

# Victim Restitution

by Antonio R. Sarabia II

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California has enacted one of the country's most sophisticated legal protocols for victim restitution. It is a complex web of constitutional provisions, statutes, and cases, and it even includes official court forms.

**C** All people who suffer losses as a result of criminal activity have a constitutional right to restitution from those convicted of that crime. (*Cal. Const. Art. I § 28(b)*; Cal. Penal Code § 1202.4(a)(1).) Indeed, a sentence without victim restitution is invalid. (*People v. Rowland*, 51 Cal. App. 4th 1745, 1751 (1997).)

## Who Is a Victim?

For restitution purposes, the term *victim* is quite broad. It includes any individual who has suffered direct or threatened physical, psychological, or financial harm as the result of criminal activity. (*Cal. Const. Art. I, § 28(e)*). It includes the person who was injured, as well as any person who has sustained economic loss as a result of the subject crime, including the injured party's parents, grandparents, siblings, spouses, children, and grandchildren. *Victim* also includes members of the injured person's household (even a fiancé) who witnessed the crime.

A victim also can be any corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental agency, and other legal or commercial entity. However, a business or government entity is entitled to restitution only if it is a "direct victim" of the crime, restitution is ordered as a condition of probation, or a specific statute authorizes restitution. (Cal. Penal Code § 1202.4(k)(2).)

## A Question of Timing

Except in cases involving juvenile defendants, the amount of restitution may be determined at any time after a conviction. If a court has ordered restitution in an amount to be determined later, neither the passage of several years from initial sentencing nor the defendant's completion of his or her sentence voids jurisdiction for the purposes of determining the amount in question. (*People v. Bufford*, 146 Cal. App. 4th 966 (2007).) If full restitution has not been ordered, the court must retain jurisdiction to modify the restitution order at the request of the prosecutor or the victim, or on its own motion. (Cal. Penal Code § 1202.46.). The issue of whether additional restitution may be ordered even after the completion of probation is currently before the California Supreme Court. (*People v. Ford*, 217 Cal. App. 4th 1354 (hearing granted, pending as No.S212940).)

## Items to Recover

The state Penal Code sets a broad standard for the elements to include in a restitution order. The governing statute refers to "all economic losses" (Cal. Penal Code § 1202.4(f)), which include: the value of stolen or damaged property (§ 1202.4(f)(3)(A)); medical expenses (§ 1202.4(f)(3)(B)); mental health counseling expenses (§ 1202.4(f)(3)(C)); lost wages and profits (§ 1202.4(f)(3)(D)–(E)); child support to the children of a murder victim (§ 1203.1(j); *People v. Clark*, 130 Cal. App. 3d 371, 384, (1982) overruled on other grounds in *People v. Blakeley*, 23 Cal. 4th 82 (2000)); loss of future economic support to surviving spouse caused by murder of a spouse (*People v. Giordano*, 42 Cal. 4th 644 (2007)); and attorneys fees incurred to: establish the victim's right to restitution (Penal Code § 1202.4(f)(3)(H); preserve the

defendant's assets so that they may be available to pay restitution (*People v. Lyon*, 49 Cal. App. 4th 1521, 1525 (1996)); collect on a restitution order in a civil action; or pursue a civil action against the defendant based on the same facts as the crime (see below).

A victim's lost wages are included for an obvious reason: The victim may have lost pay while attending court proceedings, even in a case in which testimony was not required. Beyond that, the victim may also lose future wages due to an injury. (*People v. Millard*, 175 Cal. App. 4th 7, 30 (2009).)

If the victim is involved in a business, there may be lost profits. On that score, the courts have held that the correct measure for restitution is gross profits. (*People v. Thygesen*, 69 Cal. App. 4th 988, 994 (1999).)

### **Related Civil Case**

One of the more interesting aspects of California victim-restitution law is that a victim may recover attorneys fees incurred in a related civil case. If the defendant is convicted of a crime—be it an infraction, misdemeanor, or felony—and that crime caused injuries that are a subject of the civil suit, victim restitution comes into play. As a victim, the civil plaintiff is entitled to restitution. Though it is true that the victim/plaintiff cannot recover twice for the same injury, restitution can still make a huge difference in the net recovery in the civil case. The reason is that a victim may recover restitution for the attorneys fees incurred in his or her civil case against the convicted criminal defendant. (*People v. Pinedo*, 60 Cal. App. 4th 1403, 1406 (1998).)

An example illustrates the point. Assume the plaintiff was injured in a car crash. A law firm is hired on a 40 percent contingency fee. The defendant pleads guilty to driving under the influence. There is a \$300,000 civil settlement, composed of half of economic damages (medical bills, therapy, lost wages) and noneconomic damages (pain and suffering, emotional distress). The law firm that represented the civil plaintiff will receive \$120,000 as its fee (40 percent of the recovery). After receiving the civil settlement, the plaintiff can go to criminal court and seek a restitution order for one-half of the contingent fee (\$60,000) as that portion of the attorneys fees related to economic losses. Such an award would be appropriate because the victim had to pay the law firm's fees to get that portion of the civil settlement and is therefore entitled to recoup those fees from the defendant as restitution. The criminal court can order \$60,000 restitution in addition to any previously awarded amount, which means that the client's net civil recovery of \$180,000 (\$300,000 less the 40 percent contingency fee) will increase to \$240,000—a significant increase.

Victims and their counsel should also know that a release signed in connection with a civil settlement will not bar the recovery of restitution later on. As courts have made clear, "the settlement of a civil action and release of the defendant by the crime victim does not discharge the defendant's responsibility to satisfy the restitution order." (*People v. Vasquez*, 190 Cal. App. 4th 1126, 1133 (2010).)

### **Different Damages**

Just as a civil settlement does not bar certain types of additional restitution, a restitution award does not bar a subsequent civil action for different damages arising from the same events. This occurs because civil and criminal cases have different purposes. (See *Vigilant Ins. Co. v. Chiu*, 175 Cal. App. 4th 438, 445 (2009).)

### **Restitution Hearing**

The defendant has no right to a jury trial on the issue of restitution (*People v. Chappelone*, 183 Cal. App. 4th 1159, 1184 (2010)), and the victim can prove his right to recovery by declarations. Moreover, the criminal defendant does not have a right to cross-examine witnesses who offer proof of restitution by way of a sworn declaration. (*Millard*, 175 Cal. App. 4th at 42.)

The victim bears the burden of demonstrating that there were losses caused by the crime committed by the defendant. The victim must prove that the defendant's conduct was a "substantial factor" in causing the events that inflicted harm, but the crime itself need not be the sole cause. (*In re A.M.*, 173 Cal. App. 4th 668, 673 (2009).) Appellate opinions have clarified that principles of proximate causation apply to the determination of victim restitution. (*People v. Jones*, 187 Cal. App. 4th 418, 426 (2010).) However, application of comparative negligence is not mandatory. (See *Millard*, 175 Cal. App. 4th at 41.)

Moreover, the strict rules of evidence also do not apply. (*People v. Prosser*, 157 Cal. App. 4th 682, 692 (2007).) A victim's testimony, without supporting documentation, is prima facie evidence of value. (*People v. Gemelli*, 161 Cal. App. 4th 1539, 1544 (2008).)

Despite the relative informality of restitution hearings, they are in essence mini trials. Depending on the types of losses and the evidence needed to establish them, the hearing may take anywhere from a few minutes to a full day or more.

At the conclusion of the hearing, the trial court must specify the exact amount of restitution awarded and identify the losses sustained by the victim. The order should be entered on Judicial Council Form CR-110, which provides for the accrual of 10 percent interest from either the time of loss or the time of sentencing. The court must clearly state the calculation method used and how that method justifies the amount of restitution ordered. (*Jones*, 187 Cal. App. 4th at 423.)

### **Restitution and Probation**

Although victims are often disappointed when a defendant is not sentenced to prison, a sentence of probation strengthens the hand of the victim seeking restitution in three ways. First, probation broadens the number of possible victims to which restitution may be ordered. Normally, the reasons restitution may be ordered are somewhat narrow and require a strict relation to the crime for which the defendant was convicted. But when restitution is ordered as a condition of probation, the court's discretion is circumscribed only by the purposes of probation: Restitution must be reasonably related to the crime for which the defendant was convicted, the goal of deterring future criminality, or the defendant's rehabilitation. (Cal. Penal Code § 1203.1(j); Cal. Welf. & Inst. Code § 730(b).) For this reason, a judge ordering restitution as a condition of probation has considerable discretion. For example, restitution has been ordered for losses caused by a crime related to the one for which the defendant was convicted, even though the defendant did not participate in that other offense. (*In re I.M.*, 125 Cal. App. 4th 1195 (2005).) Restitution has even been ordered to victims of noncriminal conduct related to a defendant's crime. (*People v. Miller*, 256 Cal. App. 2d 348 (1967).)

### **Asset Disclosure**

A second way probation strengthens the hand of victims involves the requirement of asset disclosure. The defendant must disclose all assets (see Cal. Jud. Council Form CR-115 (defendant's statement of assets; Cal. Penal Code § 1202.4(f)(5), (7)–(8)). There are even standardized interrogatories a victim can use to discover the defendant's assets. (See Cal. Jud. Council Form CR-200; Cal. Code Civ. Proc. § 2033.720(a).)

Defendants facing a restitution order may sometimes skirt their legal obligation to disclose (after all, they are already criminals), in the misguided hope that by silence or obfuscation they can protect their assets. That strategy (to the extent it can even be labeled a strategy) is shortsighted, for an omission when it comes to disclosure can have dire consequences for a defendant on probation.

It must be remembered that probation is a form of judicial leniency that most judges perceive to work as follows: If the defendant plays by the rules, the defendant will remain on probation. But a defendant who fails to disclose may run afoul of the court's indulgence, and if he or she does, it will surely jeopardize probation.

### **Timely Payment**

The third way that probation strengthens the victim's position is the requirement that restitution be paid in a timely fashion. (Cal. Penal Code §§ 1202.4(m), 1203(j).) Willful failure to pay restitution can result in revocation of probation and imprisonment. (Cal. Penal Code § 1203(j); *People v. Lawson*, 69 Cal. App. 4th 29, 39 (1999).)

### **Restitution and Insurance**

One interesting issue is whether a defendant can receive credit toward the restitution obligation for a payment made by an insurer. The law is unclear on this question. A line of cases holds that a defendant may indeed get credit toward restitution for a payment made by his insurer to the victim; typically this occurs in the context of a civil settlement. (See *People v. Bernal*, 101 Cal. App. 4th 155, 165 (2002); *Vasquez*, 190 Cal. App. 4th at 1126.) However, a statute explicitly bars insurance from being "construed" to provide any coverage for criminal restitution. (See Cal. Ins. Code § 533.5(a).) The California Supreme Court staked out a position consistent with the code when it opined that "as a matter of public policy, an insured's payment of certain types of restitution cannot be covered by insurance." (*Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1270 (1992).)

For this reason, the *Bernal-Vasquez* precedents would appear to be incorrect, at least as they might apply to insurance payments. But a defendant could still receive credit toward restitution for payments independent of liability insurance policy proceeds.

One should also remember that victims are not entitled to a double recovery. If the defendant has paid restitution for identified claims and there is a subsequent civil judgment against that same defendant based on the subject claims, the defendant is entitled to credit for restitution already paid. (See Cal. Penal Code § 1202.4(j).)

### **Enforcement of Restitution**

A restitution order is a “money judgment” (Cal. Code Civ. Proc. § 680.230), and a victim who has been granted restitution is a “judgment creditor.” Restitution orders are thus enforceable just the same as a civil judgment. (Cal. Penal Code § 1202.4(i).) This means that all of the typical postjudgment enforcement tools, such as orders of examination and writs of execution, are available to the victim.

If the defendant has used his own money or property to post bail, a victim may collect the ordered restitution from that same bail posting. (Cal. Penal Code § 1297.)

Criminal courts even have their own wage-garnishment procedure. If the trial court determines that the defendant has the ability to pay restitution, it must enter a separate order for income deduction once restitution has been determined. (Cal. Penal Code § 1202.42.)

### **No Discharge**

Perhaps most important of all, a restitution order is not affected by bankruptcy. Restitution is not dischargeable in a liquidation or “straight” bankruptcy under Chapter 7 of the Bankruptcy Code. (See 11 U.S.C. § 523(a)(7).) Nor is restitution a dischargeable debt under Chapter 13. (11 U.S.C. § 1328(a)(3).)

Knowing that these remedies are available can’t erase the pain of being a crime victim. But properly pursued, they can deliver a measure of monetary compensation to victims who justly deserve it.

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