



When your civil case has a companion criminal case

Settlement can often move forward despite the pending criminal matter, and the victim may be entitled to restitution in addition to the civil settlement

BY CHRISTOPHER MONTES DE OCA

A billion-dollar-plus settlement was reached before the criminal case had proceeded to trial. I am, of course, talking about the recent George Tyndall lawsuit involving USC. This is important to show you that, as the plaintiff's attorney, you can bring justice for your client – the victim – and not be at the mercy of the criminal case.

What happens when your personal-injury civil case has a companion criminal case? Do you ignore the criminal case? Do you tell yourself that, because it is excluded from your fee agreement, you don't need to pay attention to it? Are you even aware that a criminal case is ongoing? Looking

forward to the criminal case can be critical to your client's civil case.

Yes, criminal cases have their own lingo and you will feel like a fish out of water. After a few cases you will definitely feel more comfortable. Let's jump into some of the basics. The most common types of crossover cases are driving under the influence, hit and run, assault and battery, and sexual assault and sexual battery cases.

Automatic stay of civil case? Not so fast...

Many personal-injury civil attorneys mistakenly believe that once a criminal case is pending, the civil case must stop. This is simply not true, as seen in the Tyndall/USC matter. Yes, the criminal case almost always

takes priority because of the defendant's Fifth Amendment right, and the civil case can be stayed, but many aspects of the civil case can continue. Furthermore, many issues can be resolved during the criminal case and thus would not need to be relitigated with the civil action.

For example, the effect of a plea or judgment on the criminal case can prove civil liability. A no-contest plea to a felony offense is admissible as an admission in a civil case growing out of the act on which the criminal prosecution is built. (Pen. Code, (PC) § 1016(3).) While a no-contest plea to a misdemeanor is not admissible as an admission in a civil case (PC § 1016(3)), a guilty plea to either a felony or a misdemeanor may be used as an admission in a civil case.



(*Teitelbaum Furs, Inc. v. Dominion Ins. Co.* (1962) 58 Cal.2d 601.)

Victims' rights

There are some different players in the criminal arena. It is important to understand that your client is called the victim in a criminal case. The prosecutor represents the people of the State, not the victim. However, there are certain laws and statutes that prosecutors must abide by to protect the victim. Perhaps the most important rights are detailed in the Victims' Bill of Rights, found in the California Constitution. (Cal. Constitution Article I, § 28 (b).) These enumerated rights include: (a) to prevent disclosure of victim confidential information, including communications made in the course of medical or counseling treatment; (b) to refuse an interview, deposition, or discovery request; (c) to confer with the prosecuting agency regarding the charges filed, and to be notified of and informed before any pretrial disposition of the case; (d) to be notified of all public proceedings and to be present at all such proceedings; (e) to be heard at any proceeding, including any delinquency proceeding, involving a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue; (f) to a speedy trial and a prompt and final conclusion of the case and any related post-judgment proceedings; (g) to provide information to a probation department official conducting a pre-sentence investigation concerning the impact of the offense on the victim and the victim's family and any sentencing recommendations before the sentencing of the defendant; (h) to receive the pre-sentence report when available to the defendant; (i) and to restitution.

It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer. Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition

imposed, in which a crime victim suffers a loss. All monetary payments, monies, and property collected from any person who has been ordered to make restitution shall be first applied to pay the amounts ordered as restitution to the victim.

As you can see, the Victims' Bill of Rights provides many safeguards to the victims. Perhaps most relevant to a personal-injury civil case is that of restitution. Many attorneys think that, because their client may have signed a settlement release, they are not entitled to restitution from the criminal case. This is not accurate.

Restitution

California courts have long held that a release of liability signed by the victim as part of a civil settlement with the defendant's insurance does not preclude restitution. (*People v. Bernal* (2002) 101 Cal.App.4th 155.)

The victim is entitled to restitution in the criminal case. (Pen. Code, § 1202.4.) Specifically, the statute details that it shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct, including, but not limited to, all of the following: (a) full or partial payment for the damaged property; (b) medical expenses; (c) mental health counseling expenses; (d) wages or profits lost due to injury incurred by the victim, and if the victim is a minor, wages or profits lost by the minor's parent, parents, guardian, or guardians, while caring for the injured minor. Lost wages shall include commission income as well as base wages; (e) wages or profits lost by the victim, and if the victim is a minor, wages or profits lost by the minor's parent, parents, guardian, or guardians, due to time spent as a witness or in assisting the police or prosecution. Lost wages shall include commission income as well as base wages; (f) noneconomic losses, including, but not limited to, psychological harm, for felony violations of section 288, 288.5, or 288.7; (g) interest, at the rate of 10 percent per annum, that accrues as of the date of

sentencing or loss, as determined by the court; (h) actual and reasonable attorney's fees and other costs of collection accrued by a private entity on behalf of the victim; (k) expenses to retrofit a residence or vehicle, or both, to make the residence accessible to or the vehicle operational by the victim, if the victim is permanently disabled.

Contingency fee restitution

The statute for restitution is very detailed and seems to cover many items your client may have lost. However, a significant benefit to your client may be the contingency fee paid to the attorney from the civil case. California law provides that contingency fees for a civil matter are recoverable in restitution. (See *People v. Taylor* (2011) 197 Cal.App.4th 757.) In *People v. Taylor*, the Court also noted that contingency fees were reasonable and necessary in plaintiff's personal injury litigation for a number of reasons, including that: (1) parties rarely have the resources to pay attorneys an hourly rate; (2) significant risks of loss are borne by counsel for plaintiffs; and (3) plaintiff's counsel typically finances the litigation during the pendency of the lawsuit. (*Id.* at 763-764.)

Don't say it ... "bankruptcy"

Many personal-injury attorneys get scared when the other side threatens bankruptcy. But the Bankruptcy Code does not apply to restitution orders. (*People v. Washburn* (1979) 97 Cal.3d 621.) A restitution obligation imposed as a condition of probation is not dischargeable in a liquidation or "straight bankruptcy" proceeding under Chapter 7 of the Bankruptcy Code. (11 USC §§ 701 et seq.; *Kelly v. Robinson* (1986) 479 US 36, 50-53, 107 S Ct 353, 93 L Ed 2d 216; 11 USC § 523(a)(7); see also *Warfel v. City of Saratoga (In re Warfel)* (9th Cir BAP 2001) 268 BR 205, 209-213.) Nor is a restitution obligation dischargeable under Chapter 13 of the Bankruptcy Code. (11 USC §§ 1301 et seq; 11 USC § 1328(a)(3).) Bankruptcy does not block restitution even when



JUNE 2021

defendant's civil obligations to the victim were discharged by bankruptcy before criminal charges were filed. (*People v. Moser* (1996) 50 Cal.4th 130, 136, 57.)

First step: Contact prosecutor

Now that you better understand your client's rights, it is imperative that at the outset of the case you contact the prosecutor and let them know that you are representing the victim and wish to be apprised of the court dates and that you would like to attend the preliminary hearing. In a felony case, the preliminary hearing is like a mini trial where hearsay is admitted. You can gain a lot of information by attending this hearing. If you can't make the hearing, you should request a copy of the court transcript. If you attend any criminal hearing you should ask to make an appearance as the victim's attorney.

Be sure to email the prosecutor and ask for the pre-plea report, discovery (Gov. Code, § 6254, subd. (f)), and ask for a victim-service representative to be assigned to the victim, ask what restitution the defendant can pay the victim, and inform the prosecutor that the victim would like to be heard at any plea or sentencing hearing. Victim services is an agency that can help the victim obtain services like counseling and therapy. Also ask for the probation officer's name and contact information so you can share with her the impact of the offense on the victim. Probation is the department that is involved in collecting the restitution for the victim. Finally, request to be notified of and informed before any pretrial disposition of the case. Be aware that the court may still order restitution on dismissed counts when the negotiated disposition includes a *Harvey* waiver. (Pen. Code, § 1192.3; *People v. Harvey* (1979) 25 Cal.3d 753, 758.)

Many times, the prosecutor does not want to provide you with discovery. But unless the prosecutor is unable to provide the requested discovery because it "would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or a related investigation," the statute doesn't allow for the prosecutor to withhold the information just because the case is still open and there is an ongoing investigation. (Gov. Code, § 6254, subd. (f).) This statute references "Law enforcement" which is defined as "every district attorney, municipal police department, sheriff's department, district attorney's office, county probation department, and social services agency, the Department of Justice, the Department of Corrections, the Department of the Youth Authority, the Department of the California Highway Patrol, the police department of any campus of the University of California, California State University, or community college, and every agency of the State of California expressly authorized by statute to investigate or prosecute law violators." (Gov. Code, § 13951.)

This discovery can greatly assist you in pursuing your client's personal injury civil case as many times there is evidence in the "Law enforcement" possession.

Additional victim compensation

Another great resource for your client is the California Victim Compensation Board, a state program dedicated to providing reimbursement for many crime-related expenses to eligible victims who suffer physical injury or threat of physical injury as a direct result of a violent crime. (Gov. Code, §§ 13950-13966.) An application for compensation to the California Victim Compensation

Board must be filed within three years of the date of the crime, three years after the victim attains 18 years of age, or three years of the time the victim or derivative victim knew (or in the exercise of ordinary diligence could have discovered) that an injury or death had been sustained as a direct result of crime, whichever is later. An application based on any crime eligible for prosecution under Penal Code section 801.1 (specified sex crimes involving a minor) may be filed any time before the victim's 28th birthday. The Board may for good cause grant an extension of these time periods. (Gov. Code, § 13953, subd. (b).)

Victims need your representation

Unfortunately, many victims are going without representation throughout the criminal case. These victims are being deprived of their rights under the California Constitution. This is something that can be changed by the plaintiffs' bar. Right now, we are seeing injustice across our country in cases that have both a criminal and civil component. It is imperative for these victims to be represented. Please continue to stand up for your clients, the victims, and help them achieve full justice. As consumer attorneys we really make a difference in our clients' lives and we should all strive to help them with their companion criminal case.

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