



LEGAL Bulletin

STRATEGIES FOR OBTAINING CRIME VICTIM COMPENSATION: RESTITUTION VERSUS COMPENSATORY FINES

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A prosecutor has two tools for obtaining crime victim compensation during criminal sentencing proceedings: restitution and compensatory fines. Each of those tools has advantages and disadvantages, and has its own set of procedural requirements. The Court of Appeals recently has made clear that, even if defendant did not object at the time of the imposition of these financial obligations, it will find “plain error” if the procedural requirements have not been met.

This article summarizes the procedures for obtaining restitution and compensatory fines and discusses the advantages and disadvantages of each in light of recent case law. Because, by definition, these issues will arise only in cases with victims—often the most vulnerable of victims—you must be extremely careful to ensure not only that *they* meet their burdens for each, but also that the trial court complies with the particular procedural requirements that apply.

A. Restitution

1. Statutory Restitution

If a victim suffers “economic damages” as a result of a defendant’s criminal activities, the victim is entitled to restitution if the state can prove “the nature and amount of the damages.” ORS 137.106(1). Economic damages include, among other things, “objectively verifiable monetary losses” that are “reasonable” and “necessarily incurred” pertaining to medical costs, burial costs, lost income, and “costs due to loss of use of property” and “for replacement of damaged property[.]” ORS 137.103(2); ORS 31.710.

For medical treatment costs, just submitting the bill does not demonstrate that the costs were “reasonable.” *State v. McClelland*, 278 Or App 138, 372 P3d 614 (2016).¹

As for timing, the state must present evidence of the “nature and amount” of the victim’s damages “at the time of sentencing or within 90 days after the entry of judgment,” but the trial court may extend that deadline after finding “good cause” for delay past 90 days. ORS 137.106(1). And, at least 10 days before presenting that evidence, the state must provide the defendant with names of witnesses and copies of exhibits. ORS 137.106(6). The defendant has a right to be heard on any objection to the state’s requested restitution. ORS 137.106(5).

Once the evidence is submitted, the trial court reviews it to determine whether the victim suffered economic damages and whether the defendant’s criminal conduct caused the victim’s damages. That determination focuses on the existence of (1) criminal activities, (2) damages, and (3) a causal relationship between the two. *See, e.g., State v. Dillon*, 292 Or 172, 181, 637 P2d 602 (1981). Causation for the purposes of restitution means that the victim’s damages “‘result from’ a defendant’s criminal activity in the ‘but for’ sense and also [is] a reasonably foreseeable result of the defendant’s criminal activity.” *State v. Ramos*, 358 Or 581, 603, 368 P3d 446 (2016). Criminal activities are “any offense with respect to which the defendant is convicted or any other criminal conduct admitted by the defendant[,]” ORS 137.103(1), meaning that if defendant is charged with multiple counts of criminal activity and is acquitted of some but not others, or pleads guilty to some of the counts in exchange for dismissal of other counts, restitution will not be available for the acquitted or dismissed counts. Accordingly, if you are making an offer in plea bargaining that could result in the dismissal of counts that might serve as a basis for restitution, ensure that you obtain an on-the-record admission of the conduct underlying the dismissed count so that the victim does not lose the opportunity to obtain restitution on that count. Even better, get defendant to agree in the plea petition to pay all requested restitution, including for dismissed counts, if that is possible.

If the trial court determines that defendant’s criminal conduct has caused the victim’s damages, the trial court must order the defendant to pay the “full amount” of the victim’s damages unless the victim’s consents to receiving less. ORS 137.106(1).

2. Constitutional Restitution

Under the Oregon Constitution, a crime victim has “[t]he right to receive prompt restitution from the convicted criminal who caused the victim’s loss or injury.” Or Const, Art I, § 42(1)(d). But, unlike the restitution statute, a victim’s constitutional right to

¹ *McClelland* did not explain what type of proof would suffice to demonstrate reasonable medical costs, but the Appellate Division recently distributed a Legal Bulletin on *McClelland* discussing what type of proof might work. If you need a copy of that Legal Bulletin contact the Appellate Division and we can send you one.

receive “prompt restitution” does not include the right to receive restitution in the “full amount” of the victim’s economic damages, ORS 137.106. *State v. Algeo*, 354 Or 236, 311 P3d 865 (2013). Still, if the victim or the state (acting on the victim’s behalf) asserts a violation of the victim’s right “to receive prompt restitution,” the trial court has authority to re-open sentencing proceedings and order restitution even if the statutory 90-day deadline has passed. *State v. Thompson*, 257 Or App 336, 344, 306 P3d 731 (2013). If you rely on the constitutional right to restitution as a basis for the sentencing court to re-open the proceedings, make sure that you follow the procedures for making a victim’s rights violation claim as set forth in ORS 147.500 through 147.550.

3. Recap of Important Considerations Regarding Restitution

Unless defendant will be stipulating to the imposition of restitution and the amount, prosecutors will need to do the following:

- **Extent of Damages and Reasonableness:** Make a record of the **nature and amount** of all of the victim’s damages and demonstrate that the damages at issue fall within the statutory definition of “economic damages.” If medical costs are at issue, you must prove “reasonableness” by providing more than just an itemized bill of treatment costs.
- **Causation:** Make a record establishing that the victim’s damages were the **factual and foreseeable consequence** of defendant’s criminal conduct.
- **Discovery:** Ensure you provide defendant with relevant exhibits and witness information **at least 10 days before presenting evidence** of nature and amount of restitution damages.
- **Timing:** Make your record **at sentencing or within 90 days of sentencing**. If you find yourself past the 90-day statutory deadline, and cannot show good cause to excuse further delay, consider alleging a denial of the victim’s “right to prompt restitution” under Art. I, § 42(1)(d). **But if you make a claim of constitutional violation**, make sure that you follow the statutory procedures for making a victim’s rights violation claim set forth in ORS 147.500 through 147.550.
- **Pleas:** When plea bargaining think about the effect of the negotiations on a victim’s right to restitution. If possible, obtain a promise from defendant to pay all of the victim restitution (even for any dismissed counts). If you can’t get defendant to agree to that condition, at the very least, obtain an on-the-record admission from defendant about his commission of the crimes underlying any dismissed counts for restitution purposes.

B. Compensatory Fines

1. Procedures

When a trial court imposes a punitive fine, it can “order that the defendant pay any portion of the fine” as a “compensatory fine” payable to the victim if the victim “has a remedy by civil action” for the defendant’s criminal conduct. ORS 137.101. Under the compensatory fine statute, a person is a “victim” if he or she is the person “against whom the defendant committed the criminal offense” and whom the court determines suffered “economic damages as a result of the offense.” ORS 137.103(4). For purposes of a compensatory fine, the term “economic damages” has the same meaning that it does under the restitution statutes. ORS 137.103(2); ORS 31.710. And, like restitution, “the prerequisites for imposition of a compensatory fine are: (1) criminal activities, (2) economic damages, and (3) a causal relationship between the two.” *State v. Haines*, 238 Or App 431, 436, 242 P3d 705 (2010).

But, unlike the restitution statute, the compensatory-fine statute does not require proof of *all* of the economic damages that the victim suffered, only proof that the victim suffered *some amount* of economic damages. *State v. Grismore*, 283 Or App 71, 388 P3d 1144 (2016). That is, the amount of economic damages need not match the amount of the compensatory fine, provided the victim sustained *some* amount of economic damages. But because a compensatory fine is part of a punitive fine, it cannot exceed the relevant statutory maximum fine for the defendant’s crime of conviction. *See* ORS 161.625—161.635 (establishing maximum fines for felonies and misdemeanors).

Other procedural requirements also apply to a compensatory fine. A court “shall consider” a defendant’s financial resources when deciding whether to impose a fine, and in setting the amount. ORS 161.645. But, the court’s authority to impose a fine does not depend on a defendant’s ability to pay. *State v. Wheeler*, 268 Or App 729, 732, 344 P3d 57 (2015).

Also, a compensatory fine must be imposed as part of a punitive fine at the same time as any other punitive fine. *State v. Moore*, 239 Or App 30, 35, 243 P3d 151 (2010); *State v. Moreno-Hernandez*, 290 Or App 468, __ P3d __ (2018). This requirement can be tricky, because ORS 137.286 requires the court to impose a mandatory minimum fine for misdemeanors (\$100) and felonies (\$200). For example, if a defendant is being sentenced on a second-degree assault conviction (a B felony with a maximum fine amount of \$375,000), and you want a compensatory fine of \$100,000 to cover the victim’s medical bills, you would ask the court for the following:

Total punitive fine: \$100,200

-- Compensatory fine, payable to victim: \$100,000

-- Statutory minimum punitive fine for a felony: \$200

In addition to having a less stringent proof requirement for amount of damages than restitution (*i.e.*, proof of “some damages” rather than proof of all damages), compensatory fines also have a higher statutory payment priority for payment by the court clerk. Compensatory fines are first in line. *See* ORS 137.291 (“Level I obligations in criminal judgments entered in circuit courts are compensatory fines imposed pursuant to ORS 137.101.”). Restitution awards are second in line. *See* ORS 137.292 (explaining that “Level II obligations” include “awards of restitution”). Consequently, through a compensatory fine, a sentencing court may be able to quickly compensate a victim for all or part of his or her damages from a defendant’s security, if the defendant has posted a substantial amount.

2. Recap of Important Considerations Regarding Compensatory Fine

Unless defendant stipulates to the fine and to the amount, do all of the following, *even if* defendant does not object on any particular ground.

- **Causation.** Make a record that the victim suffered *some amount* of economic damages as a result of defendant’s criminal conduct.
- **Existence of Civil Remedy.** Demonstrate that the victim would have a civil remedy for the damages that defendant caused (for example, if it is a physical or sexual assault, the victim would have a remedy for the civil action of battery).
- **Defendant’s Financial Circumstances.** Ensure that the sentencing court *considers* defendant’s financial circumstances when imposing the fine. The court is not required to affirmatively find that defendant *has* the ability to pay, but it must take into account the defendant’s financial circumstances.
- **Details and Timing.** Remember that a compensatory fine is part of a punitive fine that is made payable to the victim, and all fines must imposed **at the same time**—that is, **at the time of sentencing**.
 - At the **sentencing hearing**, make sure that the judge states that he or she is imposing a TOTAL fine that includes a compensatory fine in addition to any other part that is not designated as a compensatory fine.
 - In the **judgment**, make sure that it reflects the total punitive fine, and the amount of that fine that is designated as a compensatory fine.

In summary, restitution and compensatory fines both have advantages and disadvantages, depending on the specifics of your case. Below is a summary of circumstances when restitution may be the preferred alternative:

- When the victim's losses exceed the relevant statutory maximums for the defendant's crimes of convictions.
- When you might need extra time beyond sentencing to investigate and gather proof of the victim's damages.
- When the proof of the full range of the victim's damages is available and the damages are calculable at the time of sentencing, or within 90 days after sentencing.
- When the victim suffers damages that would not be recoverable in a civil action (although you must still be able to prove that the damages incurred are compensable under the statutory definition of "economic damages")

Conversely, a compensatory fine might be the better compensation strategy in the following situations:

- When you know that you will not be able to establish the full amount of the victim's damages at sentencing or within 90 days after sentencing (such as where the victim may have future medical costs that are not easily measurable at the time of sentencing) and the total amount of damages do not exceed the relevant statutory fine maximums.
- When the victim suffers different types of damages and you cannot establish that some of those damages were the factual and foreseeable result of the defendant's criminal conduct and the total amount of damages do not exceed the relevant statutory fine maximums.
- When the defendant has posted a large amount of security that can be quickly paid out to the victim as a compensatory fine.

If you have questions about which is the best alternative in a particular case, please do not hesitate to contact Greg Rios or Jennifer Lloyd at the Appellate Division, (503) 378-4402.