

THE BASICS OF THE FEDERAL TORT CLAIMS ACT  
("FTCA")

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**I. INTRODUCTION.**

**A. STATUTES OF THE FTCA.**

1. 28 U.S.C. § 1346(b).
2. 28 U.S.C. § 1402(b).
3. 28 U.S.C. § 2401(b).
4. 28 U.S.C. § 2402.
5. 28 U.S.C. §§ 2671-2680.

**B. REGULATIONS OF THE FTCA.**

1. 28 C.F.R. §§ 14.1 - 14.11 (DOJ's regulations).
2. Most agencies have their own FTCA regulations, i.e., 32 C.F.R. Part 536 (Department of the Army), but the U.S. Attorney General's regulations prevail if there is a conflict.

**C. CAVEAT.**

1. This outline is not exhaustive.
2. There may be contrary or minority caselaw holdings on any given point.
3. Top reference sources are Lester S. Jayson's Handling Federal Tort Claims: Administrative and Judicial Remedies (1987) and recent ABA publication.

**D. BACKGROUND OF THE FTCA.**

1. Before 1946 the United States was immune from negligence suits per sovereign immunity.
2. FTCA provided a remedy for parties injured by government employee negligence.

3. Congress wished to avoid the burden of passing private relief bills for injured citizens.

## **E. SOME HIGHLIGHTS OF THE FTCA.**

1. Attorney fees are limited to 20% of an administrative settlement and 25% of a judgment or compromise settlement after suit is filed. It's a federal crime to charge, demand, receive or collect more than the specified amounts. 28 U.S.C. § 2678 (not more than one year imprisonment or \$2,000 fine or both).
2. The FTCA authorizes recovery for personal injury, death, or property damage caused by negligent federal government employees acting within the scope of their federal employment. 28 U.S.C. § 1346(b).
3. Government liability is determined by the law of the state where the act or omission occurred. 28 U.S.C. § 1346(b); Richards v. United States, 369 U.S. 1 (1962). The Government's liability is "in the same manner and to the same extent as a private individual under like circumstances ... ." 28 U.S.C. § 2674.
4. The waiver of sovereign immunity is limited and must be strictly construed in favor of continuing immunity. Congress and the courts have carved out exceptions and limitations to the government's liability. 28 U.S.C. § 2680; Feres v. United States, 340 U.S. 135 (1950).
5. Negligence claims are allowed, but generally not intentional torts or strict liability claims. 28 U.S.C. § 2680.
6. The FTCA is the exclusive money damages remedy for negligent acts or omissions of federal government employees acting within the scope of their federal employment. 28 U.S.C. § 2679.
7. Punitive damages are precluded. 28 U.S.C. § 2674.
8. Prejudgment interest damages are precluded. 28 U.S.C. § 2674.
9. Non-jury trial before a U.S. District Court judge only. 28 U.S.C. § 2402.
10. U.S. District Court has exclusive jurisdiction to hear FTCA claims. Wood v. United States, 961 F2d 195, 197 (Fed. Cir. 1992).
11. Claimant must present an administrative tort claim to the appropriate government agency for adjudication before filing suit in federal court. 28 U.S.C. § 2675(a).
12. FTCA plaintiff cannot demand or recover in federal court an amount greater than that submitted in the administrative tort claim without proof of newly discovered evidence or intervening facts relating to the amount of the claim. 28 U.S.C. § 2675(b).
13. FTCA statute of limitations requires claim be presented to the appropriate government agency within two years of accrual. 28 U.S.C. § 2401(b).
14. Claimant must file a federal court complaint within six months of the agency's denial of the administrative tort claim, or can file a federal court complaint anytime six months after presenting the claim if no agency action has been taken. 28 U.S.C. § 2401(b).

15. Venue is only authorized in the district where the plaintiff resides or where the act or omission occurred. 28 U.S.C. § 1402(b).

## **II. FTCA ADMINISTRATIVE TORT CLAIM REQUIREMENTS.**

### **A. EXHAUSTION OF ADMINISTRATIVE REMEDIES IS REQUIRED.**

1. The administrative remedies set forth in the FTCA scheme must be exhausted prior to filing suit. Exhaustion of FTCA administrative remedies is a jurisdictional requirement. A federal court complaint will be dismissed for lack of subject matter jurisdiction if the claimant has failed to exhaust his administrative remedies. Benston v. Evans, 2006 WL 487837 (4<sup>th</sup> Cir.(Md.)); Plyler v. United States, 900 F.2d 41 (4<sup>th</sup> Cir. 1990); Henderson v. United States, 785 F.2d 121, 123 (4<sup>th</sup> Cir. 1986); McNeil v. United States, 508 U.S. 106, 112 (1993).

### **B. WRITTEN NOTICE IS REQUIRED.**

1. Written notice of the administrative tort claim must be presented to the appropriate government agency. 28 U.S.C. § 2675(a). The standard method of notice is by the government's Standard Form 95 ("SF-95"), but any writing which contains the required elements of notice to the agency will suffice. The written claim must provide the agency sufficient notice so that it can conduct a proper investigation to determine liability, conduct settlement negotiations and assign value to the claim. State Farm v. United States, 2004 WL 1638175 (E.D.N.Y.); McNeil v. United States, 508 U.S. 106, 112 (1993).
2. The claimant does not have to state a cause of action in the administrative tort claim. Rise v. United States, 630 F.2d 1068 (5<sup>th</sup> Cir. 1980). However, a claimant's suit may be brought only on those facts and theories of liability raised in the administrative claim. Williams v. United States, 932 F.Supp. 357 (D.D.C. 1996) (claimant cannot "present one claim to the agency and then maintain suit on the basis of a different set of facts"); Bembenista v. United States, 866 F.2d 493 (D.C. Cir. 1989) (where only a sexual assault claim alleged in the SF-95s, failure to include allegations of medical malpractice therein bars an FTCA claim of medical malpractice); Burchfield v. United States, 168 F.3d 1252 (11<sup>th</sup> Cir. 1999); Bush v. United States, 703 F.2d 491, 495 (11<sup>th</sup> Cir. 1983) (failure to allege lack of informed consent in administrative claim bars the theory for FTCA recovery); contra, Frantz v. United States, 29 F.3d 222 (5<sup>th</sup> Cir. 1994) (administrative claim alleging medical negligence was sufficient notice of lack of informed consent claim even though not specifically stated therein).
3. Claimants with "derivative" claims must file an administrative claim separate from the underlying primary claim. Aziz ex re. Azizi v. United States, 338 F.Supp.2d 1057 (D.Neb. 2004) (loss of consortium claims barred for failure to exhaust); Manko v. United States, 830 F.2d 831 (8<sup>th</sup> Cir. 1987) (same); Harbury v. Hayden, 444 F.Supp.2d 19 (D.D.C. 2006) (same).
4. Class actions are allowed under the FTCA, but only if each member of the class has satisfied FTCA administrative tort claim requirements. Gollehon Farming v. United States, 17 F.Supp.2d 1145 (D.Mont. 1998) ("the FTCA require[s] claimants to have separately and individually satisfied all jurisdictional requirements"); Bates v. Tenco Services, Inc., 132 F.R.D. 160 (D.S.C. 1990) (Blatt, J.) (allowing only those plaintiffs of the class who filed separate administrative claims to pursue a claim under the FTCA).

5. FTCA personal injury claims may be submitted by the injured party, his duly authorized agent, or legal representative. 28 C.F.R. § 14.3(b); Mintz v. United States, 842 F.2d 1291 (Table case) (4<sup>th</sup> Cir. 1988).
6. The proper claimant in a wrongful death claim is one acting on behalf of the decedent, the estate, or the beneficiaries, as determined by state law. An appointment is not necessary to file an administrative claim, but is necessary in order to file suit. Dawson ex rel. Estate of Dawson v. United States, 333 F.Supp.2d 488 (D.S.C. 2004); Knapp v. United States, 844 F.2d 376 (6<sup>th</sup> Cir. 1988).
7. Regulations require additional information be provided to support the administrative claim. See 28 CFR § 14.4. The courts are split as to whether the lack of sufficient additional information supplied with claim as required by Section 14.4 is fatal to a claim. Davis v. United States, 2008 WL 3983342 (S.D.N.Y.) (additional information required to exhaust administrative remedies); Douglas v. United States, 658 F.2d 445 (6<sup>th</sup> Cir. 1991) (additional information not required to exhaust administrative remedies); Waddington v. United States, 2008 WL 2522430 (E.D.Pa.) (same).

**C. A SUM CERTAIN MUST BE DEMANDED.**

1. The written administrative tort claim must demand a sum certain in money damages. 28 C.F.R. § 14.2(a). Failure to have specified a sum certain at the administrative stage is a defect that deprives the court of subject matter jurisdiction over the action. Ahmed v. United States, 30 F.3d 514 (4<sup>th</sup> Cir. 1994); Kokotis v. U.S. Postal Service, 223 F.3d 275 (4<sup>th</sup> Cir. 2000); College v. United States, 572 F.2d 453 (4<sup>th</sup> Cir. 1978); Kokaras v. United States, 980 F.2d 20, 22 (1st Cir.1992); Dalrymple v. United States, 460 F.3d 1318 (11<sup>th</sup> Cir. 2006); 28 U.S.C. § 2675(b).
2. Claim demanding damages “in excess of \$1,500” was held to not be a sufficient sum certain. Montoya v. United States, 841 F.2d 102 (5<sup>th</sup> Cir. 1988); Gladden v. U.S. Department of Justice, 2001 WL 1018365 (10<sup>th</sup> Cir.) (administrative claim demanding “in excess of \$100,000” insufficient).
3. Claim of “\$1,088,135 and an additional amount yet to be ascertained” was too indefinite. Keene Corp. v. United States, 700 F.2d 836, 842 (2d Cir. 1983).
4. Demand of “compensation for any damages caused” without a specified amount is insufficient. Richalnd-Lexington Airport Dist. V. Atlas Properties Incl., 854 F.Supp. 400 (D.S.C. 1994).
5. Claims asking for approximate amounts have been considered sufficient, but the recovery has been limited to the approximated amount. Fallon v. United States, 405 F.Supp. 1320 (D.Mont. 1976).

**D. NOTICE MUST BE SIGNED BY CLAIMANT OR HIS REPRESENTATIVE.**

1. The written notice of a claim demanding a sum certain must be signed by the claimant or the claimant's representative. 28 C.F.R. § 14.2(a).
2. If one signs in a representative capacity, evidence of the representative's authority to sign on behalf of the claimant must be shown. 28 C.F.R. §14.3(e); Kanar v. United States, 118 F.3d 527 (11<sup>th</sup> Cir. 1997) (lack of timely evidence of representative capacity barred FTCA suit). The circuits are split on whether this is a jurisdictional defect. See Warren v. United States Dept. of Interior Bureau of Land Management, 724 F.2d 776 (9<sup>th</sup> Cir. 1984) (en banc) (discussing the conflict but holding that attorney's signature without proof of

his representative authority was a sufficient claim); Waddington v. United States, 2008 WL 2522430 (E.D.Pa.) (lack of timely evidence of representative capacity is not a jurisdictional defect).

#### **E. NOTICE MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY.**

1. Written notice of the administrative tort claim must be presented to the appropriate government agency. 28 U.S.C. § 2675(a).
2. Mailing is not "presenting." Drazan v. United States, 762 F.2d 56, 58 (7<sup>th</sup> Cir. 1985). Presentment is the date the agency receives a written administrative tort claim. 28 C.F.R. § 14.2(a).
3. The "appropriate federal agency" is not defined, but generally means the agency whose employees' acts or omissions caused the injuries which are the subject of the claim. Estrella v. United States, 2000 WL 33348249 (W.D.Tex.); Lotrionte v. United States, 560 F.Supp. 41 (S.D.N.Y.), aff'd, 742 F.2d 1436 (2<sup>d</sup> Cir. 1983).
4. In the event the wrong agency is presented with a claim, the regulations require that the receiving agency must transfer the claim forthwith to the appropriate agency and notify the claimant of the transfer. 28 C.F.R. § 14.2(b)(1).
5. The failure of an agency to transfer a claim to the appropriate agency will not extend the statute of limitations. Cronauer v. United States, 394 F.Supp.2d 93 (D.D.C. 2005); Lotrionte v. United States, 560 F.Supp. 41 (S.D.N.Y.), aff'd, 742 F.2d 1436 (2<sup>d</sup> Cir. 1983); contra, Blair v. United States, 1990 WL 113900 (D.Kan.) (when agency fails to timely transfer a timely filed claim to incorrect agency the claim was constructively presented); Bukala v. United States, 854 F.2d 201 (7<sup>th</sup> Cir. 1988) (government agency's failure to transfer misfiled claim to the appropriate agency may give rise to a "constructive" presentment). See Equitable Tolling section below. Cases finding constructive presentment generally involve negligence or tardiness on government's part in transferring the case. The closer to the end of the limitations period a claim is presented, the less likely the government will be faulted for failing to timely transfer the case.

#### **F. STATUTE OF LIMITATIONS.**

1. 28 U.S.C. § 2401(b) provides: "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues **or** unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."
2. For statute of limitations purposes, a claim is not perfected until the "appropriate" agency receives the claim; mailing is not "presenting." Drazan v. United States, 762 F.2d 56, 58 (7<sup>th</sup> Cir. 1985); 28 C.F.R. § 14.2(a).
3. After presenting the administrative claim, the claimant cannot file suit until the agency has had the claim for six months. The court lacks subject matter jurisdiction within six months of the submission of the claim and before the agency has made a final denial. McNeil v. United States, 113 S.Ct. 1980 (1993). When a suit is filed before final denial is received from the agency, it cannot be repaired by subsequent acts. Id.
4. After the agency has had the claim for six months and has not settled or denied it, the claimant may, at his option, deem the claim denied and file suit in federal court. 28 U.S.C. § 2675(a).

5. If the agency notifies the claimant by certified or registered mail of its decision to deny the claim, the claimant must file suit or request reconsideration within six months of the date of mailing of the letter or his action will be forever barred. 28 U.S.C. § 2401(b); 28 C.F.R. § 14.9(b).
6. Even though the FTCA, at 28 U.S.C. § 2401(b), bars a claim unless “an action is begun within six months” of denial of the claim, courts have required that the United States, as defendant, be served within the six month SOL period. Weisgal v. Smith, 774 F.2d 1277 (4<sup>th</sup> Cir. 1985) (service on the government must be made within the six month SOL – to hold otherwise would extend the SOL); Penn Millers Ins. Co. v. United States, 472 F.Supp.2d 705 (E.D.N.C. 2007); (same); Plourde v. U.S. Postal Service, 721 F.Supp. 218 (D.Minn. 1989). Fed.R.Civ.P. 2 (“A civil action is commenced by filing a complaint with the court.”)
7. If a plaintiff files a case in court against a federal agency or employee within two years of accrual of the claim, and the United States is substituted as the defendant and the action is dismissed for failure to exhaust administrative remedies per Section 2675(a), then the plaintiff can preserve claim by filing a tort claim with the appropriate agency with 60 days of dismissal. 28 U.S.C. § 2679(d)(5); Osborn v. Haley, 549 U.S. 225 (2007); Dockery v. Tucker, 2007 WL 5303009 (E.D.N.Y.).

#### **G. COMPUTATION OF TIME.**

1. Most circuits compute the two-year statute of limitations period of 28 U.S.C. § 2401(b) by applying FED. R. CIV. P. 6(a), excluding the day of the injury and including the last day of the two-year period, unless it falls upon a Saturday, Sunday, or holiday. Maahs v. United States, 840 F.2d 863 (11<sup>th</sup> Cir. 1987); Hart v. United States, 817 F.2d 78, 79 (9<sup>th</sup> Cir. 1987); Frey v. Woodard, 748 F.2d 173, 175 (3<sup>d</sup> Cir. 1984); United Mine Workers v. Dole, 870 F.2d 662 (D.C. Cir. 1989); United Van Lines v. Anderson, 802 F.Supp. 1399 (D.S.C. 1992).
2. Most circuits compute the six month statute of limitations of 28 U.S.C. § 2401(b) by beginning on the day after the government’s notice of denial is mailed and running through the day before the same calendar date six months later. Gervais by and Through Bremner v. United States, 865 F.2d 196 (9<sup>th</sup> Cir. 1988). Thus, a denial mailed on January 1<sup>st</sup> requires a claimant to either file a federal court action or request a reconsideration no later than July 1<sup>st</sup>. Santiago v. United States, 2004 WL 758196 (E.D.N.Y.); Hatchell v. United States, 776 F.2d 244 (9<sup>th</sup> Cir. 1985); Vernell v. United States Postal Service, 819 F.2d 108, 111 (5<sup>th</sup> Cir. 1987).

#### **H. ACCRUAL OF A CLAIM.**

1. An FTCA claim generally accrues at the time of the plaintiff’s injury. United States v. Kubrick, 444 U.S. 111, 120 (1979); Sexton v. United States, 832 F.2d 629 (D.C. Cir. 1987) (claim accrued upon son’s death, not when plaintiffs learned that other treatment could have been provided).
2. The Kubrick Court also recognized, but did not endorse, a “discovery rule” for the accrual of FTCA medical malpractice claims. TRW Inc. v. Andrews, 534 U.S. 19 (2001) (“we simply observed (without endorsement) that several Courts of Appeals had substituted injury-discovery for the traditional rule in medical-malpractice actions under the Federal Tort Claims Act”); Rotella v. Wood, 528 U.S. 549 (2000) (“we have recognized a prevailing discovery rule . . . in two contexts, latent disease and medical malpractice, ‘where the cry for [such a] rule is loudest.’”). Accrual of a claim occurs when the claimant knew or should have known that he

has been injured and who injured him. Accrual is not postponed until the claimant learns that the injury-causing act or omission was negligent. United States v. Kubrick, 444 U.S. 111, 123 (1979).

3. Accrual of an FTCA claim is determined by federal law, not state law. Erlin v. United States, 364 F.3d 1127 (9<sup>th</sup> Cir. 2004); J.I. v. United States, 2007 WL 983138 (W.D.Wash.).
4. Claim accrual is based upon an objective standard, to wit, “the discovery of sufficient facts about the injury and its cause to prompt a reasonable person to inquire” whether or not a claim exists. Skwira v. United States, 344 F.3d 64, 78 (1<sup>st</sup> Cir. 2003); Kubrick, 444 U.S. at 111; McIntyre v. United States, 367 F.3d 38 (1<sup>st</sup> Cir. 2004).
5. There is a split among the Circuits as to whether the “discovery rule” extends to FTCA claims other than medical malpractice cases. Johnston v. United States, 85 F.3d 217 (5<sup>th</sup> Cir. 1996) (“the circuits are split as to whether a discovery rule should be extended to wrongful death claims under the FTCA”); Dubose v. Kansas City S. Ry. Co., 729 F.2d 1026 (5<sup>th</sup> Cir.), cert. denied, 469 U.S. 854 (1984); Wehrman v. United States, 830 F.2d 1480, 1483 (8<sup>th</sup> Cir. 1987) (“claim accrues at the time of the plaintiff’s injury, but medical malpractice cases are an exception to this rule”); Wilkinson v. United States, 677 F.2d 998 (4<sup>th</sup> Cir.), cert. denied, 459 U.S. 906 (1982) (discovery rule not applied to Driver’s Act case, but noting that result would not change if it were applied).

## **I. EQUITABLE TOLLING OF A CLAIM MAY BE ALLOWED.**

1. In Irwin v. Veterans Affairs, 498 U.S. 89 (1990), the Supreme Court held limitations included in waivers of sovereign immunity would be subject to equitable tolling unless Congress specifically precluded such tolling.
2. If the government’s negligence caused the plaintiff’s mental incapacity to understand the significance of the relevant facts, tolling may be allowed. Washington v. United States, 769 F.2d 1436 (9<sup>th</sup> Cir. 1985); contra, Barren v. United States, 839 F.2d 987 (3<sup>d</sup> Cir. 1988) (tolling refused even when incapacity caused by government conduct).
3. Government’s continuing tortious conduct or continuous medical treatment may delay accrual of the claim. Otto v. National Institute of Health, 815 F.2d 985 (4<sup>th</sup> Cir. 1987) (“doctrine is based on a patient’s right to place trust and confidence in his physician” and “the patient is excused from challenging the quality of care being rendered until the confidential relationship terminates”); Wehrman v. United States, 830 F.2d 1480 (8<sup>th</sup> Cir. 1987).
4. Government’s active or fraudulent concealment of its role in the injury causing event may toll the statute of limitations. Muth v. United States, 1 F.3d 246 (4<sup>th</sup> Cir. 1993); Bennett ex rel. Estate of Bennett v. United States, 429 F.Supp.2d 270 (D.Mass. 2006); Valdez ex rel. Donely v. United States, 518 F.3d 173 (2<sup>d</sup> Cir. 2008) (government misconduct or concealment not necessary to invoke doctrine of equitable tolling).
5. Government physicians’ reassurances that medical complications experienced by the plaintiff are normal may delay the plaintiff’s knowledge of his injury and toll the statute of limitations. Dearing v. United States, 835 F.2d 226 (9<sup>th</sup> Cir. 1987).

6. Ignorance of the injury and/or its cause because of a claimant's lack of diligence does not delay accrual of the claim; if the cause is unknowable despite the claimant's diligence, accrual may be delayed. Skwira v. United States, 344 F.3d 64, 78 (1<sup>st</sup> Cir. 2003); Kronisch v. United States, 150 F.3d 112 (2<sup>d</sup> Cir. 1998).

## **J. EQUITABLE TOLLING NOT ALLOWED.**

1. Infancy does not toll the FTCA statute of limitations. Schappacher v. United States, 475 F.Supp.2d 749 (S.D.Ohio 2007) (parents' knowledge of claim is imputed to child); McCall v. United States, 310 F.3d 984 (3<sup>d</sup> Cir. 1995) (infant rendered mentally incompetent by government negligence not entitled to tolling); Papa v. United States, 281 F.3d 1004, 1011 (9<sup>th</sup> Cir. 2002); Crawford v. United States, 796 F.2d 924, 927 (7<sup>th</sup> Cir. 1986); J.I. v. United States, 2007 WL 983128 (W.D.Wash.); contra, Albright v. Keystone Rural Health Center, 320 F.Supp.2d 286 (M.D.Pa. 2004).
2. Incompetency does not toll the FTCA statute of limitations. McCall v. United States, 310 F.3d 984 (3<sup>d</sup> Cir. 1995); Robbins v. United States, 624 F.2d 971, 972 (10<sup>th</sup> Cir. 1980); Chomic v. United States, 377 F.3d 607 (7<sup>th</sup> Cir. 2004).
3. Insanity does not toll the FTCA statute of limitations. Jackson v. United States, 234 F.Supp. 586 (E.D.S.C. 1964); Casias v. United States, 532 F.2d 1339, 1342 (10<sup>th</sup> Cir. 1976).

## **III. THE FTCA CLAIM IN FEDERAL COURT.**

### **A. SERVICE OF PROCESS.**

1. Rule 4(i)(1) of the Federal Rules of Civil Procedure requires service of a copy of the summons and of the complaint on both the Attorney General and U.S. Attorney for the district in which the action is brought. Service upon the U.S. Attorney may be accomplished by serving the Assistant U.S. Attorney or clerical staff designated in writing with the court, or by registered or certified mail to:

U. S. Attorney for the District of S.C.  
Attention: Civil Process Clerk  
First Union Building, Suite 500  
1441 Main Street  
Columbia, S.C. 29201

Service upon the Attorney General is accomplished by registered or certified mail to:

Attorney General of the United States  
Department of Justice  
Room 5111  
10th & Constitution Avenue, NW  
Washington, D.C. 20530

### **B. CONTROLLING SUBSTANTIVE LAW.**

1. The FTCA provides that the law of the state where the act or omission occurred determines the liability of the United States. 28 U.S.C. § 1346(b).

2. The “law of the state” is the whole law, including the state's choice of law rules. Richards v. United States, 369 U.S. 1 (1962).
3. The substantive tort law of the state determines whether the plaintiff has a valid cause of action. Henderson v. United States, 846 F.2d 1233 (9<sup>th</sup> Cir. 1988).
4. If the state law does not permit recovery under the circumstances, the United States will not be liable. Iodice v. United States, 289 F.3d 270 (4<sup>th</sup> Cir. 2002) (North Carolina law barred recovery by a non-patient for medical malpractice so like claim against the government barred); Corrigan v. United States, 815 F.2d 954 (4<sup>th</sup> Cir.), cert. denied, 484 U.S. 926 (1987) (Virginia law barred recovery under dram shop theory so like claim against the government was barred); United States v. Olson, 546 U.S. 43 (2005).
5. Claims of violation of federal regulations will be barred unless the duties imposed by the regulations are analogous to those imposed by the state's tort law. Art Metal-U.S.A., Inc. v. United States, 753 F.2d 1151, 1157 (D.C. Cir. 1985) (D.C. law provided no negligence claim analogous to violation of federal regulation so claim barred); Hornbeck Offshore Transp., LLC v. United States, 2008 WL 2580865 (D.D.C.) (same); Chen v. United States, 854 F.2d 622 (2<sup>d</sup> Cir. 1988) (New York law provided no private party analog to government’s debarment of contractor); Cecile Indus., Inc. v. United States, 793 F.2d 97 (3<sup>d</sup> Cir. 1986) (Pennsylvania law provided no private party analog to government’s de facto debarment of contractor); Moody v. United States, 774 F.2d 150, 156-58 (6<sup>th</sup> Cir. 1985), cert. denied, 107 S.Ct. 65 (1986) (federal regulations promulgated for the government's benefit and not for the protection of the individual barred plaintiff’s voluntary undertaking claim); Gammill v. United States, 727 F.2d 950 (10<sup>th</sup> Cir. 1984) (Colorado law provided no private cause of action for failure to report communicable diseases so government not liable even though Army regulation required such reporting).
6. The United States may claim the benefit of state limitations on the liability of private parties. Starnes v. United States, 923 F.2d 34 (4<sup>th</sup> Cir. 1991) (Virginia’s medical malpractice cap applied to federal government); Taylor v. United States, 821 F.2d 1428 (9<sup>th</sup> Cir. 1987), cert. denied, 108 S.Ct. 1300 (1988) (California’s cap on noneconomic damages in professional negligence cases applied to the United States); Hegg v. United States, 817 F.2d 1328 (8<sup>th</sup> Cir. 1987) (Iowa’s recreational use statute applied to the United States for injuries of recreational user of federal property); Insurance Co. of North America v. United States, 643 F.Supp. 465 (M.D.Ga. 1986) (government was a statutory employer under state worker's compensation statute thus immune from third-party claims for contribution and indemnity); Glover v. United States, 2:96-cv-2450-PMD (D.S.C.) (government failed to satisfy statutory employer requirements and could not take advantage of the defense).
7. The FTCA does not waive sovereign immunity as to strict liability claims. Even if state law would permit recovery under a strict liability theory, the United States is immune. Laird v. Nelms, 406 U.S. 797 (1972); Craine v. United States, 722 F.2d 1523 (11<sup>th</sup> Cir. 1984).
8. The FTCA does not waive sovereign immunity for federal constitutional or federal statutory torts. Freeman v. U.S. Dept. of Homeland Sec., 2007 WL 1296206, fn.4 (E.D.La.); Castro v. United States, 775 F.2d 399 (1<sup>st</sup> Cir. 1985), abrogated on other grounds, Stevens v. Department of Treasury, 500 U.S. 1 (1991) (violations of Title VII and the constitution are not cognizable under the FTCA).

### C. AVAILABLE RELIEF.

1. Relief is limited to money damages; equitable relief is not available under the FTCA. Peck v. Bessing, 2006 WL 213736 (N.D.Cal.); Ajaj v. United States, 479 F.Supp.2d 501 (D.S.C. 2007).
2. The amount of recovery cannot exceed the amount claimed in the administrative claim unless “the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.” 28 U.S.C. § 2675(b); Cole v. United States, 861 F.2d 1261 (11<sup>th</sup> Cir. 1988).
3. Punitive damages are prohibited. 28 U.S.C. § 2674.
4. Prejudgment interest damages are prohibited. 28 U.S.C. § 2674.

#### **D. PROPER DEFENDANT.**

1. The United States is the only proper defendant in an FTCA action. Agencies may not be named as parties *eo nomine*. If an offending federal employee or agency is named as a party in an FTCA suit, the United States shall be substituted as the sole defendant. 28 U.S.C. § 2679.
2. Other statutes prohibiting suits against federal employees:
  - a. Public Health Service medical personnel (42 U.S.C. § 233(a)) (FTCA action is the exclusive remedy for torts by PHS personnel acting within the scope of employment); Robles v. Beaufort Memorial Hosp., 482 F.Supp.2d 700 (D.S.C. 2007).
  - b. Department of Veterans Affairs medical personnel (38 U.S.C. § 7316) (Remedy provided by the FTCA or other federal programs regarding claims “allegedly arising from malpractice or negligence of a health care employee of the [Veteran’s] Administration in furnishing health care or treatment while in the exercise of that employee's duties in or for the [Veteran’s] Administration shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the health care employee (or employee's estate) whose act or omission gave rise to such claim.”); Richardson v. Department of Veteran Affairs, 2006 WL 1348392 (W.D.Wash.) (“all claims for willful or negligent conduct by DVA personnel are encompassed within FTCA and veterans-benefits statutes”)
  - c. Military medical personnel (10 U.S.C. § 1089) (“The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, ... caused by the negligent or wrongful act or omission of any physician ... in the performance of medical, dental, or related health care functions ... while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician ... whose act or omission gave rise to such action or proceeding.”).
  - d. State Department medical personnel (22 U.S.C. § 2702). (Remedy provided by the FTCA or other federal programs regarding claims “allegedly arising from malpractice or negligence of a physician, dentist, nurse, pharmacist, or paramedical (including medical and dental assistants and technicians, nursing assistants, and therapists) or other supporting personnel of the Department of State in furnishing medical care or related services, including the conducting of clinical studies or investigations, while in the exercise of his or her duties in or for the Department of State or any other Federal department, agency, or instrumentality shall be

exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or his or her estate) whose act or omission gave rise to such claim.”)

- e. NASA medical personnel (42 U.S.C. § 2458a). (Remedy provided by the FTCA regarding claims allegedly “caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of [NASA] in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding. Jarrett v. United States, 874 F.2d 201 (4<sup>th</sup> Cir. 1989) (noting “exclusive” administrative remedy for claims of personal injury or death from the negligence of NASA’s medical personnel is provided in 42 U.S.C. § 2458a).

## **E. SCOPE OF EMPLOYMENT OF THE TORTFEASOR.**

1. The tortfeasor must be a federal employee acting within the course and scope of his federal employment. 28 U.S.C. §§ 1346(b)(1), 2675, 2672 and 2679.
2. Federal law determines whether a given individual is an employee of the United States. The test to determine if an individual is an employee of the government is the "right to control the details of the day-to-day performance of duty" of the employee. United States v. Orleans, 425 U.S. 807 (1976); Logue v. United States, 412 U.S. 521 (1973).
3. The United States has no liability for acts or omissions of its independent contractors. 28 U.S.C. § 2671.
4. State tort law determines whether a given employee was acting within the course and scope of his federal employment. Williams v. United States, 350 U.S. 857 (1955).
5. The test applied in South Carolina to determine if an act is within an employee's scope of employment is whether it is reasonably necessary to accomplish the purpose of his employment and in furtherance of the master’s business. Adams v. South Carolina Power Co., 200 S.C. 438, 21 S.E.2d 17 (1942); Morris v. Mooney, 288 S.C. 447, 343 S.E.2d 442 (1986); Wade v. Berkeley County, 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998).
6. If a federal employee commits an intentional tort such as rape or assault, the employee has acted outside the scope of his employment and not in furtherance of his master's business. Thigpen v. United States, 618 F.Supp. 239 (D.S.C. 1985), aff’d, 800 F.2d 393 (4<sup>th</sup> Cir. 1986) (sexual assault not within the scope of federal employment).

## **F. FTCA STATUTORY BARS TO RECOVERY PER 28 U.S.C. § 2680.**

1. Discretionary Function (28 U.S.C. § 2680(a)). Government policy decisions cannot be subjected to a tort suit. If the nature and quality of the actions in question are discretionary, to wit, involves an agency’s political, social, and economic judgments, the cause of action is barred by the discretionary function exception. United States v. Varig Airlines, 467 U.S. 797 (1984); Medina v. United States, 259 F.3d 220 (4<sup>th</sup>

Cir. 2001) (decision to arrest is a discretionary function); Hinsely v. Standing Rock Child Protective Services, 516 F.3d 668 (8<sup>th</sup> Cir. 2008) (decision to place former child molester in foster home without warning host family of past abuse was discretionary); Mercado Del Valle V. United States, 856 F.2d 406 (1<sup>st</sup> Cir. 1988) (decision to not supervise ROTC organization was discretionary function – no liability for death in hazing incident); Bowman v. United States, 820 F.2d 1393 (4<sup>th</sup> Cir. 1987) (decision to not place guardrail along roadway was exercise of agency discretion); Shuler v. United States, 2008 WL 2728932 (D.C. Cir.) (decision regarding the scope of protection afforded to a confidential informant was discretionary).

- a. The exception applies even when the decisions are intentionally or negligently made or the discretion is abused. United States v. Gaubert, 499 U.S. 315 (1991); Scanwell Laboratories, Inc. v. Thomas, 521 F.2d 941 (D.C. Cir. 1975).
  - b. For the exception to apply, however, there must be room for the exercise of policy judgment by the federal employee. When statutes, policy, or mandatory regulations dictate the actions of employees, there is no discretion to deviate from the prescribed course of action and the exception does not apply. Berkovitz v. United States, 108 S.Ct. 1954 (1988); Shuler v. United States, 2008 WL 2728932 (D.C. Cir.).
  - c. Day-to-day management activities are exempted so long as they involved an element of policy or choice. Gaubert v. United States, 111 S.Ct. 1267 (1991).
2. Execution of Statutes and Regulation with Due Care (28 U.S.C. § 2680(a)). Government acts executed with due care in compliance with federal statutes or regulations cannot be subjected to a tort suit. United States v. Varig Airlines, 467 U.S. 797 (1984).
- a. Due care test is two-fold: (1) determine whether the statute, regulation or policy specifically mandates a course of action for an officer to follow, and (2) if a specific action is mandated, determine whether the officer exercised due care in following the dictates of that statute, regulation or policy. Welch v. United States, 409 F.3d 646 (4<sup>th</sup> Cir. 2005) (INS officers’ decision to detain alien felon barred FTCA claim under the due care exception – no complaint that officers lacked due care in executing the detention of plaintiff); Crumpton v. Stone, 59 F.3d 1400 (D.C. Cir. 1995) (FOIA release was not a mandated action).
  - b. Such claims are exempted regardless of the validity of the statute or regulation. If the claim attempts to test the legality of a statute, regulation or policy, as opposed to the actions of the employees executing it, the claim will be barred. Welch v. United States, 409 F.3d 646 (4<sup>th</sup> Cir. 2005); Borquez v. United States, 773 F.2d 1050 (9<sup>th</sup> Cir. 1985); Doe v. Stephens, 851 F.2d 1457 (D.C. Cir. 1988); Baie v. Secretary of Defense, 784 F.2d 1375 (9<sup>th</sup> Cir.), cert. denied, 107 S.Ct. 92 (1986); Moody v. United States, 774 F.2d 150 (6<sup>th</sup> Cir. 1985).
  - c. Federal, not state law, determines whether the government employee exercised “due care” in the execution of the federal statute, regulation or policy. Hydrogen Technology Corp. v. United States, 831 F.2d 1155 (1<sup>st</sup> Cir. 1987), cert. denied, 486 U.S. 102 (1988).
3. Postal Transmission Claims (28 U.S.C. § 2680(b)). Claims arising out of the loss, miscarriage, or negligent transmission of letters or postal matters are barred. Watkins v. United States, 2003 WL 1906176 (N.D.Ill.); Bono v. United States, 145 F.Supp.2d 441 (D.N.J. 2001).

4. Tax or Customs Duty Collection Claims (28 U.S.C. § 2680(c)). Claims arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, are barred. There is an exception for certain forfeiture seizures. Perez v. United States, 2007 WL 1489816 (D.N.J.); Schreiber v. United States, 1997 WL 563338 (S.D.N.Y.)
5. Admiralty Claims (28 U.S.C. § 2680(d)). Admiralty or maritime claims, covered by the Suits in Admiralty Act (46 U.S.C. § 30901, et seq.) or the Public Vessels Acts (46 U.S.C. § 31101, et seq.), are barred from recovery under the FTCA. Maritime torts occur on navigable waters and bear a significant relationship to traditional maritime activities. Grubart v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995); McCormick v. United States, 680 F.2d 345 (5<sup>th</sup> Cir. 1982); Espinosa v. United States, 2005 WL 3670921 (S.D.Cal.) (government dredge causing property damage was a maritime claim); Miller v. United States, 725 F.2d 1311 (11<sup>th</sup> Cir.), cert. denied, 469 U.S. 821 (1984) (airplane crash in international waters was admiralty claim because the trip was traditionally accomplished by ship); Mayeux v. U.S. Army Corps of Engineers, 149 F.3d 1180 (5<sup>th</sup> Cir. 1998).
6. Trading With the Enemy Act Claims (28 U.S.C. § 2680(e)). Claims arising out of an act or omission of any employee of the Government in administering the provisions of the Trading with the Enemy Act (50 U.S.C. § 1, et seq.) are barred. Price v. United States, 69 F.3d 46 (5<sup>th</sup> Cir. 1995); Schilling v. Rogers, 363 U.S. 666 (1960).
7. Quarantine Claims (28 U.S.C. § 2680(f)). Claims for damages caused by the imposition or establishment of a quarantine by the United States are barred. Molzof v. United States, 502 U.S. 301 (1992); Rey v. United States, 484 F.2d 45 (5<sup>th</sup> Cir. 1973).
8. Intentional Tort Claims (28 U.S.C. § 2680(h)). Claims for the following intentional torts are generally barred:
  - Assault. Doe v. United States, 618 F.Supp. 503 (D.S.C. 1984).
  - Battery. Raikes v. United States, 2007 WL 546652 (N.D.W.Va.).
  - False imprisonment. Bounds v. U.S. District Court, 2007 WL 1169377 (S.D.La.).
  - False arrest. Lazo v. United States, 2007 WL 2948342 (S.D.N.Y.).
  - Malicious prosecution. Hobley v. United States, 2007 WL 1821157 (D.D.C.).
  - Abuse of process. Leroy v. Parker, 2007 WL 734396 (E.D.La.).
  - Libel. Herlik v. United States, 2008 WL 700173 (D.Colo.).
  - Slander. Diminnie v. United States, 728 F.2d 301 (6<sup>th</sup> Cir. 1984).
  - Misrepresentation. Fina Air Inc. v. United States, 2008 WL 2191283 (D.P.R.).
  - Deceit. Saks, Inc. v. United States, 218 Fed.Appx. 350 (5<sup>th</sup> Cir. 2007).

- Interference with contract rights. Vitrano v. United States, 2008 WL 1752221 (S.D.N.Y.).
- a. However, when an assault, battery, false arrest, abuse of process or malicious prosecution is committed by federal investigative or law enforcement officers, sovereign immunity is waived. 28 U.S.C. § 2680(h).
  - b. Military police are federal law enforcement officers for FTCA purposes. Kennedy v. United States, 585 F.Supp. 1119 (D.S.C. 1984). Base exchange security guards are not federal law enforcement officers. Solomon v. United States, 559 F.2d 309 (5<sup>th</sup> Cir. 1977).
  - c. When the basis of the claim is not related to the tortfeasor's employment status, i.e., the tortfeasor was either not a federal employee or was not within the scope of his employment, and the government owes a duty under state law to prevent a foreseeable harm, the claim is not barred. Sheridan v. United States, 108 S.Ct. 2449 (1988); Bembenista v. United States, 866 F.2d 493 (D.C. Cir. 1989) (government liable for medical corpsman's sexual assault on patient when state law imposed a duty on hospitals to protect patients against foreseeable criminal acts of third parties); Doe v. United States, 838 F.2d 220 (7<sup>th</sup> Cir. 1988) (government liable for sexual assault on children in agency day care center due to its breach of duty to supervise and protect the children from harm).
  - d. If the tortfeasor is a federal employee, and the injuries "arise out of" an assault and battery, a plaintiff cannot plead his way around the bar by characterizing the claim as one of negligent supervision of the tortfeasor. Doe v. United States, 618 F.Supp. 71 (D.S.C. 1985) (cannot escape bar "by merely labeling the cause of action something which it is not"); Hughes v. United States, 662 F.2d 219 (4<sup>th</sup> Cir. 1981); Doe v. United States, 618 F.Supp. 503 (D.S.C. 1984), aff'd, 769 F.2d 174 (4<sup>th</sup> Cir. 1985); Thigpen v. United States, 618 F.Supp. 239, 244-245 (D.S.C. 1985); contra, J.I. v. United States, 2007 WL 983138 (W.D.Wash.) (negligent supervision claim arising out of assault and battery is not barred).
  - e. The misrepresentation exception bars claims for negligent as well as intentional misrepresentations. United States v. Neustadt, 366 U.S. 696, 702 (1961). The exception does not bar claims that have a basis separate from the misrepresentations. Block v. Neal, 460 U.S. 289, 298 (1983).
  - f. The "interference with contract rights" exception precludes a claim based upon either interference with an existing contractual relationship or a prospective economic relationship. Appleton v. United States, 69 F.Supp.2d 83 (D.D.C. 1999); Art Metal-U.S.A., Inc. v. United States, 753 F.2d 1151 (D.C. Cir. 1985); Moessmer v. United States, 760 F.2d 236 (8<sup>th</sup> Cir. 1985); Chen v. United States, 854 F.2d 622 (2<sup>d</sup> Cir. 1988); Shipkovitz v. Mosbacher, 1991 WL 251864 (D.D.C.).
  9. Treasury Activity Claims (28 U.S.C. § 2680(i)). Claims for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system are barred. United States v. Johnson, 481 U.S. 681 (1987); In re Franklin Nat. Bank securities Litigation, 445 F.Supp. 723 (D.C.N.Y. 1978) (exception does not apply to bank examinations); Molzof v. United States, 502 U.S. 301 (1992); Renobato v. Bureau of Public Debt, 250 F.3d 739 (5<sup>th</sup> Cir. 2001).
  10. Combatant Activity Claims (28 U.S.C. § 2680(j)). Claims arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war are barred. Clark v. United States, 974 F.Supp. 895 (E.D.Tex. 1996). There does not have to be a formal declaration of war for the exclusion to apply. Koohi v. United States, 976 F.2d 1328 (9<sup>th</sup> Cir. 1992); Rotko v. Abrams, 338 F.Supp. 46 (D.Conn.

1971), aff'd, 455 F.2d 992 (2<sup>d</sup> Cir. 1972); Minns v. United States, 974 F.Supp. 500 (D.Md. 1997); Morrison v. United States, 316 F.Supp. 78 (M.D.Ga. 1970).

11. Foreign Country Claims (28 U.S.C. § 2680(k)). Claims arising in a foreign country are barred. Eaglin v. United States, 794 F.2d 981 (5<sup>th</sup> Cir. 1986) (claim which arose from acts in West Germany barred); De Sanchez v. United States, 203 F.3d 830 (9<sup>th</sup> Cir. 1999) (Table case) (claim which arose from acts in Mexico barred); Laskero v. Moyer, 1990 WL 93276 (N.D.Ill.) (claim which arose from acts in England barred); Grunch v. United States, 538 F.Supp. 534 (E.D.Mich. 1982). Congress did not want the liability of the United States determined by the laws of a foreign country.
  - a. If an injury occurred in a foreign country but the negligent act or omission occurred in the United States, the claim is not barred. Bryson v. United States, 463 F.Supp. 908 (E.D.Pa. 1978) (“the place where the act or omission occurred” is “the place where the claim arises”); In re Paris Air Crash, 399 F.Supp. 732 (C.D.Cal. 1975).
  - b. A “foreign country” includes locations subject to the sovereignty of another nation. Thus, U.S. military bases located overseas have been held to be foreign countries within the meaning of the FTCA. United States v. Spelar, 338 U.S. 217 (1949) (Air Force base on leased property in Newfoundland); Bryson v. United States, 463 F.Supp. 908 (E.D.Pa. 1978) (Army barracks in West Germany); Smith v. United States, 507 U.S. 197 (1993) (FTCA does not waive immunity for torts arising in Antarctica).
12. Tennessee Valley Authority Claims (28 U.S.C. § 2680(l)). Claims arising from the activities of the Tennessee Valley Authority are barred. Brewer v. Sheco Const. Co., 327 F.Supp. 1017 (D.C.Ky. 1971) (negligence claims against the TVA are barred but not strict liability claims); Smith v. Tennessee Valley Authority, 436 F.Supp. 151 (D.C.Tenn. 1977); North Carolina ex rel. Cooper v. Tennessee Valley Authority, 439 F.Supp.2d 486 (W.D.N.C. 2006); Painter v. Tennessee Valley Authority, 476 F.2d 943 (5<sup>th</sup> Cir. 1973).
13. Panama Canal Company Claims (28 U.S.C. § 2680(m)). Claims arising from activities of the Panama Canal Company are barred. Galapagos Corporacion Turista “Galatours”, S.A. v. Panama Canal Commission, 205 F.Supp.2d 573 (E.D.La. 2002); De Scala v. Panama Canal Co., 222 F.Supp. 931 (D.C.N.Y. 1963); Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Inst., 566 F.2d 289, 297 (D.C. Cir. 1977).
14. Federal Bank Claims (28 U.S.C. § 2680(n)). Claims arising from activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives are barred. Sterrett v. Milk River Production Credit Ass’n, 647 F.Supp. 299 (D.Mont. 1986).

## **G. OTHER STATUTES AFFECTING RECOVERY AGAINST THE GOVERNMENT.**

1. The federal workers compensation act is the exclusive remedy for their on the job injuries. Federal Employees' Compensation Act (“FECA”), 5 U.S.C. §§ 8101 - 8151. Heilman v. United States, 731 F.2d 1104 (3<sup>d</sup> Cir. 1984).
2. The Longshoreman's and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901 - 950; 5 U.S.C. § 8173, covers some claims not covered by FECA, and is the exclusive remedy. Vilanova v. United States, 851 F.2d 1 (1<sup>st</sup> Cir. 1988) (“LHWCA compensation is Vilanova's exclusive remedy against the United States.”)

3. Flood Control Operations Claims (33 U.S.C. § 702c) (“No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place ...”); Craan v. U.S. Army Corps of Engineers, 2008 WL 62200 (E.D.Cal.).
4. Patent Infringement Claims (28 U.S.C. § 1498, 22 U.S.C. § 2356)(provides exclusive remedy for those patent infringement claims alleged against the United States government).
5. Non-Resident Enemy Aliens Claims in Time of War (50 U.S.C. § 7(b)). Sundell v. Lotmar Corporation, 44 F.Supp. 816 (D.C.N.Y. 1942) (“The Trading With the Enemy Act prohibiting a nonresident enemy alien or ally of an enemy alien from prosecuting an action in United States courts applies to both commercial and tort actions.”).
6. Compensation from Federal Prison Industries Fund (18 U.S.C. § 4126). Vander v. U.S. Dept. of Justice, 268 F.3d 661 (9<sup>th</sup> Cir. 2001) (“The Prison Industries Fund is the sole source of compensation for an injury sustained by prisoner in connection with work activity at prison; its remedy is exclusive.”); United States v. Demko, 385 U.S. 149 (1966).
7. Postal Reorganization Act (39 U.S.C. § 1001, *et seq.*). Biermann v. United States, 67 F.Supp.2d 1057 (E.D.Mo. 1999).
8. Status of Forces Agreements (*see* Agreement Between Israel and the United States on the Status of United States Personnel, January 22, 1991, U.S.-Isr., State Dept. No. 94-63, 1994 WL 82665). Moore v. United Kingdom, 384 F.3d 1079 (9<sup>th</sup> Cir. 2004) (“Litigation against members of foreign military forces who are within the United States (and against members of the U.S. military abroad) is guided by so-called status-of-forces agreements, or “SOFAs.”).
9. Veterans Administration Benefits are the exclusive remedy for service-connected injuries. Muniz v. United States, 374 U.S. 150 (1963); Parker v. United States, 611 F.2d 1007 (1980).
10. The Anti-Assignment Act (31 U.S.C. § 3727) bars recovery for assigned claims against the government.

#### **H. JUDICIALLY IMPOSED BAR TO FTCA RECOVERY – THE FERES DOCTRINE.**

1. The “Feres” doctrine prohibits servicemembers who are injured “incident to service” from maintaining an FTCA action. Feres v. United States, 340 U.S. 135 (1950); Bradley v. United States, 161 F.3d 777, 778 (4<sup>th</sup> Cir. 1998).
2. Factors to determine whether injury was “incident to service” pursuant to Feres doctrine:
  - a. The site of the injury. An injury occurring on a military base is more likely to be barred as incident to service as opposed to an injury occurring off-base. Shaw v. United States, 854 F.2d 360 (10<sup>th</sup> Cir. 1988); Stewart v. United States, 90 F.3d 102 (4<sup>th</sup> Cir. 1996); Bon v. United States, 802 F.2d 1092 (9<sup>th</sup> Cir. 1986); Pringle v. United States, 208 F.3d 1220 (10<sup>th</sup> Cir. 2000); Torres-Morales v. United States, 537 F.Supp.2d 291 (D.P.R. 2007) (injuries from an on-base arrest were incident to service).

- b. The nature of the plaintiff's activities at the time of the injury. The claim will be barred if the plaintiff was performing military duties at the time of the injury. United States v. Johnson, 107 S.Ct. 2063 (1987); Bradley v. United States, 161 F.3d 777, 778 (4<sup>th</sup> Cir. 1998).
  - c. The duty status of the plaintiff at the time of the injury. Unless a plaintiff is on actual leave away from the base and not engaged in any military duty, he is usually found to be acting incident to service. Warner v. United States, 720 F.2d 837 (5<sup>th</sup> Cir. 1983); Stewart v. United States, 90 F.3d 102 (4<sup>th</sup> Cir. 1996). Being off-duty or on pass is more likely to be incident to service than being on leave or furlough. Flowers v. United States, 764 F.2d 759 (11<sup>th</sup> Cir. 1985); Starke v. United States, 249 Fed.Appx. 774 (11<sup>th</sup> Cir. 2007) (claim of off-duty officer injured while playing golf on military base course was Feres barred); Kielty v. Ali, 2008 WL 2783340 (D.N.J.) (alleged defamation by supervising officer occurred in military context and was incident to service).
  - d. Benefits received by the plaintiff. If the servicemember receives military medical and disability benefits for his injury, the Feres doctrine more likely applies. Jackson v. United States, 110 F.3d 1483 (9<sup>th</sup> Cir. 1997); Applehans v. United States, 877 F.2d 309 (4<sup>th</sup> Cir. 1989) (medical treatment at military hospital while servicemember on duty is Feres barred).
  - e. Subject to military discipline. If yes, the Feres doctrine more likely applies. Ordahl v. United States, 646 F.Supp 4 (D.Mont. 1985).
3. The Feres doctrine extends to others not on active military duty:
- a. Commissioned officers of the Public Health Service. Diaz-Romero v. Mukasey, 514 F.3d 115 (1<sup>st</sup> Cir. 2008); Scheppan v. United States, 810 F.2d 461 (4<sup>th</sup> Cir. 1987).
  - b. Service Academy cadets. Ruggiero v. United States, 162 Fed.Appx. 140 (3<sup>d</sup> Cir. 2006) (Naval Academy cadet's fall out of dorm room was incident to service); Archer v. United States, 217 F.2d 548 (9<sup>th</sup> Cir. 1954), cert. denied, 348 U.S. 953 (1955).
  - c. National Guardsmen when engaged in Guard activities. Henry v. Textron, Inc., 577 F.2d 1163 (4<sup>th</sup> Cir.), cert. denied, 439 U.S. 1047 (1978).
  - d. Foreign military members in the United States for training or service with United States forces. Daberkow v. United States, 581 F.2d 785 (9<sup>th</sup> Cir. 1978); Whitley v. United States, 170 F.3d 1061 (11<sup>th</sup> Cir. 1999).
  - e. Servicemembers on the Temporary Disability Retired List (TDRL). There's a split. Kendrick v. United States, 877 F.2d 1201 (4<sup>th</sup> Cir. 1989), cert. denied, 493 U.S. 1065 (1990) (Feres barred); Bradley v. United States, 161 F.3d 777 (4<sup>th</sup> Cir. 1998) (not Feres barred); Cortez v. United States, 854 F.2d 723, 725 (5<sup>th</sup> Cir. 1988) (TDRL plaintiff considered retired and not barred by Feres).
  - f. Third party claimants seeking contribution or indemnity arising out of injuries sustained by a plaintiff whose underlying action is Feres barred. Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666 (1977); Minns v. United States, 155 F.3d 445, 447 (4<sup>th</sup> Cir. 1998).

4. Derivative claims of dependents of servicemembers. There is a split as to whether derivative claims of dependents, sometimes referenced as Genesis claims, that arise out of Feres barred acts to the servicemember, are also barred.
  - a. Derivative claims barred. L.J.B. v. United States, 1997 WL 162076 (E.D.La.) (Feres barred wife's derivative claim for her HIV infection as a result of servicemember husband's negligent blood transfusion while on active duty); Minns v. United States, 155 F.3d 445, 447 (4<sup>th</sup> Cir. 1998) (Feres barred children's genesis claim of birth defects for inoculations given to active duty father); Scales v. United States, 685 F.2d 970 (5<sup>th</sup> Cir. 1982), cert. denied, 460 U.S. 1082 (1983) (Feres barred child's claim of rubella syndrome for negligent administration of rubella vaccine to servicemember mother).
  - b. Derivative claims not barred. Del Rio v. United States, 833 F.2d 282 (11<sup>th</sup> Cir. 1987) (personal injury claim of infant injured by negligent prenatal care administered to servicemember mother not barred by Feres); Romero v. United States, 954 F.2d 223 (4<sup>th</sup> Cir. 1992) (civilian child's claim of alleged cerebral palsy due to inadequate prenatal care no bar where active duty servicemember mother not injured).
5. Servicemembers' derivative claims. The servicemember can generally recover on derivative claims arising out of injuries to his dependents. Hicks v. United States, 368 F.2d 626 (4<sup>th</sup> Cir. 1996); Phillips v. United States, 508 F.Supp. 544 (D.S.C. 1981). However, in a wrongful death action where damages are measured by the injury to the servicemember, if the injury was incurred incident to service, the claim will be barred. Del Rio v. United States, 833 F.2d 282 (11<sup>th</sup> Cir. 1987) (Feres barred claim of servicemember mother for wrongful death of son because state's wrongful death act compensates the survivors for their pain and suffering and not for injuries sustained by the decedent).
6. Dependents' use of military privileges/benefits. Dependents with injuries sustained while using privileges or benefits available to them because of their sponsors' status are not barred by Feres. Portis v. United States, 483 F.2d 670 (4<sup>th</sup> Cir. 1973), overruled on other grounds, Nasim v. Warden, Maryland House of Correction, 64 F.3d 951 (4<sup>th</sup> Cir. 1995).
7. Veterans/retirees . The test is generally whether the current injury was sustained incident to service. United States v. Brown, 348 U.S. 110 (1954) (Feres did not bar veteran's claim for medical malpractice which occurred after discharge even though original injury was sustained while he was on active duty); McGowan v. Scoggins, 890 F.2d 128 (9<sup>th</sup> Cir. 1989) (retired officer's claim not barred even though he was visiting military base to obtain parking decal at time of injury).

## STATUTES

### 28 U.S.C. §1346. United States as defendant

**(b)(1)** Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

## **28 U.S.C. § 1402. United States as defendant**

(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

## **28 U.S.C. § 2401. Time for commencing action against United States**

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

## **28 U.S.C. § 2402. Jury trial in actions against United States**

Subject to chapter 179 of this title, any action against the United States under section 1346 shall be tried by the court without a jury, except that any action against the United States under section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a jury.

## **28 U.S.C. § 2671. Definitions**

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term “Federal agency” includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

“Employee of the government” includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

“Acting within the scope of his office or employment”, in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

## **28 U.S.C. § 2672. Administrative adjustment of claims**

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: *Provided*, That any award, compromise, or settlement in excess of \$25,000 shall be effected only with the prior written approval of the

Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of \$2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of \$2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

### **28 U.S.C. § 2673. Reports to Congress**

The head of each federal agency shall report annually to Congress all claims paid by it under section 2672 of this title, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim.

### **28 U.S.C. § 2674. Liability of United States**

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

### **28 U.S.C. § 2675. Disposition by federal agency as prerequisite; evidence**

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

### **28 U.S.C. § 2676. Judgment as bar**

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

### **28 U.S.C. § 2677. Compromise**

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

### **28 U.S.C. § 2678. Attorney fees; penalty**

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than \$2,000 or imprisoned not more than one year, or both.

## **28 U.S.C. § 2679. Exclusiveness of remedy**

**(a)** The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

**(b)(1)** The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

**(2)** Paragraph (1) does not extend or apply to a civil action against an employee of the Government--

**(A)** which is brought for a violation of the Constitution of the United States, or

**(B)** which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

**(c)** The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

**(d)(1)** Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

**(2)** Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

**(3)** In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy

of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if--

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

## **28 U.S.C. § 2680. Exceptions**

The provisions of this chapter and section 1346(b) of this title shall not apply to--

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if--

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.. [FN1]

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with

regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, “investigative or law enforcement officer” means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

## **REGULATIONS**

### **28 C.F.R. Part 14. Administrative Claims Under Federal Tort Claims Act**

#### **28 C.F.R. § 14.1 Scope of regulations.**

These regulations shall apply only to claims asserted under the Federal Tort Claims Act. The terms Federal agency and agency, as used in this part, include the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States but do not include any contractor with the United States.

#### **28 C.F.R. § 14.2 Administrative claim; when presented.**

(a) For purposes of the provisions of 28 U.S.C. 2401(b), 2672, and 2675, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident; and the title or legal capacity of the person signing, and is accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.

(b) (1) A claim shall be presented to the Federal agency whose activities gave rise to the claim. When a claim is presented to any other Federal agency, that agency shall transfer it forthwith to the appropriate agency, if the proper agency can be identified from the claim, and advise the claimant of the transfer. If transfer is not feasible the claim shall be returned to the claimant. The fact of transfer shall not, in itself, preclude further transfer, return of the claim to the claimant or other appropriate disposition of the claim. A claim shall be presented as required by 28 U.S.C. 2401(b) as of the date it is received by the appropriate agency.

(2) When more than one Federal agency is or may be involved in the events giving rise to the claim, an agency with which the claim is filed shall contact all other affected agencies in order to designate the single agency which will thereafter investigate and decide the merits of the claim. In the event that an agreed upon

designation cannot be made by the affected agencies, the Department of Justice shall be consulted and will thereafter designate an agency to investigate and decide the merits of the claim. Once a determination has been made, the designated agency shall notify the claimant that all future correspondence concerning the claim shall be directed to that Federal agency. All involved Federal agencies may agree either to conduct their own administrative reviews and to coordinate the results or to have the investigations conducted by the designated Federal agency, but, in either event, the designated Federal agency will be responsible for the final determination of the claim.

(3) A claimant presenting a claim arising from an incident to more than one agency should identify each agency to which the claim is submitted at the time each claim is presented. Where a claim arising from an incident is presented to more than one Federal agency without any indication that more than one agency is involved, and any one of the concerned Federal agencies takes final action on that claim, the final action thus taken is conclusive on the claims presented to the other agencies in regard to the time required for filing suit set forth in 28 U.S.C. 2401(b). However, if a second involved Federal agency subsequently desires to take further action with a view towards settling the claim the second Federal agency may treat the matter as a request for reconsideration of the final denial under 28 CFR 14.9(b), unless suit has been filed in the interim, and so advise the claimant.

(4) If, after an agency final denial, the claimant files a claim arising out of the same incident with a different Federal agency, the new submission of the claim will not toll the requirement of 28 U.S.C. 2401(b) that suit must be filed within six months of the final denial by the first agency, unless the second agency specifically and explicitly treats the second submission as a request for reconsideration under 28 CFR 14.9(b) and so advises the claimant.

(c) A claim presented in compliance with paragraph (a) of this section may be amended by the claimant at any time prior to final agency action or prior to the exercise of the claimant's option under 28 U.S.C. 2675(a). Amendments shall be submitted in writing and signed by the claimant or his duly authorized agent or legal representative. Upon the timely filing of an amendment to a pending claim, the agency shall have six months in which to make a final disposition of the claim as amended and the claimant's option under 28 U.S.C. 2675(a) shall not accrue until six months after the filing of an amendment.

#### **28 C.F.R. § 14.3 Administrative claim; who may file.**

(a) A claim for injury to or loss of property may be presented by the owner of the property, his duly authorized agent or legal representative.

(b) A claim for personal injury may be presented by the injured person, his duly authorized agent, or legal representative.

(c) A claim based on death may be presented by the executor or administrator of the decedent's estate, or by any other person legally entitled to assert such a claim in accordance with applicable State law.

(d) A claim for loss wholly compensated by an insurer with the rights of a subrogee may be presented by the insurer. A claim for loss partially compensated by an insurer with the rights of a subrogee may be presented by the parties individually as their respective interests appear, or jointly.

#### **28 C.F.R. § 14.4 Administrative claims; evidence and information to be submitted.**

(a) Death. In support of a claim based on death, the claimant may be required to submit the following evidence or information:

(1) An authenticated death certificate or other competent evidence showing cause of death, date of death, and age of the decedent.

(2) Decedent's employment or occupation at time of death, including his monthly or yearly salary or earnings (if any), and the duration of his last employment or occupation.

(3) Full names, addresses, birth dates, kinship, and marital status of the decedent's survivors, including identification of those survivors who were dependent for support upon the decedent at the time of his death.

(4) Degree of support afforded by the decedent to each survivor dependent upon him for support at the time of his death.

(5) Decedent's general physical and mental condition before death.

(6) Itemized bills for medical and burial expenses incurred by reason of the incident causing death, or itemized receipts of payment for such expenses.

(7) If damages for pain and suffering prior to death are claimed, a physician's detailed statement specifying the injuries suffered, duration of pain and suffering, any drugs administered for pain, and the decedent's physical condition in the interval between injury and death.

(8) Any other evidence or information which may have a bearing on either the responsibility of the United States for the death or the damages claimed.

(b) Personal injury. In support of a claim for personal injury, including pain and suffering, the claimant may be required to submit the following evidence or information:

(1) A written report by his attending physician or dentist setting forth the nature and extent of the injury, nature and extent of treatment, any degree of temporary or permanent disability, the prognosis, period of hospitalization, and any diminished earning capacity. In addition, the claimant may be required to submit to a physical or mental examination by a physician employed by the agency or another Federal agency. A copy of the report of the examining physician shall be made available to the claimant upon the claimant's written request provided that he has, upon request, furnished the report referred to in the first sentence of this paragraph and has made or agrees to make available to the agency any other physician's reports previously or thereafter made of the physical or mental condition which is the subject matter of his claim.

(2) Itemized bills for medical, dental, and hospital expenses incurred, or itemized receipts of payment for such expenses.

(3) If the prognosis reveals the necessity for future treatment, a statement of expected expenses for such treatment.

(4) If a claim is made for loss of time from employment, a written statement from his employer showing

actual time lost from employment, whether he is a full or part-time employee, and wages or salary actually lost.

(5) If a claim is made for loss of income and the claimant is self-employed, documentary evidence showing the amounts of earnings actually lost.

(6) Any other evidence or information which may have a bearing on either the responsibility of the United States for the personal injury or the damages claimed.

(c) Property damage. In support of a claim for injury to or loss of property, real or personal, the claimant may be required to submit the following evidence or information:

(1) Proof of ownership.

(2) A detailed statement of the amount claimed with respect to each item of property.

(3) An itemized receipt of payment for necessary repairs or itemized written estimates of the cost of such repairs.

(4) A statement listing date of purchase, purchase price and salvage value, where repair is not economical.

(5) Any other evidence or information which may have a bearing on either the responsibility of the United States for the injury to or loss of property or the damages claimed.

#### **28 C.F.R. § 14.5 Review by legal officers.**

The authority to adjust, determine, compromise, and settle a claim under the provisions of section 2672 of Title 28, United States Code, shall, if the amount of a proposed compromise, settlement, or award exceeds \$5,000, be exercised by the head of an agency or his designee only after review by a legal officer of the agency.

#### **28 C.F.R. § 14.6 Dispute resolution techniques and limitations on agency authority.**

(a) Guidance regarding dispute resolution. The administrative process established pursuant to 28 U.S.C. 2672 and this part 14 is intended to serve as an efficient effective forum for rapidly resolving tort claims with low costs to all participants. This guidance is provided to agencies to improve their use of this administrative process and to maximize the benefit achieved through application of prompt, fair, and efficient techniques that achieve an informal resolution of administrative tort claims without burdening claimants or the agency. This section provides guidance to agencies only and does not create or establish any right to enforce any provision of this part on behalf of any claimant against the United States, its agencies, its officers, or any other person. This section also does not require any agency to use any dispute resolution technique or process.

(1) Whenever feasible, administrative claims should be resolved through informal discussions, negotiations, and settlements rather than through the use of any formal or structured process. At the same time, agency personnel processing administrative tort claims should be trained in dispute resolution techniques and skills that can contribute to the prompt, fair, and efficient resolution of administrative claims.

(2) An agency may resolve disputed factual questions regarding claims against the United States under the FTCA, including 28 U.S.C. 2671-2680, through the use of any alternative dispute resolution technique or

process if the agency specifically agrees to employ the technique or process, and reserves to itself the discretion to accept or reject the determinations made through the use of such technique or process.

(3) Alternative dispute resolution techniques or processes should not be adopted arbitrarily but rather should be based upon a determination that use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims. If alternative dispute resolution techniques will not materially contribute to the prompt, fair, and efficient resolution of claims, the dispute resolution processes otherwise used pursuant to these regulations shall be the preferred means of seeking resolution of such claims.

(b) Alternative dispute resolution.

(1) Case-by-case. In order to use, and before using, any alternative dispute resolution technique or process to facilitate the prompt resolution of disputes that are in excess of the agency's delegated authority, an agency may use the following procedure to obtain written approval from the Attorney General, or his or her designee, to compromise a claim or series of related claims.

(i) A request for settlement authority under paragraph (b)(1) of this section shall be directed to the Director, Torts Branch, Civil Division, Department of Justice, ("Director") and shall contain information justifying the request, including:

(A) The basis for concluding that liability exists under the FTCA;

(B) A description of the proposed alternative dispute resolution technique or process and a statement regarding why this proposed form of alternative dispute resolution is suitable for the claim or claims;

(C) A statement reflecting the claimant's or claimants' consent to use of the proposed form of alternative dispute resolution, indicating the proportion of any additional cost to the United States from use of the proposed alternative dispute resolution technique or process that shall be borne by the claimant or claimants, and specifying the manner and timing of payment of that proportion to be borne by the claimant or claimants;

(D) A statement of how the requested action would facilitate use of an alternative dispute resolution technique or process;

(E) An explanation of the extent to which the decision rendered in the alternative dispute resolution proceeding would be made binding upon claimants; and,

(F) An estimate of the potential range of possible settlements resulting from use of the proposed alternative dispute resolution technique.

(ii) The Director shall forward a request for expedited settlement action under paragraph (b)(1)(i) of this section, along with the Director's recommendation as to what action should be taken, to the Department of Justice official who has authority to authorize settlement of the claim or related claims. If that official approves the request, a written authorization shall be promptly forwarded to the requesting agency.

(2) Delegation of authority. Pursuant to, and within the limits of, 28 U.S.C. 2672, the head of an agency or his or her designee may request delegations of authority to make any award, compromise, or settlement

without the prior written approval of the Attorney General or his or her designee in excess of the agency's authority. In considering whether to delegate authority pursuant to 28 U.S.C. 2672 in excess of previous authority conferred upon the agency, consideration shall be given to:

- (i) The extent to which the agency has established an office whose responsibilities expressly include the administrative resolution of claims presented pursuant to the Federal Tort Claims Act;
- (ii) The agency's experience with the resolution of administrative claims presented pursuant to 28 U.S.C. 2672;
- (iii) The Department of Justice's experiences with regard to administrative resolution of tort claims arising out of the agency's activities.

(c) Monetary authority. An award, compromise, or settlement of a claim by an agency under 28 U.S.C. 2672, in excess of \$25,000 or in excess of the authority delegated to the agency by the Attorney General pursuant to 28 U.S.C. 2672, whichever is greater, shall be effected only with the prior written approval of the Attorney General or his or her designee. For purposes of this paragraph, a principal claim and any derivative or subrogated claim shall be treated as a single claim.

(d) Limitations on settlement authority--

(1) Policy. An administrative claim may be adjusted, determined, compromised, or settled by an agency under 28 U.S.C. 2672 only after consultation with the Department of Justice when, in the opinion of the agency:

- (i) A new precedent or a new point of law is involved; or
- (ii) A question of policy is or may be involved; or
- (iii) The United States is or may be entitled to indemnity or contribution from a third party and the agency is unable to adjust the third party claim; or
- (iv) The compromise of a particular claim, as a practical matter, will or may control the disposition of a related claim in which the amount to be paid may exceed \$25,000 or may exceed the authority delegated to the agency by the Attorney General pursuant to 28 U.S.C. 2672, whichever is greater.

(2) Litigation arising from the same incident. An administrative claim may be adjusted, determined, compromised, or settled by an agency under 28 U.S.C. 2672 only after consultation with the Department of Justice when the agency is informed or is otherwise aware that the United States or an employee, agent, or cost-plus contractor of the United States is involved in litigation based on a claim arising out of the same incident or transaction.

(e) Procedure. When Department of Justice approval or consultation is required, or the advice of the Department of Justice is otherwise to be requested, under this section, the written referral or request of the Federal agency shall be directed to the Director at any time after presentment of a claim to the Federal agency, and shall contain:

- (1) A short and concise statement of the facts and of the reasons for the referral or request;

- (2) Copies of relevant portions of the agency's claim file; and
- (3) A statement of the recommendations or views of the agency.

#### **28 C.F.R. § 14.7 [Reserved]**

#### **28 C.F.R. § 14.8 Investigation and examination.**

A Federal agency may request any other Federal agency to investigate a claim filed under section 2672, title 28, U.S. Code, or to conduct a physical examination of a claimant and provide a report of the physical examination. Compliance with such requests may be conditioned by a Federal agency upon reimbursement by the requesting agency of the expense of investigation or examination where reimbursement is authorized, as well as where it is required, by statute or regulation.

#### **28 C.F.R. § 14.9 Final denial of claim.**

(a) Final denial of an administrative claim shall be in writing and sent to the claimant, his attorney, or legal representative by certified or registered mail. The notification of final denial may include a statement of the reasons for the denial and shall include a statement that, if the claimant is dissatisfied with the agency action, he may file suit in an appropriate U.S. District Court not later than 6 months after the date of mailing of the notification.

(b) Prior to the commencement of suit and prior to the expiration of the 6- month period provided in 28 U.S.C. 2401(b), a claimant, his duly authorized agent, or legal representative, may file a written request with the agency for reconsideration of a final denial of a claim under paragraph (a) of this section. Upon the timely filing of a request for reconsideration the agency shall have 6 months from the date of filing in which to make a final disposition of the claim and the claimant's option under 28 U.S.C. 2675(a) shall not accrue until 6 months after the filing of a request for reconsideration. Final agency action on a request for reconsideration shall be effected in accordance with the provisions of paragraph (a) of this section.

#### **28 C.F.R. § 14.10 Action on approved claims.**

(a) Any award, compromise, or settlement in an amount of \$2,500 or less made pursuant to 28 U.S.C. 2672 shall be paid by the head of the Federal agency concerned out of the appropriations available to that agency. Payment of an award, compromise, or settlement in excess of \$2,500 shall be obtained by the agency by forwarding Standard Form 1145 to the Claims Division, General Accounting Office. When an award is in excess of \$25,000, or in excess of the authority delegated to the agency by the Attorney General pursuant to 28 U.S.C. 2672, whichever is greater, Standard Form 1145 must be accompanied by evidence that the award, compromise, or settlement has been approved by the Attorney General or his designee. When the use of Standard Form 1145 is required, it shall be executed by the claimant, or it shall be accompanied by either a claims settlement agreement or a Standard Form 95 executed by the claimant. When a claimant is represented by an attorney, the voucher for payment shall designate both the claimant and his attorney as payees; the check shall be delivered to the attorney, whose address shall appear on the voucher.

(b) Acceptance by the claimant, his agent, or legal representative, of any award, compromise or settlement made pursuant to the provisions of section 2672 or 2677 of Title 28, United States Code, shall be final and conclusive

on the claimant, his agent or legal representative and any other person on whose behalf or for whose benefit the claim has been presented, and shall constitute a complete release of any claim against the United States and against any employee of the Government whose act or omission gave rise to the claim, by reason of the same subject matter.

**28 C.F.R. § 14.11 Supplementing regulations.**

Each agency is authorized to issue regulations and establish procedures consistent with the regulations in this part.

**RULE 4(i) OF THE FEDERAL RULES OF CIVIL PROCEDURE**

**(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees.**

(1) United States. To serve the United States, a party must:

(A)(i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought--or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk--or

(ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;

(B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

**SF-95 (See the Attached Form SF-95 below)**

<b>CLAIM FOR DAMAGE, INJURY, OR DEATH</b>		<b>INSTRUCTIONS:</b> Please read carefully the instructions on the reverse side and supply information requested on both sides of the form. Use additional sheet(s) if necessary. See reverse side for additional instructions.			FORM APPROVED OMB NO. -1105-0008
1. Submit to Appropriate Federal Agency:		2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, street, city, State and Zip Code.) Claimant:  Claimant's Representative:			
3. TYPE OF EMPLOYMENT <input type="checkbox"/> MILITARY <input type="checkbox"/> CIVILIAN	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. or P.M.)	
8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof.) (Use additional page if necessary.)					
<b>9. PROPERTY DAMAGE</b>					
NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, street, city, State and Zip Code)					
BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See Instructions on reverse side.)					
<b>10. PERSONAL INJURY/WRONGFUL DEATH</b>					
STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.					
<b>11. WITNESSES</b>					
NAME		ADDRESS (Number, street, city, State and Zip Code)			
12. (See instructions on reverse.) <b>AMOUNT OF CLAIM (In dollars)</b>					
12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)		
<b>I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.</b>					
13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)		13b. Phone number of signatory		14. DATE OF SIGNATURE	
<b>CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM</b>		<b>CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS</b>			
The claimant shall forfeit and pay to the United States the sum of \$2,000 plus double the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)		Fine of not more than \$10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)			

95-109

NSN 7540-00-634-4046

STANDARD FORM 95 (Rev. 7-85) (EG)  
PRESCRIBED BY DEPT. OF JUSTICE 28 CFR 14.2

## PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A *Authority*: The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 38 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R.

B. *Principal Purpose*: The information requested is to be used in evaluating claims.  
C. *Routine Use*: See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.  
D. *Effect of Failure to Respond*: Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim.

## INSTRUCTIONS

**Complete all items – insert the word NONE where applicable**

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A **SUM CERTAIN** FOR INJURY TO OR LOSS OF

PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN **TWO YEARS** AFTER THE CLAIM ACCRUES.

Any instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in item #1 on the reverse side. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplemental regulations also. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item 12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim "invalid." A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

**Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights.**

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden,

to Director, Torts Branch  
Civil Division  
U.S. Department of Justice  
Washington, DC 20530

and to the  
Office of Management and Budget  
Paperwork Reduction Project (1105-0008)  
Washington, DC 20503

## INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance?  Yes. If yes, give name and address of insurance company (*Number, street, city, State, and Zip Code*) and policy number.  No.

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?

17. If deductible, state amount

\$

18. If claim has been filed with your carrier, what action has your insurer taken or proposes to take with reference to your claim? (*It is necessary that you ascertain these facts.*)

19. Do you carry public liability and property damage insurance?  Yes. If yes, give name and address of insurance company (*Number, street, city, State, and Zip Code*).  No.

SF 95 (Rev. 7-85) BACK