

Restitution and Personal Injuries: Clients Might Be Leaving Money on the Table

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Some tort cases involve a defendant who is also charged with a crime. In some instances, the defendant has assets. Many personal injury attorneys are not aware that a civil settlement with a wealthy defendant who has been convicted of a crime, may result in an amount that substantially undercompensates their clients — when in actuality, the client may be able to greatly increase his or her net receipts.

If the civil defendant is convicted of a crime — be it infraction, misdemeanor or felony — and that crime caused the injuries at issue in the civil suit, victim restitution comes into play. As a victim, the plaintiff is entitled to restitution. While it is true the plaintiff cannot recover twice for the same injury, restitution can still make a huge difference. The reason? A victim may recover restitution for the attorney fees incurred in his or her civil case against the defendant. *People v. Pinedo* (1998) 60 Cal. App. 4th 1403, 1406, 71 Cal. Rptr. 2d 151.

Assume your client was injured in a car crash and she hires your firm on a 40 percent contingency fee. The defendant pleads guilty to driving under the influence. There is a \$300,000 civil settlement, comprised half of economic (medical bills, therapy, lost wages) and non-economic (emotional distress) damages. Your firm will receive about \$120,000 as its fee. After receiving the civil settlement, the plaintiff decides to seek a restitution order from the criminal court for one-half of the contingency fee, \$60,000. Since the victim had to pay your fees to get that part of the civil settlement, she is therefore entitled to recoup them from the defendant as restitution. The criminal court awards the \$60,000 to your client. That means your client's net civil recovery of \$180,000 (\$300,000 less the \$120,000 contingency fee) will increase by 33 percent to \$240,000. That is a huge increase for the client.

Of course, to secure a restitution order for such an amount will take multiple court appearances, in addition to briefing and a hearing. The defendant is entitled to, and will, oppose the restitution. A natural question is who pays for this excursion into criminal court. The answer is in Penal Code Section 1202.4(f)(3)(H), which allows recovery by victims (as part of restitution) of their "actual and reasonable" attorneys' fees. So the victim may recover, from the defendant, any fees expended in criminal court to get fees in the civil case.

A restitution hearing stands in stark contrast to civil trials and their antecedents: There is no discovery or depositions, proof may be made by declaration and live witnesses are not required. A restitution hearing can be put on calendar within weeks in most criminal courts. Most hearings take less than an hour, if appropriate preparation and briefing has been done. Often, criminal defense counsel file little or no written opposition and call no witnesses. One reason that the defense rarely calls a witness is that the defense witness with the most information is usually the criminal defendant — and defense counsel are loathe to put the newly convicted defendant on the stand. Finally, since restitution is part of sentencing, the rules of evidence do not apply.

Some defendants will raise the specter of the civil release, especially one with a broad "bullet proof" Civil Code Section 1542 provision. This issue, whether a broad release can eliminate the right to restitution, has been repeatedly litigated, with consistently the same result: "[T]he settle-

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ment 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* (2010)190 Cal. App. 4th 1126, 1133.

There are several reasons for this. First, one of the oldest laws on the books instructs that "[w]hen 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." Code of Civil Procedure Section 32. Another reason is that the parties are not the same in a civil case and a criminal case. A victim is not a party to a criminal prosecution. Finally, the civil settlement release cannot spill over into a criminal case because restitution has a unique criminal law purpose: rehabilitation. Making defendants pay restitution to the victim is part of the learning experience, one intended to direct the defendant away from future illegal activity.

Once restitution has been ordered, additional tools are available to enforce payment. The criminal system has its own garnishment procedures. 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. Penal Code Section 1202.42.

Probation is also powerful tool for collecting restitution, and many defendants are on probation. When the court grants probation and orders the defendant to make restitution, timely payment is a condition of probation. Penal Code Section 1202.4(m). Wilful failure to pay restitution can result in revocation of probation and imprisonment. *People v. Lawson* (1999) 69 Cal. App. 4th 29, 39. This remedy makes all the civil sanctions in the world look timid. It is the rare deep pocket defendant who would elect to go to prison rather than pay restitution.

Many civil attorneys who learn of the power of restitution may wish that they had learned of it some time ago. This leads to an amazing aspect of victim restitution. Victim restitution rights cannot be lost by the passage of time. The criminal court must retain jurisdiction to hear a victim's claim for restitution. Penal Code Sections 1202.4(f) and 1202.46. So even cases previously settled may merit re-examination. This remarkable feature of restitution means that attorneys who did not know about and did not advise their clients of this opportunity to increase net recovery, can still help their client.