
NACDL: Engage & Exchange

PROFESSOR CORTNEY LOLLAR,
GEORGIA STATE UNIVERSITY COLLEGE OF LAW

MELINDA SARAFI,
SARAFI ZELLEN PLLC

EMPTY POCKETS AND EMPTY PROMISES:

*How Federal
Restitution Law
Fails Everyone*

Cortney E. Lollar



Victim and Witness Protection Act

(18 U.S.C. § 3663)

Criminal restitution no longer limited to "disgorgement of unlawful gain;" now includes compensation for losses, in a manner akin to civil damages

Restitution can be ordered for relevant conduct, or conduct that is not charged but part of a scheme, pattern, or conspiracy

A victim is a person, business, government agency who is "directly and proximately harmed" by the offense

In imposing restitution, the judge must take into consideration the amount of the losses sustained, the financial resources of the defendant, and other factors the court deems appropriate

Mandatory Victim Restitution Act

(18 U.S.C. § 3663A)

Restitution is now mandatory in any criminal case with an identifiable victim

The defendant is required to pay the "full amount" of the victim's losses, including remuneration for relevant conduct

Judges cannot take into consideration a defendant's ability (or inability) to pay

Judges can, and often do, order defendants jointly and severally liable for the restitution amount, although they can apportion it

Judges can order "community" restitution in cases with drug crimes, e.g., where the community is harmed

Amy, Andy & Vicky Act

(18 U.S.C. § § 2259, 2259A, 2259B)

A defendant convicted of a federal sex-related or domestic violence crime is required to pay the full amount of the victim's losses

Judges cannot take into consideration a defendant's ability (or inability) to pay

For a defendant convicted of trafficking in child pornography, the court must order the defendant to pay "no less than \$3,000" to any identifiable victim



Restitution calculations

- Government bears burden of establishing restitution amount by a preponderance of the evidence
- Restitution need not be calculated with “exact precision”; courts need only make a “reasonable determination” of the “appropriate” amount of restitution
- A court may apportion liability but is not required to – joint and several liability is common
- A court may only offset a restitution amount by the amount of a compensatory award in a parallel civil case

In sum...

- Under most federal statutes, restitution is mandatory for the full amount of the victim's losses
 - If a victim declines restitution, the court is still ordered to pay it
 - Money goes into the Treasury Department's Crime Victims Fund
- Judges cannot take into account a person's ability to pay
- Courts do not have to apportion liability, but they can
- Forfeited funds can be applied to restitution through "restoration"



**Returning Forfeited Assets
to Crime Victims:**
*An Overview of Remission
and Restoration*



DEFENDANT: Samuel Bankman-Fried

CASE NUMBER: 1:(S6)22-CR-673-001(LAK)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$ 700.00	\$	\$	\$	\$

- ☒ The Court declines to order restitution due to the complexity of the case and the number of victims. It instead grants the government's motion to authorize the United States to compensate victims with finally forfeited assets through a remission process, as restitution would be impractical in this case.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	----------------------	----------------------------	-------------------------------

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
---	--------------	-----------------------------	--

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
\$11,020,000,000, including the specific property identified in the Preliminary Order of Forfeiture.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVT A assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

Restitution: Procedural Issues

Restitution can be imposed at sentencing, but many judges push it off to a later date

No right to a restitution hearing and often, no hearing is held at all

Courts are split on whether a defendant has a right to be present at a standalone restitution hearing

By statute, restitution should be decided within 90 days of sentencing, but the Supreme Court has held a greater delay does not deprive the court of the power to order restitution

A judge can impose restitution “due and payable immediately,” or as a condition of supervised release

DEFENDANT: Yvette Wang
CASE NUMBER: S4 23 Cr. 118-3

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$ 200.00	\$	\$	\$	\$

☒ The determination of restitution is deferred until 4/7/2025. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	----------------------	----------------------------	-------------------------------

Court deferred decision on restitution until a later date (in this case when co-defendant was scheduled to be sentenced).

DEFENDANT: Samuel Bankman-Fried
CASE NUMBER: 1:(S6)22-CR-673-001(LAK)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$ 700.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Ask Court to impose restitution as condition of supervised release, as box E allows.

Restitution-related rights to assert

01

Ask for a restitution hearing – either at or after sentencing

02

Assert your client's right to be present under the Sixth Amendment and Federal Rule of Crim. Pro. 43

03

Assert your client's Sixth Amendment right to a jury trial on the restitution amount under *Apprendi*

Interest & Penalties



PENALTIES

Challenges to interest and penalties



Eighth Amendment excessive fines clause argument, both with regard to the restitution amount *and* the interest and penalties specifically



Anti-ruination principle argument based on majority and Justice Thomas's opinions in *Timbs v. Indiana* discussing how the excessive fines clause prohibits a financial penalty that deprives a person of their livelihood



Court is currently considering whether MVRA is punitive in *Ellingburg v. United States* – if Court says yes, strengthens Eighth Amendment argument *and* Sixth Amendment jury trial right argument

Termination of restitution obligations

By statute, federal criminal restitution debt is to expire the later of twenty years from the entry of the restitution order or the person's release from incarceration, whichever is later



Courts seem to be sua sponte extending terms



Argue violation of ex post facto clause – again, *Ellingburg*

Client counseling: Collateral consequences



Government has a lien on all your property and assets, and will garnish wages



Full restoration of rights is often dependent on finishing restitution obligation, not just carceral or S/R portion of sentence



Government has ongoing right to seek bank statements and other financial disclosures at will



Often, clerk's office cannot or will not provide an accounting of outstanding restitution obligations and payments made

Restitution remissions

OMB Control Number: 1123-0015

Expiration Date: 11/30/2026

PETITION FOR COMMUTATION OF SENTENCE

Relief sought:

☐ Reduction of prison sentence

☒ Reduction of prison sentence and
remission of fine/restitution

☐ Reduction of supervised release, probation, or parole

To the President of the United States:

The undersigned petitioner, a person subject to federal imprisonment or other restriction, asks for commutation of sentence and in support thereof states as follows: