

That Article Nobody Likes to Read



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Chair | CBA Young Lawyers Section

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It's gray outside today. People shuffle in and out of the coffee shop in which I sit. Hardly a soul can resist making a comment to the mocha-slinging clerk about the chilling weather.

"Cold one today—hope that coffee's hot." The clerk's eyes roll as she turns from the counter, returning with a cup of melancholy-laced Joe. *Must be a seasonal flavor*, I think.

The small talk is tense. Everybody knows another Cleveland winter lies in wait, premeditating every detail of its five-month murder of the sun. Even the remaining autumn clouds seem to get it. They skip town with hitch-hiked rides on winds to places I'll never see.

But despite the scene, I'm giddy inside. True, some of my elation may be artificial—a second double-espresso will do that to you. Nevertheless, my mood is mostly genuine.

Why?

Because the holiday season is upon us once again.

We kick off our drive with Thanksgiving and don't stop until we spike the ball in an entirely New Year brimming with promise and void of regret—at least until the alarm clock sounds on January 2.

And there's nothing better than holidays in the U.S. We know how to do it right. Everybody's ready to say "I love you" in bigger and better ways. After all, this is America, baby. Where bigger *is* better.



This holiday season, let's not content ourselves with the joys of rote tradition.

Let's make a difference.

Let's practice
random acts of kindness.

Say it with me, folks: **BIGGER** is **BETTER**. We want **MORE** not less, and we better get it **NOW** not later. Forget God; let *Adam Smith* bless these most sacred of days.¹

But before we buy that 20th toy that will shed novelty faster than its lead-based paint; before we super-size our love with jewelry, the brilliance of which will be known only to the innards of a velvet box laid to rest among many others; and before we carve that 25-pound bird, bought more for show than plausible human consumption, let's allow ourselves to think:

Somewhere there's a family whose only holiday gift will be a meal, given to them by others, that they get to eat together.

Somewhere there's a lonely person gazing through a frosted storefront, longing not for the goods housed therein, but simply for the conversation exchanged like currency among shoppers.

Somewhere there's a child who wants nothing more than to tell his mother "I love you" with anything . . . as long as it's wrapped.

And somewhere is always closer than we think.

This holiday season, let's not content ourselves with the joys of rote tradition. Let's make a difference.

Let's practice random acts of kindness. Extend our generosity to people we don't know and who'll never see us again. Talk to somebody long enough to let them know this world isn't nearly as bad as the look on their face suggests.

Let's give our youth the invaluable gift of perspective. Take them to volunteer at shelters, so they witness hardships and abuse that make their two-week grounding for missing curfew look like frosting on a slightly burnt cupcake.

Let's give ourselves a reason to pause while we're brushing our teeth on January 2, just long enough for the person in the mirror to congratulate us on a job well done. You know the feeling. It's better than anything you could ever unwrap.

Since we're in the giving mood, I should give our friend, Mr. Smith, a moment in rebuttal. He did, after all, write:

"How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it."²

And to all a good night. ☺

¹ Adam Smith (1723-90) was a fountainhead of contemporary economic thought, whose theory of how rational self-interest in a free-market economy leads to economic well being is often discounted as self-seeking and ruthless. Put otherwise, Uncle Scrooge was a big fan of his.

² Smith, Adam. *The Theory of Moral Sentiments*. Library of Economics and Liberty. Retrieved October 14, 2007, from the World Wide Web: www.econlib.org/library/Smith/smMS1.html.

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criminal

sive effect against the defendant for civil purposes. See *United States v. Stanelle*, 184 F. Supp.2d 854, 859 (E.D. Wis. 2002).

Enforcement of the Judgment

The VWPA provides that restitution orders are enforceable in the same manner and method as are judgments against defendants for fines, or "by all other available and reasonable means." 18 U.S.C. § 3664(m)(1)(A)(ii). In addition, the victim may obtain from the clerk of court an abstract of judgment that, after following proper State law procedure, operates as a "lien on the property of the defendant . . . in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State." 18 U.S.C. § 3663(m)(1)(B). Finally, if in-kind restitution has been authorized, the terms of that order are enforced by the probation officer. 18 U.S.C. § 3663(m)(2).

If Your Client Doesn't Pay...

Not surprisingly, there are a variety of adverse consequences for a client who defaults on a restitution order. In point of fact, there are nine different options available to the Court, including

revoking or modifying the terms of supervised release or probation, resentencing, contempt of court, entry of a restraining order or injunction, ordering a forced sale of the defendant's property, acceptance of a performance bond, entering or adjusting a payment scheduling, and the catch-all "taking any other action necessary to obtain compliance." 18 U.S.C. § 3613A(a)(1).

In determining which of these options to exercise in response to a default, the court must consider "the defendant's employment status, earning ability, financial resources, the willfulness in failing to comply with the . . . restitution order, and any other circumstances that may have a bearing on the defendant's ability or failure to comply with the order." 18 U.S.C. § 3613A(a)(2). A defendant who knowingly fails to make payment or for whom "alternatives to imprisonment are not adequate to serve the purposes of punishment and deterrence," may be resentenced, see 18 U.S.C. § 3614(a) & (b), but "in no event shall a defendant be incarcerated . . . solely on the basis of inability to make payments because the defendant is indigent," 18 U.S.C. § 3614(c).

While complicated at first blush, the MVRA can be reduced to a five-step inquiry that defense attorneys should know and understand. The steps are as follows:

1. Identify the offense of conviction to determine whether restitution is mandatory or discretionary, and whether restitution can be imposed as a separate sentence or only as a condition of supervision.
2. Identify the victims of the offense of conviction.
3. Identify the harm caused to victims by the offense of conviction.
4. Determine which harms are statutorily compensable as restitution.
5. Determine if the plea agreement broadens restitution.

Knowing these steps ahead of time can assist defense counsel in discussing the restitution aspect of sentencing with a client, in properly responding to recommendations in the Presentence Investigation Report, and in advocating the client's position at sentencing. ☺

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