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## Maximizing Restitution Orders: *How Cooperation Between Prosecutors and Civil Litigators Can Benefit All*

by Michael E. Gatto

Actual recovery of full restitution is in the best interest of victims, attorneys, and the California Victim Compensation Board (CalVCB).<sup>1</sup> By working with and understanding how civil litigators use Orders for Restitution, prosecutors can increase the likelihood that victims enjoy full restitution.

The Legislature has determined that all crime victims are entitled to full restitution for economic loss occasioned by criminal activity.<sup>2</sup> Too often, for a variety of reasons, victims do not obtain recovery of full restitution. Most large restitution orders are satisfied entirely or in part by liability insurers. To ensure crime victims receive at least some restitution, the state established the CalVCB, which is funded by restitution fines. Initially, CalVCB authorized up to \$70,000 per crime per victim. That number has now been further reduced to \$63,000.<sup>3</sup> CalVCB is a “payor of last resort.” Therefore, a crime victim’s health insurer and other sources of recovery are primary sources of restitution. CalVCB also maintains a right of subrogation. Where a victim receives compensation

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for restitution from CalVCB, subrogation is owed to replenish its coffers.

Penal Code section 1202.4(f)(3)(A)–(L) identifies a number of specifically authorized items of recoverable economic loss. This list is not exhaustive, however. The statute provides the court broad discretion with respect to the type of losses subject to a restitution order. Thus, it is incumbent upon civil attorneys and prosecutors to explore the full spectrum of recoverable restitution. Often, this will implicate losses with which civil practitioners are much more familiar, as restitution law borrows from civil law in many circumstances. Civil litigator participation in restitution hearings can often result in larger orders and greater actual recovery.

Understandably, prosecutors do not want to become “pawns” to provide leverage in a civil lawsuit. That said, working in conjunction with civil litigators in appropriate cases can maximize the restitution amount and the likelihood of actual recovery and reimbursement to CalVCB. Through collaboration, the process can be a win-win for everyone.

This article provides examples of situations where cooperation between prosecutors and civil litigators can benefit all to maximize the amount of restitution orders and how restitution orders in civil cases are used.

### **Restitution Hearings, the Right to Private Counsel, and Suggested Practices**

Crime victims are entitled to have their attorneys appear at restitution hearings and to be heard through counsel on the issue of restitution.<sup>4</sup> The victim’s attorney may present evidence and argument at the hearing as long as the prosecutor is present and has the opportunity to speak if the victim’s or his or her attorney’s position diverges from the People’s interests.<sup>5</sup>

Private counsel should:

- Reach out to the prosecutor early in the process to express interest in participating at a restitution hearing.
- Determine the local practices of the district attorney’s office regarding presentation of restitution hearings, the probation department’s role and practices, and those of the trial judge.

- Submit a restitution brief outlining pertinent issues expressing an intent to introduce testimony, if desired, and provide the court a time estimate for hearing.
- Prepare and provide the brief and supporting documentation sufficiently in advance of the hearing to determine the defendant's interest in resolution or possible areas of agreement to narrow the issues. This practice also provides the prosecutor an opportunity to identify any potentially objectionable items.

### **Scope of Restitution**

Penal Code section 1202.4(a)(1) states: "It is the intent of the Legislature that a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from a defendant convicted of that crime." Section 1202.4(f)(3) requires that the restitution order "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." Additionally, section 1202.4(g) states: "The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record."

### **Nature of a Restitution Hearing: Evidentiary Standards and Burden**

The amount of restitution must be proved by a preponderance of the evidence.<sup>6</sup> Per Penal Code section 1202.4(f), the court must base its determination on the "amount of loss claimed by the victim or victims or any other showing to the court." A victim may even submit estimates of losses.<sup>7</sup> The victim must present evidence of actual loss and causal connection to the crime committed by the defendant.<sup>8</sup>

Documentary evidence such as bills, receipts, repair estimates, insurance payment statements, payroll stubs, business records, and similar documents relevant to the value of stolen or damaged property, medical expenses, and wages and profits lost may not be excluded as hearsay evidence.<sup>9</sup> Once the victim makes a prima facie

showing of economic losses, the burden shifts to the defendant to disprove the amount of the claimed losses.<sup>10</sup> The defendant has the burden of showing that the restitution recommendation in the probation report or the victim's estimates are inaccurate.<sup>11</sup>

### **The Defendant Has No Right to a Jury Trial**

The defendant has no Sixth Amendment right to a jury trial on restitution issues.<sup>12</sup> Additionally, the defendant has no right to confront or cross-examine witnesses at a restitution hearing.<sup>13</sup> Notwithstanding, when seeking large restitution amounts, it is recommended that prosecutors not object to all cross-examination. The court will likely want to hear the defense's evidence to make the appropriate restitution order. Therefore, objections should be lodged selectively.

### **Recovery of Specific Types of Restitution**

Penal Code section 1202.4(f)(3) identifies a number of recoverable items of restitution, including, but not limited to:

- (B) Medical expenses.
- (C) Mental health counseling expenses.
- (D) Wages or profits lost by the victim, ... [to] include commission.
- (F) Noneconomic losses, including, but not limited to, psychological harm, for felony violations of section 288.
- (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.

### ***Presenting Future Medical Expenses***

Restitution for medical expenses is easily determinable when medical treatment is complete; the paid amounts for services will typically become the restitution order. But when future care is contemplated, proof becomes more cumbersome. Depending on the nature and extent of damages, input may be necessary from

multiple medical disciplines. Civil litigators refer to this as creation of a “life care plan.” A certified life care planner will work with physicians to identify recommended future medical care treatment, diagnostic imaging, assistive devices, home accommodations, etc. The life care planner will then determine the reasonable and customary charges for these recommendations in the pertinent locale. This information is then provided to an economist who can bring the future economic loss to “present value” for purposes of a restitution order.

Depending on the complexity of the issues, private counsel and prosecutors should consider calling life care planners and physicians to establish the foundation for the life care plan and the causal link for recommended treatment to the defendant’s criminal activity.

### ***Presenting Economic Loss in Homicides***

In 2007, the California Supreme Court in *People v. Giordano* held that aggrieved spouses and a decedent’s offspring are entitled to recover the economic loss they would have received from the decedent, had he or she not been murdered.<sup>14</sup> Such losses include the decedent’s income and value of household services he or she rendered, and would have rendered into the future. The *Giordano* court concluded that a surviving spouse may receive—as direct restitution—the economic loss attributable to a criminal act that resulted in the death of his or her spouse. The court looked to wrongful death case law to label the surviving spouse’s economic loss as a common category of economic loss.<sup>15</sup>

The *Giordano* court further explained that civil case law is also useful in demonstrating that the surviving spouse’s economic loss is best described as a loss of economic support. The purpose of a wrongful death judgment is “to provide the amounts of future support which the beneficiaries would have received in the future had decedent lived” and “[w]here, as here, decedent was a husband and father, a significant element of damages is the loss of financial benefits he was contributing to his family by way of support at the time of his death and that support reasonably expected in the future.”<sup>16</sup>

Additionally, the jury instructions for calculating wrongful death damages, which address both economic and non-economic damages, include “economic loss” and the “financial support,” that the decedent would have contributed to the surviving heir or family member.<sup>17</sup>

Private counsel must reduce future wage loss to the present value. In homicides, future wages must be reduced by the decedent’s anticipated consumption had he or she lived. Notably, there is no reduction for taxes.<sup>18</sup> Were the court to reduce the restitution award of future earnings by the applicable tax rate, the victims would not be fully compensated because they will pay taxes upon the restitution, should it actually be received.

### ***Recovery for Loss of Household Services***

Household services are the domestic activities an individual performs in support of the household. Crime victims may suffer a loss of ability to render, or in the case of a homicide, receive the benefit of, household services. This, too, is recoverable economic loss.<sup>19</sup> Economists can testify regarding the U.S. Bureau of Labor Statistics’ “Dollar Value of a Day,” which provides a daily valuation of activities for 200 demographic groupings of persons in the United States.<sup>20</sup> While lost wages only accrue through work life expectancy, loss of household services accrues through life expectancy. Again, this item of future loss must be reduced to present value for purposes of creating a restitution order.

### ***Recovery for Attendant Care***

Severely injured victims may require attendant care beyond an acute or rehabilitative hospital stay. Even victims not hospitalized may require assistance with activities of daily living while recovering from fractures or other debilitating injuries. Where an individual is fortunate enough to have the resources to pay a caregiver, receipts or other documentation can be submitted in support of the request for restitution. Recognizing that spouses and other loved ones typically offer injured victims attendant care, civil law authorizes recovery for gratuitous attendant care services.<sup>21</sup> In such circumstances, attorneys should address this in a restitution brief and provide declarations and/or testimony to substantiate this claim.

### **Case Study**

In January 2015, I conducted a restitution hearing related to involuntary manslaughter and Fish and Game Code convictions for a drowning death in the Los Angeles County Superior Court. I represented the widow and adult and minor children of a 49-year old decedent. I marshaled proof of decedent's income over the five years preceding death as well as evidence of decedent's rendition of household services. I prepared and submitted a restitution brief to the court, prosecutor, and defense attorney with supporting evidence and economic projections. I noticed the court of estimated length of time for the restitution hearing and a desire to elicit testimony from a forensic economist and the widow.

I provided the court a damages table in the restitution brief with assertions regarding recoverable amounts as well as blanks where the court could make determinations based upon the testimony. Both the wife and economist testified and were subject to cross-examination. I presented evidence of future earnings capacity (notably, this is not limited to one's wage but the capacity to earn, which can be higher) and had the economist reduce the amount first by personal consumption and then to present value. The defense sought to further reduce the earnings capacity loss for tax consequences. We engaged in both a factual and legal argument on this point. Ultimately, the court ordered \$1,533,730 as restitution and 10 percent interest from date of death for a total restitution order of \$1,904,381.

### ***Restitution for Attorney's Fees and Costs***

When victims have retained an attorney to establish evidence of restitution, Penal Code section 1202.4(f)(3)(H) mandates restitution for "actual and reasonable attorney's fees and other costs of collection accrued by a private entity on behalf of the victim."<sup>22</sup> These "costs" include consulting with and presenting testimony of expert witnesses. Providing evidence to the court

of such costs by way of invoices, or a declaration as part of the restitution brief, is highly recommended.

Importantly, a contingent fee paid by the victim to an attorney to pursue civil liability is also recoverable under Penal Code section 1202.4(f)(3)(H).<sup>23</sup> It is advisable to request that the court enter an order for attorney's fees related to the restitution hearing along with a request that the court reserve jurisdiction to seek additional attorney's fees as restitution upon resolution of the related civil case. For this to occur, the defendant must still be subject to the court's jurisdiction.<sup>24</sup> Prosecutors and litigators must be mindful of deadlines for seeking restitution.

### ***Interest***

The court must award interest on a restitution order under Penal Code section 1202.4(f)(3)(G) at the rate of 10 percent per year and has the option of awarding interest from the date of sentencing or loss.<sup>25</sup> Where the victims' losses flow from a single event, an argument for imposition of interest is compelling as the incident becomes more remote. Otherwise, the victims are not truly receiving full restitution.

### **Restitution Is Not Affected by Bankruptcy**

The bankruptcy code does not apply to restitution orders.<sup>26</sup> A restitution obligation imposed as a condition of probation is not dischargeable in a liquidation or "straight bankruptcy" proceeding under title 11, United States Code section 701 et seq. (Chapter 7).<sup>27</sup> Nor is a restitution obligation dischargeable under title 11, United States Code section 1301 et seq. (Chapter 13).<sup>28</sup> This is true even when the defendant's civil obligations to the victim were discharged by bankruptcy *before* criminal charges were filed.<sup>29</sup> Because collection of restitution is a continuation of a criminal action, the automatic stay provisions of bankruptcy law do not apply.<sup>30</sup>

### **Comparative Negligence**

In civil litigation, defendants are often well represented at restitution hearings by attorneys funded by insurance companies.

Such attorneys may seek to prove a victim or decedent bore legal responsibility for the economic loss. Then, the trial court may apply the doctrine of comparative negligence to reduce the award of victim restitution against a criminally negligent defendant when the court finds that the victim's contributory negligence was a substantial factor in causing the victim's injuries.<sup>31</sup> Essentially, this is an affirmative defense for which the defendant will bear the burden of proof.

### **Restitution Orders Are Enforceable as Civil Judgments**

A victim may enforce a restitution order as if it were a civil judgment.<sup>32</sup> To do so, the defendant must be (1) informed of the right to have a judicial determination of the amount; and (2) provided with a hearing, waive the right to a hearing, or stipulate to the amount of restitution.

### **Use of Restitution Orders**

Upon receipt of a restitution order, victims may begin enforcement. When a defendant is well insured, the defense has an incentive to delay. Merely holding on to the money may result in cost savings if defense costs are minimized, particularly when interest rates are high. In these cases, a victim in financial distress may be forced to take a smaller settlement. The costs of litigation for victims can be prohibitive, further militating compromise settlements. In sum, the insurance companies and their defense attorneys will do anything that benefits their economic interests without regard to the merits.

Commencing enforcement on a restitution order provides leverage to bring about a settlement. Thus, the defendant will likely put pressure on his or her insurer to make a reasonable settlement offer or be subject to liability for breach of first party bad faith for failure to accept a reasonable settlement offer.

As previously discussed, a defendant may not avoid restitution obligations through bankruptcy. In many civil settings, a defendant may claim bankruptcy to avoid collection on a civil judgment. Offering a defendant satisfaction on a restitution order can be

a powerful incentive to resolve a civil case. The defendant will want his or her insurer to settle to protect his personal assets from collection. This is particularly so when the restitution order exceeds the insurance policy limits.

### **Insurance Defense Tactics and Countermoves**

Insurance companies have stables of experts to contest any damage claim and will go to great lengths to challenge liability, argue comparative fault, and dispute all of the plaintiff's claimed injuries. Insurance companies have also enjoyed tremendous success in poisoning jury pools. As a result, they often fight on every front in an effort to wear down a plaintiff.

Restitution orders provide collateral estoppel to the determination of economic loss caused by the defendant's behavior. Thus, insurance companies cannot re-litigate a victim's right to economic loss. Collateral estoppel also applies to claims of comparative fault. The criminal conviction typically provides collateral estoppel to at least some theory of liability as well. Therefore, the only remaining issue may be general damages. Eliminating such issues provides the impetus to settle for a more appropriate amount.

In addition to attempting to defend on the merits of a claim, insurance companies may claim they have no duty to defend nor indemnify the defendant for the criminal act giving rise to restitution or the victim's theories of civil liability. Insurers may file declaratory relief actions seeking judicial determination on this issue. In such actions, the insurance company will name the victim/plaintiff, which can potentially cause further delay, risk, and expense.

Insurance companies owe a first-party duty to their insured to accept reasonable settlement offers. This provides plaintiffs some leverage; however, insurance companies may agree to indemnify their insureds beyond policy limits to avoid potential bad faith liability. Civil litigators may then offer settlement of the case not only for civil liability but also in satisfaction of the restitution order. At that point, the insurance company's willingness to prolong the proceedings is really put to the test.

### **Case Study Continued**

Following acquisition of the restitution order in the drowning case referenced earlier in this article, I sought to resolve the case with insurance companies for the boat in question and the homeowner's policy of the boat owner. Both insurance policies excluded coverage for criminal and commercial acts. The insurance companies argued both the involuntary manslaughter and Fish and Game Code convictions precluded coverage. In addition, there was evidence the defendant intended to sell the illegally captured fish through an online marine shop owned by his former wife.

I filed a complaint seeking to articulate theories of liability covered by typical homeowner's and boat policies to implicate coverage. The insurance companies contended the defendant was not insured under the homeowner's policy, and that he had violated his duty to cooperate with the insurance company's investigation. The insurance company initially denied coverage. The restitution order exceeded the insurance policies. Further complicating the case, the defendant had filed for and received bankruptcy protection. While this did not protect him from enforcement of the restitution order, the insurance companies argued this capped their exposure to the policy limits. I countered by offering to resolve the entire case and give the defendant a "Satisfaction of Judgment on Restitution Order," to establish prejudice to the defendant and exposure to the insurer beyond the policy limits.

The insurance companies then filed a declaratory relief action in federal court. Fortunately, I convinced the insurance companies we should explore settlement. I then hired a bad faith/coverage attorney to assist with preparing the mediation brief and attend mediation. The specter of a bad faith claim had suddenly moved from hypothetical to across the negotiating table.

Ultimately, the insurance companies agreed to a confidential settlement resolving the matter. Not only did my deserving clients receive compensation, VCGCB received reimbursement for benefits provided.

## Conclusion

Collaboration between prosecutors and civil attorneys can increase the amount of restitution and likelihood of actual recovery. Prosecutors must be mindful of their obligations to do justice and ensure orders for restitution are appropriate. Victims should pursue all viable claims for restitution including future lost wages, medical care, attendant care, and household services. Civil counsel should maximize use of orders for restitution by arguing collateral estoppel and aggressively pursuing restitution while considering incentivizing insurance companies to timely resolve claims by offering satisfaction of restitution as part of a civil settlement. ■

## ENDNOTES

1. On July 1, 2016, the Victim Compensation & Government Claims Board (VCGCB) became the California Victim Compensation Board (CalVCB) and the Government Claims Program was moved to the Department of General Services. <<http://www.vcgcb.ca.gov>> (accessed Sep. 1, 2016).
2. Pen. Code § 1202.4(a)(1).
3. <<http://http://vcgcb.ca.gov/victims/faq/expenses.aspx#limits>> (accessed Sep. 12, 2016).
4. Cal. Const. art. I, § 28(b)(8), (c)(1).
5. *People v. Smith* (2011) 198 Cal.App.4th 415 [cert. for part. pub.].
6. *People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1542-1543.
7. *People v. Goulart* (1990) 224 Cal.App.3d 71, 82-83.
8. *People v. Fulton* (2003) 109 Cal.App.4th 876, 885-886.
9. Pen. Code § 1203.1d(d).
10. *Gemelli, supra*, at 1543.
11. *People v. Foster* (1993) 14 Cal.App.4th 939, 946; *People v. Hartley* (1984) 163 Cal.App.3d 126, 130.
12. *People v. Chappelone* (2010) 183 Cal.App.4th 1159.
13. *People v. Cain* (2000) 82 Cal.App.4th 81.
14. *People v. Giordano* (2007) 42 Cal.4th 644.
15. *Id.* at 665.

16. *Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 520-521.
17. Judicial Council of California Civil Jury Instructions (CACI) § 3921.
18. *Canavin, supra*.
19. CACI § 3903(e).
20. <<https://sites.google.com/a/johnwardeconomics.com/expdata/>> (accessed Sep. 2, 2016).
21. *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635 [cert. for part. pub.].
22. *People v. Maheshwari* (2003) 107 Cal.App.4th 1406, 1409-1411; *In re Imran Q.* (2008) 158 Cal.App.4th 1316, 1319-1321.
23. *People v. Pinedo* (1998) 60 Cal.App.4th 1403, 1405-1406.
24. *Hilton v. Superior Court of Los Angeles County* (2014) 224 Cal.App.4th 47, superseded by grant of review in *Hilton v. Superior Court of Los Angeles County* (2015) 354 P.3d 356.
25. Also see Pen. Code § 1214.5.
26. *People v. Washburn* (1979) 97 Cal.App.3d 621.
27. *Kelly v. Robinson* (1986) 479 U.S. 36, 50-53; 11 U.S.C. § 523(a)(7). See also *Warfel v. City of Saratoga (In re Warfel)* (2001) 268 BR 205, 209-213 [civil restitution judgment originally imposed as a condition of debtor's probation not dischargeable under Chapter 7].
28. 11 U.S.C. § 1328(a)(3).
29. *People v. Moser* (1996) 50 Cal.App.4th 130, 136.
30. *Gruntz v. County of Los Angeles (In re Gruntz)* (2000) 202 F.3d 1074, 1084-1087.
31. *People v. Millard* (2009) 175 Cal.App.4th 7, 36-43 [cert. for part. pub.].
32. Pen. Code §§ 1202.4(i), 1214(b).