

# New York State Office of Victim Services

## *Crime Victim's Compensation and the Issue of Restitution*



*Presented by the Office of Victim Services*

*Legal Unit*

# WHO WE ARE



# Office of Victim Services (OVS)

- Independent Office of the Executive
- Approximately 80 employees in Albany, Brooklyn and Buffalo
- Provides compensation to innocent victims of crime and funds direct services to victims through a network of community-based programs funded by federal fines, fees and forfeitures and state court surcharges

# What We Pay...

- Essential personal property \$500 (\$100 cash max)
- Medical Expenses not covered by other insurance
- Counseling services
- Occupational rehabilitation expenses
- Lost earnings or support up to \$600/week (max \$30,000)
- Burial expenses up to \$6,000
- Cost of services of domestic violence shelter
- Transportation expenses for necessary court appearances
- Crime scene cleanup up to \$2,500
- Moving Expenses up to \$2,500
- Attorney fees for representation before OVS (max \$1,000)

# Eligibility

*Innocent victim of a crime physically injured as a result of the crime*

- Contributory conduct
- Cooperation with law enforcement
- Personal physical injury (exceptions)
- File within one year of the crime

# Payer of Last Resort

- OVS is payer of last resort
- Awards are reduced by the amount of any other kinds of insurance, including workers compensation and public funds

# Liens, Subrogation and Restitution

- Acceptance of an award subrogates OVS to any right of action to recover losses resulting from the crime; and
- Creates a lien in favor of OVS on proceeds of any recovery against a party liable for the injury giving rise to the award

# Son of Sam Law

- Requires notice to OVS of profits or funds of a convicted person
- OVS is required to notify victims
  - Victims may sue inmate
  - Must be commenced within 3 yrs of victim's receipt of notice
  - OVS may obtain an injunction to freeze funds on behalf of the victim

# Criminal Justice Evolution

- Relationship between government and the offender
- ***The Theory of Restorative Justice***  
A movement to expand the circle of stakeholders to include the VICTIM and the community

# Restitution is a Key Element

- Actual loss
- Recognition of offender's criminal responsibility
- The absence of blame or fault on the part of the victim
- Validation

# What is Restitution ?

## Penal Law 60.27:

- The fruits of the perpetrator's offense
- Actual, out-of-pocket loss of the victim

# Who Qualifies?

- Any victim of an offense or their representative
- Office of Victim Services (when it pays a victim's expenses)

# Compensable Losses

- Replacement of stolen items
- Repair costs of damaged items
- Medical expenses, including professional counseling expenses and medical transportation
- Lost earnings

# Penal Law §60.27

- Authorizes restitution **in addition** to any other disposition
- Definitions:
  - Offense : includes any offense that is part of the same criminal transaction or included in complaint/indictment - even if disposed of by plea
  - Victim : expanded beyond the individual and their representative - covers corporations, municipalities, insurance companies, school districts, etc.

# Example of “Part of the Same Criminal Transaction”

- Defendant charged with Assault and Resisting Arrest
- Each of the victims of the above crimes may recover through restitution even if the defendant pleads to Assault in satisfaction of all charges

# Restitution for a Victim of Identity Theft

- Can include losses or costs incurred by a victim or anyone who suffered a financial loss
- Can include an amount equal to time spent to remediate harm incurred by victim and financial losses from any adverse action caused to the victim

Penal Law 60.27(4)(b); 60.27 (1)

# Responsibilities of the District Attorney

## PL§60.27(1)

- The District Attorney SHALL advise the Court at or before sentencing of:
  - Extent of the victim's injury
  - Amount of restitution sought by the victim
    - Amount of the victim's economic loss
    - Amount of any damages

# Responsibilities of the Court

PL§60.27(1)

- The Court SHALL consider restitution to the victim
- The Court SHALL require the defendant make restitution if requested
- The Judge MUST state, on the record, the reasons for not ordering restitution

# Court's Responsibilities cont'd

- The Court **MUST** make a finding of a specific dollar amount
  - The Court **MAY** direct that the entire amount be paid
    - at sentencing,
    - at a later date, or
    - at specified intervals at specified amounts
- CPL 420.10

- The Court may not delegate its duty to determine the amount of restitution

People v. Fuller, 57 NY2d 152 (1982)

- Each defendant is jointly and severally liable

People v. Kim, 91 NY2d 407 (1988)

- Courts can use possibility of imprisonment as an incentive for defendants to make restitution

People v. Amorosi, 96 NY2d 180(2001)

- An order of restitution does not effect any possible civil action for amounts in excess of the order

PL 60.27(6)

- An order of restitution to a person survives the death of that person and the remaining payments go to the estate of the deceased

PL 60.27(7)

# Limits on the Amount of Restitution

PL 60.27(5)(a),(b)

|            |          |
|------------|----------|
| Felony     | \$15,000 |
| Non-felony | \$10,000 |

|          |         |
|----------|---------|
| Juvenile | \$1,500 |
| PINS     | \$1,000 |

THE COURT MAY **NOT** GO BEYOND THESE LIMITS *unless,*

1. Defendant consents, or
2. Restitution is made a condition of Conditional Discharge or Probation, or
3. Amount represents return of victim's property (including money or "equivalent") or actual medical expenses

# Restitution Limits cont'd

- \$1,500 limit in a juvenile proceeding may not be juvenile's total restitution liability

In the Matter of Joel M., 240 A.D.2d 747 (App. Div. 2<sup>nd</sup> Dep't 1997)

# Payment

- The Court may direct the defendant be imprisoned until the restitution is satisfied (the aggregate may not exceed the maximum authorized term of imprisonment):

CPL 420.10(3),(4)

- felony - up to one year
- misdemeanor – up to 1/3 maximum
- petty offense – up to 15 days

# Payment cont'd

- Even if defendant is imprisoned for failure to pay, or served the period of imprisonment imposed, the order may be collected by the victim as a civil judgment  
CPL 420.10(6)(a)
- Court SHALL direct the DA to file the order with county clerk to be entered in the same manner as a civil judgment  
CPL 420.10(6)

# Payment cont'd

- If unable to pay, the defendant may apply to the Court for RESENTENCING
  - The Court may:  
CPL 420.10 (5)
    - adjust the amount of restitution
    - adjust the period by which the defendant must pay restitution
    - revoke that part of the sentence pertaining to restitution
    - sentence defendant to any originally authorized sentence (the amount of restitution cannot be increased and may not exceed the amount the defendant is able to pay)

# Payment cont'd

- Incarceration alone is not enough to determine that the defendant is unable to pay  
CPL 420.10(5)
- Court may issue a warrant for failure to pay  
CPL 420.10(3)
- Cash bail may be used to pay restitution  
CPL 420.10(1)(e)

# Victims Still Shoulder the Burden of Loss

- National Institute of Justice estimated cost of crime to victims (medical expenses, earnings, public victim assistance costs), about \$105 billion/yr
- State compensation programs pay out approximately \$500 million/yr to victims
- Most of the costs of crime are still absorbed by the victim

# More

- More than 25 million Americans become victims of crime each year
- Survey of victims entitled to restitution (National Center for Victims of Crime) found that less than half are actually awarded restitution

# Why?

- Victims do not know they're entitled to it
- District Attorneys do not always request it
- Judges are reluctant to order it in addition to incarceration or in light of the defendant's apparent inability to pay

# Mandatory Nature of PL 60.27

- The Court **shall** consider restitution to the victim and may **require** restitution as part of the sentence imposed...
- The DA **shall**, where appropriate, advise the Court that the victim seeks restitution...
- The court **shall** hear the DA and receive the Victim Impact Statement and **shall** consider the information...
- The court **shall require** restitution unless the interest of justice dictates otherwise...

# Discretionary Nature of PL 60.27

- The Court shall **consider** restitution to the victim and **may** require restitution as part of the sentence imposed...
- The DA shall, **where appropriate**, advise the Court that the victim seeks restitution...
- The court shall hear the DA and receive the Victim Impact Statement and shall **consider** the information...
- The court shall require restitution **unless** the interest of justice dictates otherwise...

# Myth #1

Victims simply fail to request restitution most of the time

- Not notified of their right to restitution
- Notified too late in the process to gather sufficient evidence
- NOTE: The Court has an obligation to inquire whether restitution has been considered and the authority to order restitution, even in the absence of a specific request

# Myth #2

No dollar amount = no order

- DA is required to request information from the victim, Courts have the authority to order a ***pre-sentence investigation*** (PSI) and report in every case
- If inconclusive, Court may adjourn, set a hearing and order a PSI report
- If a PSI is waived and the Court determines that the information is relevant to the disposition, a Victim Impact Statement must be provided CPL 390.20(4)(b)

# Myth #3

## Restitution inappropriate in light of incarceration

- PL 60.27 effective September 1, **1980**: “In addition to any of the dispositions authorized [by law] the Court shall consider and may require restitution as part of the sentence imposed”

# Myth # 4

Defendant is indigent therefore restitution is inappropriate

- Present inability to pay bears only upon the manner of payment and not the amount
- OVS pays victims up front and agrees to collect nominal restitution amounts
- Current and future financial resources are often overlooked - prison wages, deposits to inmate discretionary accounts, judgments and settlements, inheritance, lottery, fraudulently transferred assets, cash bail

# Civil Judgment

- CPL 420.10 requires that Restitution Orders be filed as civil judgments
  - not all DA's are complying
  - this mandate must be outlined in the order
- When Criminal Justice System fails to collect, adequately compensate, or loses jurisdiction, the victim may still pursue a civil remedy
- OVS may pursue judgment enforcement proceedings civilly, on behalf of the victim, under subrogation authority

# Civil Judgment cont'd

- When a restitution order becomes a civil judgment it becomes a first lien upon real property over most other liens

CPL 420.10(6)(a),(b)

- Exceptions:
  - Liens on behalf of a governmental entity
  - Purchase money interest in the property

# Restitution and Bankruptcy

- Restitution obligations are not dischargeable in any type of bankruptcy, Chapter 7, Chapter 11 or Chapter 13
  - Chapter 7, Kelly v. Robinson, 479 U.S. 36 (1986)
  - Chapter 11, 11 U.S.C. 1129(a)(8)(B)
  - Chapter 13, 11 U.S.C. 1328(a)(3)

# Looking Forward

## Possible Solutions

- Coordinated agency approach that includes OVS, Probation, DA and the Courts
- Improving communication and inter-agency data exchange through a single system that tracks restitution orders and payments from PSI to satisfaction
- Educational Outreach

# Food For Thought

- Pennsylvania allows DA's to procure a restraining order to preserve defendant's assets that may be used to pay restitution
- California makes it a separate offense to dispose of property to avoid paying restitution (often a misdemeanor, can be a felony)
- Kansas gives victims the right to information regarding offender's financial assets, income and/or employment
- California requires offenders to file financial reports/affidavits with probation as to their income, expenses and ability to pay restitution

# Conclusion

- Hold offenders financially responsible for harm caused
  - The Court has the authority to order restitution in every case
- The criminal justice system should promote the victim's recovery by acknowledging their role in the process, validating their victim status and assigning accountability through restitution orders

# Additional Information, Resources, and Contacts

- [ovs.ny.gov](http://ovs.ny.gov)
- [criminaljustice.ny.gov](http://criminaljustice.ny.gov)
- [parole.ny.gov](http://parole.ny.gov)
- [doccs.ny.gov](http://doccs.ny.gov)
- [opdv.ny.gov](http://opdv.ny.gov)
- [navaa.org](http://navaa.org)
- [nacvcb.org](http://nacvcb.org)

# Discussion Questions:



## OFFICE OF VICTIM SERVICES

Legal Unit

518-457-8066

[ovs.ny.gov](http://ovs.ny.gov)