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## ANOTHER LOOK AT MALICIOUS MISCHIEF: CRIMINAL RESTITUTION IN THE FIFTY STATES

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All too often property damage claims are the result of arson, vandalism, or other criminal acts committed by a third party. Many times, the adjuster or subrogation specialist will choose not to pursue a subrogation claim believing that there is no viable means of recovering any money from the offending third party – even if apprehended and charged with a crime. But depending on the jurisdiction in which the loss occurred, there may be an avenue for recovery. Many jurisdictions across the United States allow courts to order some amount of restitution in favor of a subrogating carrier as part of the sentencing phase if there is a conviction or a guilty plea by the offending party. “Restitution” is defined as compensation for the wrongful taking of property.<sup>1</sup> The practical result of an order of restitution is that the offending party will make payments to the “victim” of the crime until his debt is satisfied. Oftentimes victim is defined broadly enough to include a subrogating carrier. To assist you in determining which states allow restitution in favor of a subrogating carrier and how much restitution may be recovered, we are pleased to announce our Fifty State Summary on Criminal Restitution and Recovery by Insurance Companies that is now available on our website. In addition, this article will provide a brief summary of the law, the issues surrounding restitution orders and how best to proceed with your claim for restitution.

### FIRST THINGS FIRST - WHO IS A “VICTIM”?

Every state allows a victim of a crime to recover some amount of compensation from the offending party through an order of restitution. Whether a subrogating carrier is considered a “victim” is where state courts and legislators may differ. A majority of states do allow an insurance carrier to

<sup>1</sup> BLACK’S LAW DICTIONARY 1313 (6th ed. 1990).

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recover some monies through restitution.<sup>2</sup> Eight states do not allow an insurance carrier to recover any amount in restitution because they are not a direct victim of the act or harm,<sup>3</sup> and seven states and the District of Columbia remain undecided.<sup>4</sup> But even if the court may make an award of restitution in favor of a subrogating carrier, there are several other factors that must be considered.

### HOW TO GET YOUR CLAIM BEFORE THE COURT?

The next issue to be determined is how much restitution may a court order in favor of all claimants and the subrogating carrier and how is a claim for restitution presented. The scope of what is recoverable varies significantly from state to state. Whether to impose restitution and the amount to be imposed is usually left to the court's broad discretion. To ensure the greatest likelihood of recovery, the subrogation specialist should work with the local authorities and the prosecuting attorney and inquire about the particular court's tendency to award restitution and the procedures for proving up the damages. Most often, the carrier will be required to submit its damages to the court through the prosecuting attorney during the sentencing phase. The court and prosecutor should be notified in writing of the subrogation interest as soon as possible due to the speedy nature of criminal trials. Unfortunately, the adjustment of the claim may not be completed by the sentencing phase and the court will be ruling based on incomplete estimates and reserves. Through experience, however, we have also learned that some courts will not grant restitution without an actual proof of loss and hard proof of damages.<sup>5</sup>

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<sup>2</sup> States allowing a subrogating insurance carrier to recover monies through restitution are Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

<sup>3</sup> States not allowing a subrogating insurance carrier to recover monies through restitution are California, Iowa, Kansas, Kentucky, Nevada, South Dakota, Tennessee and Vermont.

<sup>4</sup> States that are undecided are Arkansas, Hawaii, Massachusetts, Missouri, Oklahoma, Rhode Island, South Carolina and the District of Columbia.

<sup>5</sup> Courts in Arkansas and Texas have refused to grant restitution when the damages were not finalized.

## WHAT DAMAGES ARE RECOVERABLE?

Some states actually require that the court must award restitution. But, the amount to be awarded is left to the discretion of the judge.<sup>6</sup> Other states have statutory limits on the amount of restitution that can be awarded.<sup>7</sup> For example, in New Jersey, the amount of restitution may not exceed the amount of the loss, and is capped at certain levels corresponding with the severity of the offense.<sup>8</sup> Several states limit the restitution award to the economic damages actually suffered by the victim(s).<sup>9</sup> Other states' awards may range from "any pecuniary loss;"<sup>10</sup> up to three times the amount of the economic loss;<sup>11</sup> to services to be performed or work or labor done for the benefit of the victim;<sup>12</sup> or the "costs of counseling reasonably related to the offense."<sup>13</sup> But in the vast majority of jurisdictions, the amount of the award is within the sole and broad discretion of the trial court.

## OTHER VARIABLES - THE FINANCIAL MEANS OF THE OFFENDER

In addition to the damages suffered and the nature of the offense, other variables may be considered. Many jurisdictions require or suggest that the court take into consideration the defendant's ability to actually make the restitution payments.<sup>14</sup> "The purpose behind an order of restitution is to impress upon the criminal defendant the magnitude of the loss he has caused and to defray costs to the victim caused by the offense." *Jaramillo v. State*, 803 N.E.2d 243 (Ind.Ct.App. 2004). In *Jaramillo*, the trial court ordered the defendant to make restitution payments in the amount of \$34,697, which had to be paid within six months from the date of the order. *Id.* at 250. The appellate court held that the restitution order was unacceptable because Mr. Jaramillo worked as a laborer and did not speak English as his first language. The court of appeals held that Mr. Jaramillo would not be able to realistically make the payments. *Id.* at 251.

<sup>6</sup> Connecticut is one such state.

<sup>7</sup> Mississippi and New Jersey apply damages caps to restitution awards.

<sup>8</sup> See N.J. STAT. § 2C:43-3 (2005).

<sup>9</sup> Maine, Massachusetts, Minnesota, New Hampshire and Ohio limit restitution to economic damages.

<sup>10</sup> COLO. REV. STAT. §§ 18-1.3-603 (2005).

<sup>11</sup> OKLA. STAT. tit. 22 § 991f (2005).

<sup>12</sup> ALA. CODE § 15-18-66(3) (2005).

<sup>13</sup> CONN. GEN. STAT. § 53a-28(c) (2006).

<sup>14</sup> Florida, Georgia, Illinois, Indiana, New Mexico and North Carolina require the court to consider the ability of the defendant to make payments. Maine, Massachusetts and West Virginia suggest the defendant's financial means be considered when awarding restitution.

Contrary to the policy that an order of restitution is to be used as a rehabilitation tool for the offender and not be impossible or impracticable to meet, courts in Alaska will *not* take into account the ability of the defendant to make the payments.<sup>15</sup> Alaska favors requiring criminals to compensate their victims for the entire extent of the damages, and focuses on the financial burden placed on the victim – not the burden placed on the defendant.<sup>16</sup> Regardless of what the court orders one must always remember that the offending third party may still not be able to or may simply never make any payments – especially if he is incarcerated.

## WHO GETS WHAT?

Another key issue to remember is who gets to share in the restitution award. Oftentimes the damages resulting from the criminal act far exceed the defendant's ability to pay and will exceed the amount of restitution actually ordered to be paid. Thus, there may not be enough money to satisfy all claims. Delaware holds that the insurance carrier may only be paid if all other victims have been paid in full.<sup>17</sup> Other states simply follow the standard priority of recovery as between a subrogating carrier and its insured. *See* Cozen O'Connor's 50 State Jurisdiction Comparative Chart entitled Priority of Recovery of a Subrogating Insurer and its Insured When Making Joint or Separate Claims Against Responsible Third Parties. Once again, even though the court may order restitution in favor of the subrogating carrier, the carrier may not be able to realize all or any of that award.

## CONCLUSION

When you have a loss resulting from a criminal act of a third party, subrogation may not be lost. If the jurisdiction allows a subrogating carrier to recover through an order of restitution, it may be worthwhile to follow up with the local police and fire marshal to determine whether an arrest has been or will be made and if charges will be filed. If charges are filed, you should contact the prosecuting attorney and advise them in writing of your subrogation interest. The prosecuting attorney should provide you information on the likelihood of an order and how to submit your damages. Although there are no guarantees, the prosecuting attorney may be able to obtain an order and you may actually recover compensation for the damages caused.

<sup>15</sup> ALASKA STAT. § 12.55.045(g) (2005).

<sup>16</sup> ALASKA STAT. § 12.55.045 (2005).

<sup>17</sup> 11 DEL. CODE § 4106(d)(2).