

EVALUATING DIRECT RESTITUTION ORDERS
Materials & Presentation by Deborah Prucha, CCAP Staff Attorney

I. Restitution is Mandatory Pursuant to Penal Code section 1202.4; Welfare & Institutions Code section 730.6; and Cal. Const. art I, § 28, subd. (b).

In California, crime victims have the constitutional right to restitution for losses resulting from criminal acts against them. (Cal. Const., art. I, § 28, subd. (b).) In fact, the Legislature has mandated that, except for compelling and extraordinary reasons, the trial court is required to order full restitution to a crime victim who has suffered an economic loss. (Pen. Code, secs. 1203.1, 1202.4, subd. (f); *People v. Thygesen* (1999) 69 Cal.App.4th 988; *People v. Ortiz* (1997) 53 Cal.App.4th 791, 799-800.) A sentence without an order for restitution is unauthorized and can be corrected at any time. (*People v. Rowland* (1997) 51 Cal.App.4th 1745, 1754.)

a. Defendant's inability to pay is not a compelling and extraordinary reason justifying no restitution order.

b. Ability to pay cannot be considered in determining the amount of restitution.

II. Restitution is a Direct Consequence of a Guilty or No Contest Plea.

An award of restitution is a direct consequence of which a defendant must be advised. (*People v. Walker* (1991) 54 Cal.3d 1013, 1022; *People v. Rowland* (1997) 51 Cal.App.4th 1745, 1753.) But the failure to advise an accused of the consequences of his or her guilty plea constitutes error which requires that the guilty plea be set aside only if the error is prejudicial to the accused. In other words, had defendant known he would be held liable for restitution, would he have entered his plea? Upon a timely objection made at or before sentencing, the sentencing court must determine whether it is reasonably probable the defendant would have pleaded guilty if properly advised. (*Walker, supra*, 54 Cal.3d at p. 1013; *People v Valdez* (1994) 24 Cal.App.4th 1194, 1203.) In assessing prejudice, "[t]he court should consider the defendant's financial condition, the seriousness of the consequences of which the defendant was advised, the nature of the crimes

charged, the punishment actually imposed, and the size of the restitution [award]. [Citation.]” (*Walker, supra*, 54 Cal.3d at p. 1023.)

III. A Defendant Has a Right to Notice and Hearing to Dispute the Amount of Restitution.

The court should advise defendant of the right to a hearing to contest the ordered restitution and the manner in which it is to be made. (Pen. Code section 1202.4(f)(1), 1203.1k; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1125.) With juvenile offenders, the obligation to notify is limited to offenses that would have been felonies if committed by an adult. (Pen. Code, sec. 679.02(a)(4).)

a. Consequences of failure to object to amount ordered:

1. If the court does **not** order more restitution than the amount recommended in the probation report and defendant does not request a hearing to contest it, he waives any error. (*People v. Blankenship* (1989) 213 Cal.App.3d 992, 997.)

2. When the court orders a greater amount of restitution than that recommended in the probation report, defendant has been denied a reasonable opportunity to contest the accuracy of the amount of damaged claimed and the order must be reversed and defendant provided the opportunity to be heard. (*People v. Sandoval* (1989) 206 Cal.App.3d 1544, 1550; *People v. Thygesen, supra*, 69 Cal.App.4th at p. 993.)

IV. Restitution Hearing:

a. No right to jury trial on restitution issues. (*People v. Rivera* (1989) 21 Cal.App.3d 1153, 1161.)

b. No right to confront and cross-examine witnesses, including probation officer who prepared report. ““A defendant’s due process rights are protected when the probation report gives notice of the amount of restitution claimed . . . , and the defendant has an opportunity to challenge the figures in the probation report at the sentencing hearing.”” (*People v. Cain* (2000) 82 Cal.App.4th 81, 86-88; *People v. Resendez* (1993) 12 Cal.App.4th 98, 113; see also *People v. Baumann* (1985) 176 Cal.App.3d 67, 79-80.)

- c. Victim's have a right to express views. (Pen. Code, sec. 1191.1.)
- d. Court can rely on probation report recommendation despite hearsay nature if court makes an independent determination based on the available evidence. (*People v. Cain, supra*, 82 Cal.App.4th at pp. 87-88; *People v. Hartley* (1984) 163 Cal.App.3d 126, 130.)
- e. Evidentiary requirements to establish victim's economic loss are minimal and the victim can give his opinion of the value of the property. (*People v. Goulart* (1990) 224 Cal.App.3d 71, 82-83.)

Areas to consider regarding possible error are:

1. Imposition of replacement cost based on new rather than used property when the item lost was used property. Restitution is not intended to be a windfall for the victim but instead, to make him whole or to return him to the position he was in prior to the crime. (*People v. Thygesen, supra*, 69 Cal.App.4th at p. 995.)

2. Welfare Fraud cases – loss determined by subtracting the amount the government would have paid had no acts of fraud occurred from the amount the government actually paid. (*People v. Crow* (1993) 6 Cal.4th 952 .)

3. Is the order speculative rather than based on a rational means of calculation. Even though the trial court has broad discretion in making a restitution award, that discretion is not unlimited. While it is not required to make an order in keeping with the exact amount of loss, the trial court must use a rational method that could reasonably be said to make the victim whole, and may not make an order which is arbitrary or capricious. (*People v. Carbajal, supra*, 10 Cal.4th at p. 1121; *People v. Tucker* (1995) 37 Cal.App.4th 1.) When a victim provides estimates of loss, the defendant then bears the burden of proving the victim's restitution estimate exceeds the replacement cost of the stolen property. (*People v. Hartley, supra*, 163 Cal.App.3d at p. 130.)

4. Does the order compensate the victim for loss not caused by the defendant. In *People v. Scroggins* (1987) 191 Cal.App.3d 502, defendant pled guilty to receiving stolen property and as a condition of probation was ordered to pay restitution to various burglary victims. The court reversed

as there was no showing that there was loss that was a result of his criminal conduct. And *People v. Rivera* (1989) 212 Cal.App.3d 1153 applied the reasoning to cases where defendant was sentenced to prison.

5. When multiple defendants are responsible, has the court ordered restitution joint and severable amongst the defendants so that the defendant is credited with payments by the other defendants. (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1535; *People v. Madrana* (1997) 55 Cal.App.4th 1044, 1049.)

f. Defendant has the burden of proof to show that the represented value is inaccurate. (*People v. Foster* (1993) 14 Cal.App.4th 939, 946; *People v. Hartley, supra*, 163 Cal.App.3d at p. 130.)

V. Who is a Victim?

Generally, restitution under section 1202.4 is limited to the person[s] against whom the crime was committed but does not have to be an individual. (*People v. Torres* (1997) 59 Cal.App.4th 1, 5; *People v. Valdez* (1994) 24 Cal.App.4th 1194, 1200.) A victim can be a corporation, governmental agency, etc. (*People v. Saint-Amans* (2005) 131 Cal.App.4th 1076, 1084-1087; *People v. Ortiz, supra*, 53 Cal.App.4th at pp. 795-799 [defendant pled guilty to commercial burglary and ordered to pay restitution to bank for its losses resulting from defendant's fraudulent actions.] In *People v. Rubics* (2006) 136 Cal.App.4th 452, the court held that because an element of the crime of felony hit and run under section 20001, subdivisions (a) and (b)(2) is a defendant's involvement in an accident resulting in the injury or death of another, restitution for funeral expenses for the accident victim is proper because the loss was incurred as a result of the commission of the crime.

a. Not a direct victim:

1. In *People v. Martinez* (2005) 36 Cal.4th 384, the California Supreme Court reasoned that the California Department of Toxic Substances Control was not a direct victim of defendant's attempt to manufacture methamphetamine because the offense was not committed against the department, nor was the department the immediate object of his

crime. The Court struck the lower court's order to pay restitution, stating that Health and Safety Code sections 11470.1, 11470.2, are the exclusive means by which a government entity that is not a direct victim of a crime may recoup its costs.

2. *People v. Torres, supra*, 59 Cal.App.4th 1 – a law enforcement agency that in the course of investigating criminal activity purchased illegal drugs is not a direct victim of a crime and, thus, is not entitled to recoupment for the loss of buy money.

3. An insurance company is not entitled to restitution for benefits paid to the victim under the policy but must rely on indemnification/subrogation rights. (*People v. Birkett* (1997) 21 Cal. 4th 226.) But if the company is a direct victim where defendant is convicted of submitting false claims, the company is entitled to restitution. (*People v. O'Casey* (2001) 88 Cal.App.4th 967; *People v. Moloy* (2000) 84 Cal.App.4th 257.)

4. Also, see *People v. Franco* (1993) 19 Cal.App.4th 175, 183-186 [city not victim for workman's compensation to injured police officer]; *People v. Ozcan* (2004) 124 Cal.App.4th 1072, 1076-1077 [no restitution for cost of public agency to investigate crimes or apprehend criminals].

5. Other statutory remedies to recover losses.

Governmental agencies which are not able to recoup losses under section 1202.4 may be able to do so under other statutes: Emergency response to a DUI auto accident victim (Gov. Code, sec. 53150); fire suppression (Health & Safety Code, sec. 1309); medical examination for sexual assault or child abuse/neglect (Pen. Code, sec. 1203.1h); collection fees (Pen. Code, sec. 1203.1, subd. (l)); return of child in child stealing cases (Pen. Code, sec. 278.6, subd. (c) and Fam. Code, sec. 3134); criminal threat cases (Pen. Code, sec. 422.1).

VI. Losses Subject to Restitution.

The statute itself sets forth a non-exhaustive list of losses and expenditures that are

recoverable as economic losses including: attorney fees (*People v. Maheshwari* (2003) 107 Cal.App.4th 1406, 1409-1411); mental health counseling fees or relocation costs (*People v. Mearns* (2002) 97 Cal.App.4th 493, 501-502 [expenses must be verified by law enforcement as necessary for victim's personal safety or by mental health provider as necessary for emotional well-being]; and costs to make the victim's housing more secure (Pen, Code, sec. 1202.4, subd. (f)(3).) As stated, this list is not inclusive and the statute provides the court with broad discretion as to losses not included. (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1046-1047 [restitution for the cost of a traditional Hmong healing ceremony and herbal medicines to victims of a fight].)

a. Property – victims have a right to restitution for the value of stolen or damaged property, defined as replacement cost of like property or the cost of repair, if repair is possible. Restitution for damaged property that can be repaired is the lesser of market value before crime minus the value after crime or reasonable cost of repairing property to condition before the damage by defendant. (*People v. Yanez* (1995) 38 Cal.App.4th 1622, 1627.)

1. Stolen property – original cost if fair approximation of replacement cost. The victim may provide the amount and it is up to defendant to rebut it. When the property appreciates in value after the theft, such as with mutual fund shares, the court may order the value of the appreciation. (*People v. Tucker* (1995) 37 Cal.App.4th 1, 4-6; *People v. Baker* (2005) 126 Cal.App.4th 463, 468-470 [restitution included value of calves of rustled cows who gave birth after theft].)

b. Medical and counseling expenses can include future expenses. (*People v. O'Neal* (2004) 122 Cal.App.4th 817 820-821.)

c. Wages or profits lost by the victim as a result of the crime are a proper item of restitution and can include:

1. Future lost wages (*People v. Fulton* (2003) 109 Cal.App.4th 876, 880 [lost wages associated with future postsurgery recovery]; compensation for the deceased victim's widow for her future economic losses attributable to the deceased victim's death (*People v. Giordano* (2007) 42 Cal.4th 644;

child support for murder victim's children (*People v. Harvest* (2000) 84 Cal.App.4th 641, 652-653; *People v. Clark* (1982) 130 Cal.App.3d 371).

2. Profits or wages lost because of time spent as a witness. (*People v. Nguyen* (1994) 23 Cal.App.4th 32, 42; *People v. Ryan* (1988) 203 Cal.App.3d 189 192.)

3. Wages or profits lost by parents or guardian of victim. (Pen. Code, sec. 1202.4, subd. (f)(3)(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."])

4. Lost wages include commission income as well as base wages. (Pen. Code, sec. 1202.4, subd. (f)(3)(E).)

5. Plus interest – the restitution order is subject to an award of interest at the rate of 10% per year, with the court having the option of awarding it from the date of loss or the date of sentencing. (Pen. Code, sec. 1202.4, subd. (f)(3)(G).)

6. Victim entitled to restitution regardless of whether victim has submitted loss to insurer. The deductible amount the victim paid is not the loss; it is the full amount of loss. (*In re Brittany L.* (2002) 99 Cal.App.4th 1381, 1386-1390.) Third party indemnification or subrogation rights do not effect amount of restitution and victim receives amount of full loss even if s/he did not personally incur an actual economic loss because of medicare/medical benefits. (*People v. Hove* (1999) 76 Cal.App.4th 1266 1272-1273.)

7. Payments to the victim by the defendant's insurance company as a result of defendant's status as an insured under the policy will offset the amount of defendant's restitution obligation. (*People v. Bernal* (2002) 101 Cal.App.4th 155, 165-168; compare *People v. Hamilton* (2004) 114 Cal.App.4th 932, 941-943 and *In re Tommy A.* (2005) 131 Cal.App.4th 1580, 1590-1592.)

8. Amount of restitution initially uncertain – court retains jurisdiction to impose or modify the amount owed until losses are determined and counsel should advise defendant of the right to a subsequent hearing. (Pen. Code, sec. 1202.4, subd. (f); *People v. Amin*

(2000) 85 Cal.App.4th 58, 62.)

9. Court may not delegate its duty to determine the amount of restitution except in the case of minors and delegation with consent. (*People v. Cervantes* (1984) 154 Cal.App.3d 353, 358; *In re Karen A.* (2004) 115 Cal.App.4th 504, 507-511; *People v. DiMora* (1992) 10 Cal.App.4th 1545, 1549; *People v. Lunsford* (1998) 67 Cal.App.4th 901.)

VII. Discretionary Restitution.

Under Penal Code section 1203.1, subdivision (a)(3), the court has broad discretion to order restitution as a condition of probation with the goal of fostering rehabilitation and protecting public safety. (*People v. Carbajal, supra*, 10 Cal.4th at p. 1120.) Towards this end, restitution can be ordered when the losses are not the result of the crime underlying defendant's conviction. However, the loss must still be reasonably related to the crime or to the goal of deterring future criminality. (*People v. Rugamas* (2001) 93 Cal.App.4th 518, 521; *People v. Carbajal, supra*, 10 Cal.4th at p. 1124 [restitution for hit and run conviction in which defendant involved]; *In re I.M.* (2005) 125 Cal.App.4th 1195, 1208-1211 [probation condition requiring restitution for funeral expenses of victim proper against a juvenile offender who was an accessory reasonably related to crime of which defendant convicted and calculated to deter gang involvement].)

VIII. Restitution Based on Dismissed and Uncharged Counts – *Harvey* Waiver

A plea bargain may include a negotiated agreement for defendant to pay restitution for dismissed or uncharged offenses and the *Harvey* waiver suffices; i.e., the agreement need not specifically refer to restitution for dismissed counts. (*People v. Harvey* (1979) 25 Cal.3d 754; *People v. Campbell* (1994) 21 Cal.App.4th 825; *People v. Beck* (1993) 17 Cal.App.4th 209; *People v. Goulart* (1990) 224 Cal.App.3d 71.)