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Restitution in Federal Criminal Cases: A Sketch

Updated October 15, 2019

Congressional Research Service

<https://crsreports.congress.gov>

RS22708



RS22708

October 15, 2019

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Restitution in Federal Criminal Cases: A Sketch

Restitution endeavors to restore victims to the place where they stood when they became victims of crime. It seeks to make them whole and no more. In the case of a corporate or affluent defendant, victim restitution can be substantial; in some cases its value may be largely symbolic; in yet other cases it is irrelevant. Federal prosecutors collect roughly \$1 billion a year for the victims of federal crimes. Yet prosecutors will likely never secure more than \$1 out every \$10 owed, and federal courts rarely, if ever, order restitution from the defendants convicted of the most commonly prosecuted federal crimes.

Restitution in federal criminal cases is a matter of statute. A handful of statutes identify the victims who are eligible to receive restitution; what criminal convictions may trigger an obligation to pay restitution; the losses for which victims may be compensated; and the procedure by which restitution is ordered and enforced.

As a general rule, a victim is a person who is physically injured, or who suffers a property loss, as the proximate result of a qualifying offense. A victim may also be someone named as a beneficiary in a plea bargain or in a condition of probation or supervised release.

Federal crimes of violence, fraud, or property loss will usually require a sentencing court to order restitution. A court also may order restitution following a conviction for any other crime in the federal criminal code, in accordance with a plea bargain, or as a condition of probation or supervised release.

Restitution orders ordinarily must cover the full extent of a victim's losses that are the proximate result of the defendant's qualifying crime of conviction, no more and no less, even though the defendant may never be able to make full restitution.

Restitution in federal criminal cases is part of the sentencing process. The Probation Service prepares a pre-sentencing report that includes a preliminary assessment of what restitution, if any, is appropriate. The parties are free to challenge and supplement the report. The government must establish the existence and extent of any right to victim restitution by a preponderance of the evidence. Both the government and the defendant may appeal the court's restitution determinations. A victim may appeal such determinations using mandamus.

The Department of Justice, acting on behalf of a victim, may enforce a restitution order in the manner it uses to collect fines or by "all other available and reasonable means." Victims may secure a lien in their own names against the defendant's property in order to secure restitution and they may bring other civil actions in their own names against the defendant.

The courts do not agree on whether the abatement doctrine cuts off unfulfilled obligations under a restitution order. The abatement doctrine provides that when a defendant dies while his or her appeal is still pending the law treats the defendant's indictment and conviction as though they had never happened. The conviction is vacated and the indictment dismissed.

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Introduction

Criminal restitution is the “full or partial compensation paid by a criminal defendant to a victim, not awarded in a civil trial for tort, but ordered as part of a criminal sentence or as a condition of probation.”¹ Federal prosecutors recover roughly \$1 billion a year for the victims of federal crimes. Yet less than a tenth of the restitution awarded in federal criminal cases will ever be collected because of the defendants’ inability to pay. In addition, federal courts rarely order restitution in immigration and drug cases, the most commonly prosecuted federal crimes, because of the nature of the offenses.

Federal courts may not order a defendant to pay restitution to the victims of his or her crimes unless empowered to do so by statute. Two general statutes vest the courts with authority to order restitution. One, 18 U.S.C. § 3663, permits it for certain crimes. The second, 18 U.S.C. § 3663A, requires it for other crimes. In addition, several individual restitution statutes authorize awards for particular offenses, *i.e.*: (1) animal enterprise terrorism; (2) failure to provide child support; (3) human trafficking; (4) sexual abuse; (5) sexual exploitation of children; (6) stalking or domestic violence; (7) copyright infringement; (8) telemarketing fraud; (9) amphetamine or methamphetamine offenses; (10) reckless disregard of sex trafficking; and (11) transportation or travel for unlawful sexual purposes.

Federal courts also may order restitution pursuant to a plea bargain or as a condition of probation or supervised release, even where it is not otherwise authorized. Section 3664 supplies the procedure under which the restitution order is ordinarily imposed.

Victims

The various federal restitution statutes address three questions: Who qualifies as a victim? What crimes trigger restitution authority? What type of injuries or losses does restitution cover? As general rule, a victim is: (1) “A person *directly and proximately* harmed as a result of the commission of an offense for which restitution may be ordered ...”; (2) “... [I]n 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 course of the scheme, conspiracy, or pattern...” (3) “... In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim’s estate, another family member, or any other person appointed as suitable by the court, may assume the victim’s rights under this section, but in no event shall the defendant be named as such representative or guardian”; or (4) A person specified in the defendant’s plea agreement.

Under several specific sex offense and domestic violence restitution statutes, a victim is: (1) “The *individual* harmed as a result of a commission of a crime under this chapter ...”; (2) “...[I]n the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim’s estate, another family member, or any other *person* appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian”; or (3) a *person* specified in the defendant’s plea agreement.

Sections 3663, 3663A, and the statutes that incorporate their provisions understand “person” to include individuals, corporations and other legal entities. Moreover, although a victim must be a

¹ This report is an abridged form—without footnotes, citations to most authorities, or appendices—of a longer CRS Report RL34138, *Restitution in Federal Criminal Cases*. Related reports include CRS Report RL33679, *Crime Victims’ Rights Act: A Summary and Legal Analysis of 18 U.S.C. §3771*, by Charles Doyle.

“person” and governmental entities are ordinarily not considered persons, state, local, federal, and foreign governmental entities have been awarded restitution orders when they otherwise qualify as victims of a crime under §§3663 and 3663A. The human trafficking, sex, and domestic violence mandatory restitution sections define victims as “individuals” rather than “persons,” suggesting that only human victims and their representatives may claim restitution under those provisions.

The two sets of statutes also use different language to describe the nature of the harm that qualified victims must experience. Sections 3663 and 3663A speak of victims harmed *directly and proximately*. The sex-related statutes simply refer to victims as those harmed, but until recently, they defined recoverable losses to include “any other losses suffered by the victim as a *proximate result* of the offense.” Under both sets of restitution statutes, victim qualification and loss qualification are two sides of the same coin. “Victims” are only those harmed by the defendant’s crime; “losses” are only those harms caused by the defendant’s crime.

Most often under Sections 3663 and 3663A, a victim is a person or individual who suffers harm as the direct and proximate result of the defendant’s crime of conviction or who receives restitution under the defendant’s plea bargain. The definition of a victim for purposes of restitution under Sections 3663 and 3663A expands when the crime of conviction has as an element a conspiracy or a scheme or pattern of misconduct. The expansion either requires or makes possible restitution for victims and offenses not mentioned specifically in the indictment, not covered by the crime of conviction, and consequently not otherwise reimbursable.

In the case of conspiracy, the court may compel a defendant to make restitution both to the victims of the harm caused by his or her own misconduct and to the victims of the harm caused by the foreseeable misconduct of co-conspirators.

As for the scheme and pattern exception, most federal crimes do not list schemes or patterns among their elements, although the mail fraud, wire fraud, and racketeering statutes do. In such cases, restitution may include the losses incurred from a different episode of the scheme than the one mentioned in the indictment. Yet the scheme must be the same; victims entitled to restitution do not include those harmed by an otherwise identical scheme but different in time or place than the crime of conviction.

The restitution definitions of “victim” usually mention family members as permissible representatives of a child or deceased victim. Nevertheless, although the courts enjoy authority to award family members restitution on behalf of the victims of crime, it is unclear whether the victimization of one member of a family constitutes victimization of its other members sufficient to warrant a restitution order for the benefit of a victim’s family members in their own name.

Finally, under Sections 3663 and 3663A, a “victim” is anyone the defendant and the government agree is a victim.

Crimes

Although Sections 3663 and 3663A employ the same definition of *victim*, they do not authorize restitution for the same crimes. The list of crimes for which Section 3663 permits restitution supplements the list for which Section 3663A demands restitution.

Section 3663A (Mandatory Restitution)

The mandatory restitution of §3663A applies upon conviction for, a felony or misdemeanor that is: (1) a crime of violence, as defined in Section 16(a); (2) an offense against property under 18

U.S.C., or under Section 416(a) of the Controlled Substances Act (21 U.S.C. § 856(a)), including any offense committed by fraud or deceit; (3) an offense described in Section 1365 (relating to tampering with consumer products); or (4) an offense under Section §670 (relating to theft of medical products).

Section 16 describes a crime of violence as either “(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

In *Sessions v. Dimaya*, the Supreme Court held that Section 16(b), as incorporated into the Immigration and Nationality Act, is constitutionally vague. The lower federal appellate courts have held that for purposes of Section 3663A the term “crimes of violence,” as defined in Section 16(a), includes Hobbs Act robbery, threats, assault, and arson, but does not include a false statement offense or interfering with a flight attendant. Elsewhere, the Supreme Court has explained that the term “crime of violence as defined by §16” does not encompass crimes committed negligently or accidentally, such as driving under the influence. The controlled substance offense that carries with it a restitution requirement under Section 3663A (21 U.S.C. § 856) consists of maintaining a place where controlled substances are manufactured, stored, or used.

The property damage/fraud predicate in Section 3663A must involve a violation proscribed under title 18 of the *United States Code* rather than an offense found in another title. Yet the general conspiracy provision in title 18 can provide the necessary basis for a mandatory restitution order when the defendant is convicted of conspiracy to commit property damage or fraud in violation of a federal law found outside of title 18.

The court need not order restitution following conviction for an otherwise qualified property damage or fraud offense when the number of identifiable victims or complexity of the issues makes the effort impractical. The complexity exception under which the court may decline to order mandatory restitution seems fairly narrow for a number of reasons. First, all else being equal, the statute seems intended to favor restitution: reimbursing the victims of crime outweighs conforming to a sentencing time table. Second, balancing requires only a reasonable assessment of the amount of the defendant’s restitution obligations, not an assessment with “exact precision.” Third, and perhaps most compelling, after the Supreme Court’s decision in *Dolan v. United States*, the restitution time table is no longer as consequential. In *Dolan*, the Court held that the 90-day deadline for issuance of a restitution order applies to the determination that some restitution is due, nor the amount due.

Beyond the general description of crimes covered, Section 3663A lists two specific offenses for which restitution is mandatory. The product tampering offense consists of tampering with a product or its labeling that affects interstate or foreign commerce or spreading false rumors that such a product is contaminated. The medical products offense consists of the theft of, or unlawful trafficking in, pre-retail medical products.

Other Restitution Statutes

A few other federal statutes require restitution orders. Most apply the procedures that govern Sections 3663 and 3663A to a narrower range of crimes but a wider range of losses than Sections 3663 and 3663A and their attendant enforcement procedures might otherwise permit. Numbered among these provisions are: (1) 18 U.S.C. 43 (animal enterprise); (2) 18 U.S.C. 228(d) (restitution child support cases); (3) 18 U.S.C. 1593 (restitution in cases under chapter 77 relating

to peonage, slavery, and trafficking in persons); (4) 18 U.S.C. 2248 (restitution in cases under chapter 109A relating to sexual abuse); (5) 18 U.S.C. 2259 (restitution in cases under chapter 110 relating to sexual exploitation of children); (6) 18 U.S.C. 2264 (restitution in cases under chapter 110A relating to domestic violence and stalking); (7) 18 U.S.C. 2323(c) (restitution in copyright infringement cases); (8) 18 U.S.C. 2327 (restitution in telemarketing fraud cases); (9) 21 U.S.C. 853(q) (restitution in controlled substances cases involving amphetamine and methamphetamine offenses); (11) 18 U.S.C. 2421A (reckless disregard of sex trafficking); and (12) 18 U.S.C. 2429 (transportation or travel for unlawful sexual purposes).

Discretionary Restitution

Section 3663 permits restitution when the defendant has been convicted of a crime proscribed under title 18 of the United States Code for which restitution is not mandatory. It also authorizes, but does not require, restitution when the defendant is convicted of any of several drug trafficking offenses under the Controlled Substances Act or of any of a few air safety offenses. Elsewhere, the court may order restitution following conviction pursuant to a plea bargain or as a condition of either probation or supervised release.

Losses

But-For and Proximate Cause

As a general rule, restitution requires that the defendant’s offense be both the actual (or but-for) cause of the victim’s loss and the proximate cause of that loss. “Proximate cause asks ‘whether the harm alleged has a sufficiently close connection to the conduct at issue.’ In other words, was the harm foreseeable”? Proximate cause “preclude[s] liability in situations where the causal link between the conduct and result is so attenuated that the consequence is more aptly described as mere fortuity.”

The child pornography restitution statute, Section 2259, presents the courts with one of the few instances in which restitution was required in spite of the absence of but-for cause. In *Paroline v. United States*, a man videoed his 9-year old niece in sexually abusive poses. He was convicted, imprisoned, ordered to pay \$6,000 in restitution. Years later, the victim discovered the video had gone viral on the Internet further traumatizing and humiliating her. Paroline pleaded guilty to possession of a downloaded copy of the video and the victim sought restitution in the amount of a little less than \$3.4 million from him of the accumulated harm of years of wide-spread distribution. There was no question that Paroline’s offenses had harmed the victim. Nevertheless, his offense was not the but-for cause of the total harm the victim suffered and unraveling his contribution from the thousands of other unidentified past and future possessors of the pornographic material would be “incredibly difficult.” And so the Court declared:

In this special context, where it can be shown both that a defendant possessed a victim’s images and that a victim has outstanding losses caused by the continuing traffic in those images but where it is impossible to trace a particular amount of those losses to the individual defendant by recourse to a more traditional causal inquiry, a court applying § 2259 should order restitution in an amount that comports with the defendant’s relative role in the causal process that underlies the victim’s general losses.

Subsequent lower federal appellate courts have emphasized that the government must prove that the defendant’s conduct caused some of the victim’s harm, but have granted district courts some latitude in assessing the defendant’s portion of the victim’s total losses.

Property Loss or Damage

Sections 3663 and 3663A: Sections 3663 and 3663A have essentially identical restitution provisions: both call for the return of the property, if that provides full victim restitution. If not, restitution takes the form of compensatory payments, in whole or in part. As a general rule, victims are entitled only to be made whole; unlike the sentencing guidelines which calculate sentence enhancements based on both actual and intended losses, the restitution statutes permit awards only for actual losses. It is often not the fact of a reimbursable loss, but its measure, that challenges the courts. Nevertheless, the types of reimbursable property losses contemplated by Sections 3663(b)(1) and 3663A(b)(1) include things like the salary of a faithless employee, or the insurance replacement costs of a stolen car, or the losses visited upon a loan guarantor by a mortgage fraud scheme. The Supreme Court resolved uncertainty when it held in *United States v. Lagos* on May 29, 2018, that restitution under Section 3663A for a victim's attorneys' fees and other expenses incurred during an investigation and proceeding relating to the offense of conviction applies only to government investigations and proceedings and not to private investigations or civil proceedings. The Court left unresolved whether private investigations conducted or private judicial proceedings initiated at the government's request might be covered.

Section 3663(b), unlike its counterpart, permits the court to order those convicted of crime-assisting identity theft or aggravated identity theft to pay for the costs incurred by their victims to remedy the actual or intended harm associated with the offense.

Again unlike Section 3663A, Section 3663(c) authorizes community restitution in the form of awards apportioned between state victim assistance agencies and state agencies dedicated to the reduction of substance abuse. The authority is limited to certain drug trafficking cases where there are no identifiable victims; may not exceed the amount of the fine that might be imposed; and may not take priority over any fines imposed, forfeitures ordered, or penalties assessed.

Individual Restitution Statutes: Several individual restitution sections follow the same general pattern as §3663A but add at least one unique feature of its own. For example, the child support restitution section, 18 U.S.C. § 228(d), adopts the procedures of Section 3663A in cases of interstate evasion of child support orders. Yet the amount of restitution that must be awarded is determined by reference to a state court support order or by other governing state law and, as such, may include the interest on overdue support payments and support owed after children have reached their majority.

The peonage restitution section, 18 U.S.C. 1593, uses the common definition of "victim" and affords victims of human trafficking offenses a wide range of compensation that, unlike §§3663 and 3663A, includes the economic benefits derived from the victim's services and a catch-all clause ensuring compensation for predicate crime-related injuries and losses.

The telemarketing fraud restitution statute, 18 U.S.C. § 2327, originally enacted two years before the passage of the mandatory restitution provisions of Section 3663A, once had highly individualistic features. Congress has since amended it so that its provisions more closely track those of the general restitution provisions for losses caused by predicate crimes.

The methamphetamine statute, 21 U.S.C. § 853(q), covers the cleanup cost of closing down illicit amphetamine and methamphetamine production sites. At one time, the section applied only to those convicted of manufacturing offenses and consequently reached convictions for attempted manufacture but not for possession with intent to distribute. The USA PATRIOT Improvement and Reauthorization Act amended the section so that it now authorizes restitution upon conviction for offenses involving possession, possession with intent to distribute, or manufacture of amphetamine and methamphetamine.

The animal enterprise interference section, 18 U.S.C. § 43(c), permits a sentencing court to order a defendant convicted of violating its proscriptions to pay restitution for specific kinds of damage (i.e., the cost of repeating disrupted experiments, the loss of farm income, and the costs of economic disruption).

Personal Injuries

Sections 3663 and 3663A: Sections 3663 and 3663A have parallel provisions governing the restitution for personal injuries that permit or, in the case of Section 3663A require, compensation for medical expenses, lost income, rehabilitation, and, in the event the victim is killed, funeral and related expenses. The medical expenses covered by a restitution order may include those paid on the victim's behalf by a third party, and may include the costs of psychiatric and psychological treatment when the victim has suffered a physical injury. Restitution for lost income extends to both past and future lost income.

Other Restitution Statutes: Prior to passage of the general mandatory restitution authority in Section 3663A, Congress authorized restitution for three related sets of offenses. Those authorizations, found in 18 U.S.C. §§ 2248, 2259 and 2264, require the courts to order restitution following conviction for an offense proscribed in chapters 109A (sexual abuse), 110 (sexual exploitation of children), and 110A (domestic violence and stalking), respectively. Other than their designation of predicate offenses, the sections are identical. They each: (1) insist on restitution of the "full amount of the victim's losses"; (2) define "victims" in much the manner of §§3663 and 3663A; (3) supply a list of losses for which restitution must be ordered; (4) make it clear that neither the defendant's poverty nor victim compensation from other sources absolves the court of its obligation to order restitution, and (5) otherwise adopt the procedural mechanisms used for restitution under Section 3663A.

Unlike Sections 3663 and 3663A, the three sections on their face do not require bodily injury of the victim as a precondition for the award of the cost of psychiatric treatments. They also have a catch-all clause that has no counterpart in either Section 3663 or 3663A. On the other hand, unlike §§3663 and 3663A, they do not authorize payments to third parties to reimburse them for treatment of a victim's crime-related injuries.

Procedure

Except to the limited extent otherwise provided in the individual authorization statutes, Section 3664 supplies the procedure that governs the issuance of restitution orders. Upon conviction of a defendant, the court directs the probation service to investigate and prepare a report identifying each victim of the offense and the extent of their injuries, damages, or losses. Prosecutors are to provide the probation officer with pertinent information. The officer is also to ask victims to detail the extent and specifics of their predicate crime-related losses. The defendant is obliged to give the officer a complete description of his or her financial situation.

The probation officer's report is presented to the court, the defendant, and the prosecutor. The court resolves contested restitution issues by a preponderance of the evidence following a hearing, at which the prosecution bears the burden of establishing the existence and extent of the victim's losses, and the defendant bears the burden on questions regarding his or her finances and the extent to which the defendant has compensated the victim for the losses. The court may conduct a hearing or task the probation officer to secure additional information and resolve disputes.

Section 3664 is precise when it describes how the court must frame the restitution order. The order must envision full compensation for the losses of each victim without regard to the financial circumstances of the defendant. In its calculation of the manner and schedule of payment for each victim, however, the court is to consider the defendant's assets, anticipated future income, and other financial obligations. Compensation may be made in a lump sum, in-kind payments, installments, or any combination of such methods of payment. In-kind payments may take the form of a return of lost property, replacement in-kind or otherwise, or personal services. When the defendant's financial condition precludes any alternative, the order may call for nominal periodic payments. Several courts have emphasized the importance of the court's close attention to the restitution payment schedule by prohibiting sentencing courts from initially ordering that restitution be paid immediately when it is readily apparent that the defendant is unable to do so, thereby effectively leaving the task of establishing a payment schedule to the probation officer or the Bureau of Prisons.

When it sets the restitution owed by the defendant, the court may not take into account the fact that a victim may have been compensated by insurance or any other alternative form of compensation of his or her injury, loss, or damage. The amount of a restitution order may later be reduced to account for compensatory damages for the same loss recovered in a civil action.

When the government and the probation officer have been unable to determine the full extent of victim losses within 10 days of sentencing, they are obligated to inform the court. The court is then to set a date, no later than 90 days after sentencing, for the final determination of victim losses. Thereafter, victims have a limited option to present claims for restitution relating to undiscovered losses. The Supreme Court held in *Dolan v. United States* that a sentencing court may determine the extent of a victim's losses and order restitution after the expiration of the statutory 90-day deadline, as long as the defendant was aware beforehand that the court intended to order restitution. Victims may assign their right to receive restitution payments to Crime Victims Fund, but there is no consensus over whether the court may order restitution to be paid to the Crime Victims Fund on its own initiative if the victim refuses to accept it.

Should the court determine that more than one defendant contributed to the victim's loss, it may apportion restitution accordingly or it may make the defendants jointly and severally liable. When defendants are made jointly and severally liable, each is liable for the entire amount, but the victim is entitled to no more than what is required to be made whole, regardless of what portion each of the defendants ultimately contributes.

There was once a difference of opinion over whether joint and severable liability might be imposed other than with respect to co-defendants. The Supreme Court has recently provided some clarification as to how courts should deal with restitution when those who are not co-defendants are responsible for a substantial portion of the victim's losses. The defendant in the case viewed child pornography of which the victim was the subject. To hold the defendant liable for all of the victim's losses attributable to production, distribution, and viewing of the material might contravene the proscriptions of the Eighth Amendment's excessive fines clause, the Court suggested. Rather, it held that the defendant's restitution order should be calculated to reflect his relative contribution to the harm caused.

Section 3664(i) declares that when it comes to restitution, the United States is to be served last. The provision is cited most often to confirm that under the appropriate circumstances, the government and its departments and agencies may be considered victims for restitution purposes. When the government is not a victim, the defendant is not entitled to have the restitution award offset by the value of any forfeited property. Although there may be some doubt, it seems the same thing can be said when the government is both the victim of the offense and the recipient of the forfeited property.

Section 3664(j) permits a court to order restitution to third parties who, as insurers or otherwise, have assumed some or all of the victim's losses, although in such cases, the victim must be fully compensated first. It also permits a court to reduce an earlier restitution order by any amounts that the victim later receives in the course of related federal or state civil litigation. The victim, the defendant, or the government may petition to have a restitution order's payment schedule amended to reflect the defendant's changed economic circumstances. The changed economic circumstances envisioned in Section 3664(k) do not include anticipated future changes or a later, better-informed understanding of the defendant's financial condition at the time of sentence.

There are several means to enforce a restitution order. Section 3664(m) declares that the Department of Justice may enforce restitution orders in the manner used to collect fines or "by all other available and reasonable means." The government may use garnishment and the other collection mechanisms of the Federal Debt Collection Procedures Act (FDCPA) to enforce a restitution order. A restitution order also operates as a lien in the name of the United States on the defendant's property that remains in effect for 20 years. In addition, a victim may use a restitution order to secure a lien in his own name against the defendant's property to ensure the payment of restitution. Moreover, the victims' rights provisions of 18 U.S.C. § 3771 entitle a victim to "full and timely restitution as provided in law," a right, enforceable in the face of a legally insufficient restitution order through a liberalized form of mandamus. When restitution is a condition of probation or supervised release, failure to make restitution may provide the grounds for revocation. In most instances, a victim may also sue the defendant based on the conduct that led to the conviction and the issuance of the restitution order. During the course of such civil litigation, the defendant may be precluded from denying the facts that formed the basis of the conviction.

Section 3664(o) provides that the court's restitution order constitutes a final order notwithstanding the fact it may later be corrected, modified, or appealed under various court rules and statutory provisions. This does not mean that the district court may later reduce a restitution order in the absence of specific authority. Nor does it convey appellate rights upon third parties who claim a right to restitution for expenses necessarily incurred on behalf of a victim.

Abatement

In a criminal law context, the lower federal courts have generally taken the view that the death of a defendant at any time prior to the determination of his or her final direct appeal abates all underlying proceedings; appeals are dismissed as moot, convictions are overturned, indictments are dismissed, and abated convictions cannot be used in related civil litigation against the estate—all as if the defendant was never criminally charged. It might seem from this that a restitution order would abate as well, but there is some authority to the contrary.

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