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"Criminal" torts – Maximizing your client's recovery through effective use of victim restitution

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Some torts involve criminal activity. Battery is an obvious example. A more common situation is a DUI where an intoxicated driver injures a victim. In either case, when a civil defendant is also convicted of a crime – and has assets – a civil plaintiff may benefit from a greater recovery through victim restitution.

A plaintiff victim need not choose between restitution and civil damages

First and foremost, rest assured there are no hidden "election" traps. Your injured client does not give up rights in the civil court by asserting rights in the criminal court. The Code of Civil Procedure and the Penal Code concur that a plaintiff victim is entitled to recover in both civil and criminal venues. (Code Civ. Proc., § 32 ["When the violation of a right admits of both a civil and criminal remedy the right to prosecute the one is not merged in the other"]; Pen. Code, § 9 [civil remedies for criminal acts preserved].)

Restitution orders and civil judgments serve different purposes. Restitution aims to rehabilitate the offender and deter future criminal conduct. (*People v. Baumann* (1985) 176 Cal.App.3d 67, 75, quoting *People v. Walmsley* (1985) 168 Cal.App.3d 636, 639.) Civil judgments are meant to wholly compensate plaintiffs for losses. A plaintiff's right to sue a defendant for tortious conduct amounting to a crime and the State's right to impose a restitution order on a criminally convicted defendant are independent of one another. A plaintiff victim can therefore recover through both restitution and civil judgment. (*Vigilant Ins. Co. v. Chiu* (2009) 175 Cal.App.4th 438, 445.)

Timing of the cases: Criminal court retains jurisdiction to set restitution after the defendant is sentenced

Typically, a criminal case will resolve before its civil counterpart. If your client's civil case is proceeding after the defendant has been convicted and sentenced in the criminal case, you need not worry that your window of opportunity has closed. The amount of victim restitution may be determined after conviction, because the criminal court retains jurisdiction to determine and set the amount of restitution. In fact, if the amount of loss cannot be determined at the time the defendant is sentenced, the court *must* order that the restitution be determined at a later time. (Pen. Code, §1202.4(f), 1202.6; *People v. Amin* (2000) 85 Cal.App.4th 58.)

Scope of restitution — victims and losses

First, determine who the "victims" are. Any crime victim may claim restitution (Cal. Const., art. I, § 28(b); Pen. Code, §1202.4(a)(1)). A crime "victim" is any person who has suffered economic loss as a result of the crime. A victim may include an immediate family member or person living with the direct victim (Pen. Code, §1202.4(k)(3)(A) and (B); a family member or fiancée who witnessed the crime (Pen. Code, §1202.4(k)(3)(C); or the primary caretaker of a minor victim. (Pen. Code, §1202.4(k)(3)(E)).

Once you have determined who the victims are, you can fully evaluate the scope of loss.

Determine the full extent of economic losses

A restitution order must be sufficient to fully reimburse each victim for every determined economic loss incurred as a result of the defendant's criminal conduct. (Pen. Code, §1202.4(f)) In other words, the trial court *must* award each victim the entire amount required to make him or her whole. (Cal. Const., art. I, § 28(b)(13).)

The scope of economic losses is broad. Certain losses are enumerated by statute. In addition, the court has broad discretion to award restitution for economic losses that fall outside of the scope of the statutory scheme.

Statutory losses include property damage and past and future medical expenses (*People v. Phelps* (1996) 41 Cal.App.4th 946. Also included are expenses related to mental health counseling, either for the plaintiff who was directly injured or for her immediate family members who may also be considered victims. Lost wages and profits are also losses. This includes wages and profits lost by a parent or guardian to care for a minor, those lost due to helping the police or the D.A. prosecute the case; and those lost due to testifying in court. (*People v. Ryan* (1988) 203 Cal.App.3d 189. The statutory scheme also contemplates loss of economic support of a deceased spouse (*People v. Giordano* (2007) 42 Cal.4th 644, as well as expenses to retrofit a vehicle or residence if the victim is permanently disabled through the defendant's criminal conduct.

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The statute also allows a victim to claim reasonable attorneys' fees incurred by the victim in protecting or establishing her right to restitution (*People v. Lyon* (1996) 49 Cal.App.4th 1521; as well as investigative and storage expenses incurred by the victim related to the criminal case. (*People v. Ortiz* (1997) 53 Cal.App.4th 791.

These "losses" accrue 10 percent interest per year from either the date of sentencing or loss, as the Court determines.

Think expansively when considering what to claim as your client's losses. Also, be aware that restitution may be adjusted by the comparative negligence of the victim. (*People v. Millard* (2009) 175 Cal.App.4th 7, 41.)

Recovering the judgment — Restitution and insurance off-sets

Restitution collected pursuant to a restitution order may be credited against a civil judgment. The statutory scheme governing restitution statute does not conversely authorize credit from a civil settlement to the amount payable pursuant to a restitution order. This makes perfect sense if you consider that restitution is meant to deter future criminality and impress upon the defendant that he must accept responsibility for his criminal conduct.

Of course, there are nuances within this general rule that warrant further discussion.

As a general proposition, there is no off-set for moneys received by the victim from her own insurer. Direct crime victims have a statutory right to restitution for the full amount of losses without regard to full or partial recoupment from other sources (except the state Restitution Fund). (Pen. Code, §1202.4(f)(3); *People v. Millard* (2009) 175 Cal.App.4th 7, 27 [citations].) The trial court may not use reimbursements an insured victim received from his or her own insurer or the insurer of a third party, such as a relative of the defendant, to reduce the amount of restitution the defendant owes. (Penal Code, §1202.4(f)(2); *People v. Hamilton* (2003) 114 Cal.App.4th 932, 941 (emphasis added).)

Although this approach has been criticized, the court may order an off-set for monies paid to victim by criminal defendant's insurer. (*People v. Bernal* (2002) 101 Cal.App.4th 155, 165; *People v. Jennings* (2005) 128 Cal.App.4th 42, 53) or payments the defendant's employer's insurance company makes to the victim under a policy covering the defendant (*People v. Short* (2008) 160 Cal.App.4th 899, 903 (relationship between defendant and insurance company is such that victim is deemed to have received civil settlement "directly from the defendant" under Penal Code, §1202.4(a)(1)).) This does not include payments made by alternative sources, only those paid on behalf of the defendant for which restitution is sought. (*Jennings*, *supra*, 128 Cal.App.4th 50.)

In the context of a DUI, the court may off-set money paid by the drunk driver's insurance company against any restitution order imposed against the driver. Restitution paid by the drunk driver will certainly off-set a civil judgment for the same damages. However, the driver is not entitled to an off-set for monies paid to your plaintiff by alternative sources. If your client received money from her own insurance company, the driver is still on the hook for the full loss by way of restitution.

"Hanif/Nishihama" rule applies to restitution for medical expense

Restitution for medical expenses is limited to the amount paid as distinguished from the amount billed. (*People v. Millard* (2009) 175 Cal.App.4th 7, 27.)

Unlike in civil cases, the amount billed in the medical bills is of no consequence. A restitution order can only be entered for the amount of medical expenses actually paid. If a restitution order is issued for the amount billed, not paid, it is grounds for reversal on appeal – the evidence you present at the restitution hearing should be limited to only amounts actually paid to avoid a window for appeal.

Release of civil liability does not bar restitution

A civil settlement between a victim and a defendant that covers only part of the victim's losses does not preclude an additional restitution award for the balance of losses, even if the settlement releases the defendant from further civil liability. (*People v. Clifton* (1985) 172 Cal.App.3d 1165, 1168.) A release cannot waive the People's right to have a defendant pay restitution. (*People v. Bernal* (2002) 101 Cal.App.4th 155, 160).)

Moreover, because restitution orders cover only economic losses, an ideal release will specify that the settlement monies cover only non-economic damages.

Restitution — Ability to collect attorneys' fees

The victim is entitled to restitution for reasonable attorney fees expended in enforcing her restitution rights and in obtaining payment from the defendant's insurer. (*People v. Pinedo* (1998) 60 Cal.App.4th 1403.)

Attorneys fees for services toward restitution or in a related civil case must be reasonable and must be calculated using the lodestar method. (*People v. Millard* (2009) 175 Cal.App.4th 7, 32.) A court "may not determine a 'reasonable' attorney fee solely by reference to the amount due under a contingency agreement." (*Id.* at 33, citing *People ex rel. Dept. of Transportation v. Yuki* (1995) 31 Cal.App.4th 1754, 1770-1771.)

The lodestar method begins by multiplying the reasonable number of hours worked on a client's case by the reasonable hourly rate for that work. The court must begin with the lodestar calculation and then make adjustments upward or downward based on the factors discussed in *Ketchum v. Moses* (2001) 24 Cal.App.4th 1122, 1134, including whether there is a

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contingency fee agreement. After considering all relevant factors, a court may ultimately, but is not compelled to, award as reasonable those fees set forth in a contingency fee agreement. (*Id.* citing *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.App.4th 1084, 1095.)

To support a claim for attorneys fees, you should do more than simply submit your contingency fee contract. Declarations from the attorneys who have worked on the case can provide evidence of the hours worked and establish a reasonable hourly rate. Declarations of other local attorneys in the area who can support the reasonableness of your rate are also acceptable.

Costs are also recoverable, but include statements in your declarations attesting to the costs incurred to date or provide the actual invoices. You are also only entitled to costs and fees relating to prosecuting claims against the defendant. If you have a multiple defendant case, you will need to parse out costs and fees as to each defendant. You would not be able to recoup costs and fees incurred to serve discovery on, depose, or file motions relating to other parties unless you successfully argue the discovery was necessary for the case against the criminal defendant.

Defendant's inability to pay restitution irrelevant

A defendant's inability to pay restitution "shall not be considered a compelling and extraordinary reason not to impose a restitution order, nor … be a consideration in determining the amount of a restitution order." Penal Code, §1202.4(g). However, it must be considered before making an order for "income deduction" (garnishment). Pen. Code, §1202.42(a). A defendant's inability to pay only comes into play if you ask the court to garnish wages or revoke probation due to failure to pay.

Restitution procedure

While the trial court must order a criminal defendant to pay restitution for all victims' economic losses, a criminal defendant has the right to a hearing to dispute the amount of restitution.

Normally, a Deputy District Attorney would be assigned to represent the victims' interests at the restitution hearing. You are better equipped with volume and detail of economic records. Your client may request documentation, such as the police report, from the DA and provide it to you. It is best to coordinate with the DA and/or Probation Officer about how to handle the hearing; most are cooperative and appreciate the help.

A restitution hearing is more informal than a trial, but you must be prepared to put on competent evidence of loss. Often, the hearings last less than an hour. There are no pleadings and no discovery motions.

At the hearing the victim goes first to present evidence showing the losses and that the losses were caused by the crime committed by the defendant. (*People v. Rivera* (1989) 212 Cal.App.3d 1153, 1161.) The victim must prove that the defendant's conduct was a "substantial factor" in causing the events that harmed the victim; it need not be the sole cause. (*In re Ashlie M.* (2009) 173 Cal.App.4th 668, 673.) The standard of proof is by a preponderance of the evidence. (*People v. Baumann* (1985) 176 Cal.App.3d 67, 80.)

Documentary evidence such as bills, business records, and "profits lost" is admissible when offered in support of the amount of the victim's losses. (Pen. Code, §1203.1d.) A victim's testimony, without supporting documentation, is prima facie evidence of value. (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1544.)

Once you have made your initial showing, the defendant has the burden of demonstrating inaccuracies in your proof. (*People v. Goulart* (1990) 224 Cal.App.3d 71, 83; see Evid. Code, §813(a)(2).) If the defendant fails to object to your proof, any objection is deemed waived. (*In re S.S.* (1995) 37 Cal.App.4th 543, 547.) Professional fees incurred may be proved by declaration, and the victim does not have to make the declarant available for cross-examination. (*People v. Cain* (2000) 82 Cal.App.4th 81.)

At the end of what is essentially a bench trial, the judge determines the value of actual loss and makes a restitution order. The order will not include any award for punitive damages or for noneconomic loss. Those must be sought separately through the civil courts.

Once this restitution order is entered, you may request an order of examination to determine the defendant's financial assets for purposes of collecting on the restitution order. This is essentially the same examination you would want – but would not always get – if you were alleging punitive damages. Concealment of assets to avoid payment of restitution is a felony if the underlying crime was a felony, and a misdemeanor if the underlying crime was a misdemeanor. (Pen. Code, §155.5.)

A restitution order is a "money judgment" as defined in Code of Civil Procedure sections 680.230 and 680.270 and therefore enforceable as a civil judgment. All post-judgment tools such as writs of execution are available to the victim to collect from the defendant. A restitution order is equivalent to a money judgment, so a victim granted restitution is a judgment creditor. And unlike some other debts, a restitution order is not dischargeable in bankruptcy.

Once you have your civil judgment, you have considerable leverage against the defendant in your civil case. For example, if you file the judgment as a lien against the defendant's real property, you can use that judgment as a floor in dispute-resolution discussions – allowing you

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to focus on your client's noneconomic damages.

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