to consider, among other things, in determining the method of payment of a restitution order, *"... the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled..."* (emphasis added).

The statutes require the court to consider the *"financial needs and earning ability of the defendant and the defendant's dependents ..."* both in determining whether to order discretionary restitution under § 3663,[33] and in obtaining financial information from the defendant for the imposition of

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[30] U.S. v. Boula, 997 F.2d 263 (7th Cir. 1993).

[31] U.S. v. Springer, 28 F.3d 236 (1st Cir. 1994).

[32] See, e.g., U.S. v. Gelais, 952 F.2d 90, 97 (5th Cir. 1992) (upholding $12 million restitution order because court had "no choice" but to impose full restitution, in that the defendant had not met his burden of proving an inability to pay the restitution); U.S. v. Porter, 90 F.3d 64 (2d Cir. 1996) ("Porter II") (upholding full restitution of $169,000 where court was not satisfied with defendant's accounting of fraudulently obtained funds); U.S. v. Blanchard, 9 F.3d 22 (6th Cir. 1993) (upholding full restitution partly based on the defendant's apparent concealment of assets); and U.S. v. Merritt, 988 F.2d 1298 (2d Cir. 1993) (upholding upward departure based on fraudulent transfer of assets in order to avoid payment of restitution).

[33] § 3663(a)(1)(B)(i).

any restitution order.[34] Therefore the earning ability of the defendant's dependents is relevant as well as the earning ability of the defendant. There are a few pre-MVRA cases that discuss how much a court can include family assets along with the defendant's in computing the defendant's ability to pay. One Sixth Circuit case concludes that spousal assets should be included. In U.S. v. Blanchard, the indigent defendant had appointed counsel and the presentence report recommended no restitution or fine. However, the court imposed a fine and full restitution, based partly on the court's finding that the defendant was probably concealing assets, and partly because the defendant's spouse earned income, and the orders were upheld.[35]

When assets are fraudulently transferred to family members, courts can reach the assets for restitution. For example, in U.S. v. Lampien,[36] the Seventh Circuit upheld a contempt order imposed because the defendant did not pay restitution during the pendency of the appeal, and fraudulently tried to transfer an inheritance to his son. However, the court also reversed that part of the order requiring the defendant to execute a quitclaim deed to her homestead in order to pay restitution, holding that the court is limited to those enforcement means provided in the restitution statutes. This part of the Lampien holding may no longer be valid, because the Seventh Circuit later held that the authority of the court to order the surrender of real property or other assets was broadened with the passage of the MVRA. In U.S. v. Hoover, it concluded that its prior case of Lampien, above, might not produce the same result (of reversing the order to quitclaim the property) under the MVRA. The Hoover court approved a restitution order to surrender savings bonds that were in the defendant's son's name to pay restitution to a university to whom the defendant was convicted of making false statements, pursuant to § 1001.[37]

It should be noted, however, that not all family assets are automatically available for paying the defendant's restitution order. One court has held that if funds belong in whole or in part to the defendant's spouse, and the defendant had no entitlement to them other than as a bailee, it would be inappropriate to use the spouse's funds to discharge the defendant's restitution obligation.[38] Care should be taken to determine whether the defendant has access to the assets, control of them, and/or enjoys the benefit of them before considering family assets to be among the "resources" available to the defendant. However, even if the joint- or family owned-assets are not directly reached by the court, they often can be considered in computing the defendant's ability to pay. For example, the court

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[34] § 3664(d)(3).

[35] Blanchard, supra. See also, U.S. v. Lively, 20 F.3d 193 (6th Cir. 1994) (defendant capable of gainful employment at flea markets.

[36] 89 F.3d 1316 (7th Cir. 1996).

[37] The court also reversed a restitution order to surrender the bonds to pay a tax liability, because restitution is not authorized for non-title 18 offenses.

[38] U.S. v. Gomer, 764 F.2d 1221 (7th Cir. 1985).

cannot make the wife use her salary to pay for her husband's restitution, but the wife's salary can be included in calculating their necessary living expenses.

F. Computation of, and Possible Liquidation of, Tangible Assets

A number of the provisions of the MVRA add or strengthen the means by which the Department of Justice and the court may enforce financial penalties. Officers should be aware of these enforcement tools because they are (1) relevant to the determination of ability to pay, and (2) they are relevant in assessing sanctions for failure to pay during probation and supervised release. First, as discussed above, §§ 3664(d)(3) and 3664(f)(2) provide authority for the court to order *disclosure* of "jointly owned or controlled assets." At a minimum, this authority should permit the court to include the assets in the computation of the defendant's net worth and ability to pay.

Other new MVRA provisions have provided additional support for the court's authority to directly reach specific assets, particularly when the defendant is in default of payment of restitution or a fine. The MVRA created § 3613A, which lists the options available to the court when a defendant is in default. Most, if not all, of these options were arguably previously part of the court's inherent authority to enforce its orders. The newly consolidated list of options, includes, in addition to the authority to revoke supervision or modify its conditions, the court also has authority to:

> *"... resentence a defendant pursuant to section 3614, hold the defendant in contempt, enter a restraining order or injunction, order the sale of property of the defendant, accept a performance bond, enter or adjust a payment schedule, or take any other action necessary to obtain compliance with the order of a fine or restitution."*

These provisions, taken together, are indications of strong congressional intent that the court be able to exercise broad authority in assessing a defendant's ability to pay a criminal monetary penalty, and be able to order compliance with its orders.[39] It is logical that if a court can reach assets in these ways upon the defendant's default, it can probably do so earlier, at sentencing or during supervision, to prevent the subsequent dissipation of the assets.

Case law, even before the MVRA, also indicates strong court authority to enforce its monetary penalties. For example, in U.S. v. Porter, the Second Circuit upheld a large restitution order imposed on a seemingly indigent defendant, based on her inability to account for the proceeds of her crime, and the possibility of her selling some of the "durable goods" she had purchased with the proceeds. The

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[39]The MVRA provisions are expressly applicable to all convictions after the MVRA was effective (April 24, 1996). In addition, to the extent that they are procedural (rather than substantive), and therefore retroactive pursuant to Teague v. Lane, 489 U.S. 288 (1989), or were previously included among the inherent powers of the court. If retroactive, they are applicable to cases sentenced prior to the enactment of the MVRA, as well.

court concluded, "There is nothing wrong with ordering a criminal to divest herself of the fruits of her crime in order to make her victims whole."[40]

Even though the court may have the authority to reach specific assets, the probation officer is best advised to concentrate on considering the following kinds of assets when assessing the defendant's ability to pay restitution (or a fine). The application of liens, the ordered liquidation of property, injunctions, and the like are collection measures that the government may seek from the court, either at sentencing, or during or even after supervision. The case law is indicative of the court's authority, nonetheless, regarding the following types of assets.

Real Property. In U.S. v. Gresham, the Fourth Circuit held that the value of a defendant's home could be taken into account in determining his ability to pay a *fine*, even if the government could not enforce the judgment against the home.[41] (Even though this was a fine case, the factors that the court must consider in imposing a fine are substantially the same as those that are relevant to considering the defendant's ability to pay restitution.)[42] In Gresham the defendant argued that a creditor judgment under Maryland law could not reach his home because he and his wife held it as tenants by the entirety. The appellate court noted with approval that the sentencing court had not ordered the defendant to sell his home, but rather had considered the value of the home in its determination of whether the defendant could pay a fine.[43] The Fourth Circuit held, "Regardless of whether the United States is now or ever will be entitled to Gresham's interest in proceeds from the liquidation of the residence, Gresham's concurrent interest is a 'financial resource' that the court may properly consider under section 3572(a)(1) because it is presently a vested interest with value to him."[44]

One court has suggested that the MVRA provisions have broadened a court's authority to enforce a restitution order. In the pre-MVRA case of U.S. v. Lampien,[45] the Seventh Circuit reversed a sentencing court's order that the defendant execute a quitclaim deed to her homestead in order to pay restitution (although it upheld the lien the sentencing court put on the defendant's home to collect the restitution, and it upheld the sentencing court's order holding the defendant in contempt for disclaiming

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[40]90 F.3d 64, 69 (2d Cir. 1996) ("Porter II").

[41]964 F.2d 1426 (4th Cir. 1992).

[42]§ 3572(a) lists seven factors that a court "shall consider" in determining whether to impose a fine and the amount and method of payment. These include income, earning capacity, and financial resources.

[43]The sentencing court said it would consider the residence "at least to the extent that he has an interest in it ... were it to be sold... and that the imposition of a fine "will not do anything to the house ... unless [the defendant] proposes to sell it to obtain a stake for himself." Id. at 1430.

[44]Id.

[45]89 F.3d 1316 (7th Cir. 1996).

her interest in an inheritance while the case was on appeal). But the Seventh Circuit later concluded, in U.S. v. Hoover, that the order to quitclaim deed the property might now be supportable under the expanded MVRA provisions.[46]

One of the few cases to indicate a court's specific orders to enforce payment of a restitution order is the district court case of U.S.v. Ferranti, where the defendant's assets were largely in real estate holdings. The district court ordered him to liquidate his holdings to satisfy the restitution and fine penalties imposed,[47] and to supply the government with documentation of the sale or mortgage of his property within 48 hours of the event. The net proceeds would be maintained in an escrow account by defendant's counsel, under a protective stay obtained by the government.[48]

Pension Plans and IRA's. One kind of asset that sentencing courts probably cannot reach is an employer pension plan. Many employer pension plans are covered by the anti-alienation provisions of ERISA,[49] which might protect the plan from forced liquidation.[50] Courts have found themselves embroiled in litigation trying to determine whether the pension plan was so protected and whether the court could reach it for ordering restitution.[51] However, as the Fourth Circuit recently held, in U.S. v. Aramony, that even where pension benefits cannot be ordered to be surrendered, the court can take such benefits into account in assessing a defendant's overall income and prospective ability to pay.[52]

Individual retirement accounts (IRA's) do not involve the same implications as a vested,

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[46]175 F.3d 564. 569 (7th Cir. 1999). While the Hoover court did not specify which provisions it was relying on, the two provisions requiring information on jointly owned or controlled assets, discussed above, would be relevant, as would the new codification of options for the court when the defendant is in default of payment at § 3613A, as discussed above.

[47]U.S. v. Ferranti, 928 F.Supp. 206 (E.D.N.Y. 1996), aff'd sub nom U.S. v. Tocco, 135 F.3d 116 (2d Cir. 1998), cert denied, Ferranti v. U.S., 523 U.S. 1096 (1998) (citing U.S. v. Serrano, 637 F.Supp. 12 (D. Puerto Rico 1985), ordering real estate property seized).

[48]928 F.Supp at 224.

[49]29 U.S.C. § 1056(d)(1).

[50]See, Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365 (1990), finding that the anti-alienation provision of ERISA prohibited the imposition of a constructive trust for restitution on pension benefits of the defendant.

[51]See, e.g., U.S. v. Comer, 93 F.3d 1271 (6th Cir. 1996); U.S. v. Smith, 47 F.3d 681 (4th Cir. 1995); U.S. v. Aramony, 166 F.3d 655 (4th Cir. 1999); and U.S. v. Gaudet, 81 F.3d 585, 588 (5th Cir. 1996).

[52]Aramony, supra, 166 F.3d at 655.

employer-provided pension plan,[53] and should be available for liquidation to the extent that any savings account would be. For example, in U.S. v. Hoover, the Seventh Circuit upheld the sentencing court's order that the defendant surrender savings bonds to pay restitution to a university and to pay fees for his court appointed attorney and expert.[54] In an unpublished case, the Sixth Circuit noted with approval that the sentencing court had referred to the defendant's IRA in calculating his unencumbered assets, and that the court did not specify that the restitution be paid from those funds.[55]

If the assets are reachable by the court for restitution purposes, it does not matter when the defendant acquired the assets. The court can consider assets obtained prior to the offense; there is no *ex post facto* issue regarding the acquisition of networth resources. When and how the assets were acquired or used are issues relevant to *forfeiture*, not the computation of the defendant's networth for purposes of paying a criminal monetary penalty. A restitution order can be based on any "resources" of the defendant or the defendant's dependants, subject to the consideration of the needs of defendant's dependants.[56]

II. Effect of Other Proceedings on the Restitution Amount Imposed

A. Civil Agreements or Settlements.

Generally, the court should not offset the amount of restitution imposed because of a civil suit or settlement agreement between the defendant and the victim, for several reasons. First, such suits or agreements often do not cover the same harms (or costs) that are the subject of the restitution order. A defendant is not entitled to a reduction in the calculated restitution amount for monies owed to him by the victim on entirely unrelated claims.[57] For there to be any potential offset to the amount of restitution imposed, the civil settlement or suit must be for the exact same harms or costs for which restitution was ordered.[58] For example, in U.S. v. Crawford, the defendant failed to prove the civil suit award was

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[53]The anti-alienation provisions apply to employer pension plans, not to individual annuity accounts. U.S. v. Infelise, 159 F.3d 300, 304 (7th Cir. 1998)(holding that the defendant's life insurance annuity was subject to forfeiture under RICO's substitute assets provision).

[54]175 F.3d 564 (7th Cir. 1999).

[55]U.S. v. Miller, 91 F.3d 145 (Table), 1996 WL 426135 (6th Cir. Tenn.).

[56]United States v. Gomer, 764 F.2d 1221 (7th Cir. 1985).

[57]U.S. v. Cupit, 169 F.3d 536 (8th Cir. 1999).

[58]One reason for requiring the sentencing court to specifically identify victims and determine the restitution amount due to each, is to allow the court (or a court in a subsequent enforcement proceeding) to be able to determine when and if offset for a civil judgment might be appropriate. U.S. v. Miller, 900 F.2d 919, 922-924 (6th Cir. 1990) (noted in U.S. v. Stover, 93 F.3d 1379 (8th Cir. 1996).

intended to cover funeral expenses, for which restitution was ordered.[59]

Another reason that restitution should not be offset for civil judgments or agreements is that they are sometimes subsequently changed, appealed, or amended.[60] Finally, some courts conclude that restitution serves different functions than civil agreements. For these same reasons, restitution cannot be waived by the victims, primarily because restitution is considered a punitive criminal penalty, meant to have deterrent and rehabilitative effects beyond the goal of compensating the victim.[61] The penal purposes of restitution are not litigated in the civil case, and, as one court said, the "law will not tolerate privately negotiated end runs around the criminal justice system."[62]

The Fifth Circuit, in U.S. v. Coleman, recognized a narrow exception to the above rule where the government was a victim and had executed a mutual release with the defendant in a civil case.[63] The court allowed offset of the civil agreement against the restitution under those circumstances, but it later refused to extend its "Coleman rule" to a case where the government was seeking restitution for *third parties* rather than for itself in a criminal suit, despite a civil settlement or agreement between the third party and the defendant,[64] prohibiting any offset to the restitution amount.

The only time it might be appropriate to offset the compensated amount against the restitution amount to be imposed would be where the defendant proves at sentencing that he/she *has already compensated* the victim for the *same harms* that are covered by the restitution.[65] The defendant has the burden of proving he or she has already provided the compensation under the civil award, and that the civil award covers the same harm as the restitution.[66] The defendant also has the burden for convincing the court that the compensation satisfies the penal purposes of the restitution award.[67] However, a mere release of civil liability, without more, is not enough to cause an offset against

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[59]162 F.3d 550 (9th Cir. 1998)

[60]U.S. v. Cloud, 872 F.2d 846 (9th Cir. 1989), cert denied, 493 U.S. 1002 (civil settlement between the victim and the defendant does not limit restitution); U.S. v. Savoie, 985 F.2d 612 (1st Cir. 1993).

[61]Kelly v. Robinson, 479 U.S. 36, 55 (1986).

[62]U.S. v. Savoie, 985 F.2d 612, 619 (1st Cir. 1993); see also, U.S. v. Parsons, 141 F.3d 386 (1st Cir. 1998).

[63] 997 F.2d 1101 (5th Cir. 1993), cert denied, Perry v. U.S., 510 U.S. 1062 and Coleman v. U.S., 510 U.S. 1077 (1994).

[64]U.S. v. Sheinbaum, 136 F.3d 443 (5th Cir. 1998).

[65]Id.

[66]U.S. v. Crawford, 162 F.2d 550 (9th Cir. 1998); Sheimbaum, supra; U.S. v. Parsons, 141 F.3d 386 (1st cir. 1998); U.S. v. Mmahat, 106 F.3d 89, 98 (5thCir.), cert denied, 118 S.Ct. 136 (1997).

[67]U.S. v. All Star Industries, 962 F.2d 465, 477 (5th Cir.), cert denied 506 U.S. 940 (1992).

restitution.[68]

Although there is generally no offset against the *imposition* of restitution based on civil proceedings or agreements, an offset against *payments* toward the restitution award *is* statutorily authorized in order to avoid double recovery by the victim, pursuant to § 3664(j)(2).[69] The victim is only paid once, but the restitution order and civil judgment are back-up enforcement mechanisms for each other, in case one is later modified or vacated.[70]

B. Forfeiture

Questions arise regarding the interplay of restitution and forfeiture. There is an inherent tension between the two, simply because both often compete for the defendant's finite financial resources. The MVRA provided that "community restitution" (in victimless drug offenses) should not interfere with forfeiture,[71] but the statutes are otherwise silent on the interaction of forfeiture and restitution. Forfeiture and restitution are clearly distinct concepts in purpose and function. An asset is forfeitable in certain offenses if it was used in furtherance of the offense or if it was purchased with proceeds from the offense. Restitution, by contrast, seeks to repay the victims of crime for their out of pocket expenses. Accordingly, the Ninth Circuit has noted, for example, that while extraordinary restitution may constitute a viable ground for departure, civil forfeiture does not.[72]

Forfeiture of visible assets does not automatically result in less discretionary restitution being imposed, because there may be other resources available to the defendant. But there are situations where forfeited assets will affect the determination of a defendant's ability to pay, and thereby impact the amount of discretionary restitution imposed or the manner of payment set for any restitution order. When restitution is mandatory, however, forfeiture is irrelevant to the amount of restitution imposed. Recently the Fourth Circuit, in U.S. v. Alalade,[73] held that the court had no discretion under the MVRA to order the defendant to pay restitution in an amount less than the full amount of each victim's loss by allowing an offset for the value of fraudulently obtained property the government seized from the

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[68]Id. at 449.

[69]Section 3664(j)(2) provides that, "... (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." Prior to the MVRA this provision was codified at section 3663(e)(2).

[70]U.S. v. Cluck, 143 F.3d 174 (5th Cir. 1998). See also, Ahmad, infra, 2 F.3d at 249, comparing judgment and collection rights of civil judgments and criminal restitution orders.

[71]§ 3663(c)(4).

[72]U.S. v. Crook, 9 F.3d 1422 (9th Cir.1993), cert. denied, 511 U.S. 1086 (1994)

[73]2000 WL 220316 (4th Cir. 2000).

defendant and retained in administrative forfeiture. The defendant tried to rely on a pre-MVRA case, U.S. v. Kahn, 53 F.3d 507 (2d Cir. 1995), which had allowed an offset to discretionary restitution for forfeited funds, but the Fourth Circuit found that the MVRA denied the court such authority, and requires the court to order full restitution for each victim. Similarly, in U.S. v. Emerson, the Seventh Circuit held that the sentencing court has statutory authority to impose both restitution and forfeiture, and there is no authority to offset one from the other.[74] The court also held that even where the restitution is going to a federal government agency, there is no double punishment or windfall to the government, because restitution and forfeiture serve different purposes.[75] Nor does a court lose its discretion to impose restitution merely "because a defendant must also forfeit the proceeds of illegal activity."[76] The determination of the defendant's ability to pay would still be conducted.

C. Bankruptcy

The MVRA added § 3613(e), which states that restitution is not dischargeable in bankruptcy. This may have clarified this issue, but it is still beyond the function of the probation officer to be expected to provide detailed guidance to the court. Historically, restitution could generally not be discharged in bankruptcy.[77] However, bankruptcy is fraught with numerous difficult legal issues that should be briefed by the parties and determined by the court. If it arises during the supervision stages, the probation officer is advised to seek the court's advice on whether collection should be continued or stayed pending the bankruptcy proceeding, or perhaps the court's determination of whether the restitution order is discharged or not.

It is also prudent for the probation officer to coordinate and communicate with the Financial Litigation Unit of the United States Attorney's Office whenever there is a possibility that the defendant will be declaring bankruptcy. The government may have to participate in the bankruptcy proceeding and file a complaint to determine dischargeability of the restitution order. Or, the matter might be litigated before the sentencing court, especially if the defendant asks the court to block enforcement of the restitution order.

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[74]128 F.3d 557, 567 and n.5 (7th Cir. 1997)

[75]Id. The court noted that the forfeited funds go to the Department of Justice, whereas the restitution was going to go to the U.S. Postal Service, the victim in the case.

[76]Id. at 663-664 (cited in Emerson,, supra, 128 F.3d at 567).

[77]Pre-MVRA, it was held to *not* be discharged in Chapter 7 proceedings (Kelly v. Robinson, 479 U.S. 36 (1986)), nor in Chapter 13 (11 U.S.C. § 1328(a)(3) (1990). It is probably not dischargeable in Chapter 11, either. In re Amigoni, 109 B.R. 341 (N.D. Ill. 1989).

III. Imposition Procedures

Two statutes have been the source of much litigation over how the court can, or should, impose restitution (or a fine), as far as the manner of payment is concerned. Several circuit conflicts have added to the confusion. A recent article discusses in detail the legal difficulties sentencing courts are encountering in some circuits in imposing criminal monetary penalties in an effective manner.[78] Also, a new judgment will be considered by the Committee on Criminal Law this year, which may provide added guidance. Therefore, this discussion is shortened to provide the legal backdrop of some of the imposition issues currently being litigated.

A. Immediate Full or Lump Sum Payment Preferred

The ideal way to impose a criminal monetary penalty is, wherever possible, to require actual payment in full, or as substantial a portion as possible in lump sum, either immediately or at a date certain. Any remaining portion not paid up front would ideally be imposed "due immediately," for which payment could continue during incarceration and supervision. The court might, in addition, set a payment schedule for the supervision period, or indicate its intention to do so once the defendant is released to supervision, pursuant to § 3664(k), which permits the court to change the manner of imposition of restitution (with notice and the right to a hearing presumed) whenever there is a material change in the defendant's financial circumstances.

Imposing payment in full or lump sum portion due immediately (at sentencing) or by a date certain soon thereafter, where possible, the court accomplishes not only the imposition of the penalty, but also part or all of the collection process, avoiding subsequent difficult collection efforts after assets have perhaps been transferred or dissipated. Naturally, in order to impose such an order, the court must find that the defendant has sufficient resources to comply with the order. The case law and statutory provisions discussed above regarding the disclosure of information regarding jointly owned or controlled assets, the potential eventual liquidation of assets, and the court options listed at § 3613A for when the defendant is in default provide the legal framework within which the officer and the court can compute the defendant's financial resources, in order to determine the appropriate manner of imposition of restitution (and a fine).

B. "Due Immediately"[79]

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[78]The issues involving the manner of imposition of a restitution order, and the circuit conflicts on whether such an order can be imposed "due immediately" or a payment schedule must be set at sentencing, are discussed more comprehensively in a recent article in which the author was joined by U.S. District Judge Royal, W.D.Texas, and Stephanie Zucker. See, Furgeson, Goodwin and Zucker, "The Perplexing Problem with Criminal Monetary Penalties in Federal Courts," Review of Litigation, University of Texas School of Law, Spring 2000 issue.

[79]"Due immediately" is used herein, but the Judgment form prior to August 1996 used the words "payable immediately."

In most cases, however, the defendant does not have sufficient resources for the court to order full or lump sum immediate payment at sentencing or by a date certain soon thereafter. In the few cases in which the defendant is being sentenced to probation, a payment schedule would be immediately relevant and appropriate. But in cases where the defendant is being sentenced to prison for a period prior to any supervision period, the most practical and flexible approach is to impose the criminal monetary penalty on the judgment form, "due ... in full immediately," with no time or method of payment specified (where circuit law permits, as discussed below).[80] The reasonableness and practicality of this approach was endorsed by the Seventh Circuit in U.S. v. Ahmad,[81] and reaffirmed in U.S. v. Trigg.[82] The Ahmad court stated, "

> *If the sentence specifies the amount of restitution, without elaboration, ... the probation officer will assess the defendant's progress toward satisfaction of his debt. ... Everything works nicely without any effort to establish installments on the date of sentencing and without delegating a judicial function to the probation officer.*[83]

There are several significant benefits to imposing financial penalties in full, "due immediately." First, this method avoids the impractical task of setting a realistic payment schedule where there is an intervening period of incarceration before the defendant is released to supervision. Second, any schedule set by the court must be changed by the court, and there are inherent delays in getting court action, especially if a hearing is necessary. This results in much less flexibility in adapting enforcement of the monetary penalties to the often changing financial resources of the defendants. Naturally, if problems develop during supervision the court can always set a schedule, based on what would then be accurate, updated information, pursuant to § 3664(k), based on a material change in the defendant's financial circumstances.

Imposition in full due immediately also permits the Bureau of Prisons (BOP) to collect to the maximum extent possible during the defendant's incarceration through its Inmate Financial Responsibility Program (IFRP). (It is unnecessary to reference collection by the Bureau, as there is standard language on the Judgment (bottom of Sheet 5, Part B) referencing the BOP's collection - so long as the penalty is imposed in such a way that it is "due" during incarceration.) But if only a

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[80]The Second, Third, and Fifth circuits currently require the court to set a payment schedule, as discussed below.

[81]2 F.3d 245, 248-9 (7th Cir. 1993).

[82]119 F.3d 493 (7th Cir. 1997).

[83]Ahmad, supra, 2 F.3d at 249.

supervision payment schedule is specified in the judgment, the penalty is technically not "due" during the incarceration period, and the inmate is excepted from the IFRP. This minimizes collection and results in disparate treatment of inmates.

Ultimately, an amended judgment form and, even more importantly, a possible legislative change to sections 3572(d) and 3664(f)(2) may extricate sentencing courts from this difficult situation.

C. Payment Schedules

However, the imposition of monetary penalties in full "due immediately" is not currently possible in the Second, Third, and Fifth circuits, which now require the sentencing court to set a payment schedule at sentencing, but for different reasons. The Second Circuit, in U.S. v. Mortimer,[84] read the then-current Judgment language "payable immediately" literally. It held that monetary penalties cannot be so imposed unless the court finds the defendant can actually *pay* the entire amount immediately. This requires sentencing courts to try to anticipate a payment schedule for supervision, even if years in the future, and does not permit collection during imprisonment. The Second Circuit addressed the latter problem in U.S. v. Kinlock, allowing the court to also set a minimal payment schedule for the period of incarceration.[85] However, an inmate's earning capability is difficult to anticipate at sentencing; also a minimal schedule minimizes collection and results in disparate treatment of inmates under the IFRP.

Meanwhile, a provision added by the MVRA has increasingly been interpreted as requiring payment schedules to be set at sentencing in every case. Section 3664(f)(2) provides, after the court determines the amount of restitution, *"... 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 [the defendant's financial resources]."* The Third Circuit, in U.S. v. Coates,[86] interpreted this provision to require the court to set a payment schedule at sentencing in all cases sentenced pursuant to the MVRA procedures (which are virtually all cases).[87] The court in dicta even found that, to the extent that § 3663(f)(2) conflicts with the BOP's authority to implement the IFRP, the MVRA provision would override the IFRP.[88]

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[84]52 F.3d 429, 436 (2d Cir. 1995).

[85]174 F.3d 297 (2d Cir. 1999).

[86]178 F.3d 681 (3d Cir. 1999).

[87]The MVRA specified it was effective for all convictions after April 24, 1996, to the extent constitutionally permissible. Procedural provisions are generally not subject to *ex post facto* restrictions, and are presumably effective to all such convictions, regardless of when the offense was committed.

[88]This is extraordinary, given that the IFRP is separately statutorily authorized and has universally been upheld by courts, including the Third Circuit. See, e.g., James v. Quinlan, 866 F.2d 627 (3d Cir. 1989); Cooper v. U.S., 856 F.3d 193 (6th Cir. 1988); Dorman v. Thornburgh, 955 F.2d 57 (D.C.Cir. 1992).

The Fifth Circuit, in U.S. v. Myers, now also apparently requires payment schedules at sentencing, based on both of the above two rationales. That is, the court read "due immediately" literally and held it was plain error for the sentencing court to order the defendant to pay $40,000 in restitution immediately where the record did not indicate he had the ability to pay the full amount immediately,[89] and it remanded for the court to consider the defendant's financial resources in determining the manner of payment pursuant to §3664(f)(2)(A), which it interpreted as requiring a payment schedule.[90]

The Eighth Circuit has also recently interpreted § 3664(f)(2) in two cases. It reads the provision to require that, if a schedule is set it must be realistic,[91] but if no schedule is set, it is harmless error until the defendant is released to supervision, at which time the court can set a schedule.[92] This is a realistic and pragmatic rationale, because even reading "due immediately" literally, the defendant suffers no effect until released to supervision. This rationale warrants greater consideration by courts litigating this issue, and would, if adopted, save much litigation.

The Fourth Circuit recently upheld a judgment imposing a special assessment and restitution "immediately due and payable in full" in U.S. v. Dawkins.[93] The Judgment also set a payment schedule for supervision and directed the probation officer to notify the court of any needed changes to the payment schedule. However, the Fourth Circuit remanded for the court to make the required special findings regarding the defendant's ability to pay because this was a pre-MVRA discretionary restitution case.[94]

On a different, but related, topic, most courts have held that the court cannot state in the Judgment that the defendant is to pay according to a schedule set determined by the probation officer.[95] The First Circuit allows the court to order that payments be "directed by" the probation officer, but not

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[89]198 F.3d 160 (5th Cir. 1999).

[90]Id. at 165 (citing U.S. v. Coates, 178 F.3d 681 (3d Cir. 1999) and U.S. v. Rea (below), in agreement.

[91]U.S. v. Rea, 169 F.3d 1111 (8th Cir. 1999).

[92]U.S. v. Gray, 175 F.3d 617 (8th Cir. 1999).

[93]202 F.3d 711 (4th Cir. 2000).

[94]Id. at 715. It also remanded for findings to justify the particular payment schedule, citing § 3664(f)(2).

[95]See, e.g., U.S. v. Porter ("Porter I"), 41 F.3d 68, 71 (2d Cir. 1994); U.S. v. Graham, 71 F.3d 352, 356-57 (3d Cir. 1995), cert denied, 116 S.Ct. 1286 (1996); U.S. v. Miller, 77 F.3d 71, 78 (4th Cir. 1996); U.S. v. Albro, 32 F.3d 173, 174 (5th Cir. 1994); U.S. v. Ahmad, 2 F.3d 245, 248-9 (7th Cir. 1993). These are clearly statutorily based opinion, but the Fourth circuit may have implied a constitutional basis of non-delegation of payments in U.S. v. Johnson, 48 F.3d 806, 809 (4th Cir. 1995), holding that decisions about the amount of installments and their timing is a "judicial function and therefore is non-delegable."

"determined" by the probation officer, so long as the court also expressly states that it reserves the final authority to determine the payment schedule.[96] On the other hand, the Ninth and Eleventh Circuits have allowed courts to order payment according to a schedule set by the officer, recognizing that it is always ultimately the court that determines whether the defendant is willfully failing to pay.[97]

Some probation officers in "non-delegation" circuits ask whether they can use some sort of "schedule" in enforcing the financial penalties imposed by the court. As a practical matter, officers need to be able to use some sort of working schedule, perhaps better called a "plan," in monitoring offenders' payment of monetary penalties. The "non-delegation" cases apply only to what the court formally orders in the judgment, and do not apply to the informal supervision practices, strategies, and plans that an officer uses in monitoring supervision and the collection of financial penalties. Only the court can ultimately determine whether the defendant is willfully not paying a monetary penalty, even if there is a court-set schedule.

IV. Post-Sentencing Adjustments to a Restitution Order

Section § 3664(o), added by the MVRA, lists the ways in which a restitution order can be vacated or amended. The restitution order might be "corrected" pursuant to Rule 35, F.R.Cr.P; stricken or modified on direct appeal, pursuant to § 3742; amended, pursuant to § 3664(d)(5)[98] for discovery of new losses; adjusted under § 3664(k) for a defendant's changed circumstances; subject to default or delinquency, pursuant to § 3572, et. seq.; the enforcement options listed at § 3613A, upon default; or the defendant can be resentenced, pursuant to § 3565 (violation of probation, or § 3614 (for failure to pay). Section 2255 is missing, because a restitution order cannot be challenged on a motion to vacate or correct a sentence.[99] Nor can an offender challenge the restitution imposed at sentencing under Rule 3583, as a condition of supervision.[100]

Some of the potential changes are general, and apply to any sentence. Others are newer and apply specifically to restitution. The most significant restitution provisions that probation officers should be aware of are the following.

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[96]U.S. v. Merric, 166 F.3d 406 (1st Cir. 1999); see also, U.S. v. Lilly, 80 F.3d 24, 29 (1st Cir. 1996).; U.S. v. Dawkins, 202 F.3d 711 (4th Cir. 2000).

[97]Montano-Figuero v. Crabtree, 162 F.3d 548 (9th Cir. 1998); U.S. v. Fuentes, 107 F.3d 1515, 1528-9, n. 25 (11th Cir. 1997).

[98]The statute erroneously refers to § 3664(d)(3), which involves the procedure for the defendant to provide financial information to the sentencing court. Section (d)(5), discovery of new losses, was the obvious intended reference.

[99]See, e.g., U.S. v. Hatten, 167 F.3d 884, 886 (5th Cir. 1999); Blaik v. U.S., 161 F.3d 1341 (11th Cir. 1998).

[100]Hatten, supra; Smullen v. U.S., 94 F.3d 20, 26 (1st Cir. 1996).

A. Reduction of restitution amount on government motion (§ 3573).

A restitution order generally cannot be changed, once imposed. Only the government can petition to reduce a fine (or restitution), and this is done very rarely.[101] For two years, between 1994 and 1996, statutes mandating restitution for sexual exploitation of children permitted modification of the restitution order "at any time" and "as appropriate in view of the change in the economic circumstances of the offender."[102] However, the MVRA repealed those provisions, and added § 3664(d)(5).

B. Increase of restitution amount: Discovery of new losses (§ 3664(d)(5)).

Section 3664(d)(5) provides, if the victim discovers further losses subsequent to sentencing, "the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order," which shall be granted upon a showing of good cause why the loss was not included in the initial claim for restitution. It is not clear whether "the "victim" would include a newly discovered victim, as well as a previously named victim discovering new losses. This provision may be the first codification of the right of a victim to directly petition a court in a criminal proceeding. Note that the defendant's right to notice and a hearing is probably inferred, and is, at any rate, the best practice.

C. Receipt of Resources in Prison (§ 3664(n)).

Section 3664(n), added by the MVRA, provides that, if a person obligated to pay restitution or 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." This is further evidence of congressional intent to collect every bit of restitution possible from defendants. The policy is clear and well-intentioned, but there remain questions of how such a receipt of "resources" would be detected and enforced while the defendant is incarcerated. The court probably would have a basis for revocation of supervision if the court learns the defendant received such resources, did not apply them to the restitution or fine, and continues to do so while on supervision.

D. Defendant's Changed Circumstances (§ 3664(k)).

Section 3664(k), added by the MVRA, provides that the defendant is required to notify the

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[101]Until 1987, § 3573 still allowed the defendant to ask for a reduction in a fine for changed circumstances. Some courts used this provision to justify imposition of full restitution, relying on a possible later reduction, if needed. See, e.g., discussion in U.S. v. Broyde, 22 F.3d 441 (2d Cir. 1994). After 1987, with defendants no longer being able to seek later reduction of a fine or restitution, the courts' job of determining the defendant's ability to pay must be more thorough. U.S. v. Seale, 20 F.3d 1279, 1286, n.8 (3d Cir. 1994).

[102]§§2248(d), 2259(d).

court and the Attorney General of any material change in economic circumstances which might affect his or her ability to pay restitution. Victims and the government may also notify the court of any change in the defendant's economic condition. The Attorney General must then certify to the court that all of the victims have been notified, and then the court may on its own or on motion of any party, adjust the repayment schedule, or require payment in full, "as the interests of justice require." It should be noted that, even though the court may adjust the manner of payment "on its own motion," it is good practice to afford the defendant the opportunity of a hearing before it changes the manner of payment, pursuant to Rule 32.1, because payment of restitution becomes a condition of supervision.

E. Changes in Named Beneficiary of Restitution.

While there is no specific provision addressing a court's authority to change the named beneficiary of a restitution order, such authority is no doubt inherent, and there is no authority to the contrary. Because the payment of restitution becomes a standard condition of supervision, a non-substantive change, that does not increase the amount of restitution owing, should be able to be made pursuant to Rule 32.1, F.R.Cr.P. regarding modification of supervision conditions. It is, indeed, not uncommon for the beneficiary of restitution payments to change during the life of the restitution obligation. This happens, for example, when a victim dies and the estate receives the payments, or, more frequently, when the victim sells the debt or assigns it to another, or an agency becomes the successor in interest of the previous victim agency.

The determination of who is, in fact, a successor in interest to a named beneficiary is a legal one, often involving the application of state law and/or the determination of the authenticity of documents claiming the interest of the victim. Such determinations should be made by the court, perhaps with notice to the parties, to allow them to challenge the validity of the change. The clerk or the probation officer should not make such determinations. Once the determination is made, it is hoped that courts will use the Amended Judgment in a Criminal Case (245C, rev. 8/96), to make the change of beneficiary.

V. Enforcement of a Restitution Order

How long can a restitution order, imposed as a separate component of the sentence, be enforced? Prior to the MVRA, three circuits issued opinions that implied that restitution might only last for the 5 years specified in now-repealed § 3663(f).[103] Most other circuits have concluded, however, that even pre-MVRA restitution was to be collected as a fine,[104] and fines have been collectible for 20

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[103]U.S. v. House, 808 F.2d 508, 511 (7th Cir. 1986); U.S. v. Soderling, 970 F.2d 529, 535 (9th Cir. 1992); and U.S. v. Berardini, 112 F.3d 606, 611 (2d Cir. 1997).

[104]Former § 3663(h)(1), provided that "An order of restitution may be enforced by the United States in the manner provided for the collection and payment of fines... or in the same manner as a judgment in a civil action." Subsection (h)(2) provided for collection by a victim named in the order "in the same manner as a judgment in a civil action."

years plus any period of imprisonment.[105] This has also been the advice of the Administrative Office of the U.S. Courts. The MVRA made it even more clear that the liability to pay a fine or restitution lasts 20 years plus any period of incarceration, or until the death of the defendant, pursuant to § 3613(b).[106]

However, when restitution is imposed solely as a condition of supervision, its life is the same as that of the term of supervision: when the supervision ends, expires, or is revoked without reimposition of supervised release, the order of restitution expires as well.[107] This is a huge drawback to imposing restitution in this manner, but for offenses for which restitution is not statutorily authorized as a separate sentence, this is the only way restitution can be imposed.

It is a fundamental principle of criminal law that a defendant cannot be incarcerated for a mere inability to pay a financial penalty. The Supreme Court held that a court must find that the defendant "willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay" restitution in order to incarcerate the defendant.[108] Willful failure to pay can be measured not only by income and assets, but also by a defendant's failure to acquire or utilize available resources to pay.[109] "Resources" is a broader term than "income" or "assets" and invites consideration of any kind of financial "resource" to which the defendant has access.

Section 3664(f)(2) specifies that the court, in determining the manner of payment, can consider: *"(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."* As discussed above, the court can potentially reach resources controlled or used by the defendant, even if not in the defendant's name.

It is crucial for the officer to reassess the adequacy of any payment schedule set at sentencing when the offender is released to supervision. If none was set, in the Second, Third, and Fifth Circuits,

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(repealed in 1996)

[105]See U.S. v. Rostoff, 164 F.3d 63 (1st Cir. 1997) (excellent discussion of the issue).

[106]The debt collection statutes (§ 3571 et. seq.) were amended to specify restitution as well as fines, and new § 3664(m)(1)(A) provides, "An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 [§§ 3571 to 3574] and subchapter B of chapter 229 [§§ 3611 to 3614] of this title; or by all other available and reasonable means."

[107]It is an open issue whether, once imposed solely as a condition for the initial term of supervision, the court can reimpose the restitution as a condition for a term of supervision that would be reimposed, pursuant to § 3583(h) upon revocation. Arguments could be fashioned either way.

[108]Bearden v. Ga., 461 U.S. 660, 672 (1983).

[109]See, e.g., U.S. v. Boswell, 605 F.2d 171, 175 (5th Cir. 1979).

the officer probably should ask the court to set one. Otherwise, the officer can assess the defendant's ability to pay and monitor the payment accordingly. If there arises a dispute over what the defendant is able to pay, the court could be asked to set a payment schedule. Throughout supervision, the determination of a defendant's ability to pay must be an ongoing process, even where a schedule has been set by the court, in order to adequately adjust the payment of monetary penalties to the changing financial circumstances of the defendant.

There are many options available for the court to enforce the payment of monetary penalties. Some are legal collection devices, appropriate for the government to pursue (e.g., injunctions, liens, garnishments, ordered property sales). Others may be options the probation officer would want to work with the Financial Litigation Unit of the United States Attorney's office in seeking enforcement of a restitution order during the period of supervision. Officers should think in terms of a graduated scale of sanctions, with revocation reserved for the last resort. Sometimes an option that keeps the defendant employed rather than imprisoned is in the best interest of the victim, as well as facilitating the rehabilitation of the defendant.

As noted previously, the MVRA created § 3613A which provides a consolidated list of possible options for the court in enforcing monetary penalties when the defendant is in default of payment. These options no doubt available before, as part of the inherent power of the court to enforce its orders, or they were previously codified elsewhere (e.g., repealed §§ 3663(g) and (h)), or they were inferred from case law. For example, re-sentencing for default was previously available under § 3614, but has been used infrequently.[110] And the Seventh Circuit has upheld a sentencing court holding a defendant in contempt, where the defendant disclaimed his interest in an inheritance, rather than paying his restitution obligation while the case was on appeal.[111]

In considering what sanction to impose when the defendant has defaulted on payment of restitution or a fine, the court (and hence the officer) must consider the factors in § 3613A(a)(2). These include *"... the defendant's employment status, earning ability, financial resources, the willfulness in failing to comply with the ... restitution order, and any other circumstance that may have a bearing on the defendant's ability or failure to comply with the order."* A defendant who knowingly fails to make payment or for whom "alternatives to imprisonment are not adequate to serve the purposes of punishment and deterrence," may be resentenced pursuant to 18 U.S.C. § 3614(a) and (b), but "[i]n no event shall a defendant be incarcerated ... solely on the basis of inability to make payments because the defendant is indigent."[112] These options are discussed in the recent Ninth

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[110] See, e.g., United States v. Payan, 992 F.2d 1387 (5th Cir. 1993).

[111] U.S. v. Lampien, 89 F.3d 1316 (7th Cir. 1996)..

[112] 18 U.S.C. § 3614(c).

Circuit case of U.S. v. DuBose.[113]

One of the few reported cases that illustrate the specific steps a court can take to enforce a restitution order is U.S. v. Juron.[114] The defendants were convicted of conspiracy, misapplication of bank funds, and mail fraud, and were ordered to pay full restitution in six-figures. The defendants made minimal restitution payments after being released from custody, and the government filed a motion asking for a proposed schedule of payments. At the hearing, the court concluded that, "At the present payment rate, defendants will not extinguish their obligations, until midway through the next century."[115] The court also concluded that the defendants had substantial resources available to them, while not making bona fide efforts to meet their restitution obligations. One defendant had conveyed his home to his wife, but the court considered the home a valuable asset available to the defendant because he was living there rent-free. Therefore, the court ordered the defendant to submit an appraisal of his home's fair market value for computing his financial resources. The court also ordered the defendant to pay the victim the premiums he had been paying toward a life insurance policy, and ordered the defendant to liquidate two Keough retirement accounts and his stock holdings, with the funds being paid to the victim. It also ordered the defendant to assign over his interest in an accounts receivable to the victim. The court concluded that the defendant had "access to substantial outside funds," and increased the monthly restitution payments by $2,774. Finally, the court ordered the probation office to investigate whether the defendant's expenses exceeded his income; if they did, the court would consider it an indication of still more outside resources that should go toward restitution.

The Juron court was taking steps that had a good chance of recovering substantial amounts of money toward the restitution penalties, while the court still had jurisdiction over the defendants and while the assets were still identifiable. It did not have the advantage of the new MVRA provisions that are now available to officers and courts. The authority is now even more explicit for officers to rely on in conducting a continuing investigation into the defendant's financial resources, and in seeking these kinds of enforcement measures from their courts, wherever the defendant is able to pay more toward restitution than he or she is paying.

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[113]146 F.3d 1141, 1144 (9th Cir. 1998).

[114]1991 WL 222225 (N.D.Il.).

[115]Id. at 1.