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PEOPLE V. SEXTON: INSURING AN ABSURD RESULT THROUGH INFLEXIBLE INTERPRETATION—THE COURT OF APPEAL DENIES CRIMINAL RESTITUTION TO A VICTIM'S INSURANCE COMPANY

I. INTRODUCTION

Court-ordered restitution is effective in reducing the societal costs of crime.¹ It serves important goals which are often unsatisfied through more traditional sentencing.² In ordering criminal defendants to make restitution to crime victims, the courts financially compensate the victims, punish or rehabilitate the offenders, and deter future crime.³ Some studies show that criminal defendants are less likely to become repeat offenders when ordered to make restitution to their victims.⁴

1. See Scott Peterson, Survey, *Court-Ordered Criminal Restitution in Washington*, 62 WASH. L. REV. 357, 357 (1987). *But cf.* Thomas M. Kelly, Note, *Where Offenders Pay for Their Crimes: Victim Restitution and its Constitutionality*, 59 NOTRE DAME L. REV. 685, 694 (1984) (noting that offenders are rarely apprehended and convicted, and those who are may not have the financial resources necessary to provide restitution to the victims).

Americans consider crime to be one of their main concerns. See Lori Montgomery, *Crime Causes Americans Most Worry*, ORANGE COUNTY REG., Feb. 4, 1996, at A32 (showing the results of a Knight-Ridder poll in which crime and drugs were cited as the nation's top concerns). Interestingly, crime rates have fallen in California in recent years. The state Department of Justice reported that the seven major crimes tracked by the Federal Bureau of Investigation declined 9.9% in California in 1996. See James P. Sweeney, *Crime is on the Retreat in California*, SAN DIEGO UNION TRIB., Mar. 13, 1997, at A1.

2. See Richard S. Gruner, *Beyond Fines: Innovative Corporate Sentences Under Federal Sentencing Guidelines*, 71 WASH. U. L.Q. 261, 265 (1993).

3. See Peterson, *supra* note 1, at 357.

4. See Joe Hudson & Steven Chesney, *Research on Restitution: A Review and Assessment*, in OFFENDER RESTITUTION IN THEORY AND ACTION 131, 138-39 (Burt Galaway & Joe Hudson eds., 1977) (showing that those who made restitution were four times less likely to return to prison for new convictions than those who did not). *But see* Elmar Weitekamp, *Can Restitution Serve as a Reasonable Alternative to Imprisonment? An Assessment of the Situation in the USA*, in RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION—INTERNATIONAL RESEARCH PERSPECTIVES 81, 95 (Heinz Messmer & Hans-Uwe Otto eds., 1992) (discussing a Texas study which

Restitution restores persons to their original position prior to loss or injury.⁵ When crime victims are harmed by criminal acts, it is rational to award them compensation from defendants. Crimes, however, cause injuries to persons other than those immediately involved in the offense.⁶ One common victim is insurance companies. For example, homeowners insurance companies suffer losses when their policyholders are robbed and automobile insurers suffer losses when drunk drivers collide with their insured vehicles. These situations require that judges determine whether they can order defendants to pay restitution to victims other than those immediately injured.⁷ In California, the answer to this question remains unclear.

In *People v. Sexton*⁸ the California First District Court of Appeal vacated a trial court decision that ordered the defendant, as a condition of his probation, to make restitution to the victim's insurance company.⁹ At the trial court proceeding, the defendant pleaded guilty¹⁰ to auto theft¹¹ and the court ordered him to pay restitution to the victim and the victim's insurer.¹² The court of appeal ruled that a 1994 amendment to state law¹³ limited restitution to "direct" victims of crime, thus excluding insurance companies who incur expenses because of their contractual obligations with the victim.¹⁴ This result is both inequitable and contrary to the underlying purposes of

found higher recidivism rates among participants in the Texas Restitution Center Program).

5. See BLACK'S LAW DICTIONARY 1313 (6th ed. 1990).

6. See Phillip E. Hassman, Annotation, *Propriety of Condition of Probation Which Requires Defendant Convicted of Crime of Violence to Make Reparation to Injured Victim*, 79 A.L.R.3D 976, 998-99 (1977).

7. See *id.* For example, a requirement that a defendant convicted of assault with intent to commit murder pay restitution to two witnesses and to the insurance company for the medical expenses of the complaining witness was upheld by a Texas court. See *Flores v. State*, 513 S.W.2d 66, 69-70 (Tex. Crim. App. 1974).

8. 33 Cal. App. 4th 64, 39 Cal. Rptr. 2d 242 (1995).

9. See *id.* at 72, 39 Cal. Rptr. 2d at 247.

10. See *id.* at 66, 39 Cal. Rptr. 2d at 243.

11. See CAL. VEH. CODE § 10851(a) (West 1987 and Supp. 1997). The statute punishes

[a]ny person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing.

Id.

12. See *Sexton*, 33 Cal. App. 4th at 68, 39 Cal. Rptr. 2d at 245.

13. See Act of Sept. 28, 1994, ch. 1106, 1994 Cal. Stat. 1106.

14. See *Sexton*, 33 Cal. App. 4th at 70-71, 39 Cal. Rptr. 2d at 246.

restitution and the intent of California restitution law.

In three subsequent cases, the Fourth and Sixth Districts have criticized the *Sexton* opinion and have concluded that an insurance company is a victim entitled to criminal restitution.¹⁵ However, the California Supreme Court denied review of the first two decisions, issued by the Sixth and Fourth Districts, and ordered the opinions depublished.¹⁶ In a third case published this May, the Fourth District again criticized the *Sexton* decision and declined to follow its reasoning.¹⁷ In September, the California Supreme Court granted the defendant's petition for review.¹⁸

This Note examines the aforementioned cases and explores whether a sentencing court should consider an insurance company a victim under California restitution law. Part II explores the history and purposes of restitution and the application of ordering restitution to insurance companies in California. Part III examines the *Sexton* decision, the first California Court of Appeal ruling to address this controversy after the Legislature enacted the 1994 amendment to the California Penal Code. Part IV briefly describes the California Court of Appeal cases decided after *Sexton*. Part V analyzes this issue by focusing on constitutional considerations, statutory interpretation, and policy considerations. This Note concludes, in Part VI, that construing the term "direct victim" broadly to include insurance companies under state restitution law advances the objectives of criminal sentencing.

15. See *People v. Birkett*, 54 Cal. App. 4th 1438, 63 Cal. Rptr. 2d 587 (1997), rev. granted, 943 P.2d 723, 67 Cal. Rptr. 2d 514 (Cal. Sup. Ct. Sept. 3, 1997) (No. S062379); *People v. Nilsen*, 41 Cal. App. 4th 936, 48 Cal. Rptr. 2d 858 (1996) (depublished Mar. 28, 1996); *People v. Correia*, 36 Cal. App. 4th 1779, 43 Cal. Rptr. 2d 302 (1995) (depublished Oct. 26, 1995). For a summary of these cases, see *infra* Part IV.A-C.

16. See *People v. Nilsen*, 41 Cal. App. 4th 936, 48 Cal. Rptr. 2d 858 (1996) (depublished Mar. 28, 1996), appeal denied, 1996 Cal. LEXIS 1880 (Cal. Sup. Ct. Mar. 28, 1996) (No. S051740); *People v. Correia*, 36 Cal. App. 4th 1779, 43 Cal. Rptr. 2d 302 (Cal. Sup. Ct. Oct. 26, 1995) (No. S048057) (depublished Oct. 26, 1995), appeal denied, 1995 Cal. LEXIS 6641 (1995). For a discussion on the depublication of these cases, see *infra* Part IV.D.

17. See *People v. Birkett*, 54 Cal. App. 4th 1438, 63 Cal. Rptr. 2d 587 (1997), rev. granted, 943 P.2d 723, 67 Cal. Rptr. 2d 514 (Cal. Sup. Ct. Sept. 3, 1997) (No. S062379).

18. See *id.* Chief Justice George and Justices Kennard, Baxter, Chin, and Brown signed the petition order. See *id.*

II. CRIMINAL RESTITUTION

A. History of Restitution

Restitution is one of the oldest forms of criminal penalties.¹⁹ References to restitution, or "reparations" as it is also called, appear in the Bible,²⁰ Mosaic Law,²¹ and Ancient Greek history.²² As the state became the administrator of criminal law, restitution was generally separated from criminal law and became embedded in civil tort law.²³

Today, criminal courts order restitution to crime victims, primarily in cases involving property crimes and in conjunction with suspended sentences or probation.²⁴ All fifty states have adopted a form of criminal restitution,²⁵ despite the general rule that civil courts are the primary forum for recovering economic compensation for wrongdoing. In fact, the Model Penal Code endorses restitution as an appropriate part of a defendant's criminal sentence.²⁶

19. See Linda F. Frank, *The Collection of Restitution: An Often Overlooked Service to Crime Victims*, 8 ST. JOHN'S J. LEGAL COMMENT. 107, 109 (1992). For a discussion on the early history of restitution, see Richard E. Laster, *Criminal Restitution: A Survey of its Past History and an Analysis of its Present Usefulness*, 5 U. RICH. L. REV. 71, 71-80 (1970).

20. See Frank, *supra* note 19, at 109 (quoting *Leviticus* 6:4-5 (Revised Standard Version) ("When one has sinned and become guilty, he shall restore what he took by robbery . . . or anything about which he has sworn falsely; he shall restore it in full . . .") and *Exodus* 22:1-3 (Revised Standard Version) ("[I]f a man steals . . . [h]e shall make restitution.")).

21. See *id.* (Under Mosaic Law, the penalty for highway robbery could include restitution for up to five times the goods' value.)

22. See *id.* (stating that the Greeks required "death fines" to the murder victim's family).

23. See Kelly, *supra* note 1, at 686-87.

24. See Bruce R. Jacob, *Reparation or Restitution by the Criminal Offender to His Victim: Applicability of an Ancient Concept in the Modern Correctional Process*, 61 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 152, 155-56 (1970).

25. See Frank, *supra* note 19, at 111-12. As of 1988, laws in at least 23 states required restitution in all criminal cases involving an economic loss. See *id.* at 111.

26. See MODEL PENAL CODE § 301.1(2),(2)(h) (Proposed Official Draft 1962). As a condition of probation, "[t]he Court, as a condition of its order, may require the defendant . . . to make restitution of the fruits of his crime or to make reparation, in an amount he can afford to pay, for the loss or damage caused thereby." *Id.*

B. Purposes of Criminal Restitution

Three factors influence the inclusion of restitution in the criminal justice system.²⁷ First, various authorities endorse the concept of criminal restitution.²⁸ State adoptions of the Model Penal Code language for criminal restitution exemplify this influence.²⁹ Second, the interest in "victimology" and the search for means to compensate victims for their losses has significantly increased and is helping to shape restitution statutes.³⁰ Last, the federal government has demonstrated its support of restitution by allocating millions of dollars to fund such programs.³¹

Restitution serves three purposes: rehabilitation, deterrence, and compensation. The primary goal is rehabilitation.³² By forcing defendants to recognize the causal relationships between the crime and the victim's loss, and the criminal behavior and the victim's loss,³³ a sentencing court meets its rehabilitative aims by directing the defendant to accept social responsibility for the perpetrated crime.³⁴

27. See Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 52, 58 (1982).

28. See *id.* These authorities include the American Law Institute, American Bar Association, National Commission on Reform of Federal Criminal Laws, National Council on Crime and Delinquency, and National Advisory Commission on Criminal Justice Standards and Goals. See Alan T. Harland, *Compensating the Victims of Crime*, 14 CRIM. L. BULL. 203, 205 n.8 (1978).

29. See Harland, *supra* note 27, at 58.

30. See *id.* "Victimology" is the study by criminologists of victim's role in crime. See Richard Quinney, *Who is the Victim?*, 10 CRIMINOLOGY 314, 317 (1972).

31. See Harland, *supra* note 27, at 58 & n.41.

32. See *People v. Richards*, 17 Cal. 3d 614, 620, 552 P.2d 97, 100, 131 Cal. Rptr. 537, 540 (1976); see also Herbert Edelhertz, *Legal and Operational Issues in the Implementation of Restitution Within the Criminal Justice System*, in RESTITUTION IN CRIMINAL JUSTICE 64 (Joe Hudson & Burt Galaway eds., 1977) ("[T]he [restitution] programs that are actually established invariably focus on correction or rehabilitation of offenders. No restitution program has come to my attention that had the delivery of benefits to victims as its primary or even very important operational goal.").

33. See Charles R. Pengilly, *Restitution, Retribution, and the Constitution*, 7 ALASKA L. REV. 333, 344 (1990) (discussing how this tort concept of proximate cause applies to the concept of restitution).

34. See *Kelly v. Robinson*, 479 U.S. 36, 49 n.10 (1986) (indicating that "[r]estitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused"); *People v. Richards*, 17 Cal. 3d 614, 620, 552 P.2d 97, 100-01, 131 Cal. Rptr. 537, 540-41 (1976) ("Restitution . . . may serve the salutary purpose of making a criminal understand that he has harmed not merely society in the abstract but also individual human beings, and that he has a responsibility to make them whole.").

Second, restitution deters the criminal from future illegal activity.³⁵ The effectiveness of rehabilitation and deterrence is derived from the direct relation between the crime and the amount of damage suffered by the victim; by ordering restitution a court forces defendants to definitively acknowledge the harm they have caused.³⁶ Last, restitution serves the public policy goal of providing actual and efficient compensation for the victims. This is a noble and necessary goal considering that most crime victims, according to the late U.S. Senator John Heinz, are victimized by both the criminal and the criminal justice system.³⁷ Restitution ensures that crime victims are compensated for their losses without having to pursue independent and judicially inefficient civil litigation.

C. California Criminal Restitution Law and its Application to Insurance Companies

Restitution has been a part of California penal law since 1872.³⁸ Although unused for many years because judges perceived it as ineffective, restitution became popular again during the victims' rights movement which led to the passage of Proposition 8 in 1982.³⁹ This initiative amended the state constitution to require victim restitution in all criminal cases where losses occur.⁴⁰

1. The probation/non-probation dichotomy

Before the enactment of the 1994 amendments,⁴¹ two separate codes with two different definitions of "victim" provided the basis for state restitution law. The Penal Code applied to restitution as a condition of probation,⁴² while the Government Code applied to

35. See *People v. Goss*, 109 Cal. App. 3d 443, 460, 167 Cal. Rptr. 224, 234 (1980); see also *People v. Lent*, 15 Cal. 3d 481, 486, 541 P.2d 545, 548, 124 Cal. Rptr. 905, 908 (1975) ("[A]n order for restitution . . . has generally been deemed a deterrent to future criminality.").

36. See Laster, *supra* note 19, at 80-81.

37. See Kelly, *supra* note 1, at 694.

38. See EDWIN VILLMOARE & JEANNE BENVENUTI, CALIFORNIA VICTIMS OF CRIME HANDBOOK 85 (1988).

39. See *id.* at 85-86. Proposition 8 was popularly referred to as "The Victims' Bill of Rights." See Hank M. Goldberg, *The Impact of Proposition 8 on Prior Misconduct Impeachment Evidence in California Criminal Cases*, 24 LOY. L.A. L. REV. 621, 621 (1991).

40. See CAL. CONST. art. I, § 28(b).

41. See CAL. PENAL CODE § 1202.4 (West Supp. 1997).

42. See *id.* §§ 1203.04, 1203.1 (West 1994) (repealed 1994).

restitution fines when the courts denied the defendant probation.⁴³ Courts established that insurance companies were not victims under the Government Code⁴⁴ because they did not fall within the definition of "victim" outlined in California Government Code Section 13960.⁴⁵ Under California Penal Code Sections 1203.04 and 1203.1, however, restitution awards were not restricted to immediate crime victims,⁴⁶ and therefore courts could order defendants to pay restitution to insurance companies.⁴⁷ Hence, while insurance companies were not entitled to restitution fines when a criminal was denied probation, they were entitled to restitution as a condition of probation when probation was granted.

This dichotomy in the law was not accidental; it existed because

43. See CAL. GOV'T CODE § 13967 (West 1992 and Supp. 1997) (amended 1994).

44. See, e.g., *People v. Williams*, 207 Cal. App. 3d 1520, 255 Cal. Rptr. 778 (1989) (vacating a superior court order requiring the defendant to make restitution to the victim's insurance company under California Government Code Section 13967).

45. CAL. GOV'T CODE § 13960(a)(1) (West Supp. 1997) ("Victim' means a resident of the State of California, a member of the military stationed in California, or a family member living with a member of the military stationed in California who sustains injury or death as a direct result of a crime."). See, e.g., *People v. Franco*, 19 Cal. App. 4th 175, 23 Cal. Rptr. 2d 475 (1993) (denying restitution of worker compensation benefits to the victim's employer); *People v. Blankenship*, 213 Cal. App. 3d 992, 262 Cal. Rptr. 141 (1989) (denying restitution to the property insurer in robbery case); *People v. Williams*, 207 Cal. App. 3d 1520, 255 Cal. Rptr. 778 (1989) (upholding restitution of \$250 to the victim for the deductible amount of the collision insurance but prohibiting reimbursement to the insurance company for the \$1416 it had paid the victim for the loss). In later cases, however, the California Supreme Court permitted restitution fines for economic losses, not simply for physical injuries as referred to in section 13960. See, e.g., *People v. Broussard*, 5 Cal. 4th 1067, 856 P.2d 1134, 22 Cal. Rptr. 2d 278 (1993) (concluding that the legislative history of section 13967(c) shows that the statute was not intended to be subject to section 13960's limited definition of "victim"); *People v. Crow*, 6 Cal. 4th 952, 864 P.2d 80, 26 Cal. Rptr. 2d 1 (1993) (permitting a restitution fine following a conviction of aiding and abetting welfare fraud).

46. See VILMOARE & BENVENUTI, *supra* note 38, at 87.

47. See, e.g., *People v. Foster*, 14 Cal. App. 4th 939, 18 Cal. Rptr. 2d 1 (1993) (holding that victim's insurer was entitled to restitution as a condition of probation in a residential burglary case); *People v. Calhoun*, 145 Cal. App. 3d 568, 193 Cal. Rptr. 394 (1983) (allowing restitution to an insurance company as a condition of probation where a convicted drunk driver caused injury to another); *People v. Alexander*, 182 Cal. App. 2d 281, 6 Cal. Rptr. 153 (1960) (requiring restitution to the victim's insurer for losses in an arson case). *But cf.* *People v. Wardlow*, 227 Cal. App. 3d 360, 278 Cal. Rptr. 1 (1991) (denying restitution to Medi-Cal for the costs of the victim's psychological therapy).

the two statutes had different purposes.⁴⁸ The primary goal of ordering restitution as a condition of probation under the Penal Code was to rehabilitate the criminal. In contrast, the restitution fine provision under the Government Code was designed to compensate actual victims for their losses in cases where probation was denied.⁴⁹

For example, in *People v. Foster*⁵⁰ the defendant was convicted of residential burglary and argued that he should not be required to pay restitution to the victim's homeowners insurance company as a condition of his probation.⁵¹ He asserted that the disparate treatment of an insurance company was an unintended anomaly.⁵² The Fourth District Court of Appeal disagreed:

We have no difficulty harmonizing the statutes. The different objectives of the probation statutes and the victim reimbursement provisions of the Government Code justify different applications of the term "victim." The Legislature explicitly recognized this distinction by incorporating a detailed definition of the term "victim" into the Government Code, but not defining the term for purposes of section 1203. Thus, the Legislature left it open for an insurance company to be treated differently under the two statutory schemes.⁵³

Therefore, the *Foster* court upheld a restitution order to Farmers Insurance Group.⁵⁴

2. The 1994 amendments

On September 28, 1994, Governor Pete Wilson approved legislation that amended California law governing the rules of criminal restitution.⁵⁵ The legislation eliminated the legal distinction regarding criminal restitution by deleting the applicable provisions of the Government and Penal Codes and unifying them under Penal Code Section 1202.4. The newly amended law specifically pronounced that "[r]estitution is recognized to have a rehabilitative effect on

48. See *Foster*, 14 Cal. App. 4th at 949-50, 18 Cal. Rptr. 2d at 7 (1993).

49. See *id.*

50. 14 Cal. App. 4th 939, 18 Cal. Rptr. 2d 1 (1993).

51. See *id.* at 948, 18 Cal. Rptr. 2d at 5.

52. See *id.* at 951, 18 Cal. Rptr. 2d at 8.

53. *Id.* at 953, 18 Cal. Rptr. 2d at 9.

54. See *id.* at 955, 18 Cal. Rptr. 2d at 10.

55. See Act of Sept. 28, 1994, ch. 1106, 1994 Cal. Stat. 1106. This act was passed as an urgency statute that became immediately effective when filed with the Secretary of State's office on September 29, 1994. See *id.* § 9.

criminals” and is “a deterrent to future criminality.”⁵⁶

Included in this act was a new paragraph stating that “[n]othing in this section shall prevent a court from ordering restitution to any corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity when that entity is a *direct victim* of a crime.”⁵⁷ Since the legislation specifically referred to “direct victim[s],” a phrase nonexistent in prior versions of the law, a legal question has arisen: can a sentencing court still order a criminal defendant to pay restitution to an insurance company that indemnifies the crime victim? The first appellate court case to address this issue was *People v. Sexton*.⁵⁸

III. PEOPLE V. SEXTON

A. Facts

On April 9, 1993, police officers stopped a speeding vehicle with a burned-out taillight.⁵⁹ Both persons in the car, including the defendant, attempted to flee.⁶⁰ Police apprehended the defendant, who admitted to having stolen the vehicle in Oregon.⁶¹ On May 27, 1993, he failed to appear for a preliminary hearing but, after the issuance of a bench warrant, surrendered to authorities on July 7, 1993.⁶²

The probation officer’s report indicates that the vehicle owner stated that “there was extensive damage done to the interior of her car, and the car ha[d] numerous scratches.”⁶³ Her automobile insurance deductible was \$350.⁶⁴ Her automobile insurance carrier, Allstate Insurance Company, paid for the remainder of the damage.⁶⁵

At the sentencing hearing, the court placed the defendant on three years probation, which included orders to pay \$200 to the state victims’ fund, \$350 to the victim to cover the insurance deductible, a

56. *Id.* § 1(b),(c).

57. CAL. PENAL CODE § 1202.4(p) (West Supp. 1996) (repealed 1996) (emphasis added) (current version at CAL. PENAL CODE § 1202.4(k)) (West Supp. 1997).

58. 33 Cal. App. 4th 64, 39 Cal. Rptr. 2d 242 (1995).

59. *See id.* at 67, 39 Cal. Rptr. 2d at 243.

60. *See id.*

61. *See id.*

62. *See id.*

63. *Id.*

64. *See id.*

65. *See id.*

\$225 pre-sentence investigation fee, and a monthly \$25 supervision fee.⁶⁶ The defendant, disputing the claimed vehicle damage, requested a restitution hearing.⁶⁷

At the hearing, the victim stated that the “[d]ollar amount of loss and/or medical expenses” was \$3317.95.⁶⁸ The victim’s portion of this loss was the deductible amount of \$350 and \$25 in other unreimbursed expenses.⁶⁹ Allstate incurred the remaining loss of \$2942.95.⁷⁰

The court ordered the defendant to pay restitution for the full amount of \$3317.95 in installments to the victim and Allstate.⁷¹ The defendant appealed to the court of appeal, arguing that the lower court erred in ordering the restitution payment to the victim’s insurance company.⁷²

B. Judicial Reasoning

While the case was awaiting appeal, the state enacted the amendment to the California Penal Code which included the “direct victim” language.⁷³ The *Sexton* court concluded that the enacted amendment was dispositive and clearly implied that a sentencing court cannot order restitution to indirect victims.⁷⁴ Writing for the court of appeal, Justice Michael J. Phelan ruled that the use of the term “direct victim” clearly implies that the statute no longer allows restitution to an “indirect victim.”⁷⁵

As a result, the court of appeal vacated the lower court order directing the defendant to pay restitution to Allstate and remanded the case to the sentencing court.⁷⁶ The Legislature’s 1994 amendment was interpreted as clearly intending to exclude entities that are not

66. *See id.* at 67, 39 Cal. Rptr. 2d at 244.

67. *See id.*

68. *Id.*

69. *See id.*

70. *See id.* This included \$1714.32 for physical damage repairs, \$704.85 for vehicle content replacement, and \$393.50 to transport the automobile back to the victim’s home in Oregon, buy new license plates, and re-register the car. *See id.*

71. *See id.* at 68-69, 39 Cal. Rptr. 2d at 245. The order stated, in part, that “[t]he evidence presented establishes that as a result of the acts of the defendant and others the Allstate Insurance Company was damaged in the sum of \$2942.95 and the owner of the vehicle . . . was damaged in the sum of \$375.00. The restitution sum is fixed at \$3317.95.” *Id.* at 69 n.2, 39 Cal. Rptr. 2d at 245 n.2.

72. *See id.* at 69, Cal. Rptr. 2d at 245.

73. *See id.* at 70, 39 Cal. Rptr. 2d at 246.

74. *See id.*

75. *See id.*

76. *See id.* at 72, 39 Cal. Rptr. 2d at 247.

direct victims.⁷⁷ Thus, the court of appeal held that “an insurer who has incurred expenses solely by virtue of a contractual duty to indemnify the direct victim is not itself an ‘object’ of the crime and hence not a direct victim.”⁷⁸ The court of appeal, however, added that a trial court still has the discretion to order a defendant to make restitution payable to the immediate crime victim and “leave it to the insurer and the victim-insured to work out repayment under the terms of their insurance contract.”⁷⁹ Thus, the court may require the defendant to pay restitution commensurate to the amount of the insurance company’s loss to the immediate victim.⁸⁰

IV. SUBSEQUENT CALIFORNIA CASES

Since the *Sexton* decision, the California Court of Appeal has decided three cases on the issue of whether an insurance company is a victim under California restitution law. In these cases, the court of appeal has refused to follow the *Sexton* reasoning and determined that an insurance company *is* a victim entitled to restitution under the Penal Code.⁸¹

A. *People v. Correia*

Four months after *Sexton*, the Fourth District Court of Appeal decided the case of *People v. Correia*,⁸² which involved a successful criminal prosecution for assault⁸³ and battery⁸⁴ stemming from a multi-party physical altercation that took place outside a wedding reception.⁸⁵ The victim sustained several injuries, including a broken

77. *See id.* at 71, 39 Cal. Rptr. 2d at 246.

78. *Id.*

79. *Id.* at 72, 39 Cal. Rptr. 2d at 247.

80. *See id.*

81. *See* *People v. Birkett*, 54 Cal. App. 4th 1438, 1445, 63 Cal. Rptr. 2d 587, 591 (1997), *rev. granted*, 943 P.2d 723, 67 Cal. Rptr. 2d 514 (Cal. Sup. Ct. Sept. 3, 1997) (No. S062379); *People v. Nilsen*, 41 Cal. App. 4th 936, 945, 48 Cal. Rptr. 2d 858, 863 (1996) (depublished Mar. 28, 1996); *People v. Correia*, 36 Cal. App. 4th 1779, 1789-90, 43 Cal. Rptr. 2d 302, 307 (1995) (depublished Oct. 26, 1995).

82. 36 Cal. App. 4th 1779, 43 Cal. Rptr. 2d 302 (1995) (depublished Oct. 26, 1995).

83. *See* CAL. PENAL CODE § 240 (West 1988) (“An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.”).

84. *See id.* § 242 (“A battery is any willful and unlawful use of force or violence upon the person of another.”).

85. *See Correia*, 36 Cal. App. 4th at 1783, 43 Cal. Rptr. 2d at 303 (depublished Oct. 26, 1995).

palate, upper jaw, and nose.⁸⁶ The sentencing court ordered the defendants, who did not sustain any injuries, to pay restitution to Kaiser Health Plan, which paid for the victim's medical treatment.⁸⁷ The court of appeal affirmed, reasoning that Kaiser, though not the immediate victim of the crime, was closely related to the direct victim.⁸⁸

B. *People v. Nilsen*

On January 5, 1996, the Sixth District Court of Appeal decided *People v. Nilsen*.⁸⁹ At trial, a bookkeeper pleaded no contest to a felony charge of grand theft⁹⁰ from her employer, a dentist,⁹¹ and the court ordered her to pay restitution, including money to an insurance company that had paid \$10,000 for the loss.⁹² The court of appeal affirmed this decision, agreeing with the People that *Sexton* was wrongly decided and that state law did not prohibit trial courts from ordering defendants to pay restitution to all victims of their crimes who suffer a loss.⁹³

C. *People v. Birkett*

On May 14, 1997, the Fourth District Court of Appeal decided *People v. Birkett*,⁹⁴ a case in which the defendant pleaded guilty to owning a chop shop⁹⁵ and receiving stolen property.⁹⁶ After a restitution hearing, the trial court ordered the defendant to pay restitution as a condition of his probation to two insurance companies that had

86. *See id.* (depublished Oct. 26, 1995).

87. *See id.* (depublished Oct. 26, 1995).

88. *See id.* at 1788 n.14, 43 Cal. Rptr. 2d at 306 n.14 (depublished Oct. 26, 1995). The reasoning of this case is discussed *infra* Part V.

89. 41 Cal. App. 4th 936, 48 Cal. Rptr. 2d 858 (1996) (depublished Mar. 28, 1996).

90. *See* CAL. PENAL CODE §§ 484, 487(b)(3) (West 1988 & Supp. 1997) ("Grand theft is theft committed . . . [w]here the money, labor, or real or personal property is taken by a servant, agent, or employee from his or her principal or employer and aggregates four hundred dollars (\$400) or more in any 12 consecutive month period.").

91. *See Nilsen*, 41 Cal. App. 4th at 938, 48 Cal. Rptr. 2d at 859 (depublished Mar. 28, 1996).

92. *See id.* at 940, 48 Cal. Rptr. 2d at 860-61 (depublished Mar. 28, 1996).

93. *See id.* at 943, 48 Cal. Rptr. 2d at 862 (depublished Mar. 28, 1996). The reasoning of this case is discussed *infra* Part V.

94. 54 Cal. App. 4th 1438, 63 Cal. Rptr. 2d 587 (1997), *rev. granted*, 943 P.2d 723, 67 Cal. Rptr. 2d 514 (Cal. Sup. Ct. Sept. 3, 1997) (No. S062379).

95. *See* CAL. VEH. CODE § 10801 (West Supp. 1997). A chop shop is a premise where illegally obtained vehicles are sold or altered to prevent identification. *See id.* § 250.

96. *See* CAL. PENAL CODE § 496(a) (West 1988 & Supp. 1997).

indemnified two of the victims.⁹⁷ The court of appeal upheld this order and determined that insurance companies are entitled to restitution if they suffer consequences of crime by indemnifying their policyholders.⁹⁸

D. California Supreme Court Reaction

The California Supreme Court has denied review for both the *Nilsen* and *Correia* decisions and ordered these cases depublished.⁹⁹ Thus, until the *Birkett* decision in May of 1997, *Sexton* was the only officially reported case since the codification of the 1994 amendments addressing whether an insurance company that pays for the criminal victim's loss is entitled to restitution.

Depublished opinions, which normally appear in the advance sheets, are deleted from the official bound volumes of cases.¹⁰⁰ California law prohibits parties and courts from using these opinions as precedent in court proceedings.¹⁰¹ The reasons for depublication are not entirely clear. California Rule of Court 979(e), adopted in 1990, cautions against assuming that supreme court depublication signals supreme court disapproval: "An order of the supreme court directing depublication of an opinion in the official reports shall not be deemed an expression of opinion of the supreme court of the correctness of the result reached by the decision or of any of the law set forth in the opinion."¹⁰² It is shortsighted, however, to assume this is

97. See *Birkett*, 54 Cal. App. 4th at 1441, 63 Cal. Rptr. 2d at 589.

98. See *id.* at 1445, 63 Cal. Rptr. 2d at 591. The reasoning of this case is discussed *infra* Part V.

99. See *People v. Nilsen*, 41 Cal. App. 4th 936, 48 Cal. Rptr. 2d 858 (1996) (depublished Mar. 28, 1996); *People v. Correia*, 36 Cal. App. 4th 1779, 43 Cal. Rptr. 2d 302 (1995) (depublished Oct. 26, 1995).

100. See Gerald F. Uelman, *Publication and Depublication of California Court of Appeal Opinions: Is the Eraser Mightier than the Pencil?*, 26 LOY. L.A. L. REV. 1007, 1011 (1993).

101. See CAL. CT. R. 977(a) (West 1996 & Supp. 1997). Few court of appeal decisions are published in the official reports. In fiscal year 1994-1995, the court of appeal published only eight percent of all majority opinions and four percent of all criminal appeals. See JUDICIAL COUNCIL OF CALIFORNIA, 1996 ANNUAL REPORT 94 tbl.10 (1996). In the five year period between April 1, 1987 and March 31, 1992, 586 court of appeal opinions were depublished. See Uelman, *supra* note 100, at 1007 & n.3.

102. CAL. CT. R. 979(e) (West 1996). Prior to the enactment of this statute, depublication was generally regarded as demonstrating supreme court disapproval. See *People v. Dee*, 222 Cal. App. 3d 760, 764, 272 Cal. Rptr. 208, 210 (1990) ("[I]t is generally accepted that most depublication occurs because the court considers the opinion to be wrong in some significant way, usually in reasoning and sometimes in result as well.").

the actual practice. Despite Rule 979(e), there is no reason to think the court has not continued its practice of depublishing opinions when found "to be wrong in some significant way, such that it would mislead the bench and bar if it remained as citable precedent."¹⁰³

In the 1994 case of *Conrad v. Ball Corp.*, the court of appeal noted that the supreme court depublished one case but denied depublishing the other in conflicting opinions published one month apart.¹⁰⁴ The court of appeal wrote that this suggested that "the [California] Supreme Court approved of the case it chose to leave published."¹⁰⁵ This interpretation is in accord with how the late California Supreme Court Justice Otto Kaus once plainly described the effect of depublication: "When we [the supreme court] are faced with two conflicting opinions, and we decertify one of them, you don't have to be a genius to figure out what we're thinking."¹⁰⁶

In depublishing *Correia* and *Nilsen* and denying review of these cases, the supreme court left *Sexton* as the only published case addressing whether an insurance company should be considered a victim under California restitution law. This action tacitly shows approval of the *Sexton* ruling.

On September 3, 1997, however, the supreme court granted review of the *Birkett* decision and thus the appellate court opinion has been superseded.¹⁰⁷ By granting review, the supreme court has the opportunity to overrule *Sexton* and affirm the *Birkett* ruling.

V. ANALYSIS

The *Sexton* decision is currently the only citable case since the codification of the 1994 amendments discussing whether sentencing courts may order defendants to pay restitution to insurance companies who reimburse victims for losses caused by defendants' criminal acts. This decision implicates state constitutional, statutory, and

103. Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 CAL. L. REV. 514, 514-15 (1984).

104. 24 Cal. App. 4th 439, 443 n.2, 29 Cal. Rptr. 2d 441, 444 n.2 (1994) (citing the published opinion of *Espinoza v. Machonga*, 9 Cal. App. 4th 268, 11 Cal. Rptr. 2d 498 (1992) and the depublished opinion of *Romero v. Deraldzhayana*, No. B062996 (Oct. 27, 1992)).

105. *Id.* at 444 n.2, 29 Cal. Rptr. 2d at 444 n.2.

106. Ellis J. Horvitz, *Otto Kaus Remembered*, 30 LOY. L.A. L. REV. 961, 962 (1997).

107. See *People v. Birkett*, 54 Cal. App. 4th 1438, 63 Cal. Rptr. 2d 587 (1997), *rev. granted*, 943 P.2d 723, 67 Cal. Rptr. 2d 514 (Cal. Sup. Ct. Sept. 3, 1997) (No. S062379). Cases superseded by a grant of review by the supreme court are not published. See CAL. CT. R. 977(d) (West 1996 & Supp. 1997).

relevant policy issues related to victim restitution.

A. Constitutional Analysis

In California, the state constitution and statutes require victim restitution.¹⁰⁸ On June 8, 1982, California voters ratified Proposition 8, commonly known as the "Victims' Bill of Rights," which added Article I, Section 28 to the state constitution.¹⁰⁹ A section of this amendment states California's broad restitution provision:

It is the unequivocal intention of the People of the State of California that *all persons who suffer losses as a result of criminal activity* shall have the right to restitution from the persons convicted of the crimes for losses they suffer.

Restitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary.¹¹⁰

This Article requires the implementation of this constitutional provision into statutory law,¹¹¹ which can presently be found in California Penal Code Section 1202.4.¹¹² Article I, Section 28(b) was designed to "require convicted persons to pay restitution to the victims of their crimes 'in every case.'"¹¹³ Thus, Penal Code Section 1202.4 is based upon the constitutionally codified principle that all convicts pay restitution to "all persons who suffer losses as a result of criminal activity."¹¹⁴

The 1994 amendments did not alter this intent in any way. The legislation discusses the constitutional right to restitution for "all

108. See CAL. CONST. art. I, § 28(b); CAL. PENAL CODE § 1202.4(f) (West Supp. 1997) ("In every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims . . .").

109. See Goldberg, *supra* note 39, at 621.

110. CAL. CONST. art. I, § 28(b) (emphasis added).

111. See *id.*

112. CAL. PENAL CODE § 1202.4(b) states that "[i]n every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine." This Code section further states that "[t]he restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense." *Id.* § 1202.4(b)(1).

113. *People v. Young*, 38 Cal. App. 4th 560, 565, 45 Cal. Rptr. 2d 177, 180 (1995) (quoting CAL. CONST. art. I, § 28(b)).

114. CAL. CONST. art. I, § 28(b).

persons who suffer losses as a result of criminal activity"¹¹⁵ and then indicates that "[t]he right of persons to receive restitution for losses suffered as a result of criminal activity shall be secured as provided in this act."¹¹⁶ This law, on which the *Sexton* court based its denial of restitution, is intended to effectuate the constitutional guarantee of restitution to all persons suffering losses resulting from criminal activity. In cases where there is a victim, courts must order victim restitution.

In denying restitution to an insurance company, however, the court of appeal in *Sexton* did not address these underlying constitutional implications. At no point did the court of appeal refer to the state constitutional provision or principle.

Insurance companies should qualify under Article I, Section 28(b) as "persons who suffer losses as a result of criminal activity."¹¹⁷ They are corporate entities that pay for the harm caused by the illegal acts of defendants. Restitution would allocate money to insurers who assume the financial risk of loss and are legally obligated to provide financial indemnification to immediate crime victims. In denying restitution, a court instead places the burden on insurance companies to pay for injuries caused by criminal acts. The insurance-buying public pays for these expenditures¹¹⁸ since, when taken in the aggregate, higher losses require higher underwriting premiums.¹¹⁹ This essentially shifts the loss from the criminal to the general public. Restitution, however, would place the loss on the harm-causing party yet still fulfill the objectives of rehabilitating the criminal and deterring criminal activity.

The *Nilsen*, *Correia*, and *Birkett* courts addressed these constitutional considerations. In *Nilsen*, the Sixth District Court of Appeal pointed out that Article I, Section 28(b) does not restrict restitution to direct victims of criminal activity.¹²⁰ Moreover, the court of appeal held that instead of excluding non-natural entities, such as insurance

115. Act of Sept. 28, 1994, ch. 1106, §1 (a), 1994 Cal. Stat. 1106.

116. *Id.* §1 (d).

117. *Id.* §1 (a).

118. See Lorraine Slavin and David J. Sorin, *Congress Opens a Pandora's Box—The Restitution Provisions of the Victim and Witness Protection Act of 1982*, 52 FORDHAM L. REV. 507, 525-26 (1984) (concluding that insurance companies should receive restitution under a federal criminal restitution law).

119. The main sources of income for insurance companies are premium income and investment income. See BARRY D. SMITH ET AL., PROPERTY AND LIABILITY INSURANCE PRINCIPLES 154 (1987).

120. *People v. Nilsen*, 41 Cal. App. 4th 936, 943, 48 Cal. Rptr. 2d 858, 862 (1996) (depublished Mar. 28, 1996).

companies, the provision broadly requires restitution to all persons suffering losses.¹²¹ Applying this constitutional provision, the court of appeal found that “[a] flexible interpretation of the term “victim” best addresses the purposes of the statute.”¹²²

In *Correia* the Fourth District directly questioned the reasoning of the *Sexton* decision by asserting that “restricting restitution to direct victims conflicts with the broad constitutional provision which contains no such limitation.”¹²³ The Fourth District in *Birkett* found that since the constitution provides the right to restitution to all persons who suffer losses resulting from crimes, the *Sexton* rationale is inconsistent with the state constitution.¹²⁴

The *Sexton* court’s narrow interpretation of criminal restitution awards conflicts with the broad principle approved by the voters and codified into the state constitution. As the court of appeal stated in *Correia*, “since [California Penal Code Section 1202.4] was enacted to implement the constitutional provision, we construe it in a manner consistent with the constitutional provision and, if possible, in a manner so that it is constitutional.”¹²⁵

B. Statutory Analysis

Determining whether a court may order a defendant to pay restitution to an insurance company depends on whether an insurer qualifies under the “direct victim” language of California Penal Code Section 1202.4. This is a matter of statutory interpretation.

1. Statutory interpretation in California

Courts should interpret statutes to carry out their legislative intent.¹²⁶ California courts have often recognized that literal statutory

121. *See id.* (depublished Mar. 28, 1996).

122. *Id.* at 943, 48 Cal. Rptr. 2d at 862-63 (depublished Mar. 28, 1996) (quoting *People v. Foster*, 14 Cal. App. 4th 939, 953, 18 Cal. Rptr. 2d 1, 9 (1993)).

123. *People v. Correia*, 36 Cal. App. 4th 1779, 1788, 43 Cal. Rptr. 2d 302, 306 (1995) (depublished Oct. 26, 1995).

124. *People v. Birkett*, 54 Cal. App. 4th 1438, 1444, 63 Cal. Rptr. 2d 587, 591 (1997), *rev. granted*, 943 P.2d 723, 67 Cal. Rptr. 2d 514 (Cal. Sup. Ct. Sept. 3, 1997) (No. S062379).

125. *Correia*, 36 Cal. App. 4th at 1785, 43 Cal. Rptr. 2d at 304 (depublished Oct. 26, 1995) (referring to CAL. PENAL CODE § 1203.04 (West Supp. 1997)). CAL. PENAL CODE § 1203.04 was repealed effective August 3, 1995 and replaced simultaneously by CAL. PENAL CODE § 1202.4.

126. This is consistent with the rule of statutory construction of federal law established by the United States Supreme Court. *See, e.g., Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) (stating that courts are to ascertain congressional intent

construction is inappropriate when the result is contrary to the apparent legislative intent.¹²⁷

In re Haines,¹²⁸ a 1925 case often cited by courts in discussing statutory interpretation,¹²⁹ established the rule for statutory construction in California.¹³⁰ Justice Lawlor's majority opinion held that a felony-escape provision, despite contrary statutory language, applied to a prison escape by a misdemeanor.¹³¹ The supreme court ruled that when the legislative intent is shown, a statute must be liberally construed to effectuate that intent: "[w]hen a statute is fairly susceptible of two constructions, one leading inevitably to mischief or absurdity and the other consisting of sound sense and wise policy, the former should be rejected and the latter adopted."¹³²

Where a penal statute is reasonably susceptible of two constructions, a court must ordinarily adopt the construction more favorable to the defendant; this principle, however, does not apply "unless two reasonable interpretations of the same provision stand in relative equipoise."¹³³

Other judges disagree with this method of statutory construction and instead adopt a strict construction viewpoint.¹³⁴ The late

and follow legislative will); *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940) (stating that courts must interpret statutes so as to give effect to congressional intent).

127. See, e.g., *Lungren v. Deukmejian*, 45 Cal. 3d 727, 735, 755 P.2d 299, 304, 248 Cal. Rptr. 115, 120 (1988); *People v. Belton*, 23 Cal. 3d 516, 526, 591 P.2d 485, 491-92, 153 Cal. Rptr. 195, 201-02 (1979); *People v. Crowles*, 20 Cal. App. 4th 114, 118, 24 Cal. Rptr. 2d 377, 379 (1993); *People v. Mesa*, 265 Cal. App. 2d 746, 749, 71 Cal. Rptr. 594, 596-97 (1968).

128. 195 Cal. 605, 234 P. 88 (1925).

129. See, e.g., *People v. Davis*, 85 Cal. App. 3d 916, 924-25, 149 Cal. Rptr. 777, 782 (1978); *Consumers Union of the United States, Inc. v. California Milk Producers Advisory Bd.*, 82 Cal. App. 3d 433, 446, 147 Cal. Rptr. 265, 273 (1978); *Marina Village v. California Coastal Zone Conservation Comm'n*, 61 Cal. App. 3d 388, 393, 132 Cal. Rptr. 120, 123 (1976); *Kauke v. Lindsay Unified Sch. Dist.*, 46 Cal. App. 2d 176, 185, 115 P.2d 576, 581 (1941); *Southern Pac. Co. v. Riverside County*, 35 Cal. App. 2d 380, 384-85, 95 P.2d 688, 691 (1939).

130. See *In re Haines*, 195 Cal. at 613, 234 P. at 886.

131. See *id.* at 622, 234 P. at 889.

132. *Id.* at 613, 234 P. at 886.

133. *People v. Jones*, 46 Cal. 3d 585, 599, 758 P.2d 1165, 1173, 250 Cal. Rptr. 635, 643 (1988); see also *People v. Anderson*, 43 Cal. 3d 1104, 1145-46, 742 P.2d 1306, 1330, 240 Cal. Rptr. 585, 609-10 (1987) (stating that a defendant is entitled to the benefit of every realistic reasonable doubt in the interpretation of a statute).

134. See, e.g., *State v. Fryer*, 496 N.W.2d 54 (S.D. 1993). The South Dakota Supreme Court ruled that an insurance company was only indirectly injured and was not a victim under the "ordinary and popular meaning [of] the term." *Id.* at 55.

California Supreme Court Justice Roger J. Traynor adopted this position to argue that *In re Haines* should be overturned.¹³⁵ In a dissenting opinion, Justice Traynor refused to circumvent the plain language of the legislation in order to find a misdemeanor escape crime:

Misdemeanants are excluded because felons are singled out in a qualifying phrase that states what it means in the simplest terms. The court cannot reject its obvious interpretation without denying all assurance that an act of the Legislature will be interpreted to mean what it says. It is for the Legislature and not the court, to confirm the omission if it was intended, or to correct it if it was not.¹³⁶

To aid the process of statutory interpretation, the California Penal Code specifically includes a section on interpreting the code. This provision states that “[t]he rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.”¹³⁷ Although the *Haines* court followed this more liberal standard of statutory interpretation, the *Sexton* court restricted itself to strictly interpreting the statutory language.

2. Proper statutory interpretation shows that the Legislature intended to expand, not restrict, restitution awards

The central argument of the *Sexton* opinion was that the Legislature intended to limit restitution awards by incorporating the “direct victim” language into the statute.¹³⁸ As the court of appeal stated, The Legislature’s reference to “direct” victims manifestly incorporates the well-established dichotomy existing in the law which distinguishes between “direct” and “indirect” victims for purposes of restitution. A “direct” victim is the “object” of the crime committed. By authorizing restitution orders limited to entities which are “direct” victims, the Legislature necessarily intended to exclude entities which are “indirect” victims from such authorization. . . . [T]he

135. See *In re Halcomb*, 21 Cal. 2d 126, 130-32, 130 P.2d 384, 387-88 (1942) (Traynor, J., dissenting).

136. *Id.* at 131, 130 P.2d at 387 (Traynor, J., dissenting).

137. CAL. PENAL CODE § 4 (West 1988).

138. See *People v. Sexton*, 33 Cal. App. 4th 64, 70, 39 Cal. Rptr. 2d 242, 246 (1995).

Legislature knows how to define and include indirect victims if it chooses to do so.¹³⁹

The court of appeal, however, apparently disregarded the beginning of Section 1202.4 which states the intent of criminal restitution fines: “[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.”¹⁴⁰ This stated intent remained unchanged in the 1994 amendments. Thus, contrary to the *Sexton* court’s analysis, it is unlikely that the Legislature “necessarily intended”¹⁴¹ to narrow restitution awards in passing the 1994 amendments.

In fact, by enacting the 1994 amendments, the Legislature appears to have actually intended to expand restitution awards. This interpretation was asserted by Justice Daniel J. Kremer in the *Correia* opinion.¹⁴² In the 1994 amendments, the Legislature deleted the requirement that restitution be subject to a determination of a person’s ability to pay and instead made that determination only a factor for judges to consider.¹⁴³ Furthermore, restitution fines were made available for misdemeanor offenses and restitution orders became enforceable as civil judgments.¹⁴⁴ Justice Kremer noted that the legislative history states that these amendments taken together were intended “to expand the ability of the victims to receive restitution.”¹⁴⁵

Instead of expanding restitution awards, literally construing the “direct victim” language limits restitution orders to only the immediate objects of crime. Thus, insurance companies which incur pecuniary losses resulting from the criminal acts of defendants are denied restitution. This result is contrary to the Legislature’s apparent intent in passing the 1994 amendments—to broaden restitution awards in order to further the rehabilitative and deterrent goals of restitution. Judges should not strictly construe statutes when the result is contrary to the clear legislative intent. When determining a statute’s legislative intent, the supreme court has ruled that the “language of a statute should not be given a literal meaning if doing so would result

139. *Id.* at 70-71, 39 Cal. Rptr. 2d. at 246 (citations omitted).

140. CAL. PENAL CODE § 1202.4(a)(1) (West Supp. 1997).

141. *Sexton*, 33 Cal. App. 4th at 71, 39 Cal. Rptr. 2d at 246.

142. *People v. Correia*, 36 Cal. App. 4th 1779, 1788, 43 Cal. Rptr. 2d 302, 306 (1995) (depublished Oct. 26, 1995).

143. *See id.* at 1788, 43 Cal. Rptr. 2d at 306 (depublished Oct. 26, 1995).

144. *See id.* (depublished Oct. 26, 1995).

145. *Id.* (quoting ASSEMBLY PUB. SAFETY COMM., ANALYSIS OF A.B. NO. 3169 (1993-1994 Reg. Sess.) as amended Apr. 4, 1994, comments, para. 1 (1994)).

in absurd consequences which the Legislature did not intend.”¹⁴⁶ When this occurs, “[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.”¹⁴⁷

Instead of reading the 1994 amendments together to determine their intended meaning, the *Sexton* court based its ruling on interpreting one phrase, specifically the words “direct victim.” This method of statutory interpretation is misguided. As the supreme court stated in *Lungren v. Deukmejian*,¹⁴⁸ “[t]he meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible.”¹⁴⁹ The *Sexton* court’s strict interpretation of the term “victim” from an isolated statutory phrase prohibits non-entities such as insurance companies and government agencies from receiving restitution for losses resulting from criminal activity when they are not the immediate victim. This reading of the law fails to effectuate the Legislature’s aim of expanding restitution awards.

3. Even an isolated reading of former section 1202.4(p) can be interpreted as expanding restitution awards

Had they truly intended to restrict restitution awards, the Legislature could have specifically excluded indirect victims or insurance companies. Despite prior cases ruling that indirect victims were eligible to receive restitution,¹⁵⁰ the Legislature did not define the term “victim” to exclude indirect victims in the 1994 amendments.¹⁵¹

Therefore, even if one does not read the amendments together in order to determine the legislative intent, as the *Sexton* court did, reading the specific clause which includes the “direct victim” language still reveals an intent to expand restitution awards. The amendment’s analysis by the Office of the Attorney General alluded to the existing Government Code definition of “victim,” which included only state residents or stationed military personnel and their families.¹⁵² Then, the analysis stated that “[t]his bill would specify

146. *Bruce v. Gregory*, 65 Cal. 2d 666, 673, 423 P.2d 193, 198, 56 Cal. Rptr. 265, 270 (1967).

147. *Lungren v. Deukmejian*, 45 Cal. 3d 727, 735, 755 P.2d 299, 304, 248 Cal. Rptr. 115, 120 (1988).

148. 45 Cal. 3d 727, 755 P.2d 299, 248 Cal. Rptr. 115 (1988).

149. *Id.* at 735, 755 P.2d at 304, 248 Cal. Rptr. at 120.

150. See cases cited *supra* note 47.

151. See Act of Sept. 28, 1994, ch. 1106, §1(a), 1994 Cal. Stat. 1106.

152. See SENATE RULES COMM., ANALYSIS OF A.B. NO. 3169 (1993-1994 Reg.

that nothing in these provisions regarding restitution shall prevent a court from ordering restitution to any . . . legal or commercial entity when that entity is a direct victim of a crime."¹⁵³ The amendment was designed to clarify state law to show that courts shall not be prevented from ordering restitution to non-person entities. While the amendment prevents courts from denying restitution to direct victims, it does not in any way prohibit restitution to indirect victims.

In both the *Correia* and *Birkett* opinions, the court of appeal emphasized that the Legislature did not intend to limit restitution orders by using the "direct victim" language.¹⁵⁴ Justice Kremer wrote in *Correia*:

If the Legislature had intended to prohibit a court from conditioning probation on a restitution order to a corporation or governmental entity which was an "indirect" victim, the Legislature easily could have so provided by stating restitution to such an entity was permitted "only when a direct victim" or by stating the court shall not order restitution to such an entity when it was an "indirect" victim.¹⁵⁵

A 1996 amendment did change the wording of Section 1202.4 to incorporate the "direct victim" language into an official definition:

For purposes of this section, "victim" shall include the immediate surviving family of the actual victim. "Victim" shall also include any corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity when that entity is a direct victim of a crime.¹⁵⁶

The Legislature, again, neither restricted restitution *only* to direct victims nor expressly prohibited restitution to indirect victims.¹⁵⁷

Sess.), para. 9 (1994).

153. *Id.* para. 10.

154. See *Correia*, 36 Cal. App. 4th at 1789, 43 Cal. Rptr. 2d at 306-07 (depublished Oct. 26, 1995); *Birkett*, 54 Cal. App. 4th 1438, 1444, 63 Cal. Rptr. 2d 587, 591 (1997), *rev. granted*, 943 P.2d 723, 67 Cal. Rptr. 2d 514 (Cal. Sup. Ct. Sept. 3, 1997) (No. S062379).

155. *Correia*, 36 Cal. App. 4th at 1789, 43 Cal. Rptr. 2d at 306-07 (depublished Oct. 26, 1995); see also *Birkett*, 54 Cal. App. 4th at 1444, 63 Cal. Rptr. 2d at 591 (stating that the Legislature could have limited restitution to direct victims only but did not do so).

156. CAL. PENAL CODE § 1202.4(k) (West Supp. 1997).

157. See *id.*

4. The *Correia* concurrence searches for common ground

The concurrence in *Correia* warned that the majority opinion was overbroad in defining the term "victim" in a generalized manner.¹⁵⁸ To exemplify this principle, Judge Herbert B. Hoffman, a superior court judge sitting on the court of appeal under assignment by the Chairperson of the Judicial Council, presented the following hypothetical scenario:

[A]n arsonist who, in the process of setting fire to a particular business, consequently causes neighboring businesses to lose profits as a result of closed-off access from fire trucks and other emergency and rescue vehicles. Under the broad definition of "victim" suggested by the majority, all neighboring business owners would be entitled to restitution because they suffered losses as a result of criminal activity.¹⁵⁹

Judge Hoffman warned that the majority's view would burden probation departments with identifying all indirect victims¹⁶⁰ and trial courts with claims by all those who have suffered remote losses.¹⁶¹

Yet Judge Hoffman agreed that the sentencing court properly ordered restitution to Kaiser Health Plan.¹⁶² He argued that Kaiser, because of its contractual duty to pay for the victim's medical services, stands in the shoes of the victim.¹⁶³ This protects the insurer under an established subrogation principle that "permits a party who has been required to satisfy a loss created by a third party's wrong to step into the shoes of the loser and recover from the wrongdoer."¹⁶⁴

Judge Hoffman's approach recognizes that the "direct victim" language of the statute restricts restitution by preventing remote crime victims from receiving restitution awards.¹⁶⁵ It does not, however, prevent restitution awards to an insurance company that has indemnified immediate crime victims and takes over their legal

158. See *Correia*, 36 Cal. App. 4th. at 1792, 43 Cal. Rptr. 2d at 308 (Hoffman, J., concurring) (depublished Oct. 26, 1995).

159. *Id.* (Hoffman, J., concurring) (depublished Oct. 26, 1995).

160. See *id.*, 43 Cal. Rptr. 2d at 309 (Hoffman, J., concurring) (depublished Oct. 26, 1995).

161. See *id.* at 1793, 43 Cal. Rptr. 2d at 309 (Hoffman, J., concurring) (depublished Oct. 26, 1995).

162. See *id.* at 1792, 43 Cal. Rptr. 2d at 308 (Hoffman, J., concurring) (depublished Oct. 26, 1995).

163. See *id.* (Hoffman, J., concurring) (depublished Oct. 26, 1995).

164. *Transit Casualty Co. v. Spink Corp.*, 94 Cal. App. 3d 124, 132, 156 Cal. Rptr. 360, 365 (1979) (disapproved on other grounds).

165. See *Correia*, 36 Cal. App. 4th at 1792, 43 Cal. Rptr. 2d at 308 (Hoffman, J., concurring) (depublished Oct. 26, 1995).

recovery rights.¹⁶⁶ An insurance company is entitled to recovery since it analogously “steps into the shoes” of an immediate victim because of a contractual obligation and is subrogated to the victim’s right to legal recovery, which should include criminal restitution awards.¹⁶⁷

The *Birkett* court incorporated this rationale in its decision. The court of appeal ruled that “once an insurance company has indemnified the victim of a crime, the insurance company stands in the shoes of the victim and is therefore entitled to restitution from the perpetrator of the crime.”¹⁶⁸ Justice Betty Richli pointed out that although the *Sexton* opinion defines direct victims as the objects of crime, an insurer, although not the criminal object, can still be the direct victim.¹⁶⁹ This is true especially when the insurance company has paid the policyholder for the loss before the sentencing court has issued the restitution order or before the police have even apprehended the criminal.¹⁷⁰ Thus, the court of appeal reasoned that “insurance companies are in essence the direct victims of [a] defendant’s criminal conduct.”¹⁷¹

This rationale is consistent with the only other published California case to interpret the direct victim statutory language. In *People v. Ortiz*, the Second District Court of Appeal upheld a probation condition which required the defendant, convicted of possessing counterfeit cassette tapes, to make restitution to the Association of Latin American Record Manufacturers (ALARM).¹⁷² Although ALARM members—the individual record companies—were the actual immediate crime victims, the court of appeal determined that the non-profit association, formed to combat crime against its members,

166. See *id.* For an introductory discussion on the principle of subrogation, see SMITH ET AL., *supra* note 119, at 87-88. An example of a subrogation clause in an insurance policy is as follows:

In the event of any payment under this policy, the company shall be subrogated to all the insured’s rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

MERCURY GENERAL CORP., POLICY PROVISIONS 6 (1995).

167. See *Correia*, 36 Cal. App. 4th 1792, 43 Cal. Rptr. 2d at 308 (Hoffman, J., concurring) (depublished Oct. 26, 1995). But see *Williams*, 207 Cal. App. 3d at 1524, 255 Cal. Rptr. at 780 (overturning a restitution order, the court considered a civil judgment for damages against the victim, payable to the insurer on a subrogation theory).

168. *Birkett*, 54 Cal. App. 4th at 1443, 63 Cal. Rptr. 2d at 590.

169. See *id.* at 1443, 63 Cal. Rptr. 2d at 590.

170. See *id.* at 1443-44, 63 Cal. Rptr. 2d at 590.

171. *Id.* at 1443, 63 Cal. Rptr. 2d at 590.

172. 53 Cal. App. 4th 791, 794, 62 Cal. Rptr. 2d 66, 67 (1997).

stood in the shoes of the direct victims and was entitled to criminal restitution.¹⁷³ The court of appeal reasoned that since the individual companies comprising ALARM would be entitled to restitution as direct victims, there is no reason why these companies cannot form an association to collect restitution on their behalf.¹⁷⁴ Similarly, if individual policyholders are entitled to criminal restitution, it is rational to allow their insurance companies to collect the losses on their behalf.

C. Policy Considerations

The *Sexton* court did agree with the Office of the State Attorney General that a defendant should not be excused from paying restitution simply because of the fortuity that the victim was insured.¹⁷⁵ Therefore, the court of appeal ruled that trial courts may order restitution to victims and leave it to the insurers and victims to work out repayment under the contractual terms of the insurance policy.¹⁷⁶ This approach is misguided and problematic both in cases where full restitution is ordered and where full restitution is not ordered.¹⁷⁷

1. Cases where full restitution is ordered to the victim

When courts award restitution to victims already compensated by their insurance company, victims will often recover twice for their losses. In some cases, victims are unaware of their contractual obligation of subrogation which requires them to repay their insurer. This is especially true because insurance companies are not a party to the litigation and are only likely to become aware of a restitution award from the victim directly. In other cases, victims, knowing that the insurer is unaware of the criminal proceeding, may decide not to pay back their insurance company.¹⁷⁸ These two scenarios actually

173. *See id.*

174. *See id.* at 796, 62 Cal. Rptr. 2d at 68-69.

175. *See Sexton*, 33 Cal. App. 4th at 71-72, 39 Cal. Rptr. 2d at 247.

176. *See id.* at 72, 39 Cal. Rptr. 2d at 247. If an insurance company pursues its subrogation rights against the defendant for the loss, the defendant is entitled to a credit for payments made to the victim. *See id.*

177. *But see State v. Rose*, 609 P.2d 875, 876-77 (Or. Ct. App. 1980) (awarding restitution for value of stolen car even though the victim was contractually obligated to reimburse insurer).

178. A 1991 nationwide poll showed that 23% of adults believe it is acceptable to lie to an auto insurance company. *See* Kenneth Reich, *Survey Finds Many Condone Lying to Insurers*, L.A. TIMES, Nov. 19, 1991, at A26. Regarding the poll results, Andrea Margolis of the Josephson Institute for Advancement of Ethics stated the following: "These things go on all the time when it comes to

place victims in a better position than they were prior to the loss, rather than restoring them to their rightful position. Ironically, the *Sexton* approach allows one party—the victim—to be unjustly enriched at the expense of another—the insurer. This is a principle that restitution seeks to avoid.¹⁷⁹

In addition, even if insurance companies become aware of restitution payments made to their policyholders, it may be expensive or impossible to collect compensation owed by exercising their subrogation rights. If the policyholder is uncooperative, the insurer will need to file suit, obtain a civil judgment, and collect. This is costly and may be difficult to accomplish with speed and accuracy. For smaller judgments, insurance companies may find it economically advantageous not to pursue their subrogation rights and instead allow the victims to reap double-recovery. These judgments may be easier to write off as losses which can be recovered through higher underwriting premiums. This will negatively affect the insurance-buying public in California, which is already burdened with very high insurance rates.¹⁸⁰

Furthermore, if an insurance company seeks repayment from the victim, the victim bears a burden in having to litigate with the insurer. Some victims, unaware of the insurer's right of subrogation, could be forced into costly litigation. This judicially inefficient consequence victimizes crime victims a second time by making them civil defendants in unnecessary cases in an already overcrowded state court system.¹⁸¹ Awarding restitution directly to the insurer eliminates a layer

people and money People tend to rationalize these issues very regularly. It's enhanced in this case because it's insurance. There's an emotional reaction to the insurance industry. Many people, including my own mother, feel they're getting ripped off." *Id.*

The National Insurance Crime Bureau estimates that American households pay an average of \$200 a year in increased premiums to compensate for insurance fraud. See *Insurance Fraud: The \$20 Billion Disaster*, REPORT THE RIPOFF (Nat'l Ins. Crime Bureau, Palos Hills, Ill.), at 1.

179. See *Lucky Auto Supply v. Turner*, 244 Cal. App. 2d 872, 885, 53 Cal. Rptr. 628, 636 (1966) ("[O]ne person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made . . .").

180. See, e.g., Dan Morain, *No-Fault Measure's Support Is Waning*, L.A. TIMES, Mar. 19, 1996, at A3 ("California's car insurance rates are the eighth-highest in the nation, averaging \$781 a year statewide. But in urban California, especially Los Angeles, rates can be three times that amount or more.").

181. See generally *People v. Guevara*, 132 Cal. App. 3d 193, 201, 183 Cal. Rptr. 18, 23 (1982) (stating courts are overcrowded and calling for efficient use of judicial resources); Barbara Babcock, *Equal Justice—and a Defendant With the*

of needless and burdensome litigation, while serving the best interests of judicial economy.

2. Cases where full restitution is not ordered to the victim

Courts will not award full restitution in some cases. For instance, in order to avoid double recovery, judges may choose not to order restitution fines or include them as a probation condition.¹⁸² In other cases, prosecutors may not ask for full restitution. Both of these situations frustrate the objectives of criminal restitution—rehabilitation, deterrence, and providing actual and efficient compensation to victims. Criminals are not deterred and are not guided toward rehabilitation since they need not consciously face the full consequences of their acts. An order of restitution to insurance companies would impress upon criminals the full extent of their criminal acts, including that losses occur despite the existence of insurance.¹⁸³ Actual and efficient compensation is not provided when the loss is neither paid to the insurance company nor efficiently recovered.

VI. CONCLUSION

Providing full restitution to crime victims addresses important needs of the criminal justice system. It serves to provide a rehabilitative and deterrent effect upon the offender, while also compensating the victims for their losses.

Allowing the broad interpretation of criminal restitution statutes provides greater avenues of victim restitution. Under this approach, judges have greater discretion in effectuating opportunities for rehabilitating criminals, deterring future harms, and efficiently compensating victims. Limiting restitution, on the other hand, stifles judicial discretion and thwarts the constitutional mandate to provide restitution to all victims of crime. When this occurs criminals are less aware of the real harm that they have caused and crime victims are left unsatisfied. As Jeremy Bentham wrote,

Satisfaction is necessary in order to cause the evil of the first class to cease, and reestablish every thing in the condition it was in before the offence; to replace the individual

Money to Exercise Every Right, L.A. TIMES, July 10, 1994, at A26 (discussing a criminal justice system of “understaffed prosecutors’ offices, overcrowded court dockets, and harried public defenders”).

182. See generally *People v. Fritchey*, 2 Cal. App. 4th 829, 839, 3 Cal. Rptr. 2d 585, 591 (1992) (stating that courts have broad discretion in imposing restitution).

183. See *Birkett*, 54 Cal. App. 4th at 1444, 63 Cal. Rptr. 2d at 591.

who has suffered in the lawful condition in which he would have been if the law had not been violated.¹⁸⁴

By granting review in the *Birkett* case, the supreme court has the opportunity to remedy the effects of the *Sexton* ruling. In *Sexton*, the First District Court of Appeal interpreted state law in a manner the Legislature never intended. In denying insurance companies restitution when they suffer losses caused by crime, the court of appeal has created an absurd result through inflexible statutory interpretation. This ruling impedes the efficient and fair administration of the criminal restitution program in California and should be overturned.

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184. JEREMY BENTHAM, POLITICAL REMEDIES FOR THE EVIL OF OFFENSES (1838), reprinted in CONSIDERING THE VICTIM 30 (Joe Hudson & Burt Galaway eds., 1975).

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