

1987 Assembly Bill 190

Date of enactment: April 23, 1988
Date of publication: May 2, 1988

1987 Wisconsin Act 398 (Vetoed in Part)

AN ACT to repeal 346.65 (2r) (a), 346.65 (2r) (c), 943.24 (5) (a), 943.24 (5) (c), 943.50 (5) (a), 943.50 (5) (c), 973.073, 973.09 (1m) and (1r) and 973.09 (8); to renumber 346.65 (2r) (d), 943.24 (5) (d) and 943.50 (5) (d); to renumber and amend 346.65 (2r) (b), 943.24 (5) (b), 943.245 (1), 943.50 (5) (b), 973.09 (4m), 973.09 (6) and 973.09 (7); to amend 20.435 (3) (h), 94.64 (12) (b), 94.65 (11) (b), 97.72 (1), 98.15 (2), 103.87, 425.106 (1) (d), 756.25 (1), 757.69 (1) (b), 767.265 (6), 812.18 (1) (a), 949.15 (1), 949.165 (7), 973.03 (4) (a), 973.05 (1m), 973.06 (3), 973.08 (1), 973.09 (1) (b), 973.09 (1g) and 973.09 (3) (b); and to create 911.01 (5), 943.245 (1), 973.06 (1) (f), 973.09 (3) (c) and 973.20 (title), (1) to (7) and (10) to (14) of the statutes, relating to restitution, detention and making an appropriation.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

JUDICIAL COUNCIL PREFATORY NOTE: This proposal was developed by the judicial council restitution committee, whose members are listed in the last paragraph of this NOTE. The committee was appointed at the request of the cochairs of the joint committee on audit, to examine questions raised by legislative audit bureau report 85-10, "An Evaluation of Restitution by Adult Probationers" (April 15, 1985). In the course of its work, the restitution committee examined the federal laws governing restitution to crime victims and this proposal includes several provisions drawn from those federal laws.

Briefly, the proposal contains the following changes to existing law:

1. It allows the sentencing court to order that a convicted defendant make restitution to victims whether or not the offender is placed on probation.
2. It provides a comprehensive and detailed statement of the types of losses for which the court may order restitution.
3. It requires the department of justice to develop model forms and procedures for collecting victim loss information.
4. It allows restitution disputes to be determined by an arbitrator or referee, or by the court, at an informal hearing.
5. It requires the court to consider the defendant's ability to pay in ordering reimbursement of the costs of legal representation.

6. It specifies the grounds for extending probation when court-ordered payments remain unpaid at the time supervision is scheduled to terminate.

7. It allows unpaid restitution to be enforced by the victim as a civil judgment when the offender is released from probation or parole, or when neither probation nor a prison sentence is imposed.

The restitution committee consisted of: James D. Jeffries, Chair; Justice Shirley S. Abrahamson; Judge Raymond E. Gieringer; J. Denis Moran; Judge Peter G. Pappas; Rep. James A. Rutkowski; Eric Schulenburg; David C. Resheske; Michael J. Sullivan; and Barbara W. Tuerkheimer. The committee reporter was James L. Fullin, Jr.

SECTION 1. 20.435 (3) (h) of the statutes is amended to read:

20.435 (3) (h) *Administration of restitution.* The amounts in the schedule for the administration of court-ordered restitution programs under s. ~~973.09~~ ~~973.20~~. All moneys received under s. ~~973.09 (1)~~ ~~973.20 (11) (a)~~ as surcharge payments shall be credited to this appropriation.

SECTION 2. 94.64 (12) (b) of the statutes is amended to read:

94.64 (12) (b) It is the duty of each district attorney to whom any violation is reported to cause appropriate actions or proceedings to be instituted for the col-

lection of forfeitures or enforcement of other remedies. In any enforcement action the court may, in addition to other penalties provided ~~herein in this subsection~~, order restitution to any party injured by the purchase of fertilizer sold in violation of the law. If the violator is convicted of a crime, restitution shall be in accordance with s. 973.20.

SECTION 3. 94.65 (11) (b) of the statutes is amended to read:

94.65 (11) (b) Any person who wilfully violates this section shall be fined not more than \$5,000 or imprisoned not more than one year in the county jail or both. ~~A judge may require a violator to pay restitution to a person injured by the distribution of a soil or plant additive, regardless of whether the violator is placed on probation under s. 973.09. The court may provide for payment of an amount equal to the pecuniary loss, as defined under s. 973.09 (8), caused by the offense. Restitution shall be in accordance with s. 973.20, except that an injured party shall receive the amount determined under s. 973.20 plus \$50. In determining the method of payment, the court shall consider the financial resources and future ability of the violator to pay. Upon the application of any interested party, the court shall schedule and hold an evidentiary hearing to determine the value of the victim's pecuniary loss resulting from the offense.~~

SECTION 4. 97.72 (1) of the statutes is amended to read:

97.72 (1) Any person who violates any of the provisions of this chapter for which a specific penalty is not prescribed shall be fined not less than \$100 nor more than \$1,000 or imprisoned for not more than 6 months, for the first offense; and for each subsequent offense, fined not less than \$500 nor more than \$5,000, or imprisoned for not less than 30 days nor more than one year in the county jail or both. ~~In addition to other penalties, a court may order a violator to pay restitution to any person injured by a violation of this chapter regardless of whether the violator is placed on probation under s. 973.09.~~

SECTION 5. 98.15 (2) of the statutes is amended to read:

98.15 (2) A district attorney to whom any violation of this section is reported shall cause appropriate actions or proceedings to be instituted for the collection of a forfeiture or fine or for the enforcement of other remedies. In any enforcement action the court may, in addition to any other penalty provided, order restitution to any party injured by violation of this section. If the violator is convicted of a crime, restitution shall be in accordance with s. 973.20.

SECTION 6. 103.87 of the statutes is amended to read:

103.87 Employee not to be disciplined for testifying. No employer may discharge an employe because the employe is subpoenaed to testify in an action or proceeding pertaining to a crime or pursuant to ch. 48. On or before the first business day after the receipt of

a subpoena to testify, the employe shall give the employer notice if he or she will have to be absent from employment because he or she has been subpoenaed to testify in an action or proceeding pertaining to a crime or pursuant to ch. 48. If a person is subpoenaed to testify in an action or proceeding as a result of a crime, as defined in s. 950.02 (1m), against the person's employer or an incident involving the person during the course of his or her employment, the employer shall not decrease or withhold the employe's pay for any time lost resulting from compliance with the subpoena. An employer who violates this section may be fined not more than \$200 and may be required to make full restitution to the aggrieved employe, including reinstatement and back pay. Except as provided in this section, restitution shall be in accordance with s. 973.20.

SECTION 7. 346.65 (2r) (a) of the statutes, as created by 1987 Wisconsin Act 3, is repealed.

SECTION 8. 346.65 (2r) (b) of the statutes, as created by 1987 Wisconsin Act 3, is renumbered 346.65 (2r) (a) and amended to read:

346.65 (2r) (a) In addition to the other penalties provided for violation of s. 346.63 (1), a judge may order a defendant to pay restitution to a victim ~~regardless of whether the defendant is placed on probation under s. 973.09. In determining the method of payment, the court shall consider the financial resources and future ability of the defendant to pay. The court shall provide for payment of an amount equal to the pecuniary loss caused by the offense. Upon the application of any interested party, the court shall schedule and hold an evidentiary hearing to determine the value of the victim's pecuniary loss resulting from the offense s. 973.20.~~

SECTION 9. 346.65 (2r) (c) of the statutes, as created by 1987 Wisconsin Act 3, is repealed.

SECTION 10. 346.65 (2r) (d) of the statutes, as created by 1987 Wisconsin Act 3, is renumbered 346.65 (2r) (b).

SECTION 11. 425.106 (1) (d) of the statutes is amended to read:

425.106 (1) (d) Earnings or other assets of the customer which are required to be paid by the customer as restitution under s. ~~973.09~~ 973.20.

SECTION 12. 756.25 (1) of the statutes is amended to read:

756.25 (1) Every grand and petit juror summoned shall receive an amount, not less than \$16, as fixed by the county board, for each day's actual attendance upon any circuit court, and an amount, not less than 10 cents per mile, determined by the county board for each mile actually traveled each day in going and returning by the most usual route. A juror shall not be paid for a day when the court is not in session unless payment is specially ordered by the court. An employer shall grant an employe a leave of absence without loss of time in service for the period of jury

service. For the purpose of determining seniority or pay advancement, the status of the employe shall be considered uninterrupted by the service. No employer may use absence due to jury service as a basis for the discharge of an employe or for any disciplinary action against the employe. An employer who discharges or disciplines an employe in violation of this subsection may be fined not more than \$200 and may be required to make full restitution to the aggrieved employe, including reinstatement and back pay. Except as provided in this subsection, restitution shall be in accordance with s. 973.20.

SECTION 13. 757.69 (1) (b) of the statutes, as affected by 1987 Wisconsin Act 27, is amended to read:

757.69 (1) (b) In criminal matters issue summonses, arrest warrants or search warrants and conduct initial appearances of persons arrested and set bail to the same extent as a judge. At the initial appearance, the court commissioner shall, when necessary, inform the defendant in accordance with s. 970.02 (1). If the defendant appears or claims to be unable to afford counsel, the court commissioner may refer the person to the authority for indigency determinations specified under s. 977.07 (1). If the court commissioner is a full-time court commissioner, he or she may conduct the preliminary examination to the same extent as a judge. If a court refers a disputed restitution issue under s. 973.20 (13) (c) 4, the court commissioner shall conduct the hearing on the matter in accordance with s. 973.20 (13) (c) 4.

SECTION 14. 767.265 (6) of the statutes is amended to read:

767.265 (6) Except as provided in sub. (3m), if the person from whom the payer receives money fails to withhold the money after receipt of notice as provided in this section, the person may be fined not more than \$100 for each payment not withheld and may be required to pay to the clerk of the court the amount assigned. If an employer who receives an assignment under this section fails to notify the clerk of court within 10 days after an employe is terminated or otherwise temporarily or permanently leaves employment, the employer may be fined not more than \$100. No employer may use an assignment under this section as a basis for the denial of employment to a person, the discharge of an employe or any disciplinary action against an employe. An employer who denies employment or discharges or disciplines an employe in violation of this subsection may be fined not more than \$500 and may be required to make full restitution to the aggrieved person, including reinstatement and back pay. Except as provided in this subsection, restitution shall be in accordance with s. 973.20. An aggrieved person may apply to the district attorney or to the department of industry, labor and human relations for enforcement of this subsection. Compliance by the person from whom the payer receives money with the order operates as a discharge of the person's

liability to the payer as to that portion of the payer's commission, earnings, salaries, wages, benefits or other money so affected.

SECTION 15. 812.18 (1) (a) of the statutes is amended to read:

812.18 (1) (a) From the time of the service of the summons and complaint upon the garnishee, the garnishee shall be liable to the plaintiff for the property and earnings then in his or her possession or under his or her control belonging to the defendant or in which he or she is interested to the extent of his or her right or interest therein and for all his or her debts due or to become due to the defendant, except such as are exempt from execution, all sums required by a court to be paid by the defendant as restitution under s. ~~973.09~~ 973.20 or the amount of the subsistence allowance due the defendant under sub. (2) if earnings are the subject matter of the garnishment action, but not in excess of the amount of the plaintiff's claims as disclosed by the garnishee complaint and disbursements, not to exceed \$40.

SECTION 16. 911.01 (5) of the statutes is created to read:

911.01 (5) RESTITUTION HEARINGS. In a restitution hearing under s. 973.20 (13), the rules of evidence are subject to waiver under s. 973.20 (14) (d).

SECTION 17. 943.24 (5) (a) of the statutes is repealed.

SECTION 18. 943.24 (5) (b) of the statutes is renumbered 943.24 (5) (a) and amended to read:

943.24 (5) (a) In addition to the other penalties provided for violation of this section, a judge may order a violator to pay restitution ~~to a victim regardless of whether the violator is placed on probation~~ under s. ~~973.09~~. ~~In determining the method of payment, the court shall consider the financial resources and future ability of the violator to pay. The court shall provide for payment of an amount equal to the pecuniary loss caused by the offense. Upon the application of any interested party, the court shall schedule and hold an evidentiary hearing to determine the value of the victim's pecuniary loss resulting from the offense~~ 973.20. A victim may not be compensated under this section and s. 943.245.

SECTION 19. 943.24 (5) (c) of the statutes is repealed.

SECTION 20. 943.24 (5) (d) of the statutes is renumbered 943.24 (5) (b).

SECTION 21. 943.245 (1) of the statutes is renumbered 943.245 (1m), and 943.245 (1m) (intro.), as renumbered, is amended to read:

943.245 (1m) (intro.) Any person who incurs pecuniary loss, ~~as defined in s. 973.09 (8)~~, including any holder in due course of a check or order, may bring a civil action against any adult or emancipated minor who:

SECTION 22. 943.245 (1) of the statutes is created to read:

943.245 (1) In this section, “pecuniary loss” means:

(a) All special damages, but not general damages, including, without limitation because of enumeration, the money equivalent of loss resulting from property taken, destroyed, broken or otherwise harmed and out-of-pocket losses, such as medical expenses; and

(b) Reasonable out-of-pocket expenses incurred by the victim resulting from the filing of charges or cooperating in the investigation and prosecution of the offense under s. 943.24.

SECTION 23. 943.50 (5) (a) of the statutes is repealed.

SECTION 24. 943.50 (5) (b) of the statutes is renumbered 943.50 (5) (a) and amended to read:

943.50 (5) (a) In addition to the other penalties provided for violation of this section, a judge may order a violator to pay restitution to a victim regardless of whether the violator is placed on probation under s. 973.09. In determining the method of payment, the court shall consider the financial resources and future ability of the violator to pay. The court shall provide for payment of an amount equal to the pecuniary loss caused by the offense. Upon the application of any interested party, the court shall schedule and hold an evidentiary hearing to determine the value of the victim’s pecuniary loss resulting from the offense. In lieu of actual payment, the court may order return of the merchandise. If the value of the merchandise is diminished, the court may order the return of the merchandise plus payment of an amount equal to the diminished value 973.20. A victim may not be compensated under this section and s. 943.51.

SECTION 25. 943.50 (5) (c) of the statutes is repealed.

SECTION 26. 943.50 (5) (d) of the statutes is renumbered 943.50 (5) (b).

SECTION 27. 949.15 (1) of the statutes is amended to read:

949.15 (1) Whenever an order for the payment of an award for personal injury or death is or has been made under this chapter, the department is subrogated to the cause of action of a claimant against the person responsible for the injury or death and may bring an action against the person for the amount of the damages sustained by the claimant. The department is also subrogated to the cause of action of the claimant against one or more 3rd parties liable for the acts of the person responsible for the injury or death. If an amount greater than that paid under the award order is recovered and collected in any such action, the department shall pay the balance to the claimant. If the person responsible for the injury or death has previously made restitution payments to the general fund under s. 973.09 973.20, any judgment obtained by the department under this section shall be reduced by the amount of the restitution payments to the general fund.

SECTION 28. 949.165 (7) of the statutes is amended to read:

949.165 (7) THIRD PRIORITY PAYMENTS; LEGAL FEES AND RESTITUTION. The department shall make payments from an escrow account for any governmental entity for the reimbursement for or recoupment of the costs of legal representation of the person charged with the serious crime or for any unpaid restitution under s. 973.09 973.20. The governmental entity shall file a claim for the applicable amount with the department.

SECTION 28m. 973.03 (4) (a) of the statutes, as created by 1987 Wisconsin Act 27, is amended to read:

973.03 (4) (a) In lieu of a sentence of imprisonment to the county jail, a court may impose a sentence of detention at the defendant’s place of residence or other place designated by the court. The length of detention may not exceed the maximum possible period of imprisonment. The detention shall be monitored by the use of an electronic device worn continuously on the defendant’s person and capable of providing positive identification of the wearer at the detention location at any time. A sentence of detention in lieu of jail confinement may be imposed only if agreed to by the defendant. The court shall ensure that the defendant is provided a written statement of the terms of the sentence of detention, including a description of the detention monitoring procedures and requirements and of any applicable liability issues. The terms of the sentence of detention may include a requirement that the defendant pay a daily fee to cover the costs associated with monitoring him or her. In that case, the terms must specify to whom the payments are made.

SECTION 29. 973.05 (1m) of the statutes is amended to read:

973.05 (1m) If the court orders payment of restitution and a fine and related payments under s. 973.09 (1) (b) 973.20, the court may authorize a payment period in excess of 60 days.

SECTION 30. 973.06 (1) (f) of the statutes is created to read:

973.06 (1) (f) An amount equal to 10% of any restitution ordered under s. 973.20, payable to the county treasurer for use by the county.

SECTION 31. 973.06 (3) of the statutes is amended to read:

973.06 (3) If the court orders payment of restitution as a condition of probation, collection of costs shall be as provided under s. 973.09 (1g) and (1m) 973.20.

SECTION 32. 973.073 of the statutes, as affected by 1987 Wisconsin Act 3, is repealed.

SECTION 33. 973.08 (1) of the statutes is amended to read:

973.08 (1) When any defendant is sentenced to the state prisons, a copy of the judgment of conviction and a copy of any order for restitution under s. 973.20 shall be delivered by the officer executing the judgment to the warden or superintendent of the institution when the prisoner is delivered.

SECTION 34. 973.09 (1) (b) of the statutes is amended to read:

973.09 (1) (b) If the court places the person on probation, the court shall ~~require order the person to pay restitution designed to compensate the victim's pecuniary loss resulting from the crime to the extent possible under s. 973.20, unless the court finds there is substantial reason not to order restitution as a condition of probation. If the court does not require restitution to be paid to a victim, the court shall state its reason on the record. A court may require that restitution be paid to an insurer or surety which has paid any claims or benefits to or on behalf of the victim. If the court does require restitution, it shall specify the amount consistent with sub. (1m) and shall notify the department of justice of its decision if the victim may be eligible for compensation under ch. 949. If the court places the person on probation, it shall require the probationer to pay a surcharge equal to 5% of the total amount of any restitution, costs, attorney fees and any fines and related payments ordered under s. 973.05 (1) to the clerk of circuit court or the department of health and social services, as applicable under sub. (1m), for administrative expenses under this section.~~

JUDICIAL COUNCIL NOTE: See s. 973.20 (5) (d) and (11) (a), stats.

SECTION 35. 973.09 (1g) of the statutes is amended to read:

973.09 (1g) If the court places the person on probation, the court may require, upon consideration of the factors specified in s. 973.20 (13) (a) 2 to 5, that the probationer reimburse the county or the state, as applicable, for any costs for legal representation to the county or the state for the defense of the case. In order to receive this reimbursement, the county or the state public defender shall provide a statement of its costs of legal representation to the defendant and court within the time period set ~~for documenting the pecuniary loss of the victim under sub. (1m) (b). The time period does not apply to statements of costs for legal representation by private attorneys appointed under s. 977.08 by the court.~~

JUDICIAL COUNCIL NOTE: Section 973.09 (1g), stats., is amended to require the court to consider the defendant's ability to pay when ordering reimbursement of the costs of legal representation.

SECTION 36. 973.09 (1m) and (1r) of the statutes are repealed.

JUDICIAL COUNCIL NOTE: See s. 973.20, stats.

SECTION 37. 973.09 (3) (b) of the statutes is amended to read:

973.09 (3) (b) ~~The clerk or the department, as applicable under sub. (1m), shall notify the sentencing court, any person to whom unpaid restitution is owed and the district attorney of the status of the ordered payments unpaid at least 90 days before the probation expiration date. If the clerk is acting under sub. (1m), he or she shall give the department the same notifica-~~

~~tion. If payment as ordered has not been made, the court shall hold a probation review hearing prior to the expiration date, unless the hearing is voluntarily waived by the probationer with the knowledge that waiver may result in an extension of the probation period or in a revocation of probation. A probationer shall not be discharged from probation until payment of the ordered restitution, costs, attorney fees, fines and related payments under s. 973.05 has been made or the court determines that there is substantial reason not to continue to require payment. If the court does not extend probation, it shall issue a judgment for the unpaid restitution and direct the clerk to file and docket a transcript of the judgment, without fee, unless it finds that the victim has already recovered a judgment against the probationer for the damages covered by the restitution order. The clerk shall send a copy of the judgment to the victim. The judgment has the same force and effect as judgments docketed under ss. 806.16 and 809.25.~~

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JUDICIAL COUNCIL NOTE: See s. 973.09 (3) (c), stats.

SECTION 38. 973.09 (3) (c) of the statutes is created to read:

973.09 (3) (c) Any of the following may constitute cause for the extension of probation:

1. The probationer has not made a good faith effort to discharge court-ordered payment obligations.
2. The probationer is not presently able to make required payments and the probationer and the person to whom restitution is owed consent to the performance of community service work under sub. (7m) in satisfaction of restitution ordered for that person, for which an extended period of probation is required.
3. The probationer stipulates to the extension of supervision and the court finds that extension would serve the purposes for which probation was imposed.

JUDICIAL COUNCIL NOTE: Section 973.09 (3) (c), stats., specifies grounds for extending probation. The availability of a civil judgment for unpaid restitution enforceable by the victim under s. 973.20 (1), stats., substantially reduces the necessity of extending probation solely for the purpose of enforcing court-ordered payments, a practice of questionable cost-effectiveness. See legislative audit bureau report No. 85-10, April 15, 1985, at 17-18. Probation may, however, be extended upon stipulation of the defendant, to enforce community service in satisfaction of restitution, or when the probationer has not made a good faith effort to make restitution or other payments. *Huggett v. State*, 83 Wis. 2d 790, 803 (1978).

SECTION 39. 973.09 (4m) of the statutes is renumbered 973.20 (9) (b) and amended to read:

973.20 (9) (b) ~~If the defendant is placed on probation, the court shall determine if restitution would be an appropriate condition of probation. If when restitution is ordered, the court shall inquire to see if an award has been made under ch. 949 and if the department of justice is subrogated to the cause of action under s. 949.15. If the restitution ordered is less than or equal to the award under ch. 949, the restitution shall be paid only to the general fund. If the restitution ordered is greater than the award under ch. 949,~~

the general fund shall receive an amount equal to the award under ch. 949 and the balance shall be paid to the victim.

JUDICIAL COUNCIL NOTE: See s. 973.20 (1), stats.

SECTION 40. 973.09 (6) of the statutes is renumbered 973.20 (9) (a) and amended to read:

973.20 (9) (a) If a crime victim is paid an award under ch. 949 for any loss arising out of a criminal act, the state is subrogated to the rights of the victim to any restitution required ~~as a condition of probation~~ by the court. The rights of the state are subordinate to the claims of victims who have suffered a loss arising out of the offenses or any transaction which is part of the same continuous scheme of criminal activity.

SECTION 41. 973.09 (7) of the statutes is renumbered 973.20 (8) and amended to read:

973.20 (8) ~~Requiring restitution as a condition of probation~~ Restitution ordered under this section does not limit or impair the right of a victim to sue and recover damages from the ~~probationer~~ defendant in a civil action. The facts that restitution was required or paid are not admissible as evidence in a civil action and have no legal effect on the merits of a civil action. Any restitution ~~paid by the probationer to the victim made by payment or community service~~ shall be set off against any judgment in favor of the victim in a civil action arising out of the facts or events which were the basis for the restitution. The court trying the civil action shall hold a separate hearing to determine the validity and amount of any setoff asserted by the defendant.

SECTION 42. 973.09 (8) of the statutes is repealed.

JUDICIAL COUNCIL NOTE: See s. 973.20 (2) to (7), stats.

SECTION 43. 973.20 (title), (1) to (7) and (10) to (14) of the statutes are created to read:

973.20 (title) Restitution. (1) When imposing sentence or ordering probation for any crime, the court, in addition to any other penalty authorized by law, shall order the defendant to make full or partial restitution under this section to any victim of the crime or, if the victim is deceased, to his or her estate, unless the court finds substantial reason not to do so and states the reason on the record. Restitution ordered under this section is a condition of probation or parole served by the defendant for the crime. After the termination of probation or parole, or if the defendant is not placed on probation or parole, restitution ordered under this section is enforceable ~~in the same manner as a judgment in a civil action by the victim named in the order to receive restitution or enforced under ch. 785.~~

(2) If the crime resulted in damage to or loss or destruction of property, the restitution order may require that the defendant:

(a) Return the property to the owner or owner's designee; or

(b) If return of the property under par. (a) is impossible, impractical or inadequate, pay the owner or

owner's designee the reasonable repair or replacement cost or the greater of:

1. The value of the property on the date of its damage, loss or destruction; or

2. The value of the property on the date of sentencing, less the value of any part of the property returned, as of the date of its return. The value of retail merchandise shall be its retail value.

(3) If the crime resulted in bodily injury, the restitution order may require that the defendant do one or more of the following:

(a) Pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric and psychological care and treatment.

(b) Pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation.

(c) Reimburse the injured person for income lost as a result of the crime.

(d) If the injured person's sole employment at the time of the injury was performing the duties of a homemaker, pay an amount sufficient to ensure that the duties are continued until the person is able to resume performance of the duties.

(4) If the crime resulted in death, the restitution order may also require that the defendant pay an amount equal to the cost of necessary funeral and related services under s. 895.04 (5).

(5) In any case, the restitution order may require that the defendant do one or more of the following:

(a) Pay all special damages, but not general damages, substantiated by evidence in the record, which could be recovered in a civil action against the defendant for his or her conduct in the commission of the crime.

(b) Pay an amount equal to the income lost, and reasonable out-of-pocket expenses incurred, by the person against whom the crime was committed resulting from the filing of charges or cooperating in the investigation and prosecution of the crime.

(c) Reimburse any person or agency for amounts paid as rewards for information leading to the apprehension or successful prosecution of the defendant for the crime.

(d) If justice so requires, reimburse any insurer, surety or other person who has compensated a victim for a loss otherwise compensable under this section.

(6) Any order under sub. (5) (c) or (d) shall require that all restitution to victims under the order be paid before restitution to other persons.

(7) If the court orders that restitution be paid to more than one person, the court may direct the sequence in which payments are to be transferred under sub. (11) (a). If more than one defendant is ordered to make payments to the same person, the court may apportion liability between the defendants or specify joint and several liability. If the court specifies that 2 or more defendants are jointly and sever-

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ably liable, the department or clerk to whom payments are made under sub. (11) (a) shall distribute any overpayments so that each defendant, as closely as possible, pays the same proportion of the ordered restitution.

(10) The court may require that restitution be paid immediately, within a specified period or in specified instalments. If the defendant is placed on probation or sentenced to imprisonment, the end of a specified period shall not be later than the end of any period of probation or parole.

(11) (a) Except as otherwise provided in this paragraph, the restitution order shall require the defendant to deliver the amount of money or property due as restitution to the department of health and social services for transfer to the victim or other person to be compensated by a restitution order under this section. If the defendant is not placed on probation or sentenced to prison, the court may order that restitution be paid to the clerk of court for transfer to the appropriate person. The court shall require the defendant to pay a surcharge equal to 5% of the total amount of any restitution, costs and attorney fees and any fines and related payments ordered under s. 973.05 (1) to the department or clerk of court for administrative expenses under this section.

(b) The department shall establish a separate account for each person in its custody or under its supervision ordered to make restitution for the collection and disbursement of funds. A portion of each payment constitutes the surcharge for administrative expenses under par. (a).

(12) (a) If the court orders restitution in addition to the payment of fines, related payments under s. 973.05 and costs under s. 973.06, it shall set the amount of fines, related payments and costs in conjunction with the amount of restitution and issue a single order, signed by the judge, covering all of the payments. If the costs for legal representation by a private attorney appointed under s. 977.08 are not established at the time of issuance of the order, the court may revise the order to include those costs at a later time.

(b) Except as provided in par. (c), payments shall be applied first to satisfy the ordered restitution in full, then to pay any fines or related payments under s. 973.05, then to pay costs other than attorney fees and finally to reimburse county or state costs of legal representation.

(c) If a defendant is subject to more than one order under this section and the financial obligations under any order total \$50 or less, the department or clerk of court, whichever is applicable under sub. (11) (a), may pay these obligations first.

(13) (a) The court, in determining whether to order restitution and the amount thereof, shall consider all of the following:

1. The amount of loss suffered by any victim as a result of the crime.
2. The financial resources of the defendant.

3. The present and future earning ability of the defendant.

4. The needs and earning ability of the defendant's dependents.

5. Any other factors which the court deems appropriate.

(b) The district attorney shall attempt to obtain from the victim prior to sentencing information pertaining to the factor specified in par. (a) 1. Law enforcement agencies, the department of health and social services and any agency providing services under ch. 950 shall extend full cooperation and assistance to the district attorney in discharging this responsibility. The department of justice shall provide technical assistance to district attorneys in this regard and develop model forms and procedures for collecting and documenting this information.

(c) The court, before imposing sentence or ordering probation, shall inquire of the district attorney regarding the amount of restitution, if any, that the victim claims. The court shall give the defendant the opportunity to stipulate to the restitution claimed by the victim and to present evidence and arguments on the factors specified in par. (a). If the defendant stipulates to the restitution claimed by the victim or if any restitution dispute can be fairly heard at the sentencing proceeding, the court shall determine the amount of restitution before imposing sentence or ordering probation. In other cases, the court may do any of the following:

1. Order restitution of amounts not in dispute as part of the sentence or probation order imposed and direct the appropriate agency to file a proposed restitution order with the court within 90 days thereafter, and mail or deliver copies of the proposed order to the victim, district attorney, defendant and defense counsel.

2. Adjourn the sentencing proceeding for up to 60 days pending resolution of the amount of restitution by the court, referee or arbitrator.

3. With the consent of the defendant, refer the disputed restitution issues to an arbitrator acceptable to all parties, whose determination of the amount of restitution shall be filed with the court within 60 days after the date of referral and incorporated into the court's sentence or probation order.

4. Refer the disputed restitution issues to a court commissioner or other appropriate referee, who shall conduct a hearing on the matter and submit the record thereof, together with proposed findings of fact and conclusions of law, to the court within 60 days of the date of referral. Within 30 days after the referee's report is filed, the court shall determine the amount of restitution on the basis of the record submitted by the referee and incorporate it into the sentence or probation order imposed. The judge may direct that hearings under this subdivision be recorded either by audio recorder or by a court reporter. A transcript is not required unless ordered by the judge.

(14) At any hearing under sub. (13), all of the following apply:

(a) The burden of demonstrating by the preponderance of the evidence the amount of loss sustained by a victim as a result of the crime is on the victim. The district attorney is not required to represent any victim unless the hearing is held at or prior to the sentencing proceeding or the court so orders.

(b) The burden of demonstrating, by the preponderance of the evidence, the financial resources of the defendant, the present and future earning ability of the defendant and the needs and earning ability of the defendant's dependents is on the defendant. The defendant may assert any defense that he or she could raise in a civil action for the loss sought to be compensated. The office of the state public defender is not required to represent any indigent defendant unless the hearing is held at or prior to the sentencing proceeding, the defendant is incarcerated when the hearing is held or the court so orders.

(c) The burden of demonstrating, by the preponderance of the evidence, such other matters as the court deems appropriate is on the party designated by the court, as justice requires.

(d) All parties interested in the matter shall have an opportunity to be heard, personally or through counsel, to present evidence and to cross-examine witnesses called by other parties. The court, arbitrator or referee shall conduct the proceeding so as to do substantial justice between the parties according to the rules of substantive law and may waive the rules of practice, procedure, pleading or evidence, except provisions relating to privileged communications and personal transactions or communication with a decedent or mentally ill person. Discovery is not available except for good cause shown. If the defendant is incarcerated, he or she may participate by telephone under s. 807.13 unless the court issues a writ or subpoena compelling the defendant to appear in person.

JUDICIAL COUNCIL NOTE: Subsection (1) allows restitution to be ordered although the defendant is not placed on probation. It allows restitution to be made payable to the estate of a deceased victim. It requires restitution ordered to be a condition of probation or parole served by the defendant for the offense. Finally, it allows restitution unpaid at the time probation or parole supervision terminates to be enforced by the victim as a judgment creditor. See 18 USC 3662 (a), (c) and (h).

Subsection (2) is patterned on 18 USC 3663 (b) (1) and prior s. 973.09 (1r), stats.

Subsection (3) is patterned on 18 USC 3663 (b) (2). Paragraph (d) is patterned on s. 949.06 (1) (b) 3, stats.

Subsection (4) is patterned on 18 USC 3663 (b) (3).

Subsection (5) (a) and (b) is based on prior s. 973.09 (8) (a) and (b), stats. A new provision allows the court to order restitution of income lost by the victim while participating in the investigation and prosecution of the offense.

Subsection (5) (c) is new. It allows the court to order restitution of rewards paid for information which helps solve or prosecute the offense.

Subsection (5) (d) carries forward the provision of prior s. 973.09 (1) (b), stats., allowing restitution to insurers, sureties, etc.

Subsection (6) is based on 18 USC 3663 (e) (1).

Subsection (7) is new. It allows the court to direct the order of payment when there is more than one victim, and to apportion liability when more than one defendant is ordered to make restitution to the same person, or to specify joint and several liability.

Subsection (10) is based on 18 USC 3663 (f).

Subsection (11) (a) is based on prior s. 973.09 (1) (b) and (1m) (c), stats.

Subsection (11) (b) is based on prior s. 973.09 (1m) (d), stats.

Subsection (12) (a) is based on prior s. 973.09 (1m) (a), stats.

Subsection (12) (b) is based on prior s. 973.09 (1m) (c), stats.

Subsection (12) (c) is based on prior s. 973.09 (1m) (cm), stats.

Subsection (13) (a) is patterned on 18 USC 3664 (a). Prior s. 973.09 (1m) (a), stats., similarly required the court to consider the defendant's ability to pay when determining the amount of restitution.

Subsection (13) (b) is new. It makes the district attorney primarily responsible for obtaining information relating to the amount of loss suffered by any crime victim. Law enforcement, probation and parole, and victim assistance agencies must cooperate with the district attorney in this regard. The department of justice is directed to develop model forms and procedures for collecting victim loss data. See legislative audit bureau report No. 85-10, April 15, 1985, at 14-18.

Subsection (13) (c) creates several optional procedures for resolving disputes over the amount of restitution without resort to a judicial evidentiary hearing as provided by prior s. 973.09 (1m) (b), stats. First, the defendant may stipulate to the district attorney's determination of the amount of victim loss, while reserving the right to seek a lower amount of restitution based on ability-to-pay factors. Second, the court may hear the dispute at the sentencing proceeding, or adjourn the matter for later hearing prior to imposing sentence. Third, the court may order restitution of items not in dispute, referring disputed issues for subsequent resolution. Fourth, the court, with the consent of the parties, may refer disputed restitution issues to an arbitrator, whose determination is final and binding. Fifth, the court may appoint a referee to conduct fact-finding into the disputed restitution issues, whose proposed findings must be presented to the court within 60 days.

Subsection (14) (a) to (c) is based on 18 USC 3664 (d) and prior s. 973.09 (1m) (a), stats.

Subsection (14) (d) is new. It is intended to allow restitution disputes to be heard in an informal way so that parties may participate effectively without the need for legal counsel. Restitution hearings are not governed by the rules of evidence. *State v. Pope*, 1107 Wis. 2d 726 (Ct. App. 1982).

SECTION 44. Initial applicability. This act applies to persons who commit crimes on or after the effective date of this SECTION.

SECTION 45. Effective date. This act takes effect on the first day of the 4th month commencing after its publication.