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CRIME VICTIM RESTITUTION

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Table Of Contents

1. Full Restitution is Mandatory	1
What Is Restitution?.....	1
Why Is Restitution Important?.....	1
Full Restitution is Mandatory	1
Constitution.....	1
CVRA “Full Restitution”	2
Michigan Code of Criminal Procedure (CCP).....	3
Juvenile Code	3
Shall = Must.....	3
Conviction Not Required	4
Miscellaneous	5
2. Who Can Recover Restitution?.....	6
People.....	6
Legal Entities	6
Victims of Uncharged / Dismissed Crimes.....	7
Third Parties Compensating Victims	7
Third Parties that Provide Services to Victims	8
Parents of a Minor Victim.....	8
Co-Defendant Victims	8
3. What Kinds of Damages/Losses Can Be Compensated?.....	9
Individual or Entity Victims	9
Property Damage or Theft Cases	9
Physical or Psychological Injury Cases	10
Is This An Exclusive List of Damages?.....	10
Up to Triple Restitution	10
Third Party Compensating Persons / Entities	11
Parents of Minor Victims.....	11
Examples.....	12
4. Calculating Restitution.....	16
Primary Factor in Determining Restitution.....	16
Property Loss “Fair Market Value”	16
Can Restitution Be Based only on Repair Estimates?	17
Calculating Restitution for Compensating Entities (like insurance companies)	18
5. Restitution Orders	21
Deadline for Requesting Restitution?.....	22
Procedures for Entering the Restitution Order.....	22
What Information is Required or Helpful to Determine Restitution?.....	23
Collecting Restitution Information: Whose Job is It?.....	24
Ability to Pay	25
Wage Assignment	25

“Joint & Several” vs. “Pro Rata”	25
Is a Sentence / Disposition Valid Without a Restitution Order?	27
Restitution Order Can Be Amended	28
Effect of a Conviction Being Set-Aside.....	28
Effect of Civil Suit / Civil Set-off.....	28
“Mini-Tort” Law Does Not Limit or Bar Restitution	29
Bankruptcy	30
6. Restitution Hearings.....	32
What Is a Timely Objection?	32
If No Objection, Is Restitution Appealable?.....	32
Who Can Object to the Restitution Order?	33
What Happens at a Restitution Hearing?	33
7. Enforcement, Collection & Distribution.....	34
Restitution Due Immediately	34
Restitution Order Never Expires Until Paid in Full.....	34
Condition of Probation, Parole	35
Payment through Services (Bartering).....	35
Use of Bail Money to Pay Restitution	35
Payment through Jail/Prison Accounts	35
Court Monitoring: Restitution Reviews.....	36
What if a Defendant is Not Paying Restitution?.....	36
Allocation of Payments / Payment Priorities	38
Overpayments	39
Unclaimed / Refused Restitution Money	39
Where Does the Money Go if the Victim Dies?	40
Civil Enforcement of Restitution Orders	40
Discovery of Assets	40
Encumbering Assets (Liens, Levies)	42
Garnishing Wages	42
Garnishing Michigan Income Tax Refund/Credit	43
Garnishing Bank Accounts	43
Seizure of Assets / Sheriff’s Sale.....	44
8. Restitution Issues in Juvenile Delinquency Cases	45
9. Miscellaneous	47
Evolution of Rights	47
Recent Changes/Updates	47
What Version of the CVRA Applies to Your Case?.....	48
Victim Remedies for CVRA Violations	48
10. Help.....	50

1. **FULL RESTITUTION IS MANDATORY**

I. **What is Restitution?**

Dictionaries call it the act of making good or compensating for loss, damage or injury; a restoration of something to its rightful owner; or a making good of or giving an equivalent for some injury.

Criminal case restitution covers losses that are (1) **easily ascertained** *and* (2) are a **direct result** of the Defendant's criminal conduct.¹

While restitution implies a penalty, its goal is to return victims to their pre-crime status, which differs from the general goals of sentencing: rehabilitation, deterrence, protection of society, and punishment.²

II. **Why is Restitution Important?**

Because:

The constitution requires it. Statutes require it in all criminal cases.

It is a fair, objective measure of "justice". Making restitution aids a defendant's rehabilitation.

Until the victim has been made whole, has justice been served? Has the victim been "treated with fairness and respect for his/her dignity throughout the criminal process? Have the victim's and communities' scars been repaired?

III. **Full Restitution is Mandatory**

Crime victims have the right to restitution through the Michigan constitution and statutes.

A. **Constitution:**

Michigan's Constitution requires restitution for crime victims. Const 1963, Art 1, Sec 24(1). The same section also guarantees that crime victims be "treated with fairness and respect for their dignity and privacy throughout the criminal justice process."

¹ *People v Orweller*, 197 Mich App 136 (1992); *People v Law*, 223 Mich App 585, 589 (1997) rev'd on other grounds, 459 Mich 419 (1999); *People v Byard*, 265 Mich App 510, 513 (2005).

The Michigan Supreme Court has said, "The compensatory nature of restitution is ... specifically designed to allow crime victims to recoup losses suffered as a result of criminal conduct." *People v Grant*, 455 Mich 221, 230 (1997).

² *People v Coats* (Court of Appeals unpublished #206223; decided 11/30/1999), citing *Grant, supra* at 230-231, n 10.

B. CVRA “Full Restitution”:

Michigan’s William VanRegenmorter Crime Victim’s Rights Act (CVRA) mandates *full restitution to any victim* of the defendant’s / respondent’s *course of conduct giving rise to a conviction* / adjudication. The CVRA applies to felonies, ‘serious misdemeanors’,³ and juvenile adjudications.⁴

“Full restitution” was mandated by 1993 Public Act 341. Eighteen years later, the Court of Appeals reminded trial court that “[A] trial court necessarily abuses its discretion when it orders less than full restitution and similarly abuses its discretion when it orders restitution that exceeds full restitution.” *People v Weaver*, Mich Ct of App # 296601 (decided 04/26/2011) n3.

1. Restitution must be ordered for *counts dismissed in a plea agreement* if the damage / loss occurred “in the course of conduct giving rise to the conviction/adjudication”. MCL 780.766(2).

2. Restitution must also be ordered for *uncharged counts* if the damage/loss occurred “in the course of conduct giving rise to the conviction/adjudication”.⁵

3. Restitution must be ordered for an *aider/abettor*.⁶

4. **Plea bargains to “non-serious” misdemeanors** – CVRA restitution must be ordered if an originally-charged felony or ‘serious misdemeanor’ is reduced to or pled to a “non-serious” misdemeanor. Here, apply CVRA terms and procedures as if the conviction was to a serious misdemeanor, per MCL 780.811(1)(*xviii*). Full restitution is required for all misdemeanors under the Code of Criminal Procedure [MCL 769.1a(2); see below].

5. Is Restitution Ordered in Civil Infraction Cases?

If the original charge was a civil infraction (e.g., careless driving), restitution under the CVRA or CCP cannot be ordered because they are not criminal, delinquency or ordinance violations.

³ “Serious misdemeanors” include assault/A&B; domestic violence; aggravated assault; entry without permission; child abuse 4th degree; contributing to the neglect/delinquency of a minor; using the internet/computer to make a prohibited communication; aiming a firearm without malice; discharging a firearm intentionally aimed at a person; indecent exposure; stalking; injuring a worker in a work zone; leaving the scene of a personal injury accident; OWI/impaired of vehicles or vessels where property damage, injury or death resulted; furnishing alcohol to a minor resulting in physical injury or death; local ordinances substantially corresponding to the above crimes; or crimes charged as felonies or serious misdemeanors but are later reduced to non-serious misdemeanors. MCL 780.811(1)(a)(*i*)-(*xviii*).

⁴ MCL 780.751, et seq; 780.766-780.767 (felonies); MCL 780.794-780.795 (delinquency cases); MCL 780.826 (serious misdemeanors).

⁵ MCL 780.766(2).

It is recommended practice that prosecutors include the amount of restitution for uncharged or dismissed counts as a condition of a plea agreement. Also, the defendant’s plea should acknowledge participation in conduct giving rise to this damage/loss to avoid a later claim that these victims’ restitution orders were not directly related to the course of criminal conduct resulting in the conviction.

⁶ MCL 767.39; *People v Gahan*, 456 Mich 264 (1997); *People v Persails*, 192 Mich App 380, 383 (1991).

If the original felony or misdemeanor is reduced to a civil infraction (example: careless driving, speeding), restitution may fall through a loophole because MCL 780.811(1)(*xviii*) applies to charge reductions to “misdemeanors”. But, the plea bargain could be conditioned on “entry of an order for full restitution as defined by the CVRA or other laws.” Civil infraction penalties do not include being placed on probation.

C. **Code of Criminal Procedure (CCP)** mandates “full restitution” for all felonies, misdemeanors, and ordinance violations.⁷ This is broader than the CVRA because it includes victims of all misdemeanors, not just ‘serious misdemeanors’. MCL 769.1a(1). Otherwise, MCL 769.1a’s restitution language mirrors the CVRA restitution language.

The CCP does not include other CVRA procedures that protect victims. For example, the CVRA requires 10 days separating a plea and sentence if a pre-sentence report is not going to be done so the victim can submit an impact statement and attend.⁸ The CCP does not address this. Prosecutors should argue that CCP victims fall under the constitutional umbrella of Const 1963, Art I, Sec 24, and are entitled to restitution, notice of and an opportunity to attend hearings the defendant attends, submitting an impact statement, and being treated with fairness throughout the entire criminal process.

D. **Juvenile Code** mandates “full restitution” for all juvenile delinquency cases.⁹

E. **Shall = Must:** Restitution is mandatory. “Shall” means “must”. A court’s restitution order is a mandatory action, not “a discretionary call”.¹⁰

- *People v Tyler*, 188 Mich App 83, 89 (1991); *People v Orweller*, 197 Mich App 136, 140 (1992): **Restitution is not a substitution for civil damages.**
- *People v Ronowski*, 222 Mich App 58, 59-61 (1997): **Court must order restitution even if it is not part of a plea agreement or sentence recommendation.** “[I]t is no longer open to negotiation during the plea-bargaining or sentence-bargaining process, and defendants are on notice that restitution will be part of their sentences.”
- *People v Nathaniel Miller*, Court of Appeals #237929 (04/15/2003). Trial judge ordered \$0.00 restitution “because it was a matter for the civil courts”. Court of Appeals reversed/remanded.
- *People v Bell/Aldridge*, 276 Mich App 342; 741 NW2d 57 (2007). Trial judge ordered \$0.00 restitution because of private repayment agreement between the parties “precluded” court-ordered restitution. Court of Appeals reversed, concurring with CO, IN, NJ and WY.
- *People v Allen*, 295 Mich App 277 (2011); 2011 Mich. App. LEXIS 2392: **Trial courts do not have ‘discretion’ to order a convicted D to pay restitution; they must order the D to pay restitution in an amount that fully compensates the**

⁷ MCL 769.1a(2).

⁸ MCL 780.825.

⁹ MCL 712A.30-712A.31.

¹⁰ *People v Grant*, 455 Mich 221 (1997); *People v Allen*, 295 Mich App 277, 281 (2011).

victims. Whether, and to what extent, a loss must be compensated is a matter of statutory interpretation.

“It is, for that reason, inaccurate to state that trial courts have discretion to award restitution after the Legislature’s decision to require restitution. Further, because the statute plainly requires the trial court to order “full” restitution, see MCL 780.766(2), it necessarily follows that a trial court abuses its discretion when it orders restitution other than full restitution.” *Allen*, n 1.

IV. Conviction Not Required:

Since 01/01/2006, a conviction is not required. Restitution is mandatory for any resolution other than an acquittal (trial verdict of ‘not guilty’ on all counts) or unconditional dismissal.¹¹ Full restitution **must** be ordered for HYTA, diversion, juvenile delinquency consent calendar, etc.¹²

- *People v Baggett*, Court of Appeals #276551 (07/01/2008). Jury convicted defendant of R&O, but acquitted of a different count of R&O Causing Serious Injury against another officer. Restitution awarded to the injured officer for medical bills, etc. Defendant claimed error because of the acquittal and the court having not scored the injured officer as a victim under felony sentencing guidelines Offense Variable 13. Court of Appeals affirmed: the acquittal did not preclude the trial court from finding by a preponderance of evidence (here, trial proofs) that defendant caused the injury in the course of conduct that resulted in his conviction.
- *People v Powell*, Court of Appeals #293434; 2010 Mich. App. LEXIS 1777 (09/23/2010). Jury convicted defendant of child desertion (non-support). Trial court properly awarded restitution for back child support for periods outside of the charging period because there was a preponderance of the evidence that it was part of defendant’s ‘course of conduct’ in avoiding his obligation to support his children and to force taxpayers and the mother to bear the burden.

These cases remind us that restitution should be ordered for losses that are directly part of the criminal scheme / conduct that resulted in the conviction(s) ... AND for losses for uncharged acts ... AND for charged acts resulting in acquittals if the People can link them directly to the scheme by a preponderance of the evidence. At a sentencing or a restitution hearing (see below), the court can rely on the evidence presented to the jury, plus any other evidence presented by the parties. The judge is now the trier of fact on whether the loss is directly attributable to that criminal scheme.

¹¹ A plea agreement is a conditional dismissal – e.g., defendant pleads guilty to Count I in exchange for dismissal of Count II. So, restitution must be ordered because the dismissal was conditioned. But if the prosecutor dismisses a charge because there is reasonable doubt that the People can prove the crime, the dismissal is *unconditional* and restitution cannot be ordered.

¹² MCL 712A.30(2); MCL 769.1a(2); MCL 780.766(2); MCL 780.794(2); MCL 780.826; see 2005 PA 184.

V. Miscellaneous:

The CVRA was enacted to “enable victims to be compensated fairly for their suffering at the hands of convicted offenders”.¹³

The CVRA should be given “**broad construction**”.¹⁴ And the phrase “course of criminal conduct” should be broadly construed.

- *People v Gahan*, 456 Mich 264, 272 (2002): Defendant must be ordered to “compensate for all the losses attributable to the illegal scheme that culminated in his conviction, even though some of the losses were not the factual foundation of the charge that resulted in conviction.”
- *People v Lueth*, 253 Mich App 670, 692 (2002): it is not necessary that the defendant have personally benefitted from the full extent of the loss, “only that his criminal acts caused that amount of loss.”

If the victim suffered losses/damages *indirectly* from the crime, then restitution cannot be awarded.

- Example: Defendant closed a nail/tanning shop after his conviction for installing video monitoring devices in the tanning areas. Thus, an employee/apprentice could not fulfill work/schooling requirements to qualify for a state nail technician test, and wanted reimbursement for tuition money. The nail tech was not a direct victim of the crime for CVRA restitution (unlike some tanning bed patrons). *People v Daulton*, Court of Appeals #257443 (01/19/2006).
- Example: Defendant was convicted of Larceny in a Building. The theft victim later died, but was destitute (in part because of property lost in the theft). Cause of death was unrelated to the theft event. The trial court ordered \$4,350 restitution to the state and funeral home for the victim’s funeral expenses. The Court of Appeals reversed, holding that victim’s estate’s loss (funeral expense) was not *directly* related to the crime (larceny). Restitution was limited to the property loss from the crime (what was stolen). Victim’s estate can use *that* money to pay the funeral expenses. *People v Rodrigues-Ostland*, Court of Appeals #267941 (08/21/2007).

¹³ *People v Crigler*, 244 Mich App 420, 423 (2001); *People v Gubachy*, 272 Mich App 706, 710 (2006); *People v Allen*, 295 Mich App 277, 282 (2011) [“the Legislature plainly intended to shift the burden of losses arising from criminal conduct – as much as practicable – from crime victims to the perpetrators of the crimes; thus, it is remedial in character and should be liberally construed to effectuate its intent.”].

¹⁴ *People v Gahan*, 456 Mich 264, 271 (1997); *People v Gubachy*, 272 Mich App 706 (2006).

2. WHO CAN RECOVER RESTITUTION?

I. People

An individual person who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime receives restitution. If the victim is deceased, the court **must** order that restitution be made to the victim's estate.¹⁵

II. Legal Entities

A legal entity (sole proprietorship, partnership, corporation, association, government entity, etc.) that suffers direct physical or financial harm as a result of the commission of a crime receives restitution.

- No award for “emotional harm” to legal entities, or for “threatened” physical or financial harm to legal entities.
- Government victims
 - Restitution is allowed for drug team “buy money” because this property is lost as a direct result of defendant's commission of the crime. It is not government overhead that would have been paid whether or not the defendant was selling¹⁶ drugs.¹⁷
- Restitution is *not* allowed for routine costs of investigations (e.g., police salaries, overtime to investigate crimes, costs to put out fires, etc.). Those expenditures are part of the ordinary overhead costs for governments that would have been paid if the police had been working on another investigation, patrolling, writing reports, etc.
 - Other options: Even if the ‘loss’ does not qualify under CVRA restitution, other options remain for a prosecutor to request repayment by a defendant:
 - MCL 769.1f – allows for repayment of some emergency response costs for crimes specified in subsection (1): OWI/OWID, moving violation resulting in death, false police report, PPO violation.
 - MCL 771.3(3) – allows a court to impose other lawful conditions of probation as the circumstances of the case require or warrant or as in its judgment are proper.¹⁸

¹⁵ MCL 780.766(7).

¹⁶ *People v Newton*, 257 Mich App 61, 68-70 (2003). See also *People v Wass*, Michigan Ct of Appeals #302263 (unpublished; decided 03/12/2012).

¹⁷ *People v Crigler*, 244 Mich App 420 (2001); *People v Carter*, Court of Appeals #249089 (09/21/2004).

¹⁸ SCAO relies only on the lawful conditions are defined by statute, e.g., MCL 257.904(4), MCL 600.8375.

“Costs of prosecution” are defined by statute. MCL 257.625(13); MCL 769.3; MCL 771.3. See also *People v Kramer*, 137 Mich App 324 (1984); *People v Houston*, 237 Mich App 696 (1999).

III. Victims of Uncharged / Dismissed Crimes

Victims of uncharged/dismissed crimes from the criminal “course of conduct giving rise to the conviction” must receive restitution.¹⁹

NOTE:

As of May 6 2014, the Michigan Supreme Court is considering issues on appeal in *People v McKinley*, 2013 Mich. LEXIS 1846; 839 NW2d 201 (Docket 147391) that raise the following issues:

1. Is a restitution order the equivalent of a criminal penalty?
2. Is Michigan’s statutory restitution scheme unconstitutional insofar as it permits the trial court to order restitution based on uncharged conduct that is not submitted to a jury or proven beyond a reasonable doubt?

Oral arguments were held on these issues April 3, 2014. A decision has not yet been issued.

The Court of Appeals decision that was appealed in *McKinley* is found at 2013 Mich. App. LEXIS 827 (2013) in docket number 307360.

Several cases involving appeals on restitution issues are on hold in the Court of Appeals and Supreme Court until *McKinley* has been decided.

IV. Third Parties that Compensate Victims

Third parties that have compensated the victim or the victim’s estate for losses (e.g., insurance companies, crime victim compensation board, charitable organizations, victim’s relatives or friends) must be repaid restitution for some or all of what they paid for the victim’s losses/damages.²⁰

¹⁹ Evidence and advocacy in each case will determine awards of restitution in this area. Here are some examples:

People v Gahan, 456 Mich 264, 270-273 (1997): Defendant must compensate victim for “all losses attributable to the illegal scheme that culminated in his conviction, even though some of the losses were not the factual foundation of the charge”. But “totally dissimilar crimes committed at different times may not satisfy the ‘course of conduct’ requirement. *Gahan*, pp 272, 273, n 11.

People v Kim Lee, Court of Appeals #216365 (12/26/2000): restitution is appropriate for a larceny of which defendant was acquitted but that occurred at the same time as the assaultive offense of which she was convicted.

People v Baggett, Court of Appeals #276551 (07/01/2008). Jury convicted defendant of R&O, but acquitted of a different count of R&O Causing Serious Injury against another officer. Trial court awarded restitution to the injured officer for medical bills, etc. Court of Appeals affirmed: the acquittal did not preclude the trial court from finding by a preponderance of evidence heard at trial that defendant caused the injury in the course of conduct that resulted in his conviction.

²⁰ MCL 712A.30(8); MCL 769.1a(8); MCL 780.766(8); MCL 780.794(8); MCL 780.826(8); *People v Washpun*, 175 Mich App 420, 423 (1989) *People v Orweller*, 197 Mich App 136, 139-140 (1992); *People v Gourd*, 200 Mich App 493 (1993);²⁰ *People v Byard*, 265 Mich App 510 (2005).

- As noted elsewhere in this outline, they do not “stand in the shoes” of the direct individual or legal entity victims with rights to receive all CVRA protections that direct victims enjoy.
 - Direct victims must be fully repaid before third party compensators receive disbursements.
 - Distributions flow from the “non-victim payments” side of the ledger, AND after all other specified charges have been paid in full. Third party restitution payments stand last in priority on the costs/fines side of the ledger when courts disburse payments.
- Payments are limited to “the compensation paid for that loss” of the victim or victim’s estate. MCL 780.766(8). See *In re McEvoy*, 267 Mich App 55 (2005), *lv den* 474 Mich 1068 (2006) for a detailed analysis of this phrase.

V. Third Parties that Provide Services to Victims

Third parties that have provided services to the victim as a result of the defendant’s or juvenile respondent’s course of conduct (including victim service organizations) must be repaid restitution for shelter, food, clothing, transportation, etc.²¹

VI. Parents of a Minor Victim

Parents of minor victims must be paid a “reasonable amount” for expenses actually incurred as a result of the crime for homemaking and child care expenses, income loss, mileage, lodging, meals, or other costs incurred in exercising the rights of the victim or parent under the CVRA.²²

VII. Co-Defendant Victims

The CVRA definition of “victim” excludes individuals charged with offenses arising out of the same transaction as the charge against the defendant.²³ So, one defendant injured in the course of the criminal conduct cannot receive restitution in the co-defendant’s sentence order for medical bills, etc.

Co-Defendant “victims” and prisoners DO NOT have rights or privileges established under the CVRA. However, a victim in prison has the right to submit a written statement at sentencing.²⁴

²¹ MCL 780.766(8); MCL 780.794(8); MCL 780.826(8).

²² MCL 780.766(24); MCL 780.794(24); MCL 780.826(21).

²³ MCL 780.752(3); MCL 780.781(3); MCL 780.811(3).

²⁴ MCL 780.752(3) & (4).

3. WHAT KINDS OF DAMAGES/LOSSES CAN BE COMPENSATED?

In general, the nature and amount of restitution depend on:

- **Type of victim**
 - Individual victims = broader restitution than entity victims, government victims, or third party compensating entities
- **Type of loss**
 - Individual victims suffering death, physical or emotional injuries = broader restitution than “property damage” victims

I. Individual or Entity Victims

A. **PROPERTY DAMAGE OR THEFT CASES**

MCL 780.766(3) lists 3 options:

1. **Return the property** to the owner or a designee²⁵
 - Cost to “restore”/repair item so it CAN be “returned????”
2. **Pay the “fair market value”** of the property on date of crime or sentencing ... MINUS the fair market value of the property as returned²⁶
 - If there is a “market” for the stolen/damaged item, determine a FMV (condition/value of the item at the point of theft *minus* the condition/value of the item as recovered). Might be “garage sale” / eBay price (e.g., stolen music CDs).
 - **Replacement value fallback:** If the property’s fair market value cannot be determined or is impractical to ascertain, then the court must use the property’s replacement value in lieu of a fair market value.²⁷
3. **Pay the victim’s costs of seizure or impoundment**

²⁵ Much of the victim’s property recovered by police should already be returned before sentencing. Victim property seized during the course of the investigation must be returned to the victim “promptly” unless (a) it is contraband, (b) ownership remains in dispute, (c) it is a weapon used in the commission of the offense, *and* (d) the prosecutor certifies that there is a need to retain the evidence in lieu of another means of memorializing its possession (e.g., photo). MCL 780.754; MCL 780.783; MCL 780.814.

²⁶ See *People v Ballentine*, Court of Appeals #275205 (04/24/2008): restitution order vacated and case remanded for further proceedings to determine value of recovered copper cable to set off against the value of the original spool.

²⁷ Examples are broken window panes and damaged mail boxes. There is no ‘retail market’ for them to determine the amount of loss. Instead, they are simply replaced.

This amendment became effective on 07/01/2009. 2009 PA 28 amended the Code of Criminal Procedure, MCL 769.1a(3)(b), and the CVRA, MCL 780.766(3), MCL 780.794 and MCL 780.826.

B. PHYSICAL OR PSYCHOLOGICAL INJURY CASES

MCL 780.766(4) requires reimbursement for the following if there is physical or psychological injury (not if there is only property loss/damage):

- **medical and related services and devices** costs (actually incurred and reasonably expected to be incurred)
- **physical / occupational rehabilitation** costs (actually incurred and reasonably expected to be incurred)
- **after-tax income loss** related to the crime
- **psychological / medical treatment** for V or V's family as a result of the crime
- **homemaking and child care expenses** incurred (or anticipated); includes expenses reasonably paid, and the reasonable market value of services rendered even if no compensation was actually paid (e.g., grandmother's babysitting)
- **funeral expenses** (actual expenses, not just 'reasonable')
- **tax deduction / tax credit lost** for a parent/guardian for a deceased V; estimate for each year deceased V could reasonably have been claimed as a dependent.
- **income lost by a family member to care for the victim** due to an injury.
 - The family member must leave work (temporarily or permanently) to provide the care. No lost income restitution is allowed if they just work fewer hours.

Is This an Exclusive List? No.²⁸

"... MCL 780.767(1) requires the court to 'consider the *amount of the loss* sustained ... In our view, the Legislature has clearly manifested an intent to make victims of a crime as whole as they can fairly be made and to leave the determination of how best to do so to the trial court's discretion on the basis of the evidence presented and subject to the prosecuting attorney's burden of proving losses attributable to defendant's crime-related acts. [T]he *focus is consistently not on what the defendant took, but what a victim lost because of the defendant's criminal activity*. No other interpretation is consistent with [the] purpose of the act and its specific provisions." (Emphasis included)

People v Gubachy, 272 Mich App 706, 713 (2006).²⁹

(Up to) Triple Restitution: The court can award up to triple restitution (to an individual victim) in a physical injury case!!!³⁰ There must be:

- Bodily injury AND
- Death OR serious impairment of a bodily function

²⁸ *People v Gubachy*, 272 Mich App 706, 712 (2006); *People v Knott*, Court of Appeals #272554 (12/04/2008).

²⁹ See also *People v Weaver*, discussed in Section 4.III, below. Even though this is an unpublished case and included *dicta* in its conclusions, the analysis is helpful in illustrating how victims' actually-incurred losses can be creatively argued as additional restitution.

³⁰ MCL 780.766(4), (5).

- Lost limb, hand, foot or use
- Lost eye, or use of eye or ear (but not “loss of ear”)
- Serious *visible* disfigurement
- Coma for 3 or more days
- Measurable brain damage, mental impairment
- Skull fracture, serious bone fracture
- Subdural hemorrhage or hematoma
- Loss of body organ

This section has been upheld in:

- *People v Lloyd*, 301 Mich App 95 (2013): Triple restitution award of \$126,561.63 was affirmed; the sentencing court did not abuse its discretion. Defendant assaulted the victim by striking her eye with a high-heeled shoe; the victim lost her eye and now wears a prosthetic. Actual restitution was \$42,187.21. A jury convicted Lloyd of misdemeanor assault; the original charges were Assault GBH and Assault with a Dangerous Weapon.
- *People v Byard*, 265 Mich App 510 (2005): Award of \$250,000 under triple restitution provision was appropriate. “[T]he plain language of the statute gives the trial court discretion to order as much as triple the amount of any other restitution allowed, but neither limits nor specifies what the trial court may consider in exercising the discretion to do so.” *Byard* at 511-512.

II. Third Party Compensating Persons/Entities

The court must order restitution to entities that compensated the victim or the victim’s estate for: a loss incurred by the victim ... to the extent of the compensation paid for that loss.³¹

III. Parents of Minor Victims

Through MCL 780.766(24), parents of minor victims must receive restitution for their “reasonable”, actually-incurred or expected-to-be-incurred expenses as a result of the crime for:

³¹ MCL 712A.30(8); MCL 769.1a(8); MCL 780.766(8); MCL 780.794(8); MCL 780.826(8); *People v Orweller*, 197 Mich App 136, 139-140 (1992); *In re McEvoy*, 267 Mich App 55 (2005), *lv den* 474 Mich 1068 (2006).

- Homemaking & child care expenses
- Income loss [except if ordered by subsection (4)(h)]
- Mileage
- Lodging
- Meals
- Any other cost incurred in exercising the rights of a victim or a parent under the CVRA

IV. Examples

- **Property Damage?** Yes ... but it must be calculated properly (see below)
- **Lost Income?** Yes (after-tax lost income) ... only for individual victims with physical or psychological injury (not “property damage-only victims, not entity victims”).³²
 - Income loss is limited to the victim who suffered direct harm, or a family member who lost income to care for a victim.
 - Restitution amount must be “based on the evidence”:
 - *People v Guajardo*, 213 Mich App 198 (1995): Defendant convicted of Retail Fraud 1st Degree (stole jewelry). Ct of Appeals affirmed \$28,105 restitution. Victim testified figure was the total retail market value (including his ‘profit’); business operated to make a profit, Victim lost an annual bonus due to the theft, etc. Defendant had claimed restitution was limited to “replacement cost” (wholesale price).
 - *People v Lamb*, Court of Appeals #280705 (10/09/2008): After-tax lost income (not gross income) approved to victim of identity theft for work hours lost investigating the thefts, resolving problems with creditors, repairing damage to credit reports. Victim’s testimony, unsupported by records, was accepted by the courts. [NOTE: This seems to be a “property-damage only” case, but income loss was approved.]
 - *People v Cross*, 281 Mich App 737 (2008): Def convicted of Attempted Embezzlement over \$1,000. Ct of Appeals affirmed \$123,180 restitution order, which included “lost income/profits”.
- **Lost Sick Time?** No.³³
- **Funeral Expenses?** Yes.³⁴
- **Travel Expenses?** Depends ...
 - No ... if only property loss or damage. *People v Jones*, 168 Mich App 191 (1988).³⁵

³² MCL 780.766(4)(c); *People v Paquette*, 214 Mich App 336 (1995).

³³ *People v Jones*, 168 Mich App 191 (1988).

³⁴ MCL 780.766(4).

- Yes ... if personal injury (but travel must be connected to medical, psychological, or rehabilitation services for the direct victim or victim's family. MCL 780.794(4).
 - **Court hearings:** There are no CVRA provisions for mileage to/from court hearings.³⁶
- **Insurance deductible? Yes.**³⁷
 - **Interest? Yes.** The CVRA is silent, but there is case law authority.³⁸
 - **Victim's Expenses in Calculating Losses? Yes.**
 - Example: costs of an inventory to determine the extent of embezzlement
 - *People v Gubachy*, 272 Mich App 706 (2006)
 - *People v Robinson*, Court of Appeals #265188 (04/19/2007): Insurance fraud conviction. AAA spent \$6,600 investigating the losses + \$6,000 in legal fees defending a bogus pedestrian/vehicle injury lawsuit. Court of Appeals held that these were "losses attributable to the illegal scheme" that culminated in defendant's conviction.
 - *People v Holden*, Court of Appeals #272633 (06/05/2008; 2008 Mich. App. LEXIS 1188): Restitution in arson and insurance fraud case may include attorney fees and investigation costs incurred by the insurance company for investigating the validity of the claim.
 - *People v Allen*, 295 Mich App 277 (2011); 2011 Mich. App. LEXIS 2392: Restitution includes insurance company's in-house investigation costs to determine extent of defendant's misuse of customers' confidential information to try to obtain prescription drugs by fraud. Extra work (interviewing doctors' staff, reviewing pharmacy videos, etc.) did not uncover additional criminal activity. Proper restitution included cost (in

³⁵ See also *People v Garrison*, Court of Appeals #307102 (12/20/2012), majority opinion (Judges Fitzgerald and Boonstra); COA held trial court abused its discretion in awarding the victim's travel expenses to check the status of recovered stolen snowmobiles and trailers. The dissent (Judge Mateer) noted that *Jones* predated the 1990 adoption of MCR 7.215(J)(1), which required courts to follow prior decisions. The dissent adopted the People's rationale: post-*Jones* CVRA amendments made restitution mandatory; later cases like *Gahan* and *Gubachy* express a broader philosophy for awarding restitution (e.g., MCL 780.766 is a non-exhaustive list of remedies).

Jones is from the Early Years of victim rights and restitution, when restitution was allowed but not mandatory. In the ensuing decades, the CVRA has been modified many times, and appellate opinions now reject the strict-construction analysis. The *Gahan* (Supreme Ct) and *Gubachy* (Court of Appeals) cases say that the CVRA should be read broadly, not narrowly. *Gubachy* also said that the CVRA statutory list of restitution categories was not an exhaustive list.

³⁶ This issue may be subject to an appeal. Even though victims have a Constitutional right to attend all hearings the defendant can attend and are attending hearings directly related to the charges stemming from his criminal acts. Const 1963, Art 1, §24(1).

³⁷ *In re Hoffman*, Court of Appeals #234642 (12/20/2002).

³⁸ *People v Law*, 459 Mich 419 (1999). 'Lost use' of money has a value: "interest"! See also *People v Hall*, Court of Appeals #287862 (09/29/2009): Only interest accrued/paid to-date, not "future interest". Restitution may later be amended based on new information of accrued post-sentencing interest. MCL 780.766(22).

loss of 44 hours in employees' time) to investigate this case, rather than work on other cases.

- *People v Fawaz*, 399 Mich App 55 (2012) came to a different conclusion than *People v Holden* and conflicts with *Robinson* (unpublished). Fawaz was convicted of Arson and False Material Statement on an Insurance Claim. After denying Defendant's claim due to fraud, Defendant sued civilly and the insurer incurred attorney fees, deposition expenses, etc. The insurer later withdrew its request for "legal expenses" in defending the lawsuit. The COA affirmed the trial court's denial of restitution for the civil case's deposition expenses because the prosecution did not prove that the expenses were part of its investigation costs – the fraud had already been investigated before the claim was denied and Fawaz sued. The insurance company withdrew its request for attorney expenses associated with the civil suit, so there was no COA decision that was contra to *People v Holden*.
- **Lost Tax Deduction** due to the dependent-victim's death? Yes.³⁹
- **Lost rental income?** Yes.
 - *People v Knott*, Court of Appeals #272554 (12/04/2008): restitution in failure to return rental property conviction may include the value of the unreturned car plus the victim's lost *per diem* rental fee set forth in the rental agreement.
- **Lost profits?** Yes.
 - *People v Guajardo*, 213 Mich App 198 (1995): Retail Fraud 1st Degree (jewelry) conviction. \$28,105 restitution affirmed. Victim testified this figure was the total retail market value (including his 'profit'), that he operates business to make a profit, that he lost an annual bonus due to the theft, etc. Appellate court rejected defendant's claim that restitution must be limited to "replacement cost" (wholesale price).
 - *People v Cross*, 281 Mich App 737 (2008): Attempted Embezzlement \$1,000 or More conviction. \$123,180 restitution for lost income affirmed.
- **Victim's response to crime?**
 - Generally, no ... unless it is tied to psychological treatment for a personal injury victim
 - Examples: home security system or security bars added to windows after a home invasion; victim moves to a different home or school; victim changes travel route to/from work/school and has an additional expense.
 - Enhancements/improvements are outside the scope of CVRA restitution because are not "direct" losses from the crime.
- **Services in lieu of \$\$\$ (bartering):**

³⁹ MCL 780.766(4)(g), MCL 780.826(4)(g), MCL 780.794(4)(g).

- If the victim or victim's estate consents ... restitution order may require that Defendant make restitution in services, in lieu of money. MCL 780.766(6).

4. CALCULATING RESTITUTION

I. Primary Factor in Determining Restitution:

Loss Sustained by Victim: The court must consider the “amount of the loss sustained by the victim as a result of the offense”.⁴⁰ See *People v Bell*, 276 Mich App 342, 347 (2007) (“The amount of restitution to be paid by a defendant must be based on the actual loss suffered by the victim, not the amount paid by an insurer or other entity.”).⁴¹

Not Defendant’s “Ability to Pay”: The defendant’s/juvenile’s “ability to pay”, hardship to the defendant or his family, etc. are not factors in establishing how much loss the victim sustained. This has been the law since 1997.⁴²

II. Property Loss/Damage “Fair Market Value”

If lost/damaged property cannot be returned to the victim, then restitution is calculated as the difference between the property’s pre-crime and post-crime “fair market values”. As of 07/01/2009, if the fair market value of the item on the date of theft, damage or sentencing cannot be determined, or is impractical to ascertain, then the court must use the property’s replacement value in lieu of its fair market value.⁴³

Fair market value (FMV) is the price the item could have reasonably sold for in an arms-length deal – what a ready, willing, and able buyer would pay for the property on the open market.⁴⁴ In many cases, the FMV is much lower than the victim originally bought it for because most property loses value over time through use, etc. (depreciation).

⁴⁰ MCL 780.767(1); MCL 780.795(1); MCL 712A.31(1).

⁴¹ *People v Coleman*, Mich Ct of App #309234 (03/19/2013): Court cannot order restitution to a victim for a loss that was actually suffered by a different victim, or order restitution for a hypothetical loss, or order restitution that exceeds the amount actually established. Here, Def was part of a DVD / music CD bootlegging operation. A Motion Picture Ass’n rep testified to a \$19/disc “standard price” for all movie DVDs, and did not testify to the net lost profits (after deducting the costs of manufacturing, distributing and retailing the discs from the standard price). There was no testimony that the MPA was empowered to collect restitution for copyright owners. The PSIR adoption of the “standard price” did not explain the basis for deriving this value. There was insufficient proof that the MPA suffered an actual loss. The restitution order was vacated, and the case remanded for further proceedings.

⁴² *People v Grant*, 455 Mich 221, 240 (1997) n 24; *People v Crigler*, 244 Mich App 420, 428 (2001); *People v Gubachy*, 272 Mich App 706, 711 (2006).

See also 1996 PA 562, eff. 06/01/1997, amending the CVRA to delete “the financial resources and earning ability of the defendant, the financial needs of the defendant and the defendant’s dependents, and such other factors as the court considers appropriate” as legal factors for the court to consider in calculating the proper amount of restitution. So, since June 1997, a defendant’s ‘ability to pay’ is not a factor in determining the amount of restitution.

⁴³ 2009 PA 28.

⁴⁴ *People v Weaver*, Mich Ct of App # 296601 (decided 04/26/2011).

Many victims will present purchase receipts, or copies of ads showing how much the property currently costs to buy. This is evidence of “replacement cost”. But the CVRA uses “replacement value” only as a fall-back option. The initial inquiry must be to calculate the FMV, which is “the value of the property on the date of damage, loss or destruction, [or] sentencing”, whichever is greater.⁴⁵ Purchase price is a helpful starting point to determine a FMV, but it is only one factor (which also must be assessed for age, wear & tear, etc.).

Evidence to establish the Fair Market Value of the damaged/lost property: purchase receipts; damage estimates; opinions of value; insurance payoffs; photos; eBay/Craig’s List sales for similar items; etc.

An insurance payoff is not necessarily conclusive evidence of an item’s FMV.⁴⁶

Some items only have “garage sale” prices, Craig’s List or “eBay” values. Examples are used music CDs and video games, which do not sell on the open market for anywhere close to a store-bought purchase price. Originally-priced \$15 CDs might sell at garage sales or on eBay for \$5 or less, which becomes the FMV.

Some items have no resale market (e.g., damaged mail boxes). So, it is impossible or impractical to ascertain a fair market value. Here, you should use its replacement value: what does a similar mail box sell for at Meijer’s?

III. Can Restitution be Based only on Repair Estimates?

No. Repair estimates are only evidence of the victim’s *potential* loss. Once repaired, then the bill the victim paid is a measure of the victim’s actual sustained loss.

In *People v Weaver*, Mich Ct of App # 296601 (decided 04/26/2011), the defendant rear-ended the victim’s 1996 Chevrolet Suburban. The victim scrapped the truck for \$900 after considering it “totaled” due to an \$8,177.95 repair estimate. In the restitution hearing, the only evidence of the victim’s truck’s fair market value was the defendant’s testimony that it was worth \$1,500 because his similar 1996 GMC Safari had a fair market value of that amount. The trial court ordered \$7,277.95 restitution. The Court of Appeals vacated this order and remanded the case to the trial court. The appellate court held that if property cannot be returned then the measure of restitution is the item’s fair market value, which is the “value of the property” under MCL 780.766(3)(b)(i) and (ii). The cost to repair a vehicle will — in many cases — bear no

⁴⁵ MCL 769.1a(3); MCL 780.766(3).

⁴⁶ See also *People v Garrison*, Court of Appeals #307102 (12/20/2012), majority opinion, where the COA affirmed the trial court awarding restitution higher than the insurance appraisal’s “actual cash value” or the insurer’s estimate of “replacement cost” based on other evidence presented in a restitution hearing. “*Nothing in the statutes requires the trial court to adopt an insurer’s appraisal of the property’s actual cash value as its ‘fair market value.’*” Because the FMV could not be determined, restitution could be awarded based on replacement value. Here, the court awarded a figure in between the insurance appraisal and other evidence of the replacement cost – a figure higher than the cash value so the victim could purchase a comparable replacement trailer.

relationship to the vehicle's fair market value. Some owners spend far more to repair vehicles than they are worth. But a trial court's authority to order restitution for property is limited: the court must determine that the return of the property is "impossible, impractical, or inadequate" and must then order restitution equal to the "value of the property" less any value that the property retained after the loss.⁴⁷ The *Weaver* court noted in *dicta* that a court may be able to order additional restitution beyond the vehicle's lost fair market value for actual losses incurred by a victim, e.g., costs for actually repairing the vehicle; wages lost for shopping for a new vehicle; interest incurred on a replacement vehicle loan over the lifespan of the old totaled vehicle.

"[T]o the extent that the cost of a repair that actually occurred exceeded the value of the vehicle after the repair, that difference might be compensable under MCL 780.766(2). But such restitution would not be for the loss in value of property under MCL 780.766(3). Rather, such restitution would be for separate expenses directly arising out of the accident. Here, the prosecution did not present any evidence to support such additional restitution.

"The trial court did not have the authority to order restitution for the value of the property on the basis of a repair estimate that did not involve an actual estimation of the vehicle's value and which did not actually occur. See MCL 780.767(1) (stating that the court must consider evidence of losses that the victim "sustained" as a result of the offense). For that reason, we vacate the trial court's order of restitution and remand this matter for a new hearing to order restitution premised on the fair market value of Ray's vehicle less the money he received from its sale. At the hearing, the prosecution may present evidence that Ray suffered additional losses beyond the loss in value of his property for which he is entitled to additional restitution under MCL 780.766(2)."

See also *In re Chaddah / People and Chaddah v Ellison*, Mich Ct of App #306978 (decided 10/23/2012), where Ellison never got his broken window replaced. The trial court properly awarded only the vehicle's lowered fair market value due to the broken window (the \$895 difference between the blue book value and actual sale price).

IV. **Calculating Restitution for Compensating Entities (like insurance companies)**

Individuals or legal entities that compensate victim for losses are entitled to restitution "to the extent of the compensation paid for that loss" [the victim's loss].⁴⁸

Services Rendered: Services rendered for victims (shelter, food, clothing, transportation) are calculated as the "costs" for those services. Submit receipt for the food or clothing purchased, etc.

⁴⁷ MCL 780.766(3)(b); see also 769.1a(3)(b).

⁴⁸ MCL 780.766(8).

Insurance companies: Insurance companies generally submit invoices of the payments they made to replace or repair victim's damaged property. Is this simple calculation what CVRA covers? No ... because this is a "replacement cost".

The CVRA issue is what is the "compensation paid for that loss [incurred by the victim]"? This includes an insurance deductible paid by a victim.⁴⁹ But, is restitution limited to what the victim paid for the insurance coverage (insurance premium)? This is what is suggested by *In re McEvoy*, 267 Mich App 55 (2005), *lv den* 474 Mich 1068 (2006). A juvenile committed arson at a school. Damages totaled over \$750,000. His parents were ordered to jointly pay the restitution. After analyzing the history and constitutionality of the parental responsibility component of the CVRA, the Court analyzed in Section VI (pp 74-79) how the restitution should be calculated:

"The **controlling factor** with respect to determining the amount of restitution is the **victim's loss** ... '[i]n determining the amount of restitution to order ..., the court shall consider **the amount of the loss sustained by any victim as a result of the juvenile offense.**'"

"[T]he "victim" is the school district ... the entity that suffered "direct or threatened physical, financial, or emotional harm as a result of the commission of a juvenile offense." SET-SEG is an entity that compensated the victim. [A]n entity that compensated a victim "for a loss incurred by the victim" is entitled to receive restitution "to the extent of the compensation paid for *that* loss," clearly meaning the loss of the victim, not the loss of the compensating entity ...

"[W]e conclude that the **amount of restitution ordered in this case cannot be based on the replacement value of the property damaged. To do so improperly orders restitution for the loss of the compensating entity without regard to the actual loss of the victim.** Under the circumstances of the case, the loss of the compensating entity is based on the commercial transaction involved, i.e., the **school district's purchase of replacement coverage insurance, rather than the loss resulting from the fire** ... Although the amount of restitution is within the discretion of the trial court, the court erred to the extent it ordered restitution to SET-SEG on the basis of the amount SET-SEG compensated the school district, rather than the amount of the actual loss sustained by the school. **Restitution must be based on the value of the property damaged, i.e., the victim's actual loss.**"

The Court of Appeals vacated the restitution order and remanded the case (to the Livingston County Family Court) "for further proceedings consistent with this opinion". Unfortunately, no further proceedings occurred where the trial court interpreted and applied the Court of Appeals' analysis. The parties (essentially, two insurance companies) settled the case. A stipulation and order dismissing the restitution claims with prejudice was entered, and the juvenile's parents reportedly did not have to pay any money.

⁴⁹ *In re Hoffman* (Court of Appeals #234642, decided 12/20/2002).

McEvoy is a published case, and is the law of our state today. But what does it mean? Is restitution to insurance companies limited to the insurance premiums paid by the victim in order to get the insurance coverage because THAT is the “victim’s loss”. Insurance companies may still have causes of action to sue civilly in a “subrogation case”, to collect some or all of what it paid out on the victim/insured’s behalf.

5. RESTITUTION ORDERS

I. Deadline for Requesting Restitution?

The CVRA contains no deadline for requesting restitution.⁵⁰

Some information (e.g., medical expenses) may not be known at the sentencing / disposition hearing.

A court may correct an invalid sentence.⁵¹ Some appellate cases have held that the failure to order restitution renders the original sentence invalid and subject to resentencing,⁵² or that the original judgment of conviction may be amended because it was based on inaccurate or erroneous information.⁵³

A restitution order may be amended at any time when there is new or updated information.⁵⁴

As noted elsewhere, payment of restitution must be a term of probation or parole; a court may modify a term of probation while the defendant remains on probation status.⁵⁵

Some courts have set deadlines, and prosecutors should vigorously challenge such local rules:

- The CVRA does not state or even suggest a deadline.
- What is “late” when the statute is silent?
- Any local deadline is arbitrary.
- Why set a deadline when that amount can be modified at any later date?
- Victims have a constitutional right to restitution. Const 1963, Art I, §24(1).
- A court is not “treating a victim with fairness” by denying or hindering the victim obtaining a restitution order, or by judicially amending the CVRA to add an arbitrary deadline. Const 1963, Art I, §24(1).
- The trial court must order “full restitution” in each case. MCL 780.794.
- A sentence/disposition order is not valid or complete if it does not address restitution. The remedy for a partially invalid sentence is re-sentencing.⁵⁶ Without all victims’ restitution included, “full restitution” has not yet been ordered.⁵⁷

⁵⁰ Compare the federal Victim and Witness Protection Act, 18 USC 3664(d)(5), which requires victim losses to be ascertained at least 10 days before sentencing, but that a victim may request restitution after sentencing if he/she petitions the court within 60 days of discovering the loss.

⁵¹ MCR 6.429(A).

⁵² *People v Smith* (Court of Appeals #190277, 01/31/1997).

⁵³ *People v Miles*, 454 Mich 90, 96-98 (1997).

⁵⁴ MCL 780.766(22); MCL 780.794(22); MCL 780.826(22).

⁵⁵ MCL 771.2(2); MCL 771.3(1)(e).

⁵⁶ *People v Jones*, 168 Mich App 191 (1988).

⁵⁷ See *People v Miller*, Court of Appeals #237929; 2003 LEXIS 973; remand to add restitution order.

- A restitution order may be amended based on new information regarding injury or damages.⁵⁸
- Due process is protected because any party can timely object to the amount ordered, and a restitution hearing can be held to determine (i) whether the damages/losses are connected to the conduct that gave rise to the conviction, and (ii) a proper calculation of the victim's loss.
- A motion for Relief from Judgment can correct an order for oversight or omission or any other reason justifying relief.⁵⁹
- A restitution order never expires until it is paid in full.⁶⁰
- A victim has standing to use civil collection processes ... so give the victim something to collect!
- Court resources are wasted if the victim is forced to file a civil lawsuit to get a judgment for exactly what is sought through restitution.

II. Procedures for Entering the Restitution Order

The sentencing court – not the prosecutor or defense – is responsible for determining the correct amount of restitution.

A Prosecuting Attorney cannot plea-bargain-away a victim's right to restitution.

Parties may stipulate to the amount of restitution. But, the Prosecuting Attorney should include the victim in the stipulation.

A victim can agree to an amount of restitution.

Generally, the court will order a probation officer to determine the amount of restitution. The court may rely on the amount in the PSIR unless there is a timely objection by a party. The recommended amount in the PSIR is presumed to be accurate unless a party effectively challenges the accuracy of the factual information.⁶¹ There is no 'effective challenge' to the accuracy of the PSIR's restitution statement of the amount of loss to the victim if it is not contested at the sentencing hearing.⁶² Absent an effective objection, the court is not required to order, *sua sponte*, an evidentiary proceeding to determine the proper amount of restitution due.⁶³

If a party challenges the restitution amount recommended by the probation department, the court has wide latitude in responding to the merits of challenges to the accuracy of information in the sentencing information. But the court must address the challenges. It can (i) determine the

⁵⁸ MCL 780.766(22), .794(22) & .826(22).

⁵⁹ MCR 2.612(A) & (C).

⁶⁰ MCL 780.766(13).

⁶¹ MCL 780.767(2); *People v Ratkov*, 201 Mich App 123, 125 (1993); *People v Grant*, 455 Mich 221, 233-235 (1997); *People v Gahan*, 456 Mich 264, 276 (1997); *People v Ho*, 231 Mich App 178, 192-193 (1998); *People v Bowling*, 299 Mich app 552, 563-4 (2013).

⁶² *People v Conrad*, COA #284796 (05/26/2009).

⁶³ *People v Gahan*, 456 Mich 264, 276 n 17 (1997).

accuracy of the information, (ii) accept the challenging party's version, or (iii) disregard the challenged information. But, the court should articulate what its rationale is.⁶⁴

The amount awarded should be discernible from the supporting records.⁶⁵ Restitution encompasses only losses that are easily ascertained and are a direct result of the defendant's criminal conduct.⁶⁶

A. What Information is Required or Helpful to Determine Restitution?⁶⁷

- Identities of the victim and offender(s)
- Opinion of the need for restitution
- Opinion of the extent of restitution
- Whether the victim has applied for or received compensation for the loss(es) or damage(s)
- Evidence to establish the Fair Market Value of the damaged/lost property
 - Purchase receipts
 - Damage estimates
 - Opinions of value
 - Insurance payoffs
 - Photos
 - eBay sales for similar items

The documents supporting the restitution claim should be understandable. If invoices or other documents are not clear in regard to what they are intended to prove, an appellate court may rule that the trial court's conclusions were not clearly erroneous.⁶⁸

B. Collecting Restitution Information: Whose Job Is It?

The CVRA does not micromanage the entire process. The Act demands that full restitution be ordered, and that the victim's loss determines that amount. But the Act does not define *which party* in the case must collect the victim's restitution information⁶⁹ ... information that surely must get to the court so it can "determine" the proper amount of restitution under the CVRA.

- Courts – "may" order their probation departments to "obtain information pertaining to the amounts of loss" sustained by the victim.⁷⁰
- Prosecutors – "must" notify victims of their right to make an impact statement for use in the presentence investigation report, the address and phone number of the

⁶⁴ *People v Spanke*, 254 Mich App 642, 648 (2003).

⁶⁵ *People v Sims*, COA #286739 (03/16/2010).

⁶⁶ *People v Gubachy*, 272 Mich App 706, 708 (2006).

⁶⁷ MCL 780.763; MCL 780.764.

⁶⁸ See *In re Chaddah / People and Chaddah v Ellison*, Mich Ct of App #306978 (decided 10/23/2012), where Ellison's documents for clean-up costs and labor rates were not "clear on their face", and commingled with repair estimates.

⁶⁹ MCL 780.763, 780.764, 780.767(2), 780.823, 780.824, and 780.791.

⁷⁰ MCL 780.767(2).

probation department preparing the report, and their right to make an impact statement at sentencing.⁷¹

- Victims – “may” submit a impact statement that includes an explanation of the extent of economic loss or property damage suffered, and an opinion of the need for and extent of restitution.

I believe that the responsibility of collecting restitution information from crime victims falls to both the prosecuting attorney and the court. The prosecutor’s office should be seeking out restitution information early in the case and share it with the probation department. But the probation department is ultimately responsible for helping the judge determine the correct amount of restitution through its own work (which might have been helped by the prosecutor’s office’s advance work).

If prosecutors *are* advocates for victims’ justice, how do they monitor *which* cases the court ‘may’ order its staff to affirmatively gather restitution information? By deferring this task to probation departments, they abdicate a portion of that responsibility to advocate for that case’s victims. Did the probation officers diligently seek out victims, thoroughly explain what types of restitution they might apply for and what evidence will support their claims, etc? Will victims have time to gather the records before the PSIR is due? Did the probation officer make a single ‘cold call’ and then report to the judge that he could not locate the victim, and that restitution should be \$0.00?

Prosecutors’ victim advocates know well that one of the victim’s first questions is, “When will I get my [insert property description here] back?” Should the advocate just forward that call to the probation department? No! The advocate and APA need to know what the victim wants out of the case, and this includes restitution. The advocate is building a rapport and relationship with a person-in-crisis; hopefully that rapport will bear fruit with the victim’s cooperation throughout the case.

Many prosecuting attorneys’ offices directly solicit restitution information from victims because it helps finalize case settlement, and assists the court in later determining the proper amount of restitution. There is a natural connection between the victim and prosecutor. The lines of communication are open early in the case because prosecutors must provide initial victim rights information, must consult with the victim about settlement options, must notify victims about scheduled hearings, and generally hold many victims’ hands throughout the case. Why waste this infrastructure by not using it to help victims assemble restitution information?

What prosecutor would *not* want to know what the proper amount of restitution is at the earliest date – whether before charging or before striking a plea agreement? If the APA does not have restitution information before the sentencing date, can he effectively analyze the PSIR recommendation and make a timely objection⁷² to the court’s ultimate restitution award? In tight

⁷¹ Even this responsibility is somewhat qualified in that it is “upon and in accordance with the request of the victim”. MCL 780.763(1). So, if the victim never requests further information beyond the ‘initial packet’ detailed in MCL 780.756, prosecutors are off the hook?

⁷² An objection is timely if made at the sentencing hearing. MCL 780.767(2); *People v Grant*, 455 Mich 221, 235 (1997); *People v Gahan*, 456 Mich 264, 276 (1997); *People v Ho*, 231 Mich App 178, 192-193 (1998).

budget times, prosecutors have a vested interest in *minimizing* the number of restitution hearings and appeals by working with the victim, defense and probation department on the correct restitution amount before sentencing.

In tough budget times, there is a natural tendency to try to say, “That’s not *our* job because the CVRA does not require us to do it.” But the CVRA sets benchmarks, *minimum standards*. APAs are champions of justice, and should not rationalize settling for minimal standards on something as important as a victim’s constitutional right to restitution.

C. Ability to Pay? Defendant/Juvenile’s “ability to pay” is NOT a factor in determining the extent of the victim’s losses and the proper amount of “full restitution” to be ordered.⁷³ Before 06/01/1997, the CVRA factored in the defendant’s ability to pay and hardship, but that was changed by 1996 PA 562. For all cases sentenced after 06/01/1997, look *only* at the “victim’s loss”.

The court may modify the method of payment of restitution (e.g., \$100/mo) if the existing method imposes a manifest hardship on the defendant *and* if modifying the method of repayment will not impose a manifest hardship on the victim.⁷⁴

D. Wage Assignment: A court **must** order a wage assignment against an employed defendant who misses two or more regularly-scheduled restitution payments.⁷⁵ But why wait for two non-payments? Why not order a wage assignment at the beginning? Better yet, why not make imposition of a wage assignment a condition of the plea agreement?

E. “Joint & Several” vs. “Pro Rata”: The CVRA does not specify that restitution orders among co-defendants are “joint & several” or “pro rata”.⁷⁶

⁷³ MCL 780.767(1); *People v Grant*, 455 Mich 221, 239-240 (1997) at n 24; *People v Crigler*, 244 Mich App 420, 428 (2001); *People v Gubachy*, 272 Mich App 706, 711 (2006).

⁷⁴ MCL 780.766(12), 780.794(12), 780.826(12).

⁷⁵ MCL 780.766(18); MCL 780.794(18); MCL 780.826(15). Also, MCL 771.3(2)(f) authorizes wage assignments in criminal cases when probation is ordered.

⁷⁶ The Michigan Judicial Institute Crime Victim Rights Act Manual, Ch 10, §10.7 says: “Codefendants **may** be held jointly and severally liable for the entire amount of the loss. *People v Peterson*, 62 Mich app 258, 267-68 (1975).” (emphasis added) The *Peterson* case is from 1975, which pre-dates the CVRA, which now mandates “full restitution” by every defendant. Watch out for defendants who argue that if *Peterson* says that courts “may” (not “shall”) order joint & several, a court could also decline to do so and impose a different structure (e.g., *pro rata*).

Section 10.8 of the CVRA Manual also cites *People v Grant*, 455 Mich 221, 228-238 (1997), in which the Supreme Court affirmed a joint & several order despite the defendant claiming a “limited role” in a conspiracy to commit U&P.

While no appellate case has directly analyzed the “joint & several” vs. *pro rata* issue, the Supreme Court recently remanded a case to the trial court “for correction of the judgments of sentence to reflect that **the restitution ordered shall be joint and several with the codefendant**” (emphasis added). *People v Slotkowski*, 480 Mich 852 (2007); prior history: Court of Appeals #274884, Oakland County Circuit Court Nos. 2005-202815-FH & 2005-203186-FH).

In *People v McKinley*, unpublished Court of Appeals opinion #307360 (decided 05/16/2013), the court criticized using *Slotkowski* as authority that co-defendant restitution orders should be fashioned jointly and

- “Joint & several” = Each defendant is individually ordered to pay the full amount of restitution and all defendants are on the hook together and possibly individually. Any amount paid by one defendant is credited to the co-defendants’ restitution debts. In some cases, the entire amount of restitution is paid by just one defendant.
- “Pro rata” = Each defendant is ordered to pay an individual balanced percentage. For example, if there are four defendants, each is ordered to pay 25%. Amounts paid by co-defendants are not credited to the co-defendants’ restitution debts.

Pro rata orders are tempting to courts because they are easier to administer and account – especially if there is a mix of defendants in adult and juvenile courts from the same criminal event.

Juvenile delinquency restitution accounting can be particularly difficult to administer because they are often transferred to the juveniles’ counties-of-residence. So, you could have juvenile respondents from the same case with restitution orders in Wayne County and Marquette County Family Courts, and adult co-defendants in Berrien County District Court and Berrien County Circuit Court. With “joint & several” orders, all four courts have to communicate to (a) give credit to each co-defendant/respondent for payments made by a cohort, and (b) make sure that restitution is not over-collected and over-distributed (i.e., no more than 100% of the “full restitution” is distributed to the victim). This is why courts prefer *pro rata* orders: the accounting is cleaner because they only collect their defendant’s “share”. At that point, that court can close its book on restitution even if the co-defendants’ shares are not fully paid, and the victim has not been made whole.

Reading the statutes as a whole, a *pro rata* order is inconsistent with the language and intent of the CVRA. Prosecutors must argue for “joint & several” orders, because:

- Each defendant must be ordered to pay “full restitution”.⁷⁷ A *pro rata* order never orders ANY defendant to pay “full restitution” to a victim, just a share/percentage.
 - The CVRA does not say “the defendants make full restitution” or “full restitution by or between all defendants”. It says “when sentencing a defendant convicted of a crime, the court shall order ... that the defendant make full restitution to any victim of the defendant’s course of conduct that gives rise to the conviction or to the victim’s estate” (emphasis added).

severally. The *McKinley* court said that the *Slotkowski* ruling was made in an order, not an opinion. An order is binding precedent when the rationale can be understood but the Supreme Court did not present a rationale for imposing joint and several responsibility. Rather, it just corrected a procedural error. The *McKinley* opinion revealed that the *Slotkowski* trial court had ordered the restitution to be joint & several but the judgments of sentence did not reflect that, so the Supreme Court remanded the cases to add that term. The *McKinley* court declined the defendant’s request to rule that restitution must be ordered jointly & severally between co-defendants. The *McKinley* court was satisfied that this defendant’s judgment properly ordered him to pay “full restitution” as required by MCL 780.766(2).

McKinley was appealed to the Michigan Supreme Court, 839 NW2d 201; 2013 Mich. LEXIS 1846, but issues approved for appeal by the Supreme Court did not include the issue of Joint & Several liability.

⁷⁷ MCL 780.766(2).

- *Pro rata* orders do not “treat victims with fairness” [Const 1963, Art I, §24(1)]. Instead, *pro rata* orders keep “fairness to defendants” in the forefront.
 - Full restitution will be paid in full slower than joint & several orders.
 - “Full restitution” is less likely to ever be paid in full.
 - Why not collect it all from the deep-pocket defendant(s) as quickly as possible, and let the defendants’ make it square on their own (i.e., small claims court)? Victims do not care from which defendant the restitution came to them.
- *Pro rata* orders do not “enable victims to be compensated fairly for their suffering at the hands of convicted offenders.”⁷⁸
- *Pro rata* orders do not give the CVRA “broad construction”.⁷⁹
- *Pro rata* orders open the door for defendants to argue that they caused a smaller share of the damage (i.e., just 1 of 100 mailboxes). This adds an impossible burden to the Prosecuting Attorney to prove what each defendant damaged/stole.
- Defendants acted together (even if not charged as “conspirators”), so order restitution together. Like the Three Musketeers shouted: “All for one, and one for all.”

F. Is a Sentence/Disposition Valid Without a Restitution Order? No.

Restitution is mandatory. Const 1963, Art I, §24(1); MCL 780.751, et seq.; 780.766(2). Further, restitution must be condition of probation.

To date, no reported case has squarely addressed whether a sentence is valid without a restitution determination. In *People v Lamb*, Michigan Court of Appeals #280705 (10/09/2008), the trial court “reserved the issue of restitution, which was to be determined at a subsequent evidentiary hearing”. The Court said (*fn* 1) that the defendant had not included in her statement of questions on appeal “whether it was improper for the trial court to order and conduct a separate evidentiary hearing to determine restitution after having entered a judgment of sentence”.

Judgment of Sentence orders should not say “To be determined” or “held in abeyance”!

Judgments of Sentence have a restitution section that demand numbers, not letters, be added. The court’s sentencing order must include a dollar figure based on the information at hand, even if it is \$0.00. Only then can a party make a timely objection and demand a restitution hearing.

To avoid a “Restitution TBD: order”, it is better to adjourn the sentencing hearing in order to obtain information needed on restitution, or to just specify the losses and victims to the extent possible. After a timely objection, a restitution hearing can be held to challenge the dollar figure ordered.

If restitution is “reserved”, or “held in abeyance” or “to be determined”, a record that an appellate court can review might not be created. This happened in *People v Leonard*, Michigan Court of Appeals #289914 (01/28/2010), and the judgment of sentence’s specified restitution

⁷⁸ *People v Crigler*, 244 Mich App 420 (2001).

⁷⁹ *People v Gahan*, 456 Mich 264, 271 (1997).

was vacated and remanded for a restitution hearing. Defendant was caught in the act of a home invasion. He had removed 4 security cameras, all of which were recovered. The victim requested \$1,241.92 restitution (\$700.96 camera damage; \$540.96 lost wages). Defendant objected, claiming that the cameras were recovered and undamaged. With the parties' concurrence, the court said that restitution was "to be determined" through the court's reimbursement division and probation department. Yet, without that determination having been made or a hearing, the judgment of sentence included the full unsubstantiated \$1,241.92.⁸⁰

G. Restitution Order Can Be Amended – Restitution orders can be amended based on new or updated information about injuries or damages.⁸¹

A victim or the prosecutor should present the new/updated records to the probation officer. If the defendant will not join a stipulation to the amendment, a court hearing should be held.

Likewise, a defendant can request an amendment to what is owed if he learns of new or updated information on the extent of the victim's losses. For example, future counseling expenses may have been ordered but the victim stopped going to counseling right after sentencing. If the prosecutor and victim will not join a stipulation to the amendment, a court hearing should be held.

H. Effect of a Conviction Being Set-Aside:

If a conviction or adjudication is successfully set aside, **no** remission/reimbursement of restitution is allowed.⁸²

I. Effect of a Civil Suit / Civil Set-off:

A restitution order IS a civil judgment ... and never expires until it is paid in full.⁸³

But a victim may have to sue civilly to recover for losses, damages or injuries that cannot be ordered through CVRA restitution (e.g., non-economic damages like pain & suffering). Victims should consult with a civil attorney about whether they have a cause of action, and what the best strategies are.

Pending civil litigation between the victim and offender is not a sufficient reason for ordering less than full restitution.⁸⁴

But if a victim actually recovers money from a civil suit related to the same incident as the crime, money collected becomes a *civil set-off*. Restitution payments to the victim shall be a set-

⁸⁰ The court did not comment on whether wage loss was available in a purely property-loss event.

⁸¹ MCL 780.766(22); MCL 780.794(22); MCL 780.826(22).

⁸² MCL 712A.18e(11)(a); MCL 780.622(2).

⁸³ MCL 780.766(13).

⁸⁴ *People v Avignone*, 198 Mich App 419, 423 (1993).

off against any amount later recovered in compensatory damages in a civil suit.⁸⁵ The existence of an unpaid civil judgment is not a basis for reducing the restitution award. The victim has the benefit of both the civil judgment and restitution order which increases the potential that the perpetrator of wrongdoing will pay. But it does not mean that the victim will recover twice.⁸⁶

Restitution is not ordered if the victim (or estate) “has received or is to receive compensation for that loss”.⁸⁷ Restitution is limited to those who have losses which are, as of the time restitution is paid, still out-of-pocket – i.e., the victim has not yet received compensation.⁸⁸ “Is to receive” requires actual receipt or certainty regarding receipt. Mere speculation that the victim will receive compensation (for example, because an as-yet unpaid civil judgment has been obtained) does not require modification of the restitution award.⁸⁹

What if the civil judgment focuses on damages that cannot be ordered under criminal restitution, like the non-economic damage of pain and suffering?

A civil suit does not affect the victim’s right to get a restitution order, and is not a basis to reduce the proper amount of “full restitution”.⁹⁰ Restitution is not a substitution for civil damages.⁹¹

- *People v Nathaniel Miller*, Court of Appeals #237929 (04/15/2003). Trial judge ordered \$0.00 restitution “because it was a matter for the civil courts”. Court of Appeals reversed/remanded.
- *People v Bell/Aldridge*, 276 Mich App 342; 741 NW2d 57 (2007). Trial judge ordered \$0.00 restitution because of private repayment agreement between the parties “precluded” court-ordered restitution. Court of Appeals reversed, concurring with CO, IN, NJ and WY.

J. The “Mini-Tort” Law Does Not Limit or Bar Restitution ... although some judges have tried to limit or deny criminal restitution on this basis. The “mini-tort” law is part of the Insurance Code, which limits a person's ability to bring a tort action (to sue) for damage to a motor vehicle. It says:

“Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101 was in effect is abolished except as to: ... (e) Damages up to \$500.00 to motor vehicles, to the extent that the damages are not covered by insurance ...” MCL 500.3135(3)(e).

Essentially, it allows an insured victim to recover an insurance deductible (a victim’s damage that is not covered by insurance). But some judges have bootstrapped this civil statute into

⁸⁵ MCL 780.766(9); MCL 769.1a(9).

⁸⁶ *People v Dimoski*, 286 Mich App 474 (2009).

⁸⁷ MCL 780.766(8).

⁸⁸ *People v Washpun*, 175 Mich App 420, 425-426 (1989).

⁸⁹ *Dimoski*, *supra*, citing *US v Bramson*, unpublished decision of the Fourth Circuit Court of Appeals, decided 02/24/1997 (Docket No. 96-4151).

⁹⁰ *People v Avignione*, 198 Mich App 419 (1993).

⁹¹ *People v Tyler*, 188 Mich App 83, 89 (1991); *People v Orweller*, 197 Mich App 136, 140 (1992).

criminal restitution laws to either cap a vehicle crash victim's restitution at \$500 for property damage to the victim's vehicle, or to deny restitution altogether. Some judges have also held that a victim who did not have insurance cannot be awarded any restitution, apparently applying Insurance Code language that denies damage awards to parties who operate vehicles without insurance.⁹² But these Insurance Code provisions do not apply to the CVRA's or CCP's mandates for full restitution orders in criminal cases. Judges who apply Insurance Code standards to criminal restitution continue a "restitution laws are secondary to civil recovery laws" mentality that has been soundly rejected in recent appeals.⁹³

Prosecutors should vigorously challenge these bootstrapping arguments. The PLPD/mini-tort laws do not trump or supersede the victim's constitutional right to obtain restitution, and do not trump/supersede the CVRA/CCP mandates that full restitution must be ordered. The criminal case judge should order "full restitution"... MINUS the \$500 mini-tort money if the defendant has already paid it to the victim. The Insurance Code regulates civil cases, not criminal restitution. The CVRA and CCP do not say "... must order full restitution except as limited by the Insurance Code" or "... must order full restitution except when the victim has just PLPD coverage or no motor vehicle insurance.

Defendants have also argued – in motor vehicle crash cases – that the No-Fault Act's prohibition against subrogation bars insurance companies who compensated their own insured clients for property losses from seeking criminal restitution. Essentially, they say that the reimbursement is not allowed under one Act, so that prohibits the same reimbursement through another act. However, *People v Gourd*, 200 Mich App 493 (1993) rejected that argument because the CVRA and No-Fault Acts serve different purposes – one fairly compensates victims damages through criminal acts, and the other regulates and restricts civil claims – and can be applied differently under the same facts without defeating either purpose. The Insurance Code or No-Fault Act cannot be cavalierly grafted into the CVRA. The CVRA's language does not open that door; it does not say "Except as limited in other Acts, the court shall order ..."

K. Bankruptcy: Restitution orders are not dischargeable in bankruptcy.

- 11 USC 1328(a)(3) – restitution included in a sentence on a debtor's criminal conviction is not dischargeable.
- 11 USC 523(a)(9) – no bankruptcy discharge for debts for death or personal injury caused by drunken or drugged operation of a vehicle, vessel or aircraft. This was added to supersede *Pennsylvania v Davenport*, 496 US 552 (1990), which ruled that state criminal restitution debts were dischargeable in bankruptcy
- *Troff v Utah*, 329 BR 85 (2005); *Kelly v Robinson*, 479 US 36, 50 (1986).
- If a defendant files a bankruptcy petition, the original trial court and victims should receive notice of the case.

⁹² MCL 500.3135(2)(c): "(c) Damages shall not be assessed in favor of a party who was operating his or her own vehicle at the time the injury occurred and did not have in effect for that motor vehicle the security required by section 3101 at the time the injury occurred." The legislature included this as a lesson/incentive/coercion/carrot-and-stick to get people to insure their vehicles.

⁹³ See *People v Nathaniel Miller*, Court of Appeals #237929 (04/15/2003) and *People v Bell/Aldridge*, 276 Mich App 342; 741 NW2d 57 (2007).

- The court must forward notice to the prosecuting attorney about the bankruptcy action, and the prosecuting attorney must send notice to the victim's last known address.⁹⁴
- Efforts to collect restitution payment from the defendant should be immediately suspended by the court or victim. Once the bankruptcy proceedings have concluded, collection efforts may resume.
- The crime victim should not ignore the bankruptcy proceedings. The victim should attend all meetings of creditors to advise the bankruptcy court that his/her debt is a criminal case restitution order and is not dischargeable in bankruptcy, as noted by the authorities listed above.
- See www.uscourts.gov/bankruptcycourts/bankruptcybasics.html for more basic information about bankruptcy.

⁹⁴ MCL 780.766(23); MCL 780.794(23); MCL 780.826(20).

6. RESTITUTION HEARINGS

The trial court must hold a restitution hearing upon a “timely objection” to the amount of restitution ordered.

- *People v Grant*, 455 Mich 221 (1997); *People v Ho*, 231 Mich App 192-193 (1998).
- *People v Gahan*, 456 Mich 264, 276 n 17 (1997): “It is incumbent upon the defendant to make a proper objection and request an evidentiary hearing. Absent such objection, the court is not required to order, *sua sponte*, an evidentiary proceeding to determine the proper amount of restitution due. Instead the court is entitled to rely on the amount recommended in the presentence investigation report ‘which is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information.’”
- *People v Hanson*, Court of Appeals #264899 (05/22/2007) – Defendant was entitled to a restitution hearing when he objected to additional restitution imposed after restitution had ended
- *People v Baker*, Court of Appeals #301705; 2012 Mich. App. LEXIS 346 (02/28/2012) – Defendant must request an evidentiary hearing, not just object to the amount of restitution.
- *People v Lyttle*, Court of Appeals #303748; 2012 Mich. App. LEXIS 728 (04/19/2012) – Defendant’s objection to the amount of restitution being ordered must be more than a general “I object.” D must demonstrate or indicate how he arrives at the conclusion. “A party cannot simply assert an error or announce a position and then leave it to this Court to “discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.” *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).”

The court must make a restitution determination first THEN a party objects to the amount THEN a hearing is held. This is another reason why a definite \$_____ amount must be decided by the court at the sentencing. Sentencing orders with “Restitution To Be Determined” do not give anything to be objected to, and will likely result in some restitution decisions falling through the cracks.

When is an Objection “Timely”? Restitution must be objected to “at the time restitution is imposed”.⁹⁵ This should occur at the sentencing or disposition hearing.

If No Timely Objection, Is Restitution Appealable? If no objection is made at the sentencing, appellate review is for “plain error affecting the defendant’s substantial rights.”⁹⁶

⁹⁵ *People v Grant*, 455 Mich 221, 224 (1997).

⁹⁶ *People v Carines*, 460 Mich 750 (1990).

Who Can Object to the Restitution Order? The Prosecuting Attorney, the defendant, a victim, or any person or entity who compensated a victim for losses may object.

What Happens at a Restitution Hearing? The Prosecuting Attorney has the burden of proof of the amount of the loss by a preponderance of the evidence.⁹⁷

The Michigan Rules of Evidence do not apply at a restitution hearing.⁹⁸ The information relied on can come from many sources, including some that would be inadmissible at trial.⁹⁹

Witnesses may testify, including the victim testifying to an opinion about the property's fair market value. Exhibits may be filed, including photos of the property, professional estimates of repair or value, etc.

Ultimately, the court's restitution order must be based on the evidence presented at the restitution hearing.

In *People v Guajardo*, 213 Mich App 198, 200 (1995), a restitution award of stolen jewelry's retail value was affirmed, which was higher than the dealer's own wholesale cost to restock it, due to the business owner's testimony about the retail value's connection to his operating expenses, return on investment, lost profits, lost quarterly-sales bonus, etc.

In *In re Bailey* (COA #284384, released 05/12/2009), a restitution award for appreciated value of rare coins (market value is higher than face value) was affirmed even though their value was based only on the victim's "guesstimations". In both cases, the appellate courts held that the trial courts did not abuse their discretion and were not clearly erroneous in awarding such restitution because there was evidence on the record supporting the findings.

⁹⁷ MCL 780.767(4); *People v Gahan*, 456 Mich 264, 276 (1997); *People v Byard*, 265 Mich App 510 (2005).

⁹⁸ MRE 1001(b)(3); MCL 780.767.

⁹⁹ *People v Potrafka*, 140 Mich App 749 (1985).

7. ENFORCEMENT, COLLECTION & DISTRIBUTION

I. **Restitution Due Immediately:** Restitution must be paid immediately ... unless the trial court orders payment within a “specified period or in specified installments”.¹⁰⁰

MCR 1.110 also says that fines, costs and other financial obligations imposed by the court must be paid at the time of the assessment, except when the court allows otherwise, for good cause shown.

Late Payment Penalty: MCL 600.4803(1) gives a court authority to assess a 20% “late pay penalty for all fees, costs or other penalties not paid in full within 56 days. This is a discretionary assessment, and the court may waive it. The defendant should be given advanced notice that a late payment assessment is possible.

In *People v Salina Fisher*, COA #295322 (04/19/2011), the Court noted that the trial court should assess the defendant’s ability to pay before enforcing the penalty.

Court Collections Program Initiative: By administrative order of the Supreme Court (AO 2010-1), beginning 05/01/2010, all local courts must prepare and implement a collections program modeled on a SCAO-approved model.

The SCAO is training courts to proactively advise defendants – as early as the defendant’s plea hearing or first pre-sentence meeting with the probation department – that fines, costs, restitution and other assessments are expected to be paid in full at the sentencing hearing. The SCAO has created training videos that suggest ‘talking points’, examples of explanatory cards or documents to give to defendants, and recommendations to give defendants ballpark figures for the known assessments so defendants can be better informed and prepared to pay at the sentencing hearing.

Other “best practices” are part of the SCAO model. Some examples include having staff or staff time dedicated exclusively to collection activities; enforcing MCR 1.110 and communicating an expectation of payment as noted above; verifying financial information and evaluating an appropriate payment plan; closely monitoring defendants for compliance; submitting annual reports to SCAO; imposing graduated sanctions (e.g., 20% late penalties, assessing costs for non-appearances, show cause hearings, bench warrants, garnishments); using locator services; using outside collection agencies after in-house collections efforts have been exhausted.

II. **Restitution Order Never Expires Until Paid in Full:** A restitution order never expires until it is paid in full. It is a judgment and lien against “all property of the defendant”, and the lien may be recorded as provided by law. The order/judgment is enforceable by the

¹⁰⁰ MCL 780.766(10); MCL 769.1a(10); *People v Grant*, 455 Mich 221, 240 (1997).

victim, prosecutor or any other person or entity named in the order to receive restitution.¹⁰¹ It also survives the defendant's death, so it can be satisfied through the defendant's estate.¹⁰²

III. Condition of Probation, Parole: Restitution must be a condition of probation, parole, or conditional sentence.¹⁰³ A court can modify or cancel conditions of probation (e.g., probation duration, fines/costs, jail term). But, the court cannot excuse restitution without the victim's consent.¹⁰⁴

IV. Payment through Services (Bartering): Restitution may be 'paid' through the defendant's labor ... but *only* if the victim (or victim's estate) agrees to receive services in lieu of money or the return of property.¹⁰⁵

V. Use of Bail Money to Pay Restitution: If a criminal defendant has personally paid his/her bond or bail, when the bond or bail is discharged the court must order that the money be used to pay restitution, fines, costs, probation oversight fees, etc.¹⁰⁶

VI. Payment through Jail / Prison Accounts:

A. Jail Accounts: If a jailed defendant who has been ordered to pay restitution receives more than \$50 per month, the sheriff may deduct 50% of the amount over \$50 received by the defendant for the payment of restitution (and the sheriff may keep 5% of that amount as an administrative fee). The money must be promptly sent to the court or crime victim when it accumulates to more than \$100 or the defendant is released to probation or discharged on the maximum sentence.¹⁰⁷ The sheriff must give the defendant and court written notice of all deductions taken and payments made.¹⁰⁸ The sheriff and defendant shall not agree to modify these requirements; any agreement is void.

B. Prison Accounts: If an imprisoned defendant who has been ordered to pay restitution receives more than \$50 per month, the Department of Corrections shall deduct 50% of the amount over \$50 received by the prisoner for the payment of restitution. The MDOC must promptly send the money to the victim when it accumulates to more than \$100 or the prisoner is

¹⁰¹ MCL 769.1a(13); MCL 780.766(13); *People v Peters*, 449 Mich 515, 517 (1995); *People v Troy*, Michigan COA #267232 (02/08/2007).

¹⁰² MCL 780.766(13); *People v Peters*, 449 Mich 515, 517 (1995). See "Enforcement, Collection & Distribution" section, below.

¹⁰³ MCL 769.1a(11); MCL 771.3(1)(e); MCL 791.236(5); MCL 780.766(11); MCL 780.794(11); MCL 780.826(11); Mich Admin Code R 791.7730(3)(a).

¹⁰⁴ MCL 780.766(6); MCL 780.794(6); MCL 780.826(6).

¹⁰⁵ MCL 780.766(6), MCL 780.794(6), MCL 780.826(6).

¹⁰⁶ MCL 765.15(2). The money is allocated pursuant to MCL 775.22.

¹⁰⁷ MCL 780.767a(2); MCL 780.830a(1).

¹⁰⁸ MCL 780.767a(3); MCL 780.830a(2).

paroled, transferred or discharged on the maximum sentence.¹⁰⁹ The MDOC must give the prisoner and court written notice of all deductions taken and payments made. The MDOC and defendant shall not agree to modify these requirements; any agreement is void.

Fines, costs, assessments and fees may also be collected from prisoner accounts in the same manner, but monies owed to direct crime victims are given priority.¹¹⁰

C. Use of Funds from Prisoner Lawsuits: Funds owed by MDOC to a prisoner (not deducted court fees, attorney fees, etc.) for civil judgments or settlements must be used to satisfy a restitution order.¹¹¹

D. Use of Inmate Wages: Twenty percent (20%) of an inmate's after-tax wage must go to satisfy a restitution order.¹¹²

VII. Court Monitoring: Restitution Reviews: The assigned probation/parole officer must *review payments at least twice yearly*, and shall *conduct a final review not less than 60 days before the probation order expires*.¹¹³

If the probation officer finds that restitution is not being paid, s/he must make a written report to the sentencing judge, and provide the report to the Prosecuting Attorney, using SCAO Form MC 258.¹¹⁴ After a motion has been filed that a defendant has not made restitution payments, the court must take prompt action to compel compliance.

VIII. What If a Defendant is Not Paying Restitution? A court may conduct a hearing – similar to a probation violation hearing – where the defendant must explain his/her non-payment of restitution.

A court *must take prompt action to compel compliance* with a restitution order if (i) a petition or motion is filed or a proceeding is initiated to enforce payment of restitution, and (b) the court finds that restitution has not been paid or is not being paid as ordered.¹¹⁵

- **Wage Assignment:** A court **must** order a wage assignment against an employed defendant who misses 2 or more regularly-scheduled restitution payments.¹¹⁶ See also MCL 771.3(2)(f), which authorizes wage assignments in criminal cases when probation is ordered.

¹⁰⁹ MCL 780.767a(1) & (3); MCL 791.220h(1) & (3).

¹¹⁰ MCL 767.1k; MCL 767.1l.

¹¹¹ MCL 600.5511; MCL 791.220h(2).

¹¹² MCL 800.327a.

¹¹³ MCL 769.1a(15); MCL 780.766(18); MCL 780.794(18); MCL 780.826(18); MCL 791.236(13).

¹¹⁴ MCL 769.1a(15); MCL 780.766(18); MCL 780.794(18); MCL 780.826(18).

¹¹⁵ MCL 780.766(18).

¹¹⁶ MCL 780.766(18); MCL 780.794(18); MCL 780.826(18).

- 100% of monies collected through a wage assignment after multiple non-payments are applied to restitution. They are not split between victim and non-victim payments.¹¹⁷
- ***Contempt of Court / Jail:*** Defendant cannot be jailed, imprisoned or incarcerated for failure to pay restitution unless the court determines that the defendant (i) has the resources to pay the ordered restitution and (ii) has not made a good faith effort to do so.¹¹⁸
 - In determining whether to revoke probation/parole or impose imprisonment because the defendant has not made a “good faith effort” to pay restitution, the court “shall consider the defendant’s employment status, earning ability, and financial resources, the willfulness of the defendant’s failure to pay and any other special circumstance that may have a bearing on the defendant’s ability to pay”.¹¹⁹
 - The trial court cannot enter a judgment of sentence that suspends jail time upon payment of restitution because it serves the same purpose as imposing jail/imprisonment for a failure to pay under MCL 780.766(14). This violates the Equal Protection Clause. A defendant cannot be required to serve the ‘suspended’ time unless the court also makes findings that the defendant had the ability to pay and was in willful default.¹²⁰
 - Imposition of a higher sentence for a willful failure to pay restitution is not a violation of due process or equal protection.¹²¹
- ***Probation violation / revocation:*** Receiving probation is a matter of grace conferring no vested right to its continuance. All probation orders are revocable in any manner the court that imposed probation considers applicable for a violation or attempted violation of a probation condition or for any other type of antisocial conduct or action for which the court determines that revocation is proper in the public interest. However, defendants may not be imprisoned, jailed or incarcerated for violation of probation or parole for failure to pay restitution unless the court or parole board determines that the defendant has the resources to pay the ordered restitution and has not made a good-faith effort to do so.¹²²
- ***Court’s Authority to Enforce Restitution Order Continues After Probation Ends:*** A court has the authority to enforce its orders, including the payment of court-ordered

¹¹⁷ MCL 780.766a(2); MCL 780.794a(2); MCL 780.826a(2).

¹¹⁸ MCL 769.1a(14); MCL 780.766(14); *People v Collins*, 239 Mich App 125 (1999).

¹¹⁹ MCL 780.766(11) and MCL 769.1a (11).

¹²⁰ *People v Collins*, 239 Mich App 125, 136 (1999). See also *People v Anthony Johnson*, Mich Ct of Appeals #301541 (unpublished released 09/22/2011).

¹²¹ *Tate v Short*, 401 US 395, 400 (1971).

¹²² MCL 771.4; MCL 780.766(11) & (14); MCL 780.794(11) & (14); MCL 780.826(11) & (14).

financial obligations, even after probation or parole ends.¹²³ The probation department may have lost its jurisdiction to enforce payment after discharge, but the court has not. A restitution award has no expiration date – it remains effective until paid in full.¹²⁴ This shows the legislature’s intent that there is no statute of limitations to the court’s contempt power when restitution obligations are still owed. MCL 600.17019(e) allows a court to initiate contempt proceedings.

- ***Courts should not convert the balance of unpaid restitution debts at the end of probation to “civil judgments”:*** Some courts have converted the unpaid restitution balances to “civil judgments” at the end of probation terms. There is no need to do this because the criminal judgment of sentence’s restitution award is a “judgment” and is a lien against all of the defendant’s property.¹²⁵ Further, a civil judgment has a 10-year expiration date, MCL 600.5809, and may be discharged in bankruptcy – but criminal restitution in Michigan is owed until it is paid in full¹²⁶ and cannot be discharged in bankruptcy.¹²⁷

IX. Allocation of Payments / Payment Priorities:¹²⁸

Generally, 50% of payments received by the court are assigned to “victim payments” (including restitution to direct victims); and 50% are assigned to non-victim payments (with a specified priority).¹²⁹

Victim Payments MCL 780.766a(5)	Non-Victim Payments MCL 780.766a(3)-(4)
<ul style="list-style-type: none"> • Restitution ordered to be paid to the victim or victim’s estate (but <i>not</i> payment to a person who reimbursed V’s losses) • An assessment under MCL 780.905 	<ol style="list-style-type: none"> 1. Minimum state cost (MCL 769.1j) 2. Other costs 3. Fines 4. Costs 5. Probation/parole supervision fees 6. Assessment & other payments (inc. restitution to 3rd parties who reimbursed a victim’s loss)

After one side of the ledger has a zero balance, 100% of future payments are applied to the remaining side’s balance.¹³⁰

¹²³ See *People v Norman*, 183 Mich App 203 (1989). The Court of Appeals held that the existing MCL 780.766(12) limited the trial court’s ability to enforce the restitution order. But this subsection was later deleted and replaced by MCL 780.766(13).

¹²⁴ MCL 780.766(13).

¹²⁵ MCL 780.766(13); MCL 780.794(13); MCL 780.826(13).

¹²⁶ MCL 780.766(13).

¹²⁷ See 11 USC 1328(a)(3) and Bankruptcy section, above.

¹²⁸ See MCL 712A.29 [Juvenile Code delinquencies]; MCL 775.22(2) [criminal cases]; MCL 780.766a(2) [CVRA felonies]; MCL 780.794a [CVRA delinquencies]; MCL 780.826a [CVRA serious misdemeanors]; MCL 791.225a(4) [MDOC collections from probationers]; MCL 791.236a(2) [MDOC collections from parolees].

¹²⁹ MCL 712A.29; MCL 775.22(2); MCL 780.766a(3)-(5).

Payments are first applied to victim payments if (i) the person making a payment directs that the payment be applied to restitution, or (ii) the payment is received via a wage assignment, or (iii) the payment is received from a sheriff or MDOC.¹³¹ After the victim payments side of the ledger zeroes-out, the payments are applied to fines, costs, supervision fees, or other assessments and payments.¹³²

If the defendant has multiple files and the defendant does not specify which file the money should be applied to, payments are applied to “restitution files”.¹³³

Disbursements must be made to individual victims *before* payments to entity victims, government victims, or 3rd parties who compensated victim’s losses.¹³⁴

The CVRA is silent as to whether the court can order a different payment schedule among several victims if their losses and economic circumstances are different.

X. Overpayments: What if More Than 100% of the Full Restitution is Collected?

Victims should not be paid *more* than the proper “full restitution” amount (i.e., a profit or windfall). If the court has extra money paid in, the excess should be applied to non-victim payments (costs, fines, etc.) still owed, or returned to the defendant(s).

XI. Unclaimed / Refused Restitution Money: Restitution money paid to the court and unclaimed or refused by victims for more than 2 years is paid to the Michigan Crime Victim’s Rights Fund.¹³⁵ This includes situations where persons or entities entitled to restitution cannot be located or outright refuse to accept the restitution money.

- This is reason enough to get the *fullest* “full restitution” orders in every case!
- Unclaimed monies are not rebated back to the defendant.
- This probably does not apply to accumulated reimbursements to third parties who covered the victim’s losses (e.g., insurance companies) because they are defined as an “assessment or other payment”, not “restitution”. MCL 780.766a(3). “Restitution” is a “victim payment”. MCL 780.766a(5).

Every criminal case’s Judgment of Sentence should include a restitution amount, even if it is \$0.00. If a dollar figure is entered and the victim says that he/she does not want the money now, he/she has two years to change his/her mind and claim the money at the court office. After that, the money is credited to the Crime Victim Fund.

¹³⁰ MCL 712A.29(2); MCL 775.22(2); MCL 780.766a(2)-(3), MCL 780.794a(2), MCL 780.826a(2).

¹³¹ MCL 780.766a; MCL 780.767a.

¹³² MCL 780.766a(2); MCL 780.794a(2); MCL 780.826a(2).

¹³³ MCL 780.766a(1), MCL 780.794a(1), MCL 780.826a(1).

¹³⁴ MCL 780.766(8).

¹³⁵ MCL 780.766(21); MCL 780.904.

A crime victim may – at any time – claim any such monies deposited in the CVR Fund by applying to the court that originally ordered and collected it. The court then notifies the Crime Victim Services Commission of the claim, and the Commission must approve a credit in the court’s monthly transmittal to the CVR Fund to pay the victim.¹³⁶

XII. Where Does the Money Go if the Victim Dies? The defendant does not get a free pass. The victim’s estate receives all restitution money due to the individual victim, and has the victim’s standing to object to the restitution order and collect unpaid restitution through civil processes. But the court clerk should not turn money over to a purported relative who says, “I am the only surviving relative of the victim.” Orders from the probate court will specify who should receive the money and where it is to be paid. Victim’s heirs should contact the probate court and/or private attorneys to open an estate. Small estate proceedings can usually be filed without attorneys using court forms.

XIII. Civil Enforcement of Restitution Orders

A restitution order remains in effect until it is paid in full. It is a judgment and lien on all of the defendant’s property, and may be recorded as provided by law.¹³⁷

An unpaid restitution order may be enforced by the victim, Prosecuting Attorney, or any person or entity named in the order to receive restitution.¹³⁸ Enforcement actions take place in the same court, and under the same criminal/delinquency file number of the original case.¹³⁹ A “new file” should not be opened!

All means available to collect civil judgments may be used: levies, garnishment (MCL 600.4011; MCR 3.101), and seizure of money and property (MCL 600.6104). Some assets are exempt from levy (MCL 600.6023), such as IRAs, household goods up to \$1,000, work tools/equipment up to \$1,000, etc.

Courts may not impose a fee on a victim, victim’s estate, or the prosecuting attorney for enforcing an order of restitution.¹⁴⁰

A. DISCOVERY OF ASSETS: What property does the defendant have (sources of income; real property; personal property, like cars, boats, jewelry, investments, bank accounts, etc.)? You need this information before you can “get it” to pay off the restitution debt.

Here is a summary of the process involved:

¹³⁶ MCL 780.766(21), 780.794(21), 780.826(18).

¹³⁷ MCL 780.766(13); MCL 780.794(13); MCL 780.826(13).

¹³⁸ MCL 780.766(13).

¹³⁹ *People v Norman*, 183 Mich App 203, 206 (1989).

¹⁴⁰ MCL 780.766(20), 780.794(20), 780.826(17).

- File for a “judgment debtor’s examination” in the court where the restitution order was entered.
- Fill out a Subpoena (SCAO form MC 11) completely, including the defendant’s name, the criminal/delinquency case number, and check all applicable boxes.
 - The numbered boxes are important because they put the burden on the defendant to do important things.
 - Some of the key boxes you may want to check include:
 1. Commanding the defendant’s appearance at a place, date and time certain;
 2. Commanding the defendant to “testify at ... examination / hearing”;
 3. Commanding the defendant to “Produce/permit inspection or copying of the following items”.
 - a. include/attach a list of documents or items you want the defendant to bring to the hearing
 - b. For example: “W2s/1099s or other evidence of all sources of income from xxxx to the present; federal and state income tax returns for years xxxx to xxxx, including tax refunds; year xxxx-to-present records, account numbers and current balances of all banking or credit union accounts in which you hold a property interest; safe deposit box locations in which you hold a property interest; titles/registrations for all motor vehicles, motorcycles, recreational vehicles, boats, etc. in which you have a property interest; deeds or other evidence of property interest in any real estate; records of all investments; records of all monies owed to you by other persons; records of all credit cards in your name”
 4. Commanding the defendant to “Testify as to your assets”
 5. Commanding the defendant to “Testify at deposition”
 6. Commanding the defendant to not dispose of certain property; however, other forms must be attached
 7. “Other” lets you specify more issues that may be applicable
 8. Identifying the person requesting the information (victim, prosecutor, etc.), plus contact information
 - Fill out and sign the “Affidavit for Judgment Debtor Examination” box on the back of SCAO form MC 11. You must specify why you want the judgment debtor’s examination (e.g., “A restitution order from 08/01/2005 has not been paid in full yet. Defendant still owes me \$5,468.35”).
 - The criminal/delinquency case judge must sign the subpoena. The Prosecuting Attorney or a victim’s civil attorney cannot sign or authorize this kind of subpoena.
- Serve the subpoena on the defendant
 - Any adult who is not a party may serve it
- File a proof of service (back of the subpoena) with the court
- Defendant can also be served with an “Affidavit of Judgment Debtor” (SCAO form DC 87), which requests similar information about income and assets.
- At the scheduled hearing, the defendant is placed under oath

- Defendant must then truthfully answer questions (by the PA, victim or an attorney) about his assets, etc. This may occur in a conference room, rather than in open court.
 - Review all documents brought by the defendant.
 - Copies of documents may be made.
 - The interview may be taped.
 - If the defendant refuses to answer questions, see the judge about whether the information sought is relevant to the basic issue of locating defendant’s assets to pay off the restitution debt.
- Use the “leads” discovered at this event with other collection processes (described below) to collect on defendant’s assets.

B. Encumbering Assets (Liens, Levies): A restitution order is a civil judgment and is recordable as a lien against the defendant’s property (real estate, vehicles, etc.).¹⁴¹ So, the victim or prosecutor should record the restitution order &/or a “notice of *lis pendens*” as a judgment lien on defendant’s real property.

Here is a summary of the process involved for the victim or prosecutor:

- Get a *certified copy* of the Judgment of Sentence + any other restitution order from the sentencing court. (There may be a fee from the court clerk to get a certified copy.)
- File the certified copy of the Judgment of Sentence with the Register of Deeds in every county in which the defendant owns real property. (There may be a fee from the Register of Deeds.)
- The lien “clouds the title” of defendant’s property. A title check should reveal this lien.
- The victim will eventually be paid when the real property is sold.

C. Garnishing Wages: A restitution order is a civil judgment.¹⁴² Use civil collection means to collect on the judgment, including garnishment.¹⁴³

Here is a summary of the process involved:

- Use SCAO form MC 12: “Request and Writ for Garnishment (Periodic)”
 - This is used to garnish money from all periodic payments made to the defendant (wages, rental or land contract payments, etc.).
- File form MC 12 with the court that issued the restitution order. There is no filing fee to enforce a restitution order. MCL 780.766(20).
- The judge reviews and signs the writ (order).
- Serve the signed form MC 12 on defendant’s employer(s).
- Serve the signed form MC 12 on defendant. Defendant can file a written objection with the court, using SCAO form MC 49 (Objections to Garnishment).
- The writ is valid for up to 91 days.

¹⁴¹ MCL 780.766(13).

¹⁴² MCL 780.766(13).

¹⁴³ MCL 600.4011; MCR 3.101.

- If the restitution order is not satisfied in full by then, repeat the process by filing a new form MC 12.

Other SCAO forms used in garnishments include:

- SCAO MC 14 – Garnishee Disclosure
- SCAO MC 15 – Motion for Installment Payments
- SCAO MC 16 – Motion to Set Aside Order for Installment Payments
- SCAO MC 48 – Final Statement on Garnishment of Periodic Payments
- SCAO MC 50 – Garnishment Release

D. Garnishing Defendant’s Michigan Income Tax Refund/Credit: A restitution order is a civil judgment.¹⁴⁴ Use civil collection means to collect on the judgment, including garnishment.¹⁴⁵

Here is a summary of the process involved:

- Use SCAO form MC 52: “Request and Writ for Garnishment (Income Tax Refund/Credit)”
 - This applies only to Michigan state income tax refunds or credits – not federal or local income tax refunds or credits.¹⁴⁶
- File form MC 52 with the court that issued the restitution order. There is no filing fee to enforce a restitution order. MCL 780.766(20).
- The judge reviews and signs the writ (order).
- Serve the signed form MC 52 on the Michigan Department of Treasury.
- Serve the signed form MC 52 on defendant. Defendant can file a written objection with the court, using SCAO form MC 49 (Objections to Garnishment).
- The form is used once. If the restitution order is not satisfied in full by then, repeat the process by filing a new form MC 52 for the next tax year.

E. Garnishing Defendant’s Bank Accounts: A restitution order is a civil judgment.¹⁴⁷ Use civil collection means to collect on the judgment, including garnishment.¹⁴⁸

Here is a summary of the process involved:

- Use SCAO form MC 13: “Request and Writ for Garnishment (Non-Periodic)”
- File form MC 13 with the court that issued the restitution order. There is no filing fee to enforce a restitution order.¹⁴⁹

¹⁴⁴ MCL 780.766(13).

¹⁴⁵ MCL 600.4011; MCR 3.101.

¹⁴⁶ A bill was introduced in April 2009 in the 111th U.S. Congress that would amend the IRS Code to direct the Treasury Department to pay a legally-enforceable state judicial debt to another person upon receipt of notice from a state court. (See H.R. 1956; The Crime Victim Restitution and Court Fee Intercept Act; it was pending in the Ways and Means Committee when Congress recessed in December 2010. There were no Michigan co-sponsors.)

¹⁴⁷ MCL 780.766(13).

¹⁴⁸ MCL 600.4011; MCR 3.101.

- File one form MC 13 for each bank or credit union where the defendant has an account.
- The judge reviews and signs the writ (order).
- Serve the signed form MC 13 on the bank(s) or credit unions where the defendant has accounts.
- Serve the signed form MC 13 on defendant. Defendant can file a written objection with the court, using SCAO form MC 49 (Objections to Garnishment).
- This form is used once. If the restitution order is not satisfied in full by then, repeat the process by filing a new form MC 13 when you have reason to believe that the defendant's account has been replenished.

F. **Seizure of Assets / Sheriff's Sale**: A restitution order is a civil judgment.¹⁵⁰ Use civil collection means to collect on the judgment, including seizure of defendant's property and selling it.¹⁵¹

~ CAVEAT ~

Crime victims should NEVER "seize defendant's assets" or sell them on their own. Victims who take "self-help" this literally are risking an unwelcome response from the defendant or others, and may result in civil liability against the victim. The statutes and court rules have authority and processes for court-appointed agents to act. Let them do their jobs under the law!

Here is a summary of the process involved:

- Use SCAO form MC 19: "Request and Order to Seize Property"
- File form MC 19 with the court that issued the restitution order. There is no filing fee to enforce a restitution order.¹⁵²
 - File one form MC 19 for each bank or credit union where the defendant has an account.
- The judge reviews and signs the writ (order).
- Serve the signed form MC 19 on defendant. Defendant can file a written objection with the court.
- After the defendant has been served with form MC 19, serve the signed form MC 19 on a court-appointed officer (e.g., county sheriff's civil division).
- The court officer seizes the defendant's personal property, sells it at auction, and the proceeds are given to the victim to satisfy the restitution debt. Any excess proceeds are returned to the defendant.

¹⁴⁹ MCL 780.766(20).

¹⁵⁰ MCL 780.766(13).

¹⁵¹ MCL 600.6104; MCR 2.621.

¹⁵² MCL 780.766(20).

8. JUVENILE DELINQUENCY RESTITUTION ISSUES

Parental Responsibility to Pay Restitution Owed by Juveniles

Juveniles cause damages and losses that are appropriate for restitution orders. But most juveniles do not have income or assets to pay the restitution themselves. Is the victim totally out of luck? Does the victim have to wait until the juvenile becomes an employed adult to collect restitution? Can the juvenile's parent(s) be ordered to pay the restitution debt?

The parent(s) of a juvenile *may* be ordered to be jointly responsible to pay any portion of the minor's restitution order.¹⁵³¹⁵⁴ A judge (not a jury) must make the following findings:

A. **Juvenile unable to pay:** The court must first determine that the juvenile "is or will be unable to pay all of the restitution ordered."

B. **Supervisory parent:** Only the parent(s) having "supervisory responsibility" for the juvenile at the time of the acts upon which the restitution order is based can be ordered as jointly responsible. For example, if the parents do not live together and one parent had custody or visitation of the juvenile when the damage occurred, only that parent is potentially on the hook for restitution.

- o No need to prove that the child had a known propensity for damaging conduct, and/or that the parent(s) knew or should have known of the propensity, and/or that the parent(s) was negligent or reckless in failing to act to better supervise the youth (which is required in Georgia's recent victim rights laws).

C. **"May", not "shall":** The court is not required to order the parent(s) to pay. It "may" do so, within its discretion.

D. **Any portion:** The court can order that the supervisory parent(s) is liable for "any portion of the restitution ordered that is outstanding" (emphasis added). Further, the CVRA does not set a "cap", like the \$2,500 limit in the Parental Liability Act, MCL 600.2913. The Court of Appeals rejected an argument that the Parental Liability Act's cap applied to CVRA restitution. See *In re McEvoy, supra*.

E. **Ability to Pay / Hardship:** The parent(s) (in)ability to pay may reduce the total amount of the portion of the restitution debt the parent is ordered to jointly pay.¹⁵⁵ This is the only time when "ability to pay" or "hardship" is relevant in calculating how much anyone owes the victim for restitution.

¹⁵³ MCL 780.766(15)-(17); MCL 780.794(15)-(17).

¹⁵⁴ *In re McEvoy*, 267 Mich App 55 (2005), *lv den* 474 Mich 1068 (2006) has a good analysis of these statutes, legislative intent, and their constitutionality.

¹⁵⁵ MCL 780.794(16); MCL 780.795(1).

F. **Defendant Tried as an Adult:** Parents of a juvenile tried as an adult can also be ordered to pay.

G. **Due process:** The parent cannot be ordered to pay restitution owed by the juvenile unless the parent has been given notice of a hearing at which the court will decide their liability (who had supervisory responsibility?), what portion of the restitution debt they are responsible for, etc.

9. MISCELLANEOUS

I. Evolution of Rights

Pre-CVRA: Restitution could be ordered for a probationary sentence (*P v Neil*, 99 Mich App 667 (1980))

1985 CVRA: victim rights in felonies

1988 CVRA: victim rights in delinquency and ‘serious misdemeanors’

1988 Const: restitution is right guaranteed by constitution!

1993 CVRA: restitution orders are mandatory

II. Recent changes/updates:

2006:

- Definition of victim expands.
- Victim rights must be applied if deferred/delayed sentence, or anything that does not result in an acquittal or unconditional dismissal.
- Restitution is mandatory for all deferred sentences, diversion, HYTA, consent calendar.
- Mandatory wage assignment after 2 missed payments by an employed defendant
- Restitution order may be amended if new information is presented.
- 50% of prison income in excess of \$50/month must be collected and applied to restitution. MCL 775.22(2); MCL 780.767a(1); MCL 780.796b(1).
- 50% of jail or juvenile facility income in excess of \$50/mo may be collected and applied to restitution. MCL 780.767a(2); MCL 780.796b(2), (3); MCL 780.830a(1).
- If victim cannot/does not accept restitution within 2 years, monies go to Crime Victim Rights Fund.
- Until restitution is paid in full, no transfer of payment monies are allowed between files to pay fines, costs.
- If victim is a minor, victim’s parents’ reasonable costs are included in restitution (homemaking & childcare expenses; income loss; mileage, meals, lodging; any other costs incurred in exercising rights under the CVRA.
- Son of Sam Law: prohibits defendants from profiting from criminal actions (selling recollections/thoughts, selling memorabilia, selling property that increases in value due to notoriety. If items are sold, proceeds must be seized and applied to outstanding restitution balance, civil judgment, etc.

2007:

- If defendant has multiple files for payment, apply \$ to restitution file first unless defendant specifies payment to another file for good cause (e.g., restore eligibility for driver’s license)
- Priority of payments for “non-restitution”: (i) state minimum cost; (ii) other costs; (iii) fines; (iv) probation/parole supervision fees; (v) assessments or other payments, including reimbursements to third parties who reimbursed a victim for losses

- Insurance companies are 3rd parties who reimbursed victims for their losses. So, payments to them are last in line.
- If jail/prison money is seized (i.e., 50+% of balance above \$50/month), money is sent to the court to apply to restitution after \$100 is accumulated

2009:

- Requires court to use an item’s “replacement value” in lieu of its “fair market value” when the fair market value is impossible or impractical to determine.

III. What Version of the CVRA Applies to Your Case? Restitution is governed by the statute in effect at the time of sentencing, not the version in effect at the time the crime occurred.¹⁵⁶

IV. Victim Remedies for CVRA Violations? For restitution, the CVRA lets a victim object timely to the court’s restitution order and request a restitution hearing, and to use civil collection processes for unpaid restitution.

Beyond that, there are no direct remedies to victims if other constitutional or CVRA rights are violated (e.g., receiving notice of hearings, attending hearings, making an impact statement, conferring with the prosecutor). Hearings cannot be “re-done” when these violations occur. And victims cannot individually file appeals from decisions of the prosecutor or judge because the victim is not a “party” to the case and lacks standing to file an appeal.¹⁵⁷ In criminal cases, the parties are the prosecuting attorney and defendant; in juvenile cases, they are the petitioner and respondent juvenile. The constitution and CVRA did not confer standing onto crime victims independent of the prosecutor to assert violations of Article 1 Section 24.¹⁵⁸ The CVRA did not give victims general remedial rights.¹⁵⁹

Victims may not sue public officials for money damages for violating their rights under Michigan’s CVRA.¹⁶⁰

Mandamus Against a Non-Judicial Officer: An action seeking a “writ of mandamus” may be a remedy to compel the performance of a mandatory legal duty by a non-judicial official.¹⁶¹ It is an extraordinary remedy – a remedy of last resort. The public official must have a clear legal duty to perform an act, and the plaintiff must have a clear legal right to the official’s discharge of that duty.¹⁶² A victim could try to compel a public official to perform a mandated

¹⁵⁶ *People v Gahan*, 456 Mich 264, 270 (2002); *People v Lueth*, 253 Mich App 670 (2002) [which rejected the defendant’s claim that this violated the Ex Post Facto Clause of the Michigan Constitution, Const 1963, Art 1, Sec 10].

¹⁵⁷ *People v Carson*, 87 Mich App 163 (1978).

¹⁵⁸ *People v Sheridan*, Court of Appeals #201233, decided 06/12/1998.

¹⁵⁹ *People v Pfeiffer*, 207 Mich App 151, 157 (1994).

¹⁶⁰ MCL 780.773, 780.800, and 780.832.

¹⁶¹ MCR 3.302(C) & 3.305; MCL 600.4401 *et seq.*

¹⁶² *People v Young (On Remand)*, 220 Mich App 420, 426 (1996).

legal duty (such as conferring with the victim on the case outcome) or to exercise his/her discretion, but not to compel exercise of the discretion in a particular way.

Action for Superintending Control of a Lower Court: An action seeking an order of superintending control may be a remedy to compel a judicial officer to comply with a mandatory legal duty.¹⁶³ It is an extraordinary remedy, and should be used only in exceptional circumstances. It should not be used if an adequate alternative remedy exists – like, an appeal.¹⁶⁴ This action is appropriate for determining if the court failed to perform a clear legal duty, but not review of an alleged abuse of discretion.¹⁶⁵ Example: challenges to a court’s general practice. So, if a judge never orders restitution in any criminal case, or habitually refuses to allow crime victims to speak at sentencing hearings, such an action may be appropriate.

Judicial Grievance for Misconduct in Office: These are complaints filed against a judge with the Michigan Judicial Tenure Commission.¹⁶⁶ Bases can include persistent failure to perform judicial duties¹⁶⁷, and disregarding statutes.¹⁶⁸

Public Disclosure of a Public Official’s Failure to Apply the CVRA: This “remedy” is to expose to the light of the public’s right to know failure of public officials to perform duties or to otherwise comply with laws.

Order Transcripts – Judges act on-the-record. What they say is etched in transcripts of court hearings. They are irrefutable evidence of what the judge said, and useful insight into how that judge thinks.

Contact the Media – Maybe your local papers or television stations will look into why local judges or prosecutors are not complying with the CVRA (including why the prosecutor is not appealing clearly erroneous court orders).

Marshal the Voters to Get to the Ballot Box – Prosecuting Attorneys are elected every four years, and judges every six years. CVRA violations may become a fatal campaign issue.

¹⁶³ MCR 3.302.

¹⁶⁴ MCR 3.302(B).

¹⁶⁵ *In re Wayne County Prosecutor*, 192 Mich App 677, 680 (1991).

¹⁶⁶ MCR 9.205(B).

¹⁶⁷ MCR 9.205(B)(1)

¹⁶⁸ *In re Del Rio*, 400 Mich 665, 695 (1977).

10. HELP

Need Restitution Help?

- A. Crime Victim Rights Manual:
<http://courts.mi.gov/education/mji/Publications/Documents/Crime-Victim-Rights-Manual.pdf>
Chapter 10 covers restitution.

- B. Juvenile Justice Benchbook:
<http://courts.mi.gov/education/mji/Publications/Documents/Juvenile-Justice.pdf>
Chapter 10 covers dispositions (sentences). A sub-chapter covers restitution.