VICTIM vs. FELON: SUING THE CRIMINAL DEFENDANT

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INTRODUCTION: Any attorney who has practiced personal injury law long enough will eventually come to grips with a personal injury claim based on an incident that is also the catalyst for the concurrent criminal prosecution of the party responsible for their client's injuries.

The most common types of crimes out of which there is both a potential civil claim and a pending criminal prosecution would be assault and battery, driving under the influence (DUI), and sexual assault.

If a civil practitioner is to successfully conclude such a case for his client, then that practitioner must be aware of how the criminal prosecution proceedings will affect the civil case, for better or worse.

Obviously, some assets investigation into the defendant is required before embarking on such a civil claim, even if the existence of an auto insurance policy for the DUI defendant or of a homeowner's or renter's insurance policy for the intentional tort defendant is known to be in place. Many insurance carriers will decline coverage for their insured due to the intentional nature of the act giving rise to the claim, or will only defend the claim with an express reservation of rights, as explained hereafter.

TIMING OF FILING OF CIVIL ACTION vs. CRIMINAL DISPOSITION:

In the experience of this practitioner, there are far more advantages to be gained in putting off the filing of the civil action until the criminal case is concluded by change of plea or trial, as opposed to filing suit or putting the defendant on notice of a pending civil claim while the criminal case is still on-going, absent a pending statute of limitations problem. The progress of the criminal prosecution can be monitored by going on-line to a court's website, and/or by having your client as the victim of the crime contact the district attorney's offices for updates.

The advantages of deferring the filing of suit or putting the defendant on premature notice of the civil claim would encompass the following factors:

1. The Privilege Against Self-Incrimination Becomes Moot: Attempts to depose the criminal defendant or serve him/her with interrogatories or other written discovery are going to run right into the

privilege against self-incrimination [U.S. Constitution, 5th Amendment; Cal. Constitution Art. I, sec. 15], with some zealous civil defense attorneys objecting to just about everything that could be asked of or be disclosed by their client. See Evidence Code sec. 940.

So long as the defendant witness believes that any disclosure could implicate them in criminal activity, they are privileged in asserting the privilege. *Kastigar v. United States* (1972) 406 U.S. 441, 444.

The civil defendant who asserts the privilege may risk evidentiary sanctions, such as exclusion of testimony, should they assert the privilege and deprive the plaintiff of important evidence. *Alvarez v. Sanchez* (1984) 158 Cal.3d 709, 712-713. In the face of being criminally prosecuted, however, this risk may mean little or nothing to certain civil defendants.

To avoid this from happening, the civil defendant may try and stay the civil proceedings until the criminal case is resolved. *Pacers, Inc. v. Superior Court* (1984) 162 Cal.App.3d 686, 689-690; or alternatively the court could grant immunity against use of their testimony or evidence in any collateral criminal prosecution. *Fuller v. Superior Court* (2001) 87 Cal.App.4th 299, 308-310.

It is generally far better for the civil case to keep the opportunity to do unfettered discovery to the defendant potentially open, by deferring filing of the civil action until the criminal prosecution is concluded.

2. The Avoidance of a Charge of Bias Given the Pending Civil Action: An astute criminal defense attorney can make major bias arguments against a plaintiff/victim if the making of the civil claim or lawsuit is known by the criminal defendant. The pending personal injury claim or action will give the criminal defense attorney the opportunity to claim that the victim's testimony at a preliminary hearing or trial is being motivated by money, and this may be a powerful argument for the criminal defendant, especially if a potential conviction is likely to turn on the credibility of the victim's testimony.

3. Civil Discovery Aids the Criminal Defendant: If the civil case has actually been filed while the criminal case is pending, the criminal defendant will be able to utilize the plethora of civil discovery tools to aid in his criminal defense that would not otherwise be available in the criminal discovery process: depositions, subpoenas of custodians of records for consumer-related documentation, interrogatories, requests for productions, a request for a statement of damages, and requests for admissions can all provide the criminal defendant with evidence or information that may make a more favorable disposition or even

potential dismissal of the criminal case possible. None of these discovery tools are available in the criminal law context, otherwise.

4. Increasing The Odds of a Disposition Favorable to the Civil Action: A criminal defendant, especially if they are represented by counsel, are likely to be far more circumspect as to any change of plea they may make in the criminal case if they have are aware of a civil action or claim pending in the wings. Such a defendant is more prone to insist on only entering a plea of nolo contendere (as opposed to guilty) or to hazard trial, although in some jurisdictions (notably Orange County) the district attorney's offices may insist on a guilty plea if the victim of the crime has sustained physical injury in the course of the crime.

As the disposition of the criminal case may produce collateral advantages for the plaintiff in the civil case, it is not wise to alert the defendant in the criminal prosecution to the imminent prospects of the civil claim and thereby provide the defendant a further incentive to broker a deal in the criminal court that might not help further the civil claim when it is made or filed on thereafter.

PRE-SUIT DISCOVERY AND INVESTIGATION PENDING THE CRIMINAL PROSECUTION:

The fact that it is preferable for the claimant to "lie low" pending the change of plea or trial in the criminal prosecution doesn't mean that the attorney for such a client cannot do any investigation.

Steps to secure the police report regarding the incident can still be undertaken. While it is usually an easy task to secure a traffic collision report, even if the responsible party was charged with DUI, many police agencies will resist producing a police report if there is a pending criminal investigation into a non-vehicular incident, per the authority of Government Code sec. 6254(f)(k), and Evidence Code sec. 1040 (official information privilege). Other times, the police incident report will be produced but with certain information pertinent to the perpetrator, like a name and address, being redacted.

If the perpetrator is a juvenile, then a petition to the Juvenile Court will be required to obtain any law enforcement or juvenile court proceeding information. Welfare and Institutions Code sec. 827, Government Code secs. 6254(k), 6255.

Obviously, there would be no hindrance to the claimant's attorney from the standpoint of doing an assets or background check on the perpetrator from public information sources or through utilizing the services of an investigator, not to mention documenting the client's injuries by obtaining medical records,

witness statements, and photographic evidence.

Once the defendant is convicted, immediate steps should be taken to obtain complete and unredacted copies of the police report and any photographic evidence obtained by the police agency.

In addition, once the criminal case is concluded it is imperative to secure a complete copy of the defendant's criminal file, including all minute orders and change of plea forms (ie., "Tahl" waivers) contained therein. Tahl waivers can often contain damaging admissions, and sometimes even set forth in the defendant's own handwriting or that of his attorney. The criminal court file can also contain other useful information that will aid in service of process or enforcement of a judgment, such as the defendant's address, employer information, date of birth, driver's license number, and social security number.

SIGNIFICANCE OF THE CHANGE OF PLEA OR DISPOSITION AT TRIAL:

Once the criminal defendant changes his plea to that of "guilty" or "no contest", or is either acquitted or convicted at trial, the issue arises as to the evidentiary usage and relevance of such events.

The Change in Plea: A criminal defendant's plea of "guilty" is not *conclusive* in a subsequent civil action based on the same act. It is simply evidence of a party's admission, but it may be explained away by the defendant. *Teitelbaum Furs, Inc. v. Dominion Ins. Co.* (1962) 58 Cal.2d 601, 605, 25 Cal.Rptr. 559, 561.

A plea of "no contest (aka nolo contendere)" to a crime *punishable as a felony* has the same legal effect as a plea of guilty, ie., it is admissible but may be explained away. See Evidence Code sec. 1300.

On the other hand, a no contest plea to a crime that is not punishable as a felony may *not* be used as an admission in any subsequent civil action arising from the same act. Penal Code sec. 1016 (3); *Rusheen v. Drews* (2002) 99 Cal.App.4th 279, 283-284, 120 Cal.Rptr.2d 769, 772-773.

Neither a withdrawn guilty plea nor an unaccepted offer to plead guilty is admissible in any later proceeding. Evidence Code sec. 1153.

An acquittal in a criminal trial would not be binding as collateral estoppel or res judicata in a subsequent civil action arising from the same act, due to the differences in the burden of proof in criminal actions vs. civil proceedings.

On the other hand, a conviction in a felony criminal action (including a judgment based on a plea of no contest) would have res judicata or collateral estoppel effects in a subsequent civil action, if offered

to prove any fact essential to the judgment. Evidence Code sec. 1300; *Principal Life Insurance Co. v. Peterson* (2007) 156 Cal.App.4th 676, 687, 67 Cal.Rptr.3d 584, 592-593. This practitioner knows of no reason why a conviction following a trial in a misdemeanor action wouldn't likewise be admissible in a subsequent civil action, although I am unaware of any specific legal authority addressing this point.

RESTITUTION ORDERS IN THE CRIMINAL CONVICTION:

It is commonplace in a criminal conviction for restitution to be ordered, and usually tied in as a condition of probation. Penal Code sec. 1202.4(f). Anecdotally, it has been the somewhat cynical experience of this practitioner that restitution is not aggressively sought from the defendant by the probation department, especially against misdemeanor defendants. When it is sought, restitution is usually limited to economic damage claims for medical bills, loss of earnings, or property damage. However, restitution for non-economic damages is allowed for felony convictions under Penal Code sec. 288 (and which concerns certain enumerated sex offenses against minors under the age of 14 years). See Penal Code sec. 1202.4 (f)(3)(F).

As a practical matter, do not expect the probation department to become your collection agency against the convicted defendant, as they have neither the time, budget, nor incentive to do so.

On rare occasions, a probation department may actually reduce a restitution order to a money judgment in the name of the victim as a judgment creditor, at which time the victim may attempt to satisfy the judgment the same as any other judgment creditor could do. See Penal Code secs. 1202.4(f) and 1214; Welfare and Institutions Code sec. 730.6(h)(i).

Although payment of a defendant's insurance proceeds to a claimant is not a bar to a restitution order, a criminal defendant is entitled to offset any restitution order by amounts paid by their insurance company to the victim. *People vs. Short* (2008) 160 Cal.App.4th 899, 903, 73 Cal.Rptr.3d 154, 156.

ATTORNEY'S FEES IN FELONY CONVICTIONS:

In a civil action predicated on an act that resulted in a defendant's conviction of a felony, the trial court in the civil action has the discretion upon the filing of a motion to award attorney's fees as an element of the prevailing plaintiff's costs of suit. C.C.P. sec. 1021.4. Accordingly, the plaintiff's practitioner in a potential felony conviction case should keep careful time contemporaneous time records, if they are to rely

on this code section and then prevail at trial.

PLEADING CONSIDERATIONS:

Once the time to file a civil action predicated on a criminal act arises, in addition to whatever intentional tort theory would apply to the given fact situation, the astute practitioner should always assert a cause of action for negligence (no matter how willful and egregious the underlying crime is), so as to engender the possibility of insurance company involvement in the case, if only on a reservation of rights basis.

The insurance company's invocation of a reservation of rights should give rise to the carrier's obligation to pay for the insured's independent legal counsel . See *San Diego Navy Federal Credit Union vs. Cumins Insurance Society* (1984) 162 Cal.App.3d 358, 208 Cal.Rptr.494, although it has been superseded and essentially codified under Civil Code sec. 2860. Depending upon the facts of any given case and the potential for coverage, an independent "*Cumis* counsel" for the defendant may be the plaintiff's second best friend (after their own attorney), as *Cumis* counsel will generally be seeking contribution or indemnity from their client's carrier to make the case resolve and thereby protect the insured.

Intentional Infliction of Emotional Distress should be a cause of action that would apply as an alternative theory of recovery in most intentional tort claims involving physical and/or emotional injury.

If a sexual offense is involved then consideration should be taken to see if a cause of action under Civil Code sec. 51.9, part of the Unruh Civil Rights Act, would also apply. Causes of action for assault and battery would also be standard in the sexual offense case.

If the tort arises out of a landlord-tenant relationship and an over-reaching landlord is the criminal defendant, such as in a wrongful eviction or entry case; then causes of action for trespass, invasion of privacy, breach of the written rental/lease contract (with a claim for attorney's fees if there is an attorney's fees provision in the agreement) or statutory causes of action (see Civil Code secs. 789.3 and 1940.2, which apply to landlord "self-help" situations in attempting to evict a tenant) would also apply.

Of course an allegation of punitive damages should always be made as well. The pleading should always be fact specific and detailed in any allegation of punitive damages, so as to better fend off a motion to strike same. Making the defendant's change of plea Tahl form as an exhibit to the complaint would not

be over-kill in such a situation.

Because of the potential for a default judgment after service on such a defendant, a Statement of Damages under C.C.P. sec. 425.115, including a specific dollar amount for punitive damages, should always be routinely initially served on the defendant along with the summons and complaint – otherwise, if the defendant fails to respond to the complaint you will not be able to secure an entry of default unless you serve the defendant a second time with the Statement of Damages thereafter.

INSURANCE COVERAGE OF INTENTIONAL TORTS:

A thorough discussion of insurance coverage for certain types of intentional actions is beyond the scope of this article, although it is a subject that needs to be touched on if a practitioner is contemplating embarking on a civil case against a criminal defendant who may happen to have been insured.

An insurance carrier is generally not liable for the willful or intentional act of its insured that results in hard to another . Insurance Code sec. 533. Furthermore, many policies contain express provisions excluding coverage for certain enumerated intentional or willful acts.

Attempts to push the envelope on this point, by arguing that the insured subjectively didn't intend to actually injure the third party, despite the nature of their act, have not fared well. See *J.C. Penny Casualty Ins. Co. v. M.K.* (1991) 52 Cal.3d 1009, 1019-1020 n. 8, 278 Cal.Rptr.64, and whereat an insured's argument that he didn't intend to injure a child sex molestation victim did not find credence with the Supreme Court.

In the assault and battery tort context, it has long been a standard defense on the part of defendants that they were only exercising self-defense, or that they negligently injured the plaintiff in a mistaken but good faith belief that they had the right to use self-defense or a certain degree of force (the so-called "imperfect self-defense" theory) to defend themselves. The imperfect self-defense theory was given its deathblow in *Delgado v. Interinsurance Exchange Of The Automobile Club* (2009) 47 Cal.4th 302, 97 Cal.Rptr.3d 298. *Delgado* held that regardless of the degree of self-defense utilized, the insured still intended to injure the plaintiff and therefore the injuries were not as a matter of law "accidental", such that coverage under the policy could not be invoked.

Having stated all of the above, it is the insurance policy language that really controls these issues,

and there is therefore no substitute for acquiring through formal discovery a copy of the defendant's insurance policy to ascertain the acting wording of the coverage and exclusions. If necessary, a consultation with an insurance coverage expert for input may be in order in any given case.

Insurance carriers are not responsible for punitive damages. *City Products Corp. v. Globe Indemnity Co.* (1979) 88 Cal.App.3d 31, 36-42, 151 Cal.Rptr. 494. However, an insurance carrier may have a duty to defend an action in which punitive damages are alleged, although a defense with an express reservation of rights will call into play the right to *Cumis* counsel, as discussed.

If there is at least some basis for insurance coverage, as in a DUI situation, then the punitive damage allegation may precipitate a more reasonable settlement than if the vehicular accident wasn't alcohol involved, due to the public's distaste for drinking drivers who injure people. However, an astute defense attorney will often stipulate to liability in the civil case, in an attempt to make evidence of the defendant's drinking non-relevant and therefore inadmissible. This move should be resisted by the plaintiff's attorney by alleging and actively prosecuting the DUI aspects of the case, including the retention of a human factors or blood alcohol expert.

THE HAMMER OF NON-DISCHARGEABILITY:

Obviously, the entry of a default judgment or a judgment after a trial against the criminal defendant may just be the start of the case, in terms of attempting to satisfy the judgment where there is no insurance or insurance coverage is denied.

The non-dischargeable nature of most intentional torts in bankruptcy proceedings can not only help to facilitate a resolution of the case before it proceeds to judgment, it can make it clear to the post-judgment defendant that judgments last forever as long as they are renewed no later than every ten years (see C.C.P. sec. 683.020), and that they generate post-judgment interest at .10% per annum (C.C.P. sec. 685.010).

Among the types of debts or judgments that are non-dischargeable in bankruptcy proceedings are those arising from "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny" [11 U.S.C. sec. 523(a)(4), 1328(a)(2)]; arising from the debtor's "willful and malicious injury" to another or the property of another [11 U.S.C. sec. 523(a)(6)]; arising from fraud or false representations [11 U.S.C. sec. 523(a)(2), *Cohen v. De La Cruz* (1998) 523 U.S. 213, 217-222]; and arising from DUI related incidents,

including motor vehicles, aviation and boat cases [11 U.S.C. sec. 523(a)(9)].

CONCLUSION:

Obviously, care should be taken at the initial case screening process to evaluate whether a tort claim against a criminal defendant has a real chance of success vs. a moral victory only and with nothing to show for it but an uncollectible judgment. Crimes that are committed by hardened and inevitably indigent criminals will almost always fall into the latter category, while a criminal defendant who has property and/or insurance coverage might very well fall into the former category.

These are challenging cases that upon a successful conclusion can prove that justice for a crime victim can only be fully realized by taking the criminal to civil court.

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