

### **Victim Law Criminal Court Motion Practice: Considerations When Seeking Attorney Fees in Restitution**

Each legal system that victims may move through in the aftermath of their victimization is complex, and victims' rights are not automatically protected. Qualified legal assistance can help victims navigate these systems, and ensure that their rights are protected. But there are myriad challenges that victims face in securing legal assistance, including that no- and low-cost expert legal services for victims are in short supply. When a victim secures legal representation for a fee, these costs are properly considered losses caused by the crime and therefore restitution for attorney fees incurred will often be appropriate.

Restitution awards that include attorney fees serve the “primary and overarching goal” of restitution “to fully compensate these victims for their losses and to restore these victims to their original state of well-being.”<sup>1</sup> Ordering restitution for such losses helps to restore the victim, support sustainability of critical nonprofit legal service providers, and ensure that defendants “confront concretely, and take responsibility for, the *entire* harm resulting from their acts.”<sup>2</sup>

To date few victims have sought recovery of legal service costs in restitution despite the propriety of such requests. This reticence may be due to the newness of the practice, the perceived or actual reluctance of some courts to award these costs in restitution, or the commitment of nonprofits and pro bono attorneys to not charge victims. But the more that victims seek to recover *all* losses in restitution, the more that restitution can fulfill its purposes of making the victim financially whole and having defendants take responsibility for the entire harm caused by the crime.<sup>3</sup> To aid practitioners in this effort, the following is a non-exhaustive list of considerations when seeking restitution on behalf of victims who have incurred attorney fees as a result of the crime:

1. Look at the language of the restitution statutes in your jurisdiction:
  - ✓ Is there a provision that explicitly allows attorney fees?<sup>4</sup>
  - ✓ Is there a provision that explicitly precludes attorney fees?<sup>5</sup>
2. If the restitution statutes in your jurisdiction do not explicitly address recovery of attorney fees, consider whether the language allows for broad financial recovery of economic losses that the victim incurred as a result of defendant's criminal conduct such that there is a colorable argument for attorney fees:
  - ✓ Do the restitution statutes and/or the crime victims' rights laws support restitution for attorney fees?<sup>6</sup>
  - ✓ Does case law support restitution for attorney fees?<sup>7</sup>

- ✓ If negative case law exists, do current crime victims' rights laws provide a basis for distinguishing or challenging that case law?<sup>8</sup>
- 3. Be prepared to argue that the court should liberally construe any necessity or reasonableness requirement in your jurisdiction's restitution statutes in favor of awarding full restitution, including attorney fees, to the victim.<sup>9</sup>

Do not limit the analysis to recovery of attorney fees directly associated with protecting victims' rights during criminal investigation and prosecution; consider whether your jurisdiction has restitution statutes, crime victims' rights laws and/or case law supporting an award of attorney fees in restitution for fees incurred by the victim in related legal matters and proceedings.<sup>10</sup>

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<sup>1</sup> *United States v. Gordon*, 393 F.3d 1044, 1053 (9th Cir. 2004).

<sup>2</sup> *People v. Kim*, 694 N.E. 2d 421, 423 (N.Y. 1998).

<sup>3</sup> For more information about restitution generally, see *Fundamentals of Victims' Rights: A Summary of 12 Common Victims' Rights*, NCVLI Victim Law Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), Nov. 2011, available at <http://law.lclark.edu/live/files/11823-fundamentals-of-victims-rights-a-summary-of-12> (describing and citing to restitution provisions); *Fundamentals of Victims' Rights: A Victim's Right to Restitution*, NCVLI Victim Law Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), Nov. 2011, available at <https://law.lclark.edu/live/files/11821-fundamentals-of-victims-rights-a-victims-right-to> (same). For a discussion of causation issues in restitution, see *Ensuring Full Restitution for Crime Victims: Polyvictims as a Case Study in Overcoming Causation Challenges*, NCVLI Victim Law Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), July 2013, available at <http://law.lclark.edu/live/files/15101-ensuring-full-restitution-for-crime-victims>. See also *Thinking Broadly About Restitution*, NCVLI Rights Enforcement Toolkit, available at <http://law.lclark.edu/live/news/22671-post-trial?preview=1>.

<sup>4</sup> See, e.g., Cal. Penal Code § 1202.4(a)(1) (“[A] victim of crime who incurs an economic loss as a result of the commission of a crime shall receive restitution directly from a defendant convicted of that crime.”), (f)(3)(H) (“[T]he restitution order . . . shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct, including . . . [a]ctual and reasonable attorney's fees and other costs of collection accrued by a private entity on behalf of the victim.”) (emphasis added); D.C. Code § 22-3227.04 (“When a person is convicted of identity theft, the court may, in addition to any other applicable penalty, order restitution for the full amount of financial injury.”) and D.C. Code § 22-3227.01(1)(A) (“Financial injury” [for restitution purposes] means all monetary costs . . . incurred by a person as a result of another person obtaining, creating, possessing, or using that person's personal identifying information in violation of this subchapter, including, but not limited to . . . [t]he costs of clearing the person's credit rating, credit history, criminal record, or any other official record, including attorney fees[.]”) (emphasis added).

<sup>5</sup> If the answer is “yes,” and your crime victims' rights laws provide the victims with a right to full restitution, determine whether you can make a colorable argument that the statutory exclusion is invalid.

<sup>6</sup> See, e.g., Alaska Stat. Ann. § 12.55.045(a) (“In determining the amount and method of payment of restitution or compensation, the court shall take into account the (1) public policy that favors requiring criminals to compensate for damages and injury, including loss of income, to their victims; and (2) financial burden placed on the victim and those who provide services to the victim . . . as a result of the criminal conduct of the defendant.”); Mont. Code Ann. § 46-18-201(5) (“[I]f . . . the sentencing judge finds that a victim . . . has sustained a pecuniary loss, the sentencing judge shall . . . require payment of full restitution to the victim[.]”) (emphasis added); Tex. Crim. Proc. Code Ann. § art. 42.037(b)(2)(A) (“If the offense results in personal injury to a victim, the court may order the defendant to make restitution to . . . the victim for any expenses incurred by the victim as a result of the offense[.]”) (emphasis added).

<sup>7</sup> See, e.g., *United States v. Battista*, 575 F.3d 226, 233 (2d Cir. 2009) (concluding that “other expenses” under the Victim and Witness Protection Act's restitution provision includes attorney fees; and holding that the trial court did not err in awarding restitution for

attorney fees incurred by the victim while participating in the investigation and prosecution of defendant's offense); *United States v. Amato*, 540 F.3d 153, 159 (2d Cir. 2008) (concluding that "other expenses" under the Mandatory Victims Restitution Act includes attorney fees and accounting costs; and holding that the trial court did not err in ordering defendants to pay restitution for the attorney fees and accounting costs incurred by the victim while participating in the investigation and prosecution of defendants' fraud); *People v. Wright*, 18 P.3d 816, 817 (Colo. App. 2000) (concluding that the trial court properly ordered defendant to pay restitution for the attorney fees incurred by the victim in a separate replevin action to recover the victim's collateral because the expenses "were the direct result of defendant's fraudulent act of selling the collateral"; and reversing the order on other grounds), *superseded by statute on another ground as stated in People v. Rockne*, 315 P.3d 172 (Colo. App. 2012); *People v. Phillips*, 732 P.2d 1226, 1230 (Colo. App. 1999) (concluding that the trial court properly awarded restitution to the victim-insurance company for its adjustment expenses, investigation costs and attorney fees incurred as a result of the crime under former Colo. Rev. Stat. Ann. § 16-11-204.5); *State v. Pless*, 646 S.E.2d 202, 204 (Ga. 2007) (concluding that unless the statute "expressly prohibited" the award of attorney fees as a condition of probation, the trial court's broad powers to impose conditions of probation under OCGA § 42-8-35 includes the authority to order defendant to pay "restitution" to the county to reimburse it for defendant's court-appointed attorney's fees); *People v. Oshana*, 965 N.E. 2d 1174, 1192-94 (Ill. App. Ct. 2012) (addressing the scope of former workers' compensation fraud statute that provided offenders "'shall' be ordered to pay 'complete restitution' to any person or entity that was defrauded"; and affirming the order of restitution that included reimbursement for attorney fees); *State v. Vick*, No. A06-1782, 2008 WL 2415266, at \*6-7 (Minn. Ct. App. June 17, 2008) (affirming the order directing defendant, convicted of aiding and abetting offenses arising out of a mortgage fraud scheme, to pay restitution for the attorney fees the victim incurred to address the fraudulent mortgages on her properties); *State v. Hinds*, No. C8-00-1692, 2001 WL 881294, \*3 (Minn. Ct. App. Aug. 7, 2001) (affirming the restitution order to the extent that it awarded the financial fraud victims restitution for attorney fees incurred in negotiating with creditors); *State v. Cerasani*, 316 P.3d 819, 822-23 (Mont. 2014) (observing that "Montana law broadly provides that a crime victim is entitled to 'full' restitution from an offender for economic loss"; and affirming the restitution order to the extent that it awarded the victims restitution for attorney fees incurred to obtain legal advice about the tax consequences of defendant's crime); *People v. Young*, 618 N.Y.S.2d 983, 987 (N.Y. Sup. Ct. 1994) (concluding that attorney fees incurred by the victim during litigation over defense subpoenas for the victim's records in the criminal case "reflect 'actual out-of-pocket loss to the victim caused by the offense'" and are recoverable in restitution); *Pfeiffer v. State*, No. 04-07-00462-CR, 2008 WL 3056837, at \*3 (Tex. Ct. App. Aug. 6, 2008) (affirming the order awarding the victim restitution for attorney fees and costs incurred to address the property damage caused by defendant).

<sup>8</sup> See, e.g., *People v. Pierce*, 184 Cal. Rptr. 3d 607, 611 n.2 (Cal. Ct. App. 2015) (observing that the restitution statute, Penal Code section 1202.4(f), "permits a trial court to provide less than full restitution where it provides 'compelling and extraordinary reasons' for doing so" and "question[ing], whether this discretion statutorily afforded the court is constitutionally sound in light of the amendment of article I, section 28, subdivision (b) of the California Constitution effectuated by the voters' approval of Proposition 9, the Victims' Bill of Rights Act of 2008: Marsy's Law"). Compare *People v. Millard*, 95 Cal. Rptr. 3d 751, 772-73 (Cal. Ct. App. 2009) (pre-Marsy's Law) (concluding that the trial court should have applied the "Lodestar method"—i.e., multiply the number of hours reasonably expended by a reasonable hourly rate—to determine whether the amount of attorney fees at issue was reasonable; and reversing order awarding restitution for the one-third contingency fee the victim paid to his attorney to settle the case with the insurance company), with *People v. Taylor*, 128 Cal. Rptr. 3d 399, 402-04 (Cal. Ct. App. 2011) (post-Marsy's Law) (explaining that "[a] victim's restitution right is to be broadly and liberally construed"; finding that the trial court did not err in ordering restitution for the one-third contingency fee that the victim paid to his attorney to settle his civil case with the insurance company; and declining to follow *People v. Millard* on the basis that adopting *Millard's* rule requiring application of the Lodestar method would, *inter alia*, "overlook[] the fundamental purpose of the statutory and constitutional right to . . . 'full restitution' . . . [s]ince a victim will likely have to pay a contingent fee in any personal injury action resulting from the crime").

<sup>9</sup> See, e.g., 18 U.S.C. § 3663A(b)(4) (Mandatory Victims Restitution Act or MVRA) (providing that "in any case, [the order of restitution may] reimburse the victim for lost income and *necessary* child care, transportation, and *other expenses* incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense") (emphasis added); Cal. Penal Code § 1202.4(f)(3)(H) (providing that "the restitution order . . . shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct, including . . . [a]ctual and *reasonable* attorney's fees . . .") (emphasis added); *United States v. Bahel*, 662 F.3d 610, 647-48 (2d Cir.

2011) (affirming order of restitution that includes attorney fees for the corporate victim’s outside counsel; rejecting defendant’s argument that the MVRA’s “necessary” expenses requirement precludes the award when the corporate victim had in-house counsel; and reasoning that, *inter alia*, “nothing in our case law limits restitution to cost of in-house counsel” and no one has contended that the fees themselves were unreasonable); *Taylor*, 128 Cal. Rptr. 3d at 402-04 (declining to follow *People v. Millard* on the basis that adopting *Millard*’s rule requiring application of the Lodestar method to determine the reasonableness of the attorney fees paid by a victim would, *inter alia*, “overlook[] the fundamental purpose of the statutory and constitutional right to . . . ‘full restitution’”).

<sup>10</sup> See, e.g., *People v. Howell*, No. H041544, 2015 WL 6671914, at \*4 (Cal. Ct. App. Nov. 2, 2015) (affirming trial court’s restitution award to the victim for attorney’s fees incurred in obtaining a restraining order against defendant in case in which defendant pleaded no contest to stalking in violation of a restraining order, because even though “[t]his economic loss is not enumerated in section 1202.4, it was a direct a result of defendant’s constant threats and harassment”); *Wright*, 18 P.3d at 817 (concluding that the trial court properly ordered defendant to pay restitution for the attorney fees incurred by the victim in a separate replevin action to recover the victim’s collateral because the expenses “were the direct result of defendant’s fraudulent act of selling the collateral”); *Arling v. State*, 559 So. 2d 1274, 1275 (Fl. Dist. Ct. App. 1990) (affirming restitution award to the victim for attorney fees associated with an interpleader action to resolve competing rights to stolen property, because even though “the sheriff’s decision to file the interpleader action may be one of several concurring causes of the loss, the interpleader action would never have occurred but for [defendant’s] dealing in stolen property[,]” and “[i]t is reasonably foreseeable to a person who deals in stolen property that the act of selling stolen property may result in a third party filing litigation to determine the rightful owner of that property”); *State v. Alcalá*, 348 P.3d 570, 575 (Kan. 2015) (affirming trial court’s restitution order to the murder victim’s mother, which included attorney fees she incurred in the CINC (child in need of care) proceedings, in another separate legal action to adopt her grandchildren, and in connection with the probate of the victim’s estate as “[t]he evidence established some causal connection between the crime and the attorney fees because, but for the murder, there would have been no CINC or adoption cases”); *State v. Anderson*, 573 N.W.2d 872, 875 (Wis. Ct. App. 1997) (affirming restitution order for the victims’ attorney fees incurred in a civil action against defendant’s accounting firm where defendant was convicted of securities fraud and other crimes and holding that the civil suit “appears perfectly reasonable and the attorney fees expended in this suit are a natural and proximate result of [defendant’s] fraud” and “[t]he award of attorney fees as restitution is consistent with the purpose of restitution and to not order attorney fees in this case would permit [defendant] to escape responsibility for actual losses suffered by his victims”). *But see State v. Gerhardt*, 359 P.3d 519, 522 (Or. Ct. App. 2015) (en banc) (reversing restitution order for the victim’s attorney fees based on the court’s conclusion that the fees “do not represent an expense that the victim necessarily incurred to redress harm that she suffered as a result of defendant’s strangulation of her”—which was the basis for defendant’s conviction—but were instead the result of defendant’s violation of a no-contact order that a court had ordered after defendant’s arrest); *Banda v. State*, No. 13-97-400-CR, 1998 WL 34202281, at \*2 (Tex. App. June 11, 1998) (concluding that the restitution statute does not authorize restitution for attorney fees that the victim incurs in a civil action to recover property damages arising from defendant’s felony driving while intoxicated offense).

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Contents of this Bulletin adapted from work originally funded in part by Grant No. 2014-XV-BX-K013, awarded by the Office of Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, conclusions or recommendations expressed in this document are those of the author(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice.