



## Legislative Fiscal Bureau

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Joint Committee on Finance

Paper #562

### Restitution Appropriation (Justice)

[LFB 2001-03 Budget Summary: Page 439, #14]

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#### CURRENT LAW

The Department of Justice's (DOJ) legal services' restitution appropriation is a continuing appropriation that receives monies deposited to DOJ to provide court-ordered restitution to victims as the result of prosecutions of medical assistance fraud, marketing and trade practices violations, violations of environmental laws and violations under federal antitrust law. Continuing appropriations are expendable until depleted or repealed by law. There is no adjusted base funding for the appropriation.

#### GOVERNOR

Convert the legal services' restitution appropriation from a continuing to an annual appropriation and amend the appropriation to provide that all monies received by DOJ to provide restitution to victims under a court order or settlement agreement be credited to the appropriation.

#### DISCUSSION POINTS

1. Restitution is awarded to a plaintiff when the defendant has been unjustly enriched at the plaintiff's expense. DOJ initiates court actions every year to recover restitution on behalf of various classes of Wisconsin consumers or citizens.

2. Court-ordered restitution payments are typically awarded in one of three manners: (a) if the defendant's victims can be specifically identified, DOJ is required by the court to give the restitution award directly to the specifically identified victims; (b) if the defendant's victims cannot

be specifically identified or it is too expensive to identify them or return the money to them, the court may distribute the restitution award directly to the Attorney General (AG), to be distributed at the AG's discretion to broadly benefit the class of people who were hurt, subject to limitations placed on the AG by the court; or (c) if the defendant's victims cannot be specifically identified or it is too expensive to identify them or return the money to them, the court may direct the AG to provide the court with a list of potential recipients who could receive the restitution award so as to broadly target the class of people who were hurt, and the court determines which of these recipients will receive the award and distributes the award directly. According to DOJ officials, courts are increasingly turning to this latter approach to distribute restitution awards when the defendant's victims cannot be specifically identified or it is too expensive to identify them or return the money to them.

3. DOJ has typically used the legal services' restitution appropriation where court-ordered restitution to specific victims in the prosecutions identified above was not possible or feasible. For other restitution payments received by the Department (including other court-ordered restitution awards and restitution payments received through settlement agreements), DOJ generally deposits the money to a holding account from which it distributes the funds as provided in the court order or settlement agreement.

4. Under the Governor's recommendation, the legal services' restitution appropriation would be converted from a continuing to an annual appropriation and the appropriation would be amended to provide that all monies received by DOJ to provide restitution to victims under a court order or settlement agreement be credited to the appropriation. There is no funding for the appropriation under the bill. With the change to an annual appropriation, therefore, before DOJ could distribute any restitution payment to any victim received under a court order or settlement agreement, DOJ would need to request and receive increased expenditure authority from the Department of Administration (DOA) and the Joint Committee on Finance under a s. 16.515 action.

5. Dollar amounts shown in the Chapter 20 appropriations schedule for a continuing program revenue appropriation represent the most reliable estimates of the amounts which will be expended during any fiscal year. It is not uncommon for appropriation authority in a program revenue continuing appropriation to be set at \$0 when expenditures fluctuate widely from year to year and cannot be estimated. Expenditures in the restitution appropriation over the last four fiscal years have been \$0 in 1997-98, \$53,700 in 1998-99, \$1,298,300 in 1999-00 and \$236,000 through March 31, 2001 in 2000-01. The amounts are dependent on court actions that cannot be projected in advance. If the Governor's recommendation to change the appropriation to an annual appropriation is adopted, it cannot be estimated what appropriation authority would be needed to reduce the need for a s. 16.515 request in order to make court-ordered or settlement payments.

6. The Governor's recommendation would lengthen the administrative time and processes required to distribute a restitution payment won by DOJ. Approval of expenditure authority under a s. 16.515 action would be required before any restitution payment could be distributed. This extra administrative step is not required under current law because: (a) many restitution payments under court order or settlement agreement are not required to pass through the

legal services' restitution appropriation; and (b) as the legal services' restitution appropriation is a continuing appropriation, DOJ only needs to seek increased expenditure authority through the DOA allotment process to distribute restitution awards that pass through the restitution appropriation.

7. DOA officials maintain that they have not always been able to ascertain from DOJ how the AG distributed restitution payments, to whom and in what amount. DOA officials maintain that the Governor's recommendation would increase accountability and disclosure as to how some restitution payments are distributed.

8. However, under current law, the AG has no discretion to distribute court-ordered restitution awards that are awarded to specifically-identified victims to anyone other than those victims. For court-granted discretion to distribute restitution awards when victims cannot be specifically identified, the AG's discretion is subject to the limitations and restrictions imposed by the court.

9. DOJ officials have identified potential legal problems with this proposed change in disbursement of court-ordered restitution awards. First, they argue that this change would violate the separation of powers doctrine. It is the court's function to determine how and to whom court-ordered awards are distributed. Second, DOJ also recovers restitution awards for Wisconsin consumers or citizens under federal law. DOJ officials argue that in cases where a court-ordered recovery is obtained under federal law, state administrative and legislative control over restitution award distribution could raise supremacy clause issues under the U.S. Constitution, in that the state law could be viewed as an attempt to obstruct a federal court's administration of federal law.

10. These potential legal problems, however, would not appear to apply in the context of out-of-court settlement agreements reached between DOJ and settling parties. Subjecting settlement agreements to administrative and legislative oversight could prove to be administratively cumbersome. A party seeking to settle with the state would now need three separate parties to agree to the settlement terms: (a) DOJ; (b) DOA; and (c) the Committee. Subjecting every settlement agreement to this process would slow down the process of concluding settlements on behalf of Wisconsin citizens and distributing settlement monies to them. On the other hand, DOA officials would maintain that this change would increase accountability and disclosure as to how these restitution settlement payments are distributed.

11. As an alternative to the Governor's recommendation, the Committee could consider requiring DOJ to report semi-annually to DOA and the Joint Committee on Finance as to: (a) all monies received by DOJ to provide restitution to victims under a court order or settlement agreement; (b) who received restitution payments under a given court order or settlement agreement and in what amount; and (c) how recipients of the restitution payments were selected.

## **ALTERNATIVES TO BASE**

1. Approve the Governor's recommendation to convert the legal services' restitution appropriation from a continuing to an annual appropriation and amend the appropriation to provide

that all monies received by DOJ to provide restitution to victims under a court order or settlement agreement be credited to the appropriation.

2. Delete the Governor's recommendation. In addition, provide that DOJ report semi-annually to DOA and the Joint Committee on Finance as to: (a) all monies received by DOJ to provide restitution to victims under a court order or settlement agreement; (b) who received restitution payments under a given court order or settlement agreement and in what amount; and (c) how recipients of the restitution payments were selected.

3. Maintain current law.

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