Paying for the Costs of Crime: Criminal Defendants, Insurance and Restitution

By Antonio R. Sarabia II

A criminal defendant may have to contend with both criminal prosecution and a civil lawsuit by the victim. This is common in driving under the influence cases. If there is a conviction, the victim may seek restitution in the criminal case, even after receiving a civil settlement or judgment. As a result, courts, victims and defendants will face the problem of whether and how to credit the defendant for payment to the victim/plaintiff by an insurance company.

The first question is whether the defendant is entitled to any credit for payment by the insurance company. There are at least three different criteria courts have offered to answer this question. These criteria come out of two cases with similar facts. In both cases the son committed a crime, which caused injury, and his mother had insurance providing defense and indemnity against the subsequent civil suit by the victim.

In the first case, *People v. Hamilton* (2004) 114 Cal. App. 4th 932, the errant son did not receive any credit for the civil settlement towards his subsequent restitution obligation. *Hamilton* focused on two criterion. It held that since the mother, not the son, procured the insurance, the son could not get credit. *Hamilton* also proposed another test: If the insurer could make an indemnity claim against the defendant, then the defendant should not be entitled to credit.

In *People v. Jennings* (2005) 128 Cal. App.4th 42, however, the son was given credit. *Jennings* stepped away from *Hamilton*'s procurement test, ignored the indemnity test and recast the *Hamilton* decision as hinging on which party was an insured. *Jennings* instead focused on the policy documents. Since the son was named in those documents, he got the benefit of the insurance.

But the *Jennings* court fell into the same mistake that *Hamilton* made. The mistake is first focusing on whether the defendant is an insured. This mistake has its genesis in *People v. Bernal* (2002) 101 Cal. App. 4th 155, which held that a criminal defendant could get credit towards restitution for payment in a related civil case by his insurer. After *Bernal*, the focus was on determining if the insurer was really the defendant's insurer. This focus has led courts away from other critical issues. Sometimes, the answers to the tests created by *Jennings* and *Hamilton* — whether the defendant was the insured or the procurer of insurance — simply does not matter.

California Insurance Code Section 533 states, "An insurer is not liable for a loss caused by the wilful act of the insured..." An insurer cannot pay for harm caused by an intentional crime. For example, *J. C. Penney Casualty Ins. Co. v. M. K* (1991) 52 Cal.3d 1009, 1014, cert. den. 502 U.S. 902, held that an insurer could not indemnify one for sexual molestation of a child under Section 533. "The public policy underlying section 533 is to discourage willful torts." This is a public policy that has been codified and is recognized by the state Supreme Court. In *Jennings* and *Hamilton, the court* was faced with situations in which insurance money had already been paid. Perhaps because payment was made, those courts did not consider the threshold issue of whether the crime was insurable at all.

Insurance companies may have a wide array of reasons for settling a case — the cost of defense, concern about the expensive litigation tactics of a particular personal injury firm, or concern that there might be an indemnification obligation for torts, which were not intentional. Civil cases often have a number of claims and a number of defendants — and some claims may be insurable, some may not. Insurance companies know that the duty to defend is broader than the duty to indemnify. Horace Mann Ins. Co. v Barbara B. (1993) 4 Cal.4th 1076.

The court in *Horace* held that an insurer had a duty to defend a child molester because some of the civil claims might be covered under the policy, even though molestation could not be covered. Horace recognized and cited J. C. Penney's principle that there could not be indemnification for sexual molestation. Nevertheless, the court found that an insurer must defend a mixed bag of claims, some of which are subject to indemnification and some of which are not. Just because an insurance company pays to settle a case does not mean the insurance company had to indemnify that defendant for the crime of which he or she was convicted.

In contrast to the wide array of concerns that may motivate an insurer to fund a settlement, a criminal court considering restitution must determine whether a defendant should get credit for a civil settlement toward restitution caused by a specific crime. The criminal court should start with the question of whether there could ever be insurance indemnification for that crime. If the answer is no, it does not matter who the insured is. The danger of applying the *Hamilton* and *Jennings* tests first is that this could allow an end run around a strong public policy as embodied in Section 533 and reflected in *J.C. Penney*. Since there was no credit for insurance in the *Hamilton* case, which was an intentional shooting case, and there was credit in *Jennings*, a driving under the influence case, they were resolved consistently with Section 533.

While *Bernal*, *Hamilton* and *Jennings* can be reconciled with Section 533 and *J. C. Penney*, there is another line of cases directly in conflict with the grant of a restitution credit to a defendant for an insurance company payment. *State Farm Fire & Cas. Co. v. Superior Court* (1987) 191 Cal. App. 3d 74, 78 held that: "[r]estitution is ordered as punishment in a criminal case. No conceivable justification exists for allowing an individual to pass on such liability to an insurance carrier." In *State Farm*, a criminal defendant was seeking defense from his insurer in his criminal prosecution for assault and attempted murder. The court ruled that there was no duty to defend. Since the duty to defend is broader than the duty to indemnify, there was also no duty to indemnify.

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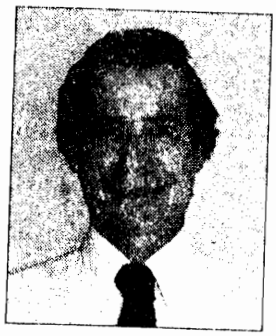
State Farm is not an isolated case. Its holding that no insurance coverage for restitution in criminal cases was cited with approval in *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1270. *Bank of the West* explained that "as a matter of public policy, an insured's payment of certain types of restitution cannot be covered by insurance."

In view of *Bank of the West*'s approval of *State Farm*, it is clear that an insured cannot go through the front door to get coverage of criminal restitution — that is tender defense of the criminal case to its insurer. *Bernal* held — without citing *State Farm* or *Bank of the West* — that defendants can go in the back door. A defendant can get an insurer to pay for a civil settlement and then get credit towards restitution for the insurer's payment. This back door approach is not reconcilable with *Bank of the West* and *State Farm*. Under these two cases, a defendant should never get credit to his restitution obligation for a payment made by his insurer in a civil case; this credit is a violation of California public policy.

So how did *Bernal* go wrong? There is no clear answer, but the court quoted a passage from a state Supreme Court case, which should have tipped it off. "[T]he Legislature intended to require a probationary offender, for rehabilitative and deterrent purposes, to make full restitution for all losses his crime had caused, and that such reparation should go entirely to the individual or entity the offender had directly wronged, regardless of that victim's reimbursement from other sources." *People v. Birkett* (1999) 21 Cal. 4th 226, 246. This passage makes it clear that a criminal defendant has to pay his or her own way when dealing with the costs of crime.



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