

Chapter 9

Claims Cognizable Under Article 139, Uniform Code of Military Justice

9–1. Statutory authority

The authority for this chapter is Article 139, UCMJ (10 U.S.C. § 939), which provides redress for property willfully damaged or destroyed, or wrongfully taken, by members of the Armed Forces of the United States.

9–2. Purpose

This chapter sets forth the standards to apply and the procedures to follow in processing claims for the wrongful taking or willful damage or destruction of property by military members of DA.

9–3. Proper claimants; unknown accused

a. A proper claimant under this chapter includes any individual (whether civilian or military), a business, charity, or state or local government that owns, has an ownership interest in, or lawfully possesses property.

b. When cognizable claims are presented against a unit because the individual offenders cannot be identified, this chapter sets forth the procedures for approval authorities to direct pay assessments, equivalent to the amount of damages sustained, against the unit members who were present at the scene and to allocate individual liability in such proportion as is just under the circumstances.

9–4. Effect of disciplinary action, voluntary restitution, or contributory negligence

a. Disciplinary action. Administrative action under Article 139, UCMJ, and this chapter is entirely separate and distinct from disciplinary action taken under other sections of the UCMJ or other administrative actions. Because action, under both Article 139, UCMJ, and this chapter, requires independent findings on issues other than guilt or innocence, a Soldier's conviction or acquittal of claim-related charges is not dispositive of liability under Article 139, UCMJ.

b. Voluntary restitution. The approval authority may terminate Article 139 proceedings without findings if the Soldier voluntarily makes full restitution to the claimant.

c. Contributory negligence. A claim otherwise cognizable and meritorious is payable whether or not the claimant was negligent.

9–5. Claims cognizable

Claims cognizable under Article 139, UCMJ (10 U.S.C. § 939), are limited to the following:

a. Requirement that conduct constructively violates Uniform Code of Military Justice. In order to subject a person to liability under Article 139, the Soldier's conduct must be such as would constitute a violation of one or more punitive articles of the UCMJ. However, a referral of charges is not a prerequisite to action under this chapter.

b. Claims for property willfully damaged. Willful damage is damage inflicted intentionally, knowingly, and purposefully without justifiable excuse, as distinguished from damage caused inadvertently, thoughtlessly or negligently. Damage, loss, or destruction of property caused by riotous, violent, or disorderly acts or acts of depredation, or through conduct showing reckless or wanton disregard of the property rights of others, may be considered willful damage.

c. Claims for property wrongfully taken. A wrongful taking is any unauthorized taking or withholding of property, with the intent to deprive, temporarily or permanently, the owner or person lawfully in possession of the property. Damage, loss, or destruction of property through larceny, forgery, embezzlement, fraud, misappropriation, or similar offense may be considered wrongful taking. However, mere breach of a fiduciary or contractual duty that does not involve larceny, forgery, embezzlement, fraud, or misappropriation does not constitute wrongful taking.

d. Definition of property. Article 139 provides compensation for loss of or damage to both personal property, whether tangible or intangible, and real property. Contrast this to the PCA and chapter 11 of this regulation, which provides compensation only for tangible personal property. Monetary losses may fall into the category of either tangible property (for example, cash), or intangible property (for example, an obligation incurred by a claimant to a third party as a result of fraudulent conduct by a Soldier), although recovery for losses of intangible property may be limited by other provisions of this regulation, such as the exclusion of theft of services (see para 9–6f) or consequential damages (see para 9–6g).

e. Claims cognizable under more than one statute. Claims cognizable under other claims statutes may be processed under this chapter.

9-6. Claims not cognizable

Claims not cognizable under Article 139, UCMJ, and this chapter, include the following:

- a. Claims resulting from negligent acts.
- b. Claims for personal injury or death.
- c. Claims resulting from acts or omissions of military personnel acting within the scope of their employment, including claims resulting from combat activities or noncombat activities, as those terms are defined in the glossary.
- d. Claims resulting from the conduct of Reserve Component personnel who are not subject to the UCMJ at the time of the offense.
- e. Subrogated claims.
- f. Claims for theft of services, even if such theft constitutes a violation of Article 134, UCMJ.
- g. Claims for indirect, remote, or consequential damages.
- h. Claims by entities in conflict with the United States, or whose interests are hostile to the United States.

9-7. Limitations on assessments

a. *Limitations on amount.*

(1) A special court-martial convening authority (SPCMCA) has authority to approve a pay assessment in an amount not to exceed \$5,000 per claimant per incident and to deny a claim in any amount. If the Judge Advocate responsible for advising the SPCMCA decides that the SPCMCA's final action under the provisions of Rule for Courts-Martial 1107 in a court martial arising out of the same incident would be compromised, the SPCMCA may forward the Article 139 claim to the general court-martial convening authority (GCMCA) for action.

(2) A GCMCA, or designee, has authority to approve a pay assessment in an amount not to exceed \$10,000 per claimant per incident and to deny a claim in any amount.

(a) If the GCMCA or designee determines that a claim exceeding \$10,000 per claimant per incident is meritorious, that officer will assess the Soldier's pay in the amount of \$10,000 and forward the claim to the Commander, USARCS, with a recommendation to increase the assessment.

(b) If the head of the ACO (usually the GCMCA's Staff Judge Advocate (SJA)) decides that the GCMCA's final action under the provisions of Rule for Courts-Martial 1107 in a court-martial arising out of the same incident would be compromised, that officer may forward the Article 139 claim to USARCS for action.

(3) Only TJAG, DJAG, the Commander, USARCS, or his or her designee has authority to approve assessments in excess of \$10,000 per claimant per incident.

b. *Limitations on type of damages.* Property loss or damage assessments are limited to direct damages. This chapter does not provide redress for indirect, remote, or consequential damages.

9-8. Procedure

a. *Time limitations on submission of a claim.* A claim must be submitted within 90 days of the incident that gave rise to it, unless the SPCMCA acting on the claim determines there is good cause for delay. Lack of knowledge of the existence of Article 139, or lack of knowledge of the identity of the offender, are examples of good cause for delay.

b. *Form and presentation of a claim.* The claimant or authorized agent may present a claim orally or in writing. If presented orally, the claim must be reduced to writing, signed, and seek a definite sum in U.S. dollars within 10 days after oral presentation.

c. *Action upon receipt of a claim.* Any officer receiving a claim will forward it within 2 working days to the SPCMCA exercising jurisdiction over the Soldier or Soldiers against whom the claim is made. If the claim is made against Soldiers under the jurisdiction of two or more convening SPCMCA's who are under the same GCMCA, forward the claim to that GCMCA. That GCMCA will designate one SPCMCA to investigate and act on the claim as to all Soldiers involved. If the claim is made against Soldiers under the jurisdiction of more than one SPCMCA at different locations and not under the same GCMCA, the claim will be forwarded to the SPCMCA whose headquarters is located nearest the situs of the alleged incident. That SPCMCA will investigate and act on the claim as to all Soldiers involved. If a claim is brought against a member of one of the other military Services, forward the claim to the commander of the nearest major command of that Service equivalent to an ACOM or ASCC.

d. *Action by the special court-martial convening authority.*

(1) If the claim appears to be cognizable, the SPCMCA will appoint an investigating officer within 4 working days of receipt of a claim. The investigating officer will follow the procedures of this chapter, supplemented by DA Pam 27-162, chapter 9, and AR 15-6, chapter 4, which applies to informal investigations. The SPCMCA may appoint the claims officer of a command (if the claims officer is a commissioned officer) as the investigating officer. In cases where the special court-martial convening authority is an inactive duty Soldier of the USAR, the appointment of an investigating officer will be made within 30 calendar days.

(2) If the claim is not brought against a person who is a member of the Armed Forces of the United States at the time the claim is received, or if the claim does not appear otherwise cognizable under Article 139, UCMJ, the SPCMCA may refer it for legal review (see *g*, below) within 4 working days of receipt. If after legal review the SPCMCA determines that the claim is not cognizable, final action may be taken disapproving the claim (see *h*, below)

without appointing an investigating officer. In claims where the special court-martial convening authority is an inactive duty Soldier of the USAR, the request for a legal review may be made within 30 calendar days.

e. Expediting payment through Personnel Claims Act and Foreign Claims Act procedures. When assessment action on a particular claim will be unduly delayed, the claims office supporting the SPCMCA may consider the claim under the PCA, 31 U.S.C. § 3721, and chapter 11 of this regulation, or under the FCA, 10 U.S.C. § 2734, and chapter 10 of this regulation, as long as it is otherwise cognizable under that authority. If the Article 139 claim is later successful, the claims office will inform the claimant of the obligation to repay to the government any overpayment received under these statutes.

f. Action by the investigating officer. The investigating officer will notify the Soldier against whom the claim is made.

(1) If the Soldier wishes to make voluntary restitution, the investigating officer may, with the SPCMCA's concurrence, delay proceedings until the end of the next pay period to permit restitution. If the Soldier makes payment to the claimant's full satisfaction, the SPCMCA will dismiss the claim.

(2) In the absence of full restitution, the investigating officer will determine whether the claim is cognizable and meritorious under the provisions of Article 139, UCMJ, and this chapter, and the amount to be assessed against each offender. This amount will be reduced by any restitution the claimant accepts from an offender in partial satisfaction. Within 10 working days, or such time as the SPCMCA may determine, the investigating officer will submit written findings and recommendations to the SPCMCA.

(3) If the Soldier is absent without leave and cannot be notified, a claims office may process the Article 139 claim in the Soldier's absence. If an assessment is approved, a copy of the claim and the memorandum authorizing pay assessment will be forwarded by transmittal letter to the servicing Defense Accounting Office (DAO) for offset against the Soldier's pay. If the Soldier is dropped from the rolls, the servicing DAO will forward the assessment documents to: Commander, Defense Finance and Accounting Service (DFAS), ATTN: Military Pay Operations, 8899 E. 56th Street, Indianapolis, IN 46249.

g. Legal review. The SPCMCA will refer the claim for legal review to its servicing legal office upon either completion of the investigating officer's report or the SPCMCA's determination that the claim is not cognizable (see para *d*(2), above).

(1) Within 5 working days or such time as the SPCMCA determines, that office will furnish a written opinion as to:

(a) Whether the claim is cognizable under the provisions of Article 139, UCMJ, and this chapter.

(b) Whether the findings and recommendations are supported by a preponderance of the evidence.

(c) Whether the investigation substantially complies with the procedural requirements of Article 139, UCMJ; this chapter; DA Pam 27-162, chapter 9; and AR 15-6, chapter 4.

(d) Whether the claim is clearly not cognizable (see para *d*(2), above) and final denial action can be taken without appointing an investigating officer.

(2) If the investigating officer's recommended assessment does not exceed \$5,000, the CJA or claims attorney will, upon legal review, forward the claim to the SPCMCA for final action.

(3) If the investigating officer's recommended assessment is more than \$5,000, the CJA or claims attorney will, upon legal review, forward the claim file to the head of the ACO, who will also conduct a legal review within 5 working days.

(a) If the recommended assessment does not exceed \$10,000, the head of the ACO will forward the claim file to the GCMCA for final action.

(b) If the recommended assessment exceeds \$10,000, the head of the ACO will forward the claim file to the GCMCA for approval of an assessment up to \$10,000 and for a recommendation of an additional assessment. The head of the ACO will then forward the claims file and the GCMCA's recommendation to the Commander, USARCS for approval.

h. Final action. After consulting with the legal advisor, the approval authority will disapprove or approve the claim in an amount equal to, or less than, the amount of the assessment limitation. The approval authority is not bound by the findings or recommendations of the investigating officer; AR 15-6, paragraph 2-3a. The approval authority will notify the claimant, and any Soldier subject to that officer's jurisdiction, of the determination and the right of any party to request reconsideration (see para 9-9). A copy of the investigating officer's findings and recommendation will be enclosed with the notice. The approval authority will then suspend action on the claim for 10 working days pending receipt of a request for reconsideration, unless the approval authority determines that this delay will result in substantial injustice. If after this period the approval authority determines that an assessment is still warranted, the approval authority will direct the appropriate Defense Accounting Office (DAO) to withhold such amount from the Soldier's pay account (see para 9-7a). For any Soldier not subject to the approval authority's jurisdiction, the approval authority will forward the claim to the commander who exercises SPCMCA jurisdiction over the Soldier for assessment. The receiving SPCMCA is bound by the determination of the approval authority.

i. Assessment. Subject to any limitations set forth in appropriate regulations, the servicing DAO will withhold the amount directed by the approval authority and pay it to the claimant. The assessment is not subject to appeal and is binding on any finance officer. If the servicing DAO cannot withhold the required amount because it does not have

custody of the Soldier's pay record, the record is missing, or the Soldier is in a no-pay-due status, that office will promptly notify the approval authority of this fact in writing.

j. Remission of indebtedness. 10 U.S.C. § 4837, which authorizes the remission and cancellation of indebtedness of an enlisted person to the United States or its instrumentalities, is not applicable and may not be used to remit and cancel indebtedness determined as a result of action under Article 139, UCMJ.

9–9. Reconsideration

a. General. Although Article 139, UCMJ, does not provide for a right of appeal, either the claimant or a Soldier whose pay is assessed may request the approval authority (SPCMCA or GCMCA, depending on the amount assessed) or successor in command to reconsider the action. Either party must submit such a request for reconsideration in writing and clearly state the factual or legal basis for the relief requested. The approval authority may direct that the matter be reinvestigated.

b. Reconsideration by the original approval authority. The original approval authority may reconsider the action at any time while serving as the approval authority for the claim in question, even after the transfer of the Soldier whose pay was assessed. The original approval authority may modify the action if it was incorrect, subject to paragraph 9–9d. However, the approval authority should modify the action only because of fraud, substantial new evidence, errors in calculation, or mistake of law.

c. Reconsideration by a successor in command. Subject to paragraph 9–9d, a successor in command may modify an action only because of fraud, substantial new evidence, errors in calculation, or mistake of law apparent on the face of the record.

d. Legal review and action. Prior to modifying the original action, the approval authority will have the servicing claims office render a legal opinion and fully explain the basis for modification as part of the file. If the legal review agrees that a return of the assessed pay is appropriate, the approval authority should request in writing that the claimant return the money, setting forth in the letter the basis for the request. There is no authority for repayment from APF.

e. Disposition of files. After completing action on reconsideration, the approval authority will forward the reconsideration action to the servicing claims office, which will then file the action in accordance with paragraph 9–8h.

9–10. Additional claims judge advocate and claims attorney responsibilities

In addition to the duties set forth in this chapter, the CJA or claims attorney is responsible for forwarding copies of completed Article 139 actions to USARCS, maintaining a log, monitoring the time requirements of pending Article 139 actions, and publicizing the Article 139 program to commanders, Soldiers, and the community.