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A Prosecutor's Guide: When and How to Consider Restitution in a Complex Homicide Case

Based in Part on: **The Association of Prosecuting Attorney's** Webinar "Murder 101: Restitution and Recovery of Economic Loss in Complex Homicide Cases Webinar" in collaboration with **Arizona Crime Victims Rights Law Group**.

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What is restitution?

Plain Meaning: 18 U.S.C § 3663A: “Mandatory Restitution to Victims of Certain Crimes” requires the court to order restitution to the “full amount of each victims’ losses”.

When a victim seeks restitution, the prosecutor does **not** represent the victim. The prosecutor merely asserts the right for a victim under the enabling statute.

18 U.S.C § 3664 Outlines procedure designed to protect victims, not defendants. A victim must inform the court of their request for restitution prior to the defendant’s sentencing. This prior notice protects the defendant from drawn-out sentencing proceedings and protects victims’ from the defendant’s dissipation of assets.

Legislative Intent: Restitution ensures the loss of crime victims are recognized and ensures the offender realizes damage caused and pays debt to the victim and society. S.Rep. No. 104-179, at 12 (1005), *reprinted in* 1996 U.S.C.C.A.N. 924, 925, 932 (Dec. 6, 1995). Restitution is ordered regardless of the defendant’s financial circumstances.

Note: Each state has their own statutory definition of restitution and economic loss. Please review your state’s statutes for specifics.

What is the causation requirement for a financial loss to be recoverable?

1. To recover restitution, the loss must be economic.
2. The loss must be one that the victim would not have incurred **but for** the Defendant’s offense. *United States v. Wilkinson*, 202 Ariz. 27, at 1133 (2002). 1
3. The loss must be **directly** caused by the Defendant’s offense. *Id.* at 1134.
 - If the financial loss is caused by consequential damages, then the loss shall be addressed in a civil suit, not at criminal sentencing. *Id.* at 1134.

How does complex homicide fit into restitution?

In 1996, Congress enacted the Mandatory Victims Restitution Act (“MVRA”). This act made restitution mandatory for crimes of violence when victims “suffer a physical injury or pecuniary loss.” 18 U.S.C § 3663A(c)(1). A complex homicide is always a crime of violence pursuant 18 U.S.C § 3663A(c)(1)(A)(i).

Who receives restitution if the victim is deceased?

Pursuant 18 U.S.C § 3663A(a)(2), when a victim is deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or person appointed by the court, may assume the victim's rights. In no event shall the defendant be named the representative or guardian. *Id.* And, pursuant 18 U.S.C § 3663A(a)(3) both parties, if in a plea agreement, may allow restitution recoverable to persons other than just the victim, such as the victims' family.

What are recoverable financial losses for victims of complex homicide?

Pursuant 18 U.S.C § 3663A(a)(2), when a victim is deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or person appointed by the court, may assume the victim's rights. In no event shall the defendant be named the representative or guardian. *Id.* And, pursuant 18 U.S.C § 3663A(a)(3) both parties, if in a plea agreement, may allow restitution recoverable to persons other than just the victim, such as the victims' family.

Enumerated recoverable losses:

| | |
|---|------------------------|
| Funeral and related services | 18 U.S.C § 3663A(b)(3) |
| Lost income | 18 U.S.C § 3663A(b)(4) |
| Necessary child care | 18 U.S.C § 3663A(b)(4) |
| Transportation | 18 U.S.C § 3663A(b)(4) |
| Expenses incurred during investigation or prosecution | 18 U.S.C § 3663A(b)(4) |

Think Creatively: *United States v. Serawop*, 505 F.3d 1112, at 1122 (2007) (holding the MVRA authorizes restitution for the victim's future lost incomes, even if the deceased is an infant.) Restitution cannot be an amount greater than the total loss caused by the offense. *Id.* at 1125. The court is under no requirement to retract an amount based on a deceased's alleged personal consumption. The amount of restitution for future income loss is *income lost* not *net* income loss. *Id.* at 1115-16. Race and gender neutral estimates are used to avoid stereotypes. *Id.* at 1116, 1126.

What is NOT recoverable?

Losses in which the amount is speculative, or in which the loss is not clearly causally linked to the offense, are not subject to mandatory restitution. S.Rep.No. 104-179, at 18-19, U.S.Code Cong. & Admin.News 1996, at 924, 932.

Taxes or interest

Pain and suffering

Private fees for matters raised during the crime

Fees related to civil recovery of financial losses

Purely speculative future financial loss

PROPOSED TIMELINE

Phase 1

- Firstly, restitution is a team effort. It is essential that victims' advocates inform victims of their right to restitution. The [National Crime Victim Law Institute](#) provides comprehensive resources to educate victims on their rights and sample documents to reference when tracking all financial loss.

Phase 2

- If the victim chooses to seek restitution, then the victim shall inform their advocate and the advocate shall inform the prosecutor as soon as possible. This is important to do early on because the prosecutor then ensures restitution will not be dismissed in a potential plea agreement negotiations. Also, the prosecutor must have prior notice to inform the court before sentencing.

Phase 3

- Victims and their advocates shall be robust in keeping a record of all financial losses. Examples of recoverable losses are discussed above. It is essential to keep a detailed record. Examples of records to keep:
 - Receipts
 - Agreements
 - Contracts
 - Estimates
 - Affidavits
 - Cancelled checks
 - Credit card statements

ENFORCEMENT MECHANISMS

Option 1

Pre-Conviction Liens

- Firstly, restitution is a team effort. It is essential that victims' advocates inform victims of their right to restitution. The [National Crime Victim Law Institute](#) provides comprehensive resources to educate victims on their rights and sample documents to reference when tracking all financial loss.

Option 2

Post-Conviction Liens

- If the victim chooses to seek restitution, then the victim shall inform their advocate and the advocate shall inform the prosecutor as soon as possible. This is important to do early on because the prosecutor then ensures restitution will not be dismissed in a potential plea agreement negotiations. Also, the prosecutor must have prior notice to inform the court before sentencing.
- Victims and their advocates shall be robust in keeping a record of all financial losses. Examples of recoverable losses are discussed above. It is essential to keep a detailed record. Examples of records to keep:

Option 3

Civil Enforcement

- Receipts
- Agreements
- Contracts
- Estimates
- Affidavits
- Cancelled checks
- Credit card statements

Option 4

Communication and Consistency

- Victim's Rights Lawyers offer victim's a way to better ensure they will recover restitution.
 - Regardless of the outcome, victims are entitled to pursue a civil lawsuit whether restitution is court ordered to address insurance settlements or other expenses.
- The victim is entitled to receive a copy of the Order of Restitution.

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