

October 2024

Restitution as Punishment?

How far from the original understanding of restitution has it evolved in Arizona? The simple answer is, significantly. Has it evolved to a point where it has become punitive?

BY EDWARD F. NOVAK & BLAIZE BOLES



While restitution can trace its roots to Roman law, it was not formalized in statute until the English did so 1529. The English Parliament passed the Restoration of Stolen Goods Act to restore to the victim of a larceny the goods that had been taken. It was the return of those very goods that were stolen that the Act sought to accomplish. The procedure was to seek a writ for restitution following an indictment for larceny. ¹ Since that time, there has been a dramatic shift in what constitutes restitution.

Some states have taken restitution further than Arizona and most states. In Florida, for example, restitution is awarded for losses caused directly or indirectly by the defendant's conduct and related to that conduct. ² In California

by the defendant's conduct and related to that conduct. — In California, restitution also serves to deter criminal conduct. ³ Florida also uses restitution to deter criminality and for retribution. ⁴

However, among the states the shift generally has been characterized as the change from “disgorge(ing) the defendant’s unlawful gain, (to) compensate(ing) a victim’s loss.” ⁵ Examples of the change in and expanse of restitution are abundant in Arizona case law.

The defendant can be liable for restitution for crimes for which guilt was not adjudicated. ⁶ The victim of a robbery can obtain restitution for the wages lost attending the trial of the defendant. ⁷ The victim’s family members’ costs of attending the defendant’s trial can be reimbursed. ⁸ However, the representative of an animal shelter could *not* receive restitution for her costs in attending the defendant’s trial for cruelty to animals. ⁹

The starting point for analyzing restitution is the constitutional change resulting from the victims’ rights initiative of the late 1980s. The Arizona Constitution was amended to establish certain victims’ rights, including the right “to receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim’s loss or injury.” ¹⁰ Statutory law requires a court to consider all losses resulting from the offenses for which the defendant is convicted and in the full amount of those “economic” losses. ¹¹



This starting point appears limited. So how do we get to the point where victims’ family members’ costs of attending trial can be compensated, or where the crime is victimless, but restitution is still ordered?

Consider *State v. Lewis*, ¹² where the defendant was acquitted of aggravated assault of victim “A,” but ordered to pay restitution because he was convicted of a drive-by shooting at the house in which the victim was located. The Supreme

Court rationalized this by holding that the drive-by shooting “directly caused the economic damage,” yet the Court did so without knowing whether the jury thought the defendant intended to only shoot at the victim’s house and not the victim. Further justification was found by the Court in that Arizona allows inconsistent verdicts, and this verdict may have been a “compromise” verdict. ¹³

Restitution is not limited to living persons. Corporate organizations and even a governmental entity, like the Arizona Department of Corrections, are entitled to restitution. To get there, the Court of Appeals cited A.R.S. § 13-804, which says restitution may be paid to any “person.” The word “person” includes a “government,” according to A.R.S. § 13-105(26). ¹⁴ In *State v. Mata*, ¹⁵ the Court of Appeals rejected the State’s argument that AHCCCS is entitled to restitution of \$100,000 for paying the medical costs of a traffic offense victim. Pursuant to A.R.S. § 13-804(E) certain traffic offenses are exempted from restitution. The *Mata* court held that restitution might still be available, but only if there is a conviction or an admission of criminal conduct. Unmentioned by the court is that an agreement by the defendant to pay restitution also would be effective.

The broad range of victims and the broad range of potentially qualifying economic losses are subject to a three-pronged test. Restitution must be based on (1) an economic loss that (2) would not have occurred but for the criminal act, and (3) the criminal conduct must directly cause the economic loss. ¹⁶ The test is referred to as the “but for” test because the “intervention of additional causative factors” may disrupt the otherwise “direct” cause. ¹⁷ What is a sufficient intervening cause is an area of the law that is ripe for development or curtailment—depending on one’s view of what really is restitution and what is something else.

Restitution’s Punitive Aspects

It seems evident that we cannot view restitution as merely the 700-year-old requirement for restoration of the victim’s stolen goods. Our Supreme Court has said, “The legislature focused on the primary purposes of restitution: reparation to the victim and rehabilitation of the offender.” ¹⁸

Yet, restitution has a distinctly punitive look. The restitution payment is most often determined based on the adult probation department report, which is often

a summary of police reports. There is no jury involvement in determining restitution. The evidence at a restitution hearing may include reliable hearsay (which may be the law's most infamous oxymoron). The restitution payment is made to the clerk of the court and paid out largely pursuant to victim information collected and set out in the presentence report. If the defendant does not pay, her probation or community supervision can be revoked and she can find herself in prison. If the defendant is not on probation or community supervision, she can be convicted of contempt and sent to jail for nonpayment. Finally, unpaid restitution impairs the defendant's ability to have her record sealed. ¹⁹

ADVERTISEMENT

The advertisement is a rectangular graphic with a blue header and a white body. The header contains the logo for 'InterActive Legal' in white text on a blue background. Below the logo, the text reads: 'Wishes to thank Vanessa Kanaga, Esq., for her 11 years of service with our great company, first as Director of Content and then as CEO. She will be missed by all her colleagues. Please join us in wishing her success as she transitions into private practice in Phoenix, AZ with the Greengard Law Firm, an established estate planning, business, and tax law practice.' To the left of this text is a portrait of Vanessa Kanaga, Esq., a woman with long red hair. To the right of the portrait is a small image of a handwritten note that says 'Thank you, Vanessa! Best wishes!'. Below the main text is the Greengard Law Firm logo, which consists of a green circular emblem with a stylized figure, followed by the text 'GREENGARD' in bold, 'LAW FIRM' in smaller text, and the address '2302 North 3rd Street Phoenix, AZ 85024 (602) 847-8401'. A small image of a building is also visible in the bottom right corner of the advertisement.

ADVERTISEMENT

“**Restitution is now so broad in what it covers, the order may exceed the victim's actual loss.**”

Restitution has other punitive characteristics. The court shall not consider economic circumstances of the defendant in setting restitution. ²⁰ Restitution cannot be stayed on appeal, but fines can be stayed. ²¹ A criminal restitution order can be recorded as a civil judgment and does not require renewal, like a civil judgment. ²² A restitution order “is a criminal penalty for the purposes of a federal bankruptcy involving the defendant.” ²³ Finally, if the defendant fails to pay restitution while on probation, the probationary term can be extended for up to five years on a felony conviction—whether the defendant has the ability to pay or not. ²⁴ That five-year extension is longer than the maximum term of probation for a class 4, 5 or 6 felony.

If restitution is punitive, does it fall within the prohibition of the Eighth Amendment to the U.S. Constitution or the Declaration of Rights in the Arizona

Amendment to the U.S. Constitution or the Declaration of Rights in the Arizona Constitution? No Arizona court has held that a restitution award is violative of either the U.S. or Arizona Constitutions. Yet, given the length to which the Legislature has gone to ensure that restitution is both ordered and collected—more so than a fine—restitution can be punitive.

There are several scholarly articles attempting to categorize restitution as a fine and then urging analysis under the Eighth Amendment excessive fines clause. ²⁵ What if the fine imposed can be used in part to pay restitution, as it can in Arizona? Would that boost the argument?

In Arizona the sentencing court can order that “all or any portion of the fine imposed be allocated as restitution.” ²⁶ In addition, while restitution “shall” be required, a fine “may” be imposed. ²⁷ And, as noted above, the enforcement mechanisms for restitution are more robust than for a fine.

Conclusion

Restitution is now so broad in what it covers, the order of restitution may exceed the victim’s actual loss. Have the courts exceeded the specific language in the Arizona Constitution? Did the voters who approved the amendment to the Arizona Constitution intend to have the defendant pay for the travel expenses of the victim’s family members?

ADVERTISEMENT



**Build your case,
byte by byte.**

Computer Forensics | E-Discovery | Internal Investigations | Expert Witness Consulting | Flat Fees

PEAK FORENSICS | 602-354-8950 | www.peakforensics.com | Jeffrey Englander, President

ADVERTISEMENT



There is no doubt about the good that restitution payments bring to the victims. However, three questions need answers:

- Have the courts extended restitution too far?
- Is restitution now potentially so onerous that it should be viewed in the Eighth Amendment context?
- When the restitution award is so large, what purpose is served by issuing an order that the defendant will be unlikely to pay? 28

This last question is one for the Legislature to consider. The first two are for prosecutors, defense counsel and the courts.

endnotes

1. Frederick Pollock & Frederick William Maitland, *The History of English Law*, Vol. 2 at 154 (1968 ed.).
2. *Martinez v. State*, 316 So.3d 362, 366 (Fla. Ct. App. 2021).
3. *People v. Clapp*, 62 Cal.App.5th 862, 868 (2021).
4. *Davis v. State*, 244 So.3d 374, 377 (Fla Ct. App. 2018).
5. Cortney E. Lollar, *What Is Criminal Restitution?* 100 Iowa L. Rev. 93, 95 (2014).
6. *State v. Cummings*, 120 Ariz. 69 (Ct. App. 1978).
7. *State v. Lindsley*, 191 Ariz. 195 (Ct. App. 1997).
8. *State v. Madrid*, 207 Ariz. 296 (Ct. App. 2004).
9. *State v. Murdock*, 2 CA-CR 2018-0020 (Ariz. Ct. App. Oct. 2, 2019).
10. Ariz. Const. Art 2, §2.1(8).
11. A.R.S. Ann. §§ 13-804(b) and 13-603(C).
12. 222 Ariz. 321 (2009).
13. *Id.* at 325.
14. *State v. Guilliams*, 208 Ariz. 48, 52 (Ct. App. 2004).
15. 1 CA-CV 23-0522 (Ariz. Ct. App. May 23, 2024).
16. *Guilliams*, 208 Ariz. at 53.
17. *Id.*
18. *State v. Wilkinson*, 202 Ariz. 27, 30 (2002).
19. A.R.S. § 13-911(A)(1).
20. *Id.* § 13-804C).
21. *Id.* § 13-804(D).

22. *Id.* § 13-805(E).

23. *Id.* § 13-805(I).

24. *Id.* § 13-902(C)(1).

25. See, e.g., Nathaniel Amann, *Restitution and the Excessive Fines Clause*, 58 Am. Crim. L. Rev. 205 (2021); Lollar, *supra* note 5 at 93.

26. A.R.S. § 13-804(A).

27. *Id.* § 13-603(C) and (D).

28. U.S. Government Accountability Office, *Federal Criminal Restitution*, GAO 18-203 (Feb. 2018).

ADVERTISEMENT



ADVERTISEMENT

EDWARD F. NOVAK is a shareholder at Polsinelli. His practice areas include criminal and civil litigation, attorney discipline and judicial complaint defense. He was State Bar President in 2008-2009.

BLAIZE BOLES is an associate at Polsinelli practicing in the areas of commercial litigation and government investigations.