SOME RULES OF RESTITUTION AND REPARATION

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Defendants who are convicted by verdict or guilty plea of criminal offenses (felonies, misdemeanors and violations) resulting in financial harm/loss (e.g. stolen money, goods or identity, damaged property), are often ordered by courts to pay restitution or make reparation to their victims as part of the sentence imposed upon them.

Whenever possible, courts will make every effort to ensure that the defendant takes steps to "make the victims whole" (financially) by paying them back for the actual out-of-pocket loss that they have sustained as a result of the crime. Judges generally take restitution very seriously, and non-payment (especially where the defendant promises to pay as part of a beneficial plea bargain and sentence commitment), can result in substantial jail time upon re-sentence (e.g. after a violation of probation for non-payment).

Penal Law 60.27(1) states that among the available authorized dispositions, the court shall consider restitution and reparation to the victim of the crime, and may require it as part of the sentence imposed. "Victims" include the victim of the instant offense, his or her representative (Exec. Law 621[6]), his/her estate if he/she has since died, or a person whose identity was assumed or whose personal identifying information was used in violation of PL 190.78, .79 or .80; or any person who has suffered a financial loss as a result of the defendant's actions involving identity theft (including also PL 190.82 and .83); a Good Samaritan (Exec. Law 621); a governmental agency that has received an application for or has provided financial compensation to the victim; an owner or lawful producer of a master recording (or trade association representing them) that has suffered an injury from unauthorized recording (i.e. bootlegging) of their recording in violation of PL Art 275.00. (PL 60.27[4][b]).

For purposes of restitution, “offense” is broadly defined to include the offense for which the defendant was convicted, any other offense that is part of the same criminal transaction or that is contained in any other accusatory instrument disposed of by any guilty plea by the defendant to an offense (PL 60.27[4][a]). So, if a defendant who is charged with multiple crimes in one accusatory instrument or in multiple accusatory instruments filed in the same or different jurisdictions, enters a guilty plea to one or more counts under one instrument (or under different accusatory instruments), in satisfaction of all the charges, he/she could, as part of a plea agreement, be ordered to pay restitution with respect to charges that were dismissed pursuant to that global disposition.

Before imposing sentence, the court must consider any victim impact statement (VIS) that is usually submitted with a pre-sentence report (PSR) , and allow the District Attorney (DA), to be heard (as well as defense counsel and the defendant), and where the record supports it, (and unless the interests of justice dictate otherwise), require the defendant to make restitution of the fruits of his/her offense or reparation for the actual out-of pocket loss caused thereby (PL 60.27[1]).

With respect to identity theft crimes, the defendant may be required to repay the victim for costs incurred due to any adverse action (e.g. unauthorized charges, credit card cancellation, penalties imposed, restoration of damaged credit rating), taken against the victim. If the court declines to order restitution, it must state its reasons on the record.

When the court requires restitution, it must determine a sum that accurately reflects the dollar amount of the fruits of the crime and actual loss sustained by the victim. (PL 60.27[2]). If the defendant was convicted after trial, the record may already contain a detailed accounting of the loss and the court can rely on that evidence (along with any supplemental information contained in the PSR and VIS), in arriving at a determination. In the case of a guilty plea, however, the court may or may not have sufficient information from the colloquy (or the DA’s offer of proof presented in connection therewith), and if not, (or if the defendant so requests), the court must conduct a restitution hearing in accordance with CPL 400.30.

In People v Consalvo 89 NY2d 140 (1989), the Court of Appeals held that the lower court deprived the defendant, (a doctor who pled guilty to Grand Larceny related to Medicaid over- billing) of his right to be sentenced as provided by law (citing People v Fuller 57 NY2d 152 [1982]), when it

refused to afford his new attorneys (retained post plea), a hearing to challenge the People's evidence offered at the time of plea (affidavit of a statistician) in support of a claimed restitution amount of $571,552.37.

The Court noted that the People's figure was based, in large measure, on unrecorded statements made during plea negotiations, and the defendant admitted to a lesser amount in over-billings. Consequently, a hearing should have been held to ascertain the correct amount of restitution.

Under CPL 400.30(1) (which pertains to fines but also applies to restitution), when the court determines that a hearing is warranted to determine the defendant's gain from his/her crime, the order for it must be filed with the court clerk who must set a date within 10 days and notify the parties. (CPL 400.30[2]). At the hearing, the defendant must be afforded an opportunity to make any statement regarding the amount of his/her gain which the court may (assuming it is supported by record evidence), accept as a basis for its determination. If the defendant remains silent or the court does not accept his/her statement, it may proceed with the hearing.(CPL 400.30[3]).

At the hearing, the People bear the burden of proving the amount of restitution due and owing by a preponderance of the evidence. Any relevant evidence that is not legally privileged is admissible and will not be precluded by any other evidentiary rules (e.g. hearsay, best evidence etc).

Although the People must advise the court "at or before the time of sentencing" (PL 60.27[1]), that the victim seeks restitution, (including the extent of claimed loss/damage and amount sought), in the case of a guilty plea, the court cannot just spring it on the defendant at sentencing. (See People v Travis 64 AD3d 808 [3d dep't 2009). That is because restitution is a direct consequence of the plea and, as such, must be mentioned by the court at that time (rather than summarily imposed at sentence), lest the plea later be overturned as involuntarily and unknowingly made. (See People v Pett 74 AD3d 1891 [4th dep't [2010]: error to impose restitution which was not part of plea bargain without first affording defendant an opportunity to withdraw plea).

As a practical matter, when a plea bargain is reached in such cases, the fact (but not necessarily the final amount) of restitution will be a known (and undoubtedly significant) part of any proposed resolution. So, the defendant should be entering the plea with his/her eyes wide open.

In People V Travis supra, the defendant pled guilty to Grand Larceny 3d degree with the understanding that restitution (in an amount to be determined), would be part of the disposition. At sentencing, however, the corporate defendant did not send a representative so the court sentenced the defendant (a second felony offender), to an indeterminate prison term of three-to-six years and "left open" the restitution question for a couple of weeks. The court then unilaterally entered a restitution order for $21,000.00. The defendant appealed.

The Appellate Division decided to consider the appeal despite the defendant's waiver of that right because the amount of restitution had not been mentioned in the plea agreement. (People v McClean 59 AD3d 859 [3d dep't 2009]). The court then remitted the case to the lower court for a hearing since the post-sentence restitution order not only deprived the defendant of the right to contest the amount but was only based on conclusory correspondence from the corporation's counsel.

It should be noted, however, that in order to contest a restitution order on appeal despite a waiver of appeal, the defendant should object to it at the time it is imposed, request a hearing (if only the amount is disputed), or move to withdraw the plea. (see People v Hulett 106 AD3d 1330 [3d dep't 2013]). Of course, in Travis Supra, the defendant never got the chance since the court simply added restitution after the fact.

Defendants who wish to avoid prison time may be all to eager to promise restitution in exchange for a favorable plea for that very reason. Counsel should be careful, however, not to allow the client to make promises that he/she may not be able to keep because, while a defendant's ability to pay may or may not have any bearing on whether the court orders restitution (see People v Jackson 23 AD3d 1057 [4th dep't 2005]), he/she may be setting him/herself up for failure (and likely jail time), for lack of any real ability to make good on his/her word.

In People v Felman141 AD3d 889 (3d dep't 1988), the defendant, who ripped off his employer (sea food restaurant and its supplier), by charging substantial amounts of product to the employer and then selling it on the side, was deemed to be tied to the terms of his bargained-for plea to Grand Larceny which included an agreement to pay $50,000.00 in restitution.

According to the plea terms, if the defendant paid full restitution by sentencing, he would be sentenced as a second-felony offender to a minimum indeterminate term of one and 1/2 to three

years in prison. If not, the court said it could be up to the maximum of 3 and 1/2 to seven years which he wound up getting for reneging on restitution.

On appeal, the defendant argued that the maximum sentence was harsh and excessive, especially because he stole to support his drug addiction. Unmoved, the Appellate Division noted that the defendant was sentenced precisely within the perameters of his negotiated plea deal, and the amount that he agreed to repay was actually much less than the actual value of the stolen seafood (over 80 thousand dollars worth). Having received the benefit of his bargain (the prospect of a minimum sentence if he held up his end), the court held that he should be bound to its terms. (see also People v Nachem 2011 NY Slip Op. 08193 [1st dep't 11/15/11]).

A similar conclusion was reached in People v Connell 188 AD2d 825 (3d dep't 1992) where the court informed the defendant at the time of his guilty plea to eight counts of a 46 count indictment that payment of restitution before sentencing could serve to reduce his exposure below the maximum of five- to-fifteen years indeterminate. The defendant made some restitution and received some consideration in the form of four and 1/3 to 12 years in prison.

The court also held that a sentence that is tailored to payment of restitution did not not violate equal protection. (But see Bearden v Georgia 46 US 660 [1983]): if a state determines that restitution is an appropriate remedy for a crime, it may not thereafter imprison him solely because he lacked the resources to pay it. The state may not use poverty as the sole basis to imprison someone who has made good faith efforts to pay. Therefore, a sentencing court cannot, for example, revoke probation for failure to make restitution absent evidence that defendant was responsible for non-payment (i.e. willful disregard or refusal), or that alternative sanctions were inadequate to meet state's interests in punishment and deterrence.

Often times, with theft-related crimes, whether straight-up larceny or surreptitious stealing (e.g. embezzlement), if defendants have little or no criminal history and at least some ability to make restitution, courts may sentence the offender to probation (sometimes along with a short period of jail time up to six months for a felony or 60 days for a misdemeanor), and require that restitution be paid in periodic installments to a designated authority (typically, the Probation Department, [CPL 420.10]), until, ideally, the full amount has been paid.

Penal Law 65.10(g) states in part, that when a court requires restitution as a condition of probation, it should impose it “in an amount (that the defendant) can afford to pay, ...and..shall fix the amount thereof, the manner of performance, (and).... specifically state the date when restitution is to be paid in prior to the expiration of ...probation...”

In some cases, where the restitution amount is high and the defendant’s income is low or virtually nil, the full amount of restitution will not have been paid by the end of the probationary term (five years for a felony and three years for a misdemeanor). While probation officers can (and often do) file a violation of probation (VOP) on a account of no-or-slow payment, thereby staying the probationary period, where it appears that full payment will never be made, the court can, if the VOP is sustained, re-sentence the defendant to a period of imprisonment (up to the maximum for the crime of conviction) in the event of willful nonpayment without good excuse, or, if warranted, simply discharge the defendant and direct the DA to file a civil judgment with the County Clerk for the balance due and owing. (CPLR 5016-5018).

Counsel should be aware that CPL 420.10(3) authorizes a sentencing court, when imposing restitution, to provide that if the defendant fails to pay as required, he/she can be imprisoned until restitution has been paid (up to a year for a felony, four months for a class A misdemeanor, 30 days for a Class B misdemeanor and 15 days for a violation). Such provision can even be added at a later time (if the defendant is personally present), but unless the defendant has access to funds or family/friends with resources, it would seem that incarceration would provide the incentive but hardly the means or opportunity to make restitution.

The intended recipients of restitution are supposed to be kept informed when restitution is ordered (including the amounts to be paid and agency designated to collect and remit it),(CPL 420.10[2]), (or if the probationer seeks a modification of the terms of payment), and it should be noted that partial payment of restitution does not preclude a civil action for any unpaid amount (PL 60.27[6]). Of course, if the defendant hasn’t paid by the end of probation, the likelihood of recovering anything in a civil action may be slim, but at least, a judgment can be obtained and perhaps satisfied if the defendant’s circumstances change for the better.

When restitution is ordered and it is in an amount that the defendant can reasonably pay over time, counsel should consider requesting that it be paid directly to the victim (or to his designated

representative in order to avoid the 5% (as high as 10%) administrative surcharge that the Probation Department imposes for collection and remission of restitution (CPL 420.10).

The duty to determine the amount of restitution and to set the terms of payment pursuant to a probationary sentence belong to the court alone (PL60.27[1], and while the court can rely on the Probation Department to make preliminary findings with respect to restitution, it cannot delegate the ultimate authority to the department. In People v Fuller 57 NY2d 152 (1982), the Court, in this Welfare Fraud/Grand Larceny case, held that the trial court erred when it sentenced the defendant to pay restitution "in an amount to be set by the Probation Department" because it deprived the defendant of the essential right to be sentenced as provided by law. (Citing People v Craig 295 NY 116 [1946]).

Similarly, the court cannot delegate the authority to conduct a restitution hearing to its law clerk. Rather, the court can utilize the clerk to make and communicate preliminary findings with respect to the restitution amount, but the final, on-the-record determination must be made by the court. (People v Bunnell 59 AD3d 942 [4th dep't 2009).

As a practical matter, when courts and prosecutors manage to avoid a trial by virtue of a guilty plea, the prospect of conducting a restitution hearing is not particularly appealing. This may be especially so in a complicated white collar case or where the value of the property must be established by proof of market value (i.e. the amount that the defendant would have had to pay had he purchased the item[s] in the relevant market), or replacement cost [see PL 155.20]). This can be a tricky business if the property has depreciated in value and even more so if the property is so rare or unique as to appreciate in value. In any event, counsel may be able to use this reality as an opportunity to negotiate a favorable compromise on the amount of restitution to be paid. Whatever the agreement, however, it should reasonably approximate the victim's actual out-of-pocket loss.

Counsel should also be aware the law enforcement agencies can seek restitution for funds expended in undercover drug buys (PL 60.27[9]), and municipalities can request restitution for the costs that are reasonably related to the cleaning and rehabilitation of property damaged in an arson committed by the defendant (PL 60.27[10]. There are also special restitution provisions pertaining to defendants convicted of harming an assistance animal (PL 60.27 [11]; of stealing timber (subs. 12);) and falsely reporting an incident (subd.13).

As is evident, the prospect of paying restitution can be a valuable tool for judges, prosecutors and defense counsel in efforts to resolve cases in a manner that gives the victim some semblance of satisfaction and more importantly, from counsel's perspective, an opportunity to obtain a favorable plea resolution that involves little or no jail time for the client as part of the sentence. How long the client's freedom lasts may well depend in large measure on his/her ability and willingness to try and make good on the loss/harm that he/she caused. If that is not realistic, the defendant may be better off going to trial or taking his/her lumps on the front end of the best plea offer available rather than prolonging the inevitable with hollow promises of payment that he/she can never fulfill.