

Court Can't Force Restitution, But It Can Be Part of Deal

By Mathew B. Tully

Q. If I commit a crime, can the military force me to pay damages to the victim?

A.

Under the Rules of Court-Martial, the powers of courts-martial are "entirely penal or disciplinary." That means military judges cannot order payments for damages, also known as "restitution." Furthermore, legal matters between private parties, also known as civil matters, cannot be adjudicated in courts-martial.

This rule does not mean a convening authority cannot order a service member to pay money. Although not frequently imposed, fines may be ordered in court-martial sentences, but a fine is payable to the U.S. government and is not restitution.

However, the Rules of Court-Martial do allow restitution to be included in a pretrial agreement. Sometimes judges will suspend punishment, such as confinement, if the service member agrees to pay damages.

Before offering to pay restitution, however, service members need to be sure they can pay. In *U.S. v. Jonathan Mitchell* (1999), the U.S. Court of Appeals for the Armed Forces held that a military judge is authorized to throw out a suspended sentence that is part of a pretrial agreement if the service member willfully refuses or makes no effort to pay the agreed-upon restitution. However, if the service member cannot pay the restitution despite his or her best efforts to do so, the court should consider alternative punishments to imprisonment, the court said.

The *Mitchell* case, for example, involved a Marine private who cashed more than \$30,000 in bad checks. He was charged with, among other offenses, writing bad checks and forgery. Under a pre-trial agreement, he agreed to plead guilty and pay restitution in return for having, among other things, any confinement over 60 months suspended. The private was convicted and the convening authority sentenced him to 10 years, but in accordance with the agreement, any confinement over 60 months was suspended.

When the private failed to pay the restitution, the convening authority threw out that suspended sentence. The private claimed he was indigent and unable to pay the restitution and that the convening authority should have honored the terms of the pretrial agreement. The court countered that the service member provided "sketchy evidence" of his net worth and did not provide a detailed plan of how he would repay the \$30,000. The court affirmed the decision to throw out the suspended sentence, saying that the service member "either made a bargain that he knew he could not keep, or he allowed his assets to be dissipated instead of

taking prompt and reasonable measures to secure them. Either alternative constitutes bad faith."

Service members charged with larceny, fraud, forgery or robbery should immediately consult with a military law attorney. A lawyer can help them raise a proper defense or advise them to enter a pretrial agreement that includes restitution to avoid longer-term confinement. h

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The information in this column is not intended as legal advice.