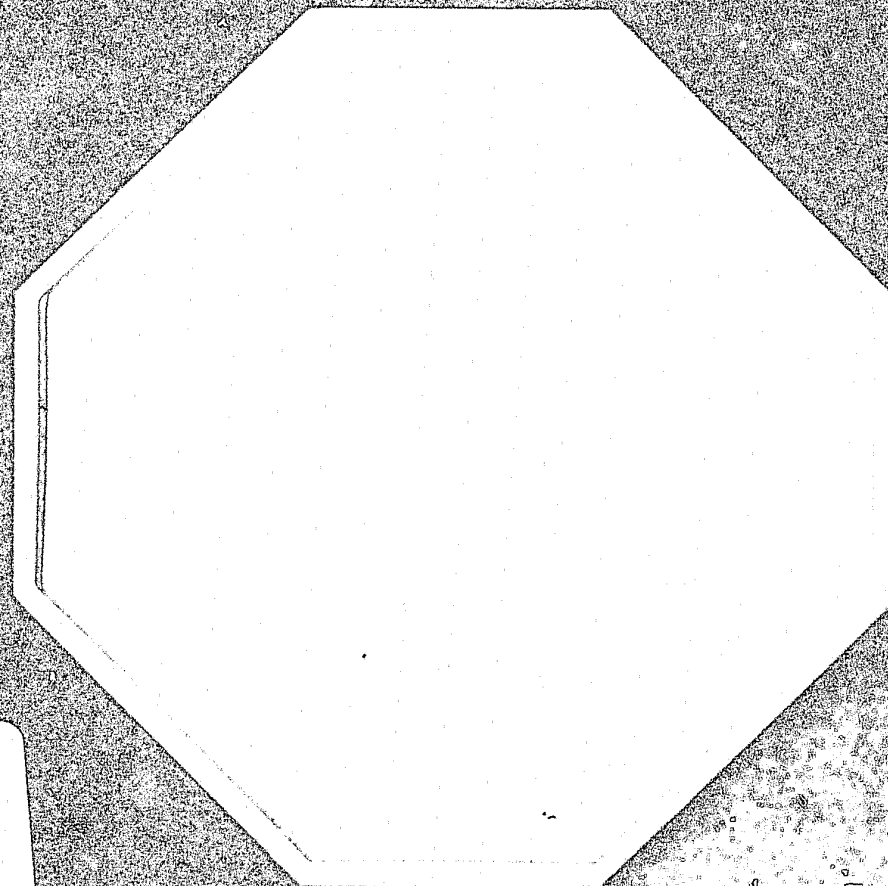


98582

2152
SA 12/2/85



98582

Pacific
Institute
for Research
and Evaluation

✓ THEORETICAL
AND PRACTICAL IMPACT OF
PRIVATE INSURANCE ON RESTITUTION
AS A SANCTION FOR CRIMINAL OFFENDERS

Howard F. Feinman
Eugene, Oregon
December 1980

Pacific
Institute
for Research
and Evaluation

1777 N. California Walnut Creek, CA 94596 (415) 939-6666

Funding for this report and research was provided by Grant No. 79-JN-AX-0009 from the Law Enforcement Assistance Administration, OJJDP/NIJJD, Department of Justice, Washington, DC to the Institute of Policy Analysis. Points of view or opinions stated in this document are those of the author and do not necessarily represent the official position or policies of the Department of Justice.

98582

U.S. Department of Justice
National Institute of Justice

This document has been reproduced exactly as received from the person or organization originating it. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the National Institute of Justice.

Permission to reproduce this copyrighted material has been granted by

Public Domain/OJJDP/NIJJD
US Department of Justice

to the National Criminal Justice Reference Service (NCJRS).

Further reproduction outside of the NCJRS system requires permission of the copyright owner.

INTRODUCTION

Restitution is an increasingly popular disposition in juvenile courts. It has received widespread support in the criminal justice community from persons with very different philosophical and ideological perspectives, yet, it cannot be said that restitution has been accepted and implemented without controversy. There are dozens of operational schemes for restitution programs which differ in terms of type of restitution, scope, eligibility, development of the restitution plan, type of services offered, and clientele.¹ Programs, courts, and persons involved with the administration of criminal justice have many differing and strongly held views on the operation and implementation of restitution as a sanction.

One of the areas of sharpest difference about the implementation of restitution as a sanction is whether restitution payments should be made to insurance companies.² This paper

¹ Schneider, Anne L. and Schneider, Peter R., Overview of Restitution Program Models in the Juvenile Justice System, Institute of Policy Analysis, Eugene, Oregon, May, 1979.

² In a recent survey of project personnel from the National Juvenile Restitution Evaluation, of 115 persons sampled, 37 percent believed restitution should not be used to pay insurance companies, 56 percent believed programs should be permitted to pay insurance companies, and 7 percent believed programs should always pay insurance companies.

will explore the legal rights and responsibilities involved in paying restitution to insurance companies. The focus will be on the legal interaction between the insurance company and the victim, the offender, and the courts. The paper will conclude with an exploration of some of the theoretical and philosophical issues a court or program must face in deciding whether or not to pay resitution to insurance companies.

INSURANCE COMPANY AND VICTIM

Many individuals purchase private insurance contracts to protect themselves against financial loss. These individuals pay premiums to an insurance company and receive a contract which obligates the insurance company to pay them if they suffer certain types of losses. A person may make a claim for losses suffered at the hands of a criminal offender, and if this loss is not excluded from coverage by the insurance contract, the victim will be compensated for this loss by the company. The insurance company is liable to its insured, the victim of the crime, and will make payment on a claim, regardless of whether the offender is apprehended or convicted.

If the insured has been paid in full by the insurance carrier, the insured is contractually and legally required to hold any money received from any other source for the

same loss in trust for the insurance company and is obligated to turn these proceeds over to the company.³ Thus, if an insurance company pays a crime victim \$400, and that victim receives \$400 for the same loss from a criminal restitution program, the law of subrogation requires the victim to turn those funds over to the insurance company.

What if the insurance company has partially paid the victim of the loss but has not paid the full amount? With deductible clauses in most insurance policies, this is a very common situation. Assume that the victim suffered a \$400 loss at the hands of a criminal offender. The victim has submitted an insurance claim and has received \$300 from the insurance company, the full amount of the claim less the \$100 deductible. In the meantime, the offender has been apprehended, convicted, and ordered to pay \$400 in restitution to the victim of the crime. What in this situation is the victim's legal obligation to the insurance company? And what rights, if any, does the insurance company have to the proceeds from the restitution order?

Appellate courts have arrived at different answers to this question. The general rule⁴ is that the insured is

³National Garment Company v. New York C. & St. L. R.R. Co., 173 F.2d 32 (8th Cir.); Phillips v. Liberty Mutual Insurance Company, 253 A.2d 502 (Del. 1969); 16 Couch, Insurance (2d ed. 19 , § 61:29).

⁴Keeton, Insurance Text, § 3.10(c), (West: St. Paul, Minnesota, 1971).

entitled to be reimbursed first for losses not covered by insurance, then the insurer is entitled to the remaining balance up to the amount it has paid out on the claim, and if there is anything remaining, the insured is entitled to it. In our example, then, the insured would be entitled to \$100 of the restitution, which is the amount of loss not covered by insurance, and the insurance company would be entitled to the remaining \$300.

Two additional rules have been adopted by appellate courts for the allocation of recoveries from third parties between an insurance company and the insured. In some jurisdictions, the insurer is entitled to be reimbursed first out of the recovery from the third party, and the insured is entitled to any remaining balance.⁵

In other jurisdictions, the recovery from the third person is to be prorated between the insurer and the insured in accordance with the percentage of the original loss paid by the insurer under the policy.⁶ Using the facts of the previous example, in these states, the insured would be entitled to \$100 of the recovery (one-fourth of \$400)

⁵Fort Worth Lloyd's v. Haygood, 246 S.W.2d 865 (Tex. 1952).

⁶Pontiac Mut. County Fire & Lightning Insurance Company v. Sheibley, 116 N.E. 644 (Ill. 1917); General Excl. Insurance Corp. v. Driscoll, 52 N.E.2d 970 (Mass. 1944); Generally, see Keeton, Insurance Text, supra § 3.10(c).

and the insurer would be entitled to \$300 (three-fourths of \$400).

In some states, courts will not order restitution payments to insurance companies either for legal or philosophical reasons. Courts which do not pay insurance companies might, in the previous example, order the offender to pay restitution in the amount of \$100 representing the loss the victim suffered which was not covered by insurance. In states which adopt the rule requiring proration of benefits between insurance companies and the insured, an insurance company could argue that it is entitled to receive \$75 of the \$100 restitution order, since the insurance company paid the victim three-fourths of the original loss and hence is entitled to three-fourths of any recovery. This argument has been advanced in at least one court program involved in the National Juvenile Restitution Initiative.

It is unlikely that an insurance company will take the time and expense to determine if a victim has received a restitution payment from a criminal offender, particularly where the amount of the claim is relatively small. If the victim does not inform the insurance company, the company may have a legal right to the restitution payments which the victim receives, but this right will not be enforced, leaving the victim with a double recovery for the same loss.

INSURANCE COMPANY AND OFFENDER

Once the insurer has paid the claim of its insured, subrogation law gives the company a right to recover from the offender for the amount of money it has paid its insured.⁷ It is possible, therefore, that the offender could be held liable for civil damages to the insurance company regardless of the outcome of the offender's case in criminal court. Furthermore, unless an agreement has been made with the court or the offender, the insurance company is free to pursue the offender for the full extent of its damages, even if the offender has been convicted and ordered to pay restitution in an amount less than the company's actual damages. Also, if the insurance company is dissatisfied with the amount of restitution, it may sue the offender in civil court. The offender is then put in a difficult position because the insurance company can use the offender's conviction against him in this lawsuit.

It is important to recognize that civil law makes the offender liable to the insurance company because the offender has caused a loss to the crime victim. Since the insurance company has paid the victim's loss, the insurance company is put in the place of the victim, i.e., subrogated to the victim's rights against the offender.

⁷ 16 Couch, Insurance (2d ed. 19 , § 61:4).

INSURANCE COMPANY AND COURTS

The majority of state criminal statutes permit courts to order restitution as one of the conditions of probation. Under these statutes, a court may, but need not, order restitution. Some statutes may provide certain limits or criteria for the sentencing judge to use in determining how and under what circumstances to order restitution. In a small minority of states, the judge must, under certain circumstances, order restitution as a condition of probation. However, there is no statutory scheme which gives a crime victim or an insurance company a right to receive restitution from a criminal offender. Even in a state where a judge is required to order restitution, neither a victim nor an insurance company may enforce the judge's failure to order restitution, since the only parties to the criminal proceeding are the State and the offender.

If a court chooses to order restitution, is an insurance company eligible to receive these payments? In some states, this question has been specifically answered by statute:

No third party shall benefit by way of restitution or reparation as a result of the liability of that third party to pay indemnity to an aggrieved party for the damage or loss caused by the defendant.

N.C. Gen. Stat. 15A-1343(6)(d).

An insurer shall be regarded as the victim {within the meaning of the restitution statute}, only if the insurer has no right of subrogation and the insured has no duty to pay the proceeds of the restitution to the insurer.

Iowa Code Ann. § 907.12(1)(a).

The North Carolina and Iowa statutes are exceptional in that they clearly state whether an insurance company is eligible to receive restitution payments from offenders. Most restitution statutes provide that restitution may be ordered without stating who is to be the beneficiary of the restitution,⁸ or provide that restitution may be ordered payable to the victim or to the aggrieved party,⁹ without defining these terms.

Where these terms have been left undefined, appellate courts have reached different results on the question of whether a court may order an offender to pay restitution to an insurance company. In State v. Getsinger,¹⁰ the Oregon Court of Appeals held that an insurance company was not eligible to receive restitution payments. The Oregon statute then in effect allowed the court to order an offender to make restitution to the "aggrieved party," and

⁸ N.Y. Penal Law § 65.10(s)(f); N.J. Stat. Ann. 2c:45-1(8).

⁹ Kan. Crim. Proc. Code Ann. § 21.4610(b); Ky. Rev. Stat. Ann. § 533.30(d); Utah Code Ann. § 77-35-17.

¹⁰ 27 Or. App. 339, 556 P.2d 147 (1976).

the court in Getsinger held that an insurance company was not an "aggrieved party" within the meaning of the statute, since it was not the direct victim of the crime.

A similar result was reached in People v. Grago,¹¹ where the court held that the insurer of a bank who repaid embezzled funds was not an "aggrieved party" within the meaning of the New York restitution statute then in effect, since the court interpreted "aggrieved party" to include only those persons whose rights were invaded by the defendant.

A contrary result was reached in Flores v. State,¹² where the appellate court in Texas upheld the trial court order requiring an offender to reimburse an insurance company for medical expenses paid to the complaining witness. Also, in People v. Alexander,¹³ the court approved a restitution order in an arson case which ordered repayment of funds to the insurer for losses suffered from a fire caused by the defendant. A similar result was reached in State v. Thorstad.¹⁴

It is important to note that the cases and statutes which have been discussed speak to the eligibility of the

¹¹ 24 N.Y. Misc.2d 739 (N.Y. 1960).

¹² 513 S.W.2d 66 (Tex. 1974).

¹³ 6 Cal. Rptr. 153, 182 C.A.2d 281 (1960).

¹⁴ 261 N.W.2d 899 (N.D. 1979).

insurance company to receive restitution payments directly from the offender rather than from the victim. For example, the North Carolina statute clearly states that an insurance company is not eligible to receive restitution from an offender, however, it is doubtful that the statute would have any effect on the rule of subrogation, which would require the victim to turn over any restitution payments received to the insurance company to the extent of benefits the company has paid the victim. This fact was discussed in a footnote in State v. Getsinger:¹⁵

Our holding does not preclude the trial court from requiring the defendant to make reparation to the owner for the full amount of the damages. . . , even though the owner might be contractually bound to give such sums to the insurer. The reparation statute is a rehabilitative tool of the criminal law; its applicability should not be affected by the happenstance of whether the owner carries insurance.

This statement was followed in a recent Oregon case, State v. Rose,¹⁶ where the court held that a restitution order was not invalid because the victim was contractually bound to pass the restitution payment on to its insurer.

¹⁵ 27 Or.App. 339, 340, 556 P.2d 147, 148.

¹⁶ 45 Or.App. 879, 609 P.2d 875 (1980).

THEORETICAL ISSUES

Society, through acts of its legislature and decisions of its courts, sets certain standards for conduct by citizens and imposes sanctions for violations of these standards. As a sanction of the criminal law, restitution has multiple purposes and serves multiple goals. Herbert Packer has classified societal sanctions into four categories: punishment, treatment/rehabilitation, compensation, and regulation.¹⁷ Criminal law is generally concerned with the first two types of sanctions, yet restitution combines the first three, punishment, treatment and compensation. The issue is whether restitution is less likely to accomplish these goals of punishment, rehabilitation, and compensation if the restitution payments are made to insurance companies rather than to direct victims.

PUNISHMENT

Punishment has been defined as the infliction of consequences in response to a person being convicted of a crime.¹⁸ Among the purposes of punishment in the criminal law setting are: deterrence, i.e., to prevent undesirable

¹⁷ Packer, Herbert L. The Limits of the Criminal Sanction, (Stanford University Press: Stanford, CA 1968).

¹⁸ Von Hirsch, Andrew. Doing Justice: The Choice of Punishments, (Hill and Wang: New York 1976).

conduct, and deserts, retribution by society for wrongdoing. The consequence inflicted by restitution is that the offender is deprived of property when he pays back the victim for the loss caused by the offense. The deprivation of property is the same regardless of who the ultimate recipient of the property is, and therefore, from a strict punishment point of view, the effectiveness of restitution as a sanction should be unaffected by whether the recipient of the restitution payment is the direct victim, an insurance company, or any other third party victim.

TREATMENT/REHABILITATION

In addition to its punitive aspects, restitution is most often viewed as a sanction likely to treat the offender by providing rehabilitation. Several arguments have been advanced for how restitution will serve this rehabilitative purpose: (1) the offender will be held accountable and be made aware of the loss he has caused; (2) the offender will receive a sense of accomplishment for completing a set of concrete requirements; and (3) the offender will perceive restitution as a just sanction.¹⁹

¹⁹Galaway, Burton. "The Use of Restitution," 23 Crime & Delinquency 57, 65, (1977); Schafer, Stephen. Compensation and Restitution to Victims of Crime, (2nd Ed., Patterson Smith: Montclair, NJ 1970).

Accountability. Whether an offender will be held less accountable if restitution is paid to an insurance company instead of to the "direct victim" of the offense, is both an empirical and a philosophical question. The empirical question can be answered by questioning offenders concerning their attitudes about accountability, and by comparing offenders who have been ordered to pay restitution to an insurance company. Results would then be analyzed to determine if an offender actually felt more or less accountable if restitution were paid to an insurance company.

From a philosophical point of view, some argue that an offender is less aware of the total loss caused when "payment" of restitution is ordered to be made to an insurance company rather than to the direct victim of the crime.²⁰ The question becomes how broadly we define the term "payment." If "payment" is narrowly construed to mean the actual transfer of funds from the offender to the victim, even where the offender is ordered to make restitution to the "direct victim," it is unlikely that the offender actually will hand the funds directly to the victim. An examination of restitution projects participating in the National Juvenile Restitution Initiative reveals that of 76 projects, only eight projects, or 10.5 percent,

²⁰Harland, Alan T. "Restitution to Victims of Personal and Household Crimes," Working Paper 15, Criminal Justice Research Center, Albany, N.Y.: August 1978.

require the offender actually to make payments directly to the victim. In all of the other projects, the payment is made to the victim through the restitution project, or some other third party intermediary.

If the term "payment" is interpreted more broadly to mean the ultimate recipient of the payment, will the offender be made more aware of the loss suffered if payment ultimately goes to the victim's insurance company, rather than to the victim? If the argument for accountability is that an offender is held accountable when payment is made to the victim because the offender is deprived of funds as a consequence of his criminal activity, then the ultimate beneficiary of the restitution would not matter.

If the only purpose of restitution is to deprive an offender of property, then restitution as a sanction may be indistinguishable from a fine. Restitution and fines can be distinguished from a theoretical point of view. Restitution is a sentence ordered because of the financial loss caused by the offender and should correspond to this financial loss, whereas a fine is a financial penalty assessed by the state based on the offense committed by the offender, and the amount of the fine should correspond to the offense committed irrespective of the financial loss caused. Appellate courts have recognized this theoretical distinction in upholding restitution orders which exceed

the maximum statutory fine for a particular offense.²¹ It is not clear, however, that offenders would make the theoretical distinction that appellate courts have drawn between restitution and fines.

If the amount of restitution ordered corresponds to the amount of loss caused by the offender, one could hypothesize that this order and the repayment of this amount by the offender is alone sufficient to accomplish the accountability purposes of restitution, regardless of the ultimate recipient of the restitution payment. The counter-argument would be that the offender can only be held accountable and be made aware of the loss caused by the offense if: (1) the restitution ordered corresponds to the amount of loss caused, (2) the offender completes the restitution order, and (3) the offender is aware that the direct victim who has suffered a financial loss will receive the restitution payment.

Sense of Accomplishment. The second argument for restitution as a rehabilitative sanction is that the offender will receive a sense of accomplishment from completing a set of concrete requirements. This sense of accomplishment should

²¹ Commissioner of Motor Vehicles v. Lee, 254 Md. 279, 255 A.2d 44 (1969); Biddy v. State, 138 Ga. App.4, 225 S.E.2d 448 (1976).

by who ultimately receives the restitution payment.

Perception as Just Sanction. The final argument for restitution is that it will be perceived by the offender as a just sanction. However, the offender may not perceive restitution as a just sanction where payment is to be made to an insurance company. The offender may feel that the insurance company has suffered no real financial loss, and even if it did, is in a much better position to withstand this loss than the offender. The offender may very well feel victimized when a court enters a restitution order payable to an insurance company, rather than an sense of relief in "doing the right thing" for the victim of the offense.

COMPENSATION

The third sanctioning purpose of the criminal law identified by Packer is to provide compensation to the victim for the loss caused. Many authors have pointed out that since most offenders are not apprehended and convicted, and those who are, are often without financial means, restitution will never serve as a primary vehicle to compensate victims who have suffered losses.²² However, in those

²²Galaway, supra; Schafer, supra.

cases where the offender is apprehended and convicted, restitution certainly serves to compensate the victim of the offense when the restitution requirements are met. Where an insurance company has paid the victim, the insurance company has suffered a pecuniary loss and the payment by the offender to the insurance company serves the purpose of compensating the insurance company equally as well as if restitution were paid directly to an uninsured individual victim. The question then is whether an insurance company has actually suffered any "pecuniary loss" since the payment on a claim by an insurance company is just part of the operation of its business. After all, individuals, businesses and other customers of insurance companies pay insurance premiums to avoid the risk of financial loss. The insurance company goes to great trouble to develop a premium schedule so that the amount it charges for premiums is sufficiently great to be able to pay all claims made by its customers, to pay all expenses, and also to provide a profit. By ordering the offender to pay the insurance company, it could be said that the offender is not compensating for a loss caused by the crime, but rather is helping to increase the profitability of the insurance company.

A partial answer to this argument depends on how the insurance company treats restitution payments or any other monetary recoveries it receives from third parties. In

information gathered in interviews with persons in the insurance industry in Oregon and with the Insurance division of the Oregon State Department of Commerce, it appears that if the insurance company receives a recovery after it has paid a claim, the insurance company will offset this recovery against the claim it has paid. Thus, if an insurance company obtains a full recovery from an offender of a claim it has paid, the recovery will cancel out the claim paid, which will prevent the insurance company from raising the rates of that individual or the rates of all customers, since the company has suffered no loss. Aside from the method insurance companies use to account for restitution payments they receive, many persons in and out of the criminal justice system argue that it is wrong as a matter of policy for restitution payments to go to insurance companies.

If we decide for philosophical or ideological reasons that offenders should not pay restitution to insurance companies or other third parties, what alternative dispositions can or should be ordered? State statutes, court decisions, and restitution programs cannot alter the contractual relationship between the victim and the insurance company. Thus, unless a restitution program is aware that a victim has insurance prior to entering a restitution order, nothing can be done to prevent the victim from turning over the restitution payments to the insurance company.

If a court is aware that a victim was insured and elects not to order the offender to pay restitution directly to the insurance company, what sanctions are available to the court which will still serve to rehabilitate the offender and to make the offender accountable for the crime?

The court could order the offender to perform community service without pay rather than paying restitution to an insurance company. The thirteenth amendment to the U.S. Constitution prohibits involuntary servitude except for the punishment of a crime. An offender who is ordered to perform community service in lieu of monetary restitution solely because the victim of the offense had private insurance could argue that he is being treated in a discriminatory fashion for no valid rehabilitative purpose, since the sole reason he is ordered to perform involuntary community service is not as punishment for a crime but because the victim of the crime had private insurance.

Another option would be for the court to order the defendant to pay monetary restitution to a charity or some other substitute victim rather than to the insurance company. Since the charity is not the direct victim of the offense nor is it connected in any way to the financial loss caused by the offender, payment to the charity should not make the offender feel any more accountable than if payment is made to an insurance company. For that matter, since the charity is not related even in an indirect way to the

offense, it could be argued that the offender would feel less accountable. Furthermore, since payment of restitution to a charity is not punitive in nature, as is a fine, and is not clearly related to the offense as is financial restitution to the victim, the offender could argue that the court is depriving him of property without due process of law by ordering payment to a charity.

In performing community service or monetary restitution to a substitute victim, the offender presumably will feel a sense of accomplishment upon completion of a set of tasks, and may feel that this is more "just" than monetary payment to an insurance company.

Other alternatives to ordering direct restitution to insurance companies include: (1) ordering the offender to pay the victim in the amount of the insurance premium paid by the victim, (2) ordering the offender to pay the victim for the amount of the deductible, and (3) not ordering any monetary restitution. If any of these alternatives are adopted, the offender receives a "windfall" in that the offender pays less restitution than the amount of loss caused by the offense solely because the victim had an insurance policy. In this situation, although the court or the program implements its policy not to pay insurance companies, the offender may feel unaccountable for the offense since the financial restitution ordered is less than the amount of loss caused.

CONCLUSION

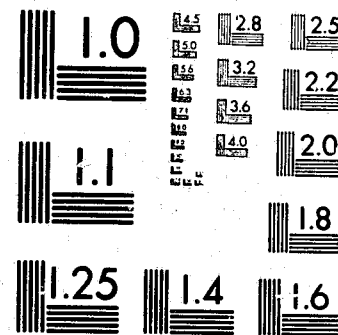
Restitution is being implemented by many courts and agencies throughout the country in a variety of fashions. Case law and court policies toward the payment of restitution to insurance companies are strongly divided. Major national evaluations of restitution in adult and juvenile courts are being undertaken at the present time, and it is hoped that these evaluations will shed light on whether restitution is more or less effective in meeting its stated goals and purposes when the offender is ordered to make payment to an insurance company. Courts and agencies that prohibit restitution payments to insurance companies should have defensible rationales for this policy, and should develop reasonable alternative sanctions.

END

National Criminal Justice Reference Service

ncjrs

This microfiche was produced from documents received for inclusion in the NCJRS data base. Since NCJRS cannot exercise control over the physical condition of the documents submitted, the individual frame quality will vary. The resolution chart on this frame may be used to evaluate the document quality.



MICROCOPY RESOLUTION TEST CHART
NATIONAL BUREAU OF STANDARDS-1963-A

Microfilming procedures used to create this fiche comply with the standards set forth in 41CFR 101-11.504.

Points of view or opinions stated in this document are those of the author(s) and do not represent the official position or policies of the U. S. Department of Justice.

National Institute of Justice
United States Department of Justice
Washington, D. C. 20531

1/24/86

THEORETICAL
AND PRACTICAL IMPACT OF
PRIVATE INSURANCE ON RESTITUTION
AS A SANCTION FOR CRIMINAL OFFENDERS

Howard F. Feinman
Eugene, Oregon
December 1980

U.S. Department of Justice
National Institute of Justice

98582

This document has been reproduced exactly as received from the person or organization originating it. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the National Institute of Justice.

Permission to reproduce this copyrighted material has been granted by

PUBLIC DOMAIN/ OJJDP
US DEPT. OF JUSTICE

to the National Criminal Justice Reference Service (NCJRS).

Further reproduction outside of the NCJRS system requires permission of the copyright owner.

98582

Funding for this report and research was provided by Grant No. 79-JN-AX-0009 from the Law Enforcement Assistance Administration, OJJDP/NIJJDP, Department of Justice, Washington, DC to the Institute of Policy Analysis. Points of view or opinions stated in this document are those of the author and do not necessarily represent the official position or policies of the Department of Justice.

INTRODUCTION

Restitution is an increasingly popular disposition in juvenile courts. It has received widespread support in the criminal justice community from persons with very different philosophical and ideological perspectives, yet, it cannot be said that restitution has been accepted and implemented without controversy. There are dozens of operational schemes for restitution programs which differ in terms of type of restitution, scope, eligibility, development of the restitution plan, type of services offered, and clientele.¹ Programs, courts, and persons involved with the administration of criminal justice have many differing and strongly held views on the operation and implementation of restitution as a sanction.

One of the areas of sharpest difference about the implementation of restitution as a sanction is whether restitution payments should be made to insurance companies.² This paper

¹Schneider, Anne L. and Schneider, Peter R., Overview of Restitution Program Models in the Juvenile Justice System, Institute of Policy Analysis, Eugene, Oregon, May, 1979.

²In a recent survey of project personnel from the National Juvenile Restitution Evaluation, of 115 persons sampled, 37 percent believed restitution should not be used to pay insurance companies, 56 percent believed programs should be permitted to pay insurance companies, and 7 percent believed programs should always pay insurance companies.

will explore the legal rights and responsibilities involved in paying restitution to insurance companies. The focus will be on the legal interaction between the insurance company and the victim, the offender, and the courts. The paper will conclude with an exploration of some of the theoretical and philosophical issues a court or program must face in deciding whether or not to pay resitution to insurance companies.

INSURANCE COMPANY AND VICTIM

Many individuals purchase private insurance contracts to protect themselves against financial loss. These individuals pay premiums to an insurance company and receive a contract which obligates the insurance company to pay them if they suffer certain types of losses. A person may make a claim for losses suffered at the hands of a criminal offender, and if this loss is not excluded from coverage by the insurance contract, the victim will be compensated for this loss by the company. The insurance company is liable to its insured, the victim of the crime, and will make payment on a claim, regardless of whether the offender is apprehended or convicted.

If the insured has been paid in full by the insurance carrier, the insured is contractually and legally required to hold any money received from any other source for the

same loss in trust for the insurance company and is obligated to turn these proceeds over to the company.³ Thus, if an insurance company pays a crime victim \$400, and that victim receives \$400 for the same loss from a criminal restitution program, the law of subrogation requires the victim to turn those funds over to the insurance company.

What if the insurance company has partially paid the victim of the loss but has not paid the full amount? With deductible clauses in most insurance policies, this is a very common situation. Assume that the victim suffered a \$400 loss at the hands of a criminal offender. The victim has submitted an insurance claim and has received \$300 from the insurance company, the full amount of the claim less the \$100 deductible. In the meantime, the offender has been apprehended, convicted, and ordered to pay \$400 in restitution to the victim of the crime. What in this situation is the victim's legal obligation to the insurance company? And what rights, if any, does the insurance company have to the proceeds from the restitution order?

Appellate courts have arrived at different answers to this question. The general rule⁴ is that the insured is

³National Garment Company v. New York C. & St. L. R.R. Co., 173 F.2d 32 (8th Cir.); Phillips v. Liberty Mutual Insurance Company, 253 A.2d 502 (Del. 1969); 16 Couch, Insurance (2d ed. 19 , § 61:29).

⁴Keeton. Insurance Text, § 3.10(c), (West: St. Paul, Minnesota, 1971).

entitled to be reimbursed first for losses not covered by insurance, then the insurer is entitled to the remaining balance up to the amount it has paid out on the claim, and if there is anything remaining, the insured is entitled to it. In our example, then, the insured would be entitled to \$100 of the restitution, which is the amount of loss not covered by insurance, and the insurance company would be entitled to the remaining \$300.

Two additional rules have been adopted by appellate courts for the allocation of recoveries from third parties between an insurance company and the insured. In some jurisdictions, the insurer is entitled to be reimbursed first out of the recovery from the third party, and the insured is entitled to any remaining balance.⁵

In other jurisdictions, the recovery from the third person is to be prorated between the insurer and the insured in accordance with the percentage of the original loss paid by the insurer under the policy.⁶ Using the facts of the previous example, in these states, the insured would be entitled to \$100 of the recovery (one-fourth of \$400)

⁵Fort Worth Lloyd's v. Haygood, 246 S.W.2d 865 (Tex. 1952).

⁶Pontiac Mut. County Fire & Lightning Insurance Company v. Sheibley, 116 N.E. 644 (Ill. 1917); General Excl. Insurance Corp. v. Driscoll, 52 N.E.2d 970 (Mass. 1944); Generally, see Keeton, Insurance Text, supra § 3.10(c).

and the insurer would be entitled to \$300 (three-fourths of \$400).

In some states, courts will not order restitution payments to insurance companies either for legal or philosophical reasons. Courts which do not pay insurance companies might, in the previous example, order the offender to pay restitution in the amount of \$100 representing the loss the victim suffered which was not covered by insurance. In states which adopt the rule requiring proration of benefits between insurance companies and the insured, an insurance company could argue that it is entitled to receive \$75 of the \$100 restitution order, since the insurance company paid the victim three-fourths of the original loss and hence is entitled to three-fourths of any recovery. This argument has been advanced in at least one court program involved in the National Juvenile Restitution Initiative.

It is unlikely that an insurance company will take the time and expense to determine if a victim has received a restitution payment from a criminal offender, particularly where the amount of the claim is relatively small. If the victim does not inform the insurance company, the company may have a legal right to the restitution payments which the victim receives, but this right will not be enforced, leaving the victim with a double recovery for the same loss.

INSURANCE COMPANY AND OFFENDER

Once the insurer has paid the claim of its insured, subrogation law gives the company a right to recover from the offender for the amount of money it has paid its insured.⁷ It is possible, therefore, that the offender could be held liable for civil damages to the insurance company regardless of the outcome of the offender's case in criminal court. Furthermore, unless an agreement has been made with the court or the offender, the insurance company is free to pursue the offender for the full extent of its damages, even if the offender has been convicted and ordered to pay restitution in an amount less than the company's actual damages. Also, if the insurance company is dissatisfied with the amount of restitution, it may sue the offender in civil court. The offender is then put in a difficult position because the insurance company can use the offender's conviction against him in this lawsuit.

It is important to recognize that civil law makes the offender liable to the insurance company because the offender has caused a loss to the crime victim. Since the insurance company has paid the victim's loss, the insurance company is put in the place of the victim, i.e., subrogated to the victim's rights against the offender.

⁷ 16 Couch, Insurance (2d ed. 19 , § 61:4).

INSURANCE COMPANY AND COURTS

The majority of state criminal statutes permit courts to order restitution as one of the conditions of probation. Under these statutes, a court may, but need not, order restitution. Some statutes may provide certain limits or criteria for the sentencing judge to use in determining how and under what circumstances to order restitution. In a small minority of states, the judge must, under certain circumstances, order restitution as a condition of probation. However, there is no statutory scheme which gives a crime victim or an insurance company a right to receive restitution from a criminal offender. Even in a state where a judge is required to order restitution, neither a victim nor an insurance company may enforce the judge's failure to order restitution, since the only parties to the criminal proceeding are the State and the offender.

If a court chooses to order restitution, is an insurance company eligible to receive these payments? In some states, this question has been specifically answered by statute:

No third party shall benefit by way of restitution or reparation as a result of the liability of that third party to pay indemnity to an aggrieved party for the damage or loss caused by the defendant.

N.C. Gen. Stat. 15A-1343(6)(d).

An insurer shall be regarded as the victim {within the meaning of the restitution statute}, only if the insurer has no right of subrogation and the insured has no duty to pay the proceeds of the restitution to the insurer.

Iowa Code Ann. § 907.12(1)(a).

The North Carolina and Iowa statutes are exceptional in that they clearly state whether an insurance company is eligible to receive restitution payments from offenders. Most restitution statutes provide that restitution may be ordered without stating who is to be the beneficiary of the restitution,⁸ or provide that restitution may be ordered payable to the victim or to the aggrieved party,⁹ without defining these terms.

Where these terms have been left undefined, appellate courts have reached different results on the question of whether a court may order an offender to pay restitution to an insurance company. In State v. Getsinger,¹⁰ the Oregon Court of Appeals held that an insurance company was not eligible to receive restitution payments. The Oregon statute then in effect allowed the court to order an offender to make restitution to the "aggrieved party," and

⁸ N.Y. Penal Law § 65.10(s)(f); N.J. Stat. Ann. 2c:45-1(8).

⁹ Kan. Crim. Proc. Code Ann. § 21.4610(b); Ky. Rev. Stat. Ann. § 533.30(d); Utah Code Ann. § 77-35-17.

¹⁰ 27 Or. App. 339, 556 P.2d 147 (1976).

the court in Getsinger held that an insurance company was not an "aggrieved party" within the meaning of the statute, since it was not the direct victim of the crime.

A similar result was reached in People v. Grago,¹¹ where the court held that the insurer of a bank who repaid embezzled funds was not an "aggrieved party" within the meaning of the New York restitution statute then in effect, since the court interpreted "aggrieved party" to include only those persons whose rights were invaded by the defendant.

A contrary result was reached in Flores v. State,¹² where the appellate court in Texas upheld the trial court order requiring an offender to reimburse an insurance company for medical expenses paid to the complaining witness. Also, in People v. Alexander,¹³ the court approved a restitution order in an arson case which ordered repayment of funds to the insurer for losses suffered from a fire caused by the defendant. A similar result was reached in State v. Thorstad.¹⁴

It is important to note that the cases and statutes which have been discussed speak to the eligibility of the

¹¹ 24 N.Y. Misc.2d 739 (N.Y. 1960).

¹² 513 S.W.2d 66 (Tex. 1974).

¹³ 6 Cal. Rptr. 153, 182 C.A.2d 281 (1960).

¹⁴ 261 N.W.2d 899 (N.D. 1979).

insurance company to receive restitution payments directly from the offender rather than from the victim. For example, the North Carolina statute clearly states that an insurance company is not eligible to receive restitution from an offender, however, it is doubtful that the statute would have any effect on the rule of subrogation, which would require the victim to turn over any restitution payments received to the insurance company to the extent of benefits the company has paid the victim. This fact was discussed in a footnote in State v. Getsinger:¹⁵

Our holding does not preclude the trial court from requiring the defendant to make reparation to the owner for the full amount of the damages. . . , even though the owner might be contractually bound to give such sums to the insurer. The reparation statute is a rehabilitative tool of the criminal law; its applicability should not be affected by the happenstance of whether the owner carries insurance.

This statement was followed in a recent Oregon case, State v. Rose,¹⁶ where the court held that a restitution order was not invalid because the victim was contractually bound to pass the restitution payment on to its insurer.

¹⁵ 27 Or.App. 339, 340, 556 P.2d 147, 148.

¹⁶ 45 Or.App. 879, 609 P.2d 875 (1980).

THEORETICAL ISSUES

Society, through acts of its legislature and decisions of its courts, sets certain standards for conduct by citizens and imposes sanctions for violations of these standards. As a sanction of the criminal law, restitution has multiple purposes and serves multiple goals. Herbert Packer has classified societal sanctions into four categories: punishment, treatment/rehabilitation, compensation, and regulation.¹⁷ Criminal law is generally concerned with the first two types of sanctions, yet restitution combines the first three, punishment, treatment and compensation. The issue is whether restitution is less likely to accomplish these goals of punishment, rehabilitation, and compensation if the restitution payments are made to insurance companies rather than to direct victims.

PUNISHMENT

Punishment has been defined as the infliction of consequences in response to a person being convicted of a crime.¹⁸ Among the purposes of punishment in the criminal law setting are: deterrence, i.e., to prevent undesirable

¹⁷Packer, Herbert L. The Limits of the Criminal Sanction, (Stanford University Press: Stanford, CA 1968).

¹⁸Von Hirsch, Andrew. Doing Justice: The Choice of Punishments, (Hill and Wang: New York 1976).

conduct, and deserts, retribution by society for wrongdoing. The consequence inflicted by restitution is that the offender is deprived of property when he pays back the victim for the loss caused by the offense. The deprivation of property is the same regardless of who the ultimate recipient of the property is, and therefore, from a strict punishment point of view, the effectiveness of restitution as a sanction should be unaffected by whether the recipient of the restitution payment is the direct victim, an insurance company, or any other third party victim.

TREATMENT/REHABILITATION

In addition to its punitive aspects, restitution is most often viewed as a sanction likely to treat the offender by providing rehabilitation. Several arguments have been advanced for how restitution will serve this rehabilitative purpose: (1) the offender will be held accountable and be made aware of the loss he has caused; (2) the offender will receive a sense of accomplishment for completing a set of concrete requirements; and (3) the offender will perceive restitution as a just sanction.¹⁹

¹⁹Galaway, Burton. "The Use of Restitution," 23 *Crime & Delinquency* 57, 65, (1977); Schafer, Stephen. Compensation and Restitution to Victims of Crime, (2nd Ed., Patterson Smith: Montclair, NJ 1970).

Accountability. Whether an offender will be held less accountable if restitution is paid to an insurance company instead of to the "direct victim" of the offense, is both an empirical and a philosophical question. The empirical question can be answered by questioning offenders concerning their attitudes about accountability, and by comparing offenders who have been ordered to pay restitution to an insurance company. Results would then be analyzed to determine if an offender actually felt more or less accountable if restitution were paid to an insurance company.

From a philosophical point of view, some argue that an offender is less aware of the total loss caused when "payment" of restitution is ordered to be made to an insurance company rather than to the direct victim of the crime.²⁰ The question becomes how broadly we define the term "payment." If "payment" is narrowly construed to mean the actual transfer of funds from the offender to the victim, even where the offender is ordered to make restitution to the "direct victim," it is unlikely that the offender actually will hand the funds directly to the victim. An examination of restitution projects participating in the National Juvenile Restitution Initiative reveals that of 76 projects, only eight projects, or 10.5 percent,

²⁰Harland, Alan T. "Restitution to Victims of Personal and Household Crimes," Working Paper 15, Criminal Justice Research Center, Albany, N.Y.: August 1978.

require the offender actually to make payments directly to the victim. In all of the other projects, the payment is made to the victim through the restitution project, or some other third party intermediary.

If the term "payment" is interpreted more broadly to mean the ultimate recipient of the payment, will the offender be made more aware of the loss suffered if payment ultimately goes to the victim's insurance company, rather than to the victim? If the argument for accountability is that an offender is held accountable when payment is made to the victim because the offender is deprived of funds as a consequence of his criminal activity, then the ultimate beneficiary of the restitution would not matter.

If the only purpose of restitution is to deprive an offender of property, then restitution as a sanction may be indistinguishable from a fine. Restitution and fines can be distinguished from a theoretical point of view. Restitution is a sentence ordered because of the financial loss caused by the offender and should correspond to this financial loss, whereas a fine is a financial penalty assessed by the state based on the offense committed by the offender, and the amount of the fine should correspond to the offense committed irrespective of the financial loss caused. Appellate courts have recognized this theoretical distinction in upholding restitution orders which exceed

the maximum statutory fine for a particular offense.²¹ It is not clear, however, that offenders would make the theoretical distinction that appellate courts have drawn between restitution and fines.

If the amount of restitution ordered corresponds to the amount of loss caused by the offender, one could hypothesize that this order and the repayment of this amount by the offender is alone sufficient to accomplish the accountability purposes of restitution, regardless of the ultimate recipient of the restitution payment. The counter-argument would be that the offender can only be held accountable and be made aware of the loss caused by the offense if: (1) the restitution ordered corresponds to the amount of loss caused, (2) the offender completes the restitution order, and (3) the offender is aware that the direct victim who has suffered a financial loss will receive the restitution payment.

Sense of Accomplishment. The second argument for restitution as a rehabilitative sanction is that the offender will receive a sense of accomplishment from completing a set of concrete requirements. This sense of accomplishment should

²¹Commissioner of Motor Vehicles v. Lee, 254 Md. 279, 255 A.2d 44 (1969); Biddy v. State, 138 Ga. App.4, 225 S.E.2d 448 (1976).

by who ultimately receives the restitution payment.

Perception as Just Sanction. The final argument for restitution is that it will be perceived by the offender as a just sanction. However, the offender may not perceive restitution as a just sanction where payment is to be made to an insurance company. The offender may feel that the insurance company has suffered no real financial loss, and even if it did, is in a much better position to withstand this loss than the offender. The offender may very well feel victimized when a court enters a restitution order payable to an insurance company, rather than an sense of relief in "doing the right thing" for the victim of the offense.

COMPENSATION

The third sanctioning purpose of the criminal law identified by Packer is to provide compensation to the victim for the loss caused. Many authors have pointed out that since most offenders are not apprehended and convicted, and those who are, are often without financial means, restitution will never serve as a primary vehicle to compensate victims who have suffered losses.²² However, in those

²²Galaway, supra; Schafer, supra.

cases where the offender is apprehended and convicted, restitution certainly serves to compensate the victim of the offense when the restitution requirements are met. Where an insurance company has paid the victim, the insurance company has suffered a pecuniary loss and the payment by the offender to the insurance company serves the purpose of compensating the insurance company equally as well as if restitution were paid directly to an uninsured individual victim. The question then is whether an insurance company has actually suffered any "pecuniary loss" since the payment on a claim by an insurance company is just part of the operation of its business. After all, individuals, businesses and other customers of insurance companies pay insurance premiums to avoid the risk of financial loss. The insurance company goes to great trouble to develop a premium schedule so that the amount it charges for premiums is sufficiently great to be able to pay all claims made by its customers, to pay all expenses, and also to provide a profit. By ordering the offender to pay the insurance company, it could be said that the offender is not compensating for a loss caused by the crime, but rather is helping to increase the profitability of the insurance company.

A partial answer to this argument depends on how the insurance company treats restitution payments or any other monetary recoveries it receives from third parties. In

information gathered in interviews with persons in the insurance industry in Oregon and with the Insurance division of the Oregon State Department of Commerce, it appears that if the insurance company receives a recovery after it has paid a claim, the insurance company will offset this recovery against the claim it has paid. Thus, if an insurance company obtains a full recovery from an offender of a claim it has paid, the recovery will cancel out the claim paid, which will prevent the insurance company from raising the rates of that individual or the rates of all customers, since the company has suffered no loss. Aside from the method insurance companies use to account for restitution payments they receive, many persons in and out of the criminal justice system argue that it is wrong as a matter of policy for restitution payments to go to insurance companies.

If we decide for philosophical or ideological reasons that offenders should not pay restitution to insurance companies or other third parties, what alternative dispositions can or should be ordered? State statutes, court decisions, and restitution programs cannot alter the contractual relationship between the victim and the insurance company. Thus, unless a restitution program is aware that a victim has insurance prior to entering a restitution order, nothing can be done to prevent the victim from turning over the restitution payments to the insurance company.

If a court is aware that a victim was insured and elects not to order the offender to pay restitution directly to the insurance company, what sanctions are available to the court which will still serve to rehabilitate the offender and to make the offender accountable for the crime?

The court could order the offender to perform community service without pay rather than paying restitution to an insurance company. The thirteenth amendment to the U.S. Constitution prohibits involuntary servitude except for the punishment of a crime. An offender who is ordered to perform community service in lieu of monetary restitution solely because the victim of the offense had private insurance could argue that he is being treated in a discriminatory fashion for no valid rehabilitative purpose, since the sole reason he is ordered to perform involuntary community service is not as punishment for a crime but because the victim of the crime had private insurance.

Another option would be for the court to order the defendant to pay monetary restitution to a charity or some other substitute victim rather than to the insurance company. Since the charity is not the direct victim of the offense nor is it connected in any way to the financial loss caused by the offender, payment to the charity should not make the offender feel any more accountable than if payment is made to an insurance company. For that matter, since the charity is not related even in an indirect way to the

offense, it could be argued that the offender would feel less accountable. Furthermore, since payment of restitution to a charity is not punitive in nature, as is a fine, and is not clearly related to the offense as is financial restitution to the victim, the offender could argue that the court is depriving him of property without due process of law by ordering payment to a charity.

In performing community service or monetary restitution to a substitute victim, the offender presumably will feel a sense of accomplishment upon completion of a set of tasks, and may feel that this is more "just" than monetary payment to an insurance company.

Other alternatives to ordering direct restitution to insurance companies include: (1) ordering the offender to pay the victim in the amount of the insurance premium paid by the victim, (2) ordering the offender to pay the victim for the amount of the deductible, and (3) not ordering any monetary restitution. If any of these alternatives are adopted, the offender receives a "windfall" in that the offender pays less restitution than the amount of loss caused by the offense solely because the victim had an insurance policy. In this situation, although the court or the program implements its policy not to pay insurance companies, the offender may feel unaccountable for the offense since the financial restitution ordered is less than the amount of loss caused.

CONCLUSION

Restitution is being implemented by many courts and agencies throughout the country in a variety of fashions. Case law and court policies toward the payment of restitution to insurance companies are strongly divided. Major national evaluations of restitution in adult and juvenile courts are being undertaken at the present time, and it is hoped that these evaluations will shed light on whether restitution is more or less effective in meeting its stated goals and purposes when the offender is ordered to make payment to an insurance company. Courts and agencies that prohibit restitution payments to insurance companies should have defensible rationales for this policy, and should develop reasonable alternative sanctions.

END