



Over 90% of federal criminal cases are resolved by plea agreement, and plea agreements typically require defendants to waive their rights to appeal their sentences.

In many cases, prosecutors also require that defendants agree to pay restitution (compensation for loss) to the victims of the crime. Practically speaking, the specific amount of restitution to be paid is rarely set forth in the plea agreement. Rather, restitution is calculated by the court during sentencing. But what if the court errs by miscalculating the amount of restitution? Does the plea agreement's waiver of appeal rights apply to the calculation of restitution? According to the Sixth Circuit--it depends. In 2003, the Sixth Circuit permitted a defendant to appeal the restitution calculation in [United States v. Smith](#). In *Smith*, the defendant's plea agreement stated that he would **"pay restitution for all losses resulting from his relevant offense conduct."** He also

"knowingly and voluntarily" gave up "any right he may have to appeal any sentence which is within the parameters of this agreement." The court reasoned that the agreement was ambiguous as to the scope of the waiver, was to be construed *against* the government, and therefore the waiver of the appeal did not extend to the restitution calculation. In [United States v. Winans](#), decided in March 2014, the Sixth Circuit reached the opposite conclusion, despite the striking similarities to the facts in *Smith*. The plea agreement in *Winans* stated that the Court "**shall order restitution to every identifiable victim of defendant's offense and all other relevant conduct.**" The agreement also stated that the defendant "waives any right he may have to appeal his conviction." The *Winans* court looked to facts outside the waiver language of the agreement in reaching its decision, including that:

- the plea recited the fact that the defendant obtained \$8 million from his victims;
- the Presentence Investigation Report recommended restitution of over \$5 million;
- the federal sentencing guidelines calculation was based on a loss calculation of \$8 million; and
- the factual basis recited at sentencing noted that the defendant obtained \$8 million from his victims.

Based on these facts, the Sixth Circuit determined that there was "no doubt" that the defendant knew the amount of restitution he was agreeing to pay as part of his plea agreement. As a result, the Sixth Circuit found that the defendant waived his right to appeal the restitution calculation (approximately \$4.8 million), along with the rest of his sentence. As *Winans* shows, the burden of restitution can be staggering. Although the Sixth Circuit does not provide concrete guidance as to how to preserve appeals of restitution, the case serves as a reminder to defendants and counsel that alleged loss amounts should be challenged early and often. If it is not possible to dispute the amount, other potential strategies might include negotiating a cap on the restitution calculation, or a carve-out to the plea agreement that is specifically tailored to challenge restitution.

Authors



[Thomas D. Ryerson](#)

Partner

TRyerson@perkinscoie.com [602.351.8039](tel:602.351.8039)

Explore more in

[White Collar & Investigations](#)

Blog series

White Collar Briefly

Drawing from breaking news, ever changing government priorities, and significant judicial decisions, this blog from Perkins Coie's White Collar and Investigations group highlights key considerations and offers practical

insights aimed to guide corporate stakeholders and counselors through an evolving regulatory environment.

[Subscribe ?](#)

[View the blog](#)