

## **An ACLU-PA Guide to the Imposition of Fines, Costs, or Restitution at Sentencing**

Individuals convicted of misdemeanors or felonies face not only jail time, but also substantial financial obligations in the form of fines, costs, or restitution. These obligations can follow defendants for years or even decades, long after they have completed their jail sentences and any period of probation. They also face downstream consequences if they do not—or cannot—pay, such as contempt hearings, driver’s license suspension, or jail. We intend this Guide to help attorneys and judges understand the law that governs imposing fines, costs, and restitution in criminal and summary cases.<sup>1</sup>

### **Fines, costs and restitution: each has separate requirements at sentencing.**

**Fines:** Fines are “direct consequences and, therefore, punishment.”<sup>2</sup> They are part of the sentence, are intended to be punitive, and might be the only sentence imposed (particularly in a summary case). When a court imposes a fine, it must consider the defendant’s ability to pay:

- 42 Pa. Cons. Stat. § 9726(c) prohibits a court from sentencing a defendant to pay a fine “unless it appears of record that: (1) the defendant is or will be able to pay the fine; and (2) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime.”
- 42 Pa. Cons. Stat. § 9726(d) requires that, in “determining the amount and method of payment of a fine, the court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose.”
- Pa.R.Crim.P. 706(C) applies in misdemeanor and felony cases only, and it provides: “The court, in determining the amount and method of payment of a fine or costs shall, insofar as is just and practicable, consider the burden upon the defendant by reason of the defendant’s financial means, including the defendant’s ability to make restitution or reparations.”<sup>3</sup>

These provisions require that the court:

- 1) consider the defendant’s ability to pay the fine;
- 2) consider the burden that payments will impose;
- 3) only impose a fine that the defendant will be able to pay; and
- 4) ensure that the fine will not prevent the defendant from paying restitution.

To meet these requirements:

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<sup>1</sup> How to determine whether the defendant is “able to pay,” as well as specific guides on the financial aspects of contempt and probation/parole, are the subject of separate ACLU-PA Guides.

<sup>2</sup> *Commonwealth v. Rivera*, 95 A.3d 913, 916 (Pa. Super. Ct. 2014)

<sup>3</sup> *See, e.g., Commonwealth v. Martin*, 335 A.2d 424 (Pa. Super. Ct. 1975) (en banc) (trial court violated Rule 706(C) (then 1407) by failing to consider the defendant’s ability to pay a \$5,000 fine); *Commonwealth v. Mead*, 446 A.2d 971, 973 (Pa. Super. Ct. 1982) (Rule 706 (then 1407) and § 9726 require that a court determine “on the record, whether he would be able to pay the fine”).

- The court must make a finding on the record regarding the defendant’s financial resources and ability to pay a fine.<sup>4</sup>
- Even if the defendant pleads guilty<sup>5</sup> or waives a pre-sentence investigation,<sup>6</sup> the court must still determine whether he can pay a fine before imposing it.
- If the trial court fails to perform this inquiry, it cannot lawfully impose a fine.<sup>7</sup>
- Still, a court may impose a fine even if the defendant does not have the *present* ability to pay it, as § 9726 permits a court to impose a fine that the defendant “will” be able to pay.<sup>8</sup>

The Superior Court has repeatedly invalidated fines that trial courts imposed without adhering to these requirements.<sup>9</sup> It has ruled, however, that “mandatory” fines are not subject to § 9276(c) and (d).<sup>10</sup>

**Costs:** Costs “are a reimbursement to the government for the expenses associated with the criminal prosecution.” These are “akin to collateral consequences” and “are not part of the criminal’s sentence but are merely incident to the judgment.”<sup>11</sup>

Although there is a common view that costs are “mandatory,” a 2010 statutory amendment gives courts discretion to reduce or waive costs based on the defendant’s financial circumstances. There is an unsettled legal question of whether the court *must* consider the defendant’s ability to pay, or merely *may* exercise that discretion. Either way, the law is clear that all costs can be reduced or waived:

- All costs are waivable: 42 Pa. Cons. Stat. § 9728(b.2) makes defendants automatically liable for costs “unless the court determines otherwise pursuant to Pa.R.Crim.P. No. 706(C).”<sup>12</sup>

<sup>4</sup> *Commonwealth v. Heggenstaller*, 699 A.2d 767, 769 (Pa. Super. Ct. 1997).

<sup>5</sup> *Commonwealth v. Gaskin*, 472 A.2d 1154, 1157 (Pa. Super. Ct. 1984).

<sup>6</sup> *Commonwealth v. Fusco*, 593 A.2d 373, 375 n.1 (Pa. Super. Ct. 1991).

<sup>7</sup> *Commonwealth v. Schwartz*, 418 A.2d 637, 638-39 (Pa. Super. Ct. 1980).

<sup>8</sup> *Commonwealth v. Thomas*, 879 A.2d 246, 264 (Pa. Super. Ct. 2005) (“Imposition of a fine is not precluded merely because the defendant cannot pay the fine immediately or because he cannot do so without difficulty.”).

<sup>9</sup> *See, e.g., Thomas*, 879 A.2d at 264 (invalidating \$6,000 fine where court “stated merely that it had ‘all the appropriate information,’ knowing appellant’s history and his recent ten year sentence to federal prison”); *Mead*, 446 at 973-74 (fine improper where sentencing court did not have information about current income, indebtedness, living situation, or ability to pay restitution); *Commonwealth v. Reardon*, 443 A.2d 792, 795 (Pa. Super. Ct. 1981) (court failed to consider the defendant’s financial status and reasons for imposing a fine); *Commonwealth v. Fusco*, 594 A.2d 373, 355-56 (Pa. Super. Ct. 1991) (information that a defendant would be working, without an indication of income, was not sufficient to show he could pay a \$10,000 fine).

<sup>10</sup> The Superior Court has ruled that § 9726 does not apply to mandatory fines. *See Commonwealth v. Cherpes*, 520 A.2d 439, 449 (Pa. Super. Ct. 1987). However, *Cherpes* failed to follow the basic rule of statutory interpretation that a specific provision prevails over a general provision *only if* they are irreconcilable. *See* 1 Pa. Cons. Stat. § 1333. A perfectly consistent reading would be that certain fines are mandatory unless the defendant is unable to pay them. As a result, counsel should consider preserving the issue to argue that *Cherpes* should be overturned.

<sup>11</sup> *Rivera*, 95 A.3d at 916.

<sup>12</sup> *Commonwealth v. Childs*, 63 A.3d 323, 326 (Pa. Super. Ct. 2013). *See also Commonwealth v. Burrows*, 88 WDA 2017, 2017 WL 4974752 (Pa. Super. Ct. Oct. 31, 2017) (Rule 706(C) “permits the trial court to consider the burden of the amount of costs in light of a defendant’s financial means”).

- This provision was adopted in 2010 and applies “[n]otwithstanding any provision of law to the contrary,” meaning that even if it conflicts with any other statutes that impose costs, it takes precedence over any older statutes that impose specific costs.<sup>13</sup>
- The legislative history explains that the amendment was intended to allow the “sentencing court” to “retain all discretion to modify or even waive costs in an appropriate case.”<sup>14</sup>
- The sentencing court should consider the defendant’s ability-to-pay costs at sentencing: The unresolved question is whether the court *must* consider the defendant’s ability to pay, or merely *may* exercise that discretion.
  - Rule 706(C) applies at sentencing and uses mandatory language that the court “shall” consider the burden on the defendant when determining the “amount and method of payment of a fine or costs.”
  - In a series of opinions starting in 1975, the Superior Court invalidated sentences for not following Rule 706(C) at sentencing, but more recently it has said that the Rule only *requires* an ability-to-pay hearing prior to incarceration for nonpayment.<sup>15</sup> Either way, the current case law at least permits trial courts to consider ability to pay and to reduce or waive court costs.
  - Indigent defendants should ask to have costs waived or reduced and preserve this issue for appeal.

Other points from case law:

- With the exception of supervision fees, the payment of costs cannot be a condition of probation: Because costs serve neither a penal nor rehabilitative purpose, a court cannot require that a defendant pay costs, other than supervision fees, as a condition of probation because they are “not reasonably related to the rehabilitation of the defendant” under 42 Pa. Cons. Stat. § 9754(c).<sup>16</sup>

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<sup>13</sup> Statutes dealing with the imposition of costs must be read *in pari materia* and construed “if possible, so that effect may be given to both.” 1 Pa. Cons. Stat. § 1933. There is no inherent conflict between individual statutes that impose court costs and § 9728(b.2), as it can easily be interpreted as simply providing a separate procedure if a defendant is too poor to pay costs. To the extent there is any conflict, § 1933 explains that specific statutes generally prevail “*unless* the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail.” (emphasis added). Section 9728(b.2) was enacted long after other statutes that impose costs. Moreover, the General Assembly, in enacting these statutes, has demonstrated its “manifest intention” that they trump older, more specific statutes. When a statute uses the “notwithstanding any other provision of this title or other statute to the contrary,” language, it “clearly indicates that the legislature intended to limit the application of prior” statutes. *Commonwealth v. Smith*, 544 A.2d 991, 998 (Pa. Super. Ct. 1988) (en banc). As a result of these fundamental statutory interpretation rules, all costs are waivable.

<sup>14</sup> Pennsylvania House of Representatives Judiciary Committee, SB 1169 Bill Analysis (Sept. 15, 2010) PN 2181.

<sup>15</sup> *Compare Martin*, 335 A.2d at 425-26 (en banc) (trial court violated Rule 706(C) (then 1407) by failing to consider the defendant’s ability to pay a \$5,000 fine at sentencing) *with Childs*, 63 A.3d at 326 (Rule 706(C) does not require an ability-to-pay hearing at sentencing).

<sup>16</sup> *Rivera*, 95 A.3d at 916. The only exception are supervision fees, as the statute that imposes that cost specifically requires that it is a condition of supervision. *See* 18 P.S. § 11.1102.

- Costs can only be imposed if a statute authorizes them: A defendant can only be required to pay costs that are authorized by statute.<sup>17</sup> The Superior Court has invalidated numerous illegal costs that trial courts imposed without statutory authorization.<sup>18</sup>
  - There is nothing inappropriate about the clerk of courts actually calculating the amount of costs, as long as there is a court order or statutory authorization for their imposition.<sup>19</sup>
  - “Costs of prosecution” is a term broad enough to encompass all authorized court costs.<sup>20</sup>
- The defendant has a right to object to the imposition of individual costs: At sentencing, a defendant must receive a bill of costs, to which he can file objections.<sup>21</sup>

**Restitution:** Restitution “compensates the victim for his loss and rehabilitates the defendant by impressing upon him that his criminal conduct caused the victim's loss and he is responsible to repair that loss.”<sup>22</sup> It is not considered punishment.<sup>23</sup>

Whether the court must consider a defendant’s ability to pay restitution at sentencing depends on whether the restitution is a part of the sentence or a condition of probation. Counsel should ask the court to clarify what type of restitution the court is imposing.

- Restitution that is part of sentence must be imposed without considering the defendant’s ability to pay.<sup>24</sup>
- Restitution that is solely a condition of probation can be imposed *only if* it is in an amount the defendant “can afford to pay.”<sup>25</sup>
- If restitution is solely a condition of probation, then the obligation to pay it “expires upon the end of the term of probation, even if the amount of restitution ordered has not been paid.”<sup>26</sup> By contrast, restitution that is ordered as part of the sentence under 18 Pa. Cons. Stat. § 1106(a) is part of the sentence and does not expire at the end of the defendant’s probation.<sup>27</sup>

<sup>17</sup> *Commonwealth v. Coder*, 415 A.2d 406, 410 (Pa. 1980).

<sup>18</sup> *See, e.g., Commonwealth v. Garzone*, 34 A.3d 67, 80 (Pa. 2012) (order to pay the prosecutors’ salaries not a proper cost); *Rivera*, 95 A.3d at 916 (Pa. Super. Ct. 2014) (repaying public defender not a proper cost); *Gill*, 432 A.2d at 1009 (various Allegheny costs, including \$60 flat fee for certain hearings, a witness fee, costs on withdrawn/dismissed charges, a fee for processing payments to witnesses, and a fee for service of process were illegal).

<sup>19</sup> *Richardson v. Pennsylvania Dep’t of Corrections*, 991 A.2d 394, 397 (Pa. Commw. Ct. 2010).

<sup>20</sup> *Commonwealth v. Cutillo*, 440 A.2d 607, 609 (Pa. Super. Ct. 1982); *Commonwealth v. Mazer*, 24 A.3d 481, 484 (Pa. Commw. Ct. 2011).

<sup>21</sup> *Commonwealth v. Coder*, 415 A.2d 406, 410 (Pa. 1980); *Commonwealth v. Gill*, 432 A.2d 1001, 1003 (Pa. Super. Ct. 1981) (defendant can appeal a denial of his objections).

<sup>22</sup> *Rivera*, 95 A.3d at 916.

<sup>23</sup> *Id.*

<sup>24</sup> 18 Pa. Cons. Stat. § 1106(c)(1)(i).

<sup>25</sup> 42 Pa. Cons. Stat. § 9754(c)(8).

<sup>26</sup> *Commonwealth v. Karth*, 994 A.2d 606, 610 (Pa. Super. Ct. 2010); *Commonwealth v. Holmes*, 155 A.3d 69, 86-87 (Pa. Super. Ct. 2017) (en banc) (opinion of four judges).

<sup>27</sup> *Holmes*, 155 A.3d at 86-87. Note that until 1998, 18 Pa. Cons. Stat. § 1106 prohibited a court from collecting restitution past the maximum period of time for which the defendant *could have* been sentenced for the offense (e.g. if a defendant was given a sentence of 5 years in jail but could have received a sentence of 10 years, he could only be forced to pay restitution for 10 years). *See Karth*, 994 A.2d at 610. Act 121 of 1998 removed that time limit, so there is no time limit on collecting restitution from defendants who were sentenced after December 3, 1998.

When setting restitution, the court must hold an adversarial evidentiary hearing and make findings on the record regarding the appropriate amount of restitution.<sup>28</sup> The burden is on the Commonwealth to show entitlement to restitution and establish the amount the defendant owes.<sup>29</sup> The court must determine the amount of restitution owed and cannot delegate this decision-making to an agency such as the probation department.<sup>30</sup>

### **Determining how much the defendant can afford to pay.**

Despite numerous appellate decisions instructing trial courts to consider the defendant's ability to pay when determining the amount of fines, costs, and restitution at sentencing, Pennsylvania's appellate courts have provided almost no guidance on *how* to determine an appropriate dollar amount.

- The Superior Court has said that a defendant's "ability to pay a fine in the immediate future was seriously curtailed by the imposition of a prison term," suggesting that trial courts should focus on the near-future financial ability of a defendant.<sup>31</sup>
- There is no indication that the legislature intends defendants to spend years paying fines and costs, long after having completed any potential jail sentence.
- In the absence of clear guidance, counsel should be prepared at sentencing to suggest a principled standard to the court, to determine how much the defendant should pay in fines and costs. Here are some suggestions:
  - Defendants with severe and permanent disabilities, such as individuals who receive SSI, should have their fines and costs substantially reduced or completely waived, since they will be unlikely to be able to afford to pay anything.<sup>32</sup>
  - The defendant and the court should identify an amount that the defendant can reasonably afford to pay each month while on probation, and the fines and costs should be capped at the total the defendant would pay over the course of that supervision (e.g. \$50 x 36 months of supervision).
  - The defendant should not pay fines and costs for a period of time longer than the maximum sentence. A defendant who is convicted of a crime with a possible maximum sentence of 5 years should have his payments capped at the amount he could reasonably pay over the course of that time (e.g. \$50 x 60 months). If the court uses this calculation, it should subtract from that any months that the defendant will be incarcerated, as a defendant who is in jail is unlikely to have any ability to pay.

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<sup>28</sup> *Commonwealth v. Atanasio*, 997 A.2d 1181, 1183 (Pa. Super. Ct. 2010).

<sup>29</sup> *Id.*

<sup>30</sup> *Commonwealth v. Deshong*, 850 A.2d 712, 715-16 (Pa. Super. Ct. 2004).

<sup>31</sup> *Martin*, 335 A.2d at 426 n.3.

<sup>32</sup> *Commonwealth v. Eggers*, 742 A.2d 174, 176 n.1 (Pa. Super. Ct. 1999) (receiving public assistance and the services of the public defender's office "invite the presumption of indigence"); *Commonwealth v. Smetana*, 2018 PA Super 176 at n.10 (Pa. Super. Ct. 2018) (endorsing the use of a national bench card that, among other items describes receipt of SSI as an indication that the defendant is unable to pay).

- Regardless, it is only the defendant’s finances—not those of friends or family—that the court can consider.<sup>33</sup>

Consult our guide on determining “ability to pay” at [www.aclupa.org/finesandcosts](http://www.aclupa.org/finesandcosts) to identify the types of information the court should consider at sentencing when it evaluates the defendant’s financial resources.

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<sup>33</sup> *Smetana*, 2018 PA Super 176 (“Although Appellant indicated that he could potentially borrow money from a sibling, the court failed to find—as our law requires—that he alone had the financial ability to pay the outstanding fines and costs such that imprisonment was warranted.”).