Federal Tort Claims Handbook
PROCEDURAL ASPECTS OF FILING AND PROCESSING CLAIMS UNDER THE FEDERAL TORT CLAIMS ACT AND SPECIAL PROBLEMS RELATED THERETO

Compiled by Joseph Rouse, Esq.
November 2003 WEB Edition
MEMORANDUM FOR CLAIMS JUDGE ADVOCATES/CLAIMS ATTORNEYS

SUBJECT: Federal Tort Claims Handbook

1. The Federal Tort Claims Handbook (FTCH) is a treatise compiled by the U.S. Army Claim Service under the direction of Joseph Rouse, Esq. It provides case citations covering a myriad of issues. The citations are organized in a topical manner, paralleling the steps an attorney should take in analyzing a claim.

2. This edition of the FTCH is a revision of the material originally published in July 1979 and updated periodically since. The previous edition was last updated in September 2001. This edition contains significant cases through September 2003 pertaining to the filing and processing of administrative claims under the FTCA (Title 28, United States Code, §§ 2671-2680) and related claims statutes.

3. Stylistic revisions have been incorporated into this edition, toward the goals of an updated look and user friendliness. Older citations have not been removed and Sheppardizing is essential.

4. This edition has been prepared for WEB publishing and does not include a printable Table of Contents. The book-marking feature provides hyperlinks to text sections and is the only navigational tool for this version. Users wishing to print hard copy that will include a Table of Contents should contact USARCS Tort Claims Division, as directed below, to have an appropriate copy transmitted.

5. If any errors are noted, including case citations, omission of relevant cases or clerical errors, please use the error sheet on the next page to bring this to our attention. Users needing further information or clarification of this material should contact their Area Action Officer or Mr. Joseph H. Rouse, Deputy Chief, Tort Claims Division, at joseph.rouse@claims.army.mil, DSN: 622-7009, ext. 212, or commercial: (301) 677-7009, ext. 212 or Diane Banner, Paralegal Specialist (Project Editor), Tort Claims Division, at diane.banner@claims.army.mil, DSN: 622-7009, ext. 207, commercial 301-677-7009, ext. 207.

Mark Romaneski
Colonel, JA
Commanding
PROCEDURAL ASPECTS OF FILING AND PROCESSING CLAIMS UNDER FTCA AND SPECIAL PROBLEMS RELATING THERETO

I. REQUIREMENTS FOR ADMINISTRATIVE FILING

A. Why is There a Requirement?

1. Effective Date of Requirement. Formerly permitted only on claims not over $2,500 (28 U.S.C. § 2672, as applicable to claims accruing prior to 18 January 1967).


5. **Administrative Filing Location.** An administrative claim must be filed with the appropriate Federal agency before filing suit, 28 U.S.C. § 2675(a).


B. **What Must Be Filed?**

1. **Written Demand for Sum Certain.** Written demand for sum certain (28 U.S.C. §§ 2401, 2675(b); 28 C.F.R. § 14.2). See, e.g., *Danowski v. U.S.*, 924 F. Supp. 661, 1996 U.S. Dist. LEXIS 8281 (D. N.J.) (single claim form held sufficient to present father's claim for ERISA medical bills where both his name and son’s name appears on SF 95 form as claimants, the SF 95 was accompanied with the bills, and government was alerted to subrogated nature of father’s claim concerning the bills, even though son was the person hit by Postal truck); *Shoemaker v. U.S.*, 1997 WL 96543 (S.D.N.Y.) allegations against numerous Federal agencies alleging placement of electronic surveillance devices in Plaintiff’s home does not constitute a claim because it lacks specificity). Sum certain requirement is jurisdictional. *Hamilton v. U.S.*, 741 F. Supp. 1159 (D.N.J. 1990). Failure to state a sum certain constitutes a fatal defect in the claim. *Suarez v. U.S.*, 2 F.3d 1064 (11th Cir. 1994). See also *Coska v. U.S.*, 114 F.3d 318 (1st Cir. 1997) (failure to state a sum certain despite two requests to do so bars suit); *Martinez v. U.S. Postal Service (USPS)*, 875 F. Supp. 1067 (D.N.J. 1995) (letter

2. **Examples of Written Demand.**


f. **Approximate or Present Amount.**  Where approximate or present amount of claim stated on SF 95 claim may be limited to that amount.  Adams by Adams v. U.S., 807 F.2d 318 (2d Cir. 1986) (administrative claim stating "in excess of $1,000" is limited to $1,000); Fallon v. U.S., 405 F. Supp. 1320 (D. Mont. 1976) ("Approximately $1,500.00" held sum certain, but limited to that amount); Erxleben v. U.S., 668 F.2d 268 (7th Cir. 1981) ("$149.42 presently" meets sum certain requirement). But see Bradley v. U.S. by Department of Veterans Administration, 951 F.2d 268 (10th Cir. 1991) (SF 95 stating sum "in excess of $100,000" does not meet requirement). Presentation of bills or receipts may meet requirement where SF 95 amount left blank, but recovery may be limited to this amount.  Molinar v. U.S., 1975 U.S. App. LEXIS 13938 (5th Cir. 1975); Mack v. U.S. Postal Service, 414 F. Supp. 504 (E.D. Mich. 1976); Erxleben v. U.S., 668 F.2d 268 (7th Cir. 1981). See also Williams v. U.S., 693 F.2d 555 (5th Cir. 1982) (includes itemization presented to State court where SF 95 amount left blank). Contra Schaefer v. Hills, 416 F. Supp. 428 (S.D. Ohio 1976). However, presentation of medical bills not subject of claim does not meet sum certain requirement. Farr v. U.S. Department of Veterans Administration, 580 F. Supp. 1194 (E.D. Pa. 1984).  Poynter v. U.S., 55 F. Supp. 2d 558, 1999 W 1515838 (W.D. La. 1999), SF 95 which states "$500,000+ is proper claim. Plus (+) mark is surplus.  Koktis v. U.S. Postal Service, 233 F.2d 27 (4th Cir. 2000) Stating amount of medical bills is not sum certain.  Estate of Gladden v. U.S., 2001 U.S. App. LEXIS 19779 (10th Cir. 2001) "In excess of $100,000" does not constitute a sum certain nor do letters requesting reinstatement, back pay, front pay, etc, thereby administrative filing


i. **Class Action Maintenance Prerequisites.** Class actions are permitted only where questions of law or fact are common to the class (F.R.Civ.P. 23(a), (b)). Harrigan v. U.S., 63 F.R.D. 402 (E.D. Pa. 1974). This is difficult in a tort action or multi-district class action litigation. McDonnell Douglas Corp. v. U.S. District Court, 1975 U.S. App. LEXIS 12422/14531, 523 F.2d 1083 (9th Cir. 1975); In re Northern District of California Dalkon Shield IUD Products, 526 F. Supp. 887 (N.D. Cal. 1981). See also In re Agent Orange Product Liability Litigation, 506 F. Supp. 762 (E.D.N.Y. 1980), later proceedings, In re Agent Orange Product Liability Litigation, 818 F.2d 145 (2d Cir. 1987).


k. **Tolling by Insurer’s Claim.** Filing by insurer for subrogated loss does not toll insured’s PI claim. Shelton v. U.S., 615 F.2d 713 (6th Cir. 1980). See also Ahmed v. U.S., 30 F.3d 514 (4th Cir. 1994) (Where claim filed by insurer only mentions potential PI claim and no sum for PI is named, no PI claim has been filed); Cizek v. U.S., 953 F.2d 1232 (10th Cir. 1992) (amount stated by insurer does not substitute for insured's demand, since they were not identical). Huber v. U.S., Civ. #CY-01-3022-EFS (E.D. Wash., 16 Jul. 2001) insurer’s claim for PD and medical bills which included $500 deductible tolls SOL for insured’s PI even though not signed by either.

l. **Spouse’s Name on SF 95 Not Sufficient.** Identifying claimant's spouse as such on SF 95 not sufficient to present written demand for spouse. Rucker v. Department of Labor, 798 F.2d 891 (6th Cir. 1986). See also Nazarenus v. U.S., 1996 U.S. Dist.

m. Failure to Provide facts. Shoemaker v. U.S., 1997 U.S. Dist. LEXIS 12740/23227, 1997 WL 96543 (S.D. N.Y.) (Claim that does not state place and date is not a claim since it is so attenuated and insubstantial under Hagans et al. v. Lavine, 415 U.S. 528 (2d Cir. 1974)).


3. Documenting a Claim.

b. Documentation Excused. Documentation should be excused where claim is obviously subject to denial or Summary Judgment at trial.

(1) Feres Cases. Where Feres doctrine may control. In “Parker” type cases (Parker v. U.S., 611 F.2d 1007 (5th Cir. 1980)), initial investigation and documentation required should concern solely “incident to service” status. Pending decision on "Feres" application, documentation of liability and injuries should be delayed.

(2) Statute of Limitation Cases. Where statute of limitations may control, similar procedures should be followed in cases where accrual date of claim is clear. In cases where accrual date is unclear, e.g., medical malpractice, full documentation of liability and injuries should be demanded, as decision on SOL is frequently delayed at trial until evidence on the merits is heard.

(3) Exclusion Cases. Where "2680" exclusions may control, documentation may sometimes not be demanded when application of exclusion is clear, e.g., “foreign country” and “combat” exclusions.


a. Authority and State Law. Authority should be in accordance with State law, since it determines who may bring claims and when they may do so. Schwarder v. U.S., 974 F.2d 1118 (9th Cir. 1992) (adult children can file WD claim under California law, even though deceased and his widow-to-be settled PI claim indicates that State law prevails over final and conclusive language of 28 U.S.C. § 2672); Jackson v. U.S., 730 F.2d 808 (D.C. Cir. 1984) (daughter may not sign death claim in D.C. where there is a widow, since death occurred in Pa. and forum law applies); Transco Leasing Corp. v. U.S., 896 F.2d 1435 (5th Cir. 1990) (claim by estate sufficient to permit suit by widow and child); Frantz v. U.S., 791 F. Supp. 445 (D. Del. 1992) (estate claim does not include

b. Appointment Held in Abeyance. In cases where amount of claim does not justify cost of appointment, requirement may be held in abeyance provided that it is met prior to settlement, filing of suit or, in any event, prior to two years from accrual of action. Van Fossen v. U.S., 430 F. Supp. 1017 (N.D. Cal. 1977). Booten v. U.S., 95 F. Supp. 2d 37 (D. Mass. 2000) widow can file proper wrongful death claim without being appointed administrator and thereby exhaust administrative remedies.

5. Notifying Claimant of Improper Claim. Claimant should be put on written notice that failure to file for sum certain in writing by proper person within two years of accrual may result in statute of limitation barring claim. Molinar v. U.S., 1975 U.S. App. LEXIS 13938 (5th Cir. 1975); Kelley v. U.S., 568 F.2d 259 (2d Cir. 1978). See also Danowski v. U.S., 1996 U.S. Dist. LEXIS 8281 (D. N.J.) (failure of USPS to notify claimant of defect leads to court holding that father’s claim for son’s medical bills paid by him was constructively filed). Since 1983, objective standards apply to Rule 11 sanctions; bad faith need not be shown. Accordingly, early notification should be made to claimants where claim is clearly barred, e.g., SOL, Feres, FECA, and foreign country exclusion. See The Law of Sanction, Trial, May 1988; Vaccaro v. Stephens, 1989 U.S. App. LEXIS 10268, 869 F.2d 866 (9th Cir. 1989) (frivolous claim may result in substantial penalties).

6. Amendments. Administrative claim may be amended at any time before final agency action, i.e., denial; final offer of settlement, even after two year SOL has run (28 C.F.R. § 14.2). Provancial v. U.S., 454 F.2d 72 (8th Cir. 1972). Agency action not final until claimant signs settlement agreement in PI case, even though payment is approved in full amount claimed. Odin v. U.S., 656 F.2d 798 (D.C. Cir. 1981). See also Wiseman v. U.S., 976 F.2d 604 (9th Cir. 1992) (issuing a check for full amount stated on SF 95 does not bar
amendment when check returned and higher amount claimed). Whether an amendment will be allowed is based on the nature and timing of the amendment. Beheler v. USA, 66 F.3d 322, #94-11045 (5th Cir. 1995) (location of accident on SF 95 different from location named in suit--amendment not permitted); Tilton v. U.S., Civ. #C-86-20448-SW (N.D. Cal. 1990) (addition of pain and suffering claim at trial in wrongful death case not authorized); Barrett v. U.S., 845 F. Supp. 774, (D. Kan. 1994) (addition of survival claim at trial in wrongful death case prohibited); Lopez-De Robinson v. U.S., 114 F.3d 1169 (table), 1997 U.S. App. LEXIS 18705 (1st Cir. 1997) (claim by widow for her pain and suffering can be converted into claim of estate for decedent’s pain and suffering); Doe v. U.S., 58 F.3d 494 (9th Cir. 1995) (amendment to avoid foreign country exclusion by pleading act took place on high seas, rather than in Venezuelan waters).

a. Valid Claims Only. Only a valid claim can be amended--not one lacking a sum certain.

b. Amendment Restarts Administrative Consideration Period. Amending a claim, e.g., by including spouse's loss of consortium or raising the amount upwards, starts the 6 months period for delaying suit running over again (28 C.F.R. § 14.2(c)). Kirby v. Marsh, 624 F. Supp. 1100 (M.D. Ala. 1985) (claimed amount increased several days before suit filed—in creased amount accepted by court--new claim issue not raised).


e. Ad Damnum Amendments at Trial. Ad Damnum may be raised in amount at trial only if there is newly discovered evidence not reasonably available previously or on proof of intervening facts (28 U.S.C. § 2675(b)). See Del Valle Rivera v. U.S., 630 F. Supp. 750 (D. P.R. 1986) (Ad Damnum of $500,000 reduced to $200,000--amount of administrative claim); Robison v. U.S., 746 F. Supp. 1059 (D. Kan. 1990) (held to amount on SF 95, even though discovered later surgery may be needed); Colon v. U.S., 877 F. Supp. 57 (D. P.R. 1995) (court values injuries at $125,000, but limits award to $50,000 amount claimed); Hogan v. U.S., 86 F.3d 1162 (table), 1996 WL 280061 (9th Cir. 1996) (damages limited to $50,000 claimed administratively and not amount raised at trial, since plaintiff did not seek additional treatment until 5 years after accident); McFarlane v. U.S., 684 F. Supp. 780 (E.D.N.Y. 1988) (cannot raise Ad Damnum where increase based on medical diagnosis made prior to original claim). But see Lane v. U.S., 1996 U.S. Dist. LEXIS 10755, 1996 WL 426312 (S.D. N.Y.) (amendment of Ad Damnum from $1 million to $5 million permitted as results of future surgery unknown even if claimant knew he needed surgery at time of filing administrative claim). Amendment is allowed when evidence not reasonably available. Spivey v. U.S., 912 F.2d 80 (4th Cir. 1990) (claimant's Tardive Dyskinesia could not have been discovered prior to filing--upward amendment permitted). Salcedo-Albanez v. U.S., 149 F. Supp. 2d 1240, 2001 WL 705637 (S.D. Cal. 2001) Ad Damnum not increased due to loss of vision as increase due to claimant's postponing necessary operation. Zurba v. U.S., 2000 U.S. Dist. LEXIS 6937, 2001 WL 1155285 (N.D. Ill.) In pedestrian knock down case resulting in internal injuries, administrative claim for $300,000 is increased at trial to permit an award of $519,566. Salcedo-Albanez v. U.S., 149 F. Supp. 2d 1240 (S.D. Cal. 2001) Amendment from $75,000 to $500,000 at trial not permitted, as even though eye injury had become worse, it was foreseeable. Sullivan v. U.S., Civ. #00-73630 (E.D. Mich. 18 Jan. 2002) $250,000 increased to $500,000 at trial based on later discovered torn rotator cuff in minor rearend. Ferrer v. U.S., Civ. #00-1535-Civ-Garber (S.D. Fla., 14 May 2002) Ad damnum raised at trial as injured plaintiff did not recover as well as he thought he would. Damages were $1.5m plus and coverage items he gets for nothing from Veterans Administration. Warning v. U.S., Civ.# 001-5411RJB (W.D. Wash., 14 Oct. 2002) increase allowed despite fact that injured party had four back surgeries prior to filing administrative claim thereby increasing U.S. exposure from $2.5 million to $6 million and permitting a verdict of $4,318,585; Hoehm v. U.S., 217 F. Supp. 2d 39 (D.D.C. 2002) victim of collision caused by WRAMC patient provided no basis to raise her $10 million administrative claim to $15 million at trial. Craig v. U.S., 2002 U.S. Dist. Lexis 17950 (N.D. Ill.) claim for $50,000 filed 17 days after rear-end collision; 2 years later, need for spinal surgery is discovered; not permitted to increase demand at trial; Davis v. U.S., 2002 U.S. Dist. Lexis 19225 (N.D. Ill.) claim for $1 million for unnecessary operation filed pro se, subsequent suit filed by attorney seeks increase in ad damnum as successful recovery would result in decreased VA pension, increase denied. Ferrer v. U.S., Civ. #00-1535-CIV-Farber (S.D.Fla. 14 May 02) $1,000,000 administrative claim is raised to permit recovery of first million at trial based on allegation that injured party did not recover from his injuries as well as anticipated.

(1) Offers by Claimants during Negotiation. Claimant offers made in administrative negotiations in an amount lesser than that stated on the claim form are not considered being amendments downward limiting the amount of any subsequent suit.
F.3d 736 (7th Cir. 2003) Claimant recovers $419,666 at trial despite $300,000 administrative claim based on later discovered emotional distress.


C. **Where Must the Claim be Filed?**

1998), claim for false arrest by DEA filed with FBI and forwarded to DEA after SOL has run
is not timely filed.

a. Legislative and Judicial Branches. “Appropriate agency” includes Legislative and
Judicial Branches, but only when latter is performing non-judicial function.
(8th Cir. 1978), on remand, 463 F. Supp. 264 (D. Neb. 1978), aff'd, 593 F.2d 827 (8th
Cir. 1979); Cromelin v. U.S., 177 F.2d 275 (5th Cir. 1949), cert. denied, 339 U.S. 944
(1950); Foster v. MacBridge, 521 F.2d 1304 (9th Cir. 1975); Tomalewski v. U.S., 493 F.
18401 (1st Cir. 1999) filing with U.S. Attorney's office does not constitute proper
filing.

b. Mailbox Not Appropriate Agency. “Appropriate agency” does not include
1973). See also Bellcourt v. U.S., 994 F.2d 427 (8th Cir. 1993) (claim placed in mail,
but not received--not properly filed); Seitu v. Rutherford, 1997 WL 122919 (D.D.C.)
(coppy of SF 95 and unsigned return receipt card produced by plaintiff is insufficient to
prove receipt). Claim improperly filed when delivered to Federal Express, who failed
Proof of mailing is insufficient in face of affidavit of no receipt. Payne v. U.S., 10 F.
Supp. 2d 203 (N.D.N.Y. 1998), affidavit of no receipt by Government employee is
sufficient to overcome presumption that claim was mailed and received. Tapia-Ortiz
v. U.S., 171 F.3d 150, 1999 WL 166329 (2d Cir. 1999) delivery of claim against DEA
by prisoner to prison officials for mailing to DEA tolls SOL. Whitaker v. U.S., 2001
U.S. App. LEXIS 24776 (9th Cir. 2001) claimant's presentation of green card to prove
USPS's receipt of claim is rejected in face of parole testimony of no receipt. Glover v.
U.S., 111 F. Supp. 2d 190 (E.D.N.Y. 2000) After citing a number of mailbox rule
cases, court refuses Summary Judgment and grants plaintiff opportunity to depose
USPS claims office system of logging and handling requests for recommendation.
Bryan v. Stevens, 169 F. Supp. 2d 676 (S.D. Tx. 2001) USPS never received claim that
24776 (9th Cir.) Defective certified mail receipt is not sufficient to establish timely
receipt as card is unsigned, bears no USPS stamp or barcode and was received on a
Sunday. Barnett v. U.S., 2002 U.S. App. LEXIS 2870 (11th Cir.) Proof that SF95 was
properly mailed creates a rebuttable presumption that federal agency received i.e.,
agency must prove that it had system insuring receipt and logging of SF95;

c. Counterclaim Excluded. Does not include counterclaim except as to third party
dropped as third party, original plaintiff must bring or have brought administrative

2. Multi-Agency Claim. Where more than one Federal agency is involved, each should be
notified, plus informing each of the other's role (28 C.F.R. § 14.2).
a. **Problems from Failure to Notify.** Failure to so notify may result in one agency-denying claim while administrative negotiations are proceeding with another.

b. **Six Months.** Result could be requirement to file suit within six months of denial.

c. **Avoidance by Withdrawal.** Can be avoided by withdrawal of denial action.

d. **Claimant must be Notified of Lead Agency.** One agency cannot deny claim for another unless the other agency notifies the claimant in writing that the lead agency is acting on behalf of other agency. *Raddatz v. U.S.*, 750 F.2d 791 (9th Cir. 1984).

**3. Primary Agency.** Where agencies are aware of multi-agency claim, one agency should be agreed upon to be primary or Civil Division, Department of Justice, should make designation.


**D. When Must the Claim be Filed?** *Cato v. U.S.*, 70 F.3d 1103 (9th Cir. 1995) (claim of enslavement and continuing disrespect of African Americans does not fall under FTCA, even if continuing violations doctrine avoids 2-year SOL, since there is no jurisdiction over these allegations).

**1. Within Two Years of Accrual (28 U.S.C. § 2401b).**


and diagnosis of vascular necrosis in October 1997, claim filed in Spring 2000 time barred.

c. **Is Limitation Jurisdictional or Includes Equitable Tolling?** Formerly, courts agreed that the 2-year filing requirement from the accrual of the claim was jurisdictional and not subject to waiver. *Casias v. U.S.*, 532 F.2d 1339 (10th Cir. 1976); *Caton v. U.S.*, 1974 U.S. App. LEXIS 9389 (9th Cir. 1974); *Mann v. U.S.*, 399 F.2d 672 (9th Cir. 1968); *United Missouri Bank South v. U.S.*, 423 F. Supp. 571 (W.D. Mo. 1976); *Pugh v. Farmers Home Administration*, 846 F. Supp. 60 (M.D. Fla. 1994, aff'd without opinion, 74 F.3d 1251 (11th Cir. 1995) (table); *Bailey v. U.S.*, 642 F.2d 344 (9th Cir. 1981). Since the U.S. Supreme Court’s ruling in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 111 S. Ct. 453 (1990) and *U.S. v. Brockcamp*, 519 U.S. 347, 117 S. Ct. 849 (1997), courts have become divided on whether the requirement is jurisdictional or is not jurisdictional, because if the latter, it is subject to equitable tolling. Cases maintaining the requirement are subject matter jurisdictional. See, e.g., *Winters v. U.S.*, 953 F.2d 1392 (table), 1992 WL 11317 (10th Cir.). See also *Willis v. U.S.*, 879 F. Supp. 889 (C.D. Ill. 1994) (rejects view that FTCA SOL is not jurisdictional and permits factual hearing on accrual date of medical malpractice claims—excellent list of citations on equitable tolling and jurisdictional nature of SOL), aff'd, *Willis v. U.S.*, 65 F.3d 171 (7th Cir. 1995) (table); *Burns v. U.S. Department of Justice*, 864 F. Supp. 80 (N.D. Ill. 1994) (ignores existence of doctrine of equitable tolling and cites old 7th Circuit cases stating that FTCA SOL is jurisdictional). Cf. *U.S. v. Brockamp*, 519 U.S. 347, 117 S. Ct. 849 (1997) (claim for tax refund under § 6511 of Internal Revenue Code filed late due to drunkenness or senility is not subject to equitable tolling due to number of times § 6511 references 2 year filing period); *Raziano v. U.S.*, 999 F.2d 1539 (11th Cir. 1993) (equitable tolling under SIAA not permitted where negotiation with Coast Guard ran past 2 year filing limit); *Ferreiro v. U.S.*, 934 F. Supp. 1375 (S.D. Fla. 1996) (equitable tolling not permitted in Public Vessels Act case where plaintiff missed the SOL where Government allegedly misled plaintiff by negotiating under FTCA). Other courts have held that equitable tolling applies in FTCA cases. See, e.g., *Glarner v. U.S.*, 30 F.3d 697 (6th Cir. 1994) (claimant requested Disabled American Veterans forms to file negligence claim while still a patient—wrong forms are given—SOL is equitably tolled); *Schmidt v. U.S.*, 933 F.2d 639 (8th Cir. 1991) (FTCA 2 year requirement not jurisdictional under Irwin and thus subject to equitable tolling); *Alvarez-Machain v. U.S.*, 96 F.3d 1246 (9th Cir. 1996) (equitable tolling applies to Mexican kidnapped by DEA hirelings in Mexico and jailed for 2 years in U.S.—claim filed three years after kidnapping); *Bartus v. U.S.*, 930 F. Supp. 679 (D. Mass. 1996) (claimant files wrong form based on instructions of DVA counselor—DVA acknowledges receipt, but does not inform claimant that he used wrong form—SOL equitably tolled based on *Glarner v. U.S.*, 30 F.3d 697 (6th Cir. 1994)); *Diltz v. U.S.*, 771 F. Supp. 95 (D. Del. 1991) (equitable tolling allowed—wrongfully placed stitch during eye surgery). See also *Beggerly v. U.S.*, 114 F.3d 484 (5th Cir. 1997) (equitable tolling permitted under Quiet Title Act where Department of the Interior mislead plaintiff re valid title to patent land). The First Circuit’s decision in *Kelley v. National Labor Relations Board*, 79 F.3d 1238, 1996 U.S. App. LEXIS 5332 (1st Cir. 1996) discusses five relevant factors in assessing equitable tolling claims, which are (1) lack of actual notice of the filing requirements; (2) lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement. The First Circuit’s *Kelley* decision also notes that the cases in
which equitable tolling is most often invoked are where affirmative misconduct by the party against whom it is employed is present, e.g., the U.S. many courts have held that even if equitable tolling was applicable, the plaintiff failed to show its entitlement to relief from the 2 year time bar. See, e.g., Hoosier Bancorp of Indiana, Inc. v. Rasmussen, 90 F.3d 180 (7th Cir. 1996) (using 6 month paragraph in denying Bivens claim does not extend SOL for constitutional suit and does not constitute equitable tolling); Johnson v. U.S., 78 F.3d 579 (4th Cir. 1996) (future potential of U.S. to become involved in suit against West Virginia National Guard is not basis for equitable tolling--National Guard member never requested representation); Lambert v. U.S., 44 F.3d 296 (5th Cir. 1995) (suit dismissed for failure to properly serve--suit refiled same day, but dismissed again for failure to comply with 6 months SOL--doctrine of equitable tolling not applicable as adequate remedy under Federal rules); Justice v. U.S., 6 F.3d 1474 (11th Cir. 1993) (equitable tolling not permitted in second DVA suit where first suit, though timely filed, was dismissed without prejudice due to lack of due diligence); First Alabama Bank, N.A. v. U.S., 981 F.2d 1226 (11th Cir. 1993) (no equitable tolling, since claimant did not rely on IRS agent's misrepresentation concerning need to file claim); Sule v. The Warden, MCC New York, 1995 U.S. Dist. LEXIS 3275, 1995 WL 115694 (S.D. N.Y.) (equitable tolling does not apply to suit of prisoner for overcrowded conditions, since SOL runs from date of injury, not from date of discovery of cause of action); McKewin v. U.S., 1993 U.S. App. LEXIS 25684, (4th Cir. 1993) (claim for brain damage at 1982 birth filed in 1990--parents know of cause in 1987--no basis for equitable tolling); Muth v. U.S., 1 F.3d 246 (4th Cir. 1993) (no equitable tolling for claim filed in 1991, where claimant wrote COE before 1988 acknowledging contamination of land). Cf. Oropallo v. U.S., 994 F.2d 25 (1st Cir. 1993) (in taxpayer refund suit filed more than 3 years after tax paid, holds that no equitable tolling can be applied to 3 year limit based on belief that Irwin v. Department of Veterans Affairs, 498 U.S. 89, 111 S. Ct. 453 (1990) was modified by Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 111 S. Ct. 2773 (1991), holding that equitable tolling could not be invoked where claim was barred prior to Irwin); Million v. Frank, 47 F.3d 385 (10th Cir. 1995) (equitable tolling not permitted in Title VII action where plaintiff fails to read mailed denial notice accepted by spouse). U.S. v. Beggerly, 524 U.S. 38 (1998), no equitable tolling where petitioner finds key document in 1991 in Quiet Title Act suit closed. Jones-Booker v. U.S., 16 F. Supp. 2d 52 (D. Mass. 1998), where Federal employee is unable to timely file a FECA appeal due to his inability to communicate as his property interest is protected by due process. Perez v. U.S., 167 F.3d 913 (5th Cir. 1999), equitable tolling granted where Texas National Guard fails to send SF 95 in response to attorney's letter demanding redress for injury and fails to forward letter to Army Claims. Berlin v. U.S., 9 F.2d 648 (S.D. W.Va. 1997), Government claims paralegal tells claimant's attorney he can't file suit until 6 months expires does not provide basis for equitable tolling where SF 95 contains no sum certain; Kieffer v. Vilk, 8 F. Supp. 2d 387 (D.N.J. 1998), letter to Postal Inspection Service did not contain sum certain. Neither state nor Federal suit corrects the deficiency-note state suit filed before 2 years but improperly removed. Stanfill v. U.S., 43 F. Supp. 2d 1304, 1999 WL 183766 (M.D. Ala.), equitable tolling permitted where plaintiff takes voluntary dismissal to file FECA claim at urging of US and the FECA proceedings are then held up by CPO. Parker denial issued prior to FECA filing and suit refiled after 6 months ran; Barr v. U.S., 1999 U.S. App. LEXIS 9687, 1999 WL 314634 (10th Cir. Colo.), equitable tolling not permitted where suit is refiled more than 6 months from date of decree. St. John v. U.S., 1999 U.S. Dist. LEXIS 10631 (S.D. Fla.), where plaintiff files claim 12 years after he was told his

2. Acknowledgment of Filing Date. Letter to claimant acknowledges filing date since it determines when 6-month period for filing suit expires. This is usually required by agency regulation.


Naval Officer undergoes Lipodol contrast myelogram at VA Hospital in 1950; disability rating raised to 90% as a result, suit filed after his death in 1996 is time barred as no showing of incompetence.


4. **Medical Malpractice.**

Claimant put on notice by difficulty in delivery and immediate transfer of newborn to medical center for ecmo; Erano v. U.S., 92 F. Supp.2d 1200 (M.D. Fla. 2000) Same facts as Britt but SOL not tolled by knowledge of injury. Downey v. U.S., 79 F. Supp.2d 1250 (D. Kan. 1999) Claim accrues when Psychiatrist tells claimant he has been harmed by prior Psychiatrist kissing him on the lips, not when he considered the conduct revolting. Winter v. U.S., 244 F.3d 1088 (9th Cir. 2001) Where claimant expressly informed by treating physician that electrodes implanted in his legs were not causing cellulitis, statute is tolled until he discovers otherwise. Knudson v. U.S., 254 F.3d 747 (8th Cir. 2001) SOL started to run in 1982 when veteran was informed he had PTSD and needed continuing treatment-SOL bars suit filed in 1998. Larose v. U.S., #01-2722-CIV-HUCK/TURNOFF (S.D. Fla., 14 Jun 2002) Claimant did not discover clinic doctor was U.S. employee until two years ran. Minamyer v. U.S., C-1-02-42 (S.D. Ohio, 01 Aug 2002) seriously injured at birth at WRAMC in 1982. SF 95 filed in 2000; parents should have known cause of injuries earlier. Statute of limitation applies. Kreutzer v. U.S., Civ. #00-5126-KES 2002 DSD 21 (D.S.Dak. 23 July 02) Where parents knew shortly after birth child's injuries were due to lack of oxygen but were not informed in despite numerous requests of reason for lack of oxygen, claim filed shortly after diagnosis of Cerebral Palsy several years after birth was timely. Wajton v. U.S., 199 F. Supp. 2d 722 (S.D. Ohio 2002) World War II veteran receiving a pension for schizophrenia is diagnosed in 1989 as having PISD but same medicines are prescribed until 1996, when they were changed; veteran's allegation that he did not know of misdiagnosis until 1996 is upheld.

Deceased was murdered in 1984 but body discovered in 1998; claim filed within two years from 1998 was not timely filed as family knew by 1989 that decedent had been murdered as a result of FBI revealing decedent had been murdered as a result of FBI revealing decedent as an informant.

5. Court Decisions. Courts have expanded definition by various theories.


November 2003 WEB Edition 29
b. **Credible Explanation.** Sanders v. Department of Army Surgeon General, 551 F.2d 458 (D.C. Cir. 1977); Reilly v. U.S., 513 F.2d 147 (8th Cir. 1975); Jordan v. U.S., 503 F.2d 620 (6th Cir. 1974); Brown v. U.S., 353 F.2d 578 (9th Cir. 1965). See also Gabbard v. U.S., 1989 U.S. App. LEXIS 18790 (table), 1989 WL 150592 (9th Cir. 1989) (plaintiff told injury at birth may have been caused by pressure on umbilical cord-plaintiff need not seek another explanation).


g. Emotional Injury. Suppressed recollection may toll SOL. See Hildebrand v. Hildebrand, 736 F. Supp. 1512 (S.D. Ind. 1990) (plaintiff brings suit at age 26 for abuse by father until late teens--recollection brought on by treatment-discovery rule applied). But see Baily v. Lewis, 763 F. Supp. 802 (E.D. Pa.), aff'd without opinion, 950 F.2d 721 (3d Cir. 1991) (childhood sexual molestation does not extend SOL under Pennsylvania law, even where memory of act is repressed or where victim does not associate injury with act). However, when tortuous act remembered, SOL begins to run at date of tortuous act, not when cause or impact of injury is realized. Shirley v. U.S., 832 F. Supp. 1324 (D. Minn. 1993) (SOL began to run when assault occurred, not when therapy resulted in sexual abuse victim becoming aware of cause of her injury); K.E.S. v. U.S., 38 F.3d 1027 (8th Cir. 1994) (claim accrues at time of sexual advances, not when victim realizes impact of psychological harm); Hinkley v. Department of the Army, Civ. #H-94-1735 (S.D. Tx., 19 Jan. 1995) (claim filed 13 months after sexual assault is time barred--distinguishes Simmons v. U.S., 805 F.2d 1363 (9th Cir. 1986)).


6. Kubrick Decision. In November 1979, the Supreme Court held that accrual of medical malpractice claim need not await discovery, of all elements of a cause of action, i.e., that act was negligent. U.S. v. Kubrick, 444 U.S. 111 (1979). Rather, plaintiff must only know of existence and probable cause of injury. How far has Kubrick overruled the cases in 5 above?

awaiting airlift for advanced treatment—not when father told airlift may have caused
Indian Health Services Hospital for 50 minutes before air ambulance called—died from
severe stab wound before evacuation—claim accrues on date of death); Price v. U.S.,
775 F.2d 1491 (11th Cir. 1985) (SOL starts running when Veteran is informed of
injury, not when appeal for increased compensation is denied); Burns v. U.S., 764 F.2d
722 (9th Cir. 1985) (when Osteoradionecrosis is side effect of radical therapy about
which patient was warned, SOL starts running when patient informed of
Osteoradionecrosis); Green v. U.S., 765 F.2d 105 (7th Cir. 1985) (even though victim
of explosion and fire was unaware of prior OSHA inspection SOL runs from time of
incident where action is based on improper OSHA inspection); Radman v. U.S., 752
F.2d 343 (8th Cir. 1985) (SOL begins to run from allegedly tortuous termination of
of aberrant coronary artery following heart attack in 16-year-old, long time heart
patient starts SOL running); Schroer v. Chmura, 634 941 (N.D.N.Y. 1986) (SOL
began to run when patient learned anal sphincter torn during childbirth); Hacker v.
U.S., Civ. #C84-321T (W.D. Wash. 1985) (16-year-old with diagnosed heart murmur
being followed at Army Hospital has heart attack--files claim 4 years later); Sexton v.
U.S., 832 F.2d 629 (D.C. Cir. 1987) (nuclear radiation experimental therapy for
Leukemia in child who died shortly thereafter in 1983--claim filed 1986); Hicks v.
Hines, Inc., 826 F.2d 1543 (6th Cir. 1987) (barge employee sues under Jones Act for
bladder cancer 17 years after eye burns, where both injuries allegedly due to exposure
to chemicals); Bass v. U.S., Civ. #C85-1257 MHP (N.D. Cal. 1987) (baby's brain
damaged by delayed C-section filed 10 years after birth); Shostack v. U.S., 679 459
(M.D. Pa. 1988) (severity of Guillain-Barre Syndrome following Swine Flu dictated
inquiry); Gustafson v. U.S.; 650 F.2d 1034 (9th Cir. 1981); Barren v. U.S., 839 F.2d
987 (3d Cir. 1988); Herrera-Diaz v. United States Department of the Navy, 845 F.2d
1534 (9th Cir. 1988) (born 1977, claim filed 1984--no evidence of misrepresentation);
filed 1985--SOL not tolled); Outman v. U.S., 890 F.2d 1050 (9th Cir. 1989) (SOL ran
even though claimant died not of excessive dose, but only of Tardive Dyskinesia);
denied, not when Veteran conﬁrms there was negligent care); Mazur v. U.S.
Department of Immigration and Naturalization, 957 F. Supp. 1041 (N.D. Ill. 1997)
(SOL begins to run when alien was informed that her permanent residency application
would be denied, not when it was formally denied); Mendez v. U.S., 732 F. Supp. 414
(S.D.N.Y. 1990) (guardian never read medical records which indicate cause of infant's
1990) (SOL runs even though did not learn that Federal Aviation Administration failed
third trimester vaginal exam in 1976 brings on PROM—claim ﬁled in 1986--SOL ran);
Dyskinesia from long term Stelazine—claim ﬁled and denied in 1976--claimant said he
did not get notice—SOL ran); Simmons v. U.S., 754 F. Supp. 274 (N.D.N.Y. 1991)
(SOL started when status changed from MIA to KIA, not when "new" evidence found
years later); Bradley v. U.S. by Veterans Administration, 951 F.2d 268 (10th Cir. 1991)
(insertion and removal of elbow prosthesis more than 2 years before filing barred by
SOL); Schunk v. U.S., 783 F. Supp. 72 (E.D.N.Y. 1992) (failure to diagnose chronic
headache and pain over a period of time at two DVA Hospitals is time barred); Tirey v.
had been punctured is sufficient to start SOL running, not when she discovered silicone leaked; O'Neal v. U.S., Civ. #02-876-A (E.D. Va., 20 Aug. 02) claimant knew she was injured in March 1989, SOL has run despite her argument she did not know she could sue U.S.

Cir. 1987) (baby brain damaged at birth by failure to promptly resuscitate, files one year and 10 months after birth); Nemmers v. U.S., 870 F.2d 426 (7th Cir. 1989) (parents did not have knowledge of negligence until reading similar case in newspaper-uses objective test); McDonald v. U.S., 843 F.2d 247 (6th Cir. 1988) (surgeon's post-op assurances that healing may take 3-5 years tolls SOL); Colleen v. U.S., 843 F.2d 329 (9th Cir. 1987) (SOL tolled until brain damage in newborn discovered one year 10 months after birth); Gould v. U.S., 684 F. Supp. 508 (N.D. Ill. 1988) (born 1970, claim filed 1984--not mother's subjective belief, but her acquisition of medical records, started SOL); Weaver v. U.S., Civ. #SA-87-CA-562 (W.D. Tx. 1990) (SOL tolled until learned of HIV positive, even though negligence was in failure to diagnose timely and creating need for colon surgery); Osborn v. U.S., 918 F.2d 724 (8th Cir. 1990) (claim accrued when physician told mother seizures related to DPT shots, not when another physician earlier told mother to stop pertussis shots); Miller v. U.S., 932 F.2d 301 (4th Cir. 1991) (where decedent knew of alleged delay in diagnosing breast cancer in 1984, SOL started in 1984 under Virginia law and wrongful death claim filed in 1988 within two years of death was time barred); Hance v. U.S., 773 F. Supp. 551 (W.D.N.Y. 1991) (brain damaged at birth on April 23, 1982--SOL tolled until saw attorney in Sept. 1987); Muenstermann v. U.S., 787 F. Supp. 499 (D. Md. 1992) (parents informed injury due to improperly conducted blood test, but not of failure to perform timely C-section--SOL starts when damage due to intrauterine stroke diagnosed, not when told of improper blood test); Willis v. Ortho Pharmaceutical, Inc., Civ. #84-CV-742, 3 & 85-CV-542 (N.D.N.Y. 1992) (knowledge of general risks of IUD does not toll SOL until told that ongoing PID is associated with IUD); Slooten v. U.S., 990 F.2d 1038 (8th Cir. 1993) (SOL starts when board decided that oil and mineral rights had not been converted by U.S.); Rice by and Through Rice v. U.S., 889 F. Supp. 1466 (N.D. Okla. 1995) (mother's knowledge that daughter delivered at 43 weeks when taken to civilian Hospital for breathing problems due to swallowing meconium and spend first 40 days of life there does not start SOL running); In re Swine Flu Products Liability Litigation v. U.S., 764 F.2d 637 (9th Cir. 1985) (in action alleging Swine Flu death where coroner did not conduct autopsy and said no Guillain-Barre Syndrome, SOL starts when survivor discovers cause of death); Sanborn v. U.S., 660 F. Supp. 1129 (D. Idaho 1987) (wife died one month following Swine Flu shot in 1976--claim filed 1980--SOL tolled); Pleasant v. U.S., 915 F. Supp. 826 (W.D. La. 1996) (claim filed 37 months after death is not time barred, since widower's request for medical records not filed until 13 months after death). Diaz v. U.S., 165 F.3d 1337 (11th Cir. 1999), med malpractice suit time where widow waited 1 1/2 years to find out that husband-inmate was undergoing psychiatric care at time of suicide. Frasure v. U.S., 256 F. Supp. 2d 1180 (D. Nev. 2003) Child is injured by playing in the contaminated dirt at a former dynamite plant., SOL is tolled until a definite medical diagnosis is made, despite parent’s injuries; cites Stolesen v. U.S., 629 F2d 1265 (7th Cir. 1980) involving adult who had worked in dynamite production.

rule or for fraudulent concealment, since Pennsylvania WD Statute says from date of death). However, a cause of action must exist under state law for death claim to be filed. **Rosenberg v. Celotex Corp.**, 767 F.2d 197 (5th Cir. 1985) (SOL bars suit as New York law requires personal injury claim to exist at time of death); **Quattlebaum v. Carey Canada, Inc.**, 685 F. Supp. 939 (D.S.C. 1988) (action under wrongful death can only be maintained if decedent could sue for PI). Thus, where claim must be filed under state law within two years of original injury and no claim is filed until death three years after original injury, FTCA claim is barred. See, e.g., **Winn v. U.S.**, 593 F.2d 855 (9th Cir. 1979); **Crownover v. Gleichman**, 574 P.2d 497 (S. Ct. Colo. 1977). **Accord Weedin v. U.S.**, 509 F. Supp. 1052 (D. Colo. 1981). However, there is no need to file a wrongful death claim where personal injury claim already filed as both are based on the same injury. **Brown v. U.S.**, 838 F.2d 1157 (11th Cir. 1988); **Nelson v. U.S.**, 541 F. Supp. 816 (M.D.N.C. 1982). **Green v. U.S.**, 1998 U.S. App. Lexis 31014 (9th Cir. Cal.), failure to file wrongful death claim within two years of air crash is not excused by fact that NTSB report not available until eight months after crash. **McGraw v. U.S.**, 281 F.3d 997 (9th Cir. 2002) SOL dismissal of claim filed 26 months after death is remanded to determine whether claim accrued in face of argument it accrued prior to death. **Carswell v. Children's National Medical Center**, 217 F. Supp. 2d 101 (D.D.C. 2002) SOL tolled where parents were told child's death was due to genetics but later learned through genetics testing, it was not.


9. **Damage to Land and Property.** SOL on damage to property begins when damage is first noticeable. **Blue Dolphin, Inc. v. U.S.**, 666 F. Supp. 1538 (S.D. Fla. 1987) (SOL on damage to boat began to run when boat returned to owner's possession, even though it was still constructively seized by U.S.). The same rule applies to land damage, such as erosion. **Heezen v. Aurora County**, 157 N.W.2d 26 (S. Ct. 1968); **Cravens v. U.S.**, 163 F. Supp. 309 (W.D. Ark. 1958); **Rygg v. U.S.**, 334 F. Supp. 219 (D. N.D. 1971); **Konecnv v. U.S.**, 388 F.2d 59 (8th Cir. 1967). See also **Bayou des Familles Development Corp.**, 130 F.3d 1034

November 2003 WEB Edition 37
(Fed. Cir. 1997) (SOL starts to run when COE denies wetlands permit to develop marshes, not when court remedies exhausted); Miller v. U.S., Civ. #CA 5:93-1673-6 (D.S.C., 26 Sep. 1996), aff’d, 125 F.3d 848 (table), 1997 WL 592854 (4th Cir. 1997) (where plaintiff knew of erosion damage to her land caused by adjacent U.S. Air Force Base as early as 1973, claim is time barred though erosion continues). Often land damage claims are plead as nuisance claims, and the type of nuisance created by the wrongful Government conduct has an effect upon the statute of limitation. If a permanent nuisance, the damage is permanent when inflicted and the SOL begins to run when the damage is first noticed, but if a temporary nuisance, the harm is deemed to be continuing, so the SOL never runs. Prescott v. U.S., 1996 U.S. App. LEXIS 34004 (table), 1996 WL 747922 (9th Cir. 1996) (U.S. removal of diversion dam in 1976 started SOL running, since removal created permanent nuisance); Bartleson v. U.S., 96 F.3d 1270 (9th Cir. 1996) (even though property had been shelled from adjacent Camp Roberts for years, shelling had been intensified in the last two years prior to filing of claim for permanent nuisance—claim timely filed); Huffman v. U.S., 82 F.3d 703 (6th Cir. 1996) (addition to inn built next to loading dock—whether 2 years SOL had run turns on whether noise nuisance was permanent, that is, structure was properly constructed and/or operated, meaning that such noise was normal, thereby barring claim or temporary, that is, Post Office was improperly constructed and/or operated, meaning noise occurred only occasionally, making the violation continuous, thereby not barring the claim); Rapf v. Suffolk County of New York, 755 F.2d 282 (2d Cir. 1985) (SOL continues to run, since groin causing beach to wash away is considered continuing public nuisance under New York law). Inverse condemnation (taking) under Tucker Act SOL accrues when damage is complete. U.S. v. Dickinson, 331 U.S. 745, 67 S.Ct. 1382 (1947). Donovan v. Gober, 5 F. Supp.2d 142 (W.D.N.Y. 1998) SOL starts when Federal salary is guaranteed the first time as to claim for infliction of emotional distress. Dziura v. U.S., 168 F.3d 581 (1st Cir. 1999), claim for seizure of painting by IRS for unpaid taxes is filed more than 2 years from failure to sell at auction - SOL barred as not a continuing violation. Dahl v. U.S., 155 F. Supp. 2d 1298 (D. Utah 2001) BLM levels stockpile of minerals; claim filed 3 years later is time barred as damage could have been easily discovered. Loughlin v. U.S., 2002 U.S. Dist. Lexis 22312 (D. D.C.) U.S. fails to show that plaintiffs were aware of chemical contamination of their property after surveys by COE, EPA and private firms showed no contamination, Hoery v. U.S., 324 F. 3d 1220 (10th Cir. 2003) Toxic run-off from U.S. Air Base flows under claimant’s property constitutes continuing tort and is timely filed even if he knows of pollution earlier, Banks v. U.S., 314 F. 3d 1304 (Fed. Cir. 2003) Gradual erosion of bank due to 1903 construction of Corp of Engineers jetty falls under Tucker Act; claim accrues after 1997 Corp of Engineers mitigation efforts by sand replenishment failed and situation stabilizes; Rosner v. U.S., 231 F. Supp. 2d 1202 (S.D. Fl. 2002) In 1945-46, U.S. Army seized property in Austria originally taken by force from Hungarian Jews and then distributed the property; because of denial that this happened until October, 1999, equitable tolling is granted, Dahl v. U.S., 319 F.3d 1226 (10th Cir. 2003) Date of Bureau of Land Management’s destruction of mineral ore stock pile starts statute of limitations running, not date of discovery of loss.


15. Lack of Knowledge of U.S. Involvement. A plaintiff’s lack of knowledge of Federal government involvement normally does not toll the SOL. See Gould v. U.S. Department of Health and Human Services, 905 F.2d 738 (4th Cir. 1990), cert. denied, 498 U.S. 1025 (1991) (plaintiff did not learn physicians in private clinic were PHS employees-SOL not tolled); Zeleznik v. U.S., 770 F.2d 20 (3rd Cir. 1985), cert. denied, 475 U.S. 1108 (1986) (SOL not tolled even though plaintiff made diligent inquiry and did not learn of U.S. involvement); Dyniewicz v. U.S., 743 F.2d 484 (9th Cir. 1984) (parents drowned in flood, but did not learn MPs controlled road--SOL not tolled); Steele v. U.S., 599 F.2d 823 (7th Cir. 1979) (injured while installing runway lights, but did not learn of FAA involvement--SOL not tolled). See also paragraph I D 2d, supra, for additional cases. Whittlesey v. Cole, 142 F.3d 340, 1998 WL 177351 (6th Cir. Tenn.). Where plaintiff was not notified that Navy doctor was a contractor until over one year after death (Tenn. has one year SOL in medical malpractice cases), claim against U.S. not timely filed as SOL ran from date of death. Bueno v. Sheldon, 2000 U.S. Dist. LEXIS 6232 (S.D. N.Y.) Suit filed in state court more than 2 years from accrual only to discover was U.S. employee-claim is time barred. Note claimant was misled as to whether physician had U.S. employment-equitble tolling decision held in abeyance; Bryant v. U.S., 96 F. Supp. 2d 552 (N.D. Miss. 2000) same holding as Bueno supra, lack of knowledge of identity of tortfeasor; Bewley v. Campanile, 87 F. Supp. 2d 79 (D.R.I. 2000) same holding as Bueno, Sullivan v. American Community Mutual Ins. Co., 2000 U.S. App. LEXIS 3202 (6th Cir.) same holding as Bueno. In accord Benjamin v. U.S., 210 F.3d 374 (7th Cir. 2000); Rendon v. U.S., 98 F. Supp. 2d 646 (E.D. Pa. 2000). Motley v. U.S., 144 F. Supp. 2d 1128 (E.D. Mo. 2001) Fact that claimants did not know People’s Health Center was covered by FTCA does not toll SOL. Larose v. U.S., Claimants did not discover clinic doctor was United States employee until two years ran. Brandin v. Brammer Const., 220 F. suppl. 2d 647 (E.D. Tex. 2002) plaintiff sues construction company, the City and USPS for a slip and fall in front of post office, subsequent administrative claim is filed 27 months after, suit is dismissed for failure to file timely claim; Grullon v. U.S., 2002 U.S. Dist. Lexis 12796 (N.D. Ill.) suit filed more than two years after false arrest is not timely despite fact that claimant did not know persons arresting him were U.S. employees; LaRose v. U.S., Civ.#01-2722-CIV-HUCK/Turnoff (S.R. Fla. 14 Jun. 02) Where claimant filed necessary state action with state within 4 year statute of limitations and then discovered clinic doctor is U.S. employee, and files administrative claim after federal 2 year statute of limitation; suit is time barred. Gonzoles v. U.S., 284 F.3d 281 (1st Cir. 2002) Delivering physicians in local hospital were U.S. employees; lack of knowledge on part of mother of brain damaged baby as to their status does not toll statute of limitations. Garza v. U.S., 284 F.3d 930 (8th Cir. 2002) Where federal prisoner escapes from private halfway house and murders his wife, statute of limitations is not tolled by failure to inform that U.S. Bureau of Prisons employee was part of halfway house.

16. Professional Malpractice. General Dynamics Corp. v. U.S., 139 F.3d 1280, (9th Cir. 1998) reversed on other grounds, 1998 WL 136209 (Calif.) (statute runs when indictment based on improper audit is dismissed).

17. Westfall Act. Filaksi v. U.S., 776 F. Supp. 115 (E.D.N.Y. 1991) (where state suit is removed under Westfall Act and dismissed for failure to file administrative claim, the
plaintiff has an additional 60 days to file claim—plaintiff not aware other driver was U.S. employee—based on 28 U.S.C. § 2679(d)(5)). See also Jackson v. U.S., 789 F. Supp. 1109 (D. Colo. 1992); Egan v. U.S., 732 F. Supp. 1248 (E.D.N.Y. 1990); Algorri v. U.S., Civ. #86-4757-WDK (C.D. Cal., 8 Jun. 1994) (in suit originally commenced in state court in 1986, plaintiff had 60 days to file administrative claim after U.S. was substituted as party).


E. Who May File?

1. Injury Claim. In injury cases, the injured party or agent or legal representative (28 C.F.R. § 14.3(a)). Separate claims must be filed separately. Lee v. U.S., 980 F.2d 1337 (10th Cir. 1992) (parents claim filed beyond SOL is separate and cannot relate back to timely filed claim for child's injuries). A person may be considered injured when their injury is cognizable at state law, such as when there is a reasonable medical probability that cigarette smoking asbestos worker will develop cancer and die from it is sufficient to establish cause of action. Gideon v. Johns-Manville Sales Corp., 761 F.2d 1120 (5th Cir. 1985). Accord Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir. 1986); Gonzalez v. U.S., 600 F. Supp. 1390 (W.D. Tx. 1985). A person may not file a claim for speculative future health hazards, such as those resulting from land pollution. Good Fund Ltd.-1972 v. Church, 540 F. Supp. 519 (D. Col. 1982); Laswell v. Brown, 683 F.2d 261 (8th Cir. 1982). Nguyen v. U.S., CA 3:00-CV-0528-R (N.D. Tx. 31 Oct. 2001) Claim for detention of alien by under exclusive jurisdiction of INS by virtue of 8 U.S.C. 1252(g). Gonzalez-Jimenez de Ruiz v. U.S., 2002 U.S. Dist LEXIS (M.D. Fla.) common law wife is not a proper claimant for negligent infliction of emotional distress for injury to partner as Puerto Rico does not recognize such marriages. Gonzalez-Jimenez de Ruis v. U.S., 2002 U.S. Dist Lexis (M.D. Fla.) common law wife is not a proper claimant for negligent infliction of emotional distress for injury to partner as Puerto Rico does not recognize such marriages.

2. Death Claim. In death cases, the person authorized by state law (28 C.F.R. § 14.3(c)). Thus, a claim by the estate or the survivors or both may be filed depending on state law in the state where the negligence occurred (28 U.S.C. § 2672). Van Fossen v. United States, 430 F. Supp. 1017 (N.D. Cal. 1977). But see Keener v. Morgan, 647 F.2d 691 (6th Cir. 1981) (negligence of one parent may be imputed to other parent, and thus bar recovery by either for death of child). Some states WD statute makes a viable fetus a person for legal purposes. Espadero v. Feld, 649 F. Supp. 1480 (D. Colo. 1986) (interprets state death statute as including viable fetus as a person); Volk v. Baldazo, 651 P.2d 11 (Idaho 1982) (citing a


5. Volunteer Barred. Volunteer is not a proper claimant as he is not an “injured” party, e.g., rich uncle who pays medical bills, employer who pays full salary.


8. **Intergovernmental Claim.**

   a. **Not Reimbursable Except by Statute.** Since U.S. does not reimburse itself for loss of its own property, intergovernmental claims are not payable, except where authorized by statute. 25 Comp. Gen. 49 (1945); 9 Comp. Gen. 263 (1930); 6 Comp. Gen. 171 (1926); 22 Comp. Gen. 390 (1916); Comp. Dec. 74 (1899).

   b. **Army Damage to GSA Vehicle.** Claims for damage or loss by Army personnel to General Services Administration vehicles on loan are payable as an expense out of O&M funds (41 Comp. Gen. 199 (1961); 40 U.S.C. § 491(d)), for U.S. Postal Service claims (39 U.S.C. § 411) payable by USARCS only.

prosecution, false arrest, abuse of process and promises estoppel are excluded by Postal Reform Act.


g. Subsequent Malpractice. FECA bar extends to subsequent malpractice during treatment of FECA injury. Balancio v. U.S., 267 F.2d 135 (2d Cir. 1959); Byrd v. Warden, Fed. Detention Hq., 376 F. Supp. 37 (S.D.N.Y. 1974); Mohr v. U.S., 184 F. Supp. 80 (N.D. Cal. 1960); Alexander v. U.S., 500 F.2d 1 (8th Cir. 1974); Sanders v. U.S., 387 F.2d 142 (5th Cir. 1967). See also FECA Program Memo. 186, 14 Oct. 1980; FECA Program Memo. 42, 3 March 1966; Scheppan v. U.S., 810 F.2d 461 (4th Cir. 1987) (PHS officials claim for negligent medical treatment barred); Lance v. U.S., 70 F.3d 1093 (9th Cir. 1995) (volunteer worker who was treated at DVA for injury not on the job is FECA barred); Votteler v. U.S., 904 F.2d 128 (2d Cir. 1990) (coverage for medical malpractice for PHS employee, even though treatment was for non-job related injury); McCall v. U.S., 901 F.2d 548 (6th Cir. 1990) (FECA coverage for medical malpractice for on-the-job injury of Federal employee, even though surgery was furnished on basis employee was military dependent); Somma v. U.S., 283 F.2d 149 (3d Cir. 1960) (failure to properly read x-rays on required physical results in delayed diagnosis of non-job related TB falls under FECA); Wilder v. U.S., 873 F.2d 285 (11th
Cir. 1989) (FECA coverage for medical malpractice on NAFI employee injured on job, even though treatment furnished as military dependent). But see Daly v. U.S., 946 F.2d 1467 (9th Cir. 1991) (U.S. held liable under FTCA for failure to inform employee of abnormal test results--FECA not raised); Wright v. U.S., 717 F.2d 254 (6th Cir. 1983) (no coverage for medical malpractice for DVA Hospital employee re rupture of tubal pregnancy); Noble v. U.S., 2000 U.S. App. LEXIS 15315 (11th Cir.) injury due to delay in surgery due to actions of OWCP in deciding whether to authorize surgery falls under FECAL.


v. U.S., Civ. 79-3077 (9th Cir. 1980). Bednasowicz v. U.S., 1997 WL 665792 (N.D. Ill.) (Feres bars action by Reservist for wrongful discharge, which is heartland Feres by its nature). Feres applies to AD Reservists or those ordered to AD. Uhl v. Swanstrom, 876 F. Supp. 1545 (N.D. Iowa 1995), aff'd, 79 F.3d 751 (8th Cir. 1996) (Feres bars claim by National Guard technician who received medical discharge in error, even though BCMR ordered him reinstated--accord Wood v. U.S., 968 F.2d 738 (8th Cir. 1992)); Loughney v. U.S., 839 F.2d 186 (3d Cir. 1988) (Feres applies to National Guardsman's two week training duty); Maw v. U.S., 733 F.2d 174 (1st Cir. 1984) (Feres bars suit from non AD reservist who did not report for 6 months AD, since JAG reservist told him he was mistakenly ordered to AD); Eisenhart v. U.S., Civ. #81-73051 (9th Cir. 1980) (Feres bar includes auxiliary Coast Guardsman on reserve duty on another Reservist's privately owned boat); Tobin v. Pryce, 963 F. Supp. 880 (D. Neb. 1997) (derogatory treatment of Jewish National Guard officer during 2 week ADT in Germany falls under Feres); Barry v. Stevenson, 965 F. Supp. 1220 (E.D. Wis. 1997) (National Guardsman on 2 weeks training injured passenger in vehicle accident--suit against driver barred under Westfall Act, since driver was in scope of employment); Velez v. U.S. ex rel. Department of the Army, 891 F. Supp. 61 (D.P.R. 1995) (member of Puerto Rico NG performing official duties without orders is arrested at Fort Buchanan--Feres bars false arrest claim); Hassenfratz v. Garner, 911 F. Supp. 235 (S.D. Miss. 1995) (Civilian technician with Miss. ARNG filed suit for being terminated for cause--Feres applies); Townsend v. Seuver, 791 F. Supp. 227 (D. Minn. 1992) (member Minn. NG barred from suing state Civilian employees for racial harassment); Patterson v. U.S., Civ. #1P 83-900C (S.D. Ind. 1983) (Reservist voluntarily riding in jeep at summer camp barred under Feres). Feres also applies to AD Reservist involved in off-post accidents. Green v. Hall, 881 F. Supp. 451 (D. Or. 1995) (reservist on weekend training, killed in off-post accident with civilian truck while going to breakfast--Feres bars claim for negligent supervision of driver who was ill); Bielema v. Biester, 880 F. Supp. 555 (N.D. Ill. 1995) (Feres bars claim by 2 week Reservist involved in off-post, off-duty accident, Parker distinguished). Feres also applies when injury incurred on AD, but negligent treatment not rendered while plaintiff on AD. Jackson v. U.S., 110 F.3d 1484 (9th Cir. 1997); Quintana v. U.S., 997 F.2d 711 (10th Cir. 1993) (medical treatment at USAF MTF for ADT injury after return to civilian status--Feres barred); Bloss v. U.S., 545 F. Supp. 102 (N.D.N.Y. 1982) (full-time Recruiter for N.Y. Navy Reserve--claim for medical malpractice falls under Feres, even though he was not in pay status at time of treatment); Lied v. U.S., Civ. #82-0322 (M.D. Pa. 1982). A § 709 employee’s suit may not be barred. See Neal v. Alabama National Guard, 1997 WL 1114910 (M.D. Ala.) (709 employee’s suit against fellow 709 employee for racial harassment is not necessarily barred by Feres, even though harassment occurred in a duty status--cites many cases on hybrid status of 709 employees). Hupp v. Department of the Army, 144 F.3d 1144 (8th Cir. 1998) Title VII applies to Iowa NG sergeant's application for AGR position but Feres bars claim. Gregory v. Widnall, 153 F.3d 1071 (9th Cir. 1998) Title VIII applies to National Guard technicians except when they challenge personnel actions integrally related to military's unique structure, therefore, Feres bar not applicable to hostile work environment claims; Grant v. Shubuck, 81 F. Supp. 2d 250 (W.D.N.Y. 1998), barring Guardsman access to Armory, stripping his security clearance among other actions is not a 42 U.S.C. 1983 action and is Feres barred; Walker v. U.S., 1998 WL 637360 (E.D. La.), Army Reserve Officer's suit is Feres barred re common law tort portion for involuntary release--also time-barred. Rowe v. U.S., 37 F. Supp. 3d 425 (D. Md. 1999), medical malpractice alleged for improper repair of knee after 2 weeks active duty is Feres


c. Government Contractor Defense. Feres may extend to third party claims for indemnity and to claims against U.S. contractor by service member particularly where “government contractor” defense is viable under State law. See, generally, Brown v. Caterpillar Tractor, 696 F.2d 246 (3d Cir. 1982), appeal after remand, 741 F.2d 646 (3d

d. AD Military Personnel. Feres bars suits involving AD military personnel incident to service. See U.S. v. Johnson, 481 U.S. 681, 107 S.Ct. 2063 (1987) (Coast Guard pilot killed because of FAA Controllers' negligence while the pilot was conducting search operation at sea--Feres barred); Belton v. Dow Chemical Co., 103 F.3d 137 (table), 1996 WL 674150 (9th Cir. 1996) (claim for injury from Agent Orange is Feres barred); Stephenson v. Stone, 21 F.3d 159 (7th Cir. 1994) (accused Soldier shot another Soldier who was going to testify against him--Feres barred); Jackson v. Reigle, 17 F.3d 280 (9th Cir. 1994) (claim based on USAF investigation into homosexual lifestyle of USAF officer who was assigned to Ballistic Missile office is Feres barred--differentiates Lutz, infra); Blakey v. U.S.S. Iowa, 991 F.2d 148 (4th Cir. 1993) (Feres applies to death of Sailor due to explosion on high seas); Washington v. U.S., 12 F.3d 1111 (table), 1993 WL 471790 (9th Cir. 1993) (acquisition of AIDS based on Navy's failure to issue “no sex” order to Sailor--Feres barred); Kitowski v. U.S., 931 F.2d 1526 (11th Cir. 1991) (Feres applies to deliberate drowning of Navy trainee by instructors during training); Smith v. U.S., 877 F.2d 40 (11th Cir. 1989) (Feres applies to death of Challenger astronaut); Dozler v. U.S., 869 F.2d 1165 (8th Cir. 1989) (failure to warn of plot to murder--Feres applies); LeCrone v. Department of the Navy, 958 F. Supp. 169 (S.D. Cal. 1997) (claim for emotional distress allegedly due to failure to discipline Sailors who beat and kicked LeCrone is Feres barred); Ordahl v. U.S., 646 F. Supp. 4 (D. Mont. 1985) (blowgun known to be in barracks used to attack fellow Airman--Feres barred); Bolton v. U.S., 604 F. Supp. 1219 (S.D. Miss. 1985) (failure to furnish mental health treatment to AD Soldier who killed son is Feres barred); McCaleb v. U.S., 572 F. Supp. 1260 (M.D. Tenn. 1983) (one Navy member stabs another aboard ship--both incident to service). The Feres bar may include sexual harassment claims incident to service. Becker v. Pena, 103 F.3rd 137 (table), 1997 WL 90570 (9th Cir. 1997) (Coast Guard member’s claim for sexual harassment is Feres barred as is her constitutional claim); Bois v. Marsh, 801 F.2d 462 (D.C. Cir. 1986) (superior officer admittedly discriminates against female officer--suit barred by Feres--no suit under 42 U.S.C. § 1983(3) against superior); Stubbs v. U.S., 744 F.2d 58 (8th Cir. 1984) (Feres bars action for suicide of service member who was sexually harassed by Drill Sergeant); Colon v. U.S., Civ. #C-93-3320 WHO (N.D. Cal., 22 Feb. 1994) (suicide of Soldier allegedly due to wrongful order and sexual harassment is Feres barred); Lunsford v. U.S., Civ. #83-H-701-S (M.D. Ala. 1984) (sexual harassment of service woman by military supervisor--suit barred). But see Lutz v. Sec’y of Department of the Air Force, 944 F.2d 1477 (9th Cir. 1991) (USAF Major injured by spreading her private correspondence obtained surreptitiously is not Feres barred). Swiantek v. U.S., 1995 WL 120208 (E.D. Pa. 1995) (Soldier-driver dies when he overturns tank allegedly due to improper training--Feres applies. Jimenez v. U.S., 158 F.3d 1228 (11th Cir. 1998), Sailor still on active duty at time of alleged malpractice as court martial not


f. Medical Malpractice on Service Members. The Feres bar includes medical malpractice on service members. Jones v. U.S., 112 F.3d 299 (7th Cir. 1997) (Soldier’s claim for improper surgery at Letterman AMC while he was at Olympic tryout is Feres barred); Catches v. U.S., 75 F.3d 426 (8th Cir. 1996) (reverses district court holding that Feres not applicable to Sailors’ claim for delayed diagnoses of lymphoma); Schoemmer v. U.S., 59 F.3d 26 (5th Cir. 1995) (Feres bars claim for failure to diagnose Acromegaly during MEPS exam upon entry into National Guard from Regular Army); Hayes v. U.S. on Behalf of Department of the Army, 44 F.3d 377 (5th Cir. 1995) (Feres applies to hernia operation, even though hernia not caused by military service); Major v. U.S., 835 F.2d 641 (6th Cir. 1987); Persons v. U.S., 925 F.2d 292 (9th Cir. 1991) (Feres applies to suicide of Sailor who previously attempted suicide, but was not admitted); Irvin v. U.S., 845 F.2d 126 (6th Cir. 1988) (Feres bars claim for negligent prenatal care to female Soldier--follows Atkinson v. U.S., 825 F.2d 202 (9th Cir. 1987), cert. denied, 485 U.S. 987 (1988)); Madsen v. U.S., 841 F.2d 1011 (10th Cir. 1987) (medical malpractice in military Hospital while on terminal leave--Feres applies); Del Rio v. U.S., 833 F.2d 282 (11th Cir. 1987) (negligent prenatal care to service woman, personal injury claim by mother barred, but not to child); Rayner v.

g. Off-Duty, On-Base Conduct. Feres applies to off-duty, but on-base activity. Hale v. U.S., 452 F.2d 668 (6th Cir. 1971); Flowers v. U.S., 764 F.2d 759 (11th Cir. 1985) (Airman on-post returning to quarters from an off-post personal errand, collision with U.S. vehicle on State highway running through base); Bon v. U.S., 802 F.2d 1092 (9th Cir. 1986) (Feres bars claim arising from collision of two boats operated by off-duty Sailors); Shaw v. U.S., 854 F.2d 360 (10th Cir. 1988) (Feres applies to on-post on way to work POV accident); Rainey v. U.S., Civ. #91-2654-5/6 (W.D. Tenn., 30 Nov. 1992) (off-duty Sailor placed under detention and taken to confinement is injured in jeep caused by officer-of-the-day--Feres barred); Estate of McAllister v. U.S., 942 F.2d 1473 (9th Cir. 1991) (off-duty Army officer is stabbed to death by enlisted mental patient near Post Exchange is Feres barred); Millang v. U.S., 817 F.2d 533 (9th Cir. 1987) (off-duty Marine at on-post picnic run over by on-duty MP--Feres barred); Kelly v. Major, 835 F.2d 641 (6th Cir. 1987) (Feres bars Soldiers claim for injuries resulting from motorcycle car collision on post in which NCO got drunk at unit party and caused accident); Frazier v. U.S., 372 F. Supp. 208 (M.D. Fla. 1973) (in PX). But see Elliott v. U.S., 13 F.3d 1555 (11th Cir. 1994) (Soldier totally disabled by carbon monoxide


n. Returning to Duty. Feres applies to persons returning to duty. Morey v. U.S., 903 F.2d 880 (1st Cir. 1990) (Sailor falls off pier as he is boarding ship on return from pass); Pierce v. U.S., 813 F.2d 349 (11th Cir. 1987) (Feres not applied to accident just off-post to Soldier who had been home for several minutes and was returning to duty); Shoen v. U.S., 885 F. Supp. 827 (E.D.N.C. 1995) (Marine injured in on-post collision while on way to work--Feres applies); Daly v. U.S., Civ. #76-2381-Z (D. Mass., 27 Mar. 1980) (Feres barred suit by estate of “on liberty” Petty Officer killed by vehicle driven by another service member on public way while proceeding back to his ship from service club). But see Mileville v. U.S., 751 F. Supp. 976 (N.D. Fla. 1990) (Sailor recruiter injured off-base after leaving on-base quarters to go to office off-base in POV--not Feres barred). Fleming v. U.S. Postal Service, 993 F. Supp. 582 (W.D. Ky. 1998). Soldier on way to work collides with USPS vehicle off-post - Feres applies.


s. Foreign Service Member. Feres extends to Foreign Service Members. Daberkow v. U.S., 581 F.2d 785 (9th Cir. 1978) (NATO); Aketpe v. U.S., 925 F. Supp. 731 (N.D. Fla. 1996) (claims by Turkish service members injured and killed by U.S. Navy missile during NATO training exercise off Turkish coast are Feres barred); In re Agent Orange Product Liability Litigation, 506 F. Supp. 762 (E.D.N.Y.) (claims by Australian serviceman for Agent Orange injuries are Feres barred). But see Whitley v. U.S., Civ. #94-cv-64 JTC (N.D. Ga., 19 Feb. 1997) (members of British Army rugby team are not Feres barred when U.S. Army van overturns on way back to Fort Benning after playing "third half" at Atlanta nightclub to celebrate victory over civilian rugby club, aff'd 170 F.3d 1061 (11th Cir. 1999).


(cc). Delayed Entry Program. Feres bars action by person enrolled in delayed entry program for failure to report. Bauer v. U.S., Civ. #C-78-1049 WHO (N.D. Cal., 7 Aug. 1979) (Feres barred action for false arrest and imprisonment of AWOL person who enlisted under delayed entry program under alleged condition she would be automatically discharged if her husband did not receive change of specialty).

(dd). ROTC Cadets. See also Morse v. West, 1989 U.S. App. Lexis 446 (19th Cir. (Colo.)), aff'd 1999 WL 11287 (10th Cir. Colo.), (sexual harassment by another ROTC
cadet held Feres barred; Wake v. U.S., 89 F.3d 53 (2d Cir. 1996) (inactive reservist who is member of senior Naval ROTC is injured while traveling in a van driven by a U.S. Marine on trip back to college after undergoing pre-commissioning physical--Feres applies); Brown v. U.S., 151 F.3d 800 (8th Cir. 1998), ROTC Cadet-reservist injured in PT training alleges negligent treatment at Army Hospital-Feres barred--cites Wake v. U.S., 89 F.3d at 58-62.

(ee). Public Health Service. Scheppan v. U.S., 810 F.2d 461 (4th Cir. 1987) PHS Officer’s suit for negligently performed elective surgery at his Hospital is Feres barred; Alexander v. U.S., 500 F.2d (4th Cir. 1974) PHS officer’s suit for negligently performed elective surgery at military Hospital is Feres barred.

(ff). Civilian Employees. Meister v. Texas Adjutant General’s Department, 233 F.3d 332 (6th Cir. 2000) State employee of Texas ARNG files Title VII discrimination and retaliation complaint against NG Officers; case remanded to determine if Mindes factors apply (Mindes v. Seaman), 453 F.2d 197 (9th Cir. 1971) making claim nonjustifiable not Feres barred). Luckett v. Bure, 290 F.3d 493 (2nd Cir. 2000) Civilian technician loses his job when he is transferred from his unit due to failure to make weight, his FTCA claim is Feres barred and his civil rights claim is nonjusticiable as requirement that technician belong to unit is regulatory.

(gg). Retired Service Members. Sweazey v. U.S. ex. rel. Veteran’s Administration, 2003 U.S. App. LEXIS 13814 (10th Cir.) Claim for medical malpractice on veterans is based on tort not contract and falls under the FTCA but is not Feres barred; cites Brown v. U.S., 151 F.3d 800 (8th Cir.1998); Quilico v. Kaplan, 749 F.2d 480 (7th Cir. 1984).

II. PROCESSING OF AN ADMINISTRATIVE CLAIM

A. When Must Suit be filed?

1. Suit Optional after Six Months. Suit permissible at option of claimant any time after 6 months has expired from date of filing proper claim (28 U.S.C. § 2675(a)). McKenith v. U.S., 771 F. Supp. 670 (D. N.J. 1991) (filing of suit after expiration of 6 months from date of filing admin. claim constitutes final action and precludes refiling admin. claim). See also Arigo v. U.S., 980 F.2d 1159 (8th Cir. 1992) (suit filed 8 months after claimant wrote DVA that he was withdrawing claim and filing suit is time barred, since his letter constituted a “final denial”). But see Hyatt v. U.S., 546 F. Supp. 96 (E.D.N.Y. 1997) (where plaintiff first files suit, then files administrative claim which is denied, but does not file suit, but dies not file suit, equitable tolling of 6 months is granted since U.S. entered into discovery with plaintiff without raising issue). Richardson v. U.S., Civ. #97-1962 (CKK)(D.D.C., 16 Mar. 2001) Claimant fails to prove he filed administrative claim in 1976; even if he did he must file suit under 28 U.S.C. 2401(a)(1) within six years- Auction Co. v. Federal Deposit Ins. Corp., 141 F.3d 1198 (D.C. Civ. 1998); Brown v. U.S.P.S., 2002 U.S. Dist. LEXIS 5770 (E.D. Pa.) Suit filed one year after denial notice is dismissed, Kampinen v. U.S., 2003 U.S. Dist. Lexis 3777 (N.D. Ill) While plaintiff has option to file suit after six months, her suit filed 22 months after constructive denial was past the statute of limitations and it was frivolous.

2. Negotiations. Negotiations may continue indefinitely with claimant provided claim is not finally denied by agency. McAllister v. U.S. by U.S. Department of Agriculture, 925 F.2d

3. What is a “Final Denial”? Term “final denial” includes a final settlement offer. Jerves v. U.S., 96 F.2d 517 (9th Cir. 1992) (settlement offer by U.S. in attempt to negotiate does not constitute final denial and thereby permit suit within 6 months of filing administrative claim); Wiseman v. U.S., 976 F.2d 604 (9th Cir. 1992) (issuing a check for full amount stated on SF 95 does not constitute final action when check returned and reconsideration requested). Plamondon v. U.S. Postal Service by and through the U.S., 1997 WL 724417 (M.D. Fla.) (USPS denies claim even though claimant alleges there was a settlement agreement, no equitable tolling permitted where suit filed 9 months later.

4. Written Notice of Final Denial. Written notice of final denial required (28 C.F.R. § 14.9). Boyd v. U.S., 482 F. Supp. 1126 (W.D. Pa. 1980). The written notice itself does not create a cause of action nor must it state explicitly that suit must be filed within 6 months. See Pitts v. U.S., 109 F.3d 822 (1st Cir. 1997) (failing to file within 6 months ground for dismissal despite fact that 6 months paragraph does not say “need to file suit”); Gromo v. U.S. Army Finance Center, Civ. #92-4767 (D.N.J. 1993) (use of six months paragraph in FTCA denial letter does not create FTCA cause of action through implication by its use). Denial notice must be sent to claimant’s attorney. Graham v. U.S., 96 F.3d 446 (9th Cir. 1996) (suit filed after 6 month period had run is proper, since denial notice was sent to claimant, not her attorney). The cases are split on whether the denial can be sent by regular mail to start the 6 months running. See Rover v. U.S., Civ. #94-2454 RMU (D. D.C., 21 Aug. 1995) (regular mail okay--citing Pipken v. U.S. Postal Service, 951 F.2d 272 (10th Cir. 1991)); McMahon v. Aquilera, Civ. #94-2454 RMU (D. D.C., 21 Aug. 1995) (same as Rover); Johnson v. U.S. v. Airport Baggage Carriers, Inc., 652 F. Supp. 407 (E.D. Va. 1987) (regular mail insufficient even though letter received). Request for reconsideration must be received by agency, which denied claim is received, not mailed, within 6 months. Gervais by and through Bremner v. U.S., 667 F. Supp. 710 (D. Mont. 1987); Anderberg v. U.S., 718 F.2d 976 (10th Cir. 1983). See also Moya v. U.S., 35 F.3d 501 (10th Cir. 1994) (fact that reconsideration request was sent by certified mail does not create presumption that request was received); Solomon v. U.S., 566 F. Supp. 1033 (E.D.N.Y. 1983) (request for explanation of denial did not rise to level of request for reconsideration which would toll 6 month SOL); Polk v. U.S., 709 F. Supp. 1473 (N.D. Iowa 1989) (no proof for reconsideration ever received--suit barred); Stewart v. Department of Veterans Administration, 722 F. Supp. 406 (W.D. Tenn. 1989) (reconsideration request must be received not later than 6 months from denial). Gonzales v. U.S., Civ. #96-2167 (10th Cir. 30 Jan. 1998) (mailing of reconsideration request does not toll 6-month SOL as receipt is not presumed. Flory v. U.S., 138 F.3d 157 (5th Cir. 1998). Final action by USPS sent by regular mail is insufficient to toll 6-months filing period due to requirement of 28 U.S.C. 2401(b) to send notice by certified or registered mail - so held even though claimant actually received notice. Zumazama v. U.S., 1998 WL 560757 (9th Cir. Cal.), applies equitable tolling where Navy unintentionally leads new attorney to believe final denial not previously denied when it had been and attorney missing filing date. Winter v. U.S., Civ. #97-1484 PHX-PGR (D. Az., 18 Mar. 1999), denial notice informed claimant that request for reconsideration must be sent to DVA General Counsel, but
was received by District Counsel—suit not timely filed despite fact DVA General Counsel
acted on reconsideration request. Shoff v. U.S., 245 F.3d 1266 (11th Cir. 2001) Notice of
denial to attorney in accordance with Attorney General’s Regulation (28 C.F.R. Sect. 14-9)
starts 6 months filing period—necessary to send to claimant.

5. Suit within Six Months. Suit must be commenced within six months after denial (28
U.S.C. § 2401(b)). See, e.g., Schmidt v. U.S., 901 F.2d 680 (8th Cir. 1990) (where U.S. has
no retained receipt, regularity of mail pickup is presumed and suit filed too late); Anderson v.
U.S., 803 F.2d 1520 (9th Cir. 1986) (suit filed within 2 years of incident, but after 6 months
from denial is not timely, where exclusive Federal jurisdiction exists—16 U.S.C. § 457
Federal grazing regulations to preempt state open range law); McDuffee v. U.S., 769 F.2d
492 (8th Cir. 1985) (filed one day too late); Kollios v. U.S., 512 F.2d 1316 (1st Cir. 1975);
(suit filed one day too late); Woirhaye v. U.S., 609 F.2d 1303 (9th Cir. 1979) (two days too
late in state court); Pappa v. Pro-Source Distribution, Inc., Civ. #CV-97-H-1554-E (N.D.
Ala., 10 Oct. 1997) (suit filed in state court filed in state court solely against private
defendants within 6 months of administrative denial, then withdrawn and filed in Federal
court with addition of U.S. after 6 months of denial—SOL bars suit); Knox v. U.S., 874 F.
Supp. 1282 (M.D. Ala. 1995) (failure to file within 6 months from notice of denial—barred by
§ 2401(b); Sparrow v. U.S. Postal Service, 825 F. Supp. 252 (E.D. Cal. 1993) (filing
amended complaint does not satisfy 6-month filing requirement); Chandler v. U.S., 840 F.
Supp. 51 (M.D. Ala. 1994) (Rule adding 3 days for service of complaint does not extend 6-
month filing requirement as jurisdictional); Chambly v. Lindy, 601 F. Supp. 959 (N.D. Ind.
1985) (where both state court suit and administrative claim filed and state court suit removed
and dismissed under Federal Drivers Act, claimant can reinstitute FTCA suit after exhaustion
cannot extend 6 months by refiling admin claim for additional injuries); Tuttle v. U.S. Postal
Service, 585 F. Supp. 55 (M.D. Pa. 1983) (requirement does not violate U.S. Constitution);
Myszkowski v. U.S., 553 F. Supp. 66 (N.D. Ill. 1982) (suit filed within 2 years, but more than
6 months after denial—held suit is time barred); Sinkfield v. Pope, 578 F. Supp. 1500 (E.D.
Mo. 1983); McGowan v. Williams, 481 F. Supp. 681 (N.D. Ill. 1979). Date of mailing denial
notice starts 6 months running. Carr v. Department of Veterans Administration, 522 F.2d
1355 (5th Cir. 1975). The 6-month limitation period is normally not tolled. DeCasanave v.
U.S., 991 F.2d 11 (1st Cir. 1993) (no equitable tolling of 6 months where suit dismissed
because of counsel's failure to comply with discovery orders); Goff v. U.S., 659 F.2d 560
(5th Cir. 1981) (prior filing does not toll 6 months where voluntary dismissal taken);
within 6 months where first suit was dismissed for naming wrong defendant); Pascarella v.
U.S., 582 F. Supp. 790 (D. Conn. 1984) (six months not tolled by attorney's failure to tell
client that administrative claim denied). But see Moore v. Bureau of Prisons, Civ. #89-3121-
RDR (D. Kan. 1993) (equitable tolling of 6 months filing requirement granted where penal
institution failed to mail). However, where reconsideration has been timely requested, a suit
filed within 6 months of the request for reconsideration is premature. Clark v. U.S., 974 F.
by failure to file within 6 months of denial, a jurisdictional bar. Stanfill v. U.S., F. Supp.2d,
1999 WL 183766 (M.D. Ala.) equitable tolling permitted after 6 months ran due to actions of
U.S.-not garden variety neglect by plaintiff; Cabiniss v. U.S., 2000 U.S. Dist. LEXIS 5047
(E.D. La.) Where suit filed one day after administrative claim filed, and motion to stay made,
LEXIS 30794 (6th Cir.) No equitable tolling of 6 months based on transfer of prisoner 2 weeks prior to end of 6 months period-no due diligence. Roman v. Townsend. 2000 U.S. App. LEXIS 21285 (1st Cir.) Filing of Bivens action within 6 months of denial of administration claim does not toll 6 months period for filing FTCA claim, which is filed one year later. Acres v. U.S., Civ. #CS-01-0080-WFN (E.D. Wash., 2 Jul. 2001) Suit filed within six months period is voluntarily dismissed and refilled after expiration of six months is time barred. Newsome v. U.S., 2002 U.S. Dist. LEXIS 12865 (N.D. Ill.) Where suit filed within six months of denial by United States Air Force is voluntarily dismissed, subsequent re-filing must meet 6 month requirement. Chappel v. U.S., 2002 U.S. Dist. LEXIS 18356 (N.D.N.Y. 2002) Denial notice mailed to claimant’s former attorney starts 6 months running even though claimant is not notified; Gonzales-Rucci v. U.S., 218 F. Supp. 2d 161 (D.P.R.) Suit filed 2 days after 6 months had run is time barred; Haceesa v. U.S. 309 F.3d 722 (10th Cir. 2002) Individual claims for widow and daughter are filed within 6 months but suit cannot be amended to include estate claim as it was denied 7 months after attempted amendment; Townsend v. U.S., 49 Fed. Appx. 822 (10th Cir. 2002) Claim denied Nov. 2, 2000, suit filed 10/10/01 was untimely.


7. Filing of Suit Constitutes Final Action. Some case hold that a claimant’s filing of a suit after six months has expired constitutes final action on a claim. Arigo v. U.S., 980 F.2d 1159 (8th Cir. 1992) (suit filed 8 months after claimant wrote DVA that he was withdrawing claim and filing suit is time barred as his letter constituted a “final denial”); McKenith v. U.S., 771 F. Supp. 670 (D. N.J. 1991) (filing of suit after expiration of 6 months from date of filing administration claim constitutes final action and precludes refiling administration claim). See also Benge v. U.S., 17 F.3d 1286 (10th Cir. 1994) (court refuses to apply doctrine of relation back to the refiling of a previously dismissed suit after original 6 months has run); Rainey v. U.S., Civ. #91-2656-415 (W.D. Tenn. 1993) (premature filing of suit is mooted by administrative denial of claim simultaneously filed). However, some courts allow a claimant to refile their suit, when dismissed without prejudice initially, if the agency has never formally denied the claim. Pascale v. U.S., 998 F.2d 186 (3d Cir. 1993) (suit can be refilled if suit dismissed without prejudice, even though filed after 6 months, when agency has not finally denied claim); Parker v. U.S., 935 F.2d 176 (9th Cir. 1991) (administrative claim can be refilled if suit is dismissed without prejudice if no final action has been taken by agency); Hannon v. U.S. Postal Service, 701 F. Supp. 386 (E.D.N.Y. 1988). See also Gilles v. U.S., 906 F.2d 1386 (10th Cir. 1990) (even though first complaint dismissed and second complaint...
did not refer to first complaint, second complaint considered timely filed under doctrine of relation back).


10. Proper Service is Required. Suit must be served on both U.S. Attorney and Attorney General or no jurisdiction. Peters v. U.S., 9 F.3d 344 (5th Cir. 1993) (failure to complete proper service is basis for dismissal even though SOL has run); McGregor v. U.S., 933 F.2d 156 (2d Cir. 1991) (failure to serve Attorney General within 6 months bars suit, and filing second suit to remedy error is not permitted--distinguishing Zankel v. U.S., 921 F.2d 432 (2d Cir. 1990)); Watts v. Pinckney, 752 F.2d 406 (9th Cir. 1985); Allgeier v. U.S., 909 F.2d 871

U.S., 2003 U.S. Dist. LEXIS 4184 (S.D. N.Y.) Failure to obtain medical records did not prevent claimant from filing within six months, no equitable tolling.

B. What is Proper Basis for a Claim?

1. Definition of Tort.


(2) Negligence Not a Constitutional Tort. A negligence claim under the FTCA may not be plead as a Bivens constitutional tort claim, if no constitutional rights violated. Martin v. Malhoyt, 830 F.2d 237 (D.C. Cir. 1987) (no cause of action against Park policemen for Constitutional torts--limited to common law torts); Bryson v. City of Edmond, 905 F.2d 1386 (10th Cir. 1990) (failure of National Guard employee to conduct mental test on National Guard member prior to issuing gun and ammunition, not a constitutional tort); Barber v. Grow, 429 F. Supp. 820 (E.D. Pa. 1996) (supervisor of prisoner allegedly pulls chair from under prisoner who is seated at supervisor's desk not an 8th Amendment tort); Misko v. U.S., 453 F. Supp. 513 (D. D.C. 1978); Garcia v. U.S., 666 F.2d 96 (5th Cir. 1982).

(3) Existence of Adequate Remedy. A Bivens’ action can exist only where there the plaintiff lacks an adequate remedy. McCarthy v. Madigan, 503 U.S. 140, 112 S.Ct. 1081 (1992) (Bivens action for money damages does not require exhaustion of grievance procedure, since there is no grievance procedure for money damages); Weiss v. Lehman, 676 F.2d 1320 (9th Cir. 1982); Doe v. U.S.,

(4) Employee Relation Remedial Schemes. Constitutional tort claims by a Federal employee against other Federal employees may be barred by statutory schemes concerning employee relations. Federal constitutional tort claims Title VII bars concerning racial discrimination. Brown v. General Services Administration, 425 U.S. 820, 96 S.Ct. 1961 (1976); Kizas v. Webster, 707 F.2d 524 (D.C. Cir. 1983). Federal constitutional tort suits are barred concerning retaliatory personnel practices, since Civil Service procedures are exclusive remedy for retaliatory personnel practices. Bush v. Lucas, 462 U.S. 367 (1983). See also Rivera v. U.S., 924 F.2d 948 (9th Cir. 1991) (Bush v. Lucas applied to Whistleblower); Bryant v. Cheney, 924 F.2d 525 (4th Cir. 1991) (Bush v. Lucas applies to Bivens action by Federal Civil service worker); American Postal Workers Union v. U.S. Postal Service, 940 F.2d 704 (D.C. Cir. 1991) (class action for retaliatory dismissal does not lie under Federal Tort Claims Act--Civil service remedy exclusive); Kotarski v. Cooper, 866 F.2d 311 (9th Cir. 1989) (fact that probationary civil servant has only limited benefits does not avoid Bush v. Lucas); Brothers v. Custis, 886 F.2d 1282 (10th Cir. 1989) (Bush v. Lucas extends to probationary employee, e.g., part-time contract surgeon even though remedy is limited); Maxey v. Kadrovach, 890 F.2d 73 (8th Cir. 1989) (same); Boretos v. The U.S. Naval Observatory, Civ. #92-1073-LFO (D.D.C., 6 Jan. 1993), aff'd, 1993 WL 267491 (D.C. Cir. 1993) (Federal employee's emotional distress due to being pressured by supervisor is barred by Bush v. Lucas); Castella v. Long, 701 F. Supp. 578 (N.D. Tex. 1988) (AAFES employee subject to benefit scheme—no suit allowed under Bush v. Lucas); Liles v. U.S., 638 F. Supp. 963 (D. D.C. 1986) (dismissal following arrest for indecent acts--must exhaust administrative remedies under MSPB appeal procedure); Francisco v. Schmidt, 575 F. Supp. 1200 (E.D. Wis. 1983) (Civil service probationary employee cannot file Bivens tort action, even in absence of Civil Service procedural remedy). The Civil Service Reform Act (CSRA) has also been held to bar Federal constitutional tort suits. Spagnola v. Mathis, 859 F.2d 223 (D.C. Cir. 1988) (Federal employees statutory civil rights claim against superiors foreclosed by civil Service Reform Act); Neverez v. U.S., 957 F. Supp. 884 (W.D. Tex. 1997) (suit for defamation dismissed under Westfall Act--no remedy under CSRA); Saul v. U.S., 928 F.2d 829 (9th Cir. 1991) (CSRA preempts both constitutional tort against Federal employee's superior and common law claims against U.S. arising from personnel action the definition of which is broadly construed to include search); Mittleman v. Department of Treasury, 773 F. Supp. 442 (D. D.C. 1991) (former U.S. employee's claim for inaccuracies in her medical records falls exclusively under CSRA); Morales v. Department of the Army, 947 F.2d 766 (5th Cir. 1991) (alleged mistreatment of Assistant Fire Chief falls under CSRA); Gergick v. Austin, 997 F.2d 1237 (8th Cir. 1993) (successful Whistleblower Protection Act claimant has no claim under FTCA, since he is limited by Civil Service Reform Act); Grisham v. U.S., 103 F.3d 24 (5th Cir. 1997) (termination under Whistleblower Protection Act (WPA) falls under CSRA and is not a basis for FTCA claim); Steele v. U.S., 19 F.3d 531 (10th Cir. 1994) (CSRA is exclusive remedy for claim for dismissal of USAF civil servant); Blaney v. U.S., 34 F.3d 508 (7th Cir. 1994) (failure of USAF to abide by terms


c. **Types of Torts.** Not limited to traditional common law torts where other torts permitted by state law--not excluded unless enumerated in 28 U.S.C. § 2680.


(3) **Waste.** Duty to restore premises to original condition under lease. See AR 405-15 (method of paying claim for damage to real property occupied under an implied contract). Suit may be brought either FTCA or Tucker Act. Myers v. U.S., 323 F.2d 580 (9th Cir. 1963); Palomo v. U.S., 188 F. Supp. 633 (D. Guam 1960). The government’s negligent failure to maintain an easement may constitute waste. Walsh v. U.S., 672 F.2d 746 (9th Cir. 1982).

(D.D.C. 2002) Burying chemical ordinance close to surface following WWI supported claims for emotional distress by persons later occupying residences constructed on site; Wilder v. U.S., 230 F. Supp. 2d 648 (E.D. Pa. 2002) Where patient was told she was HIV positive and had 4 subsequent abortions before being tested negative; no claim for intentional infliction of emotional distress as conduct not outrageous, no impact; Gonzales-Jimenez de Ruis v. U.S., 231 F. Supp. 1187 (M.D. Fla. 2002) Denial of visiting privileges, failure to inform of transfer, failure to ship body, do not constitute outrageous conduct by Federal prison officials in cancer death of prisoner.


(c) Emotional Distress From Birth of Child. Cases allowing recovery in such circumstances. Haught v. Maceluch, 681 F.2d 291 (5th Cir. 1982) (Texas case recognizing emotional distress of mother from birth of child). See also Sanchez v. Schindler, 651 S.W.2d 249 (Tx. 1983); St. Elizabeth Hospital. v. Garrard, 730 S.W.2d 649 (Tx. 1987)(contra Boyle v. Kerr, 855 SW.2d 593 (Tx. 1993) which overrules Garrard except on bystander liability
cases); Ingraham v. Bonds, 808 F.2d 1075 (5th Cir. 1987) ($500,000 to
mother for experiencing negligent delivery which resulted in brain damaged
child); Sesma v. Cueto, 181 Cal. Rptr. 12 (Cal. App. 1982) (mother's
emotional injury at stillbirth based on Dillon v. Legg, 441 P.2d 912 (Cal.
(father's emotional injury at stillbirth); Blackwell v. Oser, 436 So. 2d 1293
(La. App. 1983) (mother can recover for her mental anguish when physician
causes birth defects in child, since physician has obligation to treat her so as
to avoid injury to child--however, father cannot recover); Shaw v. U.S., 741
F.2d 1202 (9th Cir. 1984) ($2,000,000 award for parent's emotional injury
for child brain damaged at birth under Washington law (RCWA § 2.24.010)-
-reduced to $50,000 on appeal); Phillips v. U.S., 575 F. Supp. 1309 (D. S.C.
1983) ($500,000 for parent's emotional injury for birth of child damaged by
Rubella despite absence of South Carolina law, cites Naccash v. Burger, 290
S.E.2d 825 (Va. 1982) and Berman v. Allan, 404 A.2d 8 (N.J. 1979)); Boyd
v. Bulala, 877 F.2d 1191 (4th Cir. 1989) (permits father to recover for
witnessing birth of brain damaged infant); Shelton v. Anthony's Med. Center,
781 SW.2d 48 (Mo. 1989) (mother's emotional distress allowed for viewing
birth of armless baby); Wade v. U.S., Civ. #89-00226 HMF (D. Haw., 2 May
1991) (mother awarded $500,000 for emotional distress over loss of stillborn
twins for whom recovery not permitted under Wrongful Death Act); Phillips
both parents of shoulder dystocia delivery can provide basis for emotional
distress claim). But see Schmeck v. City of Shawnee, Kansas, 647 P.2d 1263
(Kan. 1982) (holds the opposite of Haught).

(d) Bystanders. Requirements for bystander recovery. In re Air Crash at
Dallas/Ft. Worth Airport on 2 August 1985, 856 F.2d 28 (5th Cir. 1988)
(reviews bystander requirements). See also Gross v. U.S., 676 F.2d 295 (8th
Cir. 1982). Cases allowing recovery by bystanders for emotional distress.
injury at stillbirth based on Dillon v. Legg, 441 P.2d 912 (Cal. 1968)); Thing
v. La Chusa, 257 Cal. Rptr. 865, 771 P.2d 814 (Cal. 1989) (adds requirement
of awareness to that of presence); Marlene F. v. Psychiatric Medical Clinic
Inc., 770 P.2d 278 (Cal. 1989)(mother allowed to recover for emotional
injuries from finding out daughter had been sexually molested by Therapist);
In re Air Crash Disaster Near Cerritas, Cal., 967 F.2d 1421 (9th Cir. 1992),
further proceedings, 973 F.2d 1490 (9th Cir. 1992) (witnessing husband and
two children trapped in burning home after plane crashed into it is basis for
emotional distress claim as placed in fear for own safety); Walker v. Clark
Equipment Co., 320 N.W.2d 561 (Iowa 1982) (product liability psychic
injury case); Woodill v. Parke Davis and Co., 402 N.E.2d 194 (Ill. 1980)
(same as Walker); Marzolf v. Hoover, 596 F. Supp. 596 (D. Mont. 1984)
brystander case--close relative witnesses injury to child); Ochoa v. Superior
Court of Santa Clara County, 703 P.2d 1 (Cal. 1985); Hahn v. Sterling Drug,
Inc., 805 F.2d 1480 (11th Cir. 1986) (Georgia follows impact rule in absence
of willful act); Lejeune v. Rayne Branch Hospital., 556 So. 2d 559 (La.
1990) (wife's emotional distress for viewing rat bites on husband who is
patient in Hospital--cause of action permitted). But see In re Air Crash
Disaster Near New Orleans, Louisiana on 9 July 1982, 764 F.2d 1082 (5th
Cir. 1985) (homeowner in area of air crash who suffered no physical injury or property damage not entitled to damages for mental injury); Harper v. Illinois Central Gulf RR, 808 F.2d 1139 (5th Cir. 1987) (train wreck causes spread of hazardous fumes--no emotional injury unless in zone of danger or for property damage unless witnessed same); Wilder v. City of Keene, 557 A.2d. 636 (N.H. 1989) (no recovery for parents who saw son one hour after accident); Burris v. Grange Mutual Cos, 545 N.E.2d. 83 (Ohio 1989) (no recovery for mother who later learned of son's death in auto accident); Nesom v. Tri Hawk Intern, 985 F.2d 208 (5th Cir. 1993) (discusses abandonment of "zone of danger" rule by La. Sup. Court, but states that fear of developing disease in future does not create action for emotional distress); Martin by and through Martin v. U.S., 984 F.2d 1033 (9th Cir. 1993) (neither older sister of 6-year-old or mother have emotional distress action); Doe v. U.S., 976 F.2d 1071 (7th Cir. 1992) (no cause of action for seduction, i.e., emotional distress permitted for parents of child sexually abused at USAF day care center); Mortise v. U.S., 102 F.3d 697 (2d Cir. 1997) (wife who witnessed assault upon husband by National Guard on training exercise does not have claim for negligent infliction of emotional distress, since he did not suffer serious bodily injury); Garber v. U.S., 578 F.2d 414 (D.C. Cir. 1978) (no recovery for emotional distress without impact); Soldinger v. U.S., 247 F. Supp. 559 (E.D. Va. 1965) (same).  MR (Vega Alta) v. Caribe General Elec. Products, 31 F. Supp.2d 226 (D. P.R. 1998) failure of EPA to follow Federal regulations during CERCLA clean up is not at FTCA tort. Hughes v. Moore, 214 Va. 27 (1973) Recovery for emotional distress allowed for injury caused by car crashing into house; El-Meswari v. Washington Gas Light Co., 785 F.2d 483 (4th Cir. 1986) No recovery in Virginia for witnessing injury.


Alaska LEXIS 38 (Sup. Ct.) there is no state tort for being the unwitting instrument of negligent infliction of emotional distress.


law). However, a law or regulation is considered sufficient notice. Burton-Bey v. U.S., 100 F.3d 967 (table), 1996 WL 654457 (10th Cir. 1996) (seizures of inmate’s properly purchased Dallas Cowboys cap under newly published prison regulation is not conversion). For a conversion to occur the plaintiff must have an ownership interest in the thing being converted. Koppie v. U.S., 1 F.3d 651 (7th Cir. 1993) (alleged improper registration of aircraft does not constitute a conversion, since it does not determine ownership); Chopp Computer Corp. v. U.S., 5 F.3d 1344 (9th Cir. 1993) (U.S. levies on a stock account on which an injunction has been placed--no conversion--injunction holder had no property interest in the account). Bazauye v. U.S., F. Supp. 2d, 1999 WL 166996 (D.D.C.) No conversion as plaintiff did not own release bond at time it was seized by USPS under a forfeiture statute. Rodriguez v. U.S., 2001 U.S. App. LEXIS 2182 (10th Cir.) Prisoner’s claim for conversion of her platinum plate fails as it was seized as contraband when he attempted to fashion plate into knives or shanks. United Federal Leasing v. U.S., 33 Fed. Appx. 672 (4th Cir. 2002) Where Navy retains leased computers to supplier despite demand for return from successor owner, claim for conversion falls only under the Contract Disputes Act. Smith v. U.S., 293 F.3d 984 (7th Cir. 1993) Army seizes tank donated to VFW from Smith as VFW had no right to transfer ownership, court states that there was no conversion of Smith’s property.


(12) Trade Secrets. Wrongful misuse of trade secrets is tort under New York law and, therefore, falls under FTCA Kramer v. Secretary, Department of the Army, 653 F.2d 726 (2d Cir. 1980).


(16) Legal Malpractice. Valid legal malpractice claim must be plead and proven. Knisley v. U.S., 817 F. Supp. 680 (S.D. Ohio 1993) (examines in detail what entails legal malpractice by Army legal assistance officer in domestic separation case and concludes no legal malpractice). See also Massow by Massow v. U.S., 987 F.2d 1365 (8th Cir. 1993) (base legal assistance informing Airman that brain damaged baby claim is Feres barred constitutes legal malpractice--genesis test applied); Walker v. U.S., 663 F. Supp. 258 (E.D. Okla. 1987) (Department of Interior attorney fails to properly represent Indian client re oil and gas lease). But see Parris v. U.S., 45 F.3d 383 (10th Cir. 1995) (FTCA is not vehicle to challenge Public Defender's inept defense); Brooks v. U.S., Civ. #94-181-M Civil (D. N.Mex., 15 Mar. 1995) (information provided to employer of ex-service member by defense counsel in court martial does not constitute a state tort, even if it constitutes a violation of confidentiality); Chesky v. U.S., Civ. #94-0478-D (D. Me. 1988) (legal assistance discloses sexual misconduct of client's husband based on her agreement that he could tell husband's company-held no written consent required). Some states would allow a legal malpractice claim to proceed as an emotional distress claim. Pinkham v. Burgess, 933 F.2d 1066 (1st Cir. 1991) (gross mishandling of Civil law suit can give rise to tort of negligent infliction of emotional distress, even though lawsuit could not have been successfully pursued).

(17) Professional Negligence. General Dynamics Corp. v. U.S., 139 F.3d 1280, (9th Cir. 1998) reversed on other grounds F.3d 1998 WL 136209 (9th Cir.). (Improper audit is a tort for professional negligence under California law), rev’d on other grounds.

(18) Anti-Dumping Statute, (COBRA), 42 U.S.C. §§ 1395dd(b)(1)(A)&(B). Dickey v. Baptist Memorial Hospital of North Miss., 1996 WL 408879 (N.D. Miss.) (COBRA does not create course of action under FTCA); Burrows v. Turner Memorial Hospital, Inc., 762 F. Supp. 840 (W.D. Ark. 1991) (COBRA is not applicable under the FTCA, since state tort is separate). COBRA applicability generally. Abercrombie v. Osteopathic Hospital, Founders Ass'n,
950 F.2d 676 (10th Cir. 1991) (COBRA is a strict liability statute); Johnson v. Univ of Chicago Hospital, 982 F.2d 230 (7th Cir. 1992) (COBRA is applicable to Hospital's telemetric referral of patient); Lee by Wetzel v. Allegheny Regional Hospital, Comp. 778 F. Supp 900 (W.D. Va. 1991) (COBRA required that patient be stabilized prior to transfer); McIntyre v. Schick, 795 F. Supp. 777 (E.D. Va. 1992) (failure to return to ER after premature discharge while in labor falls under COBRA). But see Hutchinson v. Greater S.E. Community Hospital, 793 F. Supp. 6 (D. D.C. 1992) (discharge due to negligent diagnosis does not constitute failure to treat and is not under COBRA). Chervomiah v. U.S., 1999 U.S. Dist. LEXIS 10197 (D. N.Mex) EMTALA is not applicable to Indian Health Service Hospital. Chervomiah v. U.S., 55 F. Supp.2d 1295 (D. N.Mex. 1999) EMTALA does not waive sovereign immunity. Williams v. U.S., 242 F.3d 169 (4th Cir. 2001) IHS Hospital refuses emergency treatment to oxygen tank dependent non Indian who dies next day from respiratory failure-EMTALA not applicable.


that he did not meet standard of care and $205,000 wrongful death award, 
Dowdle Butane Gas Co. v. Moore, et.al., 831 So. 2d 1124 (Sup. Ct. Miss. 2002) 
Rejects tort of spoliation.

F.2d 1184 (8th Cir. 1993) (failure of FmHA officials to inform farmers as 
ordered by a court constitutes a tort under FTCA).

(22) Nuisance. Bartleson v. U.S., 96 F.3d 1270 (9th Cir. 1996) (shelling from 
adjacent Camp Roberts for a period of two years constituted a permanent 
uisance, since Army cannot assure that shelling will not continue).

(23) Negligent Entrustment. McGuire v. Wright, Civ. #96-50931 (5th Cir. 23 
Mar. 1998). Failure of NAFI to make certain that driver of rental vehicle was 
insured does not constitute negligent entrustment.

LEXIS 30079 (9th Cir.) where U.S. allegedly spirited driver, a U.S. agent from 
Mexico after he fell asleep at the wheel, claimant argues that equitable estoppels 
applies, not foreign country exception. Argument fails as equitable estoppels has 
no U.S. statutory authority. See Office of Personnel Management v. Richmond, 

D.C. 2002) Antifal demonstrator are subjected to strip and squab search upon 
misdemeanor arrest and claim invasion of privacy, held allegation is tort of 
intrusion upon seclusion, cites a number of examples including Wolf v. Regardie, 
553 A 2d 1213 (D.C. 1989) and Restatement (2d) of Torts (1977) Sect 652B. 
Muick v. Glenoyre Electronics, 280 F.3d 741 (7th Cir. 2002) Seizure of laptop 
computer by employer based on allegation it contained child pornography is not 
invasion of privacy but may constitute tort of invasion of right of seclusion if 
employer so promised.

minor’s name to mine operator in violation of federal regulation tort of 
constructive fraud results, not negligence misrepresen-tation.

d. FTCA Liability for Violating Federal Regulations. FTCA claim cannot arise 
from violation or failure to follow Federal rule or regulation unless State law 
recognizes private cause of action. Cases where no cause of action for violation of 
government rule or regulation, because not actionable under state law. See U.S. v. 
Varig Airlines, 467 U.S. 797, 104 S.Ct. 2755 (1984); Johnson v. Sawyer, 47 F.3d 716 
(5th Cir. 1995) (en banc)(violation of IRS statute prohibiting public dissemination of 
tax information does not constitute a tort under Texas law); Myers v. U.S., 17 F.3d 890 
(6th Cir. 1994) (miner’s death based on failure of Mine Health and Safety 
Administration's failure to enforce its regulations does not constitute a tort under 
Tennessee law); Hardaway v. Department of the Army-COE, 980 F.2d 1415 (11th Cir. 
1992) (failure to investigate financial worth of contract and require posting of Miller 
Act bond in violation of COE regulation is not a state tort); Sheridan v. U.S., 969 F.2d
officials does not constitute a state tort. Sigmon v. U.S., 110 F. Supp. 906 (7th Cir. III. 1957) Violation of mandatory AFR concerning enlistment of former mental patient and retention of Airman despite PEB recommendation is not barred by discretionary function exception. McMellon v. U.S. Army COE, 338 F.3d 287 ((4th Cir. 2003) COE regulation (33 C.F.R. 207.300(s)(2002) requires dams to be marked by buoys; failure to do so forms basis for liability where jet skiers went over top of dam.


2. **Must be caused by U.S. Employee.** Mendrada v. Crown Mortgage Co., 955 F.2d 1132 (11th Cir. 1992) (Federal Home Loan Mortgage Company is not a Federal agency for purposes of FTCA; cites military case); Polcari v. J.F. Kennedy Center, 712 F. Supp. 230 (D.D.C. 1989) (Kennedy Center is Federal agency due to substantial oversight and funding); Brandes v. U.S., 783 F.2d 895 (9th Cir. 1986) (fiancée of DVA employee was not Federal employee while driving daughter in U.S. vehicle from prospective house purchase).


c. **Contract Physicians.** The term “U.S. employee” excludes "contract physician." Wood v. Standard Products Co., 671 F.2d 825 (4th Cir. 1982); Walker v. U.S., 549 F. Supp. 973 (W.D. Okla. 1982) (even where service is performed in USAF Hospital); Lurch v. U.S., Civ. #79-034-C (D. N.M. 1980) (excludes "scarce medical specialist" hired under 32 U.S.C. § 4117). See also Kramer v. U.S., 843 F. Supp. 1066 (E.D. Va. 1994) (failure of CHAMPUS partners at Langley AFB clinic to diagnose condition which led to leg amputation is not under FTCA, since they were not U.S. employees); Sorahan v. U.S., 1997 WL 573403 (N.D. Ill.) (Dr. Peterson dismissed from FTCA suit since he was independent contractor whose sponge was not removed from patient during hysterectomy); Hanna v. Naegle, Civ. #93-1421M (D. N.M., 30 Aug. 1996) (CHAMPUS partner held to be independent contractor); Bunevitch v. U.S., Civ. #C-91-0728-L (J) (W.D. Ky., 19 Jul. 1994) (contract radiologist is held to be an independent contractor in suit for misinterpretation of mammogram); Rodriguez v. Sarabyn, 129
F.3d 760 (5th Cir. 1997) (Clinical Psychologist hired on a purchase order to provide family counseling to ATF victims of Waco raid is an independent contractor); Richerson v. U.S., 104 F.3d 361 (table), 1996 WL 733136 (6th Cir. 1996) (University of Michigan Medical School Anesthesiologist is an independent contractor, but immune under State immunity statute); Robb v. U.S., 80 F.3d 884 (4th Cir. 1996) (USAF contracted with contractor to set up a "stand alone" OP clinic, which failed to diagnose lung cancer--both OP physician and contract Radiologist were independent contractors); Pickett v. U.S., 724 F. Supp. 390 (D. S.C. 1989) (ER physician not U.S. employee); Eames v. U.S., Civ. #C-92-1822 MHP (N.D. Cal., 29 Dec. 1993) (U.S. not liable for error in reading x-ray by contract Radiologist at Naval Hospital); Lilly v. Fieldstone, M.D., 876 F.2d 857 (10th Cir. 1989) (Civilian Urologist performing surgery in Army Hospital an independent contractor, not a civilian employee--Soldier not Feres barred); Sneed v. U.S., Civ. #91-0613-FMS (N.D. Cal. 1992) (contract Radiologist at Oakland Naval Hospital is independent contractor); Carrillo v. U.S., 5 F.3d 1302 (9th Cir. 1993) (contract Pediatrician is not U.S. employee in case where he failed to diagnose child abuse); Leone v. U.S., 910 F.2d 46 (2d Cir. 1990) (private physician is not U.S. employee when conducting FAA Pilot Licensing exam); Limo v. U.S., 852 F. Supp. (D.D.C. 1994) (contract Neuro-radiologist at WRAMC is not U.S. employee--distinguishes Spinnard v. U.S., Civ. #85-0502 (D.D.C., 30 Jan. 1994)); Taylor v. U.S., Civ. #85-H-5396-NE (N.D. Ala. 1989) (contractor in Army Hospital ER not an employee of a Federal agency); Broussard v. U.S., 989 F.2d 171 (5th Cir. 1993) (physician employed by Emergency Medical Services, Inc. to work in ER of Army Hospital is independent contractor); McDonald v. U.S., 807 F. Supp. 775 (M.D. Ga. 1992) (physician employed by National Emergency Services and working in ER at Moody AFB is independent contractor--cites similar case involving Eisenhower Army Medical Center); Spritzer v. U.S., 1988 WL 363944 (S.D. Ga. 1988)). However, even where a physician’s contract states he/she is an independent contractor, this is not determinative. Wafford v. U.S., #CV-95-01134 LEW (N.D. Cal., 5 Jun. 1997), an interlocutory order is final for purposes of appeal where it “conclusively determined the disputed question.” 116 F.3d 488 (table), 1997 WL 306434 (9th Cir. 1997) (even when MTF contract states that contractor is U.S. employee for FTCA purposes, such language is not determinative, but control test is, cites Bird v. U.S., 949 F.2d 1079 (10th Cir. 1991)); Berman v. U.S., 572 F. Supp. 1486 (N.D. Ga. 1983) (whether Senior Flight Examiner for FAA is Federal employee depends on supervision.). Contra B & A Marine v. American Foreign Shopping. 23 F.3d 709 (2d Cir. 1994). Some courts have held the government liable on an apparent agency theory, even though the physician was a contractor. See, e.g., Gamble v. U.S. v. Univ. Anesthesiologists, Inc., 648 F. Supp. 438 (N.D. Ohio 1986) (U.S. equitably estopped from denying that contract Anesthesiologist was U.S. employee despite nature of contractual arrangement); Utterback v. U.S., 668 F. Supp. 602 (W.D. Ky. 1987) (U.S. liable for actions of contract Anesthesiologist at DVA Hospital estopped to deny apparent authority--distinguishes Lurch v. U.S., 719 F.2d 333 (10th Cir. 1983) involving scarce services contract between DVA and surgeon). See also Apparent Agency, Trial Magazine (1988) (19 states have adopted doctrine making a Hospital liable for acts of staff doctors who are independent contractors, not employees). Further, the U.S. can be held liable if it breaches some independent duty. Ayers v. U.S., 750 F.2d 449 (5th Cir. 1985) (administration of second spinal anesthetic by Supervisory Anesthesiologist provided DVA Hospital at University Texas Medical School under contract does not release DVA whose liable for negligent conduct of fourth year Anesthesiology DVA resident--held jointly liable). However, sometimes the context renders the physician a
supplied physicians to clinic. Dedrick v. Youngblood, 200 F.3d 744 (11th Cir.) Obstetrician employed by Med-National is furnished to civilian Hospital - not a U.S. employee under Federally Supported Health Services Act; Kelly v. Total Health Care, 2000 EL 151280 (D. Md.) fact that U.S. did not advertise that defendant was a Federally Supported health care center does not change fact that its employees are Federal. Duplan v. U.S., 1999 U.S. App. LEXIS 18688 (10th Cir. 1999) physician at Tinker Air Force Base Clinic is determined to be independent contractor - excellent discussion re criteria for making the determination; Duplan v. Harper, 188 F.3d 1195 (10th Cir. 1999) clinic physician employed by Med. National is independent contractor; Koehler v. Cortland Memorial Hospital, 65 F. Supp.2d 103 (N.D.N.Y. 1999) physician employed by Family Health Newark is not a Federal employee under Federally Supported entities; Wooten v. Hudson, 71 F. Supp.2d 1149 (E.D. Okla. 1999) Hudson is employed on a personal services contract with Creek Nation Hospital during day and as the same holding as Alexander supra. Starnes v. U.S., 139 F.3d 540 (9th Cir. 1998) (Tx.) Army resident at local Hospital is not a borrowed servant; Alexander v. Mount Sinai Hospital Medical Center of Chicago, 2001 U.S. Dist. LEXIS 4729 (N.D. Ill.) contract physician employed by Federally supported health center is considered U.S. employee under F.T.C.A.; Delvalle v. Sanchez, 2001 U.S. Dist. LEXIS 16812 (S.D. Fla.) where two physicians enter contract with a family health service to provide 16 hours of OB-GYN service a week, they are not Federal employees. Teresa T. v. Ragaglia, 154 F. Supp.2d 290 (D. Conn. 2001) Physician for Hill Health Center is U.S. employee and was acting in scope regarding his responsibility to report child abuse. Alexander v. Mount Sinai Hospital Medical Center, 165 F. Supp.2d 768 (N.D. Ill. 2001) Physician who signed contract to provide services to Federally Supported health center is Federal employee under F.T.C.A.; distinguishes Dedrick v. Youngblood, 200 F. 3d 744 (11th Cir. 2000); Delvalle v. Sanchez, 170 F. Supp.2d 1257 (S.D. Fla. 2001) Three Ob-Gyn physicians practicing together are not Federal employees by virtue of contract to provide services to Federally Supported health center. Patterson v. Elliott, Civ. #01-CV-70-K(E) (N.D. Okla., 7 Nov. 2001) Dentist who contracts with health care provider service who in turn supplies dentist to supported health clinic is an independent contractor even though contract clause says he is a Federal employee he was required to obtain liability insurance. See also Bernie v. U.S., 712 F. 2d 1271 (8th Cir. 1983). Duplan v. U.S., Civ.# CIV-95-216-R (W.D. Okla. 13 Mar. 2000) After remand from 10th Circuit CA holding physician and independent contract, original holding that physician and nurse-employee were jointly liable means U.S. can be held completely liable under joint and several liability. Woodruff v. U.S., 189 F. Supp. 2d 1283 (E.D. Okla., 23 Jan. 2002) Physician employed by Oklahoma City Indian Clinic, a temporary demonstration project not under the Indian Self-Determination Act is not a Federal Employee. Brush v. U.S., Civ.# 00-100-BLG-JDS (D. Mont., 5 Dec. 2001). Montana Family Practice Residency Program physician employed at Federal health clinic under contract is not a Federal employee as there was no day to day close supervision. Heinrich v. Sweet, 308 F.3d 48 (1st Cir. 2002) AEC contract with private physicians and hospital concerning use of boron therapy in terminal brain tumor patients did not constitute day-to-day control necessary to an agency relationship. Rutten v. U.S., 299 F.3d 993 (8th Cir. 2002).
Army employee’s physical exam at MEPS involved x-ray read by contract radiologist who is determined to be independent contractor. Garcia v. Reed, 227 F. Supp. 2d 1183 (D. N.Mex. 2002) Nurse anesthetist is independent contractor, distinguishes Bird v. U.S., 949 F.2d 1079 (10th Cir. 1991); Rutten v. U.S., 2002 U.S. App. LEXIS 17366 (8th Cir.) MEPS contract radiologist is independent contractor and his failure to report lung lesion is not under FTCA; Jones v. Gahn, 246 F. Supp. 2d 622 (S.D. Tex. 2003) Indian Health Service resident training in State hospital who injures fetus during C-section is within scope and failure to file FTCA administrative claim results in dismissal; In re Estate of Kout v. U.S., 241 F. Supp. 2d 1183 (D. Kan. 2002) Where physician is nonpersonal services contractor, plaintiff must show control to overcome contract; for example, separate billing, separate control over patient and records, permanent office space in hospital, secretarial help, on duty roster, can see patients only at hospital, can refuse to see a patient.


National Guard member assigned to attend high school as part of weekend training is not in duty status on way to school in causing single car collision.


g. Volunteer Workers. “U.S. employee” does include volunteer workers, e.g., Red Cross volunteers in Army medical treatment facilities. McNicholas v. U.S., 226 F. Supp. 965 (N.D. Ill. 1964). See 5 U.S.C. § 3111 (c) and 10 U.S.C. § 1588. See also Pervez v. U.S., 1991 WL 53852 (E.D. Pa. 1991) (Officials of steel company who participate in effort to entrap smuggler at request of U.S. Customs are employees of U.S. for purposes of removal and substitution in false arrest suit); Murphy v. Mayfield, 860 F. Supp. 340 (N.D. Tx. 1994) (includes as a U.S. employee a VISTA volunteer hired under 42 U.S.C. § 5055(f)(3)); Billings v. U.S., 57 F.3d 797 (9th Cir. 1995) (Marilyn Quayle, while inspecting 1992 San Francisco earthquake damage on FEMA invitational orders is U.S. employee). But see Marcello v. Brandywine Hospital, 47 F.3d 618 (3d Cir. 1995) (“U.S. employee” does not include Red Cross regarding HIV positive blood Supplied to Civilian Hospital, since Red Cross, while Federal instrumentality, does not have sovereign immunity); Rayzor v. U.S., 937 F. Supp. 115 (D. P.R. 1996), aff’d, 121 F.3d 695 (table), 1997 WL 414100 (1st Cir. 1997) (Naval Officer’s daughter who was assaulted by baby-sitter obtained from Red Cross list at Naval Air Station--Red Cross not a Federal agency).


control of Navy flying club member and maintained by flying club is Feres barred; See also Walls v. U.S., 832 F.2d 93 (7th Cir. 1987)


(9) Hunt Club. Hass v. U.S., 518 F.2d 1138 (4th Cir. 1975). Contra Scott v. U.S., 337 F.2d 471 (5th Cir. 1964) (hunt club was a private association which should be distinguished from NAFI hunt club). Rod&Gun clubs, yachting clubs, flying clubs, daycare centers, can be either NAFI or private association. See also Witt v. U.S., 462 F.2d 1261 (2d Cir. 1972) (prisoner of Disciplinary Barracks who volunteered to shovel manure at Post Stable, a private association is injured while being transported by a Stable employee-held Stable employee is agent of Disciplinary Barracks). Thrift shops, wives' clubs are invariably private associations.


k. NAFI Claims. In order to encourage participation, claims are paid which arise from the use of certain types of NAFI property, i.e., flying clubs, golf clubs, and craft shops, even though user is not an employee as defined by FTCA. Such claims are not paid under FTCA, but Chapter 12, AR 27-20, and from NAFI funds. They do not fall under FTCA, as the operator of the equipment is not within scope, e.g., member of flying club. This now includes Family Child Care Providers.

m. **Delayed Entry Program.** Smith v. U.S., 688 F.2d 476 (7th Cir. 1982) (excludes delayed entry EM driving his POV); Heredia v. U.S., 887 F. Supp. 77 (S.D.N.Y. 1995) (Delayed Entry Program Marine Corps poolee injures another poolee who voluntarily accompanied him while driving recruiter’s car on a recruiting mission assigned by recruiter--passenger is not Feres barred, since he was not performing mission and poolee driver is U.S. employee).

n. **Indian Tribes.** Shaffer v. U.S., Civ. #S-94-1287 GEB/GGH (E.D. Cal., 22 Mar. 1995) (suit against Indian tribe constitutes suit against U.S. under FTCA). Cheromiah v. U.S., Civ. #97-1418 MV/RVP (D.N. Mex., 29 Jun. 1999) suit against Indian Health Service Hospital falls under FTCA but tribal not New Mexico law applies e.g. New Mexico Medical malpractice cap is not applicable. Dry v. U.S., 235 F.3d 1249 (10th Cir. 2000) Claimants arrested Tribal officials suit is against tribe as officials were acting in their Tribal capacity.


a. **Scope Generally.** Cases holding within scope. See, e.g., Rodriguez v. Sarabyn, 129 F.3d 760 (5th Cir. 1997) (ATF Agents who allegedly detained undercover ATF Agent concerning loss of surprise in Waco raid were in scope of employment); Maron v. U.S., 126 F.3d 317 (4th Cir. 1997) (NIH physician’s harassment of fellow NIH physician is within scope even though motivated in part by ill will so long as acts were engendered by their duties); Aviles v. Lutz, 887 F.2d 1046 (10th Cir. 1989) (fellow employees in Indian Health Service dismissed under Westfall Act in defamation action); Harris v. Walker, 89 F.3d 833 (table), 1996 WL 354018 (6th Cir. 1996) (alleged false testimony at Merit System Protection Board within scope under...
1996) (USPS employee was in scope when she filed criminal complaint against supervisor); Wilson v. Drake, 87 F.3d 1073 (9th Cir. 1996) (supervisor in scope when he allegedly used physical force to preclude subordinate from leaving his office); Cassell v. Norris, 103 F.3d 61 (8th Cir. 1996) (Social Security Administration employees were within scope when they wrote letters to high officials complaining about job related performance of Administrative Law Judge); Pearson v. Friend, 103 F.3d 133 (table), 1996 WL 694398 (7th Cir. 1996) (National Biological Service (NBS) employee was within scope of employment when he made defamatory remarks concerning objectivity of DVM and Biologist who were trying to preclude the killing of a sick flock of ducks); Reynolds v. U.S., 927 F. Supp. 91 (W.D.N.Y. 1996) (FWS Special Agent was within scope where he entered plaintiff's property and arrested plaintiff's son for hunting ducks without a valid permit--case dismissed, since investigation was permitted by U.S. law); Carpenter v. Laxton, 96 F.3d 1448 (table), 1996 WL 49099 (6th Cir. 1996) (National Park Service Rangers engaging in arrest attempt at request of local Sheriff are within scope); McGovern v. Thomas, 1996 WL 478698 (N.D. Cal.) (IRS Agent assisting in IRS auction allegedly assaults person who is videotaping IRS Agent's POV--held within scope); Wilson v. Drake, 87 F.3d 1072 (9th Cir. 1996) (supervisor allegedly barring subordinates egress from his office and forcibly precluding subordinate from turning on tape recorder is within scope); Cerri v. U.S., 80 F. Supp. 831 (N.D. Cal. 1948) (MP hits innocent bystander--held scope). Contra U.S. v. Jasper, 222 F.2d 632 (4th Cir. 1955). Cases holding outside scope. See, e.g., McNally v. Dewitt, 961 F. Supp. 1041 (W.D. Ky. 1997) (U.S. Marshal not in scope when arresting McNally for State crime); Williams v. Morgan, 723 F. Supp. 1532 (D. D.C. 1989) (DOJ non-scope in "horseplay" case under Westfall Act); Meridian Center Logistics, Inc. v. U.S., 939 F.2d 740 (9th Cir. 1991) (Attorney General's certification of scope re FBI agent reversed re contacts with foreign countries); Tilton v. Dougherty, 493 A.2d 442 (N.H. 1985) (official immunity not applicable to NG physician conducting physical exam); Travelers Insurance Co. v. SCM Corp., 600 F. Supp. 493 (D. D.C. 1984) (coffeemaker owned by U.S. employees causing fire in leased building subjects employees to individual suit); Dretar v. Smith, 752 F.2d 1015 (5th Cir. 1985) (permits individual suit in State court against Federal supervisor who shoved Federal employee and struck her with door); Focke v. U.S., 597 F. Supp. 1325 (D. Kan. 1982), aff'd, Civ. #82-1511 (10th Cir. 1985) (Social Work Associate who was not Counselor was outside scope in engaging in sexual activity with wife and daughter of a DVA mental patient); U.S. v. Campbell, 172 F.2d 500 (5th Cir. 1949), cert. denied, 337 U.S. 957 (1949) (Sailor running to catch troop train knocked down bystander--held not scope); Wynn v. U.S., 200 F. Supp. 457 (E.D.N.Y. 1961) (Posse Comitatus Act--held not scope); Sanchez v. U.S., 177 F.2d 452 (10th Cir. 1949) (U.S. security guard volunteers to help in search of lost girl--held not scope); Guzman v. U.S., Civ. #75-658 (D. P.R.) (service member brings back grenade from Vietnam after five years causes death and injuries--held not scope); Witt v. U.S., 319 F.2d 704 (9th Cir. 1963); Tilden v. U.S., 365 F.2d 148 (7th Cir. 1966) (driving POV when CO said he was not to do so--held not scope); Bates v. U.S., 701 F.2d 737 (8th Cir. 1983) (Game Warden murders and rapes while on duty--held not scope); Kirby v. U.S., Civ. #78-1060 (D. S.C. 1979) (off-duty NCO who drives injured civilians to Hospital allegedly at request of off-duty officer--not within scope); Piper v. U.S., 887 F.2d 861 (8th Cir. 1989) (Airmen let dog run loose when base required control--not within scope), Brotko v. U.S., 727 F. Supp. 78 (D. R.I. 1989) (same as Piper); Chancellor by Chancellor v. U.S., 1 F.3d 438 (6th Cir. 1993) (same as Piper--concurs with Nelson v. U.S., 838 F.2d 1280 (D.C. Cir. 1988) (contra Lutz v. U.S., 685 F.2d 1178 (9th Cir.}
Ill.) (Libelous complaints against supervisors made outside of channels on DOL stationary on duty time are within scope. Schroder v. Sandoval, Civ. #A97 CA 896SS (W.D. Tx., 9 Sep. 1998), Physicians Assistant who re-examines prisoner after complaint to the Warden, is not in scope when he rams in finger and says, "[t]his is for complaining." Webb v. U.S., Civ. #97-0283-B (W.D. Va., 3 Nov. 1998), Federal Support Health Center Assistance Act (FSHCAA) Clinic physician not in scope when he allegedly examines patient's body not incident to care sought and offers rendezvous in his apartment. Primeau v. U.S., 149 F.3d 879 (8th Cir. 1998), BIA policeman who uses his authority to pick up stranded motorist and later rapes her is within scope; Primeau v. U.S., 181 F.3d 876 (8th Cir. 1999) en banc court held policeman not in-scope and reverses prior 8th Cir. court decision. Mackey v. Milan, 154 F.3d 648 (6th Cir. 1998), superior officers' sexual harassment of female officer is within scope under Ohio law by virtue of fact that the alleged harassment occurred because of their being placed in charge of her. Bergeron v. Henderson, 47 F. Supp. 2d 61 (D. Maine 1999) Letter Carrier files suit against her Postmaster and Supervisor for sexual harassment-held to be in rape; Hoffman v. U.S., 1999 WL 417830 (4th Cir. (NC)) coworkers were acting in scope of employment when they defended themselves during persona vendetta by plaintiff. Moore v. Willinger, Civ. #C-3-98-328 (S.D. Ohio, 30 Jun. 2000) defendant designated a private pool party miles from his unit as place of duty - not in scope when he threw plaintiff in pool and injured her back. Pendergast v. U.S., 1999 U.S. LEXIS 17070 (E.D. La.) Local police officer on Federal drug task force is not in scope in hiring plaintiff to accompany him on his daily rounds as his motives were purely personal; Borneman v. U.S., 213 F.3d 819 (4th Cir. 2000) Where one Postal Service employee assaults another, District Court cannot base its no scope decision on victim’s version alone but must hold hearing; Jones v. Autry, 105 F. Supp. 2d (E.D. Miss. 2000) DVA employee was in scope when reporting theft of wallet to DVA police and assisting in investigation; Hudson v. U.S. Postal Service, 2000 U.S. Dist. LEXIS 2360 (N.D. Cal.) Postal worker swipes magazines at fellow worker's finger while she is lecturing him on workplace manners – in scope; Garcia v. U.S., 2000 U.S. Dist. LEXIS 3953 (S.D. N.Y.) DVA employee files criminal complaint in State court against another DVA employee who allegedly sexually harassed her – done at suggestion of EEO counselor – within scope; Longman v. U.S., 2000 U.S. App. LEXIS 6707 (9th Cir.) NLRB employee is within scope while conducting informal investigation into obscene phone calls and accusing claimants without adequate evidence. Allstate Ins. Co. v. Quick, 107 F. Supp. 2d 900 (S.D. Ohio 1999) Discrimination complaint by Federal employees made maliciously and for personal gain may be outside scope. Stidham v. U.S., 2000 U.S. Dist. LEXIS 12055 (E.D. La.) three recruits were not in scope while performing sexual acts in process of inducting female recruit; Gilbar v. U.S., 108 F. Supp. 2d 812 (S.D. Ohio 1999) AF Major files complaint against another AF Major with 2 IGs and JAG office, and also with unit members when he gets no action-held within scope; Goldstein v. U.S., 2000 U.S. Dist. LEXIS 13126 (S.D. N.Y.) under NY law, action for theft of medical document by an employee against another employee is precluded. St. John v. U.S., 240 F.3d 691 (8th Cir. 2001) BIA police officer arrests wife and releases her when he goes off duty; he forces her into his POV and subsequently agrees. Remanded to determine whether he used his official capacity to force her into his POV. Brumfield v. Sanders, 232 F.3d 376 (3d Cir. 2000) Federal employee is in scope of he lies about another employee’s action baring an official investigation; move over claim falls under slander exclusion. Avila v. U.S., Civ. #E.P.-99-CA-15-H? (W.D. Tx., 25 May 2001) Late night phone calls to client’s residence by legal assistance attorney not in scope; harassment during office calls is within scope but

b. Frolic and Detour. Scope is presumed when in official vehicle: must be rebutted to be overcome. Cases holding scope. Lawrence v. Dunbar, 919 F.2d 1525 (11th Cir. 1990) (DEA Agent on way home from Christmas party in a GOV on 24 hour duty dispatch--within scope); Stephenson v. U.S., 771 F.2d 1105 (7th Cir. 1985) (Marine Recruiter returning GOV after drinking bout is within scope); Gutierrez De Martinez v. DEA, 111 F.3d 1148 (4th Cir. 1997) (male DEA Agent escorting female DEA Agent back to hotel dinner is in scope, even though going in wrong direction and partially intoxicated); Parada v. U.S., Civ. #95-CV-2204 (D. D.C., 4 Feb. 1997) (fact that DEA Agent was drinking on duty did not remove him from scope of employment); Nieves-Rios v. U.S., Civ. #93-1885 ccc (D. P.R., 13 Mar. 1995) (two week reservist drives GOV home on last duty day, changes clothes, washes GOV in private car wash and is returning to post at time of accident--held scope); U.S. v. Baker, 265 F.2d 123 (D.C. Cir. 1959) (getting haircut held in scope); McConville v. U.S., 197 F.2d 680 (2d Cir. 1952) (on return route from bar--held scope); Malicote v. McDowell, 479 F. Supp. 63 (E.D. Tenn. 1979) (intentionally running over two goats--held scope); Atnip v. U.S., 245 F. Supp. 386 (E.D. Tenn. 1965) (Rural Mail Carrier deviates to pick up eggs--held

c. TDY Travel. Cases holding scope. Flohr v. MacKevjak, 84 F.3d 386 (11th Cir. 1996) (LTC Flohr on TDY returning to hotel from dinner when MacKevjak on TDY with Flohr turns in front of oncoming car--both were within scope); McCluggage v.


f. Using POV Without Express Authority. Cases holding scope. U.S. v. Hopper, 214 F.2d 129 (6th Cir. 1954) (used POV for TDY when U.S. vehicle available—held scope); Taber v. Maine, 49 F.3d 598 (2d Cir. 1995) (Sailor driving POV returning to duty on base after drinking spree is involved in off-base accident—court sets aside Guam law and uses Cal. law to hold in scope). Cases holding not in scope. Walsh v. U.S., 31 F.3d 696 (10th Cir. 1994) (National Guardsman driving POV en route to weekend drill is not in scope); Green v. Hall, 8 F.3d 695 (9th Cir. 1993) (Army Reservist went off-post in POV for coffee or breakfast—not within scope—MRE rations available); Harris v. U.S., 718 F.2d 654 (4th Cir. 1983) (EM directed to use POV by military officer to take injured to Hospital in civilian accident—not scope); Frazier v. U.S., 412 F.2d 22 (6th Cir. 1969) (driving POV to look for home at new duty station—not scope); Paly v. U.S., 221 F.2d 958 (4th Cir. 1955) (used POV on TDY for funeral detail—not scope); Bisel v. U.S., Civ. #2:94-CV-44 (W.D. Mich., 12 Feb. 1996), aff’d, 121 F.3d 702 (table), 1997 WL 415316 (6th Cir. 1997) (Sailor who leaves service sponsored beer party at Long Beach Naval Station is not in scope when he leaves party and goes off-base to purchase beer to consume in quarters and gets in accident returning to on-base quarters—court states Taber v. Maine misinterpreted California law); Holloway v. U.S., 829 F. Supp. 1330 (N.D. Ga. 1993) (driving POV from weekend drill not scope, even though mileage was reimbursed—not in scope due to seven rest stops and consumption of beer); Weaver v. U.S. Coast Guard, 857 F. Supp. 539 (S.D. Tx. 1994) (Coast Guardsman driving POV on way back from four-hour pass is not in scope nor is fellow Coast Guardsman who permitted him to drive while drunk); Manderacchi v. U.S., 264 F. Supp. 380 (D. Md. 1967) (Editor used own car to get story—not scope); Ledesma v. U.S., Civ. #A-83-CA-26 (W.D. Tx., 12 Sep. 1984) (Soldier returning in borrowed POV to Fort Hood after trip to Austin to pay friend’s alimony—not scope). Vuevas v. Harris, 2 F. Supp.2d 189 (D. P.R. 1998) (Navy Officer drives POV to main base to have lunch. She intends to deliver official files but forgets them. On return, she has accident on public road - no scope). Thompson v. U.S., Civ.#01-7701-CIV-MIDDLEBROOKS, (S.D. Fla. 20 Aug. 2002) FBI agent collides with claimant while driving in his POV after dining and drinking with his supervisor in a public restaurant; judge holds scope in abeyance, cites Lawrence v.
Dunbar, 919 F.2d 1525 11th Cir. 1990 (per curiam); Sullivan v. Shimp, 324 F. 3d 397 (6th Cir. 2003) USAF attorney returns to base on Sunday to retrieve documents needed for TDY on Monday, accident on way home is not in scope as no U.S. control.


i. Medical Residents in Civilian Training. Ward v. Children's Orthopedic Hospital, 999 F.2d 1399 (9th Cir. 1993) (Army resident training in civilian Hospital is Federal
employee, but not within scope despite Washington's borrowed servant rule); Palmer v. Flaggman, 93 F.3d 196 (5th Cir. 1996) (USAF physician completing residency in private Hospital is an employee of both the U.S. and private Hospital under Texas law).

j. Federal Employees Assigned To State or Local Agencies


(a) Interpretation of Duty. Common law duty subject to misinterpretation in many cases particularly where it varies from one state to another, e.g., duty

duty to inspect grain warehouse and insure adequate quantity of acceptable grain was available to insure contracts were met.


(ii) Rescue. Rescue cases are more frequent, e.g., MAST program. Huber v. U.S., 838 F.2d 398 (9th Cir. 1988) (once Coast Guard participates in rescue must complete proper action); Frank v. U.S., 250 F.2d 178 (3d Cir. 1957), cert. denied, 356 U.S. 962 (1958) (Coast Guard helicopter rescue--liability imposed). See also Korpi v. U.S., 961 F. Supp. 1335 (N.D. Cal. 1997) (Coast Guard’s rescue efforts to save boat were not negligent). If a duty is assumed by mounting a rescue, the discretionary function exclusion might still apply. Kiehn v. U.S., 984 F.2d 1100 (10th Cir. 1993) (manner of conducting rescue is discretionary concerning use of backboard for fallen climber in national park). However, the Coast Guard’s decision not to mount a search or rescue may well not be actionable. Bunting v. U.S., 884 F.2d 1143 (9th Cir. 1989) (Coast Guard's failure to go to pilot's aid not actionable under State's Good Sam. Statute--also applied to Coast Guard physician emergency care); Daley v. U.S., 499 F. Supp. 1005 (D. Mass. 1980) (no duty for Coast Guard to search); Kurowsky v. U.S., 660 F. Supp. 442 (S.D.N.Y. 1986) (Coast Guard's decision not to engage in risky rescue is not actionable). Fondow v. U.S., 112 F. Supp. 2d 119 (D. Mass. 2000) Coast Guard is volunteer rescuer falls under Good Samaritan. Rule and as such is not liable for negligent failure to confer benefit but only for making matters worse. Sagan v. U.S., 157 F. Supp. 2d 824 (E.D. Mich.) Where injured party is already a quadriplegic from shallow dive, any negligence by Coast Guard does not create liability under Good Samaritan as delay must increase degree of injury. Hurd v. U.S., 34 Fed. Appx. 77 (4th Cir. 2002) Where Coast Guard has confirmed rescue call and asks a pilot boat to investigate, and nothing more is reported, U.S. is held liable for abandoning search and plaintiff’s recover $19 million for several deaths.


of fire personnel and equipment in fighting numerous fires is discretionary).


(D) **California Health and Safety Code for "resort" keepers at COE reservoir.** Donaldson v. U.S., 653 F.2d 414 (9th Cir. 1981).

(E) **Florida non-delegable duty doctrine.** Dickerson, Inc. v. U.S., 875 F.2d 1577 (11th Cir. 1989) (Florida non-delegable duty statute applied to PCB disposal)

(iii) **Restatement of Torts.** By Restatement of Torts, if adopted by State courts. See, e.g., Thorne v. U.S., 479 F.2d 804 (9th Cir. 1973) (California); U.S. v. Babbs, 483 F.2d 308 (9th Cir. 1973) (California); Sowicz v. U.S., 368 F. Supp. 1165 (E.D. Pa. 1973) (Pennsylvania); Toole v. U.S., 588 F.2d 403 (3d Cir. 1978) (Pennsylvania); Toppi v. U.S., 327 F. Supp. 1277 (E.D. Pa. 1971); Jeffries v. U.S., 477 F.2d 52 (9th Cir. 1973) (Washington); U.S. v. DeCamp, 478 F.2d 1188 (9th Cir. 1973). See also Yanez v. U.S., 63 F.3d 870 (9th Cir. 1995) (under Privette v. Superior Court, 854 P.2d 721 (Cal. 1993) U.S. cannot be held liable for failure of independent contractor to take special precautions for inherently dangerous work to prevent lead azide explosion, but can be held liable under Restatement (Second) of Torts, § 414 if U.S. Inspectors were aware that conductive shoes were not being worn); Camozzi v. Roland/Miller & Hope Consulting Group, 866 F.2d 287 (9th Cir. 1989) (Thorne not effected by Varig and Berkowitz); McMichael v. U.S., 856 F.2d 1026 (8th Cir. 1988) (Arkansas law re duty to employees at GOCO ammo plant is inherently dangerous activity); Rooney v. U.S., 634 F.2d 1238 (9th Cir. 1980) (following Thorne); Vandergrift v. U.S., 500 F. Supp. 229 (E.D. Va. 1978) (roofing contractor fell through roof--U.S. liable); Tatem v. U.S., 499 F. Supp. 1105 (M.D. Ala. 1980) (premises case under Alabama law). But see Busalacchi v. U.S., Civ. #S-91-1720 LKK (E.D. Cal., 22 Feb. 1994), aff'd in relevant part, rev'd in part, 70 F.3d 1277 (9th Cir. 1995) (claim for fall from warehouse roof by employee of independent contractor discussed under § 2680(a)--applicability of Restatement not discussed--on appeal, 9th Cir.court reinstated claim that government Safety Inspectors knew of safety violations and failed to correct them based on Yanez v. U.S., 63 F.3d 870 (9th Cir. 1995)); Bloom v. Waste Management, Inc., 615 F. Supp. 1002 (E.D. Pa. 1985) (bulldozer operator at COE worksite electrocuted by overhanging wire, no duty to warn, since U.S. has no superior knowledge). One typical imposition of duty upon the U.S. towards the employees of an independent contractor is for inherently dangerous activities. Murdock v. Employers Ins. of Wausau, 917 F.2d 1065 (8th Cir. 1990) (non-delegable duty under Nebraska law re collapse of excavation trench near BLM canal); McCall v. Department of Energy, 914 F.2d 191 (9th Cir. 1990) (non-delegable duty under Montana law re electrical workers fall when his safety belt failed); McMillian v. U.S., 112 F.3d 1040 (9th Cir. 1997) (cutting snags in national forest is inherently dangerous--Montana’s non-delegability doctrine applies to tree cutting contract where there are snags--U.S. is 45% liable when stood near a snag being cut). But see Phinney v. U.S., 15 F.3d 208 (1st. Cir. 1994) (contract for resurfacing road on Army installation does not


USAF regulation create liability in NCO club over serving case from which off-post collision results.

**Protection from Intoxicated Persons.** Government responsibility to protect other people from intoxicated persons. Other laws, besides Dram Shop laws, may well impose upon the government a duty to protect the public from intoxicated persons. *Doggett v. U.S.*, 875 F.2d 684 (9th Cir. 1989) (base regulation requiring guards to prevent intoxicated drivers from leaving base creates duty to off-base motorist). But see *Beatty v. U.S.*, 983 F.2d 908 (8th Cir. 1993) (permitting intoxicated Airman to drive past gate guards and strike bicyclist on public highway creates no liability); *Crider v. U.S.*, 885 F.2d 294 (5th Cir. 1989) (Park Rangers under no duty under Texas law to restrain intoxicated driver from driving); *Louie v. U.S.*, 776 F.2d 819 (9th Cir. 1985) (DWI Soldier turned over to MPs by Civilian police, drives again and kills victim--no duty under Washington law). *Henakahi v. U.S.*, Civ. #00-00807 DAE KSC (D. Haw. 31 Jan. 2002) Alcoholic soldier driving privately owned vehicle off base is involved in fatal collision after drinking in barracks, no duty to public arising from either his commanding or alcohol counselors actions to resolve drinking problem.


**Attractive Nuisance.** Duty to frequent trespasser or child trespasser (attractive nuisance). See, e.g., *Epling v. U.S.*, 453 F.2d 327 (9th Cir. 1971)

(h) Duty of Landlord to Tenant. A landlord may have duty to provide adequate security or prevent violent acts. Washington v. Resolution Trust Co., 68 F.3d 934 (5th Cir. 1995) (Under Texas law, where landlord maintains control of premises, duty exists to protect tenants from foreseeable violent criminal acts); Choy v. 1st Columbia Management, Inc., 676 F. Supp. 28 (D. Mass. 1987) (where tenant assaulted must show entry was through door with faulty lock--duty to provide adequate security). However, a landlord may not have other types of duties to warn depending on the circumstances. See Brooks v. U.S., 712 F. Supp. 667 (N.D. Ill. 1989) (U.S. as landlord did not warn of lead paint hazard, since it had no knowledge of its existence); Parker Land and Cattle Co. Ins. v. U.S., 796 F. Supp. 477 (D. Wyo. 1992) (no duty to warn holder of grazing permit on Federal land of danger of Brucellosis in wild elk); Duff v. U.S., 829 F. Supp. 299 (D. N.D. 1992) (U.S. not responsible for injuries due to contractor generated varnish fumes to occupant of military housing). Nuridden v. U.S., 2000 U.S. LEXIS 835 (D. Mass.) Navy as landlord assumed duty to ensure water heater thermostat set at 120º through inspection, U.S. is liable for burns to 17-month-old child where temperature is at 170º.

(j) Public Duty Doctrine. Duty to public as a whole, but not to a specific individual. If the duty is a public duty, no cause of action exists. Pezzimenti v. U.S., 114 F.3d 1195 (table), 1997 WL 289400 (9th Cir. 1997) (U.S. Civilian security has no duty to intervene under public duty doctrine in altercation outside gate at Pearl Harbor Naval Station); Grange Insurance Association v. U.S., 1989 U.S. Dist. LEXIS 17389, #C86-77R (W.D. Wash.) (Department of Agriculture not liable for failing to warn of brucellosis); Sheridan v. U.S., 773 F. Supp. 786 (D. Md. 1991) (U.S. owed no duty to protect public from harm at the hands of drunk Sailor shooting his private firearm); Kazanoff v. U.S., 753 F. Supp. 1056 (E.D.N.Y. 1990) (Mail Carrier who has key to locked apartment building inadvertently allows murderer to enter--no special relationship or duty); Kugel v. U.S., 947 F.2d 1504 (D.C. Cir. 1991) (leak in violation of FBI internal procedures does not constitute a cause of action based on public duty); Taylor v. Phelen, 799 F. Supp. 1094 (D. Kan. 1992) (failure to timely investigate and arrest criminal who had been previously reported falls under public duty doctrine--cites cases in support); King v. Bureau of Indian Administration, 108 F.3d 338 (table), 1997 WL 75543 (9th Cir. 1997) (BIA policeman under no duty to arrest Crazy Bull based on his prior record--duty to general public, not to King); Cameron v. Janssen Bros. Nurseries Ltd., 7 F.3d 821 (9th Cir. 1993) (USDA independent contractor fails to check root stock after fumigation in violation of USDA rule--no claim based on public duty doctrine, since no statutory intent or reliance on monitoring); Stratmeyer v. U.S., 67 F.3d 1340 (7th Cir. 1995)(USDA veterinarian owed duty to public, not individual, where misdiagnosis of Brucellosis alleged); Wyler v. Korean Air Line Co. Ltd., 928 F.2d 1167 (D.C. Cir. 1991) (USAF tracking system does not create duty to warn); Shelton v. U.S., Civ. #97-CV-84 (M.D. La., 17 Dec. 1997) (FBI investigated U.S. Marshal for child molestation, but charges not brought despite airtight case—Marshal resigned but continued molestation—U.S. has no duty to children molested). See also Schweiker v. Hansen, 450 U.S. 785 (1981); Jacobo v. U.S., 853 F.2d 640 (9th Cir. 1988). But see Florida Auto Auction of Orlando, Inc. v. U.S., 74 F.3d 498 (4th Cir. 1996) (statute requiring Customs Service to input vehicle titles prior to export does impose duty to auction house to preclude exportation based on bill of sale). However, if there is a special relationship between the defendant and the plaintiff, the public duty doctrine does not apply, but the discretionary function exclusion may. Merced v. City of New York, 856 F. Supp. 826 (S.D.N.Y. 1994) (failure of N.Y. police acting as DEA agent to furnish protection to assault victim is discretionary, even though special relationship existed). Sellers v. U.S., Civ. #CV 496-68 (S.D. Ga., 21 May 1998) (Georgia statute immunizes Army doctor for negligently diagnosing Chlamydia in child abuse case). Mexican v. U.S., Civ. #98-3009 (D. S.D., 14 Feb. 2000) public duty doctrine applies where BIA police fail to respond to mother's phone calls allegedly resulting in fire deaths of her two children.

(k) Duty to Inform of Results of Employment Physical. The U.S. may have a duty to disclose results of pre-employment physical. Daly v. U.S., 946 F.2d 1467 (9th Cir. 1991) (chest X-ray on pre-employment physical showed premonitory signs of sarcodiosis--duty to inform found--citing other cases, including Betesh v. U.S., 400 F. Supp. 238 (D. Md. 1974)).

(m) **Fireman's Rule.** *Alvarado v. U.S.*, 798 F. Supp. 84 (D. P.R. 1992) (fireman’s rule bars suit for death of local policeman who is shot by VA mental patient while entering his home).


(q) **Duty in Suicide Cases.** (For suicide, cases involving mental health see also IIB4c (2(a)) Richards v. U.S., 67 F. Supp.2d 1321 (M.D. Ala. 1999) general rule is suicide is an efficient intervening cause unless defendant's conduct causes the mental condition that results in suicide or a custodial situation exists in which suicide is foreseeable place. Jutzi-Johnson v. U.S.,
263 F.3d 753 (7th Cir. 2001) Prison officials failed to treat prisoner’s nervous condition did not lead to her suicide, as it was not foreseeable.


(2) Negligence. Negligent act or omission is required, which can arise from negligence per se or res ipsa among other legal causes. Cases finding no negligent act or omission by the defendant. Stuart v. U.S., 23 F.3d 1483 (9th Cir. 1994) (high-speed chase by U.S. Border Patrol resulting in death and injuries was not negligent--California statutes immunizing peace officers does not apply); Mendiola v. U.S., 994 F.2d 409 (7th Cir. 1993) (Army recruiter rear ends car which has just been struck by another car from opposing lane--ruled unavoidable accident); Dotson v. U.S., 1995 WL 871178 (E.D. Mich.) (Failure to prevent slip on ice at Naval Armory by failure to clear previous night's ice storm by 7:45 a.m. is not actionable under Michigan law); Walsh v. U.S., Civ. #CV-N-93-349-PHA (D. Nev., 14 Aug. 1995) (fall in post office reported one week later--photo shows insignificant tear in entrance mat not sufficient to be unreasonably dangerous); Denney v. U.S. Postal Service, 916 F. Supp. 1084 (D. Kan. 1996) (irregularity 1 to 2-inches deep, 8 to 10 inches long, and 3 to 4 inches at its widest point running along seam in sidewalk is a minor defect and not actionable); Vaughn v. U.S., 982 F. Supp. 489 (N.D. Ohio 1997) (U.S. not liable for fall on sidewalk where there is less than a 2 inch deviation); Heller v. U.S., 99 F.3d 1143 (table), 1996 WL 607138 (8th Cir. 1996) (while U.S. was aware of patch of ice at entrance to post office, it was too small to present an unreasonable risk of harm); Wood v. U.S., 106 F.3d 395 (table), 1997 WL 42711 (4th Cir. 1997) (slip and fall on wet pavement in entrance to U.S. Post Office while leaving during heavy rain--U.S. not liable); Nieves v. U.S., 980 F. Supp. 1295 (N.D. Ill. 1997) (U.S. not liable for fall at entrance to Post Office in water which accumulated from rainfall); Faircloth v. U.S., 837 F. Supp. 123 (E.D.N.C. 1993) (slip and fall on a wet floor on a rainy day in Post Office lobby not compensable, since there was adequate lighting); Walker v. U.S., Civ. #89-3234-RDR (D. Kan., 19 Sep. 1994), aff’d, 48 F.3d 1233 (table), 1995 WL 87122 (10th Cir. 1995) (no negligence shown in §91 claim for lost or damaged property seized in a search of Federal prisoner’s cell); Jones v. U.S., Civ. #4:94-CV-140 (JRE) (M.D. Ga., 15 Apr. 1997) (U.S. prevails by using photogramatry expert in fatal crash into pole at Ft. Benning); Freeman v. U.S., 704 F.2d 154 (5th Cir. 1983) (failure to use mats on terrazzo floor on wet day not negligence); Spagnolia v. U.S., 598 F. Supp. 683 (W.D.N.Y. 1984) (same as Freeman); Palmer v. U.S., Civ. #93-54 (E.D. Ky., 16 Aug. 1996) (release by DVA of violent mental patient to group home when DVA knew he would not remain due to long history--U.S. liable for murder of three family members of ex-wife). Whether an action or inaction is reasonable is judged by the standards prevailing at the time the act took place. Western Greenhouses v. U.S., 878 F. Supp. 916 (N.D. Tx. 1995) (dumping TCE at USAF base in early 70s was not negligent under standards at time); Solario v. U.S., 228 F. Supp. 2d 1280 (D. Utah 2002) When government driver has unforeseeable seizure just prior to hitting pedestrian, no negligence.

(b) Negligence Per Se. Negligence per se can arise under State law from statutory violation or extreme wrongdoing. See, e.g., Griffin v. U.S., 500 F.2d 1059 (3d Cir. 1974) (substandard polio vaccine approved and released); Muhammad v. U.S., 366 F.2d 298 (9th Cir. 1966), cert. denied, 386 U.S. 959 (1967) (running stop sign); Stephens v. U.S., 472 F. Supp. 998 (C.D. Ill. 1979) (inadequate warning of submerged tree stumps contrary to regulation is negligence per se); Rudelson v. U.S., 431 F. Supp. 1101 (C.D. Cal. 1977) (violation of FAA regulations); Cronenberg v. U.S. et al., 123 F. Supp. 693 (E.D.N.C. 1954) (no warning flares for disabled vehicle at night); Worley v. U.S., 119 F. Supp. 719 (D. Or. 1952) (spring-gun); Cerri v. U.S., 80 F. Supp. 831 (N.D. Cal. 1948) (hitting bystander when shooting at trespasser); U.S. v. Praylou, 208 F.2d 291 (4th Cir. 1953), cert. denied, 347 U.S. 934 (1954) (operation of aircraft); Davenport v. U.S., 241 F. Supp. 792 (D. S.C. 1965) (running stop sign at direction of MP); Peck v. U.S., 470 F. Supp. 1003 (S.D.N.Y. 1979) (failure by FBI to prevent beating in Selma March)(proximate cause ignored); Beesley v. U.S., 364 F.2d 194 (10th Cir. 1966); Michael v. U.S., 338 F.2d 219 (6th Cir. 1964); U.S. v. Wells, 337 F.2d 615 (5th Cir. 1964). But see Coumou v. U.S., 107 F.3d 290 (5th Cir. 1997) (where Coast Guard turned vessel over to Haitian police when contraband was discovered, it was not negligence per se for failure to comply with Federal extradition law or criminal statute, but claim could be based on failure to notify Haitian police that plaintiff was Captain who cooperated in search); Moody v. U.S., 774 F.2d 150 (6th Cir. 1985) (FHA improperly inspected new house not negligence per se because of Federal statute requiring inspection); Evans v. U.S., 824 F. Supp. 93 (S.D. Miss. 1993) (Postal patron falls through glass window at entrance to Post Office--safety glass requirement not applicable). However, the invocation of negligence per se is measured against state law, not local law. Seaberg v. U.S., 448 F.2d 391 (9th Cir. 1971) (city ordinance required full stop for ambulances, state code only required slowing down--not negligence per se).

(c) Res Ipsa Loquitur. Res ipsa is a rule of Circumstantial evidence, which is rebuttable and requires exclusive control, incident would not have occurred in absence of negligence and no contributory negligence, if applicable. See, generally, cases cited in Jayson "Handling Federal Tort Claims," § 214.02(2). Usually arises in aircraft accidents, (Ashland v. Ling-Temco-Vought Inc., 711 F.2d 1431 (9th Cir. 1983); U.S. v. Johnson, 288 F.2d 40 (5th Cir. 1961)), medical malpractice, (Baker v. U.S., 226 F. Supp. 129 (S.D. Iowa 1964);

November 2003 WEB Edition 140


(e) Negligence in Medical Malpractice Cases Including Negligent Referral.  The defendant acts or omissions must constitute negligence, i.e., falling below the standard of care, with the standard of care being decided on a local level and by the type of facility.  Goodman v. U.S., 2 F.3d 291 (8th Cir. 1993) (local, not national, standard applicable in medical malpractice involving Indian Health Services Hospital in South Dakota); Simmons v. U.S., Civ. #5:96-CV-258-HI (E.D.N.C., 14 Jan. 1998) (false positive diagnosis of Chlamydia leads to testing of parents—held for U.S. as family clinic not required to run more sophisticated test for presence of sexually transmitted diseases).  The standard of care is also the standard of care applicable at the time of the negligent act.  Wilson v. U.S., Civ. #89-00737 ACK (D. Haw., 11 Jun. 1992) (in early 1980’s, use of sigmoidoscope was not standard of care relative to colon cancer).  Cases holding negligence.  Pineda v. U.S., 42 F.3d 1401 (table), 1994 WL 684542 (9th Cir. 1994) (Circuit reverses District Court holding that nurses promptly responded to cardiac crisis in newborn); MacDonald v. U.S., 853 F. Supp. 1430 (M.D. Ga., 1994) (failure to treat hypercholesteremia with timely thrombolytic therapy caused MI—civilian Hospital received patient too late); Bischoff v. U.S., Civ. #94-1456-W (W.D. Okla., 29 Sep. 1995) (examination by physician's assistant with referral to physician does not meet standard of care
supported that diagnosis, even though diagnosis was somewhat uncertain). An interesting decision held that if the claimant could show on remand that there was a negligent referral, the U.S. could be held liable for the negligence of a civilian Hospital and physician. The referral (so called) was under CHAMPUS and did not constitute a referral at all. Rise v. U.S., 630 F.2d 1068 (5th Cir. 1980). Note however, Army Hospital Commanders can transfer patients to civilian Hospitals for care paid for out of their operating budget. Gardner v. U.S Ireland Army Hospital, Civ. #3:97 CV-571H (W.D. Ky., 19 Apr. 1999), in failure to diagnose Cancer, expert opinion that earlier symptoms could have been related to tumor and may have resulted in a different outcome does not constitute negligence. Estate of Whitling ex rel Whitling v. U.S., 99 F. Supp.2d 636 (W.D. Pa., 2000) Accidental death on DVA Hospital grounds of escaped mental patient results in finding of gross negligence and judgment of $1.3 million. Sumodi v. U.S., Civ. # COO-52RJB (W.D. Wash., 19 Sep. 2000) Injury to --- nerve during suspension of bladder was not caused by negligence. Spence v. U.S., 132 F. Supp.2d 1061 (M.D. Ga. 2001) DVA doctor was negligent in issuing pass to patient who murdered his mother. Smith v. U.S., 119 F. Supp.2d 561 (D. S.C. 2000) Simple negligence not medical malpractice negligence can be the standard if the acts involved are far removed from patient care—here failure of a computer system to result in notice of mammography result is at issue. Winkle v. U.S., 162 F. Supp. 918 (S.D. Ohio 2001) Temporary use of prednisone for GI problems in U.S. cannot be determined to be necessary for continued use at MTF’s in Germany causing Cushing’s syndrome; Cautieri v. U.S., 167 F. Supp.2d 207 (D.R.I. 2001) Failure to prove DVA physicians were negligent in inserting inflatable penile prosthesis; Diaz-Colon v. U.S., 178 F. Supp. 2d 52 (D.P.R. 2001) Delay in diagnosis to treat talus fracture did not cause arthritis, original injury did; Ellis v. U.S., Civ.# 7:01-CV-00223 (W.D. Va., 6 Feb. 2002) Psychiatrist plan for treating mental patient the day prior to his suicide was not negligent and not a factor; Cladwell v. Northeast Baptist Memorial Hospital, Civ.# SA-00-CA-758-EP (W.D. Tex., 15 Jan. 2002) U.S. not liable for failure to prevent death in acute ascending dissecting carta which began 17 days earlier and was misdiagnosed at civilian hospital whose attending was held liable; Meyer v. U.S., 2002 U.S. App. LEXIS 3876 (8th Cir. (S. Dak.)) Decedent was acting strangely in VA domiciliary facility laundry room prior to being strangled the same night, VA policemen and medical assistant both tolled to decedent and took action; their lack of action was not negligent; Quijano v. U.S., 325 F. 3d 564 (5th Cir. 2003) Where Brooke Army Medical Center refuses family donation of blood due to its internal standard and patients dies from rare organism in donor blood, case remanded for findings as to whether BAMC’s internal standard violated Texas standard.

(f) Comparative Negligence. Currently, a plaintiff’s negligence will not totally bar recovery, especially if it is less than or equal to 50% of the injury’s cause, but will reduce it. See, e.g., Soto v. U.S., 11 F.3d 15 (1st Cir. 1993) (U.S. is 10% negligent, since U.S. driver failed to brake when plaintiff was running stop sign—recovery was $250,000 for injured plaintiff); Allstate Insurance Co. v. U.S., 973 F. Supp. 759 (M.D. Tenn. 1997) (speeding plaintiff is more than 50% negligent when he strikes left turning USPS
vehicle—no recovery); Estate of Daniel Gonzales v. U.S., 1997 WL 214865 (E.D. Pa.) (14 year old decedent on motorbike comes out of one-way street and turns in front of USPS trailer on 4 lane, 2 way street--U.S. held 60% liable--judgment of $510,000); Cooper v. U.S., 897 F. Supp. 306 (E.D. Tx. 1995) (plaintiff northbound turned left; Postal driver southbound turned right--U.S. 66 2/3% liable as Postal driver had yield sign); In re Greenwood Air Crash, 924 F. Supp. 1518 (S.D. Ind. 1995) (mid-air collision of two aircraft--liability proportioned as follows: 70% to plane which violated right-of-way, 25% to U.S. aircraft controller for failure to warn of plane’s location); Torres v. U.S., 953 F. Supp. 239 (N.D.N.Y. 1995) (Postal truck entering alley without stopping is struck in the right rear by bicyclist on sidewalk--view of both is blocked by parked truck--U.S. is 80% liable); Soto v. U.S., 11 F.3d 15 (1st Cir. 1993) (U.S. is 10% negligent as U.S. driver failed to brake as plaintiff was running stop sign--recovery was $250,000 for injured plaintiff); Jackson v. U.S., 933 F. Supp. 273 (D. Mass. 1997) (Experienced pilot who flies into icing condition known to him exceeds that of air traffic controller who did relay other icing reports—U.S. not liable under West Virginia law); Baldwin v. U.S., 929 F. Supp. 1270 (E.D. Mo. 1996) (plaintiff stopped suddenly in merge lane and was rear ended by COE vehicle--U.S. 90% liable); Yeary v. U.S., 754 F. Supp. 546 (E.D. Mich. 1991) (pedestrian crossing wide street intersection where there were no crossing lines held 40% negligent when she walked into Postal vehicle she did not observe); Richardson v. U.S., 835 F. Supp. 1236 (E.D. Wash. 1993) (drunken driver who had right-of-way collides with second vehicle of 19 to 25 vehicle convoy--awarded 50% of his damages); Loco v. U.S., 1993 WL 97256 (S.D.N.Y.) (fall due to catching heel in expansion joint in West Point Chapel steps--50% recovery); DeVeau v. U.S., 833 F. Supp. 139 (N.D.N.Y. 1993) (constant patron slips on vinyl between two rugs at entrance of Post Office on rainy day--U.S. 85% liable); Loy v. U.S., Civ. #S-93-1178-DFL (E.D. Cal., 2 Sep. 1994) (driver of forklift and purchaser assisting in unloading are equally liable for injury caused by teetering box); Phillips v. U.S., 1996 WL 407237 (N.D. Miss.) (Truck driver slips debris while leaving lunchroom--plaintiff's negligence reduces award); Mittiga v. U.S., 945 F. Supp. 476 (N.D.N.Y. 1996) (U.S. vehicle collides with pedestrian that is crossing the street in a commercial area in middle of the block--neither driver nor pedestrian are paying attention--U.S. 60% liable and pedestrian 40%). Jackson v. U.S., 156 F.3d 230 (9th Cir. 1998), pilot's negligence flying single engine light plane in area subject to icing conditions exceeds that of FAA comptroller who failed to warn pilot of specific icing conditions. Duffy v. U.S., 1999 U.S. Dist. LEXIS 7590 (S.D. N.Y.) Postal patron trips over 1.7 inch rise in sidewalk around rounding sharp corner breaks - judgment $125,000 minus 33 percent. Masek v. U.S., 1999 U.S. Dist. LEXIS 10690 (N.D. Ill.), in intersection collision plaintiff's damages reduced by 20% due to his negligence, U.S. recovers nothing as its negligence exceeds 50%. Halek v. U.S., 178 F.3d 481 (7th Cir. 1999), upholds attribution of 20% negligence to plaintiff, an electrician who reaches into a cage designed to preclude catching fingers between pulley and cable while elevator he was repairing was moving. U.S.


(3) Proximate Cause Necessary.
(a) Proximate Cause Required. Fact of negligence does not mean there is proximate cause. Cases finding no proximate cause: Magee v. U.S., 121 F.3d 1 (1st Cir. 1997) (plaintiff failed to show how VA's allegedly negligent treatment of mental patient caused mental patient to rear-end plaintiff's automobile); Anderson v. U.S., 82 F.3d 417 (table), 1996 WL 185762 (6th Cir. 1996) (slip on water in Post Office customer service area near entrance—judgment for U.S.); Essex v. U.S., 123 F.3d 1060 (table), 1997 WL 560014 (4th Cir. 1997) (fall in Post Office as patron stepped off mat on drizzly day—no causation); Fairchild v. U.S., 1996 WL 197692 (N.D. Ill.) (Failure by Park Rangers to identify heat stroke earlier was not negligent—treatment for heat exhaustion was proper); Cosenza v. U.S., Civ. # CV-930450 (VVP) (E.D.N.Y., 30 Jul. 1997) (no recovery for aggravation of preexisting back and knee injuries allegedly due to rear-ender by car driven by FBI agent); Remo v. U.S. Federal Aviation Administration, 852 F. Supp. 356 (E.D. Pa. 1994) (no proximate cause where FAA Controller failed to control movements of two small aircraft); Bidden v. U.S., 15 F.3d 1444 (8th Cir. 1994) (improper weather briefing before take off is remote, not proximate cause, where pilot continues course after encountering difficult weather); Corrival v. U.S., 832 F. Supp. 19 (D. Mass. 1993) (death following second accident is not related to accident with Postal vehicle about 2 months previously); Martin v. U.S., 934 F. Supp. 159 (E.D. Pa. 1996) (residents of village abutting Navy facility fail to prove TCE contamination emanated from Navy facility); McGrath v. U.S., Civ. #96-78-M (D. N.H., 6 Mar. 1997) (Failure of FAA to require that all jumpers be listed on permit did not cause midair collision between plane and parachutist); Lawson v. U.S., 1996 WL 875077 (N.D. Ohio) (method of operation of flashing light and foghorn on breakwater did not cause collision with breakwater); Ayala v. U.S., 49 F.3d 607 (10th Cir. 1995), Gaff's, 846 F. Supp 1431 (D. Colo. 1993) (incorrect technical advice by U.S. does not create liability for mine explosion, since proximate cause was intervening negligence of suppliers and miners); Phillips v. U.S., Civ. #3:95cv773 (E.D. Va., 14 May 1996) (drunk driver speeding with no headlights hits 2.5-ton GOV with loaded trailer as GOV crosses highway in front of him—U.S. not liable); Garza v. U.S., 809 F.2d 1170 (5th Cir. 1987) (Airman stole dud which injured 13-year-old who found it—not foreseeable or actionable—distinguishes Williams v. U.S., 352 F.2d 477 (5th Cir. 1965) (where Soldier was issued ordnance which he neglected to return); Castro v. U.S., Civ. #92-1525 (DRD)(D. P.R., 29 Nov. 1995) (plaintiff crosses two lanes of traffic to enter flow of congested traffic in front of oncoming emergency vehicle—plaintiff is cause of accident); Goodman v. U.S., 916 F. Supp. 362 (S.D.N.Y. 1996) (trip and fall over crowd control barrier at national monument—no proximate cause, since not demonstrated that U.S. was aware of improper placement of barrier); Hunter v. U.S., 1997 WL 163513 (M.D. Fla.) (Crash of experimental aircraft caused by adding fuel tanks and entering into wake turbulence after being warned by Controller, and not by acts of Controller); Dacrepin v. U.S., 964 F. Supp. 659 (E.D.N.Y. 1997) (failure of proof that crack on basketball court was significant enough to cause fall of player); Washington v. U.S. Department of HUD, 1997 WL 21389 (W.D. Tx.) (Where plaintiff was

(b) Medical Malpractice Proximate Cause. Medical malpractice cases have given rise to some strained interpretations of proximate cause. For


(A) Other Lost Chance Cases. Other cases dealing lost chance of survival include: Kramer v. Lewisville Memorial Hospital, 858 SW.2d 397 (Tx. 1993) (no loss of chance in WD case for cervical cancer); Hurley v. U.S., 923 F.2d 1091 (4th Cir. 1991) (holds Md. law rejects loss of chance re cardiac arrest in long term heart problem patient--states Hicks rule has been misinterpreted and should be preponderance, not substantial possibility); Bell v. U.S., 854 F.2d 881 (6th Cir. 1988) (Michigan has loss of chance, i.e., less than 50% in failing to diagnose abdominal aneurysm); McBride v. U.S., 462 F.2d 72 (9th Cir. 1972) (42-year-old Navy pilot recently retired while on flight status died in Hospital parking lot just after having misread EKG--court held 20 percent chance of survival, enough to establish proximate cause--this in accordance with rule in Hicks v. U.S., 368 F.2d 626 (4th Cir. 1966) wherein the court held that reasonable medical probability of survival was not the test, but used the test of substantial possibility of survival); Boody v. U.S., 706 F. Supp. 1458 (D. Kan. 1989) (permits loss of chance in lung cancer, but applies 5-year past morbid life expectancy to premorbid, i.e., to permit 15 percent recovery); Bowen v. U.S., Civ. #86-0382 (D. Haw. 1987) (lost chance adopted in lung cancer case); Richmond Co. Hospital v. Dickerson, 356 S.E.2d 548 (Ga. 1987) (lost chance adopted in death due to failure to timely perform surgery); McKellips v. St. Francis Hospital, 741 P.2d 467 (Okla. 1987) (lost chance adopted in death by heart attack after premature release from ER); Blackmon v. Langley, 737 S.W.2d 455 (Ark. 1987) (lost chance adopted in failure to timely diagnose lung cancer). But see Dumas v. Cooney, 1 Cal. Rptr. 2d 584 (1991) (causation in medical malpractice cannot be based on loss of chance of survival); Weimer v. Hetrick, 525 A.2d 643 (Md. 1987) (lost chance not applicable in death of newborn due to failure to perform C-section); Kroll v. U.S., 694 F. Supp. 1210 (D. Md. 1988) (interprets recent Maryland cases as not adopting loss of chance-held failure to treat impending strokes as actionable); Thomas v. Corso, 265 Md. 84, 288 A.2d 379 (1972)
(holds that Hicks is not a lost chance case); McKain v. Bisson, 12 F.3d 692 (7th Cir. 1993) (loss of chance under Indiana law not recognized in heart attack case). But see Mayhue v. Sparkman, 653 N.E.2d 1384 (Ind. 1995). Some recent cases adopting loss of chance. Wellen v. DePaul Health Center, 828 S.W.2d 681 (Mo. 1992); Aasheim v. Hamberger, 690 P.2d 824 (Mont. 1985); Perry v. Las Vegas Medical Center, 805 P.2d 589 (Nev. 1991); Evans v. Dollinger, 471 A.2d 405 (N.J. 1984). The cases do not necessarily reach the same result even on analogous facts. Compare Webb v. U.S., 446 F.2d 760 (5th Cir. 1971), cert. denied, 405 U.S. 1072 (1972) (decedent was summarily ejected from emergency room in Georgia when she showed up several hours after ingesting 50 tablets of gout medicine in suicide attempt--held no liability, since no treatment available but palliative) with Rewis v. U.S., 503 F.2d 1202 (5th Cir. 1974) (aspirin poisoning of 15-month-old child involving delay before seeking treatment). Wilson v. U.S., 82 F.3d 409 1996 WL 174695 (4th Cir. Va.) In lung cancer claim, interprets Hicks v. U.S., 368 F.2d 626 (4th Cir. 1966) language "substantial probability of survival" to mean more likely than not; Hollis v. U.S., 323 F. 3d 330 (5th Cir. 2003) Retinopathy of prematurity in 1 lb. 3oz. premie could not have been precluded by more frequent examinations as not shown when it started.

**B) Proportional Damages in Lost Chance Cases.** Boody v. U.S., 706 F. Supp. 1458 (D. Kan. 1989) (listing three methods of determining damages in loss of chance cases: 1) award based on assessment of all the evidence; 2) full compensation even though plaintiff had less than even chance of survival or care; and 3) multiply percentage of living or surviving for fixed period of time and award for percent of chance lost); Short v. U.S., 908 F. Supp. 227 (D. Vt. 1995) (loss of chance is 30 percent in delayed diagnosis of prostate cancer--award is total value times 30 percent). Hebert v. U.S. 1998 WL 171668 (E.D. La.) Delay in treatment of Wegener's granulomatosis of 8 days, ruling that treatment earlier, e.g., 2 days later, would have had 30 percent chance of saving kidney - awards $5,000 to unemployed male in early 50s. Smith v. U.S., Civ. #97-CV-73380-DT (E.D. Mich. 18 Dec. 1998), delay in diagnosis results in 20 percent loss of chance and award of $376,649 as earlier detection of cervical cancer would have resulted in hysterectomy rather than radiation. Bueno v. U.S., 64 F. Supp.2d 627 (W.D. Tx. 1999) placing complete reliance of positive exercise stress test in 49-year-old male smoker and testing further for continuing left arm results in heart attack and $1.1 million verdict despite deceased 45% negligence; Liebig-Grigsby v. U.S., 2003 U.S. Dist LEXIS 3682 (N.D. Ill. 11 Mar. 2003) Judge applies 75% loss of chance factor to damages based on testimony that second surgery would have improved plaintiff by that factor if timely referred, award of $3,843,821.


(iv) Cases Finding No Causation in Medical Malpractice Cases. See, e.g., Jones v. U.S., 127 F.3d 1154 (9th Cir. 1997), affg, 933 F. Supp. 894 (N.D. Cal. 1996) (failure of both Army gynecologist and Army dentist to explain to female Army sergeant that antibiotics would reduce efficacy of birth control pills was not cause of her pregnancy, since start of pregnancy occurred before she started taking the antibiotics--District Court rejected plaintiff's expert testimony based on standard in Daubert v. Merrell Dow Pharmaceuticals Inc. v. U.S., 509 U.S. 579, 116 S.Ct. 189 (1995)); Miner v. U.S., 94 F.3d 1127 (8th Cir. 1996) (mild pervasive development disorder in newborn not caused by foiled midforceps delivery, but by blows to abdomen by husband or car accident during pregnancy); Halley v. U.S., 97 F.3d 1456 (table), 1996 WL 499085 (8th Cir. 1996) (no causal connection between injury due to rear end collision and death from congestive heart failure two years later); Kipp v. U.S., 88 F.2d 681 (8th Cir. 1996), affg, 880 F. Supp. 681 (D. Neb. 1995) (in January 1985, prior to effective AIDS test, decedent must prove that she would not have obtained AIDS if proper prescreening of donor had been conducted which she failed to do--negligence per se is not basis for liability); Ulezycki v. U.S., 89 F.3d 839 (table), 1996 WL 328782 (7th Cir. 1996) (wrongful death allegedly due to acute mesenteric ischemia not caused by failure to perform angiogram during first Hospitalization or delay of surgery over weekend); Henry v. U.S., 89 F.3d 850 (table), 1996 WL 355568 (10th Cir. 1996) (failure to obtain history of headaches in 10-year-old who died from brain tumor does not constitute negligence); Champagne v. U.S., 40 F.3d 946 (8th Cir. 1994) (Indian Health Service failure to treat caused young man's suicide, but parents barred from recovery as father's conduct was a contributing cause); Campbell v. U.S., 907 F.2d 1188 (7th Cir. 1990) (fact that stroke occurred during operation for carotid endarterectomy does not establish negligence); Mann v. U.S., 904 F.2d 1 (2d Cir. 1990) (DVA could allow unlicensed intern to perform surgery under staff supervision--no liability); Lemaire by & through Lemaire v. U.S., 826 F.2d 949 (10th Cir. 1987) (failure to timely diagnose impending stroke--held for U.S.); Wafflen v. U.S., 799 F.2d 911 (4th Cir. 1986) (seven months delay in diagnosing moderately differentiated lung cancer--no proximate cause of reduction in life expectancy); Imm v. U.S., 912 F.2d 469 (table), 1990 WL 124496 (9th Cir. 1990) (failure to deliver vaginally not cause, since
no indication to do so); Campbell v. U.S., 907 F.2d 1188 (7th Cir. 1990) (fact that stroke occurred during operation for carotid endarterectomy does not establish negligence); Zwicky v. U.S., Civ. #95-8103 JGD (C.D. Cal. 21 Oct. 1997) (Swine Flu shot in 1976 did not cause plaintiff’s myriad of medical symptoms); Luther v. U.S., Civ. #93-263J (W.D. Pa., 29 Jul. 1996) (detailed opinion finding brain damage occurred ante-partum, not during labor and post-partum); Wilson v. U.S., Civ. #CV 194-199 (S.D. Ga., 31 Jul. 1996) (attack on visitor in ladies restroom by schizophrenic mental patient is not compensable, since mental patient was fully aware of his act and not symptomatic); Fairchild v. U.S., 1996 WL 197692 (N.D. Ill.) (Failure by Park Rangers to identify heat stroke earlier was not negligent--treatment for heat exhaustion was proper); McKenna v. U.S., Civ. # 1:88CV4683 (N.D. Ohio, 9 Aug. 1995) (failure to prove that mother received thalidomide during treatment of pregnancy at Army dispensary in Germany); Bellamy v. U.S., 888 F. Supp. 760 (S.D. W.Va. 1995) (4-5 month delay in diagnosing malignant lymphoma which was 16 cm in size at diagnosis--no liability, since mode of treatment identical); Jordan v. U.S., Civ. #A1-92-231 (D. N.D., 25 Jan. 1995) (no loss of chance of survival where patient not transported from accident scene, since irreversible damage already present); Doe v. U.S., Civ. #3:94cv882 (E.D. Va., 17 Nov. 1995) (mental patient’s allegation of sexual contact with therapist are based on false recollection implanted by others); Negron v. U.S., Civ. #4:93cv2270-DJS (E.D. Mo., 4 Jan. 1995) (failure to treat HIV+ during kidney transplant in early 1986 had no effect on subsequent death from cardiac arrest secondary to HIV+); Bullock v. U.S., Civ. #C 93-20995 EAI (N.D. Cal., 22 May 1995) (in suit where there is medical opinion in Support of medical claim, Judge rules he has right to consider allegation despite lack of proof, but dismisses suit based on Government’s expert testimony); Basten by and through Basten v. U.S., 848 F. Supp. 962 (M.D. Ala. 1994) (failure to offer alpha-beta protein test creates liability for spina bifida infant); Bertuat v. U.S., Civ. #91-4215 (E.D. La., 30 Mar. 1994) (failed to prove swine flu shot caused Guillain Barre Syndrome, since the patient had normal reflexes through numerous Hospitalizations and repeated GBS is rare); Portillo v. U.S., 816 F. Supp. 444 (W.D. Tex. 1993), aff’d without opinion, 29 F.3d 624 (5th Cir. 1994) (Summary Judgment for U.S. in suit for urinary tract infection based on failure to timely catherize); Young v. U.S., 574 F. Supp. 571 (D. Del. 1993) (negative wide excision breast biopsy at Tripler AMC, rather then needle localization, did not cause breast deformity); Ward v. U.S., Civ. #90-0518-L (W.D. Ky., 8 Apr. 1993) (even though there was evidence of medical malpractice at Fort Knox, blindness was congenital and not compensable); Poulos v. U.S., #92-8287 (5th Cir. 16 Apr. 1993) (neurological injury to newborn was not caused by medical malpractice at Wm. Beaumont AMC); Zywicki v. U.S., 809 F. Supp. 822 (D. Kan. 1992) (2½-year-old child med-evaced within 2 hours of arrival at military Hospital--died 3½ hours later at civilian Hospital--failure to use nasogastric tube and IV line did not cause death); Shepard v. U.S., 811 F. Supp. 98 (E.D.N.Y. 1993) (showing by plaintiff that lingual nerve damage in tooth removal can be avoided by sufficiently experienced
Informed Consent. The causation requirement also applies to informed consent actions. Hutchinson v. U.S., 841 F.2d 966 (9th Cir. 1988) (failure to warn that Predisone may cause aseptic neurosis must be material); Valdiviez v. U.S., #91-5777 (5th Cir. 1992) (in 1984, prior to HIV testing, reasonable person would have chosen heart surgery
keratoma after radiation was performed with full consent and proper documentation; Harrison v. U.S., 284 F.3d 293 (5th Cir. 2002) Failure of obstetrician to inform expectant mother of availability of C-section constitutes lack of informed consent, on remand at 233 F. Supp.2d 128 (D. Mass 2002) award of $25,000 for Erb’s palsy.


(e) Exploding Ordnance.


However, comparative negligence may have diminished the effectiveness of many defenses. Roggow v. Mineral Processing Corp., 698 F. Supp. 1441 (S.D. Ind. 1988) (cites numerous cases on amelioration of traditional defenses by comparative negligence); Schumacher v. Cooper, 850 F. Supp. 438 (D.S.C. 1994) (damages reduced by 75% in case where swimmer injured by boat's propeller--reduced from $500,000 to $125,000). Hroboaski v. U.S., 2000 U.S. App. LEXIS (10th Cir.) Funeral home-cremated wrong corpse is intervening cause, not DVA Hospital from which the bodies came.

b. Exclusions From FTCA. Subject to exclusions listed in 28 U.S.C. § 2680 and by other statute. First of which is 28 U.S.C. § 2680(a) (1st Clause), that is, claims based on execution of statute or regulation (valid or not) provided due care is used. For cases, see IB1d.

c. Discretionary Function. Excludes claims arising out of the exercise or performance of, or failure to exercise or perform, discretionary function whether or not discretion is abused (2d clause, 28 U.S.C. § 2680(a)). USF&G v. U.S., 837 F.2d 116 (3d Cir. 1988) (Government conduct not discretionary if it violates Constitution, statute or applicable regulation). Moreover, while a government program may be discretionary, not every act in carrying it out is. Prescott v. U.S., 959 F.2d 793 (9th Cir. 1992) (nuclear tests in general fall under exclusion but not every act in carrying out program). Montague v. Mary Lou Keener, Civ. #97-1603 (CKK) (D. D.C., 21 Nov. 1997), denial of an FTCA claim is discretionary.

(1) Nature of Discretionary Function Exclusion. Discretionary functions exclusions may apply at any level where decisions are made. Question is whether government policy making is reflected in decision. However, if decision is contrary to statute, regulation, or policy, discretionary function exclusions not applicable. Gaubert v. U.S., 499 U.S. 315, 111 S.Ct. 1267 (1991) (discretionary function exclusion covers only acts that are discretionary in nature, acts that involve elements of judgment or choice—discretionary conduct is not confined


(Postal Service decision to sell jeeps as surplus without warning of propensity to turn over is discretionary); Myslakowski v. U.S., 806 F.2d 94 (6th Cir. 1986) (failure to warn of propensity to turn over of surplus Postal Service jeep discretionary—follows Varig); Tindall by Tindall v. U.S., 961 F.2d 53 (5th Cir. 1990) (distribution of explosives by BATF without warning label falls under § 2680(a)); Jurzec v. American Motors Corp. v. U.S., 856 F.2d 1116 (8th Cir. 1988) (sale of jeep with insufficient roll bar warning exempt); Grammatico v. U.S., 932 F. Supp. 1120 (C.D. Ill. 1996), aff’d, 109 F.3d 1198 (7th Cir. 1997) (sale of surplus radial mill on “as is/where is” basis is discretionary by Defense Reutilization Management Office because it was not hazardous). But see Merklin v. U.S., 788 F.2d 172 (3d Cir. 1986) (U.S. as Supplier of radioactive ore may have duty to warn unknowledgeable user). Miles v. Navel Aviation Museum Foundation, 289 F.3d 715 (11th Cir. 2002) U.S. Aircraft already sold to private party causing injury by nose caving in and part flying off and hitting plaintiff’s leg, U.S. held liable for failure to properly inspect during its ownership, even though sold as is.


(h) Decision to Ban Goods. The Government’s decision to ban certain goods may fall within the discretionary function exclusion. Jayvee Brand, Inc. v. U.S., 721 F.2d 385 (D.C. Cir. 1983) (ban on Tris treated garments is excepted). But see Fisher Bros. Sales, Inc. v. U.S., 17 F.3d 647 (3d Cir. 1994) (decision of Federal Drug Administration (FDA) Commissioner to bar entry to Chilean grapes was not discretionary if based on negligent FDA lab tests for cyanide). Appleton v. U.S., 69 F. Supp.2d 83 (D. D.C. 1998) where Alcohol, Tobacco, and Firearms (ATF) issues permit to import ammunition from South Africa and retracts it after the report 2680(a) not applicable or is interference with contract exclusion if permit negligently issued.

(i) Decision to Warn about Danger. Government decisions to warn persons about particular dangers may fall within the discretionary function exclusion. Grunnet v. U.S., 730 F.2d 573 (9th Cir. 1984) (State Department fails to warn Congressman Ryan re Jonestown discretionary); Begay v. U.S., 768 F.2d 1059 (9th Cir. 1985) (decision by Uniformed Services Public Health Service (USPHS) not to warn uranium miners of known hazard is discretionary); Barnson v. U.S., 816 F.2d 549 (10th Cir. 1987) (decision not to warn uranium miners of danger despite USPHS research project is political, therefore, discretionary and not actionable); Hagy v. U.S., 976 F. Supp. 1373 (W.D. Wash. 1997) (failure of National Institute of Health (NIH) to warn of possibility of acquiring Creutzfeldt-Jakob Disease from taking human growth hormone is discretionary); King v. U.S. Forest Service, 649 F. Supp. 20 (N.D. Cal. 1986) (failure of U.S. Forest Service to warn of dangers of rafting when water is high); Bacon v. U.S., 810 F.2d 827 (8th Cir. 1987) (Housing Urban Development (HUD) clean up of dioxin in local roads—failure to warn clean up crew is discretionary); Lockett v. U.S., 714 F. Supp. 848 (E.D. Mich. 1989) (Environmental Protection Agency (EPA) has no duty to warn neighborhood re PCB test sample at local plant); Lacock v. U.S., 106 F.3d 408 (table), 1997 WL 22463 (9th Cir. 1997) (no duty to warn about veteran diagnosed as being potentially dangerous to others). But see Andrulonas v. U.S., 924 F.2d 1210 (2d Cir. 1991) (failure to warn bacteriologist of danger of working with rabies viruses is not discretionary); W.O. & A.N. Miller Companies v. U.S., 963 F. Supp. 1231 (D. D.C. 1997) (failure to warn of buried chemicals not discretionary, but method of disposal is discretionary). Safeco Ins. Co. v. U.S., Civ. #S95-2226 LKK/PAN (E.D. Cal., 25 Sep. 1998), where contract provides that U.S. Forest Service will provide daily report on fire hazard danger to Government contractor clearing branch in National Forest, failure to do so is not discretionary; Lambert v.
November 2003 WEB Edition 167


(k) Immigration. The decision to allow a person to enter this country is discretionary. Flammia v. U.S., 739 F.2d 202 (5th Cir. 1984) (decision to permit Cuban criminals to enter U.S. under Mariel boat lift--discretionary). Medina v. U.S., 259 F.3d 220 (4th Cir. 2001) Decision to arrest during deportation proceedings for simple A&B is discretionary on basis it may involve moral turpitude.

(distinguished Varig and follows Griffin v. U.S., 500 F.2d 519 (3d Cir. 1974) re duty to test oral polio vaccine). In re Orthopedic Bone Screw Product Liability Litigation, 264 F.3d 344(3d Cir. 2001) FDA decision to approve bone screw pedicle on basis it was similar to existing product on market was discretionary. King v. Federal Drug Enforcement Administration, 35 Fed. Appx. 511 (9th Cir. 2002) FDA’s pre-market approval of medical device for use during surgery is discretionary.


**n** Audits. Decisions concerning when to conduct an audit are discretionary. Gary Sheet & Tin Employees Federal Credit Union v. U.S., 605 F. Supp. 916 (N.D. Ind. 1985) (Federal audit of Credit Union does not create duty to regulate and control).

held proximate cause was the effective intervening negligence of suppliers and miners—see Ayala v. U.S., 846 F. Supp. 1431 (D. Colo. 1993), aff’d, 49 F.3d 607 (10th Cir. 1995). Carter v. Bell Helicopter Textron, Inc., 52 F. Supp.2d 1108 (D. Az. 1999), Forest Service investigates crash of helicopter on Forest Service mission. Allegation of spoliation as key evidence lost, which is in Forest Service possession - exception applies.


(s) Law Enforcement. Decisions concerning criminal cases are discretionary. Lopez-Pacheco v. U.S., 627 F. Supp. 1224 (D. P.R. 1986) (no cause of action under Puerto Rican law for invasion of privacy—even if so, surveillance of known radical is exempt under § 2680(a)); Hydrogen Technology Corp. v. U.S., 831 F.2d 1155 (1st Cir. 1987) (FBI dismantling of machine in evidentiary exam falls under § 2680(a), provided that due care is used); Georgia Casualty & Surety Co. v. U.S., 823 F.2d 260 (8th Cir. 1987) (suit by good faith purchasers barred by § 2680(a)—repurchase of stolen autos in FBI covert operation); Mesa v. U.S., 827 F. Supp. 1210 (S.D. Fla. 1993), aff’d, 123 F.3d 1435 (11th Cir. 1997) (arresting wrong person with same name is discretionary and exclusion applies); Olson v. U.S., Civ. #CV89-4034 (E.D.N.Y., 10 Oct. 1991) (FBI use of concussion grenade which caused fire to remove guest-suspect from private home is...


(u) Adjudicatory Decisions. Adjudicatory decisions are discretionary. Pierce v. U.S., 804 F.2d 101 (8th Cir. 1986) (denial of benefits by Social Security examiner is exempt). Green v. U.S., 8 F. Supp.2d 983 (W.D. Mich. 1998), decision to award loan to another applicant despite allegation that claimant was first on list was discretionary.


(y) Security. Decision whether to provide security to contractor is discretionary. Fazi v. U.S., 935 F.2d 535 (2d Cir. 1991) (whether to protect contract mail carrier with security guard is discretionary). Mihaylo v. U.S.,
70 F. Supp.2d 8 (D.D.O. 1999) amount of security U.S. Secret Service must provide to foreign embassy under Geneva Convention is discretionary where delegation member is show and killed at Bulgarian Chancery. Charlie Augo Sales v. U.S., 68 F. Supp.2d 257 (D. P.R. 1999) decision of U.S. Postal Service inspection of mail to screen out mail bombs is discretionary including decision not to repair bomb-screening machine.

(z) Advertising. Government decision on whether to advertise is discretionary. Powers v. U.S., 996 F.2d 1121 (11th Cir. 1993) (failure of FEMA to advertise availability of national flood insurance is discretionary and falls within exclusion).


direct result of stormy weather conditions, but rather pilot fatigue and disorientation.


(2) Nature and Quality of Decision. Nature and quality of decision, i.e., subject matter of same and does it involve day-to-day routine. See Flammia, supra. Examples below.


been convicted of drug smuggling to work with children (one of whom he sexually abused) in a Group Home was discretionary; Coyne v. U.S., 233 F. Supp. 2d. 135 (D. Mass 2002) Amount and type of security and protection given to witnesses under the Federal Witness protection program is discretionary.


(d) Control of Service Members. The control of service members is usually discretionary. Doyle v. U.S., 530 F. Supp. 1278 (C.D. Cal. 1982) (discharge of service member who kills policeman two days later); Carlyle v. Department of the Army, 674 F.2d 554 (6th Cir. 1982) (failure to supervise applicants for enlistment who threw bench from window of hotel room rented at Army expense); Fair v. U.S., 234 F.2d 288 (5th Cir. 1956). Roskiewich v. U.S., 1998 WL 77888 (4th Cir. W.C.) (Whether to place sexual offender-prisoner on external work detail is discretionary in sexual assault claim. Sigman v. U.S., Civ. #CS-96-090-JLG (E.D. Wash., 9 Jul. 1998) (failure to follow recommendation of mental health professional to discharge airman with long history of mental illness is discretionary but failure to properly screen at enlistment is not, as mandatory regulation not followed). Pineda v. U.S., Civ. #BP-96-CA-478-FB (W.D. Tx., 24 Jan. 1998), exclusion applies to failure to control or warn visitors in double murder by Soldier - only fore knowledge of unit was domestic disturbance several months earlier-expressly rejects Otis Engineering Corp v. Clark, 801 SW.3d 307 (Tx. 1983). Malone v. U.S., 61 F. Supp.2d 1372 (S.D. Ga. 1999) failure to place Soldier in confinement after he raped another Soldier just before he raped Malone is discretionary; DeHaan v. U.S., Civ. #98-1151 M/DJS-ACE (D. N.M., 7 Feb. 2000) Transfer Airman to an unknown duty station due to threats by ex-husband is discretionary even though court order granted joint custody; Sigman v. U.S., 208 F.3d 760 (9th Cir. 2000) The enlistment, diagnosis, treatment and retention of airman were not barred by the exclusion as mandatory regulations were not followed.

(e) Duty to Prisoners. Assignment of prisoners to particular prisons or cells falls within the discretionary function exclusion. Ross v. U.S., 641 F. Supp. 368 (D.D.C. 1986) (negligent transfer of prisoner to Marion--exempt); Calderon v. U.S., 923 F. Supp. 127 (N.D. Ill. 1996), aff’d, 123 F.3d 946 (7th Cir. 1997) (failure to remove cellmate who attacked Calderon falls under exclusion despite fact that Calderon has furnished criminal information on cellmate’s relative); Bailor v. Salvation Army, 51 F.3d 678 (7th Cir. 1995) (decision to place prisoner in halfway house is discretionary, even though

(f) Protection from Harm. The decision whether to protect an individual from potential harm may fall within the discretionary function exclusion. Weissach v. U.S., 4 F.3d 810 (9th Cir. 1993) (U.S. Probationary Service regulations do not create a duty to warn ex District Attorney of threat by prisoner to kill him); Simmons v. U.S., 626 F.2d 985 (3d Cir. 1982) (no duty to protect individual because of his own request--duty is to public); Bates v. U.S., 517 F. Supp. 1350 (W.D. Mo. 1981), aff’d, 701 F.2d 737 (8th Cir. 1983) (murder of three teenagers and assault of another by on-duty MP using service revolver, U.S. held not liable based on Missouri law); Sellers v. U.S.,


storage of whale meat, under Restatement 413 re superior knowledge of
danger and under Restatement 410 re prohibition on firearms; Cochran v.
U.S., 38 F. Supp. 986 (W.D. Fla. 1998), decision to keep bowling alley open
and leave stacks of resurfacing panels throughout is discretionary; Morales v.
U.S., 1999 WL 221149 (E.D. La.), where jogger steps in grass-covered hole
whose presence was known to Government caretaker, Government owed
duty for failure to correct hazard; Smith v. U.S., Civ. 3:96 CV-650-M (W.D.
Ky., 1 Jun. 1999), decision by recreation official to eject pregnant horse from
(E.D. Md. 1998) slip and fall on stairs at Gateway Arch due to poor design
duty to warn of puddle on Post office floor on a rainy day. Brotman v. U.S.,
2000 U.S. Dist. LEXIS 12843 (S.D. N.Y.) Fall inside Statue of Liberty
allegedly due to inadequate lighting falls under exclusion due to need to
preserve historic integrity of Statue.

(i) Buildings and Grounds. Cases where the discretionary function
exclusion held applicable. Wiggins v. U.S. through Department of the
Army, 799 F.2d 962 (5th Cir. 1986) (decision not to remove 70-year-old
pilings is discretionary); McCartney v. U.S., No. 85-1527 (5th Cir. 27
Aug. 1986) (tenant failure to properly change filters in gas furnace);
tracks around it in busy corridor—no duty to warn since presence
unknown); Taylor v. U.S., 121 F.3d 86 (2d Cir. 1997), aff'g, 946 F.
Supp. 314 (S.D.N.Y. 1996) (where door slammed shut on child’s finger
due to broken door closer, U.S. must be on actual notice for liability to
attach); Linn v. U.S., 979 F. Supp. 521 (E.D. Ky. 1997) (canopy of
ceiling fan falls on prison visitor when screw works loose from 4.5 years
of operation—no duty to inspect and Summary Judgment for U.S.);
1987) (no duty to warn of bare terrazzo floor between two mats at USPS
facility entrance on a rainy day); Curtis v. U.S., Civ. #C-80-3744-WAI
(N.D. Cal. 1982) (failure to build fence around post quarters resulting in
injury to children not actionable); Doe v. U.S., 718 F.2d 1039 (11th Cir.
1983) (location of Post Office in high crime area); Jones v. U.S., 698 F.
Supp. 826 (D. Haw. 1988) (no duty to warn quarters occupant’s of
pesticide spraying of chlordane); Soni v. U.S., 739 F. Supp. 485 (E.D.
Mo. 1990) (unusual stairway design for aesthetic reasons is
discretionary); Calsagnol v. Figuerra, 765 F. Supp. 514 (D. P.R. 1991)
(aesthetic design of El Morro is discretionary—no duty to protect low
(impulse cartridges properly stored in fenced and guarded area at Miss.
NG at Gulfport-Biloxi Airport do not constitute attractive nuisance);
Trammell v. U.S., Civ. #DC-88-4104-B-O (N.D. Miss. 1992) (issuing a
warning by U.S. re dangers of state owned gym on leased Federal land is
discretionary); Miller v. U.S., Civ. #IP-92-165-C (S.D. Ind., 26 Mar.
1993) (U.S. not liable for premises liability at Camp Atterbury Ind. Nat’l
Guard owned and operated area); Duff v. U.S., 999 F.2d 1280 (8th Cir.
1993) (U.S. as landlord of government quarters has no duty to warn
where massive hangar door crashes contract employee to death, Navy's decision to locate joystick controls on edge of door was discretionary. Naida v. U.S., 93 F. Supp.2d 577 (D. N.J. 2000) Claimant alleges she fell because steps slippery not because she was carrying a computer to —— because steps were at Ft Hancock officers quarters, a National Historical Monument, revising steps was discretionary.


(C) Trespassers. U.S. has no duty to trespasser except to refrain from willfully and wantonly injuring them. Landen v. U.S., #85-4438 (5th Cir. 1985) (no duty to trespasser in impact area except to mark same as impact area); Vickery v. U.S., Civ. #CV 191-089 (S.D. Ga., 13 Apr. 1982) (no recovery for plaintiff trespassing in artillery impact area, since Army did not inflict injury either willfully or wantonly as required by Georgia law to sustain a finding of liability).

In California, a landowner owes a duty of reasonable care to everyone, including trespassers. Murphy v. Department of the Navy, Civ. # 87-0195-JL1 (CM) (S.D. Cal. 1991) (Navy did not breach duty of reasonable care to trespassers imposed under California law, since aerial gunnery range was clearly marked by warning signs).

(ii) Public Lands. Decision concerning management of public lands often within discretionary function exclusion. Rosebush v. U.S., 119 F.3d 438 (6th Cir. 1997) (fall of 16 month old child into fire pit at campground in Hiawatha National Forest is barred by discretionary function exclusion); Brown v. U.S., 403 F. Supp. 472 (C.D. Cal. 1975); Schieler v. U.S., 642 F. Supp. 1310 (E.D. Cal. 1986) (injured while standing on rock in park—decision not to place lightening rod is discretionary); Harmon v. U.S., 532 F.2d 669 (9th Cir. 1975) (warn of white water); Gadd v. U.S., 971 F. Supp. 502 (D. Utah 1997) (no duty to warn prior to bear attack in U.S. Forest Service campground, since no basis for expecting bear attack because terrain was in hospitalitable for bears); Rubinstein v. U.S., 338 F. Supp. 654 (N.D. Cal. 1972) (warn of bears); Husovsky v. U.S., 590 F.2d 944 (D.C. Cir. 1978) (falling tree limbs); Martin v. U.S., 546 F.2d 1355 (9th Cir. 1976) (management of wild bears); Pierce v. U.S., 142 F. Supp. 721 (E.D. Tenn. 1955); Revels v. U.S., Civ. #82-1693-R (W.D. Okla. 1986) (quad case—diving from fallen tree in non-designed area—no duty to warn); Kepp v. U.S., Civ. #6-84-67, (S.D. Tx. 1984) (design of Galveston sea wall is a discretionary function, therefore, roadway on top is not U.S. responsibility, but that of city); Gleason v. Department of the Army-COE, 857 F.2d 1208 (8th Cir. 1988) (bicyclist injured by bridge design—held discretionary); Adams v. U.S., Civ. #86-98 (E.D. Ky. 1988) (amount and placement of signs discretionary in quad diving case); Ross v. U.S., 910 F.2d 1422 (7th Cir. 1990) (no duty to warn 12-year-old drowning victim of danger of COE maintained breakwater); Arizona Maintenance Co. v. U.S., 864 F.2d 1497 (9th Cir. 1989) (seismic blasting by Department of Interior must conform to industry standard for discretionary function exclusion to apply); Graves v. U.S., 872 F.2d 133 (6th Cir. 1989) (after U.S. closes lock, nature of warning is discretionary); Self v. Fritts, Civ. #CV-F-88-680REC (N.D. Cal., 1989) (no duty to warn re danger of outdoor toilet door opening directly on road); Caplan v. U.S., 877 F.2d 1038 (1st Cir. 1990) (design of missile capsule discretionary--need not be made safe for visitors); Zumwalt v. U.S., 928 F.2d 950 (10th Cir.
1991) (failure to mark cave entrance--marking of trail which was laid out by U.S. Forest Service falls under exclusion where design was to maintain natural look); Cole v. Department of the Army-COE, Civ. #88-1549 (W.D. La., 1991) (17-year-old quad from diving into uneven bottom of shallow water--no duty); Aldrich Enterprises v. U.S., 938 F.2d 1134 (10th Cir. 1991) (U.S. as landowner had no knowledge that lessee's lake would overflow onto adjoining land); Richardson v. U.S., 943 F.2d 1108 (9th Cir. 1991) (decision not to place ground on power lines is discretionary); Johnson v. Department of Interior, 949 F.2d 332 (10th Cir. 1991) (Park Service decision as to when and how to rescue mountain climber is discretionary); Bredland, by and through Ireland v. U.S., 791 F. Supp. 1128 (S.D. Miss. 1992) (safeguarding a LAW rocket dud in impact area is discretionary); Harris v. U.S., Civ. #91 CV 0595 (SJ) (E.D.N.Y., 5 Oct. 1992) (method and time of repairing basketball court in Gateway National Recreational Area is discretionary, since it involves judgment as to the use of limited funds); Buffington v. U.S., 820 F. Supp. 333 (W.D. Mich. 1992) (drowning from breakwater due to high waves--design and operation of breakwater is discretionary); Koenig v. Department of the Army-COE, Civ. #5:93:cv:22 (W.D. Mich., 2 Jul. 1993) (drowning from breakwater--wording of sign is discretionary--follows Buffington); Autery v. U.S., 992 F.2d 1523 (11th Cir. 1993) (tree fell on car in national park--tree inspection program is discretionary); Parsons v. U.S., 811 F. Supp. 1411 (E.D. Cal. 1992) (method of fighting fire in National Forest is discretionary, even though fire escaped onto plaintiff's land); Webster v. U.S., 22 F.3d 221 (9th Cir. 1994), aff'd, 823 F. Supp 1544 (D. Mont. 1992) (BIA approval of lease to operate speedway on Indian lands does not make U.S. responsible for safe design or operation); Childers v. U.S., 40 F.3d 973 (10th Cir. 1994), cert. denied, 514 U.S. 1095 (1995) (decision not to close trails in winter at Yellowstone National Park is discretionary in case of 11-year-old boy fell to death--good district court opinion in same case at Childers v. U.S., 841 F. Supp. 1001 (D. Mont. 1994)); Faher v. U.S., Civ. #CV 93-167 TUC IMR (D. Az., 26 May 1994) (failure to post signs in Coronado National Forest re danger of diving from falls was discretionary); Lesoeur v. U.S., 21 F.3d 965 (9th Cir. 1994) (National Park Service decision not to regulate Colorado River rafting trips by Hualopi Tribe in Grand Canyon National Park is discretionary); Valdez v. U.S., 56 F.3d 1177 (9th Cir. 1995), aff'd, 837 F. Supp. 1065 (E.D. Cal. 1993) (claim concerning Park Service regulations re design of trail over falls and warning signs re danger are discretionary in claim for fall resulting in plaintiff becoming a quadriplegic based on negligent design of trail); Thune v. U.S., 872 F. Supp. 921 (D. Wyo. 1995) (U.S. employee sets fire in National Forest to increase forage for elk and incidentally destroys game hunter's camp--falls under exclusion); Lundgren v. U.S., Civ. #8:94cv462 (D. Neb., 5 Jan. 1995) (National Park Service under no duty to warn person who is struck by golf ball in West Potomac Park); Roof v. U.S. Park Service, 882 F. Supp. 567 (S.D. W.Va. 1995) (visitor to National Park dies from infection caused by coliform bacteria after fall in creek--failure to post warning signs discretionary); Mahler v. U.S., 56 F.3d 1039 (9th Cir. 1995) (miner going to his claim on BLM land where road not built or maintained by U.S. is licensee in non-
recreational area to whom no responsible duty of care was required); **McDaniel v. U.S.**, 899 F. Supp. 305 (E.D. Tx. 1995) (exclusion applies to Forest Service’s method of using pesticides which caused damage to neighboring land); **Gardner v. U.S.**, 896 F. Supp. 89 (N.D.N.Y. 1995) (exclusion applies to injury which occurred when batter in non sponsored softball game tripped on 8-10 inch hole to batter’s box); **Tippett v. U.S.**, 108 F.3d 1194 (10th Cir. 1997) (exclusion applies to snowmobiles trying to pass moose as he had observed other snowmobile’s do); **Cooper v. U.S.**, Civ. #95-3094-CV-S-4 (W.D. Mo., 22 Aug. 1995) (exclusion applies to claim for burns caused by geyser in Yellowstone where allegation was that warning sign was improperly placed); **Wright v. U.S.**, 82 F.3d 419 (table), 1996 WL 172119 (6th Cir. 1996) (decision to cut trees in wilderness near trails is under exclusion); **McMullen v. U.S.**, 956 F. Supp. 1068 (D. Kan. 1996) (method of safeguarding impact area at Fort Riley is discretionary); **Blackburn v. U.S.**, 100 F.3d 1426 (9th Cir. 1996) (sign on bridge in Yosemite are adequate warning to quadriplegic diving case--California Resort Act is not applicable); **Ward v. U.S.**, Civ. #96-589-J (LSP) (S.D. Cal., 19 Sep. 1996) (discretionary function applies to fall into bonfire during fire ring at Camp Pendleton recreation area); **Aragon v. U.S.**, 950 F. Supp. 321 (D. N.M. 1996) (discretionary function applies to TCE pollution of acquired from AFB closed in 1967); **Schroeder v. U.S.**, 1996 WL 754090 (N.D. Cal.) (Discretionary function applies to placement of signs on snowmobile course in national forest when two snowmobile’s died due to colliding with truck parked in hotel lot); **Wilson v. U.S.**, 940 F. Supp. 286 (D. Or. 1996) (28 U.S.C. §2680(a) applies to National Forest Service decision not to remove floating wood debris from lake for fear of disturbing habitat. Negligent emergency rescue by NPS employee following car accident in Sequoia National Park falls under exclusion, cites Kiehn v. U.S., 984 F.2d 1160 (10th Cir. 1993); **Bowman v. U.S.**, 820 F.2d 1393 (4th Cir. 1987) (decision not to place guard rails on Blue Ridge Parkway, a scenic route, falls under § 2680(a)); **Juan v. U.S.**, Civ. #C-89-4231-SBA (N.D. Cal. 1992) (issuance of climbing permit in Hawaii Volcano National Park is discretionary); **Layton v. U.S.**, 984 F.2d 1496 (8th Cir. 1993), cert. denied, 510 U.S. 877 (1993) (decision to select contractors and delegate safety responsibility for tree cutting in National Forest is discretionary); **Kiehn v. U.S.**, 984 F.2d 1100 (10th Cir. 1993) (no duty to warn commercial guide of danger from unstable sandstone rock in National Park). These cases have found discretionary function exclusion inapplicable. **Duke v. Department of Agriculture**, 131 F.3d 1407 (10th Circ. 1997) (discretionary function exclusion inapplicable where Forest Service gave no reason, not even budgetary ones, for its failure to either post warning signs or prohibit camping where they knew that state had cut road into hillside causing slope which large boulders would roll down, cites Third Circuit’s decision in Gotha v. U.S., 115 F.3d 176 (3d Cir. 1997) with approval; **Faber v. U.S.**, 56 F.3d 1122 (9th Cir. 1995) (Forest Service failed to post warning signs despite policy to do so re danger of diving from falls is not discretionary); **Boyd v. U.S.** ex rel. **Department of the Army-COE**, 881 F.2d 895 (10th Cir. 1989) (decision to permit swimming and boating in same area is actionable and not...
barred by § 2680 (a)); Van Orden v. U.S., 85 F.3d 639 (table), 1996 WL 256585 (9th Cir. 1996) (Forest Service' failure to place safety warnings in timber sale contract does not fall under exclusion--purchaser felled boundary line tree injuring adjoining property owner); Coe v. U.S., 502 F. Supp. 881 (D. Or. 1980) (BLM failed to institute measures which would have minimized fire damage on Federal Lands); Caraballo v. U.S., 830 F.2d 19 (2d Cir. 1987) (quad case from diving in three feet of water in National Park--duty to warn superseded by unforeseeable act); Starret v. U.S., 847 F.2d 539 (9th Cir. 1988) (failure to develop SOP to preclude ground water pollution from demo operation is not barred by § 2680(a)); Lindgren v. U.S., 665 F.2d 987 (9th Cir. 1982) (failure to warn water skiers of fluctuating water levels); Prescott v. U.S., 724 F. Supp. 792 (D. Nev. 1989) (must use objective standards to protect persons employed at Nevada test site); Roberts v. U.S., 724 F. Supp. 778 (D. Nev. 1989); Summers v. U.S., 905 F.2d 1212 (9th Cir. 1990) (National Forest Services procedures requiring safety review not followed re beach fires and warning thereof--discretionary bar n/a); Williams v. U.S., Civ. #91-007-S (E.D. Okla., 11 Dec. 1992), on remand from, 957 F.2d 742 (10th Cir. 1992)(method of releasing water from lock and design of warning system for fisherman are not discretionary); Ortiz v. U.S., 885 F. Supp. 363 (D. P.R. 1995) (boater who went ashore at Navy maneuver area explodes simulation handed to him by 17-year-old son--Navy held liable (70%) for lax enforcement into maneuver area--total award $162,000); Terry v. U.S., Civ. #92-CV-1685 (N.D.N.Y., 29 Jun. 1995) (exclusion not applicable to injuries to campers caused by slack cable not constructed according to self-imposed safety requirements); Will v. U.S., 60 F.3d 656 (9th Cir. 1995) (at Forest Service request, Government contractor moves another contractor's road grader without owner's permission to area where it is vandalized--U.S. has duty under state law to warn owner). Nyazie v. Kennedy, 1998 WL 32601 (E.D. Pa.) (Failure to hand brochure warning of danger of Potomac to injured party's family even though such handouts were customary avoids the discretionary function exclusion. Alef v. Department of Interior, 990 F. Supp. 932 (W.D. Mich. 1997) No duty to warn of danger of diving from sand dune into National Forest Service Lake in quadriplegic diving case. Pearson v. U.S., 9 F.3d 1553, 1993 WL 438760 (9th Cir. (Aug.)) Decision not to fence wild burros and to provide food and water near U.S. 95 is discretionary; Shively v. U.S., 5 F.3d 540, 1993 WL 312758 (9th Cir. Cal.) Decision by Forest Service not post signs on land where it is seen grazing permit is discretionary. Reetz v. U.S., Civ. # 1-97-CV-1036 (S.D. Mich., 1 Apr. 1999), method of marking roads in National Forest for Off the Road Vehicle use is discretionary where driver goes onto public highway and collides on blind curve; Kahan v. U.S., Civ. #96-01168BMK (D. Haw., 4 May 1999), movable barrier with warning signs is sufficient notice to preclude visitors from walking on beach close to lava flow and steam plane. Weingarten v. U.S., Civ. #97--393-B (D. N.H., 11 Feb. 1999), failure to place guardrails at top of crevasse on slope of Mount Washington is discretionary. Gould v. U.S., 160 F.3d 1194 (8th Cir. 1998) where sledder is injured by flying over 6 feet off terrace above COE dams, duty to warn exists as COE ranger had superior...
knowledge; **Caudill v. Department of the Army**, Civ. #98-112 (E.D. Ky., 6 Nov 1998) no duty to warn where decedent was killed by hitting a
downed tree with his boat in COE lake with numerous downed trees. **Miller v. U.S.**, 163 F.3d 591 (9th Cir. Or. 1998) Where multiple forest
fires escape onto private land, method of Forest Service fighting fires is
discretionary; **Reed v. Avvis Rent-a-Car**, 29 F. Supp.2d 121 (N.D. Cal., 1999) BLM is not responsible for sleeping camper being run over by a
participant in a performance festival on BLM land based on issue of a
plaintiff walks a short distance from car and falls to death off cliff in
mountain table in national park, placement of warning signs is
Park Service uses to keep visitors from lava flow is discretionary; **Riske
v. Department of Agriculture, Forest Service**, Civ. #CV96-63-BU-DWM
(D. Mont., 18 Oct. 1997) Failure to place sign by or fill in dip in snow
mobile trail as suggested by manual is not discretionary. **Dwyer v. U.S.**, 76 F. Supp.2d 154 (D. N.H. 1999) where Ranger orders **Dwyer** not to
camp in Alpine Meadow and does not offer case of nearby hut resulting
in fall from dangerous trail, exclusion applies as no mandatory directive
concerning use of hut in dangerous conditions; **Cestonara v. U.S.**, 211
F.3d 749 (3d Cir. 2000) Failure to properly light and place warning signs
on space traditionally used for parking does not fall under exclusion;
of hemp falls off cliff in national park, exclusion applies as Park Service presented evidence of policy decision to leave
park in natural state due to economic and aesthetic reasons. **Weir v. U.S.**, Civ. #CV00-2122 PCI-PGR (D. Az., 24 May 2001) Failure to extend bridge railing down the trail is discretionary where tourist leaned
against non-existent rail and fell in creek. **Reed ex rel Allen v. Department of Interior**, 231 F.3d 501 (9th Cir. 2000 Nev.) Issuance of
permit to use Black Rock Desert playa for Burning Man Festival is
discretionary where camper in his tent is run over by a car even though
LEXIS 21108 (6th Cir.) Park Services decision to mark only roads for
ORV use unless open for it is discretionary. **Elder v. U.S.**, 141 F.
Supp.2d 1334(D. Utah 2001). Fall to death in Zion National Park by 12-
year-old boy at spot where 4 others have fallen to death since 1956;
warning signs adequate; **Monzon v. U.S.**, 2001 U.S. App. LEXIS 11736
(11th Cir.) Failure of National Weather Service to warn of riptides of
which it had knowledge falls under exclusion. **Elders v. U.S.** cite change
visitors from falling in reservoir at discretionary in absence of mandatory
2002) Designation and management of a lightning caused fire as a
“prescribed natural fire” falls under exclusion even though fire became a
2002) No duty to post sign on well worn path from parking lot to
restroom in National Forest as regulations require posting on
2002) Where 12 year old washes off pier due to high wind, wording of warning sign regarding particular dangers is discretionary. O’Toole v. U.S., 295 F.3d 1029 (9th Cir. 2002) Exclusion does not apply to failure to maintain clear drainage ditches on ranch adjacent to O’Toole ranch, resulting in flooding, despite inadequate funding; Elder v. U.S., 312 F.3d 1172 (10th Cir. 2002) Where 12 year old slips on ledge and falls, fact that numerous signs fail to mention algae is discretionary; Demery v. U.S., 246 F. Supp. 2d 1060 (D. N.Dak. 2003) Snowmobile passenger drowns in open portion of frozen lake where BIA has properly marked aeration system, exception applies.


**(m)** RUS Laws. Landowner’s duty to warn may be abated by State law, i.e., recreational use statute (RUS), exempting U.S. A state's RUS statute may exempt the U.S., as it would a private landowner from a duty to warn. **Simpson v. U.S.**, 652 F.2d 831 (9th Cir. 1981) (state statute applies to Federal land as U.S. FTCA liability is coextensive with that of private

(i) State RUS Decisions. The following state RUS laws have been construed by the courts.


(C) Arkansas. RUS not applicable. Roten v. U.S., 850 F. Supp. 786 (W. D. Ark. 1994) Failure of National Park Service to warn of prior falls from cliff and post more signs is not malicious and RUS applies; Mandel v. U.S., 793 F.2d 964 (8th Cir. 1986) RUS not applicable where rangers failed to advise of submerged rocks as swimming hole he recommended was not in Park. Stephens v. U. S., Civ. #LR-C-96-5 (E. D. Ark., 21 May 1998) 15-year-old who is injured in impact when he tossed grenade on ground is a trespasser and Ark. RUS excludes claim (boy was preparing for hunting) as no malice - was partially fenced and warning signs posted.


jurisdictions.  Brown v. U.S., 180 F. Supp. 2d 1132 (D. Haw. 2001) Where injured party is using bike path to commute to work, RUS is not applicable even though injury is allegedly due to accident with runners in Navy sponsored race.


(O) Kansas.  RUS applicable.  Klepper v. City of Milford, Kansas v. U.S., 825 F.2d 1440 (10th Cir. 1987) (Kansas RUS applies to quad diving case at COE lake); Jensen v. COE, Civ. #86-1686-K (D. Kan. 1987) (faulty road design in COE recreational area barred by Kansas RUS and § 2680(a)).

(P) Kentucky.  RUS applicable.  Sublett v. U.S., 688 S.W.2d 328 (Ky. 1985) (Kentucky RUS applies to COE recreational use areas).


(R) Massachusetts.  RUS applicable.  Montejo v. U.S., 107 F.3d 1 (table), 1997 WL 51411 (1st Cir. 1997) (steel cable barrier across
road in Cape Cod National Seashore struck by motorcyclist—Mass. RUS bars claim. But see DiMella v. Gray Lines of Boston, Inc., 836 F.2d 718 (1st Cir. 1988) (visit to USS Constitution in Navy yard—indeed while alighting from bus—not under Massachusetts RUS). Scanlon v. Dept. of Army-COE, 277 F.3d 598, 2002 WL88879 (1st Cir. (Mass.)) Where plaintiff fell into partially secured hole in Sandwich Recreational area due to lack of bolt in manhole cover, RUS applies.


(U) Missouri. RUS applicable. Wilson v. U.S., 989 F.2d 953 (8th Cir. 1993) (Mo. RUS applied to electrocution death of 13-year-old Boy Scout who was climbing irrigation pipe held by two other Scouts—$2.00 fee paid for lodging to U.S. Army does not bar application of RUS). See also Will v. U.S., 656 F. Supp. 776 (E.D. Mo. 1987) (17-year-old becomes quadriplegic diving from tree into BLM lake—no cause of action under Missouri law since Restatement (Second) of Torts, §342 (1969) applies). Gould v. U.S., 904 F. Supp. 1176, 1998 WL 87415 (W.D. Mo.) (Sledgers at COE lakes become airborne and are injured when leaving terraced bank—considered licensees and are excluded as danger is open and obvious,


(BB) **North Dakota.** RUS applicable. *Umpleby v. U.S.*, 806 F.2d 812 (8th Cir. 1986) (negligent road design at COE reservoir--no duty to warn under North Dakota RUS).


(FF) South Carolina. RUS applicable. Giacoia v. U.S., Civ. #8:00-2667-13 (D. S.C., 6 Feb. 2001) No duty to warn or inspect where S-hook on swing had to be replaced with hammer and chisel after claimants fall.

(GG) South Dakota. RUS applicable. Haukaas v. U.S., Civ. #01-3024-RHB (D.S.Dak., 17 May 2002) Summary judgment not granted where decedent drowned by going over spillway at dam as U.S. may have been grossly negligent by failure to safeguard spillway.


(JJ) Utah. RUS applicable. Ewell v. U.S., 776 F.2d 246 (10th Cir. 1985) (applies Utah RUS law to U.S. land in motorcycle accident). Sulzen v. U.S., (D. Utah, 30 Jun. 1999), Utah RUS applies to National Park where woman in picnic area is killed by falling rock dislodged from overhang by teenagers. Figueroa v. U.S., Civ. #1:97-CV-003S (D. Utah, 3 Feb. 1999), RUS not applicable to picnic area subject to falling rocks, where U.S., but not injured party, on notice of prior death from falling rock. Figueroa v. U.S., 64 F. Supp.2d 1125 (D. Utah 1999) picnic area in Hanging Rock National Park does not fall under Utah RUS, as it is not large, remote, or undeveloped -excellent discussion of other decision. Sulzen ex rel Holton v. U.S., 54 F. Supp.2d 1212 (D. Utah 1999), Summary Judgment denied as factual issue as to whether Forest Service had foreknowledge as to whether rocks, which killed visitor, were dangerous.


boat landing, even though plaintiff paid fishing license fee); Chester v. U.S., 94 F.3d 650 (table), 1996 WL 467685 (9th Cir. 1996) (claim for injury on tank Naval air show precluded by RUS payment for special seating is not fee, since it is not connected with viewing tank); Schiano v. U.S., Civ. #94-323-Civ.-FTM-25D(M.D. Fla., 6 Aug. 1996) (fall from 16 foot government ladder while picking apples in national park--RUS applies even though he paid $6.00 for parking pad). Kennedy v. U.S., Civ. #97-15857 (9th Cir. 1999), excellent discussion on subject fees v. consideration provides listing of cases.

(iii) Willful and Wanton Conduct. RUS statute generally covers only simple negligence, not willful or wanton conduct. Miller v. U.S., 597 F.2d 614 (7th Cir. 1979); Stephens v. U.S., 472 F. Supp. 998 (C.D. Ill. 1979) (same as Miller); Davis v. U.S., 716 F.2d 418 (7th Cir. 1983) (court again holds U.S. liable for willful and wanton conduct as in Miller in failing to warn divers); Roten v. U.S., 850 F. Supp. 786 (W.D. Ark. 1994) (National Park Service knowledge of prior falls from cliff does establish malice required to negate application of Arkansas); Collard v. U.S., 691 F. Supp. 256 (D. Haw. 1988) (Hawaii RUS willfulness clause applied to large log near Marine Corps beach); Russell v. Tennessee Valley Authority, 564 F. Supp. 1043 (N.D. Ala. 1983) (Alabama RUS applies to spillway at dam--not considered to be a willful or malicious failure to guard--danger was open and obvious).


(4) Applicability to Agencies Other Than IRS or U.S. Customs Service. The circuits are split on whether the exclusion applies to seizure of goods by government agencies and the care and disposal of such property when the agency


Tenn. 1962), aff'd, 304 F.2d 871 (6th Cir. 1962); Matthews v. U.S., Civ. #92-2571 (OG) (D. D.C., 21 Jul. 1994) (exclusion applies to claim for damages to two cars seized and returned by FBI in vandalized condition). May also apply to the loss of goods; Parmelee v. Carson, 77 F.3d 486 (table), 1996 WL 64701 (8th Cir. 1996) (exclusion applies to Federal prison officer negligently disposing of prisoners property inventoried and detained disagrees with Mora v. U.S., 955 F.2d 156 (2d Cir. 1992) which holds that lost goods are not detained, therefore exclusion does not apply). If seized goods are forfeited without notice, exclusion is inapplicable and FTCA suit based on state tort of conversion may lie; Taft v. U.S., 824 F. Supp. 455 (D. Vt. 1993) (failure to follow notice procedures re seizure of truck by DEA precludes jurisdictional dismissal); Perez v. U.S., 844 F. Supp. 984 (S.D. N.Y. 1994) (DEA sale of detained goods without notice constitutes a conversion under N.Y. law--exclusion not applicable). Cf. Litzenbarger v. U.S., 89 F.3d 818 (Fed. Cir. 1996) (Adequate notice of forfeiture of car by FBI to drug user meets due process requirements). But see Conkey v. Reno, 885 F. Supp. 1389 (D. Nev. 1995) (Hydroid acid seized and destroyed by Federal official under 21 U.S.C. § 881 without giving owner due process is valid); Jeanmarie v. U.S., 242 F.3d 600 (5th Cir. 2001) Detention of Goods exception (28 U.S.C. 2680(c)) prevails over assault exception (28 U.S.C. 2680(h)) where injured party is forcibly detained during search. In accordance Cappazoli v. Tracey, 663 F.2d 654 (5th Cir. 1984); U.S. v. Hall, 269 F.3d 940 (8th Cir. 2001) Any person, including those not accused of a Federal offense, may move a Federal district court to return property seized by a Federal agent. Where the U.S. has disposed of the property the court may not award monetary damages but direct the person to the Tucker Act or FTCA; Okafor v. Dowell, 2002 U.S. Dist. LEXIS 21000 (E.D. La.) Property allegedly seized and lost when plaintiff was arrested in INS custody for deportation falls under exception; Cervantes v. U.S., 330 F.3d 1186 (9th Cir. 2003) Car seized by INS is sold at auction without inspection which would have found marijuana secreted therein; purchasers claim for car re-seized is not under exception but his claim for false arrest is barred because of probable cause.


(7) Prisoners. U.S must prove property is returned to prisoner. Sellers v. U.S., 97 F.3d 1454 (table), 1996 WL 525426 (7th Cir. 1996) (U.S must prove that 41


(4) Navigable Waters. Navigable waters are usually interstate and used in commercial navigation. Kaiser Aetna v. U.S., 444 U.S. 164 (1979) (defines navigable waters); Chapman v. U.S., 575 F.2d 147 (7th Cir. 1978); Livingston v. U.S., 627 F.2d 165 (8th Cir. 1980). See also Reynolds v. Bradley, 644 F. Supp. 42 (N.D.N.Y. 1986) (lack separated from its interstate connection not navigable). The cases have held that navigability, and thus admiralty jurisdiction, can be destroyed. Adams v. Montana Power Co., 528 F.2d 437 (9th Cir. 1975) (admiralty jurisdiction upstream removed by dam which spans river). But see Jones v. Duke Power Co., 501 F. Supp. 713 (W.D. N.C. 1980) (adopts divergent view that once body of water is navigable, it will be considered as such even though no longer so--also, it gives excellent summary of entire body of law). Particular bodies held to be navigable. Mullenix v. U.S., 984 F.2d 101 (4th Cir. 1993) (Potomac River is navigable even though wholly in Maryland and used for recreational traffic); Finneseth v. Carter, 712 F.2d 1041 (6th Cir. 1983) (COE dam straddling two states held navigable); U.S. v. DeFelice, 641 F.2d 1169 (5th Cir. 1981) (holds privately owned artificial canal navigable, since subject to ebb and flow). Alford v. U.S., 951 F.2d 30 (4th Cir. 1991) Smith Mountain Lake, one of Roanoke River’s many lakes is not in admiralty jurisdiction as not in two


Supp. 83 (E.D. Mich. 1964) (lack of venue as required by 46 U.S.C. § 742); Ayers v. U.S., 277 F.3d 821 (6th Cir. 2002 (Ky.) (Swimming across navigable river results in drowning death due to turbulence from lock opening falls under admiralty jurisdiction); Taghadomi v. Extreme Sports Maui, 257 F. Supp. 1262 (D. Haw. 2002) (Alleged negligent Coast Guard search and rescue mission involving kayak swept out-to-sea is maritime and suit must be filed within 2 years).


(9) Limitation of Liability Statute. Limitation of liability applies to vessel of U.S., including privately owned U.S. Coast Guard auxiliary boat. Dick v. U.S., 671 F.2d 724 (2d Cir. 1982). Negligence of captain or master is insufficient to deny limitation of liability. Petition of Kristie Leigh Enterprises, Inc., 72 F.3d 479 (5th Cir. 1996) (tug owners petition for limitation of liability cannot be denied for failure to discover Captain’s similar past navigational errors). Limitation value is value after collision. In re Petition of Banker’s Trust Co., 569 F. Supp. 386 (E.D. Pa. 1983). The limitation of liability statute is not applicable to non-navigable waterways not open to commerce. In Matter of Fields, 967 F. Supp. 969 (M.D. Tenn. 1997) (due to fact that lake created by dam is not navigable and open to commerce, limitation of liability statute is not applicable to marina fire). In re Maer, 146 F.3d 440 (6th Cir. 1998) (fact that owner was operating ship does not deprive LOLA jurisdiction in absence of showing fault.

(10) Feres and Admiralty Cases. Feres doctrine applicable in admiralty. Potts v. U.S., 723 F.2d 20 (6th Cir. 1983); Cusanelli v. Laver, 698 F.2d 82 (2d Cir. 1983); Charland v. U.S., 615 F.2d 508 (9th Cir. 1980); Beaucoudray v. U.S., 490 F.2d 86 (5th Cir. 1974).


(N.D.N.Y. 1995), aff'd, 102 F.3d 697 (2d Cir. 1996) (National Guard on military exercise mistakenly believes Civilian driving ATV is enemy force and points guns--allegations of assault and intentional infliction of emotional distress are one and the same--on appeal, court held that question of assault is not reached, since there is no tort of negligent infliction of emotional distress--intentional infliction not plead). Veteran's Affairs agents while investigating VA employee's excessive leave due to alleged disability are charged with entering his home, engaging in electronic surveillance, told that employee and his wife were engaged in illegal acts, denied his FOIA request and request for files; held that the claim was excluded under libel, slander, and interference with contractual relations due to loss of their day care business, also other torts were not made clear, King v. U.S., 2002 U.S. Dist. LEXIS 22026 (N.D. Ill.). Where policeman clicks a pistol against back of plaintiff's head during a work break, claim for emotional distress cannot stand as it arises out of assault, Locke v. U.S., 215 F. Supp. 2d 1033 (D.S.D.2002). Claim by a federal employee for emotional distress is barred by 2680(h) as it arises out of a verbal assault by a fellow employee, Koch v. U.S., 209 F. Supp. 2d 89 (D.D.C.2002)

(1) Assault or Battery (A or B).


(c) Emotional Distress. However, an A or B could be actionable as intentional or negligent infliction of emotional distress where recognized by local law. Truman v. U.S., 26 F.3d 592 (9th Cir. 1994) (sexual harassment including gestures towards crotch of Commissary contract stocker is not excluded as it constitutes emotional distress); Jones v. FBI, 139 F. Supp. 38 (D. Md. 1956).

x-raying female patients unnecessarily disrobes them--A or B exclusion bars claim). The courts are split on whether the use of electroshock therapy falls within the A or B exclusion. See Woods v. U.S., 720 F.2d 1451 (9th Cir. 1983) (use of "shock" therapy act--A or B). Contra Lojuk v. Quandt, 706 F.2d 1456 (7th Cir. 1983) (use of electric therapy without consent--held a battery); Moos v. U.S., 225 F.2d. 705 (8th Cir. 1955). Even if an action is technically an assault or battery, the U.S. may still be held liable on an alternative theory. Gess v. U.S., 952 F. Supp 1529 (M.D. Ala. 1996) (where medical technician assaulted newborn with lidocaine, U.S. is liable, since Hospital had knowledge of technician being unfit prior to his assignment to nursery). Further, the Gonzales Act, 10 U.S.C. § 1089, may bar the imposition of 28 U.S.C. § 2680(h) under certain circumstances. Andrews v. U.S., 548 F. Supp. 603 (D. S.C. 1982). Havrame v. U.S., 204 F.3d 815 (8th Cir. 2000) Negligent failure of Hospital to protect patients from nurse who was giving lethal doses of codeine is compensable.


Rutherford v. U.S., Civ. #81-0039-H (S.D. Ala. 1982) (extending enlistment of service member with criminal record is discretionary function)


(j) **Contingency on Employment Relationship.** Cases applying test that A or B exclusion bars claims only where claim contingent on employment relationship. *Sheridan v. U.S.*, 487 U.S. 392, 108 S. Ct. 2449 (1988) (failure of fellow Seaman to restrain drunk Sailor who got away and shot at passing car is not barred by exclusion); *Pattle v. U.S.*, 918 F. Supp. 843 (D. N.J. 1996) (recruiter in scope while performing fat measurement on applicant--negligent hiring and supervision barred by *Sheridan*--no premises liability based on duty to make recruiting station safe--A or B exclusion applies);


Student guest on campus as a member of a choral group where escorts were being provided.

(m) **Artful Pleading.** A or B exclusion may not be evaded by artful leading. Hayslip v. U.S., Civ. #94-6908-Civ.-DAVIS (S.D. Fla., 11 May 1995) (Postman throws rock-throwing child to ground falls under exclusion--negligence allegation is artful pleading).


(2) **False Arrest or Imprisonment.** False imprisonment, false arrest, malicious prosecution, and abuse of process all fall within exclusion. See, e.g., Blitz v. Boog, 328 F.2d 596 (2d Cir. 1964), cert. denied, 379 U.S. 855 (1964) (wrongful detention of mental patient); Puccini v. U.S., 978 F. Supp. 760 (N.D. Ill. 1997) (suit alleging that prison administrators wrongly failed to release prisoner at end of her sentence barred by exclusion, since suit was one arising out of false
imprisonment). Terms include wrongful detention. Restatement (Second) of
Torts §; Prosser on Torts, 42-49 (4th Ed. 1971); 32 Am. Jury. 2d, False
Imprisonment § 1, 5 Am. Jury. 2d Arrest § 1. Cannot avoid exclusion by
couching in constitutional terms. Misko v. U.S., supra; Dellums v. Powell, 566
F.2d 167 (D.C. Cir. 1977); Economou v. Department of Agriculture, 535 F.2d
688 (2d Cir. 1976), or as negligent maintenance of records. Duenges v. U.S., 114
F. Supp. 751 (S.D.N.Y. 1953). But see Ferguson v. Department of the Army,
938 F.2d 55 (6th Cir. 1991) (false arrest action dismissed, but cause of action for
negligent records keeping under Kentucky law permitted as negligent infliction
of emotional distress). Other cases finding exclusion applicable. General
LEXIS 7260 (recovery of $25,880,752 in attorneys fees expended in defense of
Federal criminal action for fraud based on negligent DCAA audit barred by
discretionary function exclusion—auditor negligence did not cause damage:
discretionary decision to prosecute did); Gray v. Bell, 712 F.2d 490 (D.C. Cir.
1983) (indictment of former Acting Director of FBI not actionable); Hohri v.
Japanese-Americans not actionable); Wilkins v. May, 872 F.2d 190 (7th Cir.
1989) (original arrest by local police continues when FBI takes over--arrest is
defined as a continuing event); Kaiser v. U.S., 761 F. Supp. 490 (D.C. Cir. 1991)
(questioning claimant to get statement when claimant was trying to get
emergency care for her wounded dog is not an arrest); Matthews v. U.S., 805 F.
Supp. 712 (E.D. Wis. 1992) (claim for conspiracy to entrap which led to Federal
indictment is excluded); Enterprise Electronics Corp. v. U.S., 825 F. Supp. 983
(M.D. Ala. 1992) (exclusion applies to negligent DCAA audit which led to
several suits against Government contractor); Employer Ins. of Wausau v. U.S.,
1993 WL 61406 (N.D. Ill. 1993) (EPA CERCLA enforcement action falls under
exclusion); Sutton v. U.S., 819 F.2d 1289 (5th Cir. 1987) (discusses interplay
between § 2680(a) and § 2680(h) re decision of Postal Inspector to investigate
and prosecute); U.S. v. Articles of Drug et al., Midwest Pharmaceuticals, Inc.,
825 F.2d 1238, 1987 U.S. App. LEXIS 10291 (8th Cir. Neb. 1987) (applied to
decision to seize drugs and prosecute pharmaceutical company); McElroy v.
U.S., 861 F. Supp. 585 (W.D. Tx. 1994) (forcible arrest of occupants from other
side of duplex during drug bust is discretionary and use of law enforcement
exception in § 2680(h) is not permitted as discretionary function exclusion in §
2680(a) predominates, cites Sutton v. U.S., 819 F.2d 1289 (5th Cir. 1987). But
see Chandler v. U.S., 875 F. Supp. 1250 (N.D. Tx. 1994) (GSA investigator
presents false evidence to USA who prosecutes unsuccessfully for perjury--two
GSA employees recover $5,000 each). See also Maldanado v. Pharo, 940 F.
Supp. 51 (S.D.N.Y. 1996) (suit of malicious prosecution permitted, but not for
abuse of process, where claimant was not arrested and charges for possession of
controlled substances were dropped). Of course, even if exclusion not
applicable, causation must be shown. Exclusion bars suit based on criminal
complaint, which lead to arrest. See, e.g., Rourke v. U.S., 744 F. Supp. 100
(E.D. Pa. 1988) (decision to file criminal complaint is discretionary and suit
precluded, however must establish proximate cause for arrest). Maurello v. U.S.,
treatment program pushing back his release date falls under exception. Nguyen
v. U.S., 2001 U.S. Dist. LEXIS 7512 (N.D. Tx.) Once INS had sufficient
document that detainee had derivative citizenship, INS must release him despite fact he made no claim of citizenship.


(e) **Service Members.** Service members held on or ordered to AD under duress may be subject to exclusion as well as being barred by Feres (see cases listed I.E.10n).


(3) Libel and Slander. See, generally, Jorgenson v. Mass. Port Authority, 905 F.2d 515 (1st Cir. 1990) (failure to salt runway--pilot's suit for lost income based on damage to reputation, even though Mass. Port Authority negligent--good discussion of defamation tort). The libel and slander exclusion is applicable in many situations: Ruderer v. U.S., 462 F.2d 897 (8th Cir. 1972)(grievance hearings); Chafin v. Pratt, 358 F.2d 349 (5th Cir. 1966), cert. denied, 385 U.S. 878 (1966) (to reports of mental disturbance of employee); Hoesl v. U.S., 629 F.2d 586 (9th Cir. 1980) (U.S. doctors psychiatric report on alcoholic); Smith v.
which ultimately results in plaintiff being clear and included numerous leaks to media is grounded in defamation and not negligence and invasion of privacy. Apampa v. Layng, 157 F.3d 1103 (7th Cir. 1988) DEA Bivens action for defamation is an FTCA claim because of Westfall Act—it fails as defamatory language not derived from illegal wiretap; Hartwig v. U.S., Civ. #1:92(CV) 315 (N.D. Ohio, 26 Jan. 1999), exception applies to claim for emotional distress by family of Navy member allegedly committing suicide by explosion on USS Iowa. Doe v. U.S., 2000 U.S. Dist LEXIS 1556 (S.D. Tx.), false new release by U.S. Attorney re money laundering indictment is excluded by libel exception including emotional distress claim. Krieger v. Fadely, Civ. #98-1703 (CKK) (D. D.C., 9 Aug. 1999), where DOJ attorney tells her former subordinate's law-firm he joined after resigning that he was unqualified as an attorney resulting in his firing six common law torts alleged all fall under 2680(h). Hartwig v. U.S., 80 F. Supp. 2d 765 (N.D. Ohio 1999) Claim for emotional distress by members of deceased Navy member's family based on release of allegedly false information is barred by defamation exclusion.


Cases holding misrepresentation exclusion not applicable.  Mundy v. U.S., 983 F.2d 950 (9th Cir. 1993) (misrepresentation exclusion not applicable where contract employee lost security clearance as his favorable FBI report was placed in his wife's personnel file); Appleby Bros. v. U.S., 7 F.3d 720 (8th Cir. 1993) (exclusion is not applicable where U.S. closes grain warehouse without discovering violation); Guild v. U.S., 685 F.2d 324 (9th Cir. 1982) (Department of Agriculture plans for community built dam failed--held not misrepresentation as performing operational task).  Lemke by Lemke v. City of Port Jervis, 991 F. Supp. 261 (S.D.N.Y. 1998) Misrepresentation exclusion not applicable where U.S. assumes responsibility to inspect house prior to making loan and fails to inform borrower of obvious lead pipe plumbing.  Lamb v. U.S., Civ. #CV 00-126-M-LBE (D. Mont., 23 Jul. 2001) Where discharged Soldier was maintained in pay status but did not receive pay but received an income tax bill falls under exception as to sending false information to his credit rating agency-court refuses to treat as tort of negligent records keeping; McDermott v. U.S., Civ. #CV 00-81-M-LBE (D. Mont., 29 Jun. 2001) U.S. Forest Service employees accusations allegedly false that campers abandoned elk, left trash and otherwise harassed them and ruined their reputation falls under 2680(h).

FDIC offer of 5 loans as a package and then withdrawing one constitutes a misrepresentation; Villaros v. U.S., Civ. #02-00507 DAE LEK (D. Haw. 16 Jan 2002) where applicant pays $3,500 to have son immigrate and fails, exception applies.


(f) **Trespass.** Can apply to damage resulting from U.S. contractor trespassing on land or easement due to improper direction on part of U.S.  
Exclusion not applicable.  
**Southern Natural Gas Co. v. Pontchartrain Materials, Inc.**, 711 F.2d 1251 (5th Cir. 1983) (ignores exclusion in dredging case);  

(g) **Medical Malpractice.** Usually does not apply in medical malpractice.  
**Beech v. U.S.**, 345 F.2d 872 (5th Cir. 1965) (delayed treatment due to improper diagnosis following slip and fall);  
**Lucarelli v. U.S.**, 116 F.3d 464 (table), 1997 WL 351626 (1st. Cir. 1997) ($33,750 award for mistakenly informing patient that he was HIV positive—award deemed adequate).  
But see  

(h) **Enlistment.** Can apply to enlistment contract.  
**Bennett v. Department of the Navy**, 1997 WL 176728 (E.D.N.Y.) (Navy recruiter’s statement that applicant could become officer by enlisting and going to OCS is misrepresentation and does not provide basis for claim);  

(5) **Interference with Contract Rights.** For general discussion, see  
See also  
**Williamson v. Department of Agriculture**, 635 F. Supp.114 (S.D. Miss. 1986) (applied to collection action by Farmers Home Administration on a loan);  
**Saratoga Savings & Loan Assn. v. Federal Home Loan Bank of San Francisco**, 724 F. Supp. 683 (N.D. Cal. 1989) (Federal bank examiner inspection falls under exclusion);  
**Custadio v. U.S.**, 866 F. Supp. 479 (D. Colo. 1994) (physician convicted of filing false claim does not have cause of action based on CHAMPUS failing to instruct him how to file a proper claim);  
**Moessmer v. U.S.**, 760 F.2d 236 (8th Cir. 1985) (exclusion applies to release of defamatory records to prospective employer);  
De facto, debarment claims full
under this exclusion. 

Art-Metal-U.S.A., Inc. v. U.S., 753 F.2d 1151 (D.C. Cir. 1985);


Some claims plead, as tort claims are purely contract claims, not FTCA claims. 


Midland Psychiatric Associates, Inc. v. U.S., 145 F.3d 1000 (8th Cir. 1998) (action against Medicare carrier and Medicare fails as Medicare carrier is considered a U.S. agency and exclusion applies.

(a) **Prospective and Existing Rights.** Can apply to prospective rights or economic advantage as well as existing rights. 


contracting officer interfered by dealing with builder without advising Plaintiff, exception applies.


k. Combat Activities. Combat activities of military or Naval forces or the U.S. Coast Guard (28 U.S.C. § 2680(j)).


(1) Examples of Operation of Exclusion. Falling within the exclusion are:


(c) Embassy Compounds: Gerritson v. Vance, 488 F. Supp. 267 (D. Mass. 1980) (embassy in Zambia); Meredith v. U.S., 330 F.2d 9 (9th Cir. 1964) (embassy in Thailand);


(f) Airspace Over Foreign Country: Pignataro v. U.S., 172 F. Supp. 151 (E.D.N.Y. 1959) (flight from Saudi Arabia to Eritrea);


m. Agencies Sue able in Own Name. Agencies, which can be sued in their own name. TVA (28 U.S.C. § 2680(i)) (16 U.S.C. §§ 831 et seq.), Panama Canal Commission (28 U.S.C. § 2680(m)); (22 U.S.C. § 3671), Federal Land Banks, intermediate credit banks, and banks for cooperatives (12 U.S.C. §§ 641 et seq.) (28 U.S.C. § 2680(h)), are excluded as all can be sued in their own name. See, e.g., Springer v. Bryant, 897 F.2d 1085 (11th Cir. 1990) (wrongful death statute in Alabama is punitive--suit against TVA barred); Husted v. U.S., 667 F. Supp. 831 (S.D. Fla. 1985) (accident claim barred under FTCA, since they arose from Panama Canal Commission and barred against company by one year SOL); McClain v. Panama Canal Commission, 834 F.2d 452 (5th Cir. 1987) (Commission has no jurisdiction over wrongful death claim in excess of $500,000); Segarra Ocasio v. Banco Regional De Bayamon, 581 F. Supp. 1255 (D. P.R. 1984)(“Sue and be sued” clause of FDIC Act does provide for remedy outside FTCA). See also Federal Express Co. v. U.S. Postal Service, 959 F. Supp. 832 (W.D. Tenn. 1997) (USPS can sue directly for false advertising under “Sue and be sued” clause in Postal Reform Act). Claims against the Army arising in Canal Zone are no longer cognizable under FTCA, since Canal Zone no longer exists by virtue of Treaty effective 1 October 1979. Such claims now cognizable under the Foreign and Military Claims Acts.


o. Flood Control Immunity. Damage from flood and flood waters (33 U.S.C. § 702c (Act of 15 May 1928, 45 Stat. 535, as amended by the act of 22 June 1936, 49 Stat. 1570). § 702c flood control immunity may bar a suit if government is actively managing dam, reservoirs or floodwaters. See, e.g., Boudreau v. U.S., 53 F.3d 81 (5th Cir. 1995) (Coast Guard auxiliary acting as agent of COE to provide water safety on flood control lake injures claimant with his anchor during rescue attempt--immunity applies--court broadly construes James, infra, as meaning management of project even
though flood waters not involved); Reese v. South Florida Water Management Dist., 59 F.3d 1128 (11th Cir. 1995) (fisherman drowns from release of waters from lock on water control device—immunity applies); Fryman v. U.S., 901 F.2d 79 (7th Cir. Ill. 1990), cert. denied 498 U.S. 920 (1990), (§ 702c applies to quad diving case from sandbar in COE reservoir); Mocklin v. Orleans Levee District v. Luhr Bros., Inc., 877 F.2d 427 (5th Cir. 1989) (§ 702c applies to child drowning in dredged flotation channel); McCarthy v. U.S., 850 F.2d 558 (9th Cir. 1988) (§ 702c immunity applies to quad diving case, since water level was controlled and fluctuated); Dawson v. U.S., 894 F.2d 70 (3d Cir. 1990) (§ 702c applies to drowning in swimming area of flood control lake); Dewitt Bank & Trust Co. v. U.S., Civ. #88-2355 (8th Cir. 1989) (§ 702c applies to quadriplegic diving case at COE Recreational Site); Zavadil v. U.S., Civ. #89-1813 (8th Cir. 1990) (quad diving case barred where dive into submerged concrete boat ramp from pier); Crowley Marine Services, Inc. v. Fed. Nav. Ltd., 924 F. Supp. 1030 (E.D. Wash. 1995) (flood control immunity does not apply to CERCLA claims, but it precludes FTCA suit, even though release of water contained hazardous substances); Powers v. U.S., 787 F. Supp. 1397 (M.D. Ala. 1992) (§ 702c bars claims based on failure to inform of availability under National Flood Control Act); Dawson v. U.S., Civ. #86-739 (W.D. Pa. 1989)(§ 702c applies since water monitored daily); Minor v. U.S., #94-30493 (5th Cir. 17 Jan. 1995) (flood control immunity applies to child drowning in a stilling basin at Morgana Spillway). Accord Henderson v. U.S., 965 F.2d 1488 (8th Cir. 1992). However, the immunity does not apply in all situations where the government is managing water projects. The operation and setting of the water level must be in furtherance of flood control. Bailey v. Department of the Army-COE, 35 F.3d 1118 (7th Cir. 1994) (in order to apply immunity, U.S. must show that flood control operations, e.g., water level, played a role in causing quadriplegia in diving case—many cases are compared); Cantrell v. Department of the Army-COE, 89 F.3d 269 (6th Cir. 1996) (stranded fisherman's barge driven by Corps employee strikes newly exposed shoreline due to annual draw down of lake—immunity does not apply as Corps not fisherman was driving boat); E. Ritter & Co. v. Department of the Army-COE, 874 F.2d 1236 (8th Cir. 1989) (§ 702c inapplicable to failure to maintain drainage ditch causing inundated crop); Boyd v. U.S. ex rel. Department of the Army-COE, 881 F.2d 895 (10th Cir. 1989) (§ 702c not applicable to injury to swimmer struck by boat propeller); Arkansas River Co. v. U.S., 840 F. Supp. 1103 (N.D. Miss. 1993) (claim for barges damaged in lock on Mississippi not excluded by 33 U.S.C. § 702c); Pueblo de Conchiti v. U.S., 647 F. Supp. 538 (D. N.M. 1986) (dam used for more than flood control—§ 702c does not bar action for failure to repair causing flood). Accord Clay v. U.S., 647 F. Supp. 110 (S.D. Miss. 1986).


(4) Indemnity from Flood Control Beneficiary. In many flood control projects an examination of the authorizing statute will reveal that the non-Federal beneficiary of such project is required to hold and save harmless the U.S. from damages due to the construction operation and maintenance of the project. This provision usually not found in multi-beneficiary projects. Further, the local beneficiary is not required to hold and save harmless damage due to the fault and negligence of the U.S. or its contractors (§ 9, P.L. 93-251, 88 Stat. 12, Act of 7 March 1974). See Smith v. U.S., 497 F.2d 500 (5th Cir. 1974) (hold harmless clause required indemnification even though U.S. was negligent). But see Butler v. U.S., 726 F.2d 1057 (5th Cir. 1984) (hold harmless clause by county not upheld where COE prevented county from filling in or posting warning signs on off-shore borrow pit).

p. Federal Disaster Relief Act of 1954, 42 U.S.C. § 5173, contains a requirement that the local beneficiary (State or local jurisdiction) hold the U.S. harmless and assume all claims out of removal of debris or wreckage from public and private property. Agreements setting forth such procedures are worked out on each occasion, e.g., emergency snow removal. See II B5v for case cites.


t. Anti-Assignment Act, 31 U.S.C. § 3727. 31 U.S.C. § 3727 bars any voluntary assignment of a claim. See, e.g., U.S. v. Shannon, 342 U.S. 288 (1952) (claim by new property owner for damage prior to purchase is barred by Act). However, assignees that acquire their interests through involuntary assignments (assignments by operation of law) can prosecute a claim. Saint John Marine Co. v. U.S., 92 F.3d 39 (2d Cir. 1996) (ship owner’s contractual lien on sub freights that U.S. had not paid to charter party is not barred, since lien was by operation of law, cites U.S. v. Aetna Casualty and Surety Co., 338 U.S. 365 (1949)).

Cir. 2001) VA decision under 38 USC 1115(a)(1) to award pension for stroke caused by hospital care does not preclude defense of FTCA suit for same injuries; Littlejohn v. U.S., 321 F.3d. 915 (9th Cir. 2003) Where veteran received increase in pension under 38 U.S.C. 1151 based on poor medical care, direct verdict denied in FTCA suit and judgment for U.S. on merits as 1151 procedure does not permit U.S. to defend on merits; Franklin Savings Corp v. U.S., Civ. # 91-41518-11 (Bankruptcy Court, D-Kan, 22 Nov. 2002) Effort to relegate claims dismissed under FTCA by filing under APA, §§ USC 106 is barred by res judicata.

5. Another Non-Judicial Authorization May Be Applicable. FTCA is exclusive negligence remedy. See IIB5a (2) below. See, e.g., Segarra Ocasio v. Banco Regional De Bayamon, 581 F. Supp. 1255 (D. P.R. 1984) (“Sue and be sued” clause of FDIC Act does provide for remedy outside FTCA). Several are:


flies too low, i.e., under 550 feet); U.S. v. Gruvelle, 407 F.2d 964 (10th Cir. 1969) (negligence found).

(4) **Real Property.** Real property used under lease, express, or implied (e.g., maneuvers) generally considered under AR 405-15 first, particularly where lease or use permit involved. See, e.g., Borquez v. U.S., 773 F.2d 1050 (9th Cir. 1985) (where maintenance and operation of U.S. dam turned over to local beneficiary, U.S. not liable). P.L. 85-804 and Executive Order 1078, 14 November 1958, (Sec. XVII ASPR) may also be used where claim is contractual (express or implied) in nature and formal contracting procedures were not followed, e.g., Supplies or services obtained in emergency.


(8) **Injury/Death Incident to Service.** By express language in statute, excludes service members as claimants for injury and death while incident to service. Jaffee v. U.S., 592 F.2d 712 (3d Cir. 1979).


(10) Single Service Authority. One service processes claims from all services arising in a foreign country in which single service directives are in effect. These directives apply only to the Military Claims Act, Foreign Claims Act and NATO-SOFA. They do not apply to personnel claims (31 U.S.C. §§ 240-43), which are handled by the respective service of the service member claimant.

(11) Damages Limitation. Damages limited by AR 27-20 (28 February 1990) (now superseded) to those authorized by the Death on the High Seas Act (DOHSA)(46 U.S.C. § 688). For leading cases, see Miles v. Apex Marine Corp., 498 U.S. 19, 111 S. Ct. 317 (1990) (discusses Gaudet and Moragne, and distinguishes Jones Act wrongful death actions); Moragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S. Ct. 1772 (1970); Sea Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974). See also Oldham v. Korean Airlines, Ltd., 127 F.3d 43 (D.C. Cir. 1997) (discussion of wrongful death damages under DOHSA, including whether sister can recover for loss of Support or loss of guidance, training and advice, loss of inheritance and whether survivors would have been financial independent after age 18); Fox v. U.S., 1996 WL 440681 (N.D. Cal.) (Navy held liable for negligent rescue of pleasure craft and its passengers who were entitled to damages under general maritime law--only first mate of vessel was entitled to DOHSA recovery); Horsley v. Mobil Oil Corp., 1993 WL 255134 (D. Mass.) (Miles applies to PI as well as WD cases--non-pecuniary loss of spouse and children are not payable). Accord Michels v. Petroleum Helicopter, 995 F.2d 82 (5th Cir. 1993). Only dependents may recover under DOHSA. In the Matter of P & E Boat Rentals, Inc., 872 F.2d 642 (5th Cir. 1989) (dependent defined as “where contributions are made for the purpose and have the result of,


(1) Effective Date. FTCA amended to include National Guardsman on Federally funded training duty for cases arising on or after 29 December 1981. However, amendment does not immunize state where state has waived sovereign immunity. U.S. v. State of Hawaii, 832 F.2d 116 (9th Cir. 1987). Application of National Guard Claims Act now limited to claims not based on negligence, e.g., non-combat activity, property and mail claim. 32 U.S.C. § 334 has been rescinded--now under 10 U.S.C. § 1089. (See IIB5a (4)-(6) above).


(b) National Guard Claims Act Coverage and Finality. National Guard Claims Act has same coverage and finality as Military Claims Act. Decision of agency is final and conclusive. Rhodes v. U.S., 760 F.2d 1180 (11th Cir. 1985) (determination that Army National Guardsman driving U.S. sedan on four hour trip to register for civilian courses is not covered by Act is final and not subject to judicial review); County Commissioner of Morgan County West Virginia, Civ. # 3:93cv64 (STAMP) (N.D. W.Va., 23 Nov. 1994) (decision of USAF not to pay cleanup costs from plane crash to county is final and not subject to judicial review).

(c) Injury or Death Incident to Service. Excludes National Guardsmen as claimants for injury and death while incident to service. The U.S. not a proper third party to suit by Guardsman against manufacturer. Henry v. Textron, 557 F.2d 163 (4th Cir. 1978).


c. Tucker Act (28 U.S.C. §§ 1346a, 1491). Exclusive jurisdiction over a taking as opposed to a tort is vested in the U.S. Court of Federal Claims (formerly the U.S. Claims Court (1982-1992) and the U.S. Court of Claims (1855-1982)). This includes inverse condemnation as opposed to consequential damages. The Tucker Act also includes contract claims, either express or implied-in-fact, against Federal appropriated fund agencies, since it acts as a waiver of sovereign immunity. Research Triangle Institute v. Board of Governors of the Federal Reserve System, 132 F.3d 895 (4th Cir. 1997) (Tucker Act not applicable to a non-appropriated fund agency). Miller v. Auto Craft Shop, 13 F. Supp.2d 1220 (M.D. Ala. 1997), failure to properly repair Soldier's auto at Auto Craft Shop, a NAFI, falls under Little Tucker, granting court jurisdiction not available in tort, that is, Feres bar under FTCA and non review ability of MCAL.

(1) Nature of Tucker Act. Tucker Act is jurisdictional, but does not create right of action. Devilish v. Small Business Administration, 661 F.2d 716 (8th Cir. 1981). However, the U.S. Constitution can be the basis for Tucker Act claim; Hohri v. U.S., 586 F. Supp. 769 (D. D.C. 1984) Cause of action can arise from U.S. Constitution, but thus far limited to 5th Amendment; Kielczynski v.


strong point during riot--no taking); Kirk, 451 F.2d 690 (10th Cir. 1971) (sonic boom--no taking). See also Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984) (taking claim inapplicable to use of U.S. citizen's claim that his Honduran ranch is being used for training El Salvadoran troops without his permission).


(6) Federal Child Care Provider Program (FCCP).  AR 215-1 obligates Army to pay for torts of FCCP. Lee v. U.S., 124 F.3d 1291 (Fed. Cir.), on rehearing, 129 F.3d 1482 (Fed. Cir. 1997) (AR 215-1 provides insurance for FCC provider—however, no liability in child abuse case since provider signed express agreement that insurance did not cover assaults).


(1) Applicability. Applies to property of Federal employees and service members only—no subrogees.

(2) Feres. Feres bars property claims. See I.E.10z above.


(4) Incident to Service. Must arise incident to service, e.g., in quarters or office, while being shipped under orders or otherwise incident to performance of duties.

(5) Contributory Negligence. Contributory negligence bars claim regardless of local law.

(6) Negligence. No negligence requirement for successful claims, but loss caused by negligence payable under Military Claims Act (7a above) under Cir.cumstances defined by implementing regulation 241 not preemptive-must be considered under FTCA and Military Claims Act. Brown v. Alexander, Civ. # 78-0574 (D.C. Cir. 1980).


(1) Coverage. Covers claims not payable under other authorities as they arose out-of-scope.
(2) **Limitations on Coverage.** Limited to use of U.S. vehicle any place and other U.S. property on U.S. installation.

(3) **Subrogated Claims.** Excludes subrogated claims and those covered by insurance whether used or not.

(4) **Limitations on Recovery.** $1,000 limit per claimant and then only for actual out-of-pocket expenses.

(5) **Contributory Negligence.** Contributory negligence bar.

f. **Article 139, Uniform Code of Military Justice** (19 U.S.C. § 939) (32 C.F.R. § 536.25). Covers claims for property damaged or stolen by willful acts of service members or, if unidentified, his unit can be assessed out of their pay. SOL is Navy-30 days, Army-90 days, and Air Force-90 days. Oral or written complaint allowable.


   (1) **Coverage.** Covers all negligent and willful acts of U.S. service members in foreign countries, both in-and-out-of-scope. However, there is no requirement that a Foreign Claims Act program be established because of a military operation in a foreign country. *McFarland v. Cheney*, 971 F.2d 766 (table), 1992 WL 168006 (D.C. Cir. 1992) (refusal to establish Foreign Claims Act program for Operation Just Cause is not subject to judicial review).

   (2) **Claimant Eligibility.** Only persons normally resident in a foreign country can claim. U.S. citizens can claim under Military Claims Act.

   (3) **Settlement.** Claims for in-scope acts settled where there is a treaty by host country under cost sharing formula, e.g., IIB5h (2) below.

   (4) **Law of Place.** Law of place of tort applies in determination of liability and damages.


h. **NATO-SOFA.** NATO-SOFA and similar agreements (Article VII, UST & OIA Pt. 2; 10 U.S.C. § 2734). See, e.g., *Dancy v. Department of the Army*, 897 F. Supp. 612 (D. D.C. 1996) (ex-Army employee’s claim for destruction of car is under SOFA as exclusive remedy, since he is resident of Germany).

   (1) **In Scope.** Must arise from “in-scope” act of service member of Sending State. Scope determined by Sending State-arbitration permitted.

   (2) **Cost Sharing Formula.** Cost sharing formula-usually 75 percent (Sending State) and 25 percent (Receiving State).

(4) Claims in U.S. In U.S., such claims fall under FTCA and must be against U.S. (Robertson v. U.S., 294 F.2d 920 (D.C. Cir. 1961)). See also Brown v. Minister of Defense of United Kingdoms, 685 F. Supp. 1035 (E.D. Va. 1988) (injury on docked British ship under FTCA--must file administrative claim); Lowry v. Commonwealth of Canada, 917 F. Supp. 290 (D. Vt. 1996) (suit must be against U.S. for Canadian helicopter over flight regardless of whether aircraft was on a NATO mission); Krumins v. Atkinson, 1996 WL 432477 (E.D. Pa.) (Sole remedy against member of British Navy serving as NATO liaison officer is under FTCA, thereby barred by SOL where no timely demand made--claim accrues when accident occurs, not when plaintiff discovers remedy is under FTCA); In re Agent Orange Product Liability Litigation, 506 F. Supp. 762 (E.D.N.Y. 1980) (Australian service members filing for Agent Orange injuries fall under FTCA and are Feres barred--Court, cites Daberkow v. U.S., 581 F.2d 785 (9th Cir. 1978) in which German pilot training in Arizona was Feres barred); Acketpe v. U.S., 925 F. Supp. 731 (M.D. Fla. 1996) (Turkish service members both injured and killed by U.S. Navy missile off Turkish coast fall under FTCA, but are excluded by nonjusticiable political question doctrine--court discusses but does not rule on Feres bar); Whitley v. U.S., Civ. #3:94-cv-64 JTC (N.D. Ga., 19 Feb. 1997) (British military rugby team accident does not fall under SOFA, since deceased British Army lieutenant’s death was not incident to service). Daberkow v. U.S., 581 F.2d 785 (9th cir. 1978) German airman’s claim for crash in U.S. is Feres barred; Greenpeace Inc. (U.S.A.) v. France, 946 F. Supp. 773 (C.D. Cal. 1996) NATO SOFA precludes jurisdiction over claims concerning French military’s transport of prisoners through California.

(5) Similar Agreements. Similar nonreciprocal agreement with other countries applicable only in those countries, e.g., Korea, Japan, Philippines. Taiwan has reciprocal agreement.


j. **Oyster Growers.** Claims arising from dredging operations, or the like, in making navigational or other improvements by the Army Corps of Engineers can be filed in the Court of Federal Claims under 28 U.S.C. § 1497. *Vujnovich v. Great Lakes Dredge & Dock Co.*, Civ. # 87-4489 (E.D. La. 1988) (where amount is over $10,000, U.S. Court of Federal Claims has exclusive jurisdiction).


m. **Meritorious Claims Act** (31 U.S.C. § 1367). The Comptroller General may submit a claim to Congress not payable by any agency appropriation if he considers deserving, e.g., contains elements of legal liability or equity to make it deserving. Sometimes used for paying AR 405-15 claims for use and occupancy of real estate where normal acquisition procedures were not complied with and claim is not otherwise payable.

n. **Quiet Title Act** (28 U.S.C. § 2409c). Under exclusive jurisdiction of District court-sounds in tort and does not fall under Tucker Act. Quiet Title Act applies to actions in ejectment for possession of property. *McClellan v. Kimball*, 623 F.2d 83 (9th Cir. 1980) (applied to suit for ejectment against U.S. Forest Service supervisor); *U.S. v. Santos*, 878 F. Supp. 1358 (D. Guam 1995) (U.S. obtains ejectment injunction in suit under Act). Quiet Title Act also applies to Government action restricting access to property. *Schultz v. Department of the Army*, 10 F.3d 649 (4th Cir. 1993) (where Army restricts historic routes across Fort Wainwright, right to use modern route exists); *Wright v. Gregg*, 685 F.2d 340 (9th Cir. 1982) (applied to efforts of BLM to close entrance to bridge). Quiet Title Act also can be used to challenge liens on real estate. *Robinson v. U.S.*, 920 F.2d 1157 (3d Cir. 1991) (IRS imposed lien without sending notice of deficiency--jurisdiction proper under Quiet Title Act); *Egbert v. U.S.*, 752 F. Supp. 1010 (D. Wyo. 1990) (taxpayer can challenge IRS tax lien by filing action under Quiet Title Act). Quiet Title Act has further been held to apply to loss of pay. *Harrell v. U.S.*, 13 F.3d 232 (7th. Cir. 1993) (Quiet Title Act can be used to challenge loss of future wages, but here suit dismissed as frivolous); *Arford v. U.S.*, 934 F.2d 229 (9th Cir. 1991) (Quiet Title Act applies to transfer of retired pay by USAF Finance Office to IRS to pay back taxes). The Quiet Title Act has a 12-year statute of limitations.


r. **Contract Disputes Act** (41 U.S.C. §§ 601-13). Contractual claims must be brought in either court of Federal Claims or appropriate Board of Contract Appeal. See *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989) (when contractor has indemnity claim, indemnity claim for damages arising out of injuries caused by contractor design of submarine diving system have to be brought in forums allowed by Contract Disputes Act). § 605 requires a written decision by contracting officer and notice to claimant required for all claims under contract.

action falls under Privacy Act not against officials who are entitled to qualified immunity. Cummings v. Dept. of Navy, 279 F.3d 1051 (D.C. Cir. 2002). Feres bar does not apply to Privacy Act claim by Navy pilot for release of personal information from her personnel file and investigation report. Flowers v. First Hawaii Bank, 295 F. 3d 966 (9th Cir. 2002) Bank supplied soldiers financial records due to subpoena from Article 32 of Uniform Code of Military Justice counsel which is not permitted by law, U.S. added as a party. Tripp v. DOD, 219 F.Supp. 2d 85 (D. D.C. 2002) Doctrine of ‘relation back’ applied to permit specific pleading to be encompassed in general original pleading and avoid SOL bar.

**t. Employee Suggestion Program.** Kroll v. U.S., 58 F.3d 1087 (6th Cir. 1995) (employee suggestion program operations are not grievable nor subject to review under the FTCA-remedy is under collective bargaining agreement). See also Hayes v. U.S., 20 Ct Cal. 150 (1990) (same as Kroll), aff’d. 928 F.2d 411 (Fed. Cir. 1991); Weber v. Department of the Army, 9 F.3d 97 (Fed. Cir. 1993) (Failure to recognize employee suggestion is not a personnel action within jurisdiction of Merit Systems Protection Board).


x. Veterans Judicial Review Act. Hicks v. Small, 69 F.3d 967 (9th Cir. 1995) (Act preempts suit under FTCA for reduction of DVA benefits as a retaliatory measure). Mibeck Menendez v. U.S., 1999 U.S. Dist. LEXIS 14556 (D. P.R.) under 38 U.S.C. 511(a), decision to withdraw veterans medical benefits is nonviable except by Court of Veterans Appeals even alleged Army lost medical records precluding service connection; Menendez v. U.S., 67 F. Supp.2d 42 (D. P.R. 1999) veteran may not circumvent review by DVA by pleading he was not entitled to service connection as DVA lost medical records.


z. Indian Tribal Court. Louis v. U.S., 969 F. Supp. 456 (D.N.M. 1997) (judgment in Acomom Tribal Court in medical malpractice action against Indian Health Service is not recognized by U.S. District Court). Fallon Paiute-Shoshone Tribes v. Inter Tribal Court of Appeals of Western Nevada, Civ. #CV-N-98-282-ECE-PHA (D. Nev., 2 Mar. 2001) Where tribe acquires liability insurance for torts arising out of a self determination contract, Tribal Court has jurisdiction even though claim might be payable under the FTCA


(ec). **Family Child Care Provider (FCCP) Program.** By regulation, AR 215-1, Army has assumed a contractual duty to pay for torts of FCCP. Lee v. U.S., 124 F.3d 1291 (Fed. Cir. 1997), modified on rehearing, 129 F.3d 1462 (Fed. Cir. 1997) (U.S. has contractual obligation to pay for torts, but torts arising from criminal acts are not within coverage).


(ee). **Title VII.** Title VII preempts FTCA emotional distress claims based on sexual harassment in the workplace. Pfau v. Reed, 125 F.3d 927 (5th Cir. 1997) (DCAA auditor sexually harassed at work could not maintain action for intentional infliction of emotional distress under FTCA, since Title VII preempts such claim). Moreover, Title VII is the remedy for workplace harassment where a government agency is not involved. Rivera v. Heyman, 982 F. Supp. 1055 (D.S.D.N.Y. 1997) (employment discrimination falls under Title VII, since Smithsonian Institution is not a Federal agency) Wilds v. U.S. Postmaster General, 989 F. Supp. 178 (D. Conn. 1997) FTCA suit for negligent processing of drug test permitted in addition to Title VII suit. Hupp v. Department of the Army, 144 F.3d 1144 (8th Cir. 1998) (Title VII applies to Iowa NG sergeant applying for AGR position but Feres bars claims. Mather v. Henderson, 243 F.3d 446 (8th Cir. 2001) where plaintiff files sexual harassment claims under Title VII she cannot use same facts to file individual state lawsuit against supervisor.

claim fails as no administrative claim filed; U.S. v. Chambers, 92 F. Supp.2d 296 (D. N.J. 2000). No authority to pay money damages under the APA even though U.S. Border Patrol improperly disposed of forfeited truck; Rosner v. U.S., 231 F. Supp. 2d 1202 (S.D. Fla. 2002) APA has jurisdiction over suit for return of property originally seized by force from Hungarian Jews by Hungarian Government then confiscated by U.S. Army and distributed; Presnell v. U.S., 64 Fed. Appx. 73 (9th Cir. 2003) the APA may provide a waiver of immunity for equitable claims of unjust enrichment and imposition of a constructive trust but not a monetary remedy; cites Presbyterian Church v. U.S., 870 F.2d 518 (9th Cir. 1989).


(pp). **Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)** (42 U.S.C. 9600 et seq). *U.S. v. Shell Oil Co.,* 281 F.3d 812 (9th Cir. 2002) U.S. has waived sovereign immunity under CERCLA (42 U.S.C. 9620(a)(1)) and can be held liable or arranger for acts of others under 42 U.S.C. 9607(a)(2) but here Shell is liable as no proof U.S. was arranger for disposal of toxic sludge. See *Pennsylvania v. Union Geological,* 491 U.S. 1 (1989).


C. **What Damages Are Payable?**

1. **State Law Controls Payable Damages.**

   a. **Which State Law Controls,** e.g., impact or comparative impairment rule is applied whenever applicable. *Richards v. U.S.,* 369 U.S. 1 (1962); *Westerman v. Sears, Roebuck & Co.,* 577 F.2d 873 (5th Cir. 1978); *In re Air Crash Disaster Near Chicago on 25 May 1979,* 644 F.2d 594 (7th Cir. 1981), further proceedings, 701 F.2d 1189 (7th Cir. 1983); *Costello v. U.S.,* 1997 WL 383278 (N.D. Ill.) (Lists five factors in choice of law determination: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of judicial tasks; (4) advancement of forum government's interests; and (5) application of the better rule of law--citing with approval *Hanker v. Royal Indemnity Co.,* 204 N.W.2d 897 (Wis. 1973) which was

b. Damage Limitations. Monetary limitations (cap) on damages in State law may be applicable. The cap is usually considered an affirmative defense, which must be asserted. Ingraham v. Bonds v. U.S., 808 F.2d 1075 (5th Cir. 1987). Many states have such caps. Haceesa v. U.S., 309 F.3d 722 (10th Cir. 2002) N. Mexico cap applies to U.S.


(2) Indiana (Code § 16-9.5-2.2). Overall medical malpractice limit of $500,000 upheld by Johnson v. St. Vincent Hospital, Inc., 404 N.E.2d 585 (Ind. 1980); Estate of Sullivan v. U.S., 777 F. Supp. 695 (N.D. Ind. 1991) (Indiana cap not applicable to Arizona medical malpractice act); Carter v. U.S., 982 F.2d 1141 (7th Cir. 1992) (Indiana $500k cap applied to U.S. and increased value of DVA benefits is deductible after application of cap);

(4) **Nebraska** (Rev Stat. § 44-2825) (cap of $1,000,000). See *Lozada v. U.S.*, 974 F.2d 986 (8th Cir. 1992) (medical malpractice cap of $1 million in Nebraska applies to U.S.);


(6) **Ohio** (Rev Code Ann. § 2307.43). Cap of $200,000 for general damages not involving death held unconstitutional in three lower court decisions. See also *Morris v. Savoy*, 576 N.E.2d 765 (Ohio 1991) ($200,000 "Cap" is unconstitutional);

(7) **South Dakota.** See *Knowles v. U.S.*, 829 F. Supp. 1147 (D. S.D. 1993) (S. Dakota $1,000,000 medical malpractice cap applies to suit against USAF Hospital in South Dakota); *Knowles v. U.S.*, 29 F.3d 1251 (8th Cir. 1994) (holds that $1,000,000 cap established by S.D. Cod. Law Ann § 21-3-11 applies to entire family); *Knowles v. U.S.*, 544 N.W.2d 183 (S.D. 1996) (Supreme Court of South Dakota declares S.D. $100,000 cap unconstitutional and reinstates former cap of $500,000); *Knowles v. U.S.*, 91 F.3d 1147 (8th Cir. 1995) (holds S.D. Cap does not apply to USAF medical technicians even though they are Hospital employees);


(9) **Virginia** (Code § 8.01-581.15). Overall cap of $1,000,000. *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989) (held constitutional). See also *Boyd v. Bulala*, 672 F. Supp. 915 (W.D. Va. 1987); *Boyd v. Bulala*, 905 F.2d 764 (4th Cir. 1990); *Clark v. Lewis*, Civ. #85-0516 Record #890900 (Sup. Ct. Va. 1990) (cap applies to all claims including derivative claims); *Starns v. U.S.*, 923 F.2d 34 (4th Cir. 1991) (Va. cap applies to FTCA--one cap applies to all claims--child's claim takes priority);

(10) **Wisconsin** (Stat. 655.23). Cap on physician's liability of $200,000;


(12) **New Hampshire.** See *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980);
(13) North Dakota. See Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) (all ruled unconstitutional). See also MacDonald v. General Motors Corp., 110 F.3d 337 (6th Cir. 1997) (University of Kansas student originally from North Dakota is killed in U. Kansas van accident in Tennessee--North Dakota law applied, where North Dakota has no damage cap, but Kansas has $100,000 cap on general damages);


(15) Massachusetts. (Gen. Law, Chapter 351, § 60H). Noneconomic cap of $500,000;

(16) Michigan. (HB 5154). Noneconomic cap of $225,000;

(17) Missouri (Stat. § 538.210). Limits noneconomic damages to $250,000. See also Romero v. U.S., 865 F. Supp. 585 (E.D. Mo. 1994) ($500,000 applies to each of two counts of malpractice, even though second surgery did not cause additional injury);

(18) West Virginia (Code § 55-7B-8). Non-economic cap of one million;

(19) Alaska ($500,000);

(20) Colorado (Colo. Rev Stat. § 13-21-203 ($250,000). See Hill v. U.S., 854 F. Supp. 727 (D. Colo. 1994) (Colorado $1,000,000 cap in medical malpractice cases did not preclude award of $2,500,000 for physical impairment and disfigurement additional in case of brain damaged infant);

(21) Florida. Laws of Florida (Chapter 86-160) ($450,000). See South v. Department of Insurance, Civ. #69-551 (Sup. Ct. Fla. 1987) (cap of $450,000 held unconstitutional--most of statute held constitutional);

(22) Hawaii ($375,000);

(23) Maryland ($350,000). See Franklin v. Mazda Motor Corp., 704 F. Supp. 1325 (D. Md. 1989) (Maryland $550,000 cap upheld); Bartucco v. Wright, 746 F. Supp. 604 (D. Md. 1990) (Md. cap applies separately to each survivor in WD case); U.S. v. Streidel, 620 A.2d 905 (Md. 1993) (Maryland cap of $350,000 does not apply to wrongful death action);

(24) Minnesota ($400,000);

(25) New Hampshire ($875,000);

(27) **Utah** ($300,000); *Condemarin v. University Hospital*, 775 P.2d 348 (Sup. Ct. Utah 1989) Holds cap unconstitutional as applies to state hospital.

(28) **Virgin Islands.** See *Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989) (Virgin Islands cap of $250,000 non-economic upheld); have all enacted caps;

(29) **Nevada.** See *Aguilar v. U.S.*, 920 F.2d 1475 (9th Cir. 1990) (Nevada cap of $50,000 applies to action involving Federal policeman as it applies to Nevada police);


2. **Only One Payment to Each Claimant.** Advance payment is permitted by 10 U.S.C. § 2736 for claims under 10 U.S.C. § 2733 and 32 U.S.C. § 715. *But see Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994) (fact that injured plaintiff died while case was on appeal does preclude award for last future earnings and medical bills).


(4), where Texas and California have permitted mental anguish damages to parents who were witnesses to injuries—are these "zone of damages" cases. See also Reben v. Ely, 705 P.2d 1360 (Az. App. 1985). However, recovery does not occur in all cases. Hay v. Medical Center Hospital of Vermont, 496 A.2d 939 (Vt. 1985) (not permitted where parents turn over brain damaged child to foster parents); Nemmers v. U.S., 612 F. Supp. 928 (C.D. Ill. 1985); Bode v. Pan American World Airways, Inc., 786 F.2d 669 (5th Cir. 1986) (bystander not permitted to recover for mental anguish for witnessing plane crash 50 feet from home in Louisiana).


bulging discs as only 80% chance of success);  
Boston v. U.S., Civ.#5:99-CV-534-F3 (E.D.N.C. 29 Aug. 2000) $100,000 mediation award for death of retired Soldier from retained sponge due to failure to follow medical advice to have sponge removed earlier.  
Hill v. U.S., 2002 U.S. Dist. LEXIS 7732 (N.D. Calif.) Plaintiff’s refusal to undergo corrective surgery on back is upheld as U.S. did not show risks of such surgery; result is award of $324,000 for what is essentially a soft tissue injury to a previously arthritic back.  
Fuller v. U.S., Civ.# 00-2791 § “R” (2)(E.D. La., 5 Apr. 2002) 48 year old is not required to undergo operation at L5-S1 for herniated disc which would restore her to 85% of his pre-injury status.

12. Follow Medical Orders.  Plaintiff must follow medical orders or timely seek treatment or suffer deduction.  
Wyatt v. U.S., 939 F. Supp. 1402 (E.D. Mo. 1996) (failure to use pressure cushion on trip by paraplegic results in Hospitalization for pressure sores where he continues to smoke--10 % comparative negligence);  
Austin v. U.S., Civ. #92-264-S (E.D. Ok., 23 Dec. 1992) (parents are responsible for pneumonia death by failing to return child for 2 days);  
Parkins v. U.S., 834 F. Supp. 569 (D. Conn. 1993) (refusal to seek earlier treatment results in denial of wrongful death suit);  
Kilburn v. U.S., Civ. #90-179 (E.D. Ky. 1990) (duty to seek dental follow-up care to lessen risk of radiation injury to teeth);  
Hunt v. U.S., Civ. #EP-89-CA-273-B (W.D. Tx. 1991) (patient fails to auto inflate ear as ordered following stapedectomy--U.S. not liable for punctured ear drum);  
Lovejoy v. U.S., Civ. #89-0039-L(CS) (W.D. Ky. 1991) (15 percent deduction for failing to seek follow-up in breast cancer case despite several explicit instructions, rescheduling and offering of transportation);  
Shelton v. U.S., 804 F. Supp. 1147 (E.D. Mo. 1992) (50% deducted from award for failure to follow medical orders);  
Norton v. U.S., Civ. #SA-91-CA-241 (W.D. Tx. 1992) (30% deducted from award for failure to follow medical orders);  
Brazil v. U.S., 484 F. Supp. 986 (N.D. Ala. 1979);  
Smith v. Perlmutter, 496 N.E.2d 358 (Ill. App. 1986) (failure to seek attention for severe chest pains);  
Grippie v. Momtazee, 705 S.W.2d 551 (Mo. App. 1986) (failure to return for follow-up exam re breast cancer);  
Tenney v. Bedell, 624 F. Supp. 305 (S.D.N.Y. 1985) (failure to show for post-op follow-up);  
Lebrecht v. Tuli, 473 N.E.2d 1322 (Ill. App. 1985) (noncompliant patient with disc problem);  
Gumper v. Bach, 474 So. 2d 420 (Fla. App. 1985) (failure to seek follow-up for pain after root canal);  
Shultz v. Rice, 809 F.2d 643 (10th Cir. 1986) (failure to seek advice re progesterone injections);  
Contra Clark v. Hoerner, 525 A.2d 377 (Pa. 1987) (failure to seek treatment for 12 hours after spitting up blood);  
Stager v. Schneider, 494 A.2d 1307 (D.C. 1985) (failure to inquire re results of cancer test);  
Owens v. Stokoe, 485 N.E.2d 537 (Ill. App. 1985) (noncompliant dental patient);  
Norman v. Mandarin Emergency Care Center, Inc., 490 So. 2d 76 (Fla. App. 1986) (patient injured on the job failed to seek follow-up emergency care);  
Barenbrugge v. Rich, 490 N.E.2d 1368 (Ill. App. 1986) (delay in notifying physician of change in condition);  
Esfandiari v. U.S., 810 F. Supp. 1 (D. D.C. 1992) (failure to return for treatment is not burden of patient where told by one physician that radiation is of no benefit in prostate cancer);  
Severn v. U.S., Civ. #93-00781HG (D. Haw., 30 May 1995) (failure to seek hysteroscopy for Asherman’s Syndrome when recommended in 1992 does not effect award, even though treatment was delayed until 1995).  
Glover v. U.S., 1998 WL 887077 (N.D. Ill.) plaintiff is 40 percent negligent for failure to report to ophthalmologist in a timely manner as instructed by ER doctor.  

13. Loss of Use.


14. **Lost Earnings.**


b. Incapacitated Claimant. In the case of incapacitated claimant who is awarded medical expenses and future lost wages, a determination should be made as to whether the awards are duplicative, e.g., does the medical expense award cover living expenses. Flannery for Flannery v. U.S., 718 F.2d 108 (4th Cir. 1983). Rigby v. U.S., Civ. #99-1998 (W.D. Pa. 8 Jun. 2001) $798,976 lost earnings in wrongful death claim for 42 year old totally disabled veteran with multiple sclerosis-no evidence of limited life expectancy introduced or reduction to present value. Fuller v. U.S., Civ.# 00-2791 § “R” (2) (E.D. La. 5 April 2002) 48 year old is awarded $503,550.07 for operable herniated disc from rear-end collision, of which $434,805 is for future lost earnings.


d. Lost Profits. Lost business profits are not lost earnings unless shown to result from injury. Reising v. U.S., 60 F.3d 1241 (7th Cir. 1995) (failure of proof of future lost profits where 56 year old insurance broker injured back in collision, but continued to work); Metz v. United Tech., 754 F.2d 63 (2d Cir. 1985); Midwest Knitting Mills, Inc. v. U.S., 950 F.2d 1225 (7th Cir. 1991) (lost profits not payable in absence of personal injury for tort of negligent supervision). See also Schuler v. U.S., 675 F. Supp. 1088 (W.D. Mich. 1987) (excellent discussion of loss to partnership due to death).


h. Enhancement by Future Training. Waldorf v. Shuta, 896 F.2d 723 (3d Cir. 1990) (no evidence that 24-year-old high school dropout was going to train to be an attorney--award for loss of earnings as attorney improper, cites other cases). Cowell v. U.S., Civ. #4:99 CV3213/3261 (D. Neb., 3 Oct. 2000) $313,464.95 award for 5% whole body disability due to L-5 injury in which future earning at lighter job is deducted from earning from former job.


15. Inflation. Inflation and present value depends on local law--varies within each circuit except in 5th Circuit--see below.


e. Generally. For general review, see Doca v. Marina Mercante Nicaraguense, S.A., 634 F.2d 30 (2d Cir. 1980).

f. Discount Applicable to Pain and Suffering.


a. Past and Future Awards. Should be broken down between past and future award and adjusted for future earning power and inflation. Gretchen v. U.S., 618 F.2d 177 (2d Cir. 1980). See also Parkins v. U.S., 842 F. Supp. 617 (D. Conn. 1993) (damages for pain and suffering need not be reduced for predicted life expectancy had surgery been refused--not akin to such a reduction for future lost earnings); Manus v. American Airlines, 314 F.3d 968 (8th Cir. 2003) $2,000,000 to mother, $800,000 to four year old and $500,000 to two year old, both physically unharmed survivors of air crash for pain and suffering and loss of earning power to survivor mother; Presley v. U.S. Postal Service, 317 F.3d 167 (2nd Cir. 2003) Award of $1,795,000 by jury against taxi co. and $415,000 U.S.P.S. truck to a 28 year old taxi passenger for some injuries in a shared liability case is remanded for consideration as to whether U.S.P.S. verdict is inadequate; Torres v. K-mart Corp., 233 F.Supp. 2d 273 (D.P.R. 2002) $1.6 million for back injury including herniated disc for fall in K-Mart store mostly for non-economic damages.

b. Delays in Treatment. Should be limited to pain and suffering caused by negligent delay in treatment and not to condition itself. See Grant v. Brandt, 796 F.2d 351 (10th Cir. 1986) (medical bills over $15,000--total award of $15,000 upheld--six month delay in symptoms following collision); Isaac v. U.S., 490 F. Supp. 613 (S.D.N.Y. 1979). Tormania v. First Investment Realty Co., 251 F.3d 128 (3d Cir. 2000) $60,000 award for knee injury despite the fact claimant did not seek treatment for nine months.


f. **Comparative Awards.** Krys v. Lufthansa German Airlines, 119 F.3d 1515 (11th Cir. 1997) ($1.8 million for 47 year old who suffered increased heart damage due to refusal of pilot to land early); Eiland v. Westinghouse Elec. Corp., 58 F.3d 176 (5th Cir. 1995) (in case of electrician extensively burned from arcing circuit breaker who returned to full-time employment within 21 months--$5,000,000 in non-economic damages reduced to $3,000,000); Salas v. U.S., 974. F. Supp. 202 (W.D.N.Y. 1997) ($90,000 for pain and suffering where high school teacher is permanently work disabled from minor soft tissue accident); In re Air Crash Disaster at Charlotte, N.C., 982 F. Supp. 1115 (D.S.C. 1997) ($550,000 for pain, suffering and disfigurement to flight attendant for third degree burns on 10-11% of body, plus $478,000 lost earnings); Tisdal v. Barber, 968 F. Supp. 957 (S.D.N.Y. 1997) ($25,000 verdict inadequate award for truck driver who slipped on ice and injured back where past medical expenses were $31,361.34 and no award made for pain); Elliott by and through Elliott v. U.S., 877 F. Supp. 1569 (M.D. Ga. 1992) (award of $2,500,000 in personal injury claim of semi-comatose quadriplegic); Consorti v. Armstrong World Industries, Inc., 64 F.3d 781 (2d Cir. 1995) (pain and suffering award reduced to $5 million in asbestos case cites numerous awards); Noble v. U.S., Civ. #CV-N-93-570-PHA (D. Nev., 15 Aug. 1995) (videotape taken surreptitiously shows claimant performing acts she testified she could not perform due to shoulder injury--$25,000 award of which $15,000 is for pain and suffering); Brannon v. U.S., Civ. #94-30-B (E.D. Okla., 14 Jun. 1995) ($673,845.99 award to 55 year old unemployed food service worker for broken ankle includes $524,000 for pain and suffering); Machesney v. Larry Bruni, M.D., P.C., 905 F. Supp. 1122 (D. D.C. 1995) ($4,100,000 award remitted to $2,100,000 for mental suffering where physician erroneously informed patient he was HIV positive); Stratis v. Eastern Air Lines, Inc., 682 F.2d 406 (2d Cir. 1982); Ouachita National Bank v. Tosco Corp., 686 F.2d 1291 (8th Cir. 1982) (Judge reduces jury award of $2,215,320.60 for nursing service to $228,082.25 and $500,000 loss of consortium to $250,000); Shaw v. U.S., 741 F.2d 1202 (9th Cir. 1984) (where $4,700,000 awarded for future medical expenses and home care and $4,600,000 for pain and suffering on appeal); Marks v. Mobil Oil Corp., 562 F. Supp. 759 (E.D. Pa. 1983) ($3,500,000 for pain and suffering to college student with spastic paraplegia and global brain damage and awareness of his plight); Blewans v. Cessna Aircraft Co., 728 F.2d 1576 (10th Cir. 1984) ($1.3 million pain and suffering for broken ribs and cartilage--not excessive);
Lucas v. U.S., Civ. #EP-81-CA-289 (W.D. Tx. 1984) ($1.5 million for pain and suffering to minor paraplegic); Robbins v. U.S., 593 F. Supp. 634 (E.D. Mo. 1984) (registered nurse undergoes above-the-knee amputation and retains badly damaged other leg following vehicle accident--lost wages $13,000 and medicals $63,000 receives $1,750,000 or about $1,700,000 pain and suffering--contrast with Guerry v. U.S., #84-Civ-2632 (PKL), 1984 U.S. Dist. LEXIS 22213 (S.D. N.Y.), in which 76-year-old male in poor health is so badly burned he can no longer ambulate and receives $40,000 total award all for pain and suffering (case not appealed) and Duty v. Department of Interior, 735 F.2d 1012 (6th Cir. 1984) (remanded for low damages, i.e., $17,517.80 (half for pain and suffering) for spinal fusion to adult female)); Dogan v. Hardy, 587 F. Supp. 967 (N.D. Miss. 1984) ($500,000 award to 85-year-old female for unspecified injuries which require custodial care); Haley v. Pan American World Airways, Inc., 746 F.2d 311 (5th Cir. 1984) (reduces parent's award for mental anguish from $350,000 each to $200,000 (Louisiana law)); Wurdemann v. U.S., Civ. #82-Z-1639 (D. Colo. 1984) ($980,000 pain and suffering for rectal-vaginal fistula followed six surgeries); Gonzalez v. U.S., 600 F. Supp. 1390 (W.D. Tx. 1985) ($250,000 pain and suffering for one-hour delay in diagnosing appendicitis); Dixon v. International Harvester Co., 754 F.2d 573 (5th Cir. 1985) ($2.8 million for loss of testicles, complete avulsion of femoral artery and vein, avulsion of skin on penis and abdomen to naval and severing of femoral nerve while pinned in tractor--not excessive); Dabney v. Montgomery Ward & Co. Inc., 761 F.2d 494 (8th Cir. 1985) ($2 million pain and suffering not excessive for second and third degree burns to 36 percent of upper body); Wells v. Ortho Pharmaceutical Corp., 615 F. Supp. 262 (N.D. Ga. 1985) ($3 million pain and suffering for birth defect from spermicidal); Trevino v. U.S., 804 F.2d 1512 (9th Cir. 1986) ($2 million pain and suffering reduced to $1 million on appeal); Reilly v. U.S., 863 F.2d 149 (1st Cir. 1988) ($1 million for child brain damaged at birth); Moreno v. U.S., Civ. #86-0555 (D. Haw. 1987) ($2 million for child brain damaged at birth); Zerangue v. Delta Towers Ltd., 820 F.2d 130 (5th Cir. 1987) (sexually assaulted four times after being forced into abandoned house--$228,000 reduced to $200,000); Brown v. McBro Planning and Dev. Co., 660 F. Supp. 1333 (D. V.I. 1987) (chipped patella in slip and fall--$1 million reduced to $200,000); Gumbs v. Pueblo International, Inc., 823 F.2d 768 (3d Cir. 1987) (sprained coccyx in slip and fall, $900,000--reduced to $525,000 by trial Judge--further reduced to $235,000); Couch v. St. Croix Marine, Inc., 667 F. Supp. 223 (D. V.I. 1987) (broken wrist, dislocation left locate to carpal bone--$400,000 reduced to $150,000); Kwasny v. U.S., 823 F.2d 194 (7th Cir. 1987) (perforated windpipe during operation, pre-death pain and suffering--$350,000 reduced to $175,000); Snead v. U.S., 595 F. Supp. 658 (D. D.C. 1984) (pre-death pain and suffering in 38-year-old female with lung cancer--$773,000); Williams v. Martin Marietta Alumina, Inc., 817 F.2d 1030 (3d Cir. 1987) ($550,000 for soft tissue back injury, $330,000 for pain and suffering reduced to $100,000, cites other awards); Edwards v. U.S., Civ. #Y-86-3695 (D. Md. 1988) ($500,000 to breast cancer victim who was terminal at time of trial); Cardillo v. U.S., 622 F. Supp. 1331 (D. Conn. 1984), (Swine flu death after six years of slowly progressing polyneuritis--$5 million); Villar v. Wilco Truck Rentals, 627 F. Supp. 389 (M.D. La. 1986) ($1 million verdict clearly excessive for concussion and traumatic amputation of arm); Laaperi v. Sears, Roebuck & Co., Inc., 787 F.2d 726 (1st Cir. 1986) ($750,000 verdict excessive for 1st and 2d degree burns over 12 percent of body of 13-year-old girl); Hope v. Seahorse, Inc., 651 F. Supp. 976 (S.D. Tx. 1986) ($1 million for lung cancer death of 41-year-old recently married father of small child); De Centeno v. Gulf Fleet Crews, Inc., 798 F.2d 138 (5th Cir. 1986) ($776,000 verdict of which $459,000 was pain and suffering for
failure to treat diabetes resulting in death remanded as excessive; Zeno v. Great Atlantic & Pacific Tea Co., 803 F.2d 178 (5th Cir. 1986) ($95,000 verdict with medicals of $807 for two fractures—not excessive, but with strong dissent); Never v. U.S., 845 F.2d 641 (6th Cir. 1988) ($1 million pain and suffering for broken leg and 12% burns—not excessive, but cannot recover for both loss of consortium and loss of services); Nairn v. National Railroad Passenger Corp., 837 F.2d 565 (2d Cir. 1988) ($400,000 pain and suffering for 15% back—excessive, cites other cases); Sharpe v. City of Lewilsburg, Tennessee, 677 F. Supp. 1362 (M.D. Tenn. 1988) ($100,000 pain and suffering for man who lived only a few minutes after shooting—excessive); Miller v. U.S., 901 F.2d 894 (10th Cir. 1990) ($1.5 million pain and suffering for 17-year-old coma victim); McCarthy v. U.S., 870 F.2d 1499 (9th Cir. 1989) ($2 million reduced to $1 million); Washington v. U.S., Civ. #83-2332-RS (C.D. Cal. 1990) ($2 million for third degree burns to child); Larson v. U.S., Civ. #EP-85-CA-304-H (W.D. Tex. 1990) ($1.5 million to scoliosis quad); Heitzenrater v. U.S., 930 F.2d 33 (table), 1991 WL 35198 (10th Cir. 1991) ($2 million reduced to $1 million); O'Bryan v. U.S., Civ. #89-1339-C (W.D. Okla. 1992) ($200,000 award including disfigurement in jaw realignment surgery resulting in doubtful reflex sympathetic dystrophy); Scala v. Moore McCormack Lines, 965 F.2d 680 (2d Cir. 1993) ($1.5 million reduced to $750,000 for torn up knee and ruptured disc in case of 33-year-old stevedore); Schneider v. National RR Passenger Corp., 987 F.2d 132 (2d Cir. 1993) ($1,250,000 not excessive for post traumatic stress disorder following brutal attack on railroad ticket agent); Stutzman v. CRST, Inc., 997 F.2d 291 (7th Cir. 1993) ($600,000 pain and suffering for traumatic aggravation of congenital spondylolisthesis in low back); Sales v. Republic of Uganda, 828 F. Supp. 1032 (S.D.N.Y. 1993) ($1.2 million award for 32-year-old construction worker who crushed both heels in fall from ladder not excessive); Datskow v. Teledyne Continental Motors, 826 F. Supp. 677 (W.D.N.Y. 1993) ($107,000,000 pain and suffering of 4 decedents who died within minutes of air crash); Allred v. Maersk Line, LTD, 826 F. Supp. 965 (E.D. Va. 1993) (fall from ladder results in broken arm and 20-30 disability in arm--$1 million award with no specials reduced to $500,000); Sheehan v. U.S., 822 F. Supp. 13 (D. D.C. 1993) ($15,000 fractured orbit of eye resulting in effect on vision and memory); Withrow v. Cornwell, 845 F. Supp. 784 (D. Kan. 1994) (no award for pain and suffering despite award of $734.00 for some of medical bills); Anthony v. G.M.D. Airline Services, Inc., 17 F.2d 490 (1st Cir. 1994) (remitter order where pilot received $566,765 for pain and suffering and medical bills totaled $1,385); Hodgson v. Forest Oil Corp., 862 F. Supp. 1552 (W.D. La. 1994) (paraplegic oil worker awarded $1.5 million general damages); Foster v. U.S., 858 F. Supp. 1157 (M.D. Fla. 1994) ($10 awarded to woman who bends to retrieve mail from mailbox as Postal truck pulls away and strikes
2nd and 3rd degrees burns of 8 percent of total body surface;  Kane v. U.S., 189 Fed. Supp. 2d 40 (S.D. N.Y. 2002) $1,236,000 for economic and $1,200,000 for non-economic losses to 41 year old computer operator executive pedestrian who was struck by USPS truck at intersection injuring her teeth, neck and knee and who had returned to work shortly after accident; 10% deduction for contributory negligence; Connolly v. U.S., 2002 U.S. Dist. LEXIS 4468 (D. Mass.) Low back injury non permanent for high speed rearender, $10,413.20 medical expenses; $5241.50 lost earnings; $100,000 pain and suffering; Warning v. U.S., Civ.# 001-5411 RJB (W.D. Wash. 18 Oct. 2002) Three point four million dollars to school principal whose back was fractured in chain collision; Raybourn v. San Juan Marriott Res. & Stell. Casino, 259 F.Supp. 2d 110 (D. P.R. 2003) Award of $500,000 for pain and suffering for fall in bathtub remitted to $300,000 and $150,000 for lost earnings dismissed as undocumented.


i. Eggshell Skull. Eggshell skull theory or "you take your victim as you find him" at common law has ramifications. Vosburg v. Putney, 50 N.W. 403 (Wis. 1891). Includes psychological, and not only physical, injuries. Thomas v. U.S., 327 F.2d 379
(7th Cir. 1964); Mizell v. State, 398 So. 2d 1136 (La. App. 1980). Includes aggravation by subsequent treatment, even though negligent. Butzow v. Wausau Memorial Hospital, 187 N.W.2d 349 (Wis. 1971); Baruk v. U.S., Civ. #93-11862-RGS (D. Mass., 13 Mar. 1996) (veteran disabled with Cohn’s Disease develops RSD in right arm from injection of hydrochloric acid solution--$350,000 for pain and suffering). However, causation of hypochondrial neurosis should be viewed with skepticism and damages should be adjusted for the possibility that the preexisting condition would have resulted in harm even in absence of a tort. Stoleson v. U.S., 708 F.2d 1217 (7th Cir. 1983).


a. Easement Cases. Karlson v. U.S., 82 F.2d 330 (8th Cir. 1936) (value is difference before and after imposition of easement).


21. Overhead. Overhead must be factually related to the actual repair work and represent reasonable charges for it to be compensable. U.S. v. Peavey Barge Lines, 590 F. Supp. 319 (C.D. Ill. 1983), aff'd, 748 F.2d 395 (7th Cir. 1984); Department of Water and Power v. U.S., 131 F. Supp. 329 (S.D. Cal. 1955); State Road Department of Florida v. U.S., 85 F. Supp. 489 (N.D. Fla. 1949). General rule is that presentation of proof that overhead charge is in accordance with agency's regulations or standard policy is not sufficient. U.S. v. Denver & Rio Grande Western Railroad Co., 547 F.2d 1101 (10th Cir. 1977); U.S. v. Gopher State, 614 F.2d 1186 (8th Cir. 1980). However, public utilities may charge arbitrary percentage by virtue of state law, such as Haw. R.S. § 296-32, and thus permit indirect costs. Should be in accordance with a uniform system of accounting. Duguesne Light v. Rippel, 478 A.2d 472
Where work on contract never began due to suspension by Government, Eichleay formula cannot be used to calculate overhead but must be based on termination for convenience clause; cites Wicham Contracting Co. v. Fischer, 12 F. 3d 1574 (Fed. Cir. 1994); Capital Electric Co. v. U.S., 729 F.2d 743 (Fed. Cir. 1984).


Frudenfeld, 185 Cal. Rptr. 76 (Cal. 1982)); Michigan (Clapham v. Yanga, 300 N.W.2d 727 (Mich. 1980)).

(3) Permitted. Full cost of raising child permitted: Wisconsin (MarCiriak v. Landberg, 450 N.W.2d 243 (Wis. 1990)).

b. Damaged Child.


(3) Future Earnings Award. Saunders by and Through Saunders v. U.S., 64 F.3d 482 (9th Cir. 1995) (lost future earnings award to damaged child permitted in wrongful life case, i.e., mother counseled before becoming pregnant that her septate uterus would not preclude normal child).

24. Future Medical Care.

cases, the award of future medical care must be supported by the evidence. Keeler v. Richards Mfg. Co., Inc., 817 F.2d 1197 (5th Cir. 1987) ($150,000 award for future care not sustainable as no evidence hip screw was defective); Smith v. Department of Veterans Administration, 865 F. Supp. 433 (N.D. Ohio 1994) (court refuses to award costs of future care at home due to lack of family support where patient-claimant is in DVA facility). Pineda v. U.S., 1999 WL 311214 (9th Cir. Haw.), upholds determination that attendant care is needed 24 hours a day, even while child is asleep-award of $7,163,441 for attendant care alone.


26. Money Damages. FTCA plaintiff may only recover money damages. Wright v. U.S., 902 F. Supp. 486 (S.D.N.Y. 1995) (demand for return of vehicles seized by IRS not cognizable under either FTCA or Tucker Act as demand is not a claim for money damages). Money damages are only payable if sovereign immunity waived. Department of the Army v. Federal labor Relations Authority, 56 F.3d 273 (D.C. Cir. 1995) (order by FLRA to Army to pay money damages, i.e., bank penalties as paycheck was late is improper, since no waiver of sovereign immunity).


c. Attorneys Fees Incurred in Improperly Brought Criminal Case. The rule is that the recovery of attorney fees for improperly brought criminal prosecutions is barred absent a statute authorizing such recovery. General Dynamics Corp. v. U.S., 139 F.3d 1280, (9th Cir. 1998) Recovery of $25,880,752 attorneys fees expended in defending criminal charge based on unprofessional DCAA audit not allowable because decision to prosecute discretionary. Resolution Trust Corp. v. Miramon, 935 F. Supp. 838 (E.D. La. 1996) (recovery under FTCA of attorneys fees expended in defense of criminal action by RTC is denied under 28 U.S.C. § 2412 as fee shifting).

27. Value of Loss of Trade Secret. Elements are established Rohm & Haas Co. v. ADCO Chemical Co., 689 F.2d 424 (3d Cir. 1982).


a. Resulting From Death. Walters v. Mintec/International, 758 F.2d 73 (3d Cir. 1985) ($250,000 to each of minor children reduced to $25,000--had not seen father in seven years); Poyer v. U.S., 602 F. Supp. 436 (D. Mass. 1984) ($500,000 to mother for loss of 15-year-old son); Winbourne v. Eastern Air Lines, Inc., 758 F.2d 1016 (5th Cir. 1984) ($500,000 for loss of wife and $150,000 for each of two daughters);
Grandstaff v. City of Borger, Texas, 767 F.2d 161 (5th Cir. 1985) ($200,000 to father of 31-year-old decedent); Pregeant v. Pan American World Airways, Inc., 762 F.2d 1245 (5th Cir. 1985) ($150,000 to each parent of 35-year-old flight attendant); In re Air Crash Disaster Near New Orleans, La. on 9 July 1982, 767 F.2d 1151 (5th Cir. 1985) (widower receives $500,000 for loss of wife and $150,000 for each of three children); Cavnar v. Quality Control Parking, 696 S.W.2d 549 (Tx. 1985) ($300,000 to one child and $150,000 to each of the others for loss of mother); Gutierrez v. Exxon Corp., 764 F.2d 399 (5th Cir. 1985) ($1,150,000 to parents of adult child); Gulf States Utilities Co. v. Reed, 659 S.W.2d 849 (Tx. App. 1983) ($1 million to parents of minor child); Johnson v. U.S., 780 F.2d 902 (11th Cir. 1986) ($2 million to parents of 21-month-old infant who died from medical overdose is excessive); Wheat v. U.S., 860 F.2d 1256 (5th Cir. 1988) ($6.7 million for cancer death of 42-year-old woman leaving husband and two children (one adult)--reduced to $5.5 million on appeal); Phipps v. U.S., Civ. #A-87-CA-125 (W.D. Tx. 1989) ($2.2 million for 38-year-old housewife); Mark v. Pan American World Airways, Inc., 785 F.2d 539 (5th Cir. 1986) ($250,000 to each of four minors for loss of parents); Morales v. U.S., 642 F. Supp. 269 (D. P.R. 1986) ($48,000 to widow and $6,000 to each daughter and $0 to grandchildren including conscious pain and suffering in death case); Nowell v. Universal Electric Co., 792 F.2d 1310 (5th Cir. 1986) (Evidence of remarriage permitted under Mississippi law, cites New York cases); Morrissey v. Welsh Co., 821 F.2d 1294 (8th Cir. 1987) ($6.5 million to parents of daughter not excessive under Missouri law, cites numerous cases); Rodriguez v. U.S., 823 F.2d 735 (3d Cir. 1987) ($500,000 for lost companionship etc., of deceased husband not excessive under New Jersey law); Stanford v. Leaf River Forest Products, Inc., 661 F. Supp. 678 (S.D. Miss. 1986) ($375,000 or $1.7 million total to widow and three children for loss of society--reduced to $1,060,000 total); Morgan Guaranty Trust Co. of New York v. Texas-Gulf Aviation, Inc., 669 F. Supp. 81 (S.D.N.Y. 1987) ($866,000 for loss of society reduced to $250,000 where six out of eight children have left home, cites cases); Schuler v. U.S., 675 F. Supp. 1088 (W.D. Mich. 1987) ($750,000 to widow of 41-year-old decedent and $200,000 each to children, ages 18 and 16, $200,000 to widow of 6-year-old decedent and $50,000 each to 5 adult children); DaSilva v. American Brands, Inc., 845 F.2d 356 (1st Cir. 1988) ($1.5 Million to widow and four children not excessive); Williams v. U.S., 681 F. Supp. 763 (N.D. Fla. 1988) ($900,000 to each parent--consistent with Florida awards); Larsen v. Delta Air Lines, Inc., 692 F. Supp. 914 (S.D. Tx. 1988) ($3 million for death of 32-year-old engineer, of which $1.8 was for emotional loss); Peck v. Garfield, 862 F.2d 1 (1st Cir. 1988) ($300,000 mental anguish to widow of 80-year-old male); Ruiz-Rodriguez v. Colberg-Comas, 882 F.2d 15 (1st Cir. 1989) (son's anguish over father's death does not rise to compensable level under Puerto Rican law); Transeco Leasing v. U.S., 896 F.2d 1435 (5th Cir. 1990) ($500,000 for mother's loss of only daughter reduced to $250,00 under LA law); Grayson v. U.S., 748 F. Supp. 854 (S.D. Fla. 1990) (mental anguish for loss of wife and two small children over $2 million, cites many awards); Valenzuela v. U.S., Civ. #EP-88-CA-200-H (W.D. Tx. 1991) ($250,000 to parents of 28-year-old unmarried decedent); Garrison v. Mollers North America, Inc., 820 F. Supp. 814 (D. Del. 1993) (award of $6,616,65.50, after 25% reduction, for mental anguish of survivors is excessive, since it is 7 times special damages); Doe v. U.S., 805 F. Supp. 1513 (D. Haw. 1992) (mental anguish of child not payable for watching parents die from AIDS); Estate of Zarif by Jones v. Korean Airlines, 836 F. Supp. 1340 (E.D. Mich. 1993) ($500,000 to adult child for death of mother in KAL 007 crash); Walls v. Armour Pharmaceutical Co., 832 F. Supp. 1505 (M.D. Fla. 1993) ($2 million to parents for death of child from AIDS due to defective blood products); Dunn

b. Resulting from Personal Injury.  Wells v. Ortho Pharmaceutical Corp., 615 F. Supp. 262 (N.D. Ga. 1985) ($500,000 to mother of child damaged before birth by spermicidal); Ingraham v. Bonds v. U.S., 808 F.2d 1075 (5th Cir. 1987) ($750,000 for mother's loss of child's society); Trevino v. U.S., 804 F.2d 1512 (9th Cir. 1986) ($400,000 for loss of love and companionship and injury to child relationship--reduced to $100,000); Deering v. U.S., 835 F.2d 226 (9th Cir. 1987) ($300,000 to parents not excessive).  Colleen v. U.S., 843 F.2d 329 (9th Cir. 1987) ($300,000 to parents of damaged child not excessive); Jenkins v. McLean Hotels, Inc., 859 F.2d 598 (8th Cir. 1988) ($600,000 to 9-month-old male for 12 inch cut to thigh--not excessive); Robichaud v. Theis, 858 F.2d 392 (8th Cir. 1988) ($450,000 for 8 percent permanent partial disability to back caused by 5 mph rear-ender--not excessive); Meader v. U.S., 881 F.2d 1056 (11th Cir. 1989) ($6 million for adult quadriplegic from medical accident).
malpractice); Yako v. U.S., 891 F.2d 738 (9th Cir. 1989) (loss of filial consortium-Alaska law—$300,000); Chenault v. U.S., #88-00590ACk (D. Haw. 1990) ($500,000 for each parent). Masaki v. General Motors Corp., 780 F.2d 566 (Haw. 1989) ($1 million for each parent by including negligent infliction of emotional distress, not from witnessing the event, but for caring for victim); Raucci v. Town of Rotterdam, 902 F.2d 1050 (2d Cir. 1990) (no emotional anguish in N.Y. death case—$250,000 reduced to $100,000 for death of 6 year old); DeLeon Lopez v. Corporacion Insular de Seguras, 742 F. Supp. 44 (D. P.R. 1990) (award of $800,000 reduced to $110,000 where grandfather witnessed switching of twins in Hospital nursery); Reilly v. U.S., Civ. #856748P (D. R.I. 1990) (no mental anguish damages to parents of brain damaged at birth child); Heitzenrater v. U.S., 930 F.2d 33 (table), 1991 WL 35198 (10th Cir. 1991) ($750,000 award reduced to $100,000, since mental anguish not permitted in Colorado—award in guise of loss of consortium to wife); Bolden v. SEPTA, 820 F. Supp. 949 (E.D. Pa. 1993) ($350,000 award for emotional injury not excessive where employee was forced to take unconstitutional drug test); Mitchell v. Globe Intern Pub. Co., 817 F. Supp. 72 (W.D. Ark. 1993) ($650,000 award for publishing photo of elderly newspaper carrier without permission was excessive—remitter of $500,000 appropriate); Gough v. Natural Gas Pipeline Co. of America, 996 F.2d 763 (5th Cir. 1993) (award of $1,444,599 for emotional injury to captain of vessel which struck pipeline reduced to $600,000); Marchica v. Long Island R. Co., 31 F.2d 1197 (2d Cir. 1994) (award of $55,000 for fear of AIDS based on accidental stick by hypodermic needle); Pineda v. U.S., Civ. #89-00239DAE (D. Haw., 12 May 1997), later proceedings, Civ. #89-00239DAE (D. Haw., 11 Jul. 1997) ($800,000 to mother and $500,000 to father of damaged child). Jones v. U.S., 9 F. Supp.2d 1119 (N. Neb. 1998) excellent discussion and listing of comparable awards by Federal courts on emotional loss. Spielberg v. American Airlines, Inc., 105 F. Supp.2d 280 (S.D.N.Y. 2000) Thirteen awards totaling $2,225,000 for emotional distress resulting from turbulence during flight except for award to two year old, cites numerous others. St. John v. U.S., 2000 U.S. App. LEXIS 1721 (8th Cir.) $3000 award is adequate for 5-hour arrest in cell with bed and other facilities—no emotional distress as South Dakota requires physical manifestation which was not present. Macsenti v. Becker, 237 F.3d 1223 (10th Cir. 2001)$500,000 to dental patient who was kept on nitrous oxide and other drugs for eight hours by impaired dentist who kept passing out and going outside. This resulted in mild cognitive impairment—$500,000 in additional damage and $3,000,000 total. Fink v. City of New York, 129 F. Supp.2d 511 at 531 (E.D.N.Y. 2001) $300,000 emotional distress award reduced to $125,000 in ADA case—cites innumerable awards. Lloyd v. Am. Airlines, Inc. (In re Air Crash at Little Rock, Ark.) 291 F.3d 503 (8th Cir. 2002) Limitation in Warsaw Convention applies to emotional damage arising out of physical injuries suffered as a result of being in an air crash, reduces $6.9 million to $1.5; Schultz v. U.S., Civ. #3:01-0560 (M.D. Tenn. 18 Dec. 2002) $6 million for disability and amputation of toes and fingers for woman with husband and small children.

30. Toxic Torts

a. Increased Risk of Developing Disease.


e. Cleanup Costs as Property Damage. Is cleanup costs property damage?

(1) Yes - U.S. v. Conservation Chemical Co., 653 F. Supp. 152 (W.D. Mo. 1986); Continental Ins. Co. v. Northeastern Pharm. & Chemical Co., Inc., 811 F.2d 1180 (8th Cir. 1987), later proceedings, 842 F.2d 977 (8th Cir. 1988) (if


31. Setoff. Common law right exists, but not applied to current officer's pay. See Smith v. Jackson, 246 U.S. 388 (1918); McCarl Comptroller General v. Cox, 8 F.2d 669 (D.C. Cir. 1925); McCarl v. Pence, 18 F.2d 809 (D.C. Cir. 1927); 26 Comp. Gen. 907. See also U.S. v. Tafoya, 803 F.2d 140 (5th Cir. 1986) (withholding under Federal Debt Collection Act of Army retired pay not authorized for public defender services, since it is "current pay" not "retirement pay"). Attorney fees awarded under 26 U.S.C. § 7430 are not subject to setoff. Marre v. U.S., 117 F.3d 297 (9th Cir. 1997) (attorney fees awarded under 26 U.S.C. § 7430 may not be setoff under 31 U.S.C. § 3728, since these are “on top” of award to plaintiff).


35. **AIDS Phobia.** Trischler v. DiMenna, 609 N.Y.S.2d 1002 (Sup. Ct. Westchester 1994) (recovery for fear of contracting AIDS permitted where reasonable basis exists--minority rule--includes citations of other cases and law reviews).


37. **Loss of Parental Nurture and Guidance.** Key factor is age of child--more for infants. Moldausky v. Simmons Airlines, Inc., 14 F. Supp.2d 533 (S.D.N.Y. 1998) noncustodial parent dies in air crash - court reduces $200,000 to $100,000 for 20-year-old daughter. $300,000 to $150,000 for 12-year-old daughter; and $550,000 to $250,000 for 16-year-old developmentally delayed son.

**D. What is the Effect of Joint Tortfeasors?** Schrab v. Catterson, 967 F.2d 928 (3d. Cir. 1992) (denial without prejudice of motion to substitute under Westfall Act cannot be appealed); Pelletier v. Fed Home Loan Bank of San Francisco, 968 F.2d 865 (9th Cir. 1992) (denial without prejudice of motion to substitute under Westfall Act can be appealed).


(2) DOJ Certification. After removal, the DOJ will issue a certification, if requested, concerning whether the Federal employees actions or inactions were within the scope of their employment. Sullivan v. Freeman, 944 F.2d 334 (7th Cir. 1991) (public defender is not immune under Westfall Act, even though a Federal employee, because Attorney General was not requested to certify). In issuing the certification, the Attorney General is not required to assume the facts plead are true. Deane v. Light, 970 F. Supp. 465 (E.D. Va. 1997) (citing Melo v. Hafer, 13 F.3d 736 (3d Cir. 1994) and Kimbro v. Velten, 30 F.3d 1501 (D.C. Cir. 1994), cert. denied, 515 U.S. 1145, 115 S.Ct. 2584 (1995)). Courts are split on whether the certification, once made, can be withdrawn. Jamison v. Wiley, 14 F.3d 222 (4th. Cir. 1994) (DOJ can withdraw scope certification and district court can hold evidentiary hearing on whether scope should be granted); Jackson v. Neuger, 783 F. Supp. 558 (D. Colo. 1992) (Attorney General certification of scope may not be withdrawn in sexual assault by psychologist case). The AG’s certification is binding as to removal, but is subject to judicial review as to scope determination and substitution of U.S. as defendant. Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 115 S.Ct. 2227 (1995) (Attorney General’s certification of scope conclusive only as to removal, but not as to substitution). The

(3) Federal Employees In Scope. When Federal employees are within scope of employment, the case against them will be dismissed. See, e.g., Aviles v. Lutz, 887 F.2d 1046 (10th Cir. 1989) (fellow employees in Indian Health Service dismissed under Westfall Act in defamation action); Dimick v. U.S., 952 F. Supp. 323 (M.D. Pa. 1997) (no pendant jurisdiction permitted where tenant sues both landlord-lessee and U.S. as property owner in slip and fall on premises); Andrulonis v. U.S., 724 F. Supp. 1421 (N.D.N.Y. 1989) (CDC employee

(4) Federal Employees Outside Scope. If the Federal employee was not acting within the scope of their employment, the suit will continue against the employee. Guadagno v. U.S., Civ. #4:96-CV-60 (W.D. Mich., 26 Sep. 1997) (Post Office employee involved in fatal accident on way home from work while on indefinite assignment to vacant postmaster job because of special program not in scope—DOJ non-scope despite U.S. coverage of employee’s injuries under FECA); Kassel v. Department of Veterans Administration, 709 F. Supp. 1194 (D.N.H. 1989) (not dismissed under Westfall Act for Privacy Act suit); Williams v. Morgan, 723 F. Supp. 1532 (D.D.C. 1989) (DOJ non-scope in "horseplay" case under Westfall Act); Meridian Center Logistics, Inc. v. U.S., 939 F.2d 740 (9th Cir. 1991) (Attorney General's certification of scope re FBI agent reversed re contacts with foreign countries). See also Tilton v. Dougherty, 493 A.2d 442 (N.H. 1985) (official immunity not applicable to NG physician conducting physical exam). The denial of a substitution motion is interlocutory and unappealable. Schrab v. Catterson, 967 F.2d 928 (3d. Cir. 1992) (denial without prejudice of motion to substitute under Westfall Act cannot be appealed); Pelletier v. Fed Home Loan Bank of San Francisco, 968 F.2d 865 (9th Cir. 1992) (denial without prejudice of motion to substitute under Westfall Act can be appealed)

(5) Analysis of Federal Employee’s Actions. Whether an employee’s actions are within scope or not is analyzed on an act-by-act basis. Nadler v. Mann, 951 F.2d 301 (11th Cir. 1992) (AUSA within scope when arranging meeting between FBI and public office under U.S. v. Smith, 499 U.S. 160, 111 S.Ct. 1180 (1991), but not for leak to press).

b. Healthcare Personnel Immunity. § 1089 and DVA immunity covers health care personnel, including rotating residents, medical students on reciprocal training.
Abraham v. U.S., 932 F.2d 900 (11th Cir. 1991) (Army and Navy residents in training as residents at civilian Hospital are not borrowed servants under Florida law because Hospital did not exercise complete dominion); Quilico v. Kaplan, 749 F.2d 480 (7th Cir. 1984) (DVA "temporary" physician is immune); Green v. U.S., 709 F.2d 1158 (7th Cir. 1983) (USAF surgeon immune while on fellowship in civilian Hospital--not a borrowed servant); Jackson v. Kelly, 557 F.2d 735 (10th Cir. 1977). Such immunity may not be available to contract employees. Walker v. U.S., 549 F. Supp. 973 (W.D. Okla. 1982) (civilian Urologist hired under personal services contract is not immune). Nor may it apply when the government physician is working in a civilian Hospital. Burchfield v. Regents of Univ of Colorado, 516 F. Supp. 1301 (D. Colo. 1981) (Rocky Mountain Arsenal physician not entitled to § 1089 immunity while detailed to University of Colorado Medical Center); Afonso v. City of Boston, 587 F. Supp. 1342 (D. Mass. 1984) (USAF physician held not immune, but loaned servant while in civilian residency); Apple v. Jewish Hospital & Medical Center, 829 F.2d 326 (2d Cir. 1987) (PHS physician working in civilian Hospital--case removed to U.S. court--U.S. pays $199,000 and civilian Hospital pays $889,000); Ward v. Gordon, 999 F.2d 1399 (9th Cir. 1993) (Army resident training in civilian Hospital is both a borrowed servant and loaned servant under Washington law--this permits suit against both the U.S. and the civilian Hospital). Nor may such immunity be absolute. Lojuk v. Johnson, 770 F.2d 619 (7th Cir. 1985) (in view of statutory indemnification, § 4116(c) does not give absolute immunity). Even if immunity applies, another remedy may also be applicable. Heller v. U.S., 776 F.2d 92 (3d Cir. 1985) (can sue USAF physician in Philippines where malpractice occurred or proceed under 10 U.S.C. § 2733 (Military Claims Act)).


(2) State Court Suits. It may allow, however, suits in state court. Anderson v. O'Donoghue, 677 P.2d 648 (Okla. 1983) (§ 1089(f) permits suit in State court and does not require removal to Federal court).


Duke University, Civ. #C-84-211-D (M.D.N.C. 1985) (suit permitted under § 1089(f)).


c. Miscellaneous Immunities.


(3) Testimony. U.S. witnesses cannot be compelled to testify in State proceeding as to information obtained in official capacity. See U.S. ex rel Touhy v. Ragen, 340 U.S. 462 (1951). See also Boron Oil Co. v. Downie, 873 F.2d 67 (4th Cir. 1989) (quashing subpoena of EPA employee to order testimony concerning official investigation). Shanks v. Allied Signal, Inc., 169 F.3d 988 (5th Cir. 1999) under Texas law, testimony given in NTSB hearing is immune as the hearing is quasi-judicial and cannot provide basis for tort of slander.

logger move Will's road grader to place where it is vandalized, under RCW4.22.070 (1) vandals cannot be held at fault nor can logger as he is not a party.

2. Indemnity or Contribution.


c. Proportional Fault. Some states have statutes, which allow defendants only to pay the amount of their proportional fault. Martin By and Through Martin v. U.S., 984 F.2d 1033 (9th Cir. 1993) (Cal. Fair Share Responsibility Act applicable to rapist where U.S. bore certain responsibility for kidnapping of 6-year-old in day care); Mittiga v. U.S., 945 F. Supp. 476 (N.D.N.Y. 1996) (under N.Y. C.P.L.R. § 1471 (McKinney 1991), U.S. held 60% liable where GOV struck pedestrian). However, such laws may have some effect on contribution or indemnity. See, e.g., Yanez v. U.S., 1996 WL 310120 (N.D. Cal.) (U.S. cannot third party joint tortfeasor who settles on a proportional basis under Col. Civ. Code § 877.6 without informing U.S.). Kriese v. Hobbs, 166 F.3d 736 (5th Cir. 1999), distinguishes between pro tanto recovery (modified joint and several) and proportional fault - lists cases from many states. Romero v. Witherspoon, 7 F. Supp.2d 808 (W.D. La. 1998) nonsettling contract physician not entitled to contribution from settling Army Hospital under La. Law. Will v. U.S., 1998 WL 448858 (9th Cir. Wash.) where Forest Service employee and contract logger move Will's road grader to place where it is vandalized, under RCW4.22.070 (1) vandals cannot be held at fault nor can logger as he is not a party. Avitia v. U.S., 2001 U.S. App. LEXIS 26806 (9th Cir.) Where private physician sexually assaults patient in U.S. funded health clinic, $210,000 award should be apportioned between physician and clinic which clinic was held solely liable for failure to use chaperone. Fabre v. Marin, 623 So. 2d 1182 (Supp. Ct. Fla. 1993) Adopts proportional rule even where all tortfeasors are not a party to the action. Haceesa v. U.S., 309 F.3d 722 (10th Cir. 2002) U.S. failure to diagnose hantavirus is followed by similar failure in civilian hospital makes them successive tort feasors and must share liability proportionately.

d. Indemnity. Indemnity may not be sought prior to final judgment and then administrative filing requirement must be met. Johns-Manville Sales Corp. v. U.S., 690 F.2d 721 (9th Cir. 1982); Barron v. U.S., 654 F.2d 644 (9th Cir. 1981). In re Air Crash at Little Rock, Ark. On 1 June 1999, (E.D. Ark. 2000) American Airlines permitted to join U.S. (FAA) for domestic passenger cases only as international passenger’s cases fall under Warsaw Convention on a contractual basis with no
indemnity permitted; Richard v. Freeman, 179 F. Supp. 2d 556 (D. Md. 2002) Where accident victim is malpracticed, offending driver may not seek indemnity as he was an active tortfeasor but he may seek contribution as the combination of his actions and those of treating physicians could have caused the death; Rannels v. Diamond Jo Casino, 250 F. Supp. 2d 829 (N.D. Ohio 2003) Where deck hand fell on ice at DOT firefighting facility while undergoing training and brings Jones Act suit against employer, U.S. not liable for indemnity under common law defenses of natural accumulation.


Bethel Native Corp. v. Department of Interior, 208 F. 3d 1171 (9th Cir. 2000) Where U.S. is sued under FTCA, state is not immunized by 11th Amendment against third party action by U.S.

5. Pendent Jurisdiction.


b. Employer Immunity. Exceptions to immunity of employer should be reviewed.


b. Rental Cars. Damages to rented car should be paid by DFAS processing TDY voucher for U.S. employee who rented car and waived deductible (JTR M 4405(c); JTR C 2101(c)). May be filed either by the employee or by Rental Company. Abrams v. Tranzo, 1997 WL 72179 (11th Cir. Fla.) Tranzo, a USAF officer, had an accident in a rental car while on TDY. U.S. as renter of car cannot recover from USAA, Tranzo's insurer, as a covered person.

November 2003 WEB Edition 314


10. Medical Care Recovery Act. Allows the U.S. to recover when it has expended money for medical expenses. USAA v. Perry, 102 F.3d 144 (5th Cir. 1996) (USAA medical payment is collectible under FMCRA, since it is no-fault); U.S. v. Blue Cross/Blue Shield of Alabama, 999 F.2d 1542 (11th Cir. 1993) (Medigap (Supplemental policy) is recoverable by

11. Collateral Estoppel. The doctrine of collateral estoppel bars the relitigation of certain issues actually litigated and decided in a prior action where a decision on these issues was necessary to the prior decision. See, e.g., Johnson v. U.S., 576 F.2d 607 (5th Cir. 1978) (where U.S. is held liable in earlier suit for murder of another victim in same incident, decision binds different court in suit of another victim); Blohm v. Bradley, 821 F. Supp. 1451
November 2003 WEB Edition 316


E. How is a Claim Investigated?

1. Agency Procedure. By agency involved according to its own regulations and procedures.

2. Specificity of Allegations. Success, particularly in medical malpractice cases, depends upon cooperation by claimant in making specific allegations known.

a. Substantiated.  See I B.3 above for cases stating that failure to substantiate or document renders claim a nullity.

b. Administrative Settlements May Not Be Coerced. Administrative settlements, however, are a voluntary process and may not be coerced.

(1) Ex Parte Contacts.  Ex Parte contact with claimant's private physician should be avoided even though physician-patient privilege has been waived by placing his or her physical condition in issue. Moses v. McWilliams, 549 A.2d.

(2) Claimant Notification of U.S. Physician Contact. Where physician is U.S. employee, claimant should be notified of contact where care is provided for injury complained of. Hippocratic Oath does not serve as an absolute bar to disclosure--oath is waived only for physical condition placed in issue. Green v. Bloodworth, 501 A.2d 1257 (Del. Super. 1985); Moses v. McWilliams, 549 A. 2d. 950 (Pa. Super. 1988); Coralluzza v. Faes, 450 So. 2d. 859 (Fla. App. 1984).


c. Joint Investigation. A joint investigation should be encouraged.

d. Subpoena. An agency has authority to subpoena upon application to a District Court, but the procedure is not used (5 U.S.C. § 304).

3. Avoid Formal Discovery. Formal discovery by deposition should be avoided, as it is costly. It is routinely opposed by the Attorney General.

4. Discoverable Items can be Released Administratively. Anything, which is discoverable under the Federal Rules, may be released administratively. This includes the names of expert witnesses. Requests under FOIA should be processed on this basis. McClellan Ecological Seepage Situation v. Garlucci, 835 F.2d 1282 (9th Cir. 1987) (requests under FOIA for information to be utilized in a tort claim cannot be denied on the basis that there is a commercial interest). Hernandez v. U.S., 1998 WL 230200 (E.D. La.) (Both USPS accident report and USPS driver's personnel file must be released to plaintiff. Owens v. U.S., Civ. #99-CV-267-J (D. Wyo., 14 Aug. 2000) FBI investigation not protected by work product where accused cannot be prosecuted and key witness has loss of memory in Civil action arising from crime.
5. Admissions. Murrey v. U.S., 73 F.3d 1448 (7th Cir. 1996) (reversible error not to admit into testimony admission of Secretary of DVA that poor care contributed to death of patient--while not judicial admission, the statement had evidentiary value).

6. Privacy Act. The Privacy Act may prohibit the release of medical records of patients involved in incidents similar to one being claimed.

7. Rule 408. Rule 408 provides evidence of conduct or statements made in compromise negotiations is not admissible at trial. See Ramada Development Co. v. Rauch, 644 F.2d 1097 (5th Cir. 1981) (excludes architects report). See also Admissibility of Compromise, 72 A.L.R. Fed. 592.


9. Pretrial IME. May be enforced even though claim is still in administrative stage by Fed.R.Civ.P. 35. See Martin v. Reynolds Metals Corp., 297 F.2d 49 (9th Cir. 1961) (used to perpetuate evidence); Vaughn v. Commercial Union Insurance Co. of New York, 263 So. 2d 50 (La. 1972) (outlines procedural steps); Dunlap v. Fields, 2000 U.S. App. LEXIS 14498 (6th Cir.) District Court properly ordered IME in case of prisoner who alleged he did not receive medical care after attack by guards.


### 11. Rule 11 Sanctions.

November 2003 WEB Edition
320


F. What are the Advantages of an Administrative Settlement?

1. Faster. Much faster, including larger claims.

2. Authority to Settle. Each Armed Service and the DVA have $200,000 authority. Chief, Tort Branch, Civil Division and U.S. Attorneys have $1,000,000 (28 C.F.R. Part 0, Subpart Y). Amounts above that must be approved at DOJ for settlement made either by agency or during pretrial.

3. Avoid Court Docket Congestion. Avoids congested court docket. When suit filed, agency loses authority to settle.

4. Trial Preparation Costly and Time Consuming. Trial preparation is both costly and time consuming for both sides.

5. Attorney Fee Structure. Twenty percent fee for administrative settlements is paid as part of one check to claimant and attorney by GAO when payment is made. Twenty-five percent fee paid by court is in separate check and is sometimes lowered by Judge (28 U.S.C. §2678), e.g., filed suit just to increase attorney fees. Doss v. U.S., 659 F.2d 863 (8th Cir. 1981). But see Robak v. U.S., 658 F.2d 471 (7th Cir. 1981) (where limit of less than 25 percent--overturned); Frazier v. U.S., 550 F. Supp. 203 (W.D. Okla. 1982)(where fee is within statutory limits, Judge is not required by statute to set fee).

6. No Jury Trials. There is no jury in FTCA cases, but Judge may call an advisory jury (28 U.S.C. § 2402).


c. **Unknown Future Costs.** In cases where future costs are unknown, settlement of the injured parties' claim may be delayed until costs can be predicted, e.g., brain-damaged newborn's claim can be delayed until age 6. This would be difficult if case is in suit. *Nemmers v. U.S.*, 795 F.2d 628 (7th Cir. 1986) (court can appoint guardian Ad Litem or purchase annuity to protect child's interests); *Reilly v. U.S.*, 863 F.2d 149 (1st Cir. 1988) (while court rejects a medical reversionary trust, future medical expenses are placed in a trust in name of injured party and will revert to U.S. if not utilized by certain age); *Little v. U.S.*, Civ. #88-00591-DAE (D. Haw. 1990) ($3.7 million future
medical put in trust); Wheeler Tarpeh Doe v. U.S., 771 F. Supp. 426 (D.D.C. 1991) (Judge requires parties to develop plan, e.g., annuities, trust or other to avoid the windfall of future medical costs to parents in event of early demise of brain damaged child).


9. **Agency Must Deal With Claimant's Attorney.** While claimant is not required to be represented by an attorney, once one is retained, agency must deal with the attorney.
10. Admissibility of Efforts to Settle. Bradbury v. Phillips Petroleum Co., 815 F.2d 1356 (10th Cir. 1987) (barred by Rule 408, however, settlements in companion cases may be admissible to show incident in question was not result of accident or mistake).

G. What Methods of Negotiation are Used?

1. Variation in Method of Negotiation. Wide variation between agencies.

2. Face-to-Face Negotiation Cost Comparison. Cost of negotiating face-to-face by claims attorneys from one central office should be compared to costs of trying cases.

3. Compliance with Local Practice. Efforts should be made to comply with local practices in regard to negotiation, e.g., who makes first offer.

4. Claimant May Offer Less Then Claimed Amount. Fact that claimant makes offer less than amount claimed does not limit his Ad Damnum to the new amount if he later files suit.

5. Tolling of Limitation Period during Negotiation. The two-year statute of limitations is tolled indefinitely during negotiations.

   a. Claimant does not have to File Suit after Six Months. The claimant is not required to file suit merely because six months since his administrative filing date have expired. McAllister v. U.S.-by-Department of Agriculture, 925 F.2d 541 (5th Cir. 1991).

   b. Six Months to File Suit After Denial. He has six months after final agency action, i.e., denial or final offer.


6. Reconsideration. Final agency actions may be reconsidered by the agency upon written request by a claimant (28 C.F.R. § 14.9).

   a. Tolls Statute of Limitation. Such a request gives the agency another six months to make final disposition thus the six months statute of limitations may be tolled by such a request. Requesting party must be informed by agency that request is being reconsidered to toll six months statute of limitations. Woirhaye v. U.S., 609 F.2d 1303 (9th Cir. 1979).

   b. Same Individual. A settlement may be reconsidered by the approving authority who made it upon request by the claimant for any reason even though payment has been made, provided he is the same individual who originally paid the claim.

   c. Setting Aside Settlement. A successor settlement authority can set a settlement aside only on the basis of fraud, collusion, new and material evidence, or manifest error of fact.

7. **Higher Agency Authority Helpful on Quantum Disputes.** If authority with monetary jurisdiction over the claim cannot effect a settlement solely because of difference of opinion as to quantum, he should be required to forward case to higher agency authority for further settlement efforts.

8. **AG Approval of Tentative Settlements Beyond Agency Monetary Jurisdiction.** On cases beyond monetary jurisdiction of agency, a tentative settlement is arrived at and case forwarded to Attorney General for approval. The required preparation of a detailed legal memorandum, takes three to six months for final action and issuance of check.


10. **Offer of Judgment.** If claimant refuses fair offer of settlement when claim is in administrative phase and files suit, the claimant may be subject to the same offer under Rule 68, Federal Rules of Civil Procedure. If claimant again refuses the offer and wins a judgment less than the offer, the court can award costs to the defendant. Delta Air Lines v. August, 450 U.S. 346 (1981). See also Offer of Judgment Under Rule 68, Drage for the Defense, Aug. 1990.

H. **What are Payment Procedures?**

1. **Payment of $2,500 or Under Claims.** Payment made by agency funds when amount is $2,500 or less. Processing time for mailing of check is several days to a week.

2. **Payment of Larger Amounts.** Payments over $2,500 are processed by financial management service Department of Treasury. Processing time is longer—usually from 4 to 6 weeks. Payment may be made in foreign currency converted as of date of award. Rose Hall Ltd. v. Chase Manhattan Overseas Banking Corp., 566 F. Supp. 1558 (D. Del. 1983); In re Good Hope Chemical Corp., 747 F.2d 806 (1st Cir. 1984) (American law where breach of contract occurred requires conversion rate for currency to be date of breach); Gathercrest Ltd. v. First American Bank & Trust, 649 F. Supp. 106 (M.D. Fla. 1985) (if obligation arises under Foreign law, judgment date determines exchange rate, if it arises under U.S. law, breach date determines exchange rate). See also Hicks v. Guinness, 269 U.S. 71 (1925) and Die Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517, 47 S. Ct. 166 (1926).
3. **Congressional Approval No Longer Needed.** Payments over $100,000 no longer need to be processed by Congress, since 31 U.S.C. § 724a was amended in 1978.

4. **Payment of NAFI Claims.** NAFI claims are paid out of NAFI funds. Civil Works claims are paid out of Civil Works Funds only if $2,500 or under.

5. **Expeditied Payments.** Payments can be expedited provided a request is for hardship or emergency reasons. Hand carrying file is the best method to achieve this.

6. **Death of Plaintiff.** Settlement cannot be set aside where plaintiff dies between settlement and issuance of check. However, EAJA does not require additional attorney fees for additional trial. Reed by and through Reed v. U.S., 891 F.2d 878 (11th Cir. 1990); Davis by Davis v. Jellico Community Hospital, Inc., 912 F.2d 129 (6th Cir. 1990) (plaintiff dies one month after $25 million judgment--no basis to set aside).