Update on Selected Restitution Issues

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This article provides expanded guidance and updated case law on the principles discussed in two previous *Federal Probation* articles on restitution: 1) the December 1998 article that introduced the 5-step analysis for determining victims and harms for restitution,[1] and 2) the June 2000 article on the imposition and enforcement of restitution.[2] In addition, some issues will be discussed that have arisen in questions from probation officers in the field and in training sessions.

The Mandatory Victims Restitution Act of 1996 (MVRA)[3] was the most sweeping change to restitution for federal criminal cases in recent decades, and it is gradually changing the restitution landscape in federal criminal law, requiring courts to consider numerous issues involved in imposing restitution in an increasing number of cases. The determination of the restitution amount (i.e. the amount of the compensable harm caused to victims of the offense) must be made in *any* case for which there is an identifiable victim. and imposed in all *mandatory* restitution cases in its entirety. However, it must be balanced with a consideration of the defendant's present and future ability to pay, when imposed in *discretionary* restitution cases.[4]
There are numerous emerging legal issues involved in the determination of the restitution amount, as well as procedures involved in the imposition and enforcement of restitution, some of which are updated herein.

I. Selected Issues Involving The Five-Step Analysis

The restitution determination, if done correctly, will avoid subsequent litigation, and will maximize the amount of restitution that can be imposed and, hopefully, collected. Since its introduction in the December 1998 article, the 5-step sequential analysis for determining the restitution amount has proven useful, according to most probation officers, and produces generally consistent and accurate results. The five steps, along with selected issues and case law, are summarized below.

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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]Goodwin, "The Imposition and Enforcement of Restitution," *Federal Probation*, Vol. 64, No. 1, June 2000, pp. 62-72.

[3]Title II of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[4]Restitution is mandatory for offenses listed in § 3663A(c) (which comprise the majority of non-drug federal offenses), and for certain specific title 18 offenses (§§ 2248, 2259, 2264, 2327, 228). It is discretionary (i.e. the court must balance the restitution amount with consideration of the defendant's ability to pay) for offenses listed in § 3663 (primarily all other title 18 offenses), and when restitution is imposed (for any other offense) as a condition of supervision, pursuant to §§ 3563(b)(2) and 3583(d). See the December 1998 article for further discussion.

A. *Step One*: Identify the Statutory Offense of Conviction.[5]

The determination of restitution begins with the determination of the statutory offense of conviction, because restitution is a *statutory* penalty: the court's authority to impose restitution is controlled by the language and terms in the restitution statutes. The identification of the specific offense of conviction must be done first, because focus on the offense of conviction is necessary to then make three threshold determinations: 1) whether restitution is mandatory or discretionary;[6] 2) whether restitution is available as a separate sentence or only as a condition of supervision; and 3) what the boundaries of the offense of conviction are for purposes of conducting the subsequent steps of identifying victims and harms.

B. *Step Two*: Identify the Victims of the Offense of Conviction

The scope of the offense of conviction defines the boundaries within which victims and harms can be identified, for restitution purposes. This fundamental fact is based on statutory language, interpreted by the Supreme Court, and has not changed.[7] Courts continue to draw very fine lines when determining the boundaries of the offense of conviction for restitution purposes.[8] The one available "expansion" of the offense of conviction was a 1990 amendment, applicable only where the offense of conviction "involves" a scheme, conspiracy, or a pattern of criminal activity.

The "scheme" provision has perhaps generated more litigation and confusion than any other aspect of restitution. It was added in 1990 to the restitution statute (§ 3663), and replicated (without change) by the MVRA into the new statute for mandatory restitution (§ 3663A). It now applies to any case for which restitution is imposed under §§ 3663 or 3663A, and reads: *"... the term "victim" means ... in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the*

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[5]In the December 1998 article, the first step was to determine whether restitution is mandatory or discretionary. Further experience has clarified that the first step is actually to identify the offense of conviction, which in turn enables one to do three things, only one of which is to determine whether restitution is mandatory or discretionary.

[6]Offenses for which restitution is mandatory are listed in § 3663A (and certain specific title 18 mandatory provisions apply to particular groups of offenses); those for which restitution is authorized as a separate sentence but for which it is discretionary (depending on the defendant's ability to pay) are listed in § 3663.

[7]See discussion of *Hughey*, *infra*, and in December 1998 article. Two firearm cases illustrate the continuation of this fundamental restitution principle: In U.S. v. Reed, 80 F.3d 1419 (9th Cir. 1996), restitution was not allowed to a shooting victim where the defendant was convicted of felon in possession of a gun; however, in U.S. v. Smith, 182 F.3d 733 (10th Cir. 1999), restitution was upheld for a credit union robbery that was the basis of the defendant's conviction of using a gun in a crime of violence, § 924(c). The court found the use of the gun was "an integral part and cause of the injury and loss to the credit union." Id. at 736.

[8]See, e.g., U.S. v. Paradis , 219 F.3d 22 (1st Cir. 2000) (bankruptcy trustee was not victim of defendant's conviction for laundering bankruptcy fraud proceeds).

course of the scheme, conspiracy, or pattern."

Earlier in 1990, the Supreme Court had decided Hughey v. U.S.,[9] in which the defendant was alleged to have stolen and used 21 credit cards in a fraudulent scheme that resulted in a total loss to numerous victims of over $90,000. He plead guilty to one count involving one credit card and $10,000 in loss, but was ordered to pay restitution for the full $90,000. The Fifth Circuit affirmed, finding the restitution statutes at that time to authorize restitution for acts which share a "significant connection" with the offense of conviction. But the Supreme Court reversed, holding that the statutory language make clear Congress' intent to authorize an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction.[10]

In response, Congress added the "scheme" provision to § 3663(a). It has been described as enlarging the set of victims to whom restitution can be granted,[11] which is true where there are numerous victims, such as in a telemarketing case. However, if the offense involves numerous acts against one victim, such as embezzlement, it enlarges the amount of harm done to that victim by the "offense." While courts have consistently concluded that, even under this provision, restitution is still limited to the offense of conviction,[12] the provision did extend the contours of what is considered an "offense," if the offense "involves" a scheme.[13] This inherent tension has added to the ambiguities surrounding application of this provision.

It may be helpful to view the "scheme" issue in two phases: Does the offense of "*involve*" a scheme, and if so, what is its nature and extent? If a conspiracy or scheme is charged, it is usually clear that the offense involves a scheme. The government's charging procedure for mail, wire, or bank fraud has always been to describe the fraud scheme in the indictment, which is then incorporated by reference into each count that represents acts committed "in furtherance" of the scheme. This charging format eliminates the issue of whether an element of the offense involves a scheme, and it usually defines the nature and extent of the scheme, as well. Unfortunately, the government does not use this charging format for other, potential "scheme" offenses, which are offenses for which the restitution "scheme" issue arises.

There are two types of offenses in particular for which the issue arises. One type involves an "intent to defraud," but no "scheme" is described or incorporated into each count, i.e. there is no

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[9]495 U.S. 411 (1979) (Hughey I).

[10]495 U.S. at 413.

[11]See, e.g., U.S. v. Akande, 200 F.3d 136, 139 (3d Cir. 1999).

[12]See, e.g., U.S. v. Upton, 91 F.3d 677, 686 (5th Cir. 1996), cert denied, 117 S.Ct. 1818 (1997).

[13]Hereinafter "scheme" represents "scheme, conspiracy, or pattern of criminal activity."

"element" of the offense that clearly involves a scheme (or conspiracy). An example is 18 U.S.C. § 1029, which provides that the defendant "knowingly and with intent to defraud" traffics in or uses one or more unauthorized access devices (usually credit cards). Congress probably intended such offenses to be included among those "involving" a scheme because to "defraud" means to commit fraud (which is conducted by means of a "scheme."[14] Nevertheless, because of the ambiguity of the contours of such offenses, courts have struggled with the application of the "scheme" provision in these kinds of cases.[15]

Offenses for which there is not even an element of an "intent to defraud" element pose even greater difficulties. For example, in U.S. v. Mancillas,[16] the defendant was convicted of possessing counterfeit securities and implements designed to make counterfeit securities with intent that they be used, in violation of 18 U.S.C. § 513 (i.e., he had passed some counterfeit notes, and was caught with some notes and the equipment to make them). To use "counterfeit" securities is by definition to defraud those to whom you are passing them off as non-counterfeit, and, again, fraud, in legal terminology, is conducted by means of a "scheme." But for these offenses the "scheme" is implied and seldom described in the indictment, making its existence and/or nature ambiguous, producing strained results. For example, in Mancillas, the Fifth Circuit reversed the restitution imposed for the defendant having passed the counterfeit notes, holding that restitution could not be imposed for *past* acts of use because the offense was to possess them with the intent to use them - in the future.[17]

If the offense of conviction *involves* a scheme, the court must also determine the extent or nature of the scheme, in order to know which acts or victims are included for restitution purposes. This is often the most difficult aspect of the scheme issue. In order to make this determination, it is often necessary to look beyond the specific offense of conviction.[18] Some courts have been willing to look at the scope of the facts alleged in the indictment, the plea colloquy, or the proof at trial in order to determine the nature and extent of the scheme. The Eighth Circuit has been particularly willing to do this. For example, in U.S. v. Jackson, the offense was conspiracy to possess unauthorized credit cards

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[14]*The American Heritage Dictionary*, 2d College Edition, defines "scheme" as "A systematic plan of action; an orderly combination of related parts or elements; a plan, especially a secret or devious one; plot..." Legally, a fraudulent scheme commonly involves causing others to rely on false statements (or acts) to their detriment.

[15]See, e.g., U.S. v. Akande, 200 F.3d 136 (3d Cir. 1999); Hughey v. U.S. (Hughey I), 495 U.S. 411 (1990); U.S. v. Hughey (Hughey II), 147 F.3d 423 (5th Cir. 1998); U.S. v. Hayes, 32 f.3d 171 (5th Cir. 1994); U.S. v. Cobbs, 967 F.2d 1555 (11th Cir. 1992); U.S. v. Moore, 127 F.3d 635 (7th cir. 1997) ; U.S. v. Blake, 81 f.3d 498 (4th Cir. 1996); U.S. v. Stouffer, 986 F.2d 916 (5th Cir. 1993).

[16]172 F.3d 341 (5th Cir. 1999).

[17]Id. at 343.

[18]Possibly lending support to looking beyond the "elements" is the fact that the statutory provision also refers to a "pattern of criminal activity" - a term not easily identified as an "element." This term suggests a series of related acts and appears to invite an examination of the facts (alleged or proven). This is yet another inherent contradiction involved with this provision which makes its application problematic in some cases.

and ID documents, but restitution was upheld for the theft of identity documents and the cards, because the *evidence at trial* indicated that the thefts were in furtherance of the conspiracy.[19] The Third Circuit, in U.S. v. Hughey, (Hughey II), vacated restitution for losses that "fall outside the offense as defined in the indictment, and *the trial record* does not otherwise tie those losses to Hughey's fraudulent scheme."[20] In U.S. v. Martin, the defendant was convicted of mail fraud and bribery, and the Seventh Circuit held that, in determining the scope and consequences of the scheme, the judge was not limited to the evidence presented at the trial.[21]

As a rule of thumb, whenever the acts of conviction are of a different kind than those for which restitution is being considered, caution is advised, because some courts will not consider different kinds of acts part of the same scheme, unless an element of the offense clearly involves a scheme or conspiracy, or the acts are described as being one scheme.[22] In addition, two recent cases have caused some confusion by holding that the dates cited for the scheme in the charging document are determinative of the duration of the scheme.[23] These cases may ultimately be limited to their facts, where the defendant plead to schemes that were in-artfully alleged. It is not clear how they can be reconciled with the fact that sentencing factors (i.e. amount of restitution) are determined by the court, and are not generally limited by allegations in the charging document.[24]

Other "Scheme" Issues. While the statutory provision authorizes restitution for "*the defendant's* criminal conduct in the course of the scheme, conspiracy, or pattern," courts have nonetheless generally upheld restitution for harms that result from the acts of other participants as well,

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[19]155 F.3d 942 (8th Cir. 1998). See also, U.S. v. Ramirez, 196 F.3d 895 (8th Cir. 1999) (looking to the scope of the indictment to determine the extent of the scheme); U.S. v. Manzer, 69 F.3d 222, 230 (8th Cir. 1995) (quoting U.S. v. Welsand, 23 F.3d 205, 207 (8th Cir.), cert denied, 115 S.Ct. 641 (1994).

[20]147 F.3d 423, 438 (5th Cir. 1998), cert denied, 119 S.Ct. 569 (1998).

[21]195 F.3d 961, 969 (7th Cir. 1999). See also, U.S. v. Savage, 891 F.2d 145, 151 (7th Cir. 1989); U.S. v. Obasohan, 73 F.3d 309 (11th Cir. 1996) (per curiam).

[22]See, e.g., U.S. v. Blake, 81 F.3d 498 (4th Cir. 1996); U.S. v. Hayes, 32 F.3d 171 (5th Cir. 1994). But see U.S. v. Moore, 127 F.3d 635 (7th Cir. 1997) (holding that restitution to use-victims for possession-offense was not plain error).

[23]U.S. v. Hughey, 147 F.3d 423 (5th Cir. 1998), cert denied, 119 S.Ct. 569 (1998); and U.S. v. Akande, 200 F.3d 136 (3d Cir. 1999).

[24]However, even under this view, charged dates *of the scheme or conspiracy* would define the contours of the offense, *not* the dates of the specific acts charged in the counts of conviction. For example, if the offense of conviction is a scheme that is alleged to have begun in January and ended in August, and the counts of conviction are specific acts in March and April, any acts in the scheme that are within the January - August time frame are included for restitution purposes.

so long as they are part of the scheme or conspiracy.[25] Some courts have held that restitution can be imposed for acts beyond the statute of limitations, so long as they are part of the scheme of the offense of conviction, as described in the indictment. For example, in U.S. v. Bach, the Seventh Circuit upheld restitution for the entire mail fraud scheme, even though mailings the defendant sent to lull victims were the only ones within the statute of limitations.[26] Also, restitution can be imposed for harm caused by conduct committed in counts which were acquitted, so long as the court determines that the conduct was part of the scheme, pattern, or conspiracy for which there was a conviction.[27] But restitution may not be ordered for victims of acquitted counts *if* the court interprets the acquittal to mean that the conspiracy did not include those acts.[28]

3. *Step Three*: Identify the Harms to the Victims Caused by the Offense of Conviction

Recent cases continue to illustrate that restitution can only be imposed for harms that are *caused* by the conduct underlying the offense of conviction, in a variety of contexts. For example, the Seventh Circuit, in U.S. v. Brierton, held that harms from acts involved in the cover-up of a fraud offense (even though part of the same common scheme or plan as the offense, and thus part of the relevant conduct of the offense) were not harms "caused" by the offense.[29] (Note: The sequential steps can overlap. Here the same result is reached if the cover up acts are viewed as outside the scope of the offense in Step Two).

Two cases have provided guidance on complex factual situations where there are more than one cause of the victims' harms. First, losses that are caused by related (perhaps unethical, but not illegal) activity should not be included in restitution. In U.S. v. Martin,[30] the Seventh Circuit held the defendants could not be held responsible for the total amount of loss ($12.3 million) that resulted from a loan default, because the loan default was only partially caused by the defendants' bribery, and partially caused by their unethical (although legal) conduct. Second, where there is an "intervening" cause for

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[25]See, e.g., U.S. v. Nichols , 169 F.3d 1255 (10th Cir. 1999). See also, U.S. v. Brewer, 983 F.2d 181, 185 (10th Cir. 1993) (good discussion of acts of co-participants for restitution).

[26]172 F.3d 520 (7th Cir. 1999). See also, U.S. v. Welsand, 23 F.3d 205, 207 (8th Cir. 1994), cert denied, 115 S.Ct. 641, upholding restitution for all losses during an 11-year mail fraud scheme, not just those acts within the 5-year statute of limitations.

[27]See, e.g., U.S. v. Boyd, 222 F.3d 47 (2d Cir. 2000); U.S. v. Dahlstrom, 180 F.3d 677 (5th Cir. 1999); U.S. v. Chaney, 964 F.2d 437 (5th Cir. 1992); U.S. v. Farkas , 935 F.2d 962 (8th Cir. 1991).

[28]U.S. v. Kane, 944 F.2d 1406 (7th Cir. 1991). The government subsequently conceded restitution could not be based on an acquitted count based on Kane in U.S. v. Polichemi, 219 F.3d 698 (7th Cir. 2000), cert denied, 2001 WL 138195.

[29]165 F.3d 1133 (7th Cir. 1999).

[30]195 F.3d 961 (7th Cir. 1999).

the harm, in addition to the defendant's conduct, restitution is authorized only for harms caused by intervening causes that are *related to* the conduct underlying the offense of conviction. In U.S. v. Meksian, the Ninth Circuit compared four different factual situations, in coming to this conclusion.[31]

Routine costs are excluded from restitution. In U.S. v. Menza, the defendant was convicted of manufacturing methamphetamine after his homemade meth lab exploded, damaging his apartment.[32] The sentencing court ordered restitution for the cost to the government for disposing of various chemicals, and to the landlord for cleaning the apartment. However, the Seventh Circuit remanded for the court to determine which costs were directly caused by the meth lab offense, and which were routine, for both the landlord and the government. Sometimes an estimation of the harm is all that is possible. "[T]he determination of an appropriate restitution amount is by nature an inexact science."[33] A case that illustrates a creative and successful estimation of the value of "harm" for restitution purposes is U.S. v. Sapoznik, in which the Seventh Circuit upheld a restitution order for one year's salary to be paid to the city by the defendant (a former Police Chief), convicted of taking bribes for four years, as a proper measure of his illegal activities (mixed in with what was agreed to be primarily beneficial, legal services to the city).[34]

The MVRA added the words "directly and proximately" to describe how restitution victims are harmed by the offense of conviction.[35] While there have been no cases focusing on these terms, some courts have occasionally recited as part of the court's holding, without discussion as to whether they contributed to it. For example, in U.S. v. Checora,[36] the Tenth Circuit upheld a restitution award for the surviving juvenile children of a victim of manslaughter, where the sentencing court had found the children to be victims "directly and proximately" harmed by a manslaughter offense (despite the fact they were with foster families, and the deceased victim had been paying child support for them through a state child welfare agency). However, the sentencing court had imposed the restitution payable to the state agency that would now pick up the added support costs for the children, and the Tenth Circuit remanded, for the court to impose the restitution payable to a proper agent for the juvenile victims, as

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[31]170 F.3d 1260 (9th Cir. 1999).

[32]137 F.3d 533 (7th Cir. 1998).

[33]U.S. v. Teehee, 893 F.2d 271, 275 (10th Cir. 1990).

[34]161 F.3d 117 (7th Cir. 1998).

[35]The victim is one who is "directly and proximately" harmed, in §§ 3663A and 3663, or harmed as a "proximate result of the offense," in the specific title 18 mandatory restitution statutes. The term "proximately" invokes the legal concept of "proximate cause," which generally includes only "foreseeable" consequences of one's acts in the law of torts. The effect of this concept here, combined with "directly," is not yet clear.

[36]175 F.3d 782 (10th Cir. 1999).

required by statute.[37] On remand, the court named a guardian for the children to receive the restitution.[38]

The courts have generally agreed that pre-judgment interest should be included in the computation of restitution owed the victim at sentencing, because it is part of the loss caused to the victim by the defendant's offense conduct.[39] The Eighth Circuit relied on the "full amount of the victim's losses" provision at § 3664(f)(1)(A) to reason that Congress intended courts to impose restitution for interest on the victim's loss in an arson case.[40] As for attorneys fees, there is a general legal premise that attorneys fees are ordinarily *not* recoverable, unless specifically provided by statute. Accordingly, victims' attorneys fees are ordinarily *not* included in the amount of restitution.[41] Attorneys' fees are considered "consequential" (indirect) losses, and restitution is primarily a reimbursement of "actual" (direct) loss.[42] The exception, however, is where the attorneys fees are *directly* related to the criminal conduct for which the defendant was convicted. For example, in the unique case of U.S. v. Hand, the Third Circuit upheld some prosecutorial costs (government's attorneys fees) where the (juror) defendant developed a relationship with one of the defendants, causing a deadlocked jury and requiring retrials of all defendants.[43]

An aspect of determining what harm was "caused" by the offense is the determination of how the damaged property should be valued. Two recent cases shed light on this. In U.S. v. Shugart, the Eleventh Circuit upheld the sentencing court's valuation of a century-old-church that had been destroyed by arson using the *replacement* value of a new church, identical to the old one on the same property, rather than the depreciated *market* value of the old church at the time of the offense.[44] The

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[37]18 U.S.C. §§3663(a)(2) and 3663A(a)(2).

[38]79 F.Supp.2d 1322 (D.Ut 2000).

[39]See, e.g., U.S. v. Catherine, 55 F.3d 1462, 1465 (9th Cir. 1995); U.S. v. Davis, 43 F.3d 41, 47 (3d Cir. 1994); U.S. v. Patty, 992 F.2d 1045 (10th Cir. 1993); U.S. v. Rochester, 898 F.2d 971, 982-3 (5th Cir. 1990).

[40]U.S. v. Rea, 60 F.3d 1111, 1114 (8th Cir. 1999).

[41]See, e.g., U.S. v. Diamond, 969 F.2d 961, 968 (10th Cir. 1992); U.S. v. Patty, 992 F.2d 1045, 1049 (10th Cir. 1993); U.S. v. Mullins, 971 F.2d 1138, 1147 (4th Cir. 1992) (attorneys and investigators fees expended finding and repossessing equipment taken by defendant not included); U.S. v. Mitchell, 876 F.2d 1178, 1184 (5th Cir. 1989) (victim's attorneys fees expended to recover from an insurance company not included); U.S. v. Arvanitis, 902 F.2d 489, 497 (7th Cir. 1990) (insurance company's legal fees expended to investigate defendant's fraudulent insurance claim not included); U.S. v. Barany, 884 F.2d 1255, 1261 (9th Cir. 1989) (same).

[42]U.S. v. Stoddard, 150 F.3d 1140, 1147 (9th Cir. 1998).

[43]863 F.2d 1100 (3d Cir. 1988). See also, U.S. v. Davis, 43 F.3d 41, 44-46 (3d Cir. 1994), further explaining the result in Hand.

[44]176 F.3d 1373 (11th Cir. 1999).

court found that the replacement value came the closest to a "restoration" of as many of the values, memories, and benefits of the old church to the victim-congregation as possible. Similarly, in U.S. v. Simmonds, III, the Third Circuit held that replacement value of personal furniture best compensated for the intrinsic values of, for example, one's favorite chair.[45]

It is not uncommon for victims to require counseling or treatment even after sentencing, for a harm the victim suffered from the offense. If the need and the cost for the treatment is reasonably ascertainable at sentencing, the court not only can, but probably should, impose restitution for the costs at sentencing, based on U.S. v. Laney.[46] The defendant was convicted of engaging in the sexual exploitation of a child, and the court ordered the defendant to pay restitution to the child for six years of (mostly future) counseling expenses (which were specifically compensable for the offense involved).[47] In upholding the restitution, the Ninth Circuit concluded that Congress must have intended compensation for harm occurring post-sentencing because § 3664(d)(5) authorizes restitution for losses discovered after sentencing that were not ascertainable at the time of sentencing.[48] It also reasoned that, because expert testimony of the victim's need for the counseling made the expense "ascertainable" at sentencing, the victim might be foreclosed from using § 3664(d)(5) to recover the costs post-sentencing.[49] While Laney partially relies on language in § 2259, much of its analysis is broad enough to lend support to such restitution awards in other kinds of cases, so long as the calculation of the future loss can be made with "reasonable certainty," at sentencing.

Child Support Recovery Act (CSRA) (18 U.S.C. § 228). Special rules apply to this mandatory "restitution" offense; the 5-step analysis is not applicable. The amount of restitution in these cases is specifically set by statute, i.e. the amount of support obligation that is "due at sentencing." Because § 228(d)(1)(A) defines "past due support obligation" to include support for the parent with

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[45]235 F.3d 826 (3d Cir. 2000).

[46]189 F.3d 954 (9th Cir. 1999).

[47]§ 2259(b)(3)(B) specifically authorizes mandatory restitution for psychological counseling. If restitution were to be imposed under § 3663 or § 3663A, however, psychological counseling is authorized only if the victim suffered physical injury - unless courts ultimately conclude that MVRA provisions such as "directly and proximately" (in §§ 3663(a) and 3663A(a)) or "the full amount of the victim's losses" (in § 3664(f)(1)(A)) authorize more restitution than is specifically listed as compensable in §§ 3663 and 3663A.

[48]Section 3664(d)(5) states: "If the victim's losses are not ascertainable by ... 10 days prior to sentencing, ... [the determination of restitution shall be continued up to 90 days after sentencing.] If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief."

[49]Id. at 967, n. 14. The court also concluded that Congress could not have intended the "strangely unwieldy procedure" of requiring a victim to petition the court for an amended restitution order every 60 days for as long as the therapy lasted. Id. at 966-67.

whom the child is living, the 11th Circuit upheld a restitution award that included maintenance for the ex-spouse as well as for the child.[50] The Ninth Circuit has held that the amount of past due child support that can be ordered as restitution is not limited to the dates in the Indictment because the statutory reference to the amount due "at the time of sentencing" indicates Congress' "desire to charge the parent for all unpaid child support, including support that accrued before the indictment was issued."[51] The statute does not mention interest, but it would appear to be included, so long as the state law provided for the accrual of interest on past due support obligations. Further, the specific amount due does not have to be alleged in the indictment or proven, because it is a sentencing factor determined by the court at sentencing.

3. *Step four*: Identify Which Harms and Costs are Compensable as Restitution

The federal restitution statutes include specific language specifying what harms or costs suffered by victims of the offense are compensable as restitution. Specific compensable harms are listed in the primary restitution statutes, §§ 3663 and 3663A, according to the kind of harm the victim suffered due to the offense, and a more inclusive list can be found in the specific title 18 mandatory restitution statutes. Because restitution is a statute-based penalty, nearly all courts have interpreted the compensable harms listed in the restitution statutes to be exclusive, and have vacated restitution orders compensating harms not tied to the statutory language that are otherwise valid, e.g. "caused" by the offense of conviction. Some recent cases have provided further guidance on what harms are compensable as restitution.

One kind of compensable loss, authorized in the primary restitution statutes, is: *"In any case, restitution should be ordered for lost income, necessary child care, transportation, and other expenses related to participation in the investigation and prosecution of the offense or attendance at proceedings related to the offense."*[52] This would presumably include persons who are "victims," even if they did not suffer a pecuniary loss or bodily injury, such as a teller in a bank robbery. This kind of restitution, which is a reimbursement for a "cost," is probably often overlooked. Two Second Circuit cases used this provision in interesting ways. In U.S. v. Malpeso, the court combined it with § 3664(j)(1), which authorizes restitution to third parties who compensate victims, to uphold a restitution order to the FBI for the expenses involved in relocating a witness to make the witness available for cooperation with the prosecution.[53] In U.S. v. Hayes, the Second Circuit upheld restitution for the victim's costs in obtaining a protection order, incurred prior to the offense conduct

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[50]U.S. v. Brand, 163 F.3d 1268, 1278 (11th Cir. 1998).

[51]U.S. v. Craig, 181 F.3d 1124, 1127 (9th Cir. 1999).

[52]§§ 3663A(b)(4) and 3663(b)(4).

[53]126 F.3d 92 (2d Cir. 1997). If the victim had paid the expenses himself, it would have been compensable under § 3663A(b)(4); besides, the FBI functioned as a third party, compensating the victim for these compensable expenses.

(i.e., when the defendant crossed state lines in violation of the protection order).[54] The court relied on the above "cost" provision as an indication that Congress did not intend that restitution be restricted to only those harms incurred during the actual commission of the offense.

The restitution statutes authorize restitution for lost income where the victim suffered bodily injury.[55] The Third Circuit relied on that provision to uphold restitution to a rape victim for the value of the annual leave she used as a result of the offense, finding the value of the leave to be equal to the value of her wages for that period of time.[56] Where the offense causes the death of a victim, while there is no compensable restitution for "pain and suffering" of the survivors, restitution is authorized for funeral and related expenses,[57] and the Ninth Circuit upheld restitution based on this provision in U.S. v. Crawford.[58]

Specific title 18 mandatory restitution statutes. These statutes, enacted in 1994, appear to authorize a broader scope of restitution than do the principal restitution statutes. They are: §§ 2248 (sexual abuse), 2259 (sexual exploitation of children), 2264 (domestic violence), and 2327 (telemarketing). All four contain "precursor" language to that added to the main restitution statutes by the MVRA, two years later. The broad interpretation of that precursor language may ultimately have a carry-over effect onto restitution under the main restitution statutes (§§ 3663 and 3663A). All four special statutes authorize restitution for the *"full amount of each victim's losses."* In addition to this phrase, § 2327(b)(3) authorizes restitution for *all losses suffered by the victim as a proximate result of the offense."* The other three (§§ 2248, 2259, 2264) each has its own list of specific compensable harms, more inclusive than those listed in §§ 3663 and 3663A, and which end with, *"[and] any other losses suffered by the victim as a proximate result of the offense."*

These phrases not only are similar to the MVRA terms *"directly and proximately"* added to the definition of victim in the main restitution statutes, but they also are similar to an MVRA provision, § 3664(f)(1)(A), that states: *"In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court..."* Given that this provision is in § 3664, it applies to *all* restitution orders, and thus represents a possible basis for expanded restitution in all cases. The Eighth Circuit recently partially relied on it to uphold a restitution award in an arson case.[59] As more courts discover this provision, it may ultimately be one of the

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[54]135 F.3d 133 (2d Cir. 1998).

[55]§§ 3663(b)(2) and 3663A(b)(2).

[56]U.S. v. Jacobs, 167 F.3d 792 (3d Cir. 1999).

[57]§§ 3663(b)(3) and 3663A(b)(3).

[58]169 F.3d 590 (9th Cir. 1999).

[59]U.S. v. Rea, 69 F.3d 1111, 1114 (8th Cir. 1999).

primary ways the MVRA expanded restitution in federal cases.

Courts generally have upheld broad restitution orders under these special restitution statutes. It should be remembered, however, if tempted to analogize to these cases for support in other kinds of cases, most of these special statutes also have expanded lists of specific compensable harms, as noted.[60] Nevertheless, the case law on these specialized offenses is helpful for those involved in the sentencing of these offenses, and may also provide a potential basis for expansion of restitution elsewhere, given the similar, "precursor" terminology.

§ 2259 (sexual exploitation of children). The Ninth Circuit upheld restitution for future psychiatric counseling costs for the victim in U.S. v. Laney,[61] as discussed above, based partially on the "full amount of the victim's losses" language in § 2259, partly on § 3664(d)(5), which provides for restitution for losses discovered in the future, and partly on the costs "incurred" language in § 2259(b)(3). In U.S. v. Crandon,[62] the Third Circuit also upheld psychiatric care, based on the "full amount of the victim's losses" in § 2259. The court also found that in-patient psychiatric care of the 14 year old victim, molested by the defendant was harm to the victim "proximately resulting" from the offense.

§ 2264 (domestic violence). In U.S. v. Hayes,[63] the Second Circuit upheld restitution for the victim's legal costs incurred prior to the defendant's interstate travel to violate her protection order, as costs "caused" by the offense conduct. It relied on the language in § 2264 that authorizes restitution for the "full amount of losses" caused by the offense, and on § 3663A(b)(4) that allows restitution for costs incurred after the offense (in cooperation with the prosecution of the case).

§ 2327 (telemarketing). In 1994 Congress passed the SCAMS Act[64] (18 U.S.C. § 2325-27), which enhanced the penalties and provided for mandatory restitution for certain "telemarketing" kinds of offenses. In U.S. v. Baggett, the defendant challenged application of the Act to his offense, which was committed prior to changes in procedure made to the Act by the MVRA in 1996, but the Ninth Circuit held that the changes to the Act were not substantive, and therefore applicable to the

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[60]For example, §§ 2248(3), 2259(3), and 2264(3)specifically authorize compensation for psychological counseling, without regard to the kind of harm suffered by the victim, whereas it is only specifically compensable under the main restitution statutes (§§ 3663(b)(2) and 3663A(b)(2)) where the victim suffered bodily harm.

[61]189 F.3d 954 (9th Cir. 1999).

[62]173 F.3d 122 (3d Cir. 1999).

[63]135 F.3d 133 (2d Cir. 1998).

[64]The Act was known as the "Senior citizens Against Marketing Scams Act of 1994."

defendant's offense.[65] Another recent case involving a telemarketing fraud is U.S. v. Grimes,[66] in which the court held that the sentencing court should use § 3664(d)(5), which provides for a 90-day continuance of the restitution determination, in order to be able to identify as many victims as possible, where necessary.

5. *Step Five*: Effect of Plea Agreement on Restitution Amount

After the restitution amount is determined, based on the analyses discussed above, the plea agreement should be reviewed to determine if it authorizes the court to impose more restitution. There are three statutory restitution provisions authorizing greater amounts of restitution to be imposed, if agreed upon, than could be imposed otherwise (i.e. under the 4-steps discussed above).[67] In order to be effective, any such agreement must be very specific.[68] Congress directed the government to ensure restitution to all victims of charged offenses in plea agreements, even if the defendant only pleads to some of the counts.[69] The courts have also urged the government to charge offenses,[70] and to make plea agreements[71] with restitution in mind. Restitution imposed pursuant to one of these provisions is probably a separate sentence rather than merely a condition of supervision, because the plea agreement provisions are in the primary restitution statutes, which authorize a sentence of restitution.

Another issue that officers ask about is whether restitution can be imposed where the defendant

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[65]125 F.3d 1319, 1323, n.5 (9th Cir. 1997). The MVRA, for example, amended the Act to incorporate the newly amended § 3664.

[66]173 F.3d 634 (7th Cir. 1999).

[67]§ 3663(a)(3) (restitution in any case to the extent agreed to by the parties in the plea agreement); §§ 3663A(a)(3) and 3663(a)(1)(A) (restitution to persons other than the victim of the offense); and § 3663A(c)(2) (mandatory restitution for non-qualifying offense, if the parties agree the plea resulted from a qualifying offense).

[68]See, e.g., U.S. v. Baker, 25 F.3d 1452 (9th Cir. 1994); U.S. v. Guthrie, 64 F.3d 1510 (10th Cir. 1995); U.S. v. Silkowski, 32 F.3d 682, 689 (2d Cir. 1994); U.S. v. Soderling, 970 F.2d 529, 532-34 (9th Cir. 1992) (providing example of specificity required).

[69]The MVRA added a note to § 3551, stating that the Attorney General shall ensure that, "in all plea agreements ... consideration is given to requesting that the defendant provide full restitution to all victims of all charges contained in the indictment or information, without regard to the counts to which the defendant actually pleaded."

[70]The Third Circuit, in U.S. v. Akande, 200 F.3d 136, 142 (3d Cir. 1999) (citing U.S. v. DeSalvo, 41 F.3d 505, 514 (9th Cir. 1994)), after remanding for correction of a restitution order, stated, "Because the government 'has control over the drafting' of the Information, it bears the burden of 'includ[ing] language sufficient to cover all acts for which it will seek restitution.'"

[71]The Second Circuit, after painstakingly analyzing the plea agreement and transcripts of the plea and sentencing to determine the extent of the agreement, said, "the government would be well advised to give greater consideration to the impact of the [restitution statutes] in future plea negotiations ..." U.S. v. Silkowski, 32 F.3d 682, 689 (2d Cir. 1994).

was not advised of the possibility of restitution being imposed at the plea. The best practice is, without doubt, for the court to advise the defendant at the plea of the fact that restitution could be imposed. The court is required to determine, before accepting a plea, that the defendant understands the penalties of the offense to which he or she is pleading, including *"when applicable, that the court may also order the defendant to make restitution to any victim of the offense."*[72] However, Rule 11 also provides that, any failure to adhere to the required procedures under the rule shall be disregarded to the extent such failure does not affect the "substantial rights" of the defendant.[73] Accordingly, the courts have held that, where the defendant was merely advised of any potential monetary penalty, such as a fine, in an amount at least as great as the ultimate restitution imposed, the error was harmless. For example, in U.S. v. Crawford,[74] the defendant was advised that he could be required to pay a fine of up to $500,000, but not advised of the possibility of restitution. The Ninth Circuit found that the defendant "could not have been surprised or prejudiced by the imposition of $64,229 as restitution in light of his potential liability for $500,000."[75] The Third Circuit used the same rationale to uphold a $1 million fine.[76]

II. Other Selected Restitution Issues

A. Restitution in juvenile cases

The federal restitution statutes authorize restitution to be imposed for federal "offenses," and would therefore not apply, on their face, to violations of the Juvenile Delinquency Act (JDA),[77] which are not offenses. However, restitution can be imposed in juvenile cases - pursuant to the JDA itself. Section 5037(a) provides that, after the dispositional hearing, if the court finds a juvenile to be a juvenile delinquent the "court may suspend the findings of juvenile delinquency, enter an order of restitution pursuant to § 3556, place him on probation, or commit him to official detention."[78] Such restitution is probably discretionary, because of the word "may." However, it could be argued that it is mandatory,

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[72]Rule 11(c)(1), Federal Rules of Criminal Procedure (F.R.Cr.P.).

[73]Rule 11(h), F.R.Cr.P.

[74]169 F.3d 590, 592 (9th Cir. 1999).

[75] See also, U.S. v. Pomazi, 851 F.2d 244, 248 (9th Cir. 1988) (same); U.S. v. Fox, 941 F.2d 480, 484 (7th Cir. 1991), cert denied, 112 S.Ct. 1190 (1992). But see, U.S. v. Pogue, 865 F.2d 226 (10th Cir. 1989), holding that § 2255 relief might be available to a defendant not advised of restitution consequences.

[76]U.S. v. Electrodyne Systems Corp, 147 F.3d 250, 253 (3d Cir. 1998).

[77]18 U.S.C. §§ 5031 et. seq.

[78]A corollary issue is how to interpret the "or;" the provision logically was intended to provide for restitution *and* either probation *or* official detention, given the mutual exclusivity of the latter two and the illogical result of a court choosing one from among the three.

if the kind of violation otherwise fits the criteria for mandatory restitution in § 3663A - because both §§ 3663 and 3663A are referenced in § 3556. The only reported case on point recently upheld mandatory restitution in a juvenile case where the offense was a crime of violence, without analysis.[79]

B. Multiple victims

There are numerous cases discussed in the December 1998 article and elsewhere, confirming that there may be numerous, and even different kinds, of victims for restitution in the same case. A case that involves many different kinds of victims is U.S. v. Ferranti,[80] in which the defendant was convicted of conspiracy to commit arson resulting in death, tampering with a witness, and mail fraud. He was ordered to pay restitution of over $1 million to: the residents of the apartments burned for their lost belongings, an injured firefighter for both his lost overtime pay and the future cost of his medical expenses, the owner of the building for the loss in the property value (but not including the loss of rent), insurance companies, and the Fire Department for medical leave, funeral expenses and lost earnings of the fire fighter killed fighting the fire.

Many legal and procedural questions arise where there are numerous victims, such as in large telemarketing or fraud scams. Several recent cases have developed interpretation of an MVRA provision sometimes used in such cases, § 3664(d)(5), that provides: *"If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing...."* In U.S. v. Grimes,[81] the Seventh Circuit held that Congress intended that courts use the provision (the court "shall") where necessary to provide for as many victims as possible. Two other courts have examined this provision, as well. In U.S. v. Stevens,[82] the Second Circuit examined the legislative history of the provision and ultimately held that the 90 days can be tolled by the defendant's conduct, and delay beyond that period is not error unless the defendant can show prejudice. The Sixth Circuit held in U.S. v. Vandenberg,[83] that the court ordinarily must resolve restitution issues within the 90 days, but no hearing is required so long as parties have notice and an opportunity to be heard through pleadings, and delay beyond the 90-days is not error if it is ultimately cured, i.e. the parties are given a full opportunity to be heard.

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[79] U.S. v. Juvenile G.Z., 144 F.3d 1148 (8th Cir. 2000).

[80] 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).

[81] 173 F.3d 634 (7th Cir. 1999).

[82] 211 F.3d 1 (2nd Cir. 2000).

[83] 201 F.3d 805 (6th Cir. 2000).

What level of identification of victims is required? Generally, victims must be "identified," but not found, by the time restitution is ordered. In U.S. v. Seligsohn, the Third Circuit held that, where the victims are numerous and difficult to identify, the sentencing court should name whatever victims it can, and otherwise describe or define the victim class specifically enough to provide appropriate guidance to the government in further identifying them (sufficient to locate them).[84] Similarly, in U.S. v. Berardini, the Second Circuit held that the court must determine the amount of restitution owed to each victim, and be satisfied that there is enough information on the victim's identity to reasonably anticipate that the victim might eventually be located.[85] That case is also one of the few on record to address another source of questions: what to do with restitution payments until victims are found. The Berardini court set up a fund administered by the clerk, and then the government, as a repository for restitution payments until victims are found.[86]

C. Multiple defendants

Issues have arisen about apparent contradictions among several MVRA provisions regarding sentencing more than one defendant. Section 3664(h) provides, *"... the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant."* On the other hand, § 3663A provides (for the offenses listed) that the court shall order the defendant to make restitution to the victim of the offense; even more significantly, however, § 3664(f)(1)(A) provides (presumably for all restitution orders) that, *"In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant."* The issue arises, therefore, in mandatory restitution cases, whereby courts must impose full restitution on each defendant, or whether they may apportion the restitution among defendants - so long as the aggregate total of all defendants' restitution orders would amount to "full" restitution for the victim(s).

Courts have long had discretion in fashioning a restitution order for several defendants, and joint

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[84]981 F.2d 1418 (3d Cir. 1992).

[85]112 F.3d 606 (2d Cir. 1997).

[86]In that case, the government had identified 62 victims of defendant's scheme, but had only located 20 of them by sentencing, suspecting some had moved or died. The court imposed restitution in the amount the defendant admitted receiving from all 62 victims and set up a fund, managed by the clerk, to receive the defendant's restitution payments, from which the victims could claim the money as they or their estates were found. The Second Circuit upheld the court's plan, noting there was some identification feature for each victim, leading to the belief that they might eventually be found. The court seemed to infer that after the court's supervision ended, the government would become trustee of the fund, and that future problems could be addressed by the court as they arose.

and severally (described as the first option in § 3664(h)) has been the most common method.[87] It is also no doubt the safest way to ensure compensation for the victim, because it permits payment, as it becomes available from any defendant, until the victim is compensated.[88] However, joint and severally is sometimes difficult to administer,[89] and there is little guidance on how to reconcile the provisions cited above. A pre-MVRA case vacated a restitution order where a less-culpable defendant was ordered to pay the same restitution as other defendants.[90] The only post-MVRA case is U.S. v. Walton, a mandatory restitution case, where the Seventh Circuit held the court has discretion to apportion the restitution among the defendants, and indeed should provide reasons where it chooses not to do so.[91] Although prepared prior to the MVRA, *Publication 107* contains some sample imposition language to enable officers to assist their courts in imposing financial penalties, illustrating both joint and severally and apportionment methods.[92]

D. Changing a restitution order

Section 3664(o), added by the MVRA, lists the ways in which a restitution order can be vacated or amended. For example, it can be "corrected" pursuant to Rule 35, modified or vacated on a direct appeal, amended pursuant to § 3664(d)(5)[93] upon discovery of new losses, or adjusted under § 3664(k) for defendant's changed circumstances. The list does not include a motion to vacate a sentence, pursuant to 28 U.S.C. § 2255; courts have uniformly held that a challenge to a restitution order cannot be brought pursuant to motions to vacate a sentence under § 2255.[94] Nor can an

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[87]See, e.g., U.S. v. All Star Industries, 962 F.2d 465 (5th Cir. 1992); U.S. v. Caney, 964 F.2d 437 (2d Cir. 1992);and U.S. v. Tzakis ,736 F.2d 867, 871 (2d Cir. 1984).

[88]U.S. v. Emerson, 128 F.3d 557, 568 (7th Cir. 1997).

[89]A recent policy change addresses one aspect of these problems and allows accounting of payments to stay in the sentencing district where one of several defendants, imposed joint and severally, is supervised in another district (even where supervision jurisdiction is transferred, as is the recommended policy). See memorandum to all clerks, district courts, and chief probation officers, "Joint and Several Restitution Orders for Offenders Jurisdictionally Transferred," November 14, 2000, from the Chiefs of the Accounting and Financial Systems Division and the Federal Corrections and Supervision Division, Administrative Office of the U.S. Courts.

[90]U.S. v. Neal, 36 F.3d 1190 (1st Cir. 1994).

[91]217 F.3d 443 (7th Cir. 2000).

[92]*The Presentence Investigation Report: Publication 107*, Administrative Office of the U.S. Courts, Appendix B, pp. 6-7.

[93]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.

[94]U.S. v. Landrum, 93 F.3d 122 (4th Cir. 1996) (but construing defendant's pro se motion in old law case as filed pursuant to former Rule 35(a); U.S. v. Hatten, 167 F.3d 884 (5th Cir. 1999); Blaik v. U.S., 161 F.3d 1341 (11th Cir. 1998).

offender challenge the restitution imposed at sentencing under Rule 3583 as a condition of supervision.[95]

A question that arises with some frequency is whether a restitution beneficiary can be changed, post-sentencing, when there is a new beneficiary entitled to receive the victim's restitution. 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 agency, in some manner). The court should be able to make such a change, based on its inherent authority or as a "correction" to the order under Rule 35 (as incorporated in § 3664(o)). Also, because the payment of restitution becomes a standard condition of supervision, the court should be able to make a non-substantive change that does not increase the amount of restitution pursuant to Rule 32.1, as a modification of supervision conditions. The determination of who is a successor in interest to a named beneficiary is a legal one, sometimes involving the application of state law, and should be made by the court, perhaps with notice to the parties, and recorded on the Amended Judgment in a Criminal Case. In one of the rare cases on this issue, U.S. v. Berman,[96] the Seventh Circuit upheld a change in payee where the beneficiary of the restitution assigned its right to the restitution to an unsecured creditor (even though the new beneficiary suffered no loss from the offense), based on the victim's statutory right to designate someone to receive the restitution.[97]

E. Civil agreements or settlements

Restitution generally is not limited by 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, and 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.[98] For there to be any potential offset, the defendant must prove that the civil settlement or suit is for the same harms or costs for which restitution was ordered.[99] For example, in U.S. v. Crawford, the

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[95]U.S. v. Hatten, 167 F.3d 884, 886 (5th Cir. 1999); Smullen v. U.S., 94 F.3d 20, 26 (1st Cir. 1996).

[96]21 F.3d 753 (7th Cir. 1994).

[97]§ 3663(b)(5) authorizes the victim to consent to restitution being made to a person or organization designated by the victim or the (deceased) victim's estate. It does not, however, indicate whether such designation could be made after sentencing, but there is no reason to suspect it could not. Besides, legal successions in interest would ordinarily happen after sentencing, during the life of the restitution order.

[98]U.S. v. Cupit, 169 F.3d 536 (8th Cir. 1999). But see, U.S. v. Coleman, 997 F.2d 1101 (5th Cir. 1993), cert denied, 510 U.S. 1077 (1994), recognizing a narrow exception where the government was victim and had also executed the mutual release with the defendant in the civil suit.

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

defendant failed to prove the civil suit award was intended to cover funeral expenses, for which restitution was ordered.[100]

Second, such agreements or settlements (or even judgments) are sometimes subsequently changed, appealed, or amended.[101] Third, restitution serves different functions than civil agreements, and cannot be waived by the victims, because it is considered a punitive criminal penalty, meant to have deterrent and rehabilitative effects, beyond the goal of compensating the victim.[102] The penal purposes of restitution are not litigated in the civil case, and the "law will not tolerate privately negotiated end runs around the criminal justice system."[103] The defendant has the burden of proving not only that the civil award covers the same harm as the restitution,[104] but also that the civil compensation satisfies the penal purposes of the restitution award.[105] However, if the defendant proves at sentencing that he/she *has already compensated* the victim for the *same harms* that are covered by the restitution award, it may be appropriate to offset the compensated amount against the restitution amount to be imposed.[106] Finally, while 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.[107] The victim is only paid once, but the restitution order acts as an additional enforcement mechanism for the civil judgment.[108]

Conclusion

This completes a "trilogy" on federal restitution in *Federal Probation*, spanning the better part of three years. Hopefully, it will provide a solid framework from which probation officers can assist

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[100]U.S. v. Crawford, 162 F.2d 550 (9th Cir. 1998).

[101]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).

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

[103]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).

[104]See, e.g., Crawford, Sheinbaum, Parsons, Mmahat, supra.

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

[106]Sheinbaum, 136 F.3d at 449.

[107]§ 3664(j)(2) (which pre-MVRA was § 3663(e)(2))states, *"(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."* (Note this refers only to compensation by the defendant, not by third parties.)

[108]U.S. v. Cluck, 143 F.3d 174 (5th Cir. 1998). See also, U.S. v. Ahmad, 2 F.3d 245, 248-49 (7th Cir. 1993), comparing judgment and collection rights of civil judgments and criminal restitution orders.

their courts in making the best possible determination of the restitution amount that should be imposed in federal criminal cases, in a way that benefits not only the system by avoiding unnecessary litigation, but also victims of crime. Some of these issues are not fully developed by the courts, and new ones will naturally appear, as restitution becomes a greater part of federal criminal jurisprudence.