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Criminal Restitution in the 110th Congress: A Sketch

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January 13, 2009

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Summary

Congress enacted two restitution provisions in the 110th Congress, one as part of the Identity Theft Enforcement and Restitution Act of 2008 (Title II of P.L. 110-326)(H.R. 5938), and the other as part of the Prioritizing Resources and Organization for Intellectual Property Act of 2008 (P.L. 110-403)(S. 3325). It also devoted considerable time and attention to other restitution proposals that did not see final action before the end of the Congress.

Restitution legislation in the 110th Congress fell into three categories. Some proposals, like the two provisions enacted, create or would have created new federal crimes or amend specific existing federal offenses and in doing so include restitution provisions particular to those offenses, e.g., P.L. 110-326 (intellectual property), P.L. 110-403 (identity theft); H.R. 880, H.R. 1582, H.R. 1692, S. 456, and S. 990 (gang bills); H.R. 6491 (organized retail offenses), H.R. 3148 (Mann Act), H.R. 3990 (sexual military offenses), and H.R. 871 (spousal support offenses). Other proposals would have addressed a particular aspect of the law such as abatement which limits restitution collection after the defendant's death (S. 149 / H.R. 4111). Two bills – H.R. 845, the Criminal Restitution Improvement Act, and S. 973 / H.R. 4110, the Restitution for Victims of Crime Act – sought to make substantial changes in federal restitution law. They anticipated three kinds of adjustments: (1) an expansion of offenses for which restitution may be ordered without recourse to the laws relating to probation and supervised release; (2) an overhaul of the procedures governing the issuance and enforcement of restitution orders to afford prosecutors greater enforcement flexibility without having to seek the approval of the sentencing court; and (3) authority for preindictment and presentencing restraining orders and other protective measures to prevent dissipation of assets by those who may subsequently owe restitution.

This is an abridged version of CRS Report RL34139, *Criminal Restitution Proposals in the 110th Congress*, by Charles Doyle. Related reports include CRS Report RL34138, *Restitution in Federal Criminal Cases*, by Charles Doyle, and CRS Report RS22708, *Restitution in Federal Criminal Cases: A Sketch*, by Charles Doyle.

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Introduction

Restitution is the act of restoring an individual or entity in whole or in part to the lost circumstances they might have once enjoyed. In a federal criminal context, it is the order of a sentencing court directing a defendant to reimburse or otherwise compensate the victims of his crimes. Restitution is based on the losses suffered by the victims of a crime. Neither the defendant's financial condition at the time of sentencing, nor his future economic prospects figure in the amount of restitution awarded. Consequently, in some cases the amount of restitution ordered may exceed what the defendant can ever reasonably be expected to pay, particularly in the case of mandatory restitution. Nevertheless, there have been suggestions that in other instances insufficient restitution has been ordered or collected because of the particularities of restitution law.

Restitution for New and Existing Crimes

Restitution legislation in the 110th Congress fell into three categories. Some proposals created or would have created new federal crimes or amend specific existing federal offenses and in doing so included restitution provisions particular to those offenses. Other proposals addressed the consequences of abatement, the legal fiction under which a conviction and all of its consequences including restitution are washed away when the defendant dies during the pendency of his appeal. Still others would have provided for more general revisions of existing law in the area.

By virtue of Section 206 of the Prioritizing Resources and Organization for Intellectual Property Act of 2008, P.L. 110-403, 122 Stat. (2008)(S. 3325), conviction for any of a number of intellectual property offenses also results in a mandatory restitution order. The Identity Theft Enforcement and Restitution Act, P.L. 110-326, 122 Stat. 3560 (2008)(H.R. 5938), among other things, authorizes federal courts to order restitution for the victims of identity theft and aggravated identity theft to compensate them for the time reasonably spend to undo the harm caused or intended by the theft. Other bills still pending when Congress adjourned would have amended federal restitution law with respect organized retail crime, street gang offenses, sex offenses under the Uniform Code of Military Justice, "dead beat dad" offenses, and offenses involving travel of illicit sexual purposes.

Abatement

Upon the death of a defendant pending appeal the courts treat his indictment and conviction as if they had never occurred. The case is returned to the lower federal court with instructions to vacate the conviction and to dismiss the indictment. The circuit courts are somewhat more divided on the question of whether a restitution order likewise abates upon the death of the defendant pending appeal. In the twilight of the 109th Congress, the Senate passed legislation that would have barred abatement of a restitution order. The bill's sponsor, Senator Feinstein, reintroduced essentially the same proposal as S. 149 in the 110th Congress, which Representative Shea-Porter introduced in the House as H.R. 4111.

H.R. 845 (Mandatory Restitution)

H.R. 845, introduced by Representative Chabot would have replaced the discretionary and mandatory restitution provisions of Sections 3663 and 3663A with a revised Section 3663. Existing law requires restitution for crimes of violence, maintaining a drug-involved premises, and when prohibited in Title18, fraud and crimes against property. It permits a court to order restitution for crimes otherwise proscribed in Title18, as well as for various aviation safety and drug offenses, and as a condition for probation and supervised release. It does not call for restitution in the case of most securities offenses, environmental offenses, drug offenses, or most of the other property crimes outlawed in other titles of the Code. H.R. 845 would have required restitution for all federal offenses that result in qualified losses to qualified victims.

Existing law portrays the restitution to be awarded in the case of qualifying offenses involving the loss or destruction of property in one way (return and/or payment of the lost value) and that to be awarded in the case of qualifying offenses involving physical injuries in another (medical expenses, costs of rehabilitation, funeral costs when the victim has been killed, and the victims' expenses relating to their participation in the investigation and prosecution of the qualifying offense). H.R. 845 would have treated the losses covered by restitution in much the same way it treats the definition of victim and inventory of qualifying offenses. It would have adopted some features of existing law and changed others. It would have carried forward the language under which restitution orders must include "in the case of an offense resulting in the death of the victim, an amount equal to the cost of necessary funeral and related services." It used the same language to describe restitution for lost income, medical expenses, and the cost of rehabilitation—with a difference. Existing law makes them a matter of mandatory restitution only with respect to offenses involving physical injuries. H.R. 845 would have required restitution regardless of the nature of the crime. Its vindication expenses clause would have run parallel to existing law, but mades specific allowance to cover the costs of attorneys other than those employed by the government.

S. 973 / H.R. 4110 (Discretionary Restitution)

S. 973 / H.R. 4110's proposed expansion of authority to order restitution was far more selective than that of H.R. 845. It would have amended Section 3663 to permit a federal court to order restitution following conviction for certain (1) Federal Water Pollution Control Act offenses; (2) Marine Protection, Research, and Sanctuaries Act offenses; (3) Act to Prevent Pollution from Ships offenses; (4) Safe Drinking Water Act offenses; (5) Solid Waste Disposal Act offenses; and (6) Clean Air Act offenses. S. 973 / H.R. 4110 amends the discretionary and mandatory restitution provisions of Sections 3663 and 3663A to permit victims to recover related attorney fees other than those of government attorneys.

Procedural Adjustments (H.R. 845)

The procedure for issuing a restitution order is laid out in 18 U.S.C. 3664. Following conviction, a probation officer conducts an investigation, collects information from the prosecutor, victims and defendant, and prepares a report for the court which is shared with the parties. The court conducts a hearing to resolve any questions relating to whether a particular individual is a victim entitled to restitution, whether a particular loss is one that qualifies for restitution, and the

specifics of the defendant's ability to pay. Court-issued restitution orders may direct the defendant to pay in a lump sum, in installments, in-kind or in some combination of the three. Until full restitution is made, the court may modify its order to reflect any change in the defendant's financial circumstances. The Justice Department contends that the role which the statute assigns to the courts impedes effective collection of restitution and has recommended amendments.

H.R. 845's amendments would have permitted the court to establish a payment schedule, but would have allowed the government to formulate one if the court did not. Moreover, the fact that the court had established a payment schedule would not have prevented the government from supplementing the effort with other collection measures taken without the need to seek the sentencing court's approval.

Procedural Adjustments (S. 973 / H.R. 4110)

Like H.R. 845, more than a few of S. 973 / H.R. 4110's amendments would have been crafted to provide alternatives to direct involvement of the sentencing court in restitution enforcement. The approach of S. 973 / H.R. 4110 to judicial scheduling of installment payments is much like of H.R. 845. The Bureau of Prisons has a program designed to ensure that federal inmates meet their financial responsibilities which requires them to have a financial plan to meet those obligations from the money they earn from prison work assignments if nothing else. The Justice Department's *Analysis* claims that appellate decisions requiring sentencing courts to maintain control over installment payment plans effectively prohibits the BOP from enforcing final restitution orders through its long established program.

Under existing law, a prosecutor's options when enforcing a restitution order include the inmate financial responsibility program, liens against the defendant's property, and garnishment of the defendant's wages or amounts in his pension plan. A court, however, may stay execution of a restitution order pending appeal. S. 973 / H.R. 4110 would have dictated that any stay pending appeal that curtails a prosecutor's ability to enforce a restitution order in the interim must be for good cause stated on the record. It also would have seemed to narrow the court's discretion over the protective orders that may accompany a stay. In addition, S. 973 / H.R. 4110 would have stated that the issuance of such mandatory protective measures should not be construed as a limitation on the authority of prosecutors to continue their restitution-related investigations and enforcement efforts.

Under the Federal Rules of Criminal Procedure, the probation officer's sentencing report may not include certain medical, confidential or informant-related material. The Rules also forbid disclosing matters occurring before a federal grand jury, subject to certain exceptions, some of which require court approval and some of which do not. Various other statutes prohibit the disclosure of financial information but recognize an exception for information provided under grand jury subpoena. Those statutes may be thought to proscribe disclosure beyond the grand jury absent some additional grant of authority. There are no statutory provisions which specifically proscribe Bureau of Prisons officials from disclosing to prosecutors information relating to an inmate's ability to pay restitution. S. 973 / H.R. 4110 would have granted the United States Attorneys access without court approval to financial information on the defendant held by a grand jury, the Probation Office, or the Bureau of Prisons in order to enforce restitution orders. The Justice Department has explained that the change is necessary because some district courts insist upon court approval before allowing prosecutors to examine probation officer reports on a defendant's financial condition. They do not explain why explicit authority for access to grand

jury material and Bureau of Prison records is necessary or why court approval constitutes an obstacle.

S. 973 / H.R. 4110 had several provisions designed to prevent the dissipation of assets following the issuance of the original restitution order. For instance, it would have insisted that every restitution order include an instruction that the defendant was to refrain from any action that would conceal or dissipate his assets. The court ordering restitution could have directed the defendant to bring crime-related property within the jurisdiction of the court. At any time, it could have entered a protective order to ensure the availability of assets for restitution purposes. And it could have crafted or modified a restitution order to reflect the fact that the defendant had concealed or dissipated assets.

H.R. 845 / S. 973 / H.R. 4110: Section 3664A (Asset Preservation)

H.R. 845 and S. 973 / H.R. 4110 would have added virtually identical asset preservation components to the restitution procedure in the form of a new 18 U.S.C. 3664A. The asset preservation features of Section 3664A contemplated judicial asset freeze orders and other protective measures before conviction, both before and after indictment. The procedure drew upon, and in part was modeled after, the protective order features of the criminal forfeiture section of the Controlled Substances Act. The title to forfeitable property, however, vests in the United States when the confiscation-triggering offense is committed. Restitution has no comparable feature. At the time of the passage of the Controlled Substance Act, property used to facilitate the commission of a forfeiture-triggering offense could be confiscated in a civil proceeding upon a showing of probable cause. Restitution requires conviction of the property owner; civil forfeiture does not.

On the other hand, proponents might have pointed out that some of the differences between forfeiture and restitution argue for greater protective tools in the case of restitution. The government is the beneficiary of confiscation; the victims of crime are the beneficiaries of restitution. A victim is likely to feel the loss of restitution more sharply than the government the loss of forfeitable property. As for the availability of a civil forfeiture equivalent, proponents might note that under existing law, authorities may use a search warrant to seize the fruits of crime based on the probable cause. The protective orders envisioned in H.R. 845 and S. 973 / H.R. 4110 either would have involved property traceable to a particular offense or could have only been issued in the interest of justice. They would not have been administrative commands, but court-issued protective measures complete with the prospect of a judicial hearing to contest their issuance.

The task of assessing the relative strengths and weaknesses of proposed Section 3664A was made more complicated by its occasional want of clarity. Notwithstanding the Justice Department's guidance, the text was sometimes perplexing. It seems fairly certain that the bills meant to establish the following procedure in the case of post-indictment orders. Courts would have been authorized to issue an ex parte protective order upon a probable cause showing that (1) the defendant had been indicted for an offense for which restitution might be ordered, (2) that the offense or offenses had resulted in qualified losses to qualified victims of an approximate amount for which the defendant would be obligated to make restitution if convicted of the offense or offenses charged, (3) that the value of the property to be restrained or the amount of the bond to

be posted did not greatly exceed the approximate amount of restitution that might be awarded, and (4) (perhaps) that the property was traceable to the offense charged.

A defendant would have been entitled to a hearing upon a prima facie showing that the value of property restrained or the amount of the bond greatly exceeded the amount of the restitution that could be ordered; or that the law did not authorize restitution for the offense, victim, or losses claimed in the order; or (if court relied on the traceable property prong of proposed Section 3664A(a)(1)(A)) that the property restrained was not traceable to the offense charged. Even then, a hearing could have been granted only if the defendant could also show by a preponderance of the evidence that the order had or would deprive him of defense counsel of his choice or deprive him or his family of the necessities of life. If the defendant had been able to meet this burden – or whatever reduced burden due process demands – he would have been entitled to a hearing at which the government may contest his challenge. After which, the court could modify its protective order should it find either (1) a want of probable cause to believe that the restrained property or at least all of it would be needed to satisfy any restitution order under the facts of the case or (2) (if the "traceable property" authority was relied upon) a want of probable cause to believe that the restrained property, or some of it, was traceable to the offense charged, or (3)(perhaps or at least to the extent due process requires) that a failure to modify the order would deny the defendant defense counsel of his choice or would impose an undue hardship upon the defendant or his family. It seems likely that is what S. 973 / H.R. 4110 and H.R. 845 meant; it is not literally what they said.

As for preindictment protective orders, the applications and orders would have been governed by 21 U.S.C. 853(e) and proposed Section 3664A. Prior to indictment, Section 853(e) requires that the property owner be given notice and an opportunity for a hearing, unless the government establishes by probable cause that the property will become unavailable if prior notice is given. The bills would seem to have made the initial issuance of the restraining order ex parte in all cases. Such ex parte restraining orders would have been temporary, good for only ten days unless extended for cause. Absent an indictment, the restraining order would only have been good for ninety days, again unless extended for cause. Section 3664A would not have described the post-restraint hearing to be held in preindictment cases. Section 853(e)(1)(B) indicates that upon application of the United States, the court may enter protective orders to preserve the availability of property that the government asserts is subject to criminal forfeiture prior to indictment if it finds the government is likely to prevail on the issue and the government's need for availability outweighs any hardship of the property owner. Third parties may move for modification of a restraining order on the grounds of hardship and less onerous alternatives. At least on the face of things, third parties may not move to have a restraining order modified on the grounds that the property restrained belongs to them rather than to the defendant, although they may do so at the conclusion of the criminal case.

H.R. 845 / S. 973 / H.R. 4110 (Anti-Crime Injunction Expansion)

Traditionally, the federal courts will not enjoin the commission of a crime unless expressly authorized to do so by statute. As part of the Comprehensive Crime Control Act of 1984, Congress enacted 18 U.S.C. 1345 which authorized the federal courts to enjoin the commission of various fraud offenses and to freeze property derived from some of these offenses, namely, banking law or health care offenses. H.R. 845 and S. 973 / H.R. 4110 would each have enlarged

Section 1345 to authorize both injunctions and freeze orders relating to any federal offenses for which restitution might be ordered. Their reach would have been different since their view of offenses for which restitution may be ordered was different. For H.R. 845, it would have been any federal offense which proximately causes another pecuniary loss. For S. 973 / H.R. 4110, it would have been the mandatory restitution crimes, that is, any federal crime of violence, property damage, fraud, and product tampering, as well as the discretionary restitution crimes, that is, any other crime proscribed in Title18, the various aircraft safety and drug offenses, and the environmental crimes that S. 973 / H.R. 4110 would have added to the restitution list. Given the wide-ranging freeze orders that the bills would have made available elsewhere, the freeze order component of their amendment of Section 1345 may have been unnecessary.

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