

# Criminal Restitution's Impact on Civil Litigation and Insurance Coverage

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## **Introduction**

Restitution is a powerful mechanism of the criminal justice system. “[T]he purpose of restitution is essentially compensatory: to restore a victim, to the extent money can do so, to the position he occupied before sustaining injury.”<sup>1</sup> Colorado requires courts to impose restitution when sentencing a criminal defendant<sup>2</sup> because persons convicted of crimes, “. . . should be under a moral and legal obligation to make full restitution to those harmed by their misconduct.”<sup>3</sup> Restitution also helps convicted persons rehabilitate and deters offenders from committing crimes in the future.<sup>4</sup> Beginning September 1, 2000, Title 16, Article 18.5 of the Colorado Revised Statutes (“Statute”) was amended to provide a more comprehensive scheme for assessment and collection of restitution for the benefit of victims.<sup>5</sup> This article discusses the criminal restitution process in Colorado and how it affects civil litigation so attorneys and their clients can better understand how criminal restitution impacts civil litigation and insurance coverage.

## **Restitution**

In a criminal case, a sentencing judge must consider restitution in “. . . [e]very order of conviction of a felony, misdemeanor, petty, or traffic misdemeanor offense, except any order of conviction for a state traffic misdemeanor offense issued by a municipal or county court in which the prosecuting attorney is acting as a special deputy district attorney pursuant to an agreement with the district attorney's office . . .”<sup>6</sup> The prosecutor in a criminal case must prove by a preponderance of the evidence the amount of restitution owed.<sup>7</sup> Under the Statute, a conviction is, “a verdict of guilty by a judge or jury or a plea of guilty or nolo contendere that is accepted by the court for a felony, misdemeanor, petty offense, or traffic misdemeanor offense, or adjudication for an offense that would constitute a criminal offense if committed by an adult.”<sup>8</sup> Convictions also include deferred judgments until successfully completed.<sup>9</sup> Failure to pay criminal restitution can result in revocation of probation.<sup>10</sup>

## **The Restitution Order**

A restitution order must include specific amounts of restitution to be paid by the defendant.<sup>11</sup> Restitution is intended to pay a victim for pecuniary loss suffered by a victim. Restitution can be ordered for any loss or injury caused by an offender’s conduct that can be

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<sup>1</sup> *United States v. Boccagna*, 450 F.3d 107, 115 (2d Cir. 2006), citing *Hughey v. United States*, 495 U.S. 411, 416, 110 S.Ct. 1979, 109 L.Ed.2d 408 (1990) (observing that the meaning of restitution is restoring someone to a position he occupied before a particular event).

<sup>2</sup> C.R.S. § 18-1.3-603.

<sup>3</sup> C.R.S. § 18-1.3-601(1)(b).

<sup>4</sup> *Id.* § 18-1.3-601(1)(c)(d).

<sup>5</sup> C.R.S. § 16-18.5-101 et seq.

<sup>6</sup> C.R.S. § 18-1.3-603(1).

<sup>7</sup> *People v. Stafford*, 93 P.3d 572, 576 (Colo. App. 2004).

<sup>8</sup> C.R.S. § 18-1.3-602 (2).

<sup>9</sup> *Id.*

<sup>10</sup> C.R.S. § 16-18.5-105(3)(d)(I).

<sup>11</sup> C.R.S. § 18-1.3-603(1)(a).

reasonably calculated and recompensed in money.<sup>12</sup> Such loss or injury may include out-of-pocket expenses, interest, loss of use value of money, anticipated future expenses, rewards paid by victims, and money advanced by law enforcement agencies.<sup>13</sup> “Restitution does not include damages for physical or mental pain and suffering, loss of consortium, loss of enjoyment of life, loss of future earnings, or punitive damages.”<sup>14</sup>

A collections investigator is appointed to the case when the defendant maintains that the full amount of the restitution cannot be paid.<sup>15</sup> The collections investigator is responsible for reviewing the defendant’s financial ability to pay the restitution order.<sup>16</sup> This investigation includes review of written financial affidavits or disclosures of the defendant’s personal, household and business income as well as other income, assets and liabilities.<sup>17</sup> The collections investigator may also conduct an oral examination of the defendant’s financial circumstances.<sup>18</sup> Following the investigation, the collections investigator establishes a payment schedule that may be entered as an order of the court.<sup>19</sup> The collections investigator may also direct the defendant to seek gainful employment, report any changes in financial circumstances and authorize defendant to incur additional debts or financial obligations.<sup>20</sup>

While a restitution order constitutes a lien on personal property, the collection investigator is authorized to record a transcript with the secretary of state to create a lien on the defendant’s personal property.<sup>21</sup> The collections investigator is also authorized to file a transcript of the order for restitution to create a lien on real property or the defendant’s motor vehicle.<sup>22</sup>

### **Restitution and Civil Litigation**

A restitution order is considered a final civil judgment until restitution is paid in full.<sup>23</sup> Restitution orders are subject to an interest rate of 12% per annum.<sup>24</sup> Defendants must also pay, “. . . reasonable and necessary attorney fees and costs incurred in collecting [restitution] due to the defendant's nonpayment.”<sup>25</sup> Restitution is considered “. . . ‘willful and malicious’ injury for purposes of exceptions to discharge in bankruptcy as provided in 11 U.S.C. sec. 523.”<sup>26</sup> Any restitution paid to a victim is considered a set off against any amount recovered as compensatory damages by the victim in any federal or state civil proceeding.<sup>27</sup> The reverse is true for funds

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<sup>12</sup> C.R.S. § 18-1.3-602 (3)(a).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> C.R.S. § 18-1.3-602(1); C.R.S. § 16-18.5-104(1)

<sup>16</sup> C.R.S. § 16-18.5-104(3)(a)

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> C.R.S. § 16-18.5-104(4)(a)

<sup>20</sup> C.R.S. § 16-18.5-104(4)(b)

<sup>21</sup> C.R.S. § 18-1.3-603(4)(c) ; C.R.S. § 16-18.5-104(5)(b)

<sup>22</sup> C.R.S. 16-18.5-104(5)(a) and (c)

<sup>23</sup> C.R.S. § 18-1.3-603(4)(a).

<sup>24</sup> *Id.* § 18-1.3-603(4)(b).; as opposed to post-judgment interest in civil cases which only applies a rate of 9% per annum. C.R.S. § 13-21-101(1).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* § 18-1.3-603(4)(c)&(d).

<sup>27</sup> *Id.* § 18-1.3-603(6).

recovered in a civil proceeding which may offset a restitution award in either a felony or non-felony criminal case.<sup>28</sup>

A victim has the right to pursue collection of restitution from the defendant in the victim's own name.<sup>29</sup> The victim must first provide notice of intent to pursue collection to the clerk of the court or the executive director of the department of corrections if the defendant was sentenced to the department of corrections.<sup>30</sup> While the collections investigator and department of corrections will cease collection efforts upon notice, the collections investigator will still assist the victim in their collection efforts.<sup>31</sup> The collecting victim may then apply to the sentencing court for transcripts, garnishment, levy or any other civil process used to collect upon a judgment.<sup>32</sup>

### **Restitution and Insurance**

#### *Felony v. Non-Felony*

Whether a criminal judge considers the availability of insurance during restitution proceedings depends on the conviction. For a non-felony conviction, “. . . the court shall order restitution concerning only the portion of the victim's pecuniary loss for which the victim cannot be compensated under a policy of insurance.”<sup>33</sup> Insurance in the restitution setting includes insurance policies, self-insurance, or any other agreement that would indemnify the defendant for any damages sustained by the victim.<sup>34</sup> Generally, “. . . a court may not award restitution to a victim concerning a pecuniary loss for which the victim has received or is entitled to receive benefits or reimbursement under a policy of insurance or other indemnity agreement.”<sup>35</sup> This rule does not apply for felony convictions.<sup>36</sup> Insurance carriers are not required to defend insureds at restitution hearings absent a specific contractual obligation.<sup>37</sup>

#### *Restitution and Reservation of Rights in Non-Felony Cases*

A reservation of rights allows the insurance carrier to, “. . . provide a [civil]defense to the insured under a reservation of its rights to seek reimbursement should the facts at trial prove that the incident resulting in liability was not covered by the policy, or to file a declaratory judgment action after the underlying case has been adjudicated.”<sup>38</sup> A reservation of rights is necessary because, “. . . [a]n insurance company has a duty to defend its insured so long as the claims for

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<sup>28</sup> *People v. Hoisington*, 902 P.2d 887, 888 (Colo. App. 1995).

<sup>29</sup> C.R.S. § 16-18.5-107.

<sup>30</sup> C.R.S. § 16-18.5-107(1).

<sup>31</sup> *Id.*

<sup>32</sup> C.R.S. § 16-18.5-107(2).

<sup>33</sup> *Id.* § 18-1.3-603(8)(a).

<sup>34</sup> *Id.* § 18-1.3-603(8)(b).

<sup>35</sup> *Id.* § 18-1.3-603(8)(c)(I).

<sup>36</sup> *Id.* § 18-1.3-603(8)(a).

<sup>37</sup> *Id.* § 18-1.3-603(8)(e)(I).

<sup>38</sup> *Hecla Min. Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1089 (Colo. 1991).

liability allege any facts that fall within the policy.”<sup>39</sup> The duty to defend is broader than the duty to indemnify.<sup>40</sup> As a result, “. . . [i]f an insurer believes that it has no obligation to indemnify—for example, if it believes the insured's actions were intentional and outside policy coverage—it can defend its insured under a reservation of rights.”<sup>41</sup> Most insurance policies contain intentional act, and/or criminal act, coverage exclusions which exempt from coverage injuries caused by insureds’ intentional or criminal acts.<sup>42</sup> The purpose of the exclusions is to, “. . . prevent extending to the insured a license to commit harmful, wanton or malicious acts.”<sup>43</sup> A reservation of rights based on these exclusions can complicate recovery of restitution.

A criminal court could decline to award restitution because it believes insurance coverage is available although the defendant’s insurance carrier has reserved its rights. Consequently, a victim/plaintiff may not receive restitution due to the criminal court’s assumption of a covered loss. At the same time, indemnity may not be paid to the plaintiff/victim under a civil judgment when a carrier successfully defends its reservation of rights. To avoid claims of impropriety or bad faith, an insurance carrier should notify the defendant/insured of its reservation of rights as soon as possible. If the carrier knows that a restitution proceeding will be conducted for damages subject to a reservation of rights, the carrier should consider a statement under its reservation of rights letter requesting that the insured/defendant notify the plaintiff/victim and criminal court that defendant’s insurer reserves its right to cover damages subject to the restitution proceeding. The defendant/insured would then be in a position to represent to the criminal judge information pertinent to any indemnity owed that would otherwise reduce or limit a restitution award based on any assumption of coverage.

### **Conclusion**

Restitution seeks to make crime victims whole.<sup>44</sup> To accomplish that goal, Colorado’s restitution system is a powerful tool for collecting money owed to victims. It may also affect civil actions arising from incidents which led to criminal charges. Whether insurance is available impacts restitution as well. As a result, it is imperative defendants, victims, attorneys, and insurance carriers consider how restitution will influence civil litigation arising from the same incident as criminal charges.

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<sup>39</sup> *Shelter Mut. Ins. Co. v. Vaughn*, 2013 COA 25, 300 P.3d 998, 998 (Colo. App. 2013).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Am. Family Mut. Ins. Co. v. Johnson*, 816 P.2d 952, 955 (Colo. 1991) and *Bailey v. Lincoln Gen. Ins. Co.*, 255 P.3d 1039, 1048 (Colo. 2011).

<sup>43</sup> *Id.* at 957.

<sup>44</sup> *People v. Reyes*, 166 P.3d 301, 304 (Colo. App. 2007).