

FEES, FINES, AND PENALTY ASSESSMENTS

By Lori Quick

As counties and local governments become ever more strapped for cash, more and more of the cost of prosecuting criminal offenses is being passed on to the defendants. This section identifies many of the fees and fines that can be imposed in criminal cases, and gives information regarding when they apply, how much a client can be charged, and whether and how they can be challenged on appeal, and existing authority to support such a challenge.

FEES AND FINES AUTHORIZED BY THE PENAL CODE

Penal Code §147

This fine will only be seen if you are representing an officer accused of inhumanely or oppressively treating prisoners. It is a mandatory **\$4,000, regardless of ability to pay.**

Penal Code §186.11, subdivision (c)

This fine is imposed where a defendant is convicted of two or more related felonies involving fraud or embezzlement and in which more than \$100,000 was taken. The fine levied is **\$500,000 or double the amount of the taking, whichever is greater.** It is not mandatory, as it can only be imposed if the existence of facts that would make the person subject to the aggravated white collar crime enhancement (Penal Code §186.11, subd. (a)(1)) have been admitted or found to be true. If the taking is more than \$100,000 but not more than \$500,000, then the fine will be **\$100,000 or twice the value of the taking, whichever is greater.**

Penal Code §186.28, subdivision (a)

This section allows for a fine of **\$1,000** to be imposed in addition to a prison or county jail

term for knowingly supplying, selling, or giving possession or control of any firearm to another *if all of the following* apply: (1) The person, corporation, or firm committing the offense has actual knowledge that the person receiving the firearm will use it to commit a felony described in Penal Code §186.22, while actively participating in any street gang as defined in Penal Code §186.22, subdivision (f), the members of which engage in pattern of criminal activity as defined in Penal Code §186.22, subdivision (e); (2) the firearm is used to commit the felony; and (3) a conviction for the felony under Penal Code §186.22 was first obtained of the person to whom the firearm was supplied, sold, or given possession or control. This fine **may not** be imposed on anyone who is convicted as a principal to the felony offense committed by the person to whom the firearm was supplied, sold, or given. (Penal Code §186.28, subd. (b).) The fine may be imposed regardless of ability to pay.

Penal Code §243.4

Each subsection of the sexual battery statute authorizes a fine of **no less than \$2,000** if convicted of a misdemeanor, and **no more than \$10,000** if convicted of a felony. One exception is that if the defendant was an employer and the victim an employee of the defendant, the fine for misdemeanor sexual battery may be as much as **\$3,000**. (Penal Code §243.4, subd. (e)(1).) Ability to pay is not a factor.

Penal Code § 264

This fine may be imposed where the defendant is convicted of rape as defined in Penal Code §§ 261 or 262. It is not mandatory. The amount is **\$70**, and the court must take into consideration the defendant's ability to pay. (Penal Code § 264, subd. (b).)

Penal Code § 290.3

Every person convicted of any offense specified in Penal Code § 290, subdivision (a) shall be fined **\$200** for the first conviction and **\$300** for the second and each subsequent conviction, **unless** the court determines that the defendant does not have the ability to pay the fine. However, it has been held that a determination of the ability to pay, while a factor to be considered, is not a condition precedent to imposition of the fine. (People v. McMahan (1992) 3 Cal.App.4th 740, 749.) Rather, it is incumbent on the defendant to affirmatively argue against application of the fine and demonstrate why it should not be imposed. (Id., at pp. 749-750.)

Penal Code § 294, subdivision (a)

For any conviction under Penal Code §§ 273a, 273d, 288.5, 311.2, 311.3, or 647.6, the court may order a restitution fine not to exceed **\$5,000** upon a felony conviction, or **\$1,000** for a misdemeanor conviction. The fine must be based upon the defendant's ability to pay. If the fine is ordered, the actual administrative cost of collecting it, not to exceed 2% of the total amount paid, may be paid into the general fund of the county treasury for the use and benefit of the county. (Penal Code § 294, subd. (d).)

Penal Code § 294, subdivision (b)

This fine is identical to that authorized by subdivision (a), except it applies to convictions under Penal Code §§ 261, 264.1, 285, 286, 288a, or 289 where the victim is a minor under the age of 14 years. Again, it is not mandatory.

Penal Code § 298.1

This is a mandatory fine of **\$500**, which may accompany imprisonment of up to one year in county jail, or if the person is already a state prison inmate, by sanctions for misdemeanor

according to a schedule determined by the Department of Corrections. It is imposed where a defendant refuses to provide any or all of the following: a blood specimen, saliva sample, or thumb or palm print impression pursuant to Penal Code § 296.

Penal Code § 308

This mandatory fine applies to any person, firm, or corporation which knowingly or under circumstances in which it has knowledge or should otherwise have grounds for knowledge, sells, gives, or in any way furnishes to a person under the age of 18 tobacco, cigarettes, cigarette papers, or any other preparation of tobacco, or any paraphernalia designed for smoking or ingestion of tobacco. The amount of the fine is **\$200 for the first offense; \$500 for the second offense; and \$1,000 for the third offense.** (Penal Code § 308, subd. (a).)

Minors who purchase, receive, or possess any of the above mentioned items will be ordered to pay a mandatory fine of **\$75.**

Penal Code § 456

For any conviction of arson, the court may impose a fine **not to exceed \$50,000.** (Penal Code § 456, subd. (a).) If, however, the crime was committed for pecuniary gain, then the court may instead impose a fine of twice the anticipated or actual gross gain. (Penal Code § 456, subd. (b).)

Penal Code § 490.5, subdivision (a)

A mandatory fine of **not less than \$50 and not more than \$1,000** shall be imposed, in addition to up to six months in county jail, upon a first conviction of petty theft involving merchandise taken from a merchant's premises or a book or other library materials taken from a library. The parent or legal guardian of an unemancipated minor is jointly liable for

the fine **up to \$500**. (Penal Code § 490.5, subd. (b).) In lieu of the fine, public services as designated by the court may be performed. (Penal Code § 490.5, subd. (d).)

Penal Code § 672

This is the catch-all provision for any crime punishable by imprisonment for which a fine is not prescribed. A fine **not exceeding \$1,000** may be imposed for all misdemeanors, and a fine **not exceeding \$10,000** may be imposed for all felonies. This fine may not be imposed if the statute under which the defendant is convicted specifies a fine, which is also imposed. In that case, imposition of a fine under this section would constitute an unauthorized sentence for which no objection is necessary. (People v. Breazell (2002) 104 Cal.App.4th 298.)

Penal Code § 987.5

A registration fee of **\$25** is assessed every defendant represented by appointed counsel, unless the defendant is financially unable to pay the fee. (Penal Code § 987.5, subd. (a).)

Penal Code section 987.8

Whenever a defendant is provided legal assistance, upon conclusion of the criminal proceedings in the trial court, or upon withdrawal of appointed counsel, the court **may**, after notice and a hearing, made a determination of the present ability of the defendant to pay all or a portion of the cost of the representation. (Penal Code § 987.8, subd. (b).) Ability to pay is determined by taking into consideration:

(A) present financial position;

(B) reasonably discernible future financial position;

(C) the likelihood that the defendant shall be able to obtain employment within a six-month

period from the date of the hearing; and

(D) any other factors bearing upon the defendant's financial capability to reimburse the court for the costs of the legal assistance provided. (Penal Code § 987.8, subd. (g)(2).)

The defendant must be notified *prior to* the furnishing of counsel that the court may require him or her to pay all or a portion of the cost of counsel. (Penal Code § 987.8, subd. (f); People v. Phillips (1994) 25 Cal.App.4th 62, 72-73.) Keep in mind, however, that even if there are insufficient statutory admonitions, an order for attorney fees will not be set aside where there is no prejudice. (People v. Smith (2000) 81 Cal.App.4th 630, 638.)

Penal Code § 1001.90

All defendants granted diversion must have imposed a diversion restitution fee in addition to any other administrative fee imposed. (Penal Code § 1001.90, subd. (a).) It is set at the discretion of the court, and is commensurate with the seriousness of the offense, but may not be **less than \$100, and not more than \$1,000**. (Penal Code § 1001.90, subd. (b).) The fee is ordered regardless of the present ability to pay, but the court may waive it for compelling and extraordinary reasons, which must be stated on the record. (Penal Code § 1001.90, subd. (c).)

Penal Code § 1202.4, subdivision (b)

This restitution fine is set in all cases where a person is convicted of a crime, unless the court finds compelling and extraordinary reasons for not doing so, which must be stated on the record. Inability to pay is *not* considered a compelling and extraordinary reason to impose the fine, but may be considered only in increasing the amount beyond the statutory minimum. (Penal Code § 1202.4, subd. (c).) The amount is within the court's discretion and

should be commensurate with the seriousness of the offense, but **shall not be less than \$200 and not more than \$10,000 if convicted of a felony, and shall not be less than \$100 and not more than \$1,000 if convicted of a misdemeanor.** (Penal Code § 1202.4, subd. (b)(1).)

The court may use a suggested formula by multiplying \$200 by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted. (Penal Code § 1202.4, subd. (b)(2).) In any event, it should consider any relevant factors including, but not limited to: defendant's inability to pay; the seriousness and gravity of the offense and the circumstances of its commission; any economic gain derived by the defendant as a result of the crime; the extent to which any other person suffered any losses as a result of the crime; and the number of victims involved in the crime. (Penal Code § 1202.4, subd. (d).) Inability to pay may include future earning capacity. (Ibid.) It is the burden of the defendant to demonstrate inability to pay. (Ibid.)

Penal Code § 1202.4, subdivision (f)

This subsection covers direct victim restitution as opposed to a restitution fine. It is covered in more detail below. It requires that in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court must order the defendant to make restitution to the victim in an amount based on the amount of loss claimed by the victim. If this amount cannot be determined at the time of sentencing, the court may order restitution to be determined at the direction of the court. This must be ordered unless the court finds compelling and extraordinary reasons for not doing so, and states them on the record. The defendant has a right to a hearing regarding the amount of restitution. (Penal Code § 1202.4, subd. (f)(1).)

Penal Code § 1202.45

In every case in which a sentence includes a period of parole, the court must assess an additional restitution fine **in the same amount as that imposed pursuant to Penal Code § 1202.4, subdivision (b)**. This fine, however, shall be suspended unless parole is revoked. This statute went into effect on August 3, 1995. It may not be imposed for crimes occurring before that date. (People v. Callejas (2000) 85 Cal.App.4th 667, 669, 673.) Failure to object in the trial court waives this issue for appeal *unless* the trial court exceeded its statutory authority. (People v. Andrade (2002) 100 Cal.App.4th 351.) Incredibly, the prosecution is also held to this standard. (See People v. Hector (2000) 83 Cal.App.4th 228.)

Penal Code § 1202.5

When a defendant is convicted of any offense enumerated in Penal Code §§ 211, 215, 459, 470, 484, 487, 488, or 594, the court shall order the defendant to pay a fine of **\$10**.

Penal Code § 1203.044

This is a mandatory fine which applies to defendants convicted of a felony for theft of an amount exceeding \$50,000 in a single transaction or occurrence. The allegation that the theft exceeded \$50,000 must be charged in the accusatory pleading and either admitted or found true. (Penal Code § 1203.044, subd. (a).) If probation is granted, the defendant shall be required to pay restitution to the victim and to pay a surcharge to the county equal to **20% of the restitution ordered** by the court. (Penal Code § 1203.044, subd. (g).)

Penal Code § 1203.097

When a person is granted probation for a crime in which the victim is a person defined in Family Code § 6211, a term of probation must be a minimum payment of **\$400**. The court

may reduce or waive this fee if, after a hearing in court on the record, it finds that the defendant does not have the ability to pay. (Penal Code § 1203.097, subd. (a)(5).) The trial court may also impose a fine pursuant to Penal Code § 672, or in lieu of it, payments to a battered women's shelter up to a maximum of **\$5,000**. (Penal Code § 1203.097, subd. (a)(11)(A).)

Penal Code § 1203.1

This section governs the fines allowable where a defendant is granted probation. They include:

Subdivision (a)(1) - the court may fine the defendant in a sum not to exceed the maximum fine provided by law in the case.

Subdivision (e) - restitution to a public agency for the costs of an emergency response

Subdivision (l) - where victim restitution is ordered, the board of supervisors may add a fee to cover the actual administrative cost of collecting restitution not to exceed 10% of the total amount ordered to be paid.

Penal Code § 1203.1b

The defendant may be ordered to pay the reasonable cost of any probation supervision or a conditional sentence, of conducting preplea investigation and preparing any preplea report, and of processing a jurisdictional transfer or a request for interstate compact supervision.

The reasonable cost of these services shall not exceed the amount determined to be the actual average cost. The probation officer must make a determination of the defendant's ability to pay, taking into account any amount that he is ordered to pay in fines, assessments, and restitution.

Penal Code § 1203.1c

Incredibly, defendants who are ordered to serve a county jail term as a condition of probation can be required to pay all or a portion of the reasonable costs of such incarceration, including incarceration pending disposition of the case. There must first be a hearing and a determination of the ability to pay.

Penal Code § 1203.1e

Where a defendant is ordered to serve local time and is eligible to be released on parole by the county board of parole commissioner, the court may order him or her to pay all or a portion of the reasonable cost of providing parole supervision, not to exceed the amount determined to be the actual average cost of providing parole supervision. (Penal Code § 1203.1e(a).) There must first be a hearing and a determination of the ability to pay all or a portion of the reasonable cost of these services.

Penal Code § 1203.1g

A defendant who is convicted of sexual assault of a minor, and who is eligible for probation, shall be ordered to make restitution for the cost of medical or psychological treatment incurred by the victim as a result of that assault.

Penal Code § 1203.1h

Upon conviction of any offense involving child abuse or neglect, a defendant may be ordered to pay the cost of any medical examinations conducted on the victim in order to determine the nature or extent of the abuse or neglect. The court must determine whether the defendant has the ability to pay.

Penal Code § 1203.1j

When convicted of assault, battery, or assault with a deadly weapon on a victim 65 years of age or older, whom the defendant knew or reasonably should have known was that age, the defendant must make restitution for the costs of medical or psychological treatment incurred by the victim as a result of the crime. The defendant is entitled to a hearing concerning any modification of the amount initially set.

Penal Code § 1203.1l

The court must make restitution for the costs of an emergency response. The defendant is entitled to contest this order at the sentencing hearing. (Penal Code § 1203.1l, subd. (b).)

Penal Code § 1203.1m

Defendants may be ordered to pay all or a portion of the reasonable costs of imprisonment in state prison, after a hearing and a determination of the ability to pay. The ability to pay is determined in light of all present and foreseeable financial obligations, including family support obligations, restitution to the victim, and fines, penalties, and other obligations to the court.

Penal Code § 1463.13

Where alcohol or substance abuse was substantially involved in the commission of a crime, except for driving under the influence or “a related offense”, a defendant shall be ordered to pay a penalty assessment of **not more than \$150** upon every fine, penalty, or forfeiture for a public offense wherein the court orders the offender to participate in a county alcohol and drug problem assessment program. The court must determine whether the defendant has

the ability to pay. (Penal Code § 1463.13, subd. (e).)

Penal Code § 1463.23

Out of every fine imposed pursuant to Business & Professions Code § 4383, Health & Safety Code § 11350, subdivision (c), Health & Safety Code § 11377, subdivision (c), Health & Safety Code section 11550, subdivision (b), Penal Code § 264, subdivision (b), Penal Code § 286, subdivision (m), Penal Code § 288a, subdivision (m), or Penal Code § 647.1, **\$50** shall be deposited in a special account in the county treasure exclusively to pay for the reasonable costs of establishing and providing an AIDS education program.

Penal Code § 1464

For every criminal offense other than parking offenses, a state penalty in an amount equal to **\$10 for every \$10 or fraction thereof** shall be imposed upon every fine, penalty, or forfeiture imposed and collected by the courts. The fine may be waived if a defendant is in prison until the fine is satisfied, and the penalty would work a hardship on the person convicted or his or her immediate family. (Penal Code § 1464, subd. (d).)

Penal Code § 1465.7

A state surcharge of 20% shall be levied on the base fine used to calculate the state penalty assessment specified in Penal Code § 1464, subdivision (a).

Penal Code § 4600

Destruction or injury to jail, prison, or any public property in a jail or prison, is punishable by a fine **not to exceed \$10,000**. If the amount of the damage is less than \$400, then the offense is a misdemeanor.

Penal Code § 11413

Any person convicted of exploding, igniting, or attempting to explode or ignite any destructive device or explosive, or who commits arson in any place specified in subdivision (b), for the purpose of terrorizing another, shall pay a fine **not to exceed \$10,000**.

FEES AND FINES AUTHORIZED BY THE HEALTH & SAFETY CODE

Health & Safety Code § 11350

Discretionary fine not to exceed **\$70** to be used for AIDS education in accordance with Penal Code § 1463.23. The defendant's ability to pay must be taken into consideration. (Health & Safety Code § 11350, subd. (c).)

For a first offense, a defendant must pay a fine of **at least \$1,000**, and **at least \$2,000** for a second offense. Community service may be ordered in lieu of the fine if a defendant does not have the ability to pay. (Health & Safety Code § 11350, subd. (d).)

Health & Safety Code § 11352.5

For sale of heroin, a fine **not to exceed \$50,000** shall be imposed in addition to imprisonment unless the court find the defendant would be incapable of paying it.

Health & Safety Code § 11372

This section authorizes fines ranging from **\$20,000** for each conviction under Health & Safety Code §§ 11350, 11351, 11351.5, 11352, 11353, 11355, 11359, 11360, or 11361, to **\$8,000,000** for each offense in which the defendant received an additional term pursuant to Health & Safety Code § 11370.4, subdivision (a).

Health & Safety Code §11372.5

A criminal laboratory fee in the amount of **\$50** shall be imposed on every person convicted of violating Health & Safety Code §§ 11350, 11351, 11351.5, 11352, 11355, 11358, 11359,

11361, 11363, 11364, 11368, 11375, 11377, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11380.5, 11382, 11383, 11390, 11391, 11550, 11357, subdivisions (a) or (c), 11360, subdivision (a), or Business & Professions Code § 4230. A finding of ability to pay is not required. (People v. Martinez (1998) 65 Cal.App.4th 1511.) The fee is required even if the trial court fails to impose the fee and even if the prosecution fails to call it to the trial court's attention. (People v. Turner (2002) 96 Cal.App.4th 1409.) The failure to impose the fee can be corrected by the Court of Appeal even absent an objection in the trial court. (People v. Talibdeen (2002) 27 Cal.4th 1151; Turner, supra.)

Health & Safety Code § 11372.7

Any defendant convicted of a violation of Chapter 6 of the Uniform Controlled Substances Act (Health & Safety Code §§ 11350 through 11383) must pay a drug program fee **not to exceed \$150** for each separate offense. The court shall determine whether or not the defendant has the ability to pay a drug program fee. (Health & Safety Code § 11372.7, subd. (b).) However, the trial court is not required to state a finding of a defendant's inability to pay the fee on the record. (People v. Martinez (1998) 65 Cal.App.4th 1511.) On the other hand, where the trial court did not impose this fee, it is presumed to have made a finding that the defendant did not have the ability to pay. (People v. Turner (2002) 96 Cal.App.4th 1409.)

Health & Safety Code § 11377

A fine **not to exceed \$70** may be assessed to be used for AIDS education in accordance with Penal Code § 1463.23. The court shall, however, take into consideration the defendant's ability to pay. (Health & Safety Code § 11377, subd.

(c.) This fine is intended to be in addition to any other fine imposed for possession.

(People v. Clark (1992) 7 Cal.App.4th 1041.)

Health & Safety Code § 11379.6

A fine **not exceeding \$50,000** is to be imposed on every person who manufactures, compounds, converts, produces, derives, processes, or prepares, any controlled substance specified in Health & Safety Code §§ 11054, 11055, 11056, 11057, or 11058.

CHECKLIST FOR EVALUATION OF ISSUES CONCERNING FINES AND FEES

The following is a step by step guide to determining whether your client has been erroneously ordered to pay a fine, fee, or penalty assessment.

1. Always check the statute purportedly authorizing the fine.
 - A. Is the fine or fee allowable for the offense of which the client was convicted?
 - B. Did the trial court impose the correct amount?
2. Is the fine mandatory or discretionary?
3. If discretionary, is the trial court required to make findings regarding the client's ability to pay the fine?
 - A. If so, did the court make those findings?
 - B. Does the statute give the court guidance regarding what factors to take into consideration, and if so, does the record indicate that the court did so?
4. Is an objection in the trial court necessary to raise the issue on appeal?
 - A. Was there an objection in the trial court?
 - B. If no objection, can you make out a claim of ineffective assistance of counsel?

DIRECT RESTITUTION

I. STATUTORY AUTHORITY

A. General Restitution

Penal Code section 1202.4, subdivision (a)(1) states “[i]t is the intent of the Legislature that a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime.”

B. What Is Compensable?

To the extent possible, the restitution order shall identify each victim and each loss to which it pertains, and shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant’s criminal conduct. (Penal Code § 1202.4, subd. (f)(3).) This includes but is not limited to the following:

1. Full or partial payment for the value of stolen or damaged property (Penal Code § 1202.4, subd. (f)(3)(A));
2. Medical expenses (Penal Code §1202.4, subd. (f)(3)(B));
3. Mental health counseling expenses (Penal Code §1202.4, subd. (f)(3)(C));
4. 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(s) or guardian(s) while caring for the injured minor (Penal Code § 1202.4 subd. (f)(3)(D));
5. Wages or profits lost by the victim or a minor victim’s parent(s) or guardians(s) due to time spent as a witness or in assisting the police or prosecution (Penal Code § 1202.4, subd. (f)(3)(E));

6. Noneconomic losses (psychological harm) for felony violation of Penal Code § 288 (Penal Code § 1202.4, subd. (f)(3)(F));

7. Interest at 10% per annum as of the date of sentencing or loss (Penal Code § 1202.4, subd. (f)(3)(G));

8. Actual and reasonable attorney's fees and other costs of collection accrued by a private entity on behalf of the victim (Penal Code § 1202.4, subd. (f)(3)(H));

9. Expenses incurred by an adult victim in relocating away from the defendant. Must be verified by law enforcement to be necessary for the personal safety of the victim or by a mental health provider to be necessary for the emotional well-being of the victim. (Penal Code § 1202.4, subd. (f)(3)(I));

10. Expenses to install or increase residential security incurred related to a violent felony as defined by Penal Code § 667.5 (Penal Code § 1202.4, subd. (f)(3)(J)); and

11. Expenses to retrofit a residence or vehicle, or both, to make accessible or operational by the victim if he or she is permanently disabled, whether partially or totally, as a direct result of the crime. (Penal Code § 1202.4, subd. (f)(3)(K).)

12. Investigative Costs

Penal Code section 1203.1, subdivision (e) states that the court shall consider whether the defendant as a condition of probation shall make restitution to a public agency for the costs of an *emergency response* pursuant to Article 8 (commencing with Section 53150) of Chapter 1 of Part 1 of Division 2 of the Government Code. Government Code section 53154 states in relevant part: "The expense of an emergency response shall be a charge against the person liable for expenses under this article. The charge constitutes a debt of that person and is collectible by the public

agency incurring those costs in the same manner as in the case of an obligation under a contract, expressed or implied . . . “ Government Code section 53155 limits liability for the expense of an emergency response to \$1,000 for a particular incident. “Expense of an emergency response” is defined as

“reasonable costs incurred by a public agency in reasonably making an appropriate emergency response to the incident, but shall only include those costs directly arising because of the response to the particular incident. Reasonable cost shall include the costs of providing . . . firefighting . . . *at the scene of the incident*, as well as the salaries of the personnel *responding to the incident*.” (Government Code section 53156, subd. (a), emphasis added.)

C. Method Of Calculation

For most of the items compensable under the restitution scheme, calculating the amount is simple. The victim presents his figures, and the court orders the defendant to pay them. This is not always easy where property is stolen or damaged. The amount of restitution for stolen or damaged property "shall be the replacement cost of *like property*, or the actual cost of repairing the property when repair is possible." (Penal Code section 1202.4, subd. (f)(3)(A), italics added; Welfare & Institutions Code § 730.6, subd. (h)(1).)

D. The Mandatory Nature Of Direct Restitution

The court must order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. Inability to pay shall *not* be considered a compelling and extraordinary reason not to impose a restitution order, nor shall it be a consideration in determining the amount of a restitution order. (Penal Code § 1202.4, subd. (g).)

E. Standard Of Review

Restitution orders are reviewed for abuse of discretion. (People v. Mearns (2002) 97 Cal.App.4th 493, 498.) Thus, if "there is a factual and rational basis for the amount of restitution

ordered by the trial court, no abuse of discretion will be found by the reviewing court." (People v. Dalvito (1997) 56 Cal.App.4th 557, 562.)

II. FREQUENT ERRORS IN RESTITUTION CALCULATION

A. Economic Loss Required

Oddly enough, it is not unheard of for a trial court to order restitution when there was in fact no loss, for example, when a burglary or other theft offense has occurred, and the property is recovered. Property which is the subject of the charged crime and which was returned to the victim does not represent an economic loss suffered by the victim. (See People v. Rivera (1989) 212 Cal.App.3d 1153, 1162; People v. Scroggins (1987) 191 Cal.App.3d 502, 506.)

B. The Loss Must Be The Direct Result Of The Defendant's Actions

Restitution is required in every case in which a victim has suffered economic loss *as a result of the defendant's conduct*. (Penal Code section 1202.4, subd. (f); People v. Ortiz (1997) 53 Cal.App.4th 791, 795.) Evaluate every restitution award carefully to make sure the victim is not exploiting the restitution scheme to get your client to pay for something for which he or she is not responsible.

C. Errors In Calculation Of Restitution Amount

1. New v. Used Property

As stated above, the amount of restitution for stolen or damaged property "shall be the replacement cost of *like property*, or the actual cost of repairing the property when repair is possible." (Penal Code section 1202.4, subd. (f)(3)(A), emphasis added; People v. Vournazos (1988) 198 Cal.App.3d 948, 958-959.) Thus, replacement cost does not mean the cost of purchasing a new item to replace lost or stolen property.

"[The victim] is not entitled to replace a used [item] with a brand new one at appellant's expense, absent some extraordinary facts. If [the victim] were a car rental agency that lost a 1995 Ford Taurus, it would be entitled to the replacement value of a similar 1995 Ford Taurus, not a 1999 model." (People v. Thygesen (1999) 69 Cal.App.4th 988, 995.)

Always make sure that your client is not being forced to pick up the bill for brand new items when he or she damaged or destroyed used items.

2. Speculation

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 (1995) 10 Cal.4th 1114, 1121.) While a rational method is not necessarily going to arrive at an *exact* amount, trial courts should not base restitution orders on speculation.

3. Insurance Recovery

Unfortunately, criminal defendants must pay full restitution if ordered to do so regardless of whether the victim receives payment from his or her insurance company. (People v. Birkett (1999) 21 Cal.4th 226, 246.) Determination of the amount of restitution shall not be affected by the indemnification or subrogation rights of any third party. (Penal Code § 1202.4, subd. (f)(2).) The basis for this rule is purportedly the Legislature's intention that the criminal restitution scheme should always require the offender to pay the full cost of his or her crime, receiving no windfall from the fortuity that the victim was otherwise reimbursed. (Ibid.)

D. Investigative Costs Incurred By Government Agencies Are Not Recoverable

Penal Code section 1203.1, subdivision (e) states that "[t]he court shall also consider whether the defendant as a condition of probation shall make restitution to a public agency for the costs of an *emergency response* pursuant to Article 8 (commencing with Section 53150) of Chapter 1 of Part 1 of Division 2 of the Government Code." (Emphasis added.) Government Code section 53154

states in relevant part: “The expense of an emergency response shall be a charge against the person liable for expenses under this article. The charge constitutes a debt of that person and is collectible by the public agency incurring those costs in the same manner as in the case of an obligation under a contract, expressed or implied . . . “

Government Code section 53155 limits liability for the expense of an emergency response to \$1,000 for a particular incident. “Expense of an emergency response” is defined as

“reasonable costs incurred by a public agency in reasonably making an appropriate emergency response to the incident, but shall only include those costs directly arising because of the response to the particular incident. Reasonable cost shall include the costs of providing . . . firefighting . . . *at the scene of the incident*, as well as the salaries of the personnel *responding to the incident*.” (Government Code section 53156, subd. (a), emphasis added.)

Thus, it is abundantly clear that the restitution scheme allows nothing more than the costs incurred in the emergency response to the incident itself not to exceed \$1,000.

Case law holds that government entities can be victims. (People v. Crow (1993) 6 Cal.4th 952, 957-958.) However, restitution is limited to those persons or entities against which the crimes were committed. (Birkett, supra, 21 Cal.4th at p. 232.) “It is well settled that a government agency is not entitled to restitution for the costs incurred in investigating and prosecuting criminal activity. [Citations]. ” (People v. Martinez (2003) 110 Cal.App.4th 353, 357.) Government entities are not entitled to receive mandatory victim restitution under section 1202.4 for costs associated with the standard performance of their duties. (People v. Torres (1997) 59 Cal.App.4th 1, 4-5.) However, “a government entity may be reimbursed for losses ‘resulting from unusual expenses directly incurred because of defendant’s conduct.’” (Martinez, ibid., citing People v. Rugamas (2001) 93 Cal.App.4th 518, 523.)

III. CONCLUSION

Criminal defendants are incurring huge liabilities as a result of fees, fines, penalty assessments, and restitution orders. It is surprising how frequently these amounts can be whittled down with some research into the statutory authority for the order, or a careful calculation of what the defendant is really liable for under the law. Taking a careful look at your client's financial penalties is an important part of handling appeals from guilty plea cases.