

A new twist on 'victim restitution'

Insurers seeking reimbursement for payment of claims

BY TRACI R. GENTILOZZI

When you hear the words “victim restitution,” chances are an insurance company does not come to mind.

The Crime Victims’ Rights Act says a court “shall order” a criminal defendant to make “full restitution to any victim of the defendant’s course of conduct that gives rise to the conviction.”

For years, the act has said that “victim” also includes a legal entity that suffers “financial harm” as a result of the crime. This includes insurance companies that want reimbursed for money paid on an insured’s property damage or injury claim.

Insurance company restitution claims used to be few and far between. But now, they are on the rise.

So why the change?

Keego Harbor attorney Kyle R. Peircey said one likely reason is that state regulators are scrutinizing insurance rates and assessing why losses have not been recovered, especially when insurers are legally entitled to reimbursement.

Another reason, said Benton Harbor lawyer Kevin P. Banyon, is that insurance companies and trial courts are getting more in tune with the restitution process. (See, “Is restitution misunderstood?” on page 20.)

This process includes typically taking a restitution request to the county prosecutor, and not directly to the trial judge.

“When we didn’t have the technology to quickly get hold of insurers, they weren’t aware of this process,” Banyon said. “But now we have the technology and so insurers say, ‘Yeah, we’ll take some money.’”

But according to William J. Maze, a Plymouth private practitioner, insurance companies are turning victim restitution on its head.

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“Restitution is designed to make a victim whole by compelling a defendant to pay expenses as part of the conviction,” Maze said. “Insurance companies that have been paid their premiums are now being permitted to double dip by taking money from the defendant after paying a claim.”

Banyon agreed, particularly where an insurer wants repaid for a defendant’s unintentional act, like an auto accident injury.

“The interpretation of the Crime Victims’ Rights Act as requiring restitution flies in the face of no-fault insurance,” Banyon said. “We have no-fault for a reason, and that’s so each party is liable for his own damage.”

Criminal intent

In recent years, several appellate rulings have affirmed that insurance companies can get restitution where criminal defendants have committed intentional acts.

However, a June 2014 Michigan Court of Appeals unpublished decision has possibly taken the restitution concept to a new level, Maze said.

In *Hastings Mutual Ins. Co. v. 48th District Court* (MLW No. 08-85654, 8 pages), the Court of Appeals said a trial court violated its legal duty by not ordering full restitution to all the victims, including Hastings Mutual.

The defendant in the case was convicted of receiving and concealing property, a truck with a plow.

Hastings Mutual “adequately states the law,” Maze said. “The maximum fine on the charge was \$2,000 or three times the value of the property, whichever is greater, in addition to restitution.”

However, the defendant was not convicted of the actual theft of the vehicle, Maze noted. “Nonetheless, he was ordered to pay the owners of the truck \$4,120, despite the fact that they were compensated for their loss by Hastings.”

In turn, Hastings Mutual “wanted to tack on another \$13,000, raising the total to \$17,120 for a simple misdemeanor charge,” Maze said.

“It sounds like a convoluted case, but you can see the ramifications of the decision,” he said. “What if the defendant was charged with receiving and concealing just the plow? Or in a more extreme theoretical case, just the hubcaps? Would he still have been liable for the entire \$17,000?”

“What if he had paid that amount, or gone to jail based upon an inability to pay, but an auto theft ring was later charged and convicted of the actual theft of the vehicle?” Maze asked. “Does the defendant become the victim at some point, and does he get to claim restitution against other criminal defendants?”

Maze noted Hastings Mutual could have brought a civil suit against the defendant. “But the insurance company would have been required to prove its

IS RESTITUTION MISUNDERSTOOD?

Many trial courts do not believe that insurance companies are entitled to restitution, even though the Crime Victims’ Rights Act says they are, according to Keego Harbor attorney Kyle R. Peircey.

“It has been my personal experience with restitution that it seems mystifying to a lot of courts,” he said. “But the act uses mandatory language — courts ‘shall’ order restitution.”

However, “courts don’t like it when you take away their discretion,” he noted.

A 2014 survey conducted by Benton Harbor attorney Kevin P. Banyon demonstrates Peircey’s point.

The purpose of Banyon’s “Restitution for No-Fault Insurers” survey was to see which counties, through the local prosecutor’s office, actively seek restitution for insurance companies in no-fault cases.

Banyon said that rarely will an insurance company directly ask a court for restitution.

“Usually it is done by a document sent through the prosecutor’s office,” he said. “There is a victim impact letter and it asks, ‘Do you have insurance?’”

If the underlying victim is in an auto accident, he will list his insurance carrier or his agent, Banyon said. “The victim’s advocate, usually the prosecutor, then sends a letter to the insurance company,” he said.

For his survey, Banyon contacted the prosecutor in every Michigan county. He said all 83 counties responded to the survey.

According to Banyon, the majority of Michigan counties reported they do not actively seek restitution for no-fault insurance companies. This includes much of northern lower Michigan and 100 percent of the 15 counties in the Upper Peninsula, he said.

“In total, 51 counties indicated that they do not seek it, with some indicating that when it had been sought in the past it had been turned down by a judge in their respective county (61.5 percent),” Banyon said.

A minority of counties said they do not seek restitution for no-fault insurers, Banyon said, unless a claim is presented by the insurer or the insurer otherwise gives the court or the prosecutor notice that it wants to recover restitution.

“Of the 83 counties polled, 32 counties indicated they do not seek restitution for no-fault insurance companies if and when a claim is made by that insurer (38.5 percent),” he said.

“Absolutely none of the counties indicated that they do actively seek restitution for no-fault insurance companies regardless of whether or not a claim has not been presented — meaning that they do not attempt to collect restitution to reimburse the no-fault insurance company without some effort or request by that insurer to initiate a claim,” Banyon said.

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damages and would lack a looming jail sentence to enforce its judgment.”

Bloomfield Hills private practitioner Leslie Anne Logan, who represented Hastings Mutual in the case, said the restitution statute makes it clear that insurance companies can be reimbursed when they pay an insured for a loss.

“Defense attorneys should be fully aware of the statute when their client pleads,” she said.

Unintentional acts

Insurance company restitution claims can also involve unintentional acts, like injuries in motor vehicle accidents.

For example, Maze pointed to a driver who is charged with causing serious impairment of a bodily function, a misde-

meanor. The insurance company may pay thousands of dollars on an injury claim, he said.

Under *Hastings Mutual*, “the court must order restitution to the insurance company against the driver who committed a civil infraction that caused an accident,” Maze said.

“Causing an accident is a civil infraction in itself, so [based on *Hastings Mutual*] insurance companies are almost automatically entitled to a restitution order in all auto accident cases,” Maze said. “Incredible.”

Banyon, who is with Burch & Banyon, has represented defendants in no-fault cases where insurance companies have asked for restitution.

He said that, to date, no appellate decision has squarely dealt with restitution under the no-fault statute.

“The Crime Victims’ Rights Act clearly allows restitution,” he said. “And I concede that insurance companies can be victims.”

However, “I think restitution is more appropriate in intentional act cases,” Banyon said. “If I willfully go burn down a house, then the insurance company shouldn’t be out that money and should be reimbursed for the intentional act.”

On the other hand, restitution needs to be reexamined in situations where criminal intent is missing, like no-fault cases, Banyon said.

“To circumvent the no-fault statute by ‘trumping’ it with the notion that the Crime Victims’ Rights Act broadly covers no-fault auto insurers questionably promotes any additional justice in cases where damages were not intentionally caused by a defendant,” Banyon said.

But Peircey sees things differently.

“Defendants do not get a free pass because the victim had the foresight to have insurance,” he said. “We are trying to balance the scales, whether it’s paying the insurance company or the individual.”

Keeping premiums down?

Detroit lawyer Adam B. Kutinsky said it costs the public when insurance companies pay for a criminal defendant’s actions, which is why insurers are entitled to restitution.

“The bottom line for defense lawyers is that if their clients are causing this loss, it’s the defendant who should be paying the price, not the general public through higher premiums,” he said.

“And it is not a double dip,” Kutinsky asserted. “When insurance companies pay a claim, it is factored back into the premium that is charged. So if an insurance carrier didn’t attempt to recover from a wrongdoer money that it paid out, then premiums would increase.”

It is “almost an obligation” for insurance companies to ask for restitution so higher premiums are not imposed on the public, said Kutinsky, who is with Kitch Drutchas Wagner Valitutti & Sherbrook.

“Insurers have the right after payment to pursue subrogation against the wrongdoer,” he said, noting that insurance carriers can bring a separate civil action against a defendant.

“But if the statute provides for restitution, why shouldn’t insurance carriers proceed?” he asked. “I see this as way of insurance carriers recouping their costs.”

Banyon disagreed.

“Show me a study,” he said. “There is no way insurance rates go up because of isolated criminal acts [under the no-fault statute].”

Banyon noted there are thousands of motor vehicle accidents in Michigan every year.

“Do we differentiate between the criminal and the noncriminal ones?” he asked. “No. So I think that argument fails.”

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