

Department of the Army
Pamphlet 27-162

Legal Services

Claims Procedures

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SUMMARY of CHANGE

DA PAM 27-162
Claims Procedures

This major revision, dated 21 March 2008--

- o Restructures by grouping to the extent possible all information on a single topic in one place, and adds cross referencing where it is not. Separates, to the extent possible, policy and procedural guidance, retaining procedure in this publication and moving policy to AR 27-20 (chaps 1, 2, 13, and 14.)
- o Clarifies, streamlines, regroups, and restates information about purpose, roles, and responsibilities within the Army claims system (chap 1).
- o Revises and updates guidance on disclosure of information (para 1-19).
- o Revises and updates guidance on disaster claims planning (para 1-21).
- o Implements a requirement for preparation of a serious incident report when serious personal injury, death, or major property damage may possibly give rise to a claim against the United States (para 2-1c).
- o Adds information about reviewing claims with attention given to compliance with state law requirements (para 2-7b).
- o Clarifies the application of the statute of limitations when claims are revised or amended or new claims are filed after denial or final offer (para 2-8).
- o Expands the special instructions pertaining to the mirror file system regarding placement of the original claim form upon file retirement (para 2-12c).
- o Substantially rewrites guidance on the use of small claims procedures (para 2-14).
- o Regroups and updates guidance pertaining to determining the correct statute (para 2-15).
- o Restates much of the guidance pertaining to claims by contractors for loss or damage to their property (para 2-15g).
- o Clarifies and expands much of the guidance pertaining to postal claims (para 2-15i).

- o Adds guidance on how to process claims resulting from damage to rental vehicles (para 2-15k(2) and 2-62b).
- o Adds guidance on how to determine if certain claims should be paid as trespass or real estate claims (para 2-15m(1)).
- o Revises, updated, and expanded guidance pertaining to the Meritorious Claims Act (para 2-17d(3)).
- o Adds more related remedy statutes (para 2-17h).
- o Adds guidance pertaining to additional information to elicit during claimant interview when a structured settlement may be possible (para 2-23b(10)(g)).
- o Adds requirement to use a digital camera for auto accident scene investigations and provides more specific instructions about the pictures that should be taken. Adds discussion and requirements related to vehicle inspections including crash data recorders (black boxes) (para 2-25).
- o Substantially revises initial guidance related to premises liability claims (para 2-27a(1) and (2)).
- o Adds information pertaining to AR 40-68 and its significance to medical malpractice claims investigations (para 2-34b).
- o Adds guidance on notice and inspection requirements for defective medical devices giving rise to a claim (para 2-34l).
- o Adds guidance pertaining to the handling of media requests for information about medical malpractice claims (para 2-34i).
- o Adds guidance regarding Department of Justice policy requiring that damage to bailed property is excluded by the FTCA exclusion for interference with contractual rights (para 2-39h(6)).
- o Adds requirement that where state law mandates that an affidavit of merit or medical expert opinion be included to file a medical malpractice claim, claimant be so informed in writing prior to final action (para 2-49d(5)).
- o Adds guidance about Military Claims Act prohibition of claims for a child's loss of a parent's consortium (para 2-55e).
- o Adds and updates guidance about the types of losses under wrongful death claims (para 2-55).
- o Expands guidance related to calculating the value of a property damage loss (para 2-56b).
- o Requires that structured settlement agreements be prepared in coordination with the USARCS representative (para 2-63).
- o Clarifies and updates information pertaining to settlement or approval authority (para 2-69).

- o Provides instructions for the use of other than standard settlement agreements, including significant revisions to sample settlement agreements posted to the USARCS Web site (para 2-73).
- o Provides additional guidance on reaching and tendering final offers (paras 2-74b and c)).
- o Adds certain language requirements to be included in final offers in certain circumstances (para 2-75c).
- o Updates guidance pertaining to payment documents (para 2-81).
- o Clarifies payment limitations and procedures for non-combat activity claims (para 3-3b(1)).
- o Clarifies application of the Military Claims Act to claims for rent, utilities, custodial services and incidental damages (para 3-3e).
- o Clarifies application of the Military Claims Act to claims arising in the Federal Republic of Germany and Korea (para 3-4a(1)) and restates the preemptive nature of a status of forces agreement (SOFA) remedy for certain claims (para 3-4a(2)).
- o Clarifies the limitation of only one claim permitted for wrongful death per incident under the Military Claims Act (para 3-5b).
- o Clarifies application of the combat activity exclusion under claims payable under the Foreign Claim Act (para 10-3b).
- o Expands information about solatia payments and moves this information from chapter 13 to chapter 10 (para 10-10).
- o Increases the settlement authority for heads of area claims office and chiefs of command claims services to pay up to \$40,000 (para 11-2d).
- o Clarifies the current rule that only the Commander, USARCS of Chief, Personnel Claims and Recovery Division, USARCS can determine that a loss was due to extraordinary circumstances thereby permitting payment up to \$100,000 (para 11-2b).
- o Changes the rules for processing personnel claims that may have arisen out of the Foreign Military Sales program (para 11-3c).
- o Eliminates provisions on special handling of claims from Corps of Engineers personnel in the Middle East and from AMC personnel (para 11-3c).
- o Clarifies the rule that if a claimant is transferring from one military service to another, the gaining service is responsible for paying the claim, regardless of which service's funds pay for the shipment of the claimants goods (para 11-4b).
- o Permits claims offices to enter other service claimant information into the database (11-4i).

- o Changes the rules for processing of claims from soldiers who are absent without leave (AWOL) (para 11-4k).
- o Changes the rules for processing soldiers whose goods are lost or damaged in shipment following a sentence to confinement. Such claims will no longer be paid under the Personnel Claims Act but may still be paid under the Military Claims Act if negligence by government personnel caused the loss (para 11-4k).
- o Changes the rule for payment under the Personnel Claims Act for damage from balls escaping from the field of play (para 11-5c(3)).
- o Establishes a new rule that claims for mold or mildew damage in quarters are not payable under the Personnel Claims Act but may be payable under the MCA (para 11-5c(3)).
- o Clarifies the rule on securing high value, easily pilfered item, to make it clear that there is no "double lock" rule. Rather all facts and circumstances must be considered to determine if the claimant acted reasonably in secure stolen items (11-5c(4)).
- o Establishes a new rule that it is reasonable to keep a limited amount of sports equipment in the trunk of a privately owned vehicle (POV) for extended periods (para 11-5c(4) (h)).
- o Clarifies the Army's position that privatized quarters on an installation in the United States may be treated as "assigned or provided in kind" so that losses at those quarters are payable, but advises claims offices to seek guidance on USARCS if they receive such a claim (para 11-5d(1)).
- o Includes the requirement that loss or damage to vehicles, even when used for the convenience of the government, is due to extraordinary hazards to be compensable (para 11-5h(1)).
- o Excludes losses to vehicles, being used to travel from one permanent duty station to another, from shipment claims for the purposes of maximum allowance tables and insurance requirements (para 11-5h).
- o Clarifies rules on claims for loss or damage from Self Procured Moves, whether do-it-yourself-moves or private contracts with commercial moving companies (para 11-5e(2)).
- o Clarifies the rule that claims for damage to a POV that is being driven to or from a vehicle processing center for overseas shipment may be payable (para 11-5h(2)).
- o Provides new guidance on paying for items that are being held by law enforcement agencies as evidence. Establishes rule that non-essential items will not be considered "lost" to the claimant unless they are held more than 60 days (11-5k).
- o Clarifies the rules on paying for damage to vehicles rented on government orders (paras 11-5h(1) and 11-6k).

- o Clarifies that only the Commander, USARCS of the Chief, Personnel Claims & Recovery Division, USARCS can determine if "good cause" exists during time of war or armed conflict to extend the two year statute of limitations on filing of Personnel Claims Act claims (para 11-7a).
- o Directs the new guidance to the claims offices to make sure claims instructions are clear about what is needed to file a claim to meet the 2-year filing deadline, and what must be filed to fully support a claim (para 11-7b).
- o Provides new guidance on which offices should handle claims from Army personnel assigned to embassies (para 11-9e).
- o Clarifies the responsibilities of the originating claims office to fully adjudicate claims prior to transfer (para 11-10i).
- o States the policy that was announced in 2003 that claimants do not need to file against private insurance on claims for loss or damage to goods in shipment or storage (paras 11-11 and 11-21a).
- o States the policy that the carrier has the right to claim salvage on all shipment delivered in the United States, not just domestic shipments (para 11-14j(2)).
- o Clarifies the rule on waiver of the maximum allowable limit on the basis of good cause by listing several examples of situations that will normally constitute good cause for waiver (para 11-14b(2)).
- o Changes the rule that military uniforms are not depreciated. Depreciation will now be taken on claims for loss of uniforms (para 11-14g(6)).
- o Establishes a new rule that claimants do not have to provide substantiation of the value or repair cost for any item on a claim on which the total amount claimed is \$500 or less (para 11-14h).
- o Clarifies the basis for denying claims because of the claimant failure to give timely written notice of loss or damage during shipment or storage (para 11-14i).
- o Moves the guidance on mobile home claims from this pamphlet to the USARCS Web site (para 11-14i(6)).
- o Now includes an explanation of the Global POV Contract process for shipping POVs and provides more detailed guidance on processing claims of transit loss or damage to POVs (para 11-14p).
- o Increases from \$2,000 to \$5,000 the amount that claims judge advocates and claims attorneys can approve as emergency partial payments (para 11-18).
- o States that the Chief, Office of the Judge Advocate, U.S. Forces Korea (Claims), has the same authority to act on requests for reconsideration as the Commander, USARCS and the Chief, U.S. Army Claims Service, Europe (para 11-20g(3)).
- o Clarifies the policy on calculating shared liability with the carrier on Code 5, Code T and Code J shipments (para 11-26b(2)(b)).

- Clarifies the rule that insurance company "hold-backs" on full replacement value policies must be considered when determining whether the claimant has been fully compensated by private insurance (para 11-29c).
- Gives more detailed guidance on resolving direct procurement method (DPM) carrier recovery claims through the contracting officer in the event of an impasse (para 11-32e).
- Gives more detailed explanation of the DPM process for shipping household goods and the liability of DPM carriers (para 11-32).
- Gives more detailed guidance on processing claims for lost or damaged accompanied baggage, including the requirement that claimants must file a claim with the airline, or bus company before filing with the government (para 11-33).
- Changes the cost-effective limit at which recovery claims will be asserted against carrier from \$25 to \$50 (para 11-35).
- Provides new guidance on recouping payments from claimants, including a new policy that any recoupment action against a claimant who is not on active duty must be sent to USARCS for involuntary collection (para 11-37).
- Implements new procedures for actions to recoup payments from claimants also includes new formats for demand letters and claimants' response that comply with the Federal Debt Collection Act (para 11-37).
- Adds information regarding application of the federal agency test for claims arising at or in connection with non-appropriated fund activity instrumentality activities or facilities (para 12-1f(1)).
- Adds information about investigation of claims arising at family child care provider homes (para 12-9f(2)(a)(1)).
- Revises the current automated procedures for office administration and claims management (chap 13).
- States importance of identifying the correct claim's statute for purposes of entering claims into one of the automated claims databases (para 13-1e).
- Expands discussion on initial administrative processing of claims from other services (para 13-1g).
- Rearranges, expands, and clarifies procedures for transferring of claims responsibility or files (para 13-2).
- Rearranges, expands, and updates guidance on claims files' organization and maintenance, adding information on establishment of files for potentially compensable events (para 13-3).
- Expands requirement to use certified or registered mail not just on all final actions, but also when sending acknowledgment letters, 30 or 60-day letters, any correspondence that includes HIPAA related documents, and so forth (para 13-5).

- Merges information formerly contained in Chap 13, Section III, Affirmative Claims, into other paragraphs in the chapter designating by subparagraphs when information pertains only to affirmative claims (chap 13, former Section III).
- Updates guidance on how to close abandoned or withdrawn claims, retaining this information in DA Pam 27-162 and removing the guidance on claims files' retention and disposal to AR 27-20 (para 13-4).
- Provides additional information concerning recovery theories (paras 14-1 and 14-2).
- Provides additional instructions regarding third party liability assertions of property damage claims for non-appropriated fund property (para 14-3c).
- Requires use of the Affirmative Claims Management Program database (para 14-6c).
- Adds additional claims investigation techniques and resources (para 14-8).
- Clarifies methodology for military pay calculations (para 14-9b(3)(c)).
- Documents higher settlement amounts for compromise, waiver, or termination of affirmative claims (para 14-11).
- Distinguishes between medical care recovery waiver and compromise (para 14-11b).
- Provides instructions for actions to take when tortfeasors are charged with crimes (para 14-12c).
- Provides additional instructions on installment payments (para 14-12a).
- Provides a much more complete listing of required and related publications and prescribed and referenced forms (app A).
- Adds appendix B, a complete list of all claims processing resources grouped according to their application and subject area as relates to claims processing (app B).
- Updates and corrects all references to the U.S. Code, regulatory and administrative materials throughout the publication.
- Removes materials previously included as figures and refers the reader to the USARCS Web site where these materials are now posted. Reviews and updates all resource materials throughout the publication.
- Examines thoroughly the impact of the Health Insurance Portability and Accountability Act (HIPAA) on claims processing policies and adds text references to and discussion of HIPAA where deemed necessary throughout the publication.


Legal Services

Claims Procedures

By Order of the Secretary of the Army:

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General, United States Army
Chief of Staff

Official:


JOYCE E. MORROW
Administrative Assistant to the
Secretary of the Army

History. This publication is a major revision.

Summary. This pamphlet sets forth procedures for investigating, processing, and settling claims against, and in favor of, the United States. This publication is intended to be read and used in conjunction with AR 27-20, which sets forth guiding legal principles and policy.

Applicability. This pamphlet applies to the Active Army, the Army National Guard/Army National Guard of United

States, the U.S. Army Reserve, the Department of Defense civilian employees under certain circumstances, unless otherwise stated. In countries where the U.S. Army has been assigned single-Service claims responsibility, this pamphlet applies to claims generated by the other armed services. During mobilization, procedures in this publication may be modified to support policy changes, as necessary.

Proponent and exception authority. The proponent of this pamphlet is The Judge Advocate General. The proponent has the authority to approve exceptions or waivers to this pamphlet that are consistent with controlling law and regulations. The proponent may delegate this approval authority, in writing, to a division chief within the proponent agency or its direct reporting unit or field operating agency, in the grade of colonel or the civilian equivalent. Activities may request a waiver to this pamphlet by providing justification that includes a full analysis of the expected benefits and must include formal review by the activity's senior legal officer. All waiver requests will be endorsed by the commander or senior leader of the

requesting activity and forwarded through their higher headquarters to the policy proponent. Refer to AR 25-30 for specific guidance.

Suggested improvements. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to the Commander, U.S. Army Claims Service, 4411 Llewellyn Avenue, Fort Meade, MD 20755-5360.

Distribution. This publication is available in electronic media only and is intended for command levels B, C, D, and E for the Active Army, the Army National Guard/Army National Guard of the United States, and the U.S. Army Reserve.

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Glossary

Chapter 1

Army Claims System

1-1. Purpose

a. Purpose. This publication explains and implements the policies contained in Army Regulation (AR) 27-20. It describes the procedures and responsibilities for investigating, processing, and settling claims arising from, or related to, military operations and activities against, and in favor of, the United States, under the authority conferred by statutes, regulations, international and interdepartmental agreements and Department of Defense (DOD) directives. This text is intended to ensure that claims are investigated properly, analyzed fully, adjudicated objectively and fairly, and paid or denied; or that collection action is initiated as may be appropriate.

b. Relationship of this publication to AR 27-20. To the extent possible and for ease of reference, the chapter and paragraph numbers in this publication correspond with the chapter and paragraph numbers used in AR 27-20. Complete correspondence is not possible since this publication contains much more information and implementing guidance than does AR 27-20. Readers will find, however, that both texts follow the same general order in presenting their subjects.

1-2. References

Required and related publications and prescribed and referenced forms are listed in appendix A.

1-3. Explanation of abbreviations and terms

Abbreviations and special terms used in this regulation are explained in the glossary.

1-4. Claims authorities

a. General. See AR 27-20, paragraph 1-4 for a complete list of federal statutes under which claims are processed under this publication.

b. Additional authoritative materials for claims processing. There are some additional authoritative materials for the processing of claims, mostly of an administrative nature. For a complete listing of all of the supplementary and authoritative materials relevant to claims processing under this publication (as well as under AR 27-20) see appendix B.

1-5. Command and organizational relationships

See also AR 27-20, paragraph 1-5.

a. Creation of an overseas command claims service.

(1) When the Army Command (ACOM), Army Service Component Command (ASCC), or equivalent Staff Judge Advocate (SJA) office determines that a command claims service is warranted to support a deployment, the MACOM or SJA office should request that the Commander USARCS establish a command claims service. A command claims service is normally created only when there are large numbers of active foreign claims commissions (FCCs) in the jurisdictional area that need a single point of contact for service and support and whose activities need to be coordinated to ensure consistency. The request should contain the following information:

- (a) Nature and duration of mission.
- (b) Number of troops.
- (c) Assessment of the claims situation.
- (d) Supplemental claims requirements.
- (e) Justification for an appointment of a command claims service rather than an FCC.

(2) Send the request to the address shown below. The MACOM or SJA will provide continued updates on the claims mission and requirements.

Commander
U.S Army Claims Service
ATTN: JACS-TCF
4411 Llewellyn Avenue
Fort Meade, Maryland 20755-5360
USA

b. Field offices. The Commander USARCS will designate area claims offices (ACO) around the world as well as command claims services for major overseas theaters. The head of an ACO may designate a claims judge advocate (CJA) or claims attorney to act in the capacity of a claims processing office (CPO) with or without approval authority. Because USARCS maintains sole control of funding codes, the Commander USARCS must approve the creation of any new office that has payment approval authority. AR 27-20, paragraph 1-5f, authorizes heads of ACOs to create four types of CPOs. CPOs are those subordinate claims offices within an ACO's geographic area that have approval

authority or investigative responsibility. The first three are permanent; the fourth is intended as a temporary, event-specific extension of the ACO. These claims offices are—

- (1) CPOs without approval authority.
- (2) CPOs with approval authority.
- (3) Medical CPOs.
- (4) Special CPOs.

c. Area claims offices. The ACOs and their subordinate CPOs have geographic areas of responsibility within the continental United States (CONUS) and command areas of responsibility overseas. See the USARCS Web site hosted on JAGCNet (<https://www.jagcnet.army.mil>), at “Claims Resources,” VI, Tables Listing Claims Offices Worldwide. Eight separate tables are shown, titled: Single-Service Responsibility Assignments, Army National Guard Offices, Central and South American Offices, Army Corps of Engineers Offices, European Claims Offices, Korean Claims Offices, Receiving State Offices in Germany and Korea, and Continental U.S. Claims Offices.

d. Reserve Judge Advocates. To ensure the best possible Army claims program, CONUS ACOs will whenever possible use Reserve JAs located in their areas for investigations and legal research. Reservists may earn retirement points for working on such projects. USARCS and the National Personnel Records Center in St. Louis, Missouri (314-801-9250 or cpr.center@nara.gov), may assist in identifying Reservists with claims experience.

1-6. Designation of claims attorney

See also AR 27-20, paragraph 1-6.

a. Claims approval authority. A settlement authority may delegate to a CJA or a claims attorney the authority to approve a claim for payment in whole or in part. Authority to deny, make a final offer or reconcile prior to final action may not be delegated. A JA is automatically qualified to approve claims upon assignment to a claims position provided the amount of monetary authority is stated in writing either by an office directive or individual delegation. A DA civilian attorney is not automatically qualified to approve claims and must be designated as set forth below.

b. Designations. The head of a command claims service or an ACO should designate, in writing, each CJA, claims attorney, or subordinate CPO having payment approval authority. A sample memorandum designating a claims attorney, including statutory and applicable monetary limits, is posted on the USARCS Web site at “Claims Resources,” II, a., no. 23.

1-7. The Judge Advocate General

The Judge Advocate General (TJAG) has supervisory authority over USARCS. The Deputy Judge Advocate General (DJAG) is the settlement and appellate authority for claims under the Military Claims Act (MCA) and National Guard Claims Act (NGCA) where the claimed amount is not more than \$100,000. DJAG advises the Secretary of the Army’s (SA’s) designees on MCA, NGCA, Army Maritime Claims Settlement Act (AMCSA), National Agreements Claims Act (NACA), and Foreign Claims Act (FCA) claims on which the SA is the settlement authority. See also AR 27-20, paragraph 1-7.

1-8. Army claims mission

The Army Claims system began early in World War II when the MCA and FCA were passed to ensure that the presence of huge numbers of troops would be acceptable both within the United States (U.S.) and in foreign countries by providing a system for compensating torts. By the time of the passage of the Federal Tort Claims Act (FTCA), the first statute to provide a limited waiver of sovereign immunity with access to federal courts, the Army system was well developed and successful as the mission was interpreted from the outset to follow the Congressional edict to pay meritorious claims. The policy has continued to the present and has resulted in a highly developed system which engages all levels of command through over 100 field offices under TJAG and USARCS. Deployments, maneuvers, and disasters demand basic teamwork. During natural disasters the Personnel Claims Act (PCA) must be used to compensate service members for loss of things essential to performing their duties and sustaining their families. PCA losses must be compensated quickly and fairly with the same goal in mind. See also AR 27-20, paragraph 1-8.

1-9. Responsibilities of the Commander, U.S. Army Claims Service

The Commander, USARCS is director of the Army claims system and is responsible for publishing and interpreting AR 27-20 and this Pam as well as providing policies and guidelines through other media. The commander decides which areas of geographic responsibility are assigned to field offices as well as which offices will process specific claims. The commander has the authority to grant exceptions from AR 27-20 not in violation of any law or other publication that has the force of law. This paragraph is supplemental information: a complete outline is located at AR 27-20, paragraph 1-9.

1-10. Command claims services

The commander of a major command through his SJA may institute a claims service to process claims arising in foreign countries with the concurrence of the Commander, USARCS. The service may be an integral part of the commander’s office or a separate organization. In either case a JAGC field grade officer should be designated as chief

or commander unless the SJA wants to be chief. SJAs are responsible for claims operations within their command theater of operations or outside that area wherever the predominant troop is from their area of deployment. Where indicated, SJAs should seek single service responsibility through the theater commander from the Office of the General Counsel of the DOD, with concurrence of the Commander USARCS. This paragraph supplements AR 27–20, paragraph 1–10 information where there is a complete list of responsibilities and operations of command claims services.

1–11. Area claims offices

This paragraph supplements AR 27–20, paragraph 1–11 where there is a complete listing of responsibilities and operations of area claims offices.

a. The ACO is the primary office that investigates and processes claims. It is staffed with qualified legal personnel under the supervision of the SJA, command JA, chief counsel, or U.S. Army Corps of Engineers (COE) district or command legal counsel.

b. Heads of ACOs may designate offices from other installations within their areas as CPOs to receive, investigate, and process claims. Only offices having a CJA or claims attorney may be designated as CPOs with payment approval authority. Before a CPO may be granted payment approval authority, the Commander USARCS must approve the designation and furnish a command and office code. Where a proposed CPO is not under the command of the ACOs parent organization, a support agreement or memorandum of understanding between the affected commands may accomplish this designation.

1–12. Claims processing offices

The responsibilities and operations of various types of claims processing offices are discussed at AR 27–20, paragraph 1–12.

1–13. Chief of Engineers

See also AR 27–20, paragraph 1–13.

a. All engineer districts are ACOs and deal directly with the Commander, USARCS on matters of claims adjudication and processing, including mirror file requirements, unlike ACOs in other ACOMs or ASCCs. However, the Chief of Engineers General Counsel has a major role in litigation and must be kept abreast of claims likely to be litigated. FTCA claims have a mandatory six-month period for administrative resolution before claimants can file suit. Such claims therefore cannot be routed to USARCS through COE channels. COE offices must send the original file directly to USARCS and route an informational copy to their higher authority.

b. COE personnel should be used to provide expert and technical advice on claims arising out of both COE and non-COE activities and operations. Typically, the claim may involve damage to a building, bridge, road or other man-made structure or real property. The requesting ACO or CPO should provide temporary duty (TDY) funding but such assistance is otherwise not reimbursable.

1–14. Commanding General, U.S. Army Medical Command

See also AR 27–20, paragraph 1–14.

a. Several agreements concerning the designation and utilization of medical claims judge advocates, medical claims attorneys, and medical claims investigators require dedication of such personnel to the investigation and processing of medical malpractice claims, as well as affirmative claims under AR 27–20, chapter 14. Two agreements between the JAGC and the U.S. Army Medical Department, dated June 1984 and June 1993, are posted on the USARCS Web site at “Claims Resources,” I, f, nos. 1 and 2. These duties take priority over other duties due to the statutory time limits placed on the processing of FTCA claims. The early recognition and investigation of potentially compensable events (PCEs) in accordance with AR 40–68 and close relationships with the medical and hospital staff are keys to timely processing.

b. Army Medical Treatment Facilities (MTFs) are charged with furnishing assistance in conducting independent medical examinations (IMEs) for claimants against the Army regardless of whether the claimant is an eligible beneficiary. Authority for such assistance is found in AR 40–400, paragraph 3–47. These examinations will be conducted after the requesting claims personnel furnish all medical records or other pertinent data. The response will be in writing and cover specific questions asked by the requestor. Claimants’ attorneys are excluded from the actual examination itself.

1–15. Chief, National Guard Bureau

See also AR 27–20, paragraph 1–15. The designated point of contact for each state should deal directly with only one ACO. Where there is more than one ACO located in a state, the designated ACO should serve as liaison for other ACOs located in that state. The responsible ACO should ensure that the names and locations of all unit claims officers as provided by the National Guard point of contact are available for use by ACOs and CPOs. ACOs and CPOs will

deal directly with National Guard unit claims officers where indicated. See the USARCS Web site for a state-by-state list of National Guard active duty liaison offices and claims offices at "Claims Resources," VI, a.

1-16. Commanders of major Army commands

See also AR 27-20, paragraph 1-16. Prior to a maneuver, the responsible SJA of the command planning the maneuver should ensure that adequate funds are provided to pay for damages or losses that may occur on land whose use is obtained by permit by the designated COE district. In addition, property damages or losses should be paid for or eliminated by the use of troop labor and equipment. This approach does not require using claims procedures under AR 27-20. Only if it is unsuccessful is there a need for filing of written claims under the MCA. See paragraph 2-26a.

1-17. Claims policies

See AR 27-20, paragraph 1-17 for important claims processing policies of general applicability to all claims.

1-18. Release of information policies

See also AR 27-20, paragraph 1-18. In an Army claims setting, the responsible attorney may not release classified material or material that violates the Privacy Act, 5 U.S.C. § 552a, or other laws or regulations. Relevant statutes include the Privacy Act, the Freedom of Information Act (FOIA), 5 U.S.C. § 552 and the Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. §§ 1320d through 1320d-8. Unclassified attorney work product may be released, with or without a request from the claimant or attorney, whenever such release may help settle the claim or avoid unnecessary litigation.

a. Information to be gathered as part of a serious incident investigation. Prior to filing a claim prospective claimants frequently request Military Police (MP) reports, Army Accident Reports, Criminal Investigation Division (CID) reports, medical records, Inspector General (IG) reports, AR 15-6, Investigations and other documents, some of which may be non-exempt in whole or part under the FOIA. These requests are processed by the creating activity or agency (for example, the chief of staff, adjutant, MTF records administrator, provost marshal, CID, safety officers). Claims personnel should establish a procedure to ensure that they are informed of the request and furnished a copy of the document released for claims purposes, including affirmative claims. For example, requests by attorneys or subjects of records for copies of medical records should be coordinated with claims personnel. If upon inquiry the requester states that he or she intends to file either a claim against the U.S. or an affirmative claim, claims personnel should create a file which includes a copy of the requested records and begin an investigation. See AR 40-68 and AR 40-400.

b. Information gathered after filing a claim.

(1) Release of documents indicated in a above should be controlled by claims personnel once they become part of the claims file. The guiding principle is that settlement of claims is a voluntary act by the claimant and necessitates a cooperative environment that engenders the free exchange of information and evidence when the claimant and his attorney are cooperative. Material releasable under the Federal Rules of Civil Procedure (Fed. R. Civ. P.) as well as unclassified attorney work product should be released in a free exchange of information, where the claimant or his or her attorney are cooperative, with a view to settling a claim or avoiding unnecessary litigation. Keep a list of all documents released to maintain compliance with HIPAA. At the outset of a claims investigation claimants must execute an authorization for the Army to obtain copies of medical records. Later authorizations may also be required as later sources of care are discovered. In addition, similar releases, executed by consulting physicians, are also required under HIPAA for medical records to be forwarded for expert review and medical consultations. Formats for these releases and assurances are posted on the USARCS Web site ("Claims Resources," II, c, nos. 15 and 16). See also paragraph 2-7, claims acknowledgment.

(2) Generally, work product may be released or withheld by the attorney who gathered the information under the work product exemptions under FOIA. *Hickman v. Taylor*, 329 U.S. 495 (1987), Fed. R. Civ. P. 26(b)(3), 5 U.S.C. § 552(b)(5) FOIA exemptions. Work product includes written recordings of interviews, statements, memoranda, briefs, correspondence, documents containing mental impressions or personal notes written by an attorney or under an attorney's direct control. Unit claims officers' reports are not work product and not exempt.

c. Quality Assurance Reports.

(1) Medical QA records are both confidential and privileged (see 10 U.S.C. § 1102). Health care providers (HCPs) and any other participants in QA activities are precluded from testifying about QA records, committee findings, actions, opinions, and recommendations. When asked for advice on the release of medical records, CJAs or claims attorneys should review the statute carefully to determine if the record is a QA document. Congress sought to remove the courts' discretion by legislating that QA records are not subject to discovery and may not be introduced into evidence. QA records are also exempt from release under FOIA. Therefore, CJAs and claims attorneys must carefully consider the information they release to claimants or their attorneys during settlement negotiations. Once a CJA or claims attorney obtains QA information, further disclosure may be made only to those persons or entities statutorily authorized to obtain it. Investigation reports conducted for other than QA purposes are discoverable and not exempt from release. Such an investigation may be conducted pursuant to AR 15-6, either by the MTF commander or MEDCOM. It may include witness statements given either to the investigator or written separately and used by the QA

committee. The fact that such material is included in the QA file and marked as a QA document does not preclude its release unless the investigation is conducted specifically for QA purposes, AR 40–68, appendix B–4.

(2) The QA statute lists specific exceptions to the general prohibition against disclosure of QA information. These exceptions permit disclosure to Army claims personnel for use in investigating and processing claims. However, if Department of Justice (DOJ) approval of a settlement is necessary, QA documents may not be used to support the request. Where DOJ or the U.S. Attorney specifically requests QA information, the request must be based on absolute necessity and release coordinated with Army Litigation Center.

d. Doctor or patient disclosures. Doctor or patient disclosures are discoverable by claims personnel and not exempt. While a treating physician or dentist has a responsibility to keep a patient or patient’s family fully informed during and after treatment, such disclosures should not constitute judgments about either past or ongoing medical care. Physicians and dentists are legally obligated to make full and frank disclosure even when doing so could give rise to a claim, AR 40–68, paragraph 12–4e(4). They are not obligated, however, to inform the patient that the medical treatment was negligent or that the previous HCP did not meet the standard of care. Such statements are admissible in evidence.

e. Presidential, congressional or inspector general inquiries. When responding to presidential, congressional or inspector general (IG) inquiries about an actual or potential claimant, ACOs should screen their responses to ensure that they contain only factual material, not admissions of negligence or failure to meet standards of care. This requires close coordination with the IG and commander’s designees, who also respond to such inquiries. Many attorneys who are familiar with procedures encourage their clients to make inquiry with a view toward obtaining admissions against interest that are admissible in evidence. This guidance should in no way detract from the duty to reply honestly and completely.

1–19. Single-service claims responsibility

See also AR 27–20, paragraphs 1–19, 1–20, 2–13, and 13–2 as well as this publication at paragraphs 1–20, 2–13, and 13–2.

a. Delegation of claims responsibility. The Army is responsible for processing DOD claims; see Department of Defense Directive (DODD) 5515.9. The ACOs should obtain a list of all DOD and Army installations and activities in their area. This includes: active installations; posts and depots; Army Reserve and Army National Guard units; armories; training sites; recruiting battalions; Reserve Officer Training Corps (ROTC) units; DOD contracting activities; Defense Reutilization and Marketing Offices (DRMOs) and Department of Defense Dependent Schools (DODDS) (which may be located on U.S. Navy or Air Force bases); and Defense Investigative Agencies. Department of Defense Commissary Agency (DECA) claims are governed by a Memorandum of Understanding (MOU), which imposes claims responsibility on the post or base at which the incident occurred. Tables listing claims offices worldwide are posted to the USARCS Web site at “Claims Resources,” VI.

b. Assigned areas. Single-service claims processing responsibility has been assigned by Department of Defense Instruction (DODI) 5515.08.

c. Unassigned areas. In the absence of assigned claims responsibility in certain countries, unified and specified commanders may when necessary implement contingency plans and as an interim measure only, assign single-service claims responsibility in accordance with the DOD General Counsel’s guidance.

d. Notification to U.S. Army Claims Service. The SJAs and other claims authorities should inform the Commander, USARCS whenever the Army has been assigned single service responsibility for a foreign country. This ensures that USARCS will receive information enabling it to respond efficiently and effectively to inquiries on policy issues from the legal staff of the Joint Chiefs of Staff or other agencies and field commands. Additionally, USARCS can advise field claims offices of any changes in the assignment of single-service responsibilities and provide required assistance.

e. Where another military department has single-service claims responsibility. Claims against and in favor of the United States resulting from activities of the U.S. Army or DA Soldiers or civilian employees in a country for which another military department has been assigned single-service claims responsibility will be investigated by the Army and referred to that department for settlement.

f. Inquiries. Field claims offices may address questions concerning single-service responsibility to the Commander, USARCS. It is advisable to contact the Foreign Torts Branch to ascertain issues that may be of import to an assigned area.

1–20. Cross servicing of claims

This topic has a direct relationship to “single servicing” and transfer of claims among armed service branches. Accordingly, please see AR 27–20, paragraphs 1–19, 1–20, 2–13, and 13–2 as well as this publication at paragraphs 1–19, 2–13, and 13–2.

1–21. Disaster claims planning

a. Definition. A disaster is an occurrence that results in large numbers of personal injuries or deaths, or extensive property loss or damage, as a result of Army or DOD operations or activities. Examples include an explosion of ordnance, release of toxic chemicals or nuclear materials, fire, or the crash of an Army aircraft (including North Atlantic Treaty Organization aircraft in the U.S.). Natural disasters such as a hurricane, tornado, or flood are not

included because they are not the result of Army or DOD operations and activities, even though the Army is required to participate in federal response. Likewise, civil disturbances are not included for similar reasons. Other procedures may apply if a claim is being processed under Personnel Claims, chapter 11.

b. Responsibility. The ACO in whose geographic area a disaster occurs is responsible for the processing and settlement of claims unless the Commander USARCS is responsible.

c. Requirements. The ACOs will develop and publish a disaster plan and furnish a copy to USARCS. In the event of a disaster, a quick response is required. The plan will be staffed within the installation to ensure that staff agencies are aware of their responsibilities. The plan should include that the servicing Defense Finance and Accounting Service (DFAS) office will be requested to establish a procedure to make immediate payments. The material and documents required in the Checklist of Disaster Readiness Materials and Supplies will be kept readily accessible. See the checklist posted on the USARCS Web site at "Claims Resources," II, A, no. 2.

d. Actions.

(1) Notice of the nature and extent of the disaster will be given by the ACO to the USARCS area action officer. If necessary, the CJA will visit the scene to determine the cause and extent of the damage, which service is responsible, and whether a claims team will be deployed. Prior to deployment of a team, USARCS will be informed to determine if additional support is needed. A decision will be made as to whether claims will be paid and under which statute. Any advance payments must be made under the MCA or FCA under the conditions set forth in paragraphs 2-71 and 11-18 based on the theory that the claims arise out of noncombat operations. A special claims processing office will be established.

(2) Assistance from local authorities will be obtained in selecting and establishing a claims office. Its location will be widely publicized through local media and local authorities. Claims will be filed, investigated and processed as set forth in chapters 2 and 11.

(3) Claims officers must be appointed as quickly as possible through the area claims office and the appointed officers must be deployed to the location of the disaster to establish a claims office.

(4) The appointed claims officers must be equipped with cash for immediate payment of claims. Alternatively, they must be accompanied by a financial officer who is equipped with cash and authorized to pay claims. Three points of contact need to be made immediately to ensure that cash is made available. First, contact Defense Finance and Accounting Service (DFAS) in Rome, NY and the USARCS budget office. Second, notify the Director of Military Pay Operations, if one is nearby. Next, draft a Paying Agent Memo in the format of the sample posted on the USARCS Web site at "Claims Resources," II, a, no. 4. The sample format for this memo must also be included in the Area Claims Office Disaster Readiness Kit. DFAS will provide instructions as to whom the memo should be addressed and submitted, as this may vary from case to case. A list of procedures to ensure timely payment of claims in the event of a natural disaster or other emergency is also posted on the USARCS Web site, at "Claims Resources," II, a, no. 3.

(5) If the disaster is in an area where a SOFA exists, the receiving State will process the claims; however, the U.S. will still provide the cash for payments.

1-22. Claims assistance visits

a. Purpose. The commanders of USARCS and the command claims services have initiated claims assistance visits (CAVs) to encourage administrative uniformity within claims offices, to share successful time and work management practices among offices, and to ensure that claimants receive consistent, high-quality service throughout the Army. These visits emphasize assistance rather than inspection and are conducted at field claims offices.

b. Scheduling. USARCS and command claims services will schedule visits with the SJA of the particular installation. The visits are made periodically, in response to specific requests from the field, or when review of field office operations indicates an apparent need.

c. Focus. During a CAV, the team examines all aspects of claims office management (see the Claims Assistance Visit Checklist posted on the USARCS Web site at "Claims Resources," II, a, no. 1).

d. Completion. After the visit, the CAV team members provide the SJA with an out briefing on the strengths and weaknesses found as well as an opportunity for immediate feedback and clarification. Upon their return to USARCS or the command claims service, CAV team members prepare a written after-action report, submitting one copy each to the commander and the installation SJA. Information from these reports may be provided to OTJAG for use on Article 6 of the Uniform Code of Military Justice, visits.

e. Claims assistance visits in Europe. In Europe, U.S. Army Claims Service Europe (USACSEUR) (<https://claimseurope.hqusaEUR.army.mil>) conducts periodic claims management evaluations, conducted in accordance with subparagraphs a through d, above, to help field claims offices evaluate their operations. These evaluations may be based on a field claims office's or SJA's need or request. However, USACSEUR visits each office at least once every two years and provides after-action reports to the CJA, the appropriate SJA and the Chief, Personnel Claims Division, USARCS.

f. Claims assistance visits in the Republic of Korea. In the ROK, the Office of Judge Advocate, U.S. Forces Korea

(Claims) (FKJA-CL) (<http://8tharmy.korea.army.mil/ClaimsSvc/>) conducts quarterly CAVs to the ACOs and CPOs located in ROK, Japan, and Okinawa.

1–23. Annual claims award

a. Procedure. At the end of the fiscal year USARCS will distribute forms for completion by all claims offices desiring to be considered for an award for the quality and quantity of work performed by all members of the command claims services, both AAOs or CPOs. An office is eligible for consideration even if it only performs one function, for example, a medical CPO.

b. Criteria. The evaluation considers the type and number of personnel dedicated to processing claims, both personnel and tort as well as affirmative claims. Criteria include processing time and method of ensuring a quick, fair result. Claims prevention is an important factor.

Chapter 2 Investigation and Processing of Claims

Section I Claims Investigative Responsibility

2–1. General

a. Chapter overview. This chapter addresses investigating, processing, evaluating, negotiating and settling tort and tort-related claims. Investigating, evaluating, and negotiating chapter 14 affirmative claims should be conducted in accordance with this chapter as applicable. Chapter 11 sets forth procedures for processing personnel claims. In certain instances, claims initially considered under the Personnel Claims Act (PCA) must be considered in tort. In these instances, follow the procedures in this chapter. See also paragraphs 1–20 of this publication and of AR 27–20, regarding cross servicing of claims.

b. Teamwork on investigations. Claims investigation is a team effort between the U.S. Army Claims Service (USARCS) area action officers (AAOs), area claims offices (ACOs), including U.S. Army Corps of Engineers (COE) districts, claims processing offices (CPOs) and unit claims officers. Investigation should begin immediately after an incident that may give rise to a claim, also called a potentially compensable event (PCE). See AR 27–20, paragraph 2–2a for a definition of a "claims incident." Affirmative claims require investigation whenever a U.S. Soldier, active or retired, a civilian employee, or their family members are injured or killed by a third-party tortfeasor and receive medical care at government expense, or when a third party destroys, damages or takes government property. The claims investigation gathers information both adverse and favorable to the government; it should include an interview of the claimant(s) when possible.

c. Serious incident reports. A directive should be published requiring serious claims incidents to be reported and the method of investigation discussed with the ACO from the onset. See the USARCS Web site at "Claims Resources," II, a, no. 24 for a sample format for an instructional memorandum for how to report PCEs. The ACO will furnish a copy of such directive to the Commander USARCS. A serious incident report describes serious personal injury, death or major property damage from which a claim for or against the U.S. Army may arise. Such incidents will be reported as a high priority to the USARCS AAO to determine whether immediate action, including the use of experts, is required to protect the U.S. interest, to minimize the impact and to determine whether a disaster claims plan should be implemented. See paragraph 1–21 for more information on disaster claims planning. This requirement applies worldwide to all units and claims processing offices and medical claims processing offices, as well as to any other Department of Defense (DOD) or Army organization. In addition, this requirement applies to the injury or death of active duty or retired service members or their family members as well as to civilians treated at U.S. expense. The report shall contain the date and place of the incident, the type of incident (for example, vehicle collision, air crash, medical incident, and so forth), the organization involved, the names and status of the injured parties, and the nature and extent of the damage.

d. Geographic concept of responsibility. See also paragraphs 1–19 of AR 27–20 and of this publication describing single-service claims responsibility.

(1) The ACO, or CPO where delegated, in whose geographic area a claims incident occurs has primary responsibility for initiating the investigation. When Department of the Army (DA) or DOD personnel are assigned to an organization located in another ACO area, the investigators involved must conduct a joint investigation; the primary responsibility remains with the ACO in whose area the incident occurred unless a formal transfer is arranged. Worldwide geographic areas of responsibility are shown in tables posted on the USARCS Web site at "Claims Resources," VI, Tables Listing Claims Offices Worldwide.

(2) When an incident involves several ACOs (for example, when personnel travel in a convoy or on temporary duty (TDY) status or fly over another ACO's area), a joint investigation is required. However, the ACO of the area in which the incident occurred retains responsibility. A more difficult situation arises when a medical malpractice incident occurs

at one medical treatment facility (MTF) and the patient is transferred to and treated at an MTF in another area. The second MTF may belong to another armed force or it may be a civilian care facility. Frequently, the actual site of the claims incident is discoverable only after reviewing all the medical records. A transfer of responsibility may be in order. See section III, Processing of Claims. If serious injury or major property loss involves more than one ACO, consult the AAO and assign responsibility accordingly.

2-2. Identifying claims incidents both for and against the government

A claims investigation begins when claims personnel learn of an incident that has the potential for liability, not when the claim is filed. The ACO or CPO should use all available information sources to learn of potential claims.

a. Reports from persons who know about the incident are the best source of information about potential claims. Claims offices that enjoy strong relationships with other units and activities on the installation or in their geographic area of responsibility have the best chance to learn about an incident right after it happens. It is also important for claims personnel to coordinate within the Office of the Staff Judge Advocate (OSJA).

b. At a minimum, the CJA, claims attorney or other qualified person should screen the following sources of information daily to discover potential claims:

- (1) Military Police (MP) blotters.
- (2) The MP and Criminal Investigation Division (CID) reports forwarded for coordination to the military justice section of the local Staff Judge Advocate office.
- (3) Serious incident reports.
- (4) Hospital emergency room logs and composite health care system (CHCS) reports.
- (5) Local newspapers.
- (6) Congressional and Presidential inquiries.
- (7) DA 4106 (Quality Assurance/Risk Management Document) used in Army MTFs.
- (8) Inspector General (IG) inquiries and investigations (maintaining a good relationship with this office is especially important).
- (9) Safety reports.
- (10) Attorney requests for documents and records.

c. Potential claims are often discovered when claimants or their attorneys request claim forms or medical records. Always ask why they are requesting a claim form or medical record and obtain as much information as possible about the potential claim. If the claim is obviously not compensable, inform the claimant or the attorney without delay. For example, if the potential claim is barred by the Feres doctrine (*Feres v. United States*, 346 U.S. 135 (1950)), let the claimant or attorney know this immediately and explain your position. This practice helps the civilian attorney evaluate the decision to represent the claimant and file a claim. This advice should be given only by a claims judge advocate (CJA) or claims attorney, who should prepare a memorandum of the conversation for the potential claim file. Never advise a potential claimant or attorney not to file a claim but rather state that a proper claim must be filed in order to bring suit under the Federal Tort Claims Act (FTCA) or an appeal under the Military Claims Act (MCA), National Guard Claims Act (NGCA) or the Foreign Claims Act (FCA).

2-3. Delegation of investigative responsibility

a. U.S. Army Claims Service. The USARCS maintains technical supervision over all claims offices and provides guidance on specific claims. It may do so at any point in the claims process. Its guidance may cover the method of claims investigation and disposition, particularly when the amount claimed is beyond an ACO's or CPO's monetary jurisdiction. An ACO or CPO may not act independently to settle or transfer such a claim unless USARCS has specifically delegated to it the authority to do so. USARCS acts through the AAO who has responsibility for an ACO's or CPO's geographic area. USARCS AAOs, ACOs, and CPOs should develop a close working relationship with each other that encourages an atmosphere of mutual cooperation, creating a free exchange of ideas or legal theories. An ACO or CPO should view USARCS, based on its broader experience and knowledge of precedent, as a valuable information resource. Nevertheless, ACO and CPO personnel should freely express their opinions about the law, damages, or payment of a claim to the AAO.

b. Claims processing offices. CPOs are those posts, depots, or other organizations, including DOD depots and activities, that employ CJAs or claims attorneys. CPOs always maintain investigative responsibility for claims incidents arising out of their activities. A CPO may be assigned an area of investigative responsibility upon coordination between the ACO and the appropriate commander. A CPO has claims approval authority upon delegation by an ACO of such authority to a CJA or claims attorney. ACOs are encouraged to designate depots or small posts, including DOD activities, as CPOs, particularly if the area assigned to an ACO includes a large area of more than one state. ACOs should designate all CPOs in their geographic area of responsibility and notify each CPO's commander of such designation. Those so designated should be assigned an office code as set forth in AR 27-20, paragraph 13-1b.

c. Unit claims officers. Commanders or heads of DOD and Army components are required to appoint a unit claims officer to conduct an initial factual investigation. Organizations, including on-post units that generate a significant claims load, should appoint a unit claims officer on standing orders with instructions to coordinate investigations with

the appropriate ACO or CPO when an incident's potential value is over \$50,000. ACOs should develop a serious incident reporting system to ensure that unit claims officers immediately notify the ACO or CPO of a claims incident. Unit claims officers may report on DA Form 1208, Report of Claims Officer, or for a motor vehicle accident on SF 91, Motor Vehicle Accident Report. To obtain blank copies of both forms see the heading for section III of appendix A for Web sites where blank copies may be downloaded.

d. Special claims processing offices. AR 27–20, paragraph 1–12, explains the necessity for, and sets forth the role of, the special claims processing office. When a claims incident occurs that will generate a large number of claims requiring immediate investigation, an ACO should consider establishing such an office. If the ACO does not have sufficient personnel to accomplish the mission, it should seek assistance from the appropriate major command (MACOM) in coordination with the USARCS AAO.

e. Medical claims processing offices. Medical claims incidents should always be investigated by a CJA or claims attorney assigned to an ACO or CPO, with any technical assistance necessary provided by a USARCS AAO, by virtue of two agreements between the Judge Advocate General (TJAG) and the Surgeon General (posted on the USARCS Web site at "Claims Resources," I, f, nos. 1 and 2). The ACOs whose area contains an Army medical center are assigned a medical claims judge advocate (MCJA) or medical claims attorney to operate a medical CPO. In the Federal Republic of Germany (FRG), responsibility for processing all medical malpractice claims arising in any MTF has been delegated to the MCJA or medical claims attorney, Landstuhl Regional Medical Center and the staff judge advocate (SJA), European Regional Medical Command. A CJA or claims attorney should conduct the investigation of all medical claims at Army MTFs that are not AMCs. Routine contact should be maintained with the MTF risk manager, who is required to screen PCEs and review DA Forms 4106 (Quality Assurance/Risk Management Documents) and maintain contact with the MTF staff. See AR 40–68 for a detailed description of these procedures. The MCJA, CJA, or claims attorney should conduct an investigation independent of any MTF investigation, such as those conducted by quality assurance (QA) or risk management (RM) committees or pursuant to AR 15–6. The MCJA, CJA, or claims attorney should advise the QA or RM committee and participate in its procedures to the extent required. However, if a QA or other investigation results in a credentialing review process, the center judge advocate (JA) or SJA, not the MCJA or CJA, should provide legal advice to the credentialing committee.

Section II

Filing and Receipt of Claims

2–4. Procedures for accepting claims

a. Initial contact with claimant. Treat all persons who request claim forms or information about filing a claim as potential claimants. Each claims office should maintain a system for handling these inquiries. Standing operating procedures (SOPs) should ensure that potential claimants are able to speak quickly with an attorney, investigator, or examiner. Unit claims officers and other investigators should interview an injured party or contact the injured party's attorney, if represented, and request an interview. Before such meetings, the ACO or CPO should instruct unit claims officers on proper claims filing procedures, including entering the appropriate ACO or CPO's address.

(1) Use the initial discussion with the potential claimant to establish a good relationship and to learn as much as possible about the claim. Be courteous and interested. If the potential claimant comes to the claims office, try to conduct an interview immediately. Arrange for follow-up interviews and close contact. If the request is made by telephone, screen the caller carefully and obtain details on the incident. Try to arrange to have the person visit the claims office to obtain forms or information, and be ready to conduct a follow-up interview. If the request is in writing, respond with a telephone call. Obtain the writer's telephone number and discuss the request directly. The goal is to have the claimant visit the office or to otherwise establish close contact with the claimant.

(2) People often visit the claims office to ask about filing forms. Interview them immediately to extract as much information as possible about the claim, especially the damages sustained. Developing a good relationship with the claimant at the outset facilitates both further investigation and ultimate settlement. Before conducting the interview, always ask if the potential claimant is represented by an attorney.

(3) Treat each inquiry as a serious potential claim until it proves otherwise. Open a potential claim file and prepare a memorandum for record of any statements the inquirer makes. If a claimant calls about a traffic accident and asks about filing a claim for damage to an automobile, assume that there may be personal injuries or other property damage. Begin the investigation as soon as you hear of the incident. If the claimant's inquiry is the first anyone knows of the incident, start the investigation by interviewing the claimant immediately.

(4) Potential claimants should never be advised not to file a claim even where it is obvious that the claim does not fall under AR 27–20's authority or, if it does, is not payable, for example, because it is incident to service or because of the statute of limitations. If another remedy exists, claimants should be advised of that remedy. Claimants should be furnished SF 95, advised of the statute of limitations, and told to file with the ACO that has jurisdiction. If the latter cannot be determined the claimant should file with USARCS. Under the FTCA, an administrative claim must be filed prior to filing suit.

(5) Where a claim for property damage is filed and there are known injuries, the claimant shall be informed of the split claims procedure, detailed in paragraph 2–70, to insure the property damage settlement is proper.

b. The Standard Form 95, Claim for Damage, Injury, or Death. Set forth below are block-by-block instructions on the proper way to complete an SF 95, Claim For Damage, Injury or Death. These instructions should be referenced as claim forms are reviewed. They will serve as a guide to identifying deficiencies in the form. A sample completed SF 95 is posted on the USARCS Web site at "Claims Resources," I, a, no. 28.

(1) *Block 1.* Claim forms handed out by your office should be stamped or overprinted with your office address. This helps claimants mail the form to the proper address. If the claimant completes the form and lists more than one address, the claims office should be aware that a transfer or designation of lead agency may be needed. If the claim is being filed with more than one federal agency or non-government defendants, the claimant should be requested to furnish the identifying information on all addresses.

(2) *Block 2.* The claimant's name is the first indication of the type of claim being presented. While a claimant cannot be required to furnish their social security number (SSN) in order to file a claim in medical malpractice cases, the patient's or spouse's SSN is needed to locate the medical records.

(a) Each claimant should submit a separate claim form. For example, if spouses are filing for personal injury and loss of consortium, each files a form. If both claims are presented on the same form, send new claim forms to the claimant, but separately log all the claims properly presented on the one form.

(b) If a person is filing a claim on behalf of another person, the names and addresses of both should be listed. The claim is not filed in the name of the agent, and the legal title of the representative must be listed. For example, if the person presenting the claim has a power of attorney to file a claim, the words "agent for" followed by the claimant's name should follow the name of the agent.

(c) Proof of representative capacity must accompany the claim form. For an agent, it is the power of attorney or other document indicating representative capacity. For an executor or administrator of an estate, it is a copy of the court appointment. For a person filing on behalf of a corporation, it is proof that the person signing the claim is authorized to file a claim on behalf of the corporation. Local forms should be devised for this purpose. Note that the same person cannot sign both the claim form and the letter designating that person as a representative of the corporation. A sample format is posted on the USARCS Web site at "Claims Resources," II, a, no. 12.

(d) Attorneys hired by a claimant do not have representative capacity by virtue of their agreement to represent the claimant. An attorney must present a power of attorney or other document that contains specific authorization to file a claim form on behalf of the claimant. A retainer or employment agreement is not sufficient for this purpose unless it contains language specifically empowering the attorney to present the claim.

(e) Ask the claimant's representative in writing to provide a copy of the basis for representative capacity. If the statute of limitations has not expired, inform the representative that the statute of limitations has not been tolled by receipt of the claim form. If the representative produces a document that was effective as of the date the Army received the claim, the claim is properly filed. If the document was prepared in response to the request for proof of representative capacity, the claim is probably defectively filed (because the representative was not appointed at the time the claim was filed), and the representative should be asked to fill out a new claim form. An exception to this is the corporate representative. Research state law to determine whether the corporate representative was authorized to file the claim.

(f) In some cases, the representative may have a separate claim from that of the claimant being represented. For example, a wife might have a power of attorney to present a claim on behalf of her husband for personal injury to both. The representative should prepare two claim forms.

(3) *Blocks 3 through 5.* This information must relate to the claimant, not the representative. In a death case, information should relate to the deceased.

(4) *Blocks 6 and 7.* For most claims, this will be the date of the accident or incident causing injury. If the discovery rule applies in a medical malpractice claim, the dates the alleged malpractice occurred should be listed. An in-depth interview with the claimant on this point will be necessary and should be conducted immediately.

(5) *Block 8.* Facts alone are not enough. The claimant must be encouraged to explain why the claimant believes he or she has a claim against the United States. The goal is to determine if the claimant or the claimant's attorney has investigated the claim.

(a) Some attorneys and claimants try to evade this requirement by inserting the words "see attached accident report" or similar language. Even if the accident report seems to provide a basis for liability, it is only one version of the facts and not necessarily the claimant's version.

(b) A similar tactic is followed in medical malpractice cases. Attorneys will often simply refer to medical records without commenting further, or they will just list a series of events without indicating why they believe the care was substandard. Attorneys who use this practice are often trying to get an investigation and settlement without investigating on their own to support the claim. In medical malpractice cases, it is crucial that claimants specify what care they believe was improper and what injury resulted from it.

(c) When a claim form is presented without the required explanations, the claim form should be acknowledged and considered properly filed. However, the claimant should be informed in writing that the filing is insufficient and that further information is needed to support the claim. Further, in a medical malpractice case the claimant should be asked

for the identity of any physician who told the claimant the care was substandard. The claim will still be investigated. The claimant's attorney should be advised of the need for an expert opinion except in a case of obvious liability.

(6) *Blocks 9 and 10.* These blocks should contain specific information. Inform the claimant that the property damage or injuries must be described in detail or compensation cannot be paid. Do not allow the claimant to include damage estimates or medical bills by reference without an explanation.

(7) *Block 11.* The usual problem here is the tendency of the claimant to list only names on an accident report or in the medical records. Be sure full names and addresses are listed. SF 95 does not require the claimant to list telephone numbers for witnesses, but this information should also be requested. In addition, ask the claimant to list the names and addresses of other persons who are not in the reports but who know about the incident.

(8) *Block 12.* A sum certain must be listed, broken down by property damage, personal injury, and wrongful death. The amounts must be totaled.

(a) The term "sum certain" means the amount of money the claimant seeks as compensation for the loss; an actual dollar figure must be listed on the claim form. Words such as "uncertain" or "to be determined" do not satisfy this requirement.

(b) If a claimant is unable to break down the amount of the claim in blocks 2a through c, simply ask the claimant to list a total figure in block 12d. Inform the claimant, however, that the amounts must be broken down before the claim can be paid.

(9) *Block 13a.* Compare the claimant's signature with the name in block 2 and other documents in the file. It should be signed as it appears in block 2, and it should be the claimant's signature. Inquire about any discrepancies you find. Attorneys often sign their names to a client's claim. Be alert to the practice.

(10) *Block 14.* The claimant must fill this out. But remember that the true (or legal) date of the claim is the date the Army receives the form. See paragraph 2-9. The acknowledgment letter spells this out.

(11) *Blocks 15 through 19.* Insurance data are mandatory. Many people refuse to list insurers for fear that the Army will contact their company and their insurance premiums will rise. The information must be filled out whether or not the claimant has filed an insurance claim.

c. Additional points to consider when reviewing a claim.

(1) A claimant need not fill out a claim form to file a claim. A claimant may file a claim by delivering to any Army activity a writing that seeks a sum certain (see para 2-5), signed by the claimant or an authorized representative, and containing enough information to allow the Army to begin investigating the incident that gave rise to the claim. Thus, treat any writing that meets this requirement as a claim. It should be logged and entered into the claims database. However, every claimant should fill out and file a claim form, even if the jurisdictional requirements are met by letter. An SF 95 contains information needed to process the claim. When a claim is filed jointly, a sum certain must be furnished for each claimant. Frequently, when one spouse is injured, both spouses' names appear on the claim. One spouse claims for personal injury and the uninjured spouse claims for loss of consortium, but they furnish only one sum. Similarly, when a minor child is injured, the parents' names, both individually and as natural guardians, appear, but they furnish only one sum. Such claims are defective because each claimant, that is each person claiming, must name a sum certain. Where the claimant refuses to state a sum certain for each claimant, log the joint claim as two claims and use the same sum certain as the amount. This rule applies equally to class action claims. All claimants involved in a class action should file separate SF 95s. Remember, for Financial Management Service (FMS) to pay a claim, each claim sent thereto must exceed \$2,500. A joint payment cannot meet this requirement. Joint claims should be avoided from the outset.

(2) Issues relating to whether the claim was properly filed may be raised long after the claim is filed. Therefore, claims personnel must identify all written materials accompanying the claim in some way that allows others to know what documents were originally filed (such as on a specially marked list). These accompanying written materials may correct defects in the claim form.

(3) A claim form may be returned to the claimant only when the information it contains is insufficient to determine which federal agency is responsible for processing the claim. Even in that case, however, retain a copy of the claim form in a potential claim file along with an explanation of the circumstances. In all other situations, retain the claim form and inform the claimant that the claim has not been validly filed and the reason why it is defective. If a claim form requires correction, either ask the claimant to fill out a new one or have the claimant correct, initial, and date it in person.

2-5. Identification of a proper claim

A claim is defined as a written document signed by the person suffering a loss or injury or that person's legal representative, which states a sum certain and identifies the PCE sufficiently to permit investigation thereof. See the Federal Tort Claims Handbook (FTCH) § 1, B, generally. When a claimant is represented by an attorney the claim should include a separate letter or memorandum, signed by the claimant, expressly authorizing the legal representative or agent to file on behalf of the claimant. Failure to include this document may be remedied at a later date and does not mean that the claim is improperly filed. A claim may be transmitted by letter or fax if it meets these requirements. A foreign claim arising under AR 27-20, chapter 10, may be presented orally provided that it is reduced to writing not

later than three years from the date of accrual. A claim for property loss is limited to the loss of, or damage to, actual tangible property. Consequential damages are not compensable. Claims must be filed with the federal agency whose acts or omissions gave rise to the claim. Section III, Processing of Claims, below sets forth procedures for transferring a claim filed with the wrong federal agency. A claim must be filed not later than two years from the date of accrual or the date on which the injured person discovered the injury and the cause thereof. Infants and incompetents are held to the same two-year filing period. There is no requirement that the injured person know that the injury or damage resulted from a negligent or wrongful act or omission (FTCH § I, D). The claimant must submit certain supporting documents as required by 28 C.F.R. § 14.4, the Attorney General's Regulations implementing the FTCA, and as outlined on the reverse side of the SF 95. Non-receipt of such documents at the time of filing is not a basis for holding that the claim was not timely filed. However, a claimant's refusal to provide supporting documents may lead to dismissal of a subsequent suit based on failure to adhere to the Federal Tort Claims Act's (FTCA) implementing regulations, *McNeil v. United States*, 508 U.S. 106 (1993). Under the FTCA, a claimant has an absolute right to sue six months from the date of filing a proper claim with a federal agency. Therefore, it is necessary to obtain sufficient documentation as soon as possible to adjudicate the claim. Under other statutes, such as the Military Claims Act (MCA), claims may be denied for failure to provide documentation. See AR 27-20, paragraph 2-38. In computing the time remaining under the statute of limitations, exclude the first day and include the last day, except when it falls on a non-business day, in which case extend it to the next business day (FTCH § I, D). Where a claim names two claimants and states only one sum certain, courts have consistently held that this is a proper claim. Nevertheless, try to obtain a sum certain for each claimant as this will be required for administrative processing and payment.

2-6. Identification of a proper claimant

- a. AR 27-20, paragraph 2-6, identifies persons who may present a claim.
- b. Subrogated claims are permitted only under the FTCA and the Army Maritime Claims Settlement Act (AMCSA). See AR 27-20, chapters 4 and 8. Such claims are excluded under all other statutes. See AR 27-20, chapters 3, 5, 6, and 10.
 - (1) The claims of the subrogor (insured) and subrogee (insurer) for damages arising out of the same incident constitute separate claims. Except under the FTCA, the aggregate of such claims may exceed the monetary jurisdiction of the approval or settlement authority as long as each individual claim seeks an amount less than that monetary jurisdiction.
 - (2) A subrogor and a subrogee may file a claim jointly or individually. A fully subrogated claim will be paid only to the subrogee. Whether a claim is fully subrogated is a matter to be determined by state law. Some jurisdictions permit property owners to file for property damage even though their insurer has compensated them for repairs. In such instances, obtain releases from both parties in interest, either jointly or severally. The approved payment in a joint claim will be made by joint check, issued to the subrogee unless both parties specify otherwise. If separate claims are filed, payment will be by check issued to each claimant to the extent of his or her undisputed interest. See section IX, Settlement Procedures, below.
 - (3) When a claimant has made an election and accepted workers' compensation benefits, research the jurisdiction's statutory and case law to determine to what extent acceptance of such benefits extinguishes the injured party's claim against third parties. In those cases in which election fully extinguishes the claim, the workers' compensation insurance carrier is the only proper party claimant. Even when the injured party's claim has not been fully extinguished, most jurisdictions hold that the workers' compensation insurance carrier has a lien on any recovery from the third party and no settlement should be reached without approval by the carrier. However, claims from the workers' compensation insurance carrier as subrogee or otherwise will not be considered payable if the United States has paid the premiums, directly or indirectly, for such workers' compensation insurance. Also, the appropriate contract provisions from the workers' compensation contract that hold the United States harmless should be referred to in the settlement agreement. See section X, Payment Procedures.
 - (4) Whether medical payments paid by an insurer to its insured may be subrogated depends on local law. Some jurisdictions prohibit insurers from submitting these claims, notwithstanding a contractual provision providing for subrogation. Therefore, research local law before deciding the issue, and include the results of this research when forwarding claims for adjudication. See Section VI, Determination of Damages. Such claims, where prohibited by state law, are also barred by the Anti-Assignment Act, 31 U.S.C. § 3727. See AR 27-20, paragraph 2-6f.
 - (5) Exercise care to require insurance disclosure consistent with the type of incident generating the claim. Every claimant will disclose in writing, as part of the claim:
 - (a) The name and address of every insurer.
 - (b) The type and amount of insurance coverage.
 - (c) The policy number.
 - (d) Whether a claim has been or will be presented to an insurer and if so, the amount of the claim.
 - (e) Whether the insurer has paid the claim in whole or in part or has indicated that it intends to do so.
 - (6) If a delay between the filing and settlement dates occurs, update insurance information to avoid double payment. All subrogees must substantiate their interest or right to file a claim by appropriate documentary evidence. They should

support the claim as to liability and measure of damages in the same manner required of any other claimant. Documentary evidence of payment to a subrogor does not constitute evidence either of governmental liability or amount of damages. Approval and settlement authorities will make independent determinations on these matters, based upon the evidence of record and the law.

c. Joint or successor tortfeasors frequently present claims for contribution or indemnity before making payment to the injured party. While such claims do not accrue until payment is made, consider a joint settlement where there is an outstanding claim against the United States and proportionate liability exists. See section VIII, Negotiations.

d. A claim presented by other than an injured person or subrogee is excluded by the Anti-Assignment Act (31 U.S.C. §3727), subject to certain exceptions.

(1) The Anti-Assignment Act bars every purported transfer or assignment of a claim against the United States or any part of or interest in a claim, whether absolute or conditional. It also bars transfer or assignment of every power of attorney or other purported authority to receive payment of all or part of any such claim.

(2) The Anti-Assignment Act was intended to eliminate multiple payment of claims, to cause the United States to deal only with original parties, and to prevent persons of influence from purchasing claims against the United States.

(3) In general, this statute prohibits the voluntary assignment of claims. It does not apply to transfers or assignments made by operation of law. The operation of law exception has been held to apply to claims passing to assignees because of bankruptcy proceedings, assignments for the benefit of creditors, corporate liquidation, consolidations or reorganizations, and where title passes by operation of law to heirs or legatees. For example, subrogated workers' compensation claims, when presented by the insurer, are cognizable.

(4) Subrogated claims arising pursuant to contractual provisions may be paid to the subrogee if recognized by state statutory or case law. For example, an insurer under an automobile insurance policy becomes subrogated to the rights of a claimant upon payment of a property damage claim. Generally, such subrogated claims are authorized by state law and are therefore not barred by the Anti-Assignment Act. In addition, payments of subrogated claims may be made pursuant only to the FTCA and the federal admiralty statutes.

e. Before paying claims, it is necessary to determine whether a valid subrogated claim under federal or state statute or a subrogation contract held valid by state law exists. If there is a valid subrogated claim forthcoming, withhold payment for this portion of the claim. If it is determined that the claimant is the only proper party, full settlement is authorized.

2-7. Claims acknowledgment

The claimant is responsible for properly filing a claim. A claimant is entitled to assistance in filing claims, including crucial information about the statute of limitations. A claim must be filed within two years of the date the claim accrues; if not filed within that time, the claim is not properly filed.

a. Acknowledging defective claims.

(1) The best way to acknowledge a claim is to telephone or e-mail the claimant or attorney and then send a letter confirming the conversation. The administrative claims procedure is intended to allow investigation and settlement of claims before they result in litigation or appeal. This is best done by establishing and maintaining close contact with the claimant or claimant's attorney.

(2) Sometimes a claim is defectively filed near the expiration of the statute of limitations. In such cases, acknowledge the claim by telephoning or e-mailing the claimant or attorney and describing the defect. Place in the claim file a memorandum of all attempts to contact the claimant and of discussions held with the claimant. Mail a letter confirming the conversation to the claimant or attorney or place a copy of the e-mail in the file. If time is of the essence, instruct the claimant or attorney to file the corrected claim with the nearest Army office (such as a recruiting or Reserve Officers' Training Corps (ROTC) office) or send it by facsimile (fax) or other expedited means.

b. *Initial review of incoming claims.* Claims should be reviewed with a view to insuring compliance with state law requirements, particularly where court approval might be required prior to payment. Review each SF 95 block by block in accordance with the instructions set forth in paragraph 2-4b. Wrongful death claims may be filed by a personal representative where state law consolidates both claims by the estate and survivors' claims and only one claim is permitted. This is the rule for MCA claims (AR 27-20, para 3-5c(1)(a)) as well as in certain states. In FTCA cases claimants should be advised in writing to follow the law of the state where the act or omission that caused the death occurred. Similarly, this is the rule where each survivor listed in the state wrongful death act files individually in addition to the claim of the estate. Where the attorney in question does not represent all survivors, for example, the separated spouse in a minor's death case, all survivors must agree to the settlement. Where state law does not permit parent-child loss of consortium claims in a personal injury claim, such a claim must be withdrawn or denied prior to settlement. Accordingly, the claimants should be informed initially upon filing that such a claim is not payable.

c. *Acknowledgment by letter.* Five sample acknowledgement letters are posted on the USARCS Web site at "Claims Resources," II, c, nos. 1 through 5. They are identified respectively as follows: acknowledgment letters (for), FTCA, MCA, Defective Claim, Amended Claim, and Request for Reconsideration. A properly written acknowledgment establishes the date of filing, notifies the claimant of the administrative requirements to process the claim, and explains

any deficiencies in the claim. Acknowledgment letters are not required under small claims procedures provided the receipt is otherwise acknowledged. Adhere to the following instructions when sending acknowledgment letters:

(1) *Certified mail.* Acknowledgment of a defectively filed claim should be sent by certified mail, return receipt requested.

(2) *Date stamp.* Date stamp a copy of the claim to reflect the date the Army received the claim. Attach a date-stamped copy to the letter to the claimant to show that the claim has been received and processed.

(3) *Medical records.* Whenever the processing of the claim either for or against the United States requires the use of either governmental or civilian medical records, provide a completed "Release for Use of Medical Records," and "Explanation of Privacy Rights Under the Health Insurance Portability and Accountability Act (HIPAA)." Samples of both are posted at USARCS Web site at "Claims Resources," II, c, nos. 13 and 14. (HIPAA was made effective April 14, 2003 and implemented by Department of Defense Directive (DODD) 6025.18-R.) Furnish the forms along with a self-addressed envelope as part of the claims acknowledgment. Request that the claimant execute the forms and return them. Under HIPAA, a claims office cannot obtain, use, or disclose protected health information obtained after April 14, 2003 without the consent of the person to whom the medical information applies. If during the course of your investigation you learn of other health care records for which a release has not been obtained, provide the claimant with another medical release under HIPAA for signature. In this situation make sure the release for medical records specifically names the facility from which medical records will be procured. The failure of the claimant to provide a medical release could result in denial of the claim based on the DA's inability to investigate or determine liability absent the right to use the medical information as set forth in the medical release. Any suit filed subsequent to the denial or expiration of six months may be contested on the basis that no administrative claim has been filed, which is a jurisdictional prerequisite to filing suit.

d. Acknowledging properly filed claims. Take the following steps in preparing the acknowledgment letter:

(1) Analyze SF 95, block by block, to ensure the claim is properly filed. A claim may be properly filed even though SF 95 is improperly completed. As long as the claim meets the criteria for a properly filed claim in paragraph 2-5 above, the statute of limitations is tolled. However, address any defects in the acknowledgement letter. For example, omission of the claimant's date of birth does not affect filing. However, the date of birth is necessary to evaluate a personal injury or wrongful death claim. When the claimant has failed to provide certain information on a properly filed claim form, advise the claimant why the missing information is needed.

(2) After studying the materials submitted by the claimant or claimant's attorney, send an acknowledgment letter requesting the specific materials you need to evaluate the claim.

e. Acknowledging improperly filed claims. If the claim does not meet the jurisdictional requirements for a properly filed claim in para 2-5 above, treat it as a potential claim. The acknowledgment letter should clearly state the defects (see subpara c above). The letter will also contain the substance of any discussions held with the claimant or claimant's attorney concerning defective filing of the claim.

(1) It is inappropriate to fail to acknowledge a defectively filed claim in the hope that the statute of limitations will run and bar the claim. Whether or not the claimant is represented by an attorney, acknowledge the claim. Claims personnel will not assume that an attorney is responsible for discovering any defect in a claim filed by the attorney on a client's behalf. A claimant or claimant's representative is entitled to an acknowledgment that specifies all errors in the claim and explains the effect of any filing errors.

(2) In the acknowledgment letter, inform the claimant of the statute of limitations and advise that the claim, as filed, does not toll the statute of limitations. Language covering this point is contained in the sample acknowledgement letter posted on the USARCS Web site (see subpara c, above). Enclose an SF 95 for each claimant and a self-addressed envelope with the acknowledgment letter. When the claim is defectively filed and the statute of limitations is about to run, promptly notify the claimant of the defect before the statute of limitations runs. Telephone notice is appropriate in such cases.

f. Action on claims determined to be defectively filed after acknowledgment. The requirement to inform claimants of defects continues as long as the claim file is active. When a defect is discovered after acknowledgment, inform the claimant at once of the defect and its nature.

g. Requests for medical records. Army claims representatives are entitled to a copy of all Army medical records from an Army medical treatment facility, AR 40-68, chapter 12. If the claimant has been treated by other than U.S. Army medical treatment facilities or health care providers, the acknowledgment letter should request that a copy of all such records be furnished or the claimant should be provided a release for his signature authorizing the AAO or CPO to obtain the records. The release should specifically state the dates and places of treatment and the identity of the health care provider where known. Such a release is requested to obtain records from other government treatment facilities including those of the Departments of Veterans Affairs, Navy, Air Force, Public Health Service and Coast Guard.

h. Health Insurance Portability and Accountability Act. The HIPAA precludes the use of medical information by other government agencies, civilian entities, expert or consultants without the consent of the patient. Enclose a copy of a release and authorization (see subpara c(3) above) to permit such use with the acknowledgement letter for any claim including personal injuries or wrongful death. This will permit an ACO or CPO to seek medical review of the injuries

by personnel at the local MTF, by an independent medical expert, or from a variety of other sources, for example, vocational rehabilitation services, brokers, insurance companies or economists. The acknowledgement letter (see subpara c above) should contain a paragraph stating that failure to sign the authorization could result in the denial of the claim, emphasizing that the claimant has the duty to document the claim and failure to do so renders the claim a nullity. Further, any ensuing suit under the FTCA could be barred by failure to file an administrative claim, a jurisdictional prerequisite to an FTCA suit. Under other chapters a denial is authorized for failure to document, AR 27–20, paragraph 2–38.

2–8. Revision of filed claims

See also AR 27–20, paragraph 2–8.

a. New claims.

(1) The acknowledgment letter should inform the claimant that the claim is a new claim. If the new claim is considered under the FTCA, inform the claimant that the six month period during which suit may not be filed starts as of the date of receipt. If the new claim is clearly received after the two year statute of limitations has expired, the claimant should be so informed in the acknowledgment letter and asked to withdraw the claim. If it is not withdrawn, deny it. If the accrual date of the statute of limitations is in doubt and must be investigated, so inform the claimant but do not deny the claim.

(2) If the original claim has been denied, a new claim as defined in AR 27–20, paragraph 2–8, may be accepted and considered provided it is filed not later than two years from the date of accrual. A claim withdrawn from suit constitutes a new claim and must be filed not later than two years from the date of accrual or the sixty day period for filing set forth in 28 U.S.C. §2679.

(3) A party may be added only if the additional party could have filed a companion claim initially. If the party has a separate cause of action, the claim is a new claim, not an amendment and must be filed not later than two years from the date of accrual. Examples are loss of consortium or services in marital or parent-child relationships.

b. Amendments.

(1) A claim may not be amended after denial has been taken or a final offer has been made by a settlement authority who has been delegated denial authority under AR 27–20.

(2) Where the insured has filed a property damage claim and has been paid by the insurer, the insurer may file an amendment to the insured's claim as the real party in interest even though the amendment is received after the expiration of the statute of limitations provided that the insured's claim for property damage has not been denied or a final offer made.

Section III Processing of Claims

2–9. Actions upon receipt of a claim

a. The ACO or CPO will date stamp all copies of a claim, including the SF 95, on the date it receives a claim. For dating purposes, the claim, if jurisdictionally defective, will be considered a PCE and any written demand on an SF 95 will be considered a claim. Neither the absence of a claimant's signature or a sum certain nor an improper signature precludes dating. However, the claimant must be informed immediately of any deficiencies as set forth in paragraph 2–7 above. If the two-year statute of limitations is at issue, the stamped date should reflect the date the post mailroom receives the claim. Maintain a system by which the claims office is made aware of such date by the post mail handlers; for example, the post mailroom might date-stamp the incoming envelope. The ACO or CPO employee who date-stamps the claim will supply either initials or signature for identification.

b. If a unit or organization that has no Army claims office receives a claim, it should nevertheless date-stamp the claim in the manner prescribed above. Upon receipt of a claim without a date stamp, the ACO or CPO should ascertain the date of its receipt and record this information on the chronology sheet placed in the claims file. Receipt of an Army claim by the U.S. Air Force, Navy, or any DOD organization tolls the statute of limitations. Receipt by another federal agency does not. Receipt of a tort claim against the Army by a state does not toll the statute of limitations, unless it is received by a full-time officer or employee of the Army National Guard (ARNG).

c. As soon as possible after receiving the claim, an ACO or CPO will enter it into the database using the next available claim number in the series assigned to that particular office, as required by paragraph 13–1. Enter the claim number on the claim itself and in the claim file. Thereafter it should appear on all correspondence and documents.

d. If the claim is based on an incident occurring in another ACO's geographic area, close the file and transfer it to that ACO, which will continue to use the same assigned claim number when entering the claim into the database. The following examples illustrate proper procedure:

(1) A unit from Fort Stewart debarks at San Diego and proceeds by military convoy to Fort Irwin. A collision between a military vehicle and a civilian vehicle occurs in Fort Irwin's area of responsibility. The civilian vehicle is driven by a resident of northern California whose San Francisco attorney files a claim for personal injury, in the amount of \$1 million, at the Presidio of Monterey. The Presidio should date stamp the claim, assign a claim number,

transfer it to Fort Irwin for processing, and submit a copy to USARCS. Fort Stewart should assist Fort Irwin in the investigation.

(2) A Louisville, Kentucky, Reserve unit's vehicle crashes into an office building in eastern Tennessee while en route to Fort Bragg for two-week annual training. A claim is filed with the Reserve unit for damage to the building, but the unit does not respond. A Congressional inquiry to the Pentagon is referred to Fort Knox, Kentucky. That office should contact the claimant and direct the claimant to the correct ACO, which is Fort Campbell.

e. When other uniformed services' claims offices are involved, the same general guidelines should apply. However, a claim under AR 27-20, chapter 11, is payable by the Army only when filed by a Soldier or by a DOD civilian employee. If a claim by a member of another uniformed service is payable under AR 27-20, chapters 3 and 4, and also under the Personnel Claims Act (PCA), refer the claim to the member's service for a determination whether it is so payable and, if not, request its return for the Army's consideration. See AR 27-20, paragraph 1-20, on cross servicing of claims. Finally, mutual assistance between uniformed services' claims offices in the investigation and processing of claims is a long-standing policy that Army personnel should follow.

f. Transfer all companion claims simultaneously. Transfer those filed later to the same office upon receipt. If the transferring office will play a role in processing, investigating, or settling the claims, duplicate as much of the file as necessary and retain it until all claims are closed.

g. When USARCS receives a new claim from a field office it will use the claim number given to it by that office. If USARCS receives a claim which has not yet been assigned a number and decides to keep responsibility for it (for example, a claim on which it may take final action without investigation), it will assign the claim one of its own office numbers.

h. Tables listing claims offices worldwide are posted to the USARCS Web site at "Claims Resources," VI.

2-10. Opening claims files

a. Open a potential claim file when an incident occurs that could result in a claim either in favor of, or against, the United States. This decision may be based on:

(1) Receipt of information concerning an incident which results in the initiation of a claims investigation as required by AR 27-20, paragraphs 2-1 and 2-2.

(2) Receipt of a request for records or other documentation by, or on behalf of, a potential claimant, indicating a potential claim either in favor of, or against, the United States.

b. Create and mark all such files as potential claims. Arrange them alphabetically by the name of the injured party.

c. Upon concluding the investigation and determining the facts and circumstances surrounding the incident, maintain the file as "active" until a claim is received, or for six months after the statutory period for filing a claim has expired.

d. Actual presentation of a claim in writing will require the opening of a claim file or the conversion of a potential claim file to an active one.

2-11. Arrangement of file

Maintain all tort claim files in standard order as prescribed in this paragraph. Following a standard format permits personnel to review the contents and prevents oversights or mistakes caused by overlooking a document in the file or failing to recognize that a document is missing. Forward all files transferred to USARCS in this format, unless USARCS has previously received all documents as a result of compliance with the mirror file system.

a. File standards. The following rules apply to all tort claim files:

(1) When possible, use a six-sided folder (available through supply channels) to contain the file contents. The following parts of the claim file correspond to the sides of such a folder. (A six-sided folder is not required for files less than one-half inch thick.)

(2) Subdivide parts into sections and sections into subsections. A table of contents is recommended for all files and should be prepared for any part that has multiple sections. Designate parts by Roman numerals, and sections by letters. Tab each section or separate with dividers. Designate subsections by Arabic numerals.

(3) When the number of claims arising out of a single incident makes it impractical to place all the documents in one folder, establish separate files containing the information unique to each claimant. For example, if an explosion breaks windows in fifty houses, establish a separate file for each claimant, maintaining the liability information in a master file. Keep all basic information about each claim (such as a copy of the claim form) as well as information pertaining to the claims generally in the six-sided folder and establish a separate file folder (manila) for each individual claimant.

(4) When a claim is settled but there is the potential for additional claims stemming from the same incident, retain the file as a potential claim file. Retain it until all claims are settled or the statute of limitations has run on all potential claims.

b. Part I, Chronology. Use this section only for the case chronology sheet, which is a mandatory part of each tort claim file.

(1) *Format.* Use plain or ruled paper or locally prepared forms for chronology sheets. Enter the date in the left-hand margin, followed by the information to be recorded, followed by the initials of the person making the entry.

(2) *Contents of entry.* Ordinarily, only administrative data and a summary of actions taken will be placed in the entry. Record interviews, inspections, and similar events in the memoranda for record (MFRs) placed in part IV, V, or VI. A chronology sheet entry is intended as a guide for those reviewing a file and a management tool for case status, not a memory aid. Personnel may place telephone numbers and addresses in a chronology sheet entry but should place notes from a claimant interview in an MFR kept in part V.

c. *Part II, Claim form and allied papers.* This part of the file contains matters pertaining to the administrative claim form and attachments. If a document pertains to one or more parts, it should appear in the part of the file most relevant to the claim. For example, if a claimant tries to submit hundreds of pages of medical records by reference in the claim form, file the medical records in part VI and place an MFR, specifying which records accompanied the claim, in part II. Place the following documents in separate sections in the order specified:

- (1) Claim form (with continuation sheets).
- (2) Attachments (other than documents that belong elsewhere in the file).
- (3) Agent's authority to file claim, letters testamentary, or letters of administration, power of attorney, or similar documents.
- (4) Acknowledgment letter from the claims office to the claimant or attorney.
- (5) When there are multiple claims, maintain the documents pertaining to each claim in a separate section, designating the sections above as subsections.
- (6) If the claim is settled, place settlement documents (including the settlement agreement, transmittal letter, voucher, and action) in a single section on top of this part.
- (7) If the claim is not settled, place final action, final offer, denial notice, reconsideration, or appeal notice in a single section on top of this part.

d. *Part III, Correspondence.* All correspondence, including memoranda on administrative matters, belongs in this section, unless it contains information that logically belongs in another section. For example, when a claimant tries to file a claim by letter, the letter belongs in part II. Arrange the correspondence or memoranda in chronological order, with the most recent document on top. Attachments to correspondence should not appear in this section unless there is no other logical place to put them.

e. *Part IV, Research.* This part consists of copies of any relevant case or statutory law as well as legal, medical or scientific research, regardless of source. Use any logical order. Place liability and damages information in separate sections.

f. *Part V, Liability.* The following sections appear in the order below (from top to bottom):

(1) *Claims investigation.* Place documentation of any investigation performed by the claims office on top of the other investigations. Investigatory materials include interview memoranda, witness statements, accident scene diagrams, and photographs.

(2) *Consultants' reports.* Place reports prepared by experts, accident reconstructionists, and other consultants in a separate section following the claims investigation.

(3) *Other investigations.* Place each investigation other than a claims investigation in a separate section, with the most recent investigation on top. For example, an MP report could be in section D, followed by a report of survey in section E.

g. *Part VI, Damages.* Separate the damages information by tabs and place it in the file as separate sections. When a claimant has received medical treatment from more than one health care provider (HCP), establish a subsection for each HCP, further subdividing into the provider's reports, records and bills. Tab medical records that are too bulky to fit in a six-sided folder and place them in a separate folder. The following is a sample section for a single claimant treated by one physician:

- (1) Claimant interview.
- (2) Research provided by the claimant.
- (3) Medical reports.
- (4) Medical records.
- (5) Medical bills.
- (6) Property damage estimates, repair bills or appraisals.

h. *Multiple claims.* When more than one claim is filed pertaining to a particular incident, personnel will maintain one file (the master file) for all related claims. If the claim numbers are not sequential, prepare separate files for each non-sequential file. All files will contain a memorandum identifying all related claims by number and claimant name.

2-12. Mirror file system

The AAO is required to monitor the progress of all claims reportable to USARCS through close telephone contact with the command claims service, ACO or CPO and by maintaining a mirror file of all reportable claims and claim incidents. The mirror file is mandatory. This system expedites disposition of a claim and is critical in determining federal liability within the FTCA's six-month administrative period and meeting the goal of disposing of all claims expeditiously.

a. Forwarding to area action officer. Contact the AAO for guidance, and forward a complete copy of the file, when a claim seeks an amount beyond the monetary jurisdiction of an ACO; when a serious potential claims incident occurs; or when a claim presents a policy issue or a new precedent or point of law. AR 27–20 sets forth the ACO’s monetary jurisdiction according to statute; such jurisdiction is based on the amount claimed, not the estimated settlement amount. For example, under the FTCA, an ACO’s monetary jurisdiction is \$50,000 per claim and \$100,000 per incident. Under the MCA, the jurisdiction is \$25,000 per claim without limitation per incident. Similarly, forward copies of all new written materials prepared or received to the AAO. The following is a reliable method for forwarding these updates:

(1) Fax, mail, or e-mail a scanned copy of the SF 95 or claim letter with attachments and a copy of the acknowledgement letter as soon as possible. This is in addition to uploading these documents onto the tort and special claims database. Following this initial transmittal, it is imperative that the original SF 95 or claim letter be sent to USARCS Tort Claims Division. The SF 95 will be returned if suit is filed.

(2) Prepare the mirror file copy, including the claim number, when you prepare or receive documentation. If so desired, and after consultation with the AAO, additional documents may be transmitted to USARCS by uploading onto the database.

(3) If additional documentation is only being provided to USARCS in hard copy form, put all mirror file copies in a distribution box for the AAO. Note the claim number on each document.

(4) Empty the box once a week: mail the contents to the AAO.

(5) Record all of the items forwarded for inclusion in the mirror file in Part I, Chronology, of each file.

b. Flexibility of the system. If a claim is forwarded for denial and the field claims office anticipates litigation or appeal, it can keep the original file and forward the original claim form, if not already forwarded, the claims memorandum of opinion, and any documents not previously forwarded to USARCS. This simplifies preparation of a report when suit or appeal is filed. The system also ensures that the USARCS AAO knows the status of the claim and can assist as needed because the field and USARCS have identical files.

c. Special instructions. When placing each document (a copy of which has been forwarded to USARCS) in a tort claim file, enter a note that a copy has been forwarded as required. Do the same with documents forwarded to the claimant or the claimant’s attorney, to Health Services Command, or another destination. Such a notation will clearly indicate to all subsequent action officers, including the U.S. Attorney, what information has been released previously to the claimant, the claimant’s attorney, or other parties. The file will be retired by the office that takes final action on the claim. However, since files may not be retired without an original claim form, ensure that the retiring office (either USARCS or a field office) is in possession of an “original” of the claim form before retirement occurs that is, before retirement, an “original” of the claim form may need to be transmitted between the field office and/or USARCS to ensure that the retiring office has an original of the claim form, as a result of the mirror file system. In some cases claim forms are provided in original duplicate and each office may already have an “original” in their file. In these cases, no transfer is necessary. Upon notice of litigation, the mirror file will be returned to the office responsible for monitoring the litigation. See AR 27–20, paragraph 13–4 for further discussion of file retirement procedures.

2–13. Transfer of claims among armed services branches

Transferring of claims among armed service branches may occur in several circumstances. First, it may occur when a claim is subject to “single-service responsibility,” either because of where it arose geographically or because of its nature. Second, a claim may be transferred among armed service branches by voluntary agreement of the services. This happens either because the claim involves more than one branch and a lead agency is established, or for other reasons, for example, that it may be more convenient for a certain agency to process a specific claim. Third, sometimes claims are transferred among service branches because the claim was clearly filed with the wrong agency. When transferring a claim among armed services branches, keep the following factors in mind. In addition, See AR 27–20, paragraphs 1–19, 1–20, and 13–2, and this publication at paragraph 1–19 for more information. Tables listing claims offices worldwide are posted on the USARCS Web site at “Claims Resources,” VI.

a. Upon receiving a claim which has obviously been filed with the wrong federal agency, the ACO or CPO will enter it into the database and transfer it to the correct agency, informing the claimant or legal representative in writing of the recipient agency’s name and address and stating that any action the latter takes will represent final action on the part of the Army.

b. Contact the claimant or legal representative when agency identity is in question. If the claim has been filed with other agencies because the claimant is unfamiliar with governmental organizations, try to identify which agency should process the claim. Send it there. However, if the claimant intends to file with multiple agencies, contact the other agencies and try to establish a lead agency in conjunction with the appropriate ACO and the regulatory guidance.

c. Medical malpractice claims frequently involve more than one military service’s MTFs. In such cases, delay the decision on the lead agency pending review of the medical records or related material. Question the claimant about which MTF is the subject of the claims.

d. If the agencies cannot agree on which one will act as lead agency, USARCS will request the Chief, Torts Branch, Department of Justice (DOJ), to designate the lead agency.

e. If the Army is the lead agency, the ACO or CPO will request all involved federal agencies to take no final action,

such as denial, to forestall the imposition of the six-month period for filing suit. If the Army and another agency are involved and the claim is not meritorious, a denial letter will be issued either for both agencies or by each at the same time to avoid any extension of the six-month period. If another agency has already issued a denial letter for a claim the Army deems meritorious, inform the claimant that the six-month filing period does not apply because the Army will consider the claim as a request for reconsideration. A sample letter to a claimant rescinding the denial is posted on the USARCS Web site at "Claims Resources", II, c, no. 12. When another federal agency is designated the lead agency, transfer the file to that agency, requesting that any final action taken represent the Army's final position as well. Also request the other agency to provide the Army a copy of the final action so the Army may close its file. When transferring the file, notify the claimant of the transfer by certified mail, providing a point of contact at the lead agency.

f. When it is impossible to determine the correct agency's identity, return the claim to the claimant and explain the reasons in a letter. Retain a copy of the properly date-stamped claim and a record of all discussions with the claimant.

2-14. Use of small claims procedures

a. *Rationale.* Small claims procedures save the Army time and expense. Meritorious claims are settled more efficiently, granting claims personnel more time to work on other, more complex claims. The Army's small claims procedures are consistent with the insurance industry practice of settling minor tort claims on the spot. Using these procedures also avoids escalation of damages since delays in settlement may cause claimants to grow increasingly dissatisfied and to amend their claims, seeking greater compensation. Finally, every claims settlement reflects the judgment and discretion of the CJA or claims attorney who settles it. Small claims procedures are simply a means of reducing the legwork and paperwork necessary to document a claims settlement decision.

b. *When to use.* Although the use of small claims procedures is optional, they should be used as much as possible whenever a tort claim can be settled for \$5,000 or less. They require no written documentation, only completion of DA Form 1668, Small Claims Certificate. A blank copy of DA Form 1668 may be obtained at www.apd.amry.mil. In addition, a sample completed DA Form 1668 is posted on the USARCS Web site at "Claims Resources," II, a, no. 29. Action may be taken by personal interview, telephone or correspondence. Interviews need not be recorded in a memorandum for record unless a settlement is not reached in that communication. The monetary limit applies to each claim and not to the entire incident. For example, if three claims arise from one incident and settlements in the amount of \$3,000, \$1,000 and \$750 can be reached, use the small claims procedure. But if two claims can be settled for \$3000 and \$1000 while the third cannot be settled within the ACO's authority, consultation with the AAO is required. Do not use the procedure for split claims. See paragraph 2-80 below. Any small claim settled for \$2,500 or less is paid by claims expenditure allowance, over \$2,500 by the Financial Management Service. See paragraph 2-26 for how small claims procedures may apply to traffic accidents.

2-15. Determining the correct statute

Congress intended the claims statutes it enacted to permit federal agencies to settle meritorious claims. Unless one particular statute precludes using others, consider an otherwise meritorious claim under all statutes that may possibly apply. For example, if a Soldier's FTCA (chap 4) property loss claim based on negligence is not payable under the FTCA because it arises incident to service, it may be payable under the PCA (chap 11). If not payable under chapter 11, it may be payable under the MCA, chapter 3. Each claim requires analysis under all statutes before denial.

a. Property claims.

(1) *Constitutional taking.* In the absence of tortious conduct as defined by the FTCA, claims for property losses caused by a "taking" under the Fifth Amendment, U.S. Constitution, are tried exclusively in the Court of Federal Claims or by a U.S. District Court for a demand not exceeding \$10,000. As neither the FTCA nor the MCA provides a basis for payment, refer such claims to USARCS immediately.

(2) *Contractual property losses.* Property losses caused by a contract, express or implied, are also Court of Federal Claims cases; however, losses arising from the use and occupancy of real estate are compensable under AR 405-15 pursuant to the Meritorious Claims Act, 31 U.S.C. § 3702. See also paragraphs 2-17d(3), 2-36b, and 2-45b. They also may be compensable under the MCA.

(3) *Property losses grounded in tort.*

(a) Soldiers' property damage claims are excluded under the FTCA if they occur incident to service as defined by the Feres doctrine. They must be paid under the PCA or, if not payable thereunder, under the MCA. The Feres bar does not apply to the MCA, whose incident-to-service bar does not exclude property losses.

(b) If the property damage occurred incident to service, the claim must be considered first under the PCA, whether or not it arose in tort.

(c) If the property is damaged incident to service, but the facts do not fall within the "incident to service" definition, or do not constitute an unusual occurrence under AR 27-20, chapter 11, thereby barring the claim, the claim must be considered under the MCA if it constitutes a tort. If it is not clear whether it is a tort, give the claimant an opportunity to clarify the matter by amending the claim.

(d) Payment of Soldiers' chapter 11 property claims should be withheld pending resolution of any personal injury or

death claim arising out of the same incident. Coordinate settlement action with the claims authority having jurisdiction over the highest dollar actual or potential personal injury or death claim.

(e) Payment of property and personal injury claims under the MCA should be withheld until coordinated with the claims authority having jurisdiction over the highest dollar actual or potential personal injury claim. Determine the extent of all injuries as to claims not filed. If hardship exists, notify USARCS promptly, to permit an early decision. However, if an incident involves tortious conduct and actual and potential claims with an estimated settlement value in excess of \$200,000, claims arising therefrom may not be settled until the Commander USARCS determines whether prior approval by DOJ is needed.

(4) *Consequential property damage claims by civilian employees.* The FTCA and the MCA limit compensation to actual property loss. Claims for consequential property damage can only be considered in the Court of Federal Claims pursuant to 28 U.S.C. § 1346, the “Tucker Act,” and 28 U.S.C. § 1491, or by the Office of Management and Budget (OMB) pursuant to 31 U.S.C. § 3702, Jurisdiction for Certain Property Claims. See paragraph 2–17, claims remedies outside of AR 27–20. In addition, examples of intangible (or consequential) damages are provided in paragraph 2–54.

(5) *Tangible property damage claims by civilian employees.* Within the United States, property damage claims by civilian employees are covered by the FTCA, even if they arise within the scope of employment; the Federal Employees Compensation Act (FECA) or Longshore and Harbor Workers Compensation Act (LSHWCA) exclusivity provision does not apply to property damage. See 5 U.S.C. § 8116(c). However, civilian employee property damage claims are first considered under AR 27–20, chapter 11. If the damage arises from a tort and is not compensable under chapter 11, the claim should be settled under the FTCA.

(6) *Impact of venue within which claim arises.* If the claim arises outside the United States, claims by both Soldiers and civilian employees follow the same priority rules. They are considered first under the PCA, and then under the MCA if the claimant is a U.S. national. If the claimant is a civilian employee who is not a U.S. national, and who normally resides in a foreign country, the Foreign Claims Act (FCA) should be used in the absence of an applicable Status of Forces Agreement (SOFA).

b. Personal injury and death claims.

(1) Claims by Soldiers and civilian employees.

(a) Under state law, personal injury and death claims arising from an employment contract or relationship are usually payable under workers’ compensation insurance, which bars tort suits against the employer even when the personal injury or death is due to the employer’s negligence. Federal law applies the same concept.

(b) Claims by Soldiers arising incident to service as defined by the Feres doctrine are barred under both the FTCA and the MCA. See 10 U.S.C. § 2733(b)(3).

(c) Claims by civilian employees arising within the scope of employment are payable under FECA, the workers’ compensation statute; see the 5 U.S.C. § 8116(c). Similarly, claims by Non-Appropriated Fund Instrumentalities (NAFIs) or the Army and Air Force Exchange Service (AAFES) employees are payable under the LSHWCA, 33 U.S.C. § 8116(c). Both statutes provide the exclusive remedy against the United States. The Department of Labor defines scope of employment according to the law of the place of occurrence and agency law. See paragraph 2–38.

(d) Claims by prisoners under military jurisdiction are barred by the Feres doctrine. Federal prisoners may be covered by the Prison Industries Act, 18 U.S.C. § 4126, or by the LSHWCA, 5 U.S.C. § 8116.

(2) *Claims arising in the United States.* Within the United States, personal injury claims by persons with whom the United States has no contractual relationship or which do not arise incident to service or within the scope of employment must be considered initially under the FTCA, if based on tortious acts or omissions, except for maritime claims. If it cannot be determined whether the claim is a maritime claim, or if the claimant insists that it is despite USARCS’ contrary belief, advise the claimant in writing of the need to file suit within two years of the occurrence.

(a) If the claim is based on a tort, it must be processed under the FTCA unless it arises out of a non-scope act. In this event, it may be considered under the Non-Scope Claims Act (NSCA). If processed under that Act, all parties must agree to the settlement, including the subrogee, who is barred from receiving payment.

(b) The MCA may be used, as appropriate, for claims arising out of noncombat activities. See paragraph 3–3.

(c) Tort claims caused by NATO Soldiers or Soldiers from other countries that have implemented a reciprocal SOFA within the United States are handled exclusively by USARCS (except for investigation). USARCS is the receiving State office (RSO) for all such armed services. Claims by such Soldiers for their own personal injuries, sustained while in scope, are barred by the Feres doctrine.

(3) Claims arising outside the United States.

(a) Soldiers’ claims based on a single act or incident cognizable under the MCA, the Army Maritime Claims Settlement Act (AMCSA), and the PCA will be considered first under the AMCSA or PCA. If not payable under either of those statutes, consider the claim under the MCA. If claims cognizable under the MCA are based on more than one act or injury and one or more of the acts or injuries are also cognizable under the FTCA (for example, claims alleging medical malpractice both in a foreign country and in the United States or claims alleging negligence in the conduct of a noncombat activity), the claims will be processed as follows: If the primary act or incident upon which the claim is based is not cognizable under the FTCA, the claim may be considered and paid under the MCA. If the primary act or incident upon which the claim is based is cognizable under the FTCA, the claim will first be considered under the

FTCA. See paragraphs 2–73 and 2–75 for specific requirements that apply to settlement agreements and denials for claims considered under more than one statute.

(b) A claim may not be paid under the MCA if it is payable under the FCA, 10 U.S.C. § 2733(b)(2).

(c) If a SOFA or other agreement provides for host country adjudication of a claim, the treaty process is normally the claimant’s exclusive remedy. Where a foreign country is responsible for adjudication of the claim under the terms of such an agreement, it may not be paid under the provisions of the MCA, FCA or FTCA. See, for example, *Eyskens v. United States*, 140 F. Supp. 2d 553. If the foreign country refuses to accept legal responsibility for the claim or to consider it under applicable treaty provisions, the Commander USARCS may authorize adjudication of the claim for good cause shown. Examples, of good cause include the historical lack of SOFA jurisdiction over the claimant (not a proper party claimant) or subject matter (for example, quasi-contractual claims) and poor advice by the Department of Defense that causes the claimant to miss the SOFA statute of limitations. The mere fact that a foreign country has failed to pay a claim on its merits is not enough to invoke this authority. See AR 27–20, chapters 3, 7, and 10.

c. *Status of forces agreement claims.* See chapter 7 for the statutory schemes that underlie the applicable SOFA.

(1) *Proper place to file.* SOFA claims should be filed directly with the designated office in the receiving State, which may either be a designated civilian office, as in Germany, or a foreign military unit. Where they are received by an Army claims office, they should be forwarded to the receiving State office. SOFA claims arising in the U.S. should be forwarded to the Commander USARCS.

(2) *Europe.* See AR 27–20, paragraph 7–2, for a list of the countries that the Army has single-service tort claims responsibility for in Europe. This authority is exercised from the U.S. Army Claims Service, Europe (USACSEUR), Office of the Judge Advocate, U.S. Army, Europe (<https://claimseurope.hqusareur.army.mil>). SOFA claims must be submitted to the applicable host nation receiving State claims office in the jurisdiction in which they arose under the applicable North Atlantic Treaty Association (NATO) or Partnership for Peace (PFP) SOFA. ACOs and CPOs in those countries must screen all tort claims to determine whether the claimant is a proper claimant under the applicable SOFA and whether the claim arose from an act or omission of a member or civilian employee of the U.S. Armed Forces stationed or on temporary duty in those countries. In the European countries listed in AR 27–20, paragraph 7–2, any of the following may be a proper claimant under the NATO or PFP SOFA: an inhabitant of a foreign country, including one claiming for medical malpractice at a military medical treatment facility; a foreign country’s corporations and local government bodies; an American civilian not a member of the force or civilian component; and a foreign subsidiary or element of an American corporation. USACSEUR should be consulted if a claimant’s status is unclear. However, members of the force and civilian components and their family members are not proper claimants under the German Supplementary Agreement to the NATO SOFA or the Korean SOFA when the claim is based on an act or omission of the U.S. Armed Forces on duty within Germany or Korea. When a SOFA claim is filed with an ACO or CPO, assign a claim number, date stamp it, and instruct the claimant to forward it to the appropriate receiving State claims office. The ACO or CPO will retain a copy of the claim. If the claim is returned to the claims office, process it in accordance with chapter 3.

(3) *Republic of Korea.* In the Republic of Korea (ROK), the Army has single-service tort claims responsibility, which it exercises from the Office of the Judge Advocate, U.S. Forces Korea (Claims) (FKJA-CL) (<http://8tharmy.korea.army.mil/ClaimsSvc/>). The screening procedures are similar to those used in Europe, except that members of the force and civilian components, and their dependents, are not proper claimants under the ROK SOFA. In the ROK, a claim by a foreign inhabitant for medical malpractice at an MTF is processed under the ROK SOFA.

d. *Foreign Claims Act claims.* See chapter 10. To qualify as a proper claimant, the claimant must have been an inhabitant of a foreign country at the time of the incident giving rise to the claim. This can include retired service members who permanently reside in a foreign country and are not employed by the U.S. In countries such as the FRG, the ROK and the Republic of Panama, making this determination may be particularly difficult. Normally, foreign-born spouses are not considered proper claimants under the FCA, even if the foreign spouse has never been to the United States; however, a foreign-born spouse may be a proper claimant under the MCA. If, however, the spouse clearly exhibits an intention to remain a foreign inhabitant and never to immigrate to the United States, the FCA is the proper remedy. Children of the marriage who are born in a foreign country would be claimants under the MCA. Dependent parents of a foreign-born spouse would normally claim under the FCA, unless they had resided in the United States, or intended to immigrate to the United States. ACOs and CPOs should develop a questionnaire designed to elicit sufficient information to determine the proper claim authority. A sample questionnaire for determining whether a claim falls under the FCA or the MCA is posted on the USARCS Web site at “Claims Resources,” II, a, no. 10.

e. *National Guard Claims Act claims.* See chapter 6 and paragraph 2–62c of this publication.

(1) *Determining applicability.* Members of the Army National Guard (ARNG) are employees of the state unless ordered into the federal service, such as during a national emergency or while performing duty under Title 10, United States Code. ARNG personnel remain state employees even when the United States has assumed tort liability under the FTCA’s 1981 amendment (AR 27–20, chapter 6) (*United States v. State of Hawaii*, 832 F.2d 1116 (9th Cir. 1989); *Maryland for Use of Levin v. United States*, 85 S. Ct. 1293 (1965)). That amendment provided coverage for ARNG and active Guard Reserve activities giving rise to claims in the situations listed in (a) through (i), below. For an activity to fall under any of these categories, the state must issue orders and the activities must conform to the orders, or drills for the unit training schedule. In other words, the Guard member must be performing duties or activities in accordance

with the orders and not be engaged in a housekeeping action or the like. An ACO or CPO should investigate the following situations carefully and discuss FTCA coverage with the appropriate AAO.

- (a) Instructing civilians at rifle ranges (32 U.S.C. § 316).
 - (b) Attending drill assemblies or participating in exercises or encampments, typically inactive duty training (32 U.S.C. § 502).
 - (c) Participating in certain maneuvers, typically two weeks annual training (32 U.S.C. § 503).
 - (d) Participating in small arms competition or attending schools for the ARNG (32 U.S.C. § 504).
 - (e) Attending regular service schools (32 U.S.C. § 505).
 - (f) Recruiting full-time (32 U.S.C. §502(f)).
 - (g) Performing active Guard Reserve duties with the state (32 U.S.C. § 502(f)).
 - (h) Performing federal drug enforcement duty (32 U.S.C. § 502(f)).
 - (i) Performing community based activities under 10 U.S.C. §§ 2012 and 2558.
- (2) *Additional considerations for Army Reserve National Guard activities.*

(a) The ARNG is often involved, incident to federally funded training in Title 32 status, in projects that assist state or local governments or various private organizations, usually youth groups or national military associations. Specific statutory authority for such incident-to-training assistance is contained in 32 U.S.C. § 508, 10 U.S.C. § 2012, and 10 U.S.C. § 2558, and other statutes. Claims arising from such duly authorized projects are cognizable, notwithstanding the fact that a government entity or private organization may derive a benefit. Other projects, particularly those that cannot be supported on an incident-to-training basis, may be accomplished in a state active duty status. Claims arising from state active duty missions are exclusively a state responsibility.

(b) The ARNG is involved under 32 U.S.C. § 112 in providing assistance to law enforcement agencies in counterdrug operations. Such support is generally provided in a Title 32 duty status (other than training) and claims arising therefrom are cognizable. Separate and apart from 32 U.S.C. § 112, the 1991 National Defense Authorization Act authorizes assistance, incident to training, to law enforcement agencies in counterdrug operations. Again, such claims arising in Title 32 training status are cognizable. However, where a state employee is actively participating in the operation, investigation must be sufficient to determine whether any claim is a state or federal responsibility.

(c) Claims based on premises liability at a state-owned or leased armory or training site are generally the state's responsibility. Examples of such claims include an exploding dud, motorcyclist running into wire barriers, person falling into a trench dug across a roadway, a person falling on an icy stairway or parking lot, or vehicle damage from grass mowing operations.

f. Third-party claims involving an independent contractor.

(1) *Generally.* See subparagraphs 2-45b, c, and d, 2-46, and 2-62b of this publication. The United States is not liable for claims arising from the act of an independent contractor (28 U.S.C. § 2671), including NAFI or AAFES contractors or concessionaires. Upon receipt of a claim, the ACO and CPO should determine if a contractor is involved. Frequently, claimants file for loss or damage stemming from housekeeping contracts for the Commissary, MTF, Army motor pools, or other buildings and maintenance of facilities (such as spraying of paint or insecticides). AAFES concessionaires or contractors may be involved. Army MTFs use the services of TRICARE partners or contractors who supply physicians and related services, such as emergency room and radiology services. When a contractor is involved, examine the contract, obtain the contractor's address and the name of its insurer and inform the claimant that a claim should be filed against the contractor. When there is joint liability, furnish this information anyway. Such warning should be made as soon as possible to avoid the running of a state statute of limitations which is applicable to a suit against a contractor. See paragraph 2-45b and c for more discussion on independent contractors generally.

(a) If the damage is considered to be primarily due to the contractor's fault or negligence, refer the claim to the contractor or the contractor's insurer for settlement. Although the claim against the Army will not be processed under AR 27-20, the advance notice procedure to the AAO contained in AR 27-20, paragraph 2-1, will be followed. When possible, ask the claimant to refer the claim personally to the contractor.

(b) If the contractor does not dispose of the claim within a reasonable period of time, determine whether the Army is legally liable to the third-party claimant for the damage. Base this determination on the same standards used to determine contractor liability. When the United States exercises sufficient control over the contractor's operations or a specified process (such as spraying) at a place where such operations or processes could cause the damage, federal liability may be invoked.

(c) If it is determined that the United States may be liable, ask the contracting officer to withhold funds due the contractor. Funds may be withheld as long as the contract specifies that the contractor is responsible for damages that occur as a result of its fault or negligence and provided that the contract contains no clause to the effect that the contractor is not responsible for negligence of the United States or its employees; see *Motor Ins. Corp. v. Aviation Specialties, Inc.*, 304 F. Supp. 973 (W.D. Mich. 1969). It is not necessary that a claim actually be paid under AR 27-20 before funds can be withheld.

(d) If withholding is not considered permissible, forward claims payable under the FTCA to the Commander USARCS for disposition. Include all pertinent data concerning contribution or indemnity in the file.

(2) *Claims for injury or death of contractor employees.* See paragraphs 2–38 and 2–62b of this publication.

(a) Claims by contractor employees for injury or death are payable from workers' compensation benefits provided by the contractor and should first be processed in this manner. In most U.S. jurisdictions, the workers' compensation remedy bars further action against the contractor except at management level. In this regard, determine whether insurance coverage of management activities is available. Such coverage usually does not bar action against the United States, and if a claim not satisfied wholly by workers' compensation is pursued further against the Army, it will be processed under AR 27–20. However, this is a matter of local law; examine it carefully in each case. In any event, a payable claim must be based on negligent acts or omissions of U.S. employees, not contractor employees.

(b) In processing such claims, examine the contract between the United States and the employer, or any related subcontract, to learn whether it holds the United States harmless and imposes liability on the contractor. Unless the provisions make it clear that the contractor is not liable to any extent, try to get the contractor to assume the burden of settling the claim. For example, such provisions often provide that the contractor will hold the United States harmless from claims arising in part from the negligence of the United States. In such cases, contractor liability should be pursued, *United States v. Accrocco*, 297 F. Supp. 966 (D.D.C. 1969). Should the claim arise in part from the negligence of the United States and the contract is silent as to whether the contractor will hold the United States harmless in such a case, examine appropriate case law and pursue contractor liability, if appropriate.

(c) Generally, the contractor need not be pursued when the claim arises solely as a result of the negligence of the United States and the contract does not expressly provide for the contractor to hold the United States harmless in such a case. *Piscopo v. United States*, 167 F. Supp. 777 (E.D.N.Y. 1958). When the claimant is an employee of the contractor who has received workers' compensation benefits provided by the contractor, federal law controls the right of the United States to indemnification under a federal indemnity contract. Include the contractual provisions in the claim file since they will determine the right to contribution or indemnification, *United States v. Seckinger*, 397 U.S. 203 (1970). This is true regardless of whether state law provides that workers' compensation benefits are the employee's exclusive remedy against the employer. Compare *American Agricultural Chemical Co. v. Tampa Armature Works, Inc.*, 315 F.2d 856 (5th Cir. 1963) with *Spurr v. LaSalle Construction Co.*, 385 F.2d 322 (7th Cir. 1967).

(d) If the United States has compensated the contractor for the latter's workers' compensation premiums, the Army may be able to deduct any payments made by workers' compensation to the claimant from any award the Army makes. Further, in such instances a claim by the workers' compensation carrier will be forwarded for resolution by the AAO. Similarly, the United States may have paid the premiums for other coverage (such as life insurance and funeral expenses in a death case), and these may also be deductible. Ask the contractor if such benefits exist, since the contract itself may not reveal their existence. Place a record of the results of the inquiries in the file.

(e) If the claim by the contractor's employee is based on the theory that the United States was in control of the contractor or otherwise in charge (for example, by regulating safety) rather than on a specific act of negligence by a federal employee, examine local law to determine whether a statutory employer defense is available to the United States. This defense is generally based on the extent of control, for example, the contract is performed on U.S. property, concerns an activity in which the government is normally engaged (mess hall or motor pool activities), and the government has paid the cost of workers' compensation premiums, directly or indirectly, as part of the contract price, *Roelofs v. United States*, 501 F.2d 87 (5th Cir. 1974), cert. denied 423 U.S. 830 (1975). See FTCH § II, D7.

(f) Claims falling under the Defense Bases Act, 42 U.S.C. §§ 1651–1654, are payable exclusively under the worker's compensation insurance required by that Act.

g. *Claims by contractors for damage to or loss of their property during the performance of their contracts.*

(1) Claims by contractors for damage to or loss of their property during the performance of their contracts are payable as contract claims where the damage or loss occurs as a result of in scope acts or omissions by a service member or civilian employee. Such claims are not payable under the FTCA even if the contract funds are insufficient to pay the contract claim. If the contracting officer denies the claim, the claimant must exhaust his contract appellate remedy prior to consideration under the MCA or FCA as a bailment claim.

(2) If damage or loss occurs from the act or omission of a third party while the property is bailed to the U.S., the claim may be considered under the MCA or FCA if not payable as a contract claim. Whether it is payable depends on duty of the government under the type of bailment in question. Prior to consideration under the MCA or FCA, review the contract to determine whether the contract provides for security of the property. If so, process the claim as a contract claim.

(3) Process in accordance with subparagraph (1), above, claims by contractors for damage to, or loss of, property being rented, leased, loaned or sold to an agency of the United States that is in the Army's possession to facilitate performance of such contracts (for example, property is in transit or in temporary storage). Also, sometimes insurance coverage purchased by the contractor and included as a contract cost may be available to pay the cost (for example, if a Soldier or civilian employee rents a car while on TDY, 35 Comp. Gen. 553 (1956)). Accordingly, scrutinize contractual provisions and refer the claim to the insurance carrier, if appropriate. If such property is rented, leased, loaned by or sold to the Army and is in the possession of the Navy or Air Force for shipment or storage when the damage or loss occurs, forward the claim to the Navy or Air Force for settlement as an MCA bailment claim.

h. *Maritime claims.* Maritime claims must be identified as such upon receipt by use of the criteria in paragraph 8–4.

The claimant must be informed that the claim lies within the maritime jurisdiction of the U.S. and any suit must be filed not later than two years after the accrual of the claim. In case of doubt as to whether the claim is maritime, or if the claimant states the claim falls under the FTCA, inform the claimant in writing that the claim will be treated as maritime for purposes of timely filing even if filed under the Admiralty Extension Act (AEA), 46 U.S.C. § 30101.

i. Postal claims.

(1) *General guidance.* The FTCA specifically excludes claims for losses due to transmission of postal matter (28 U.S.C. § 2680(b)). However, there are three types of postal claims that may be considered through channels outside the scope of the FTCA. These are: interagency claims filed by the U.S. Postal Service against the Military Postal Service pursuant to an interagency agreement; claims for loss of registered or insured mail in the possession of the U.S. Army (cognizable under the MCA); and claims for packages delivered by United Parcel Service (UPS). General guidance on each of these is provided below.

(2) *Interagency postal agreement claims.*

(a) Claims by the U.S. Postal Service are only cognizable pursuant to a special interagency agreement between the U.S. Postal Service and the Military Postal Service. The agreement is posted on the USARCS Web site on JAGCNet at "Claims Resources," I, a, no.13(d). DOD 4525.6-M provides comprehensive guidance on the military postal system including some general information about how postal losses should be handled; see also DODI 4525.7 at E.3.5.

(b) Interagency agreement claims are claims brought by the U.S. Postal Service for funds and accountable postal stock embezzled or lost through the negligence or error of unbonded Army postal clerks, assistant Army postal clerks or persons acting in those capacities, and commissioned or warrant officers of the Army designated as custodians of postal effects by the appropriate commanding officer. These claims almost invariably arise in foreign countries.

(c) Interagency postal claims must be filed by the U.S. Postal Service within one year of the discovery of loss. The loss must be due to fault on the part of Army personnel listed in subpara (b), above. For example, a claim for loss of postal monies due to robbery of a postal clerk is not payable unless there is evidence that the clerk or other Army postal personnel were at fault. Similarly, if the loss is caused by the fault of non-postal personnel, the claim is not payable. For example, if mail is destroyed in an Army truck involved in a collision and fire, the U.S. Postal Service claim is not payable under the interagency agreement unless there is evidence that the driver was one of the persons listed in subpara (b) and that the accident was due to the driver's negligence.

(d) Local claims offices do not become directly involved in interagency claims because the U.S. Postal Service files the claims with USARCS. However, local JAs or legal officers who learn of a potential claim due to theft or dereliction of duty on an Army postal clerk's part should take steps to see that the Army postal clerk reimburses the U.S. Postal Service for the loss. For example, an Army postal clerk may be required to make restitution prior to separation or as part of a plea bargain.

(3) *Postal claims for loss or damage to registered or insured mail.* See also paragraph 2-30 (for information on investigation of these types of claims) and paragraph 2-56g (for how to measure damages in claims related to registered or insured mail).

(a) The MCA specifically provides coverage for loss or damage to registered or insured mail only. The mail must be controlled by use of a registry or some other device allowing its course to be traced and responsibility for its loss to be determined. Otherwise, the loss or damage is not within the terms of the MCA. For example, the U.S. Postal Service once created a type of insured mail known as "insured minimum fee," for which no record was kept of delivery to the recipient. This type of mail was not included in the provisions of the MCA because of its lack of registry. Other types of mail, including certified mail and Express Mail, also are not included within the terms of the statute, even though the U.S. Postal Service guarantees Express Mail's delivery times and document reconstruction.

(b) It must be determined that the Army is responsible for the loss. When a claimant, either the sender or recipient, alleges that a registered or insured package was lost or damaged while in postal channels, the claimant should be directed to file the claim with the U.S. Postal Service. The U.S. Postal Service will trace the parcel and determine whether the loss occurred in U.S. Postal Service channels. If the U.S. Postal Service determines that it is not responsible for the loss, it forwards the claim, with a complete investigation, to the Army for further action. (If the loss or damage occurs after the mail has left all postal channels, the claim may be considered under the PCA (chap 11). This would include, for example, a courier or other Soldier picking up the mail at the Military Postal Service and rifling it.)

(4) *United Parcel Service package claims.* The UPS has agreed to be liable for payment of claims for loss or damage to packages delivered in the continental U.S. (CONUS) to Army mailrooms or other Army employees for delivery to the addressee. The procedures for unit mail room clerks that are established by the UPS agreement are set forth in AR 600-8-3, appendix B (Delivery of UPS Material by Unit Mailrooms). Claimants seeking reimbursement for losses covered by the agreement should be given a copy of the procedures and referred to UPS. The UPS offices sometimes seek reimbursement for payment to a customer for loss or damage to a package. These claims should be denied on the basis of the UPS agreement. Where a unit mail clerk or another unit member acting in that capacity signs the UPS delivery record, UPS will provide a copy of the delivery record.

(a) UPS remains liable for all property damage to package contents even though a unit mail clerk has signed for the item.

(b) UPS agrees to hold harmless and reimburse the United States for any claims or judgments that the United States is legally required to pay as a result of property loss or damage to packages received from UPS.

(c) UPS will remain liable for a lost package even though a unit mail clerk has signed for the package pursuant to its tariff provisions on file with the Interstate Commerce Commission and the individual Public Service Commissions in the states in which UPS operates.

j. Blast damage claims. See paragraph 2–28.

(1) Blast damage claims are payable under the MCA. While the claimant need not prove negligence, the claimant must prove a connection between the blast and the damage. Only causation need be established. See paragraph 3–3b.

(2) To achieve consistency in determining causation, AR 27–20, chapter 2, requires that blast damage claims should be forwarded to USARCS along with the information set forth in paragraph 2–28 through 2–48 for review by a blast damage expert located at or used by USARCS. If another claim under the exact circumstances has already been reviewed, such as similar damage to the house next door, the ACO or CPO should coordinate with the AAO to waive the requirement for USARCS technical review. Similar damages usually mean the type of damage caused by air blast, such as broken windows, and not ground shock, such as a cracked basement wall.

(3) Payment for nuisance value alone leads to other claims or protests by neighbors, particularly those whose claims have been denied previously. This should not be done.

k. Motor vehicle damage claims arising from the use of non-government vehicles. See also paragraphs 2–61 (joint tortfeasors), 2–62e (indemnity or contribution), and 2–70 (splitting personal injury and property damage claims) and similar topics in AR 27–20, chapter 2.

(1) *Third party vehicular damage claims caused by use of privately-owned vehicles.*

(a) AR 27–20, paragraph 2–15k, requires that third parties' tort claims against the United States arising from the use of a privately-owned vehicle (POV) by a Soldier or civilian employee allegedly within the scope of employment must be forwarded to USARCS for a decision prior to any final action. This requirement arises from the difficulty in determining scope in such cases and maintaining any degree of consistency. See FTCH § II, B3.

(b) Always determine whether the liability insurance on the POV may be used to fund at least part of the settlement. Of particular interest are insurance policies that contain exclusions made without regard to reduction of the premium. Research the law of the state in which the contract was entered to determine if it prohibits such an exclusion. This is significant because Soldiers or civilian employees use their POVs for various errands of possible benefit to the Army. See FTCH § II, D8.

(c) Before forwarding, conduct an investigation to assist in a scope determination. While the nature of the investigation varies from case to case, always determine whether mileage was reimbursable and, if not, whether the use was specifically authorized by the command. If the POV was used for more than one purpose on one trip, list the various purposes and routes.

(2) *Claims by lessors for damage to rental vehicles.*

(a) The U.S. Government Visa travel charge card provides insurance coverage for damage to the rented vehicle to all Soldiers and employees who rent qualifying vehicles (essentially passenger sedans and seven-passenger vans) using the U.S. government travel card for 30 days or less worldwide except in Jamaica, Ireland, and Israel. This coverage requires that the traveler notify Visa International Service Association at 1–800–VISA–911 (1–800–847–2911) within 20 days of the damage to the rented vehicle and complete and submit an accident report to Visa within 70 days of the damage. This coverage is independent of any other insurance provided to the renter. The coverage is primary for damage caused while an authorized driver was acting within the scope of his employment, and secondary to other coverage when the driver was using the vehicle for personal use, such as during personal time over a weekend while on a two-week TDY period.

(b) The U.S. Government Car Rental Agreement (formerly the Military Traffic Management Command (MTMC) Agreement, now known as the Surface Deployment & Distribution Command (SDDC) Agreement), effective 1 October 2002, provides that Soldiers and employees on TDY who rent a passenger vehicle or qualifying passenger van from a participating rental agency in other than a fleet rental arrangement are furnished collision insurance by the lessor and its insurer. The Agreement is posted to the USARCS Web site at "Claims Resources," II, a, 11. The Agreement may also be viewed at the SDDC Web site at <http://www.sddc.army.mil/>, by clicking on "passenger," "car rental carriers," then "car rental agreement." Under this coverage, the lessor assumes responsibility for all collision damage to its vehicle, provided the member or employee driving the vehicle did not cause the damage through willful conduct or wanton negligence, nor through one of the listed exceptions in SDDC Agreement, paragraph 9. This coverage applies only when the traveler was acting within the scope of his employment when the loss or damage occurred. Claims arising when a traveler is not within the scope of duty, such as for detours or frolics, are the traveler's individual responsibility. Deny any claim for damage covered by this insurance with an explanation that it is not cognizable under any statute or regulation and refer the claimant to the SDDC Agreement, paragraph 9b.

l. If the lessor refuses to accept liability for damage to its vehicle under the rental contract based on the lessor's belief that the driver's conduct voids the insurance coverage, process the claim by referring the claimant (lessor, lessee or lessor's insurer) to the appropriate Army disbursing office for disposition under the Joint Federal Travel Regulations (JFTR), paragraphs U3415 c(2)(b) and (c) or C2102–D2, available on the Web.

2. If the rental agency attempts to collect directly from the renter rather than filing a claim with the renter's unit, inform the rental agency that the SDDC Agreement requires it to first file with the unit. Rental agencies can only pursue the individual renter when the renter's unit has determined that the damage occurred due to acts or omissions of the renter not within the scope of his duty.

(c) If the rental agency does not participate in the SDDC Agreement, claims for damage to or loss of the vehicle are contract claims and are not cognizable as tort claims. Forward any demand for compensation for the damage or loss to the contracting authority through which the contract for the vehicle rental was obtained.

(d) In tort claims where the renter either failed to use or comply with the provisions of the government Visa travel card or to rent from a SDDC participating rental agency, the claim will be paid directly from the unit travel funds. Either the traveler can pay the rental agency and request reimbursement on the travel voucher (DD 1351-2); the rental agency can send a claim to the unit commander, who, after certifying that the damage or loss occurred while the traveler was within the scope of his duties, sends the claim to the servicing Defense Finance and Accounting Service (DFAS) office for payment, JFTR, paragraphs U3415 c(2)(b) and (c) or JTR C2102-D3; or the rental agency can send a claim directly to the unit's servicing DFAS office for payment, DOD Financial Management Regulation (FMR), vol. 9, chapter 4, paragraphs 040704 - 040705.

(3) *Third-party damages arising from the use of rental vehicles.* Third-party damages and injuries arising from the use of rental vehicles are discussed at paragraph 2-62e.

l. Claims arising from gratuitous use of DOD or Army vehicles, equipment, or facilities. Frequently, nonfederal organizations, companies or individuals are granted free use of government land, vehicles, or equipment, and such use results in tort claims. Gratuitous user claimants may be students, volunteers, members of scouting organizations, foreign military personnel, or persons injured during fundraising or recreational activities. Third parties whose property is damaged during debris removal following a natural disaster in which a state governor requests federal assistance may also be gratuitous claimants. See subparagraph(5), below. Liability may exist under AR 27-20; before processing such claims, however, consider the following issues:

(1) Departmental or local directives often require the execution of a hold harmless or similar clause before Army facilities, transportation, or equipment are used. Whether such clauses are legally enforceable should be determined by local law, based on the following factors:

(a) Whether the arrangement between the United States and the sponsoring agency is binding on the individual claimant.

(b) Whether a benefit is derived by the Army, the individual claimant, or both.

(c) Whether the Army is furnishing the benefit under an obligating statute or authority or on a voluntary basis.

(d) Whether public policy considerations are involved.

(2) Generally, hold harmless clauses are ineffective unless agreed to by both the individual claimant and the sponsoring organization and unless the latter maintains a program or method of compensation similar to workers' compensation or other insurance. Examine any insurance policy involved to see whether the DA is an insured party (if not, the insurance carrier may be subrogated to the claimant's interests). Urge Army officials arranging such functions for gratuitous users to require adequate third-party liability insurance that includes the DA as an insured party. In any event, scrutinize such claims to see whether other benefits are available to the claimant before processing under AR 27-20 or whether such benefits are considered a collateral source and thus are not deductible from any payment made under AR 27-20.

(3) If contribution or indemnity applies but the matter cannot be resolved, forward the claim to the Commander, USARCS, 28 C.F.R. § 14.6(d)(1)(iii). Attach a copy of the contract, any insurance policy, and a record of the status of the negotiations, including efforts to obtain contribution or indemnity in the file. If the claim involves Army transportation, state whether any guest statute applies.

(4) Third-party claims may arise from acts or omissions of individuals such as students, volunteers, members of scouting organizations, foreign military personnel, or other persons present on a military installation in connection with fundraising or recreational activities. These persons may be liable under the "loaned servant" doctrine or other employment-type relationship. Generally, these do not depend on compensation from federal sources but turn on either the extent of direction and control exercised by the United States or its responsibility as the owner of land or equipment. See paragraph 2-45d (volunteers). Hold harmless clauses do not bar third-party claims unless the third party is privy to the agreement permitting use of DA premises. The clause's main value is derived from any insurance or other third-party compensation program provided by the sponsoring organization or the individual involved. Refer third-party claims to the sponsoring organization or individual concerned or to either party's insurer. If not resolved by such referral and if contribution or indemnification is considered inapplicable or cannot be obtained, refer the claim to the Commander, USARCS, with all pertinent data concerning contribution or indemnity included in the file. See paragraph 2-62 (indemnity).

(5) Debris removal claims present a different problem in that a state or local government must agree to indemnify the government against any claim arising from debris removal from private property. See 42 U.S.C. § 5173. The Federal Emergency Management Agency (FEMA) represents the federal government in providing disaster relief. Past experience has indicated that the senior Army JA of a task force engaged in such a mission should arrange with a state

to assume responsibility for the settlement of such claims after a special claims processing office investigates. Attempts should be made to have the state assume liability not only for claims arising at the site but in addition for claims arising from travel to and from the home station of any unit to be used for debris removal.

m. Real estate claims.

(1) Claims for rent, damage, or other payments involving the acquisition, use, possession, or disposition of real property or interests therein by and for the DA are generally payable under AR 405–15, paragraphs 5 and 6. Claims for damage to real property and incidental personal property damage sustained during Army noncombat activities are payable under either AR 405–15 as a real estate claim or AR 27–20, chapters 3 or 10 as trespass claims. Such claims usually arise during a maneuver or training exercise or an emergency deployment. If the property is occupied pursuant to a lease or use permit and if operation and maintenance funds are available for payment of damage claims, refer to AR 405–15. The length of time the land is occupied is the general guideline for determining whether to pay a claim as a trespass (using damages to the property and loss of use as a measure of damages) or as a real estate claim. (Rent is only payable for a real estate claim.) If 30 consecutive days or less, the claim is normally considered as a trespass; if 31 consecutive days or longer, the claim is normally considered as a real estate claim. See U.S. Army, Europe Real Estate/Office of the Judge Advocate Standard Operating Procedures for Processing Claims Involving Real Estate During Contingency Operations (20 August 2002). This may be accessed through JAGCNet intranet menu selection, or directly at the U.S. Army Claims Service Europe homepage at <https://claimseurope.hqusaureur.army.mil>, at the publications/regulations menu selection.

(2) Take care to avoid splitting the claim (by considering the real property claim under AR 405–15 and the incidental personal property claim under AR 27–20, chapters 3 or 10). Instead, consider the entire claim under AR 405–15 by referring to the lease’s restoration clause. If this is not possible, or if operation and maintenance funds are not available, include a statement to this effect in the file and process the remainder of the claim under AR 27–20, chapters 3 or 10. There should be careful coordination with the COE district real estate claims office to avoid duplicate payments. See AR 405–15, paragraph 9b. Note that a lease may be entered into after the fact of occupancy. See AR 405–15, paragraph 5.

(3) Claims for damage to real property and incidental personal property damage arising out of Army activities considered to be neither combat nor noncombat activities are payable under AR 405–15. They are also payable under AR 27–20, chapters 3 and 10, but only if founded in tort. Normally, such claims arising during civil emergencies should be processed under AR 405–15; contingency planning should include adequate operations and maintenance funding for such claims.

(4) Real estate claims based on a Fifth Amendment taking of property such as navigation easements, or claims based on continuous invasion of property (such as by overflight, noise, smoke, gases, or water emanating from government sources) fall under the Tucker Act. See paragraph 2–17h(1). Take care to distinguish these claims from those based on tort or noncombat activities—that is, distinguish claims based on a continuing invasion, including a taking, temporary or permanent, from claims based on damage to the property.

(5) If the invasion is found to be of a continuing nature, try to settle the claim through real estate acquisition procedures. In such instances, claims offices should coordinate with the appropriate division and district engineers or the Directorate of Real Estate, Office of the Chief of Engineers.

(6) Under certain conditions, process these claims under the Federal Acquisition Regulation (FAR), part 50 and 50 U.S.C. § 1431, for example, if a contract instead of a lease was used to rent certain real estate and claims arise that are not payable under the contract.

n. Claims generated by civil works projects. Civil works projects that may generate claims include dams, bridges, and reservoirs. They are specifically identified by their legislative history and appropriation. The COE investigates and processes claims arising out of civil works projects in the same way as any tort claim. Payment procedures, however, are different. See paragraph 2–8e for specific payment procedures that apply.

2–16. Unique issues related to environmental claims

a. General. This paragraph presents a general discussion of the unique issues involved in receiving and processing tort claims based on environmental contamination allegedly attributable to CONUS Army operations. Most environmental contamination problems facing the installation lawyer do not involve claims under AR 27–20.

(1) There are two types of environmental claims. The first type asserts damage or injury resulting directly from the contamination; these claims are processed under AR 27–20. The second type seeks to recover the costs of or, damages attributable to, the necessary “cleanup” response; these claims are processed under the Defense Environmental Restoration Account (DERA). The line between these types is often obscure and difficult to draw, requiring close coordination between claims and environmental personnel. However, under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675, an FTCA suit is prohibited during a CERCLA cleanup, 42 U.S.C. § 9613h.

(2) For a claim to be classified as either an environmental or a “toxic tort” claim, the claimant must allege that the damage or injury was due to a legally recognized civil wrong. Many claims do not assert a state tort based on the government’s “wrongdoing.” Instead, they typically allege an activity (such as disposal of industrial chemicals) and an

adverse result (risk of cancer). Often, claimants file after an environmental survey has been conducted, at which time the ACO or CPO must review such claims carefully to determine whether to refer them to environmental personnel for processing under DERA. The claimant should be advised of proper procedures.

b. Comprehensive Environmental Response, Compensation, and Liability Act.

(1) CERCLA sets out an environmental restoration program administered by the Environmental Protection Agency (EPA). See 42 U.S.C. §§ 9601–9675. Although the statute does not create new tort remedies for individuals damaged or injured by environmental contamination, Congress by enacting it demonstrated its intent that the federal government shoulder the burden of environmental cleanup together with private industry. The statute expressly permits a private individual to sue, not for damages, but to ensure compliance with the CERCLA mandate. The DOD, by agreement with the EPA, administers the DERA program which is designed to carry out CERCLA objectives and remedies.

(2) When presented with a claim alleging damage or injury resulting from the release of a hazardous substance into the common environment, the ACO or CPO must determine whether CERCLA procedures may abate the release or ameliorate both its short-term and long-term effects. If the installation elects to abate a release of contamination or ameliorate its effects, whether as the result of a claim or not, its legal staff must inform the command and the civilian community that the Army is acting under the mandate of the Installation Restoration Program and not because of potential tort liability.

c. Defense Environmental Restoration Account.

(1) The Army first responded formally to the need for cleanup of hazardous waste sites in 1975 by instituting the Installation Restoration Program. This program was aimed originally at a few known trouble spots but soon expanded to cover all Army installations. In 1976, DOD expanded the program throughout the Services, naming the Army its executive agent.

(2) The DERA was established pursuant to the Defense Appropriation Act of 1984. The program was expanded to include cleanup of former DOD sites as well as active installations. Although the military departments individually identify, develop and implement their own cleanup projects, the Secretary of Defense controls the DERA. As funding needs are identified and developed, DOD transfers funds to existing accounts administered by the military departments.

(3) Local military or civilian environmental law specialists are responsible for active installations or activities. COE Headquarters Environmental Restoration Division, Washington, DC, is responsible for closed installations or activities.

d. Theories of tort liability and damages.

(1) Environmental tort litigation is replete with diverse theories of liability, some traditional and some new and creative. Several of the more novel theories that a few courts have adopted originated in product liability cases against multiple pharmaceutical company defendants. The traditional theories commonly urged in support of toxic tort liability include trespass, nuisance, negligence, assault and battery, and strict liability. Trespass does not usually apply to claims against the government because there is rarely evidence of the necessary intent. The same is true of assault and battery. However, under the proper circumstances, state nuisance laws may provide a viable remedy against the federal government, especially on contamination release caused by waste disposal practices.

(2) Plaintiffs seek compensation for such damages as emotional distress resulting from knowledge of exposure to a toxic substance, the need for future medical surveillance because of such exposure, cancer phobia, and the increased risk of suffering future injuries or illness. Although the courts have generally rejected such damages, which often amount to new causes of action, as too speculative, plaintiffs have made significant inroads in some jurisdictions. For the most part, however, these theories have failed because of the scientific uncertainty about causation rather than from the conceptual basis of liability. See FTCH § II, C30.

e. Typical installation contamination situations. The following are typical scenarios, each presenting its own problems and challenges:

(1) Groundwater contamination arising from:

(a) Past solid waste disposal practices (such as landfill disposal).

(b) Past or present industrial operations (such as evaporation basins, solvent disposal, and chemical storage).

(2) Lead paint or asbestos exposure to occupants of quarters, installation employees, contractor employees, and the public.

(3) Use of pesticides, herbicides, fungicides, and rodenticides.

(4) Sales of excess or salvage property containing hazardous materials, such as polychlorinated biphenyls found in transformers sold by local property disposal offices or contaminated drains or boilers used in the manufacture of explosives.

(5) Defective or inadequate water treatment.

(6) Defective or inadequate sewage treatment.

(7) “Chance” exposure to military chemical munitions, usually due to past practices of canister or drum storage or disposal.

(8) Exposure to bacteria used in Army tests for establishing dispersal patterns.

f. Role of the area claims office or claims processing office.

(1) Most allegations do not arise out of a single incident of exposure to a toxic agent that produces immediate,

identifiable personal injury. The more typical toxic tort claim involves many potential claimants who allege long-standing exposure to multiple hazardous substances. This usually occurs against a background of public concern and media attention. However, causation is often obscured by scientific and medical disagreement. The passage of time, witnesses' fading memories, and the routine destruction of documentary evidence all combine to "contaminate," or blur, the facts relevant to a negligence inquiry. Because multiple toxic tort claims involve potential class action lawsuits, plaintiffs often file administrative claims merely as the necessary first step to litigation: they have no real expectation of administrative settlement. In this atmosphere, it is not surprising that the Environmental Tort Branch of DOJ closely monitors these claims from their inception. The ACO or CPO faced with a claim asserting a toxic tort must investigate it as thoroughly as possible. Since lawsuits will likely ensue, this thoroughness is in the Army's interest.

(2) Obtain investigative assistance from the following sources:

(a) Virtually all Army installations that conduct operations likely to affect the environment employ one or more environmental specialists. These experts, either Soldiers or civilian employees, are professionals charged with guiding the installation's environmental management. They are usually well-trained in both science and the federal and local legal framework.

(b) Another good source of information is the state environmental regulatory agency, which has a long-standing relationship with the installation, often in a watchdog role.

(c) Each MACOM employs one or more environmental law specialists within the OSJA who are well versed in DOD and DA regulatory requirements and policies. Environmental Law Division, Office of the Judge Advocate General (OTJAG), has extensive experience in environmental matters and is the focal point for DA policy and litigation in this field. Consult the AAO upon receiving of an environmental claim or upon learning of potential claims.

(d) Army or DOD sources of technical assistance include the U.S. Army Environmental Hygiene Agency, the COE Headquarters Environmental Restoration Division, the U.S. Army Medical Bioengineering Research and Development Laboratory, and the DOD Hazardous Materials Technology Center.

g. *Notifying Department of Justice.* Forward copies of toxic tort claims to USARCS. In turn USARCS will notify the Environmental Law Division, OTJAG and the Environmental Law Branch, DOJ for comment and direction.

2-17. Claims remedies outside of AR 27-20

a. *Scope.* This paragraph provides information and guidance on processing demands for monetary compensation outside of AR 27-20. This compilation is by no means exhaustive, and claims personnel should research the law on incoming claims to be sure that no other means of claims disposition resides elsewhere within the Army, other federal agencies or the courts. Even if no such means is available, forward the claim to USARCS with both a factual summary sufficiently detailed to permit proper disposition and a statement as to why no means for settlement are available.

b. *Claims by war victims, including internees, and prisoners of war.*

(1) Combat claims and most claims statutes explicitly exclude claims arising out of war or armed conflict. In certain cases, the United States and the host government may mutually waive such claims through a status of forces agreement. In others, the host government has discharged and held the United States harmless from such claims in exchange for either a lump-sum payment or economic and military assistance. Belligerent nations have released the United States in certain cases.

(2) Under the War Claims Act of 1948 (50 U.S.C. app. §§ 2001-2016), the War Claims Commission initially adjudicated claims arising out of World War II of U.S. prisoners of war, internees, and organizations and individuals of nations allied to the United States. The statute was later amended to include U.S. citizens who were internees and prisoners of war during the Korean War and to expand the categories of World War II claimants. Today, the only program that is still open addresses claims of civilian internees or Soldiers or their survivors held in captivity during the Vietnam War. Their claims are adjudicated by the Foreign Claims Settlement Commission as successor to the War Claims Commission.

(3) Congress enacted Titles III and IV of the International Claims Settlement Act of 1949, as amended (22 U.S.C. §§ 1641-1642), 64 Stat. 13. This authorized the Foreign Claims Settlement Commission to determine certain claims of U.S. nationals against the governments of Bulgaria, Czechoslovakia, Hungary, Romania, Italy, and the Soviet Union. The Foreign Claims Settlement Commission started similar programs concerning Yugoslavia, Cuba, Iran, The People's Republic of China, the Democratic Republic of Germany, Vietnam, Ethiopia and Egypt. Currently, the FCSC is adjudicating property claims against Albania which is the only 22 U.S.C. § 1621 program still open. It is anticipated that legislation will permit claims against Iraq (such as those of survivors and veterans of the conflict there). Address inquiries to: Foreign Claims Settlement Commission Suite 6002 600 E. Street, N.W. Washington, D.C. 20579-0001 Commercial: 202-616-6975.

(4) For a claims view of the conflict in Grenada, see J. L. Harris, "Grenada: A Claims Perspective," *The Army Lawyer*, January 1986, p. 7. Both the Grenada and the Dominican Republic deployments have been construed to bring the combat exclusion rule into play. This accords with the United Nations practice barring claims arising out of acts based on military necessity in the Gaza Strip, Cyprus, and the Congo. When the United States joins a multinational force and an international body assumes operational control (as the Organization of American States did in the

Dominican Republic and the United Nations did in Somalia) that international body becomes responsible, at least concurrently, with its member nations for settling claims that their forces generate. Accordingly, the approval or settlement authority should seek advice from the Commander USARCS before paying any claims under the FCA. See paragraph 2-37 for a discussion of the incident to service doctrine.

c. Claims cognizable by other agencies.

(1) Department of State.

(a) The Secretary of State may provide compensation for the personal injury or death of an individual not a national of the United States located in a foreign country in which the United States exercises privileges of extraterritoriality. The Secretary of State may settle such claims when the injury or death is caused by an officer, employee, or agent of the U.S. government, other than members and employees of the armed forces (31 U.S.C. § 3725). Settlement is limited to amounts not exceeding \$1,500 in any one case. Negligence, wrongful acts, or acts within the scope of employment need not be proven.

(b) The Secretary of State may also pay tort claims in foreign countries arising out of U.S. government operations abroad. Settlement is limited to not more than \$15,000. A foreign government must present such claims for damage to, or loss of, real or personal property of, or for personal injury to or death of, a national of that foreign country, 22 U.S.C. §§ 2669 and 2669-1. These claims may not be cognizable under any other U.S. statute or international agreement.

(c) The Secretary of State may pay tort claims arising out of Department of State operations in foreign countries. Payment is made in the manner authorized under the FTCA in 28 U.S.C. § 2672. There is no provision for bringing suit if a claim is denied, 22 U.S.C. §§ 2669 and 2669-1.

(d) Under the auspices of the Department of State, the International Boundary and Water Commission, United States and Mexico, may pay claims, not exceeding \$1,000, for property damage arising from the activities of the government or its personnel in connection with any Commission project. Such claims may not be cognizable under the FTCA. They are payable from funds appropriated for the project giving rise to the loss (22 U.S.C. § 277e).

(e) The U.S. Constitution (Art. I, sec 9, clause 8) prohibits acceptance without consent of Congress of "any present, emolument, office, or title" from a foreign state by U.S. employees, including members of the armed forces and their families. The Department of State processes foreign government claims for return of gifts and decorations that it holds on deposit, 22 C.F.R. Part 3, chapter I, except for Vietnamese decorations, which are governed by Pub. L. No. 89-257, passed October 15, 1965. Pub. L. 89-257 is uncodified. More information about Pub. L. No. 89-257 is available by visiting <http://foxfall.com/fm-vca.htm>.

(2) Department of Justice.

(a) Federal prisoners injured while engaged in work activities under the Federal Prison Industries Program are limited to the exclusive remedy provided by the fund such industries have established (18 U.S.C. § 4126); see also *United States v. Demko*, 385 U.S. 149 (1966). Those prisoners under the custody or control of the Army who have been discharged and are engaged in the Federal Prison Industries Program are also covered, as are their dependents. The Disciplinary Barracks, Fort Leavenworth, has not joined this program but it plans to do so shortly. Recovery is barred, however, if injury is sustained as a result of willful conduct, is not related to work assignment, or occurs while the claimant is away from the work location. Recovery may not exceed that permitted under the FECA. Claimants are entitled to procedural due process with limited judicial review. See *Saladino v. Federal Prison Indus.*, 404 F. Supp. 1054 (D. Conn. 1975); *Sturgeon v. Federal Prison Indus.*, 608 F.2d 1153 (8th Cir. 1979).

(b) The Attorney General is authorized to settle and pay claims for no more than \$1,000 for damage to, or loss of, personal property of federal penal and correctional institution employees incident to their employment. Neither negligence nor causation is required, but recovery is barred if the damage or loss results from the claimant's or an agent's contributory negligence (31 U.S.C. § 3722).

(c) Claims based on unjust convictions may be payable under 28 U.S.C. § 1495 and 28 U.S.C. § 2513 by the Court of Federal Claims or a District Court, 28 U.S.C. § 1346. Such claims must be based on an actual conviction and are limited to a total of \$5,000.

(d) Owners of property seized under the Trading with the Enemy Act (50 U.S.C. app. § 9) are entitled to the exclusive remedy this Act provides for the payment of damages or the return of the property held by the Attorney General as custodian, provided the owners prove they were neither enemies nor allies of an enemy of the United States.

(e) Claims based on actions of the Director, Assistant Director, inspectors, or special agents of the FBI, which are not cognizable under the FTCA, may be compensable in a limited amount from agency appropriations.

(f) Claims arising out of operations of the Drug Enforcement Agency conducted in a foreign country may be settled in the manner authorized by the FTCA.

(g) Claims for death or disability of a public safety officer, including state and local officials, arising in the line of duty are payable by the Bureau of Justice Assistance, 42 U.S.C. §§ 3796-3796c-1.

(3) Department of the Treasury. Army disbursing officers are authorized to recertify checks that have been issued by the Army and later lost or stolen. However, not all federal agencies have this authority. An inquiry regarding a check issued by another agency should first be referred to that agency or, for cases in which it is known that such agency

cannot recertify the check, to the U.S. Department of the Treasury, for processing through the Check Forgery Insurance Fund (31 U.S.C. § 3343, 31 C.F.R. §§ 235.1–235.6).

(4) *Department of Agriculture.* The Secretary of Agriculture is authorized to pay up to \$2,500 for damage to private property caused by any federal employee, including Army personnel, in connection with the protection, administration, or improvement of national forests (16 U.S.C. § 574). Negligence is not a requirement. This remedy is available only for claims not cognizable under the FTCA.

(5) *Department of the Interior.*

(a) Claims for damage, loss, or destruction of horses, vehicles, and other equipment occurring while in the custody of the National Park Service may be settled by the Secretary of the Interior, if the National Park Service exercises such custody for fire-fighting, trail maintenance or other official business (16 U.S.C. § 17f). Such claims may not be cognizable under the FTCA and are payable from appropriations for the rental of such equipment.

(b) The Secretary of the Interior is authorized to settle and pay claims to owners of private property for damages resulting from government operations in the survey, construction, operation, or maintenance of tribal Native American irrigation projects. Such claims are payable from project funds but may not exceed five percent of total project funds available that year (25 U.S.C. § 388). A claim by an Indian tribe as an entity is within the exclusive jurisdiction of the Court of Federal Claims (28 U.S.C. § 1505).

(6) *Department of Health and Human Services.*

(a) Claims for injury and death caused by the administration of vaccines may be payable by the Court of Federal Claims under the National Vaccine Injury Compensation Program (42 U.S.C. §§ 300aa-1 through 300aa-6). A claimant dissatisfied with the Court of Federal Claims judgment may bring a civil suit for damages in a state or federal court. Such claims are also cognizable under the FTCA.

(b) Claims for injury or death arising from the acts or omissions of employees or contractors engaged in the performance of medical, surgical, dental or related services within the following entities: migrant health centers (42 U.S.C. § 254b); and community health centers (42 U.S.C. § 254c).

(7) *Department of Veterans Affairs.*

(a) Tort claims arising in foreign countries in connection with the Department of Veterans Affairs (DVA) operations abroad are authorized under 38 U.S.C. § 515. Administrative claims authority parallels that set forth in the FTCA, but judicial review is not available.

(b) Loss of personal effects sustained in a fire, earthquake or other natural disaster while stored in a DVA hospital or residence is covered under 38 U.S.C. § 1726.

(8) *U.S. Information Agency.* 22 U.S.C. § 1474 applies to tort claims that arise in foreign countries in connection with U.S. government information and educational exchange programs conducted abroad.

(9) *Nuclear Regulatory Commission.*

(a) Claims resulting from the detonation of a nuclear or non-nuclear explosive device in the course of conducting a Nuclear Regulatory Commission program are payable under 42 U.S.C. § 2207. This statute expressly covers acts or omissions of Army personnel engaged in such a program. Such claims, which may be brought for damage or injury from explosions or radiation, are based on causation; negligence need not be established. Although such claims are limited to not more than \$5,000, the Commission may report claims in excess of that amount to Congress for consideration if they are meritorious and otherwise covered by this provision. Such claims are not payable if caused in whole or in part by the negligent or wrongful act of the claimant or the claimant's agents and employees. An action may also be brought under the FTCA unless the claim arises outside its geographic scope. See also 42 U.S.C. § 2210 and 10 C.F.R. §8.2 for information on indemnification agreements in claims against third parties held liable for nuclear incidents.

(b) The Nuclear Regulatory Commission is authorized to settle and pay claims for property damage or personal injury or death resulting from a nuclear incident involving the nuclear reactor of a U.S. warship (42 U.S.C. § 2211.3). Additionally, the President may authorize payment of claims from available contingency funds or certify them to Congress for appropriations. Such claims are not payable if they arise from combat or civil insurrection.

(10) *National Aeronautics and Space Administration.* The National Aeronautics and Space Administration (NASA) is authorized to pay claims arising out of the conduct of its functions that are not covered under the FTCA. See 42 U.S.C. § 2473(c)(13), 14 C.F.R. §§ 1261.300–1261.317. The statute expressly covers the acts or omissions of Army personnel engaged in NASA programs. Such claims may be based on causation alone; negligence need not be shown. There is a ceiling of \$25,000; claims in excess of that amount, however, may be reported to Congress for consideration if they are meritorious and otherwise covered by this provision.

(11) *National Oceanic and Atmospheric Administration.* The Secretary of Commerce is authorized to settle claims not to exceed \$2,500 for property damage, personal injury or death arising from National Oceanic and Atmospheric Administration activities that are not cognizable under the FTCA (33 U.S.C. § 853).

(12) *Peace Corps.* The Peace Corps is authorized by 22 U.S.C. § 2509(b) to pay, in amounts not exceeding \$20,000, claims of foreign nationals for property damage, personal injury, or death resulting from tortious acts committed abroad by Peace Corps employees or volunteers.

(13) *United States Postal Service*. Claims for property damage, personal injury or death resulting from U. S. Postal Service operations that are not cognizable under the FTCA are covered by 39 U.S.C. § 2603.

(14) *Tennessee Valley Authority*. Claims arising from the activities of the Tennessee Valley Authority are not cognizable under the FTCA but the Tennessee Valley Authority may settle and pay them in its capacity as a quasi-governmental corporation, 16 U.S.C. § 831c(b).

(15) *Panama Canal Commission*. Claims arising from the Panama Canal Commission's activities or the acts or omissions of its employees are not cognizable under the FTCA but may be paid by the Panama Canal Commission. The comparative negligence of Canal employees, the vessel master, crew, or passengers may be used to apportion liability. Such claims are subject to judicial review by the U.S. District Court for the Eastern District of Louisiana. See Panama Canal Act of 1979, 22 U.S.C. §§ 3601–3873 at §§ 3761 and 3771.

(16) *American Battle Monuments Commission*. Claims arising from the American Battle Monuments Commission's activities in foreign countries are payable under 36 U.S.C. § 2110 and processed under the FCA and AR 27–20, chapter 10.

d. Claims related to Army service or employment.

(1) *Claims based on Soldiers' personal affairs.*

(a) Private indebtedness; see AR 600–15.

(b) Nonsupport of dependents; see AR 608–99. This includes court-ordered garnishment of pay for alimony and child support.

(c) Paternity claims; see AR 608–99.

(d) Claims for property willfully damaged or destroyed or wrongfully taken; see the Uniform Code of Military Justice (UCMJ), Article 139, and AR 27–20, chapter 9.

(e) Other complaints and allegations against Soldiers; see AR 600–20, paragraph 5–8.

(2) *Remission of indebtedness*. DFAS processes claims by enlisted personnel for remission of indebtedness to the federal government under 10 U.S.C. § 4837. Remission of indebtedness is available to enlisted Army Soldiers while serving on active duty, inactive duty training or active duty for training. See AR 600–4. The indebtedness of ARNG Soldiers, based on reports of survey, may be remitted under 32 U.S.C. § 710(c). See AR 600–4. Remission of indebtedness procedures are not authorized to effect offsets under Article 139, UCMJ (implemented in AR 27–20, chap 9), since the Soldier's debt under Article 139 is owed to the victim, not to the government.

(3) *Meritorious Claims Act*. See extract from 31 U.S.C. § 3702. The OMB is authorized to consider meritorious claims against the United States that are not otherwise subject to lawful adjustment. Relief under this law is discretionary and administered according to established equitable principles and the circumstances of the particular case. The OMB has delegated most claims settlement functions as set forth in subparas (a), (b), and (c), below. In addition, subpara (d), below sets forth a delegation of waiver authority by the Comptroller General. However, the Comptroller General has retained authority, under 31 U.S.C. § 3529, to issue decisions to disbursing or certifying officials and heads of agencies on matters involving the expenditure of appropriated funds not specifically involving the claims settlement and waiver functions set forth below.

(a) Settlement of claims for uniformed service members' pay, allowances, travel, transportation and survivor benefits, and carriers' claims for amounts set off from their charges for loss and damage, to the DOD, Office of Hearings and Appeals.

(b) Settlement of federal civilian employees claims for compensation and leave, to the Office of Personnel Management.

(c) Settlement of claims for civilian federal employees' travel, transportation and relocation allowances, and transportation carriers' requests for review of General Services Administration (GSA) audits of their bills, to the GSA Board of Contract Appeals.

(d) Authority to prescribe standards for and waive claims against government employees and members of the uniformed services and National Guard arising out of erroneous payments of pay and allowances and of travel, transportation and relocation benefits was transferred to the head of an agency with respect to legislative branch employees, or the Director of OMB with respect to any other federal employee, member of the uniformed services or the National Guard. OMB re-delegated this authority to the agency that made the erroneous payment.

(4) *Claims by Reserve component personnel*. Claims of Reserve component (U.S. active Reserve and ARNG) personnel arising pursuant to inactive duty training or active duty are discussed below. For purposes of this paragraph, active duty includes all federally funded full-time duty or training, such as annual training, active duty training, active duty special work, active duty other than for training and full-time training or ARNG duty (all full-time National Guard duty under 32 U.S.C. §§ 316, 502, 503, 504, or 505).

(a) Claims for loss, damage, or destruction of personal property of Reserve component members incident to inactive duty training or active duty are payable under AR 27–20, chapter 11, or if not payable thereunder, chapter 3, the MCA, may apply.

(b) Claims for personal injury to, or death of, Reserve component members pursuant to inactive duty training are barred by the incident to service doctrine. The incident to service bar applies to inactive duty training only after the

Soldier reports for duty and does not cover the Soldier's travel to or from duty by POV. The bar does not apply to POV travel to inactive duty training or two weeks training if the Soldier's travel is so authorized.

(c) Claims for payment or reimbursement of expenses for treatment of injury or disease at civilian medical facilities incurred by Reserve component members as a result of performing inactive duty training or active duty are processed by Army medical authorities pursuant to AR 40-400, chapter 3. Generally, payment for civilian medical care is authorized only if the appropriate Army medical official approved it in advance or during a bona fide medical emergency. Reserve component members are expected to receive as much care at MTFs as possible.

(d) Claims for continuation of basic pay and allowances (such as incapacitation pay) brought by Reserve component members who are disabled by injury or disease in the line of active duty or inactive duty training are processed under regulations issued pursuant to 37 U.S.C. §§ 204(g) and (h). Such coverage includes in-line-of-duty travel to and from inactive duty training, even though the member is not on active duty.

(e) Claims for disability-retirement or separation with severance pay are processed under regulations implementing 10 U.S.C. §§ 1201 through 1206.

(f) Claims for pay and allowances due for periods of inactive duty training are processed by DFAS under DOD FMR, Vol. 7A, chapter 58.

(g) Reserve component members who must be discharged due to a service-connected disability but who are not eligible for DA disability retirement may be eligible for DVA medical care, 38 U.S.C. chapter 17. Dependents of members who die as a result of service-connected injury or disease may be eligible for dependent indemnity compensation, 38 U.S.C. chapter 13.

(5) *Claims by reserve officers' training corps cadets.*

(a) Claims for injury to, or illness of, senior ROTC cadets during authorized, scheduled and supervised training or instruction, or while traveling to or from such training while on government transportation or on government orders, fall under FECA (see 5 U.S.C. § 8140). Such training or instruction may be conducted on or off campus and includes Basic Camp, Advanced Camp, and Cadet Professional Development Training (Airborne, Northern Warfare Training, Air Assault). Claims for death or permanent disability are submitted to the DVA.

(b) Claims for injury to, or death of, ROTC cadets with Reserve status are payable under FECA when they arise in the line of duty and while the claimant is attending, or traveling to or from, training or instruction described in subparagraph (a), above.

(6) *Claims by applicants for enlistment or by inductees.* The DVA processes all claims brought by applicants for enlistment or inductees for injury, disease, disability or death incurred enroute to, from, or while at the place of entry into active service, 38 U.S.C. § 106(b). The DVA's authority supersedes the Army's authority to consider a negligence claim based on the same injury or disease. However, the Army may deduct any benefits recovered or recoverable from the DVA. In addition, applicants and inductees are entitled to free medical care at Army facilities for such injury or disease; see AR 40-400. The Selective Service may authorize reimbursement for expenses of emergency medical care obtained from civilian sources (50 U.S.C. app. § 461, 32 C.F.R. § 1659).

(7) *Claims to upgrade discharges.*

(a) If it is alleged that a discharge was inequitable or improperly executed, the ex-Soldier may apply to the Army Discharge Review Board to change, correct, or modify the discharge or dismissal under AR 15-180. Such review does not apply to discharges or dismissals by general court-martial, nor may the applicant regain active status in the Army. However, an applicant who succeeds in upgrading a discharge may receive certain statutory benefits previously withheld because of the inferior discharge class.

(b) Soldiers or former Soldiers may request correction or adjustment of their military records from the Army Board for Correction of Military Records (10 U.S.C. § 1552, AR 15-185). The Board may grant any relief it deems just and proper, including reinstatement of active service with back pay. In such a case, DFAS processes the payment pursuant to AR 37-104-4, chapter 20, with Army claims budget funds.

(8) *Claims for pay, allowances or other demands processed by Defense Financial Accounting Service.* Defense Financial Accounting Service (DFAS) routinely handles many types of monetary demands that come through finance and accounting channels:

(a) Soldiers' and former Soldiers' claims for adjustments in pay or allowances after separation or for prior periods of service.

(b) Claims for lump-sum accrued leave.

(c) Claims for uniform allowances.

(d) Claims for travel and transportation allowances. (See DFAS-IN 37-1, chap 10.) These may include reimbursement of excess shipping or storage expenses that the Soldier has paid on a government shipment or that arise when a Soldier, entitled to government shipment, instead ships the property at own expense. Postage costs for mail shipments are excluded. Such claims should first be presented to the installation transportation office for consideration.

(e) Claims for interest on savings deposits are payable under AR 27-20, paragraph 11-5g. Otherwise, claims for interest should be forwarded to DFAS.

(f) Claims for repayment of amounts collected erroneously from military and civilian personnel and deposited in the

U.S. Treasury are processed through DFAS. Refunds, if appropriate, are paid from available Army claims budget funds.

(g) Claims related to official business travel are paid by DFAS under authority of the JFTRs and the DOD FMR. Such claims may include bridge, ferry, tunnel, or highway tolls; parking fees; local commercial transportation taken in connection with official business; emergency roadside service; telephone and telegraph service; clerical support hired or rented while on TDY; and registration fees incident to attendance at meetings of private organizations such as technical, scientific, or professional associations.

(h) Claims for proceeds of undelivered checks issued by DFAS, see DFAS-IN 37-1 and DOD FMR Vol. 5, chapter 8.

(i) Claims for recertification of lost, stolen, or mutilated checks issued by DFAS, see DFAS-IN 37-1 and DOD FMR Vol. 5, chapter 8.

(j) Claims arising out of forged DFAS checks, see DFAS-IN 37-1 and DOD FMR Vol. 5, chapter 8.

(k) Claims for conversion of Military Payment Certificates or for the command's refusal to convert such certificates, see DFAS-IN 37-1 and DOD FMR Vol. 5, chapter 8.

(l) Claims for reimbursement for monetary losses incurred or anticipated by a Soldier or civilian employee from the sale of a residence or from a residence mortgage foreclosure incident to closure of the military installation at which the claimant is stationed are cognizable under 42 U.S.C. § 3374. At the installation level, the appropriate military or civilian personnel officer is generally responsible for assisting applicants and forwarding completed applications with supporting documents to the appropriate COE district for processing. DFAS pays the claims from funds allocated under the Homeowners' Assistance Program.

(m) Claims for reimbursement of closing costs associated with the sale or purchase of a residence incurred by an Army civilian employee who is authorized travel under 5 U.S.C. § 5724 pursuant to a permanent change of duty station are cognizable under 5 U.S.C. § 5724a. Since such costs often arise incident to base closing, departmental directives published at the time of the base closing typically control and set forth filing and payment procedures. Check any local directives published when the base closes to determine the correct procedure and where to submit the claim-usually the civilian personnel or industrial relations office. DFAS pays these claims from funds specifically set aside for their administration.

(n) Claims for overdraft charges caused by government error which are incurred at a bank, credit union or savings and loan institution where the Soldier's or employee's sure-pay account is located are payable by DFAS (10 U.S.C. § 1053 and 10 U.S.C. § 1594).

(9) *Inconvenience claims pursuant to household goods shipments.* Claims for inconvenience due to a carrier's failure to meet a scheduled or preferred delivery date and for claimant's personal expenses incurred above normal living expenses that are not covered by AR 27-20, chapter 11, or any other regulation or statute, may in certain cases be paid by the responsible carrier. Generally, however, the dislocation allowance granted on a change of duty station is intended to cover those personal expenses incurred above normal living expenses.

(10) *General average claims.* "General average," a principle of maritime law that has been adopted by all civilized nations, is illustrated in its simplest form by Rhodian language: "If the goods of an owner are thrown overboard to lighten the ship, the loss occasioned for benefit of all must be made good by the contributions of all." Modern maritime situations are considerably more complex but the underlying principle remains the same: the sacrifice of one owner's cargo to save the ship or other owners' cargo is shared by all on a ratable basis.

(a) Military Sealift Command (MSC) has exclusive responsibility for the investigation, determination of liability and payment of general average contribution claims for all DOD cargo and DA-sponsored baggage, household goods and personal effects shipments (including POVs and professional books, papers and equipment).

(b) Send general average contribution claims to the MSC area or sub-area commander whose contracting officer chartered the vessel or booked the cargo for shipment or in whose area or sub-area the shipment originated. If the proper MSC is not known, send the claim to: Military Sealift Command, 914 Charles Morris Court, SE Bldg. 210 Washington, DC 20398-5540.

(11) *Claims involving government life insurance.*

(a) If a potential beneficiary of a life insurance policy issued to a Soldier of the armed services under National Service Life Insurance, U.S. Government Life Insurance, or yearly renewable term insurance disagrees with the distribution of the policy proceeds, the aggrieved party may bring suit against the United States in the appropriate district court (38 U.S.C. § 1984).

(b) Additionally, federal district courts have original jurisdiction over actions founded on contract for Servicemen's Group Life Insurance (38 U.S.C. § 1975). They exercise original jurisdiction concurrently with the Court of Federal Claims on actions on contracts for life insurance under 5 U.S.C. chapter 87 and for health insurance under 5 U.S.C. chapter 89. Actions based on negligence of Army personnel in administering the foregoing programs are covered, *Shannon v. United States*, 417 F.2d 256 (5th Cir. 1969); *Barnes v. United States*, 307 F.2d 655 (D.C. Cir. 1962).

(12) *Claims by foreign national employees for loss of salary due to imprisonment.* Process under 22 U.S.C. § 3970 claims for loss of salary and other benefits sustained by foreign national employees of U.S. governmental agencies incident to their imprisonment by a foreign government because of their employment by the United States.

(13) *Claims for personal effects.* Process claims for personal effects brought on behalf of deceased and missing personnel under 10 U.S.C. § 4712 and AR 638–2, part 2; claims for lost and abandoned property of absent-without-leave (AWOL) Soldiers and deserters under DA Pam 600–8; and claims for property of prisoners under AR 190–47, chapter 10, section II. Claims by deceased or missing personnel’s next of kin may be payable under AR 27–20, chapter 11, if efforts to locate the property fail.

(14) *Claims for property seized as evidence and for lost or abandoned property.*

(a) Claims for return of property seized as evidence by military police, CID or military prosecutors should be addressed to whoever seized the property. If such property cannot be returned, a property loss claim can be filed under the PCA if the claimant is a service member or otherwise an eligible claimant. If the claimant is not a proper claimant under the PCA, a claim may be filed under the FTCA or, if the loss occurred in a foreign country, under the MCA. Such claims may be subject to the exclusion for claims for the detention of goods or merchandise by any customs or other law enforcement officer. See AR 27–20, paragraph 2–39d(4).

(b) Claims for lost or abandoned property can be processed under 10 U.S.C. § 2575, DFAS–IN 37–1, and DOD 4160.21–M. If their procedures were not followed, a property loss claim may be filed under the PCA, subject to eligibility, the FTCA or, if the loss occurred in a foreign country, under the MCA.

(15) *Claims for property lost while in possession of bonded Army personnel.* For prisoners’ or patients’ claims for lost property, see the regulations applicable to military and civilian personnel engaged in disbursal, logistical or postal operations, or employed at stockades, prisons, hospitals and other places to administer prisoners’ and patients’ personal property and funds. For NAFI personnel, see AR 215–1 and AR 60–20; also contact the particular installation or activity concerned to find out if bonding has been required locally.

e. Claims arising from the provision of supplies, services, and vehicles to the Army.

(1) *Claims based on irregular procurement of supplies and services:*

(a) The Army occasionally acquires property, supplies, perishables or services for its use or consumption through other than prescribed procurement procedures. For example, during a deployment or maneuver, consensual acquisition of such property or services is not susceptible to contractual adjustments such as amendment without consideration, correction of mistakes, and formalization of informal commitments. Process these informal procurements under 50 U.S.C. § 1431, and FAR, part 50. Formalize an informal commitment only if normal procurement procedures were impractical at the time the commitment was made to the vendor. Such requests for compensation must be submitted through procurement channels to the appropriate MACOM. This provision may be effective only during a declared national emergency. Claims for noncontractual acquisitions of supplies or perishables may be processed under FAR, part 50.

(b) Claims for personal services rendered at the request of a Soldier or civilian employee may be cognizable under the Meritorious Claims Act, see subparagraph b(3), above.

(2) *Claims for medical care.* Claims for civilian medical care to Soldiers in emergencies are payable by TRICARE as authorized by AR 40–400, chapter 3. Refer claims for such services furnished to dependents of active duty or retired personnel and dependents of deceased active duty or retired personnel to the appropriate TRICARE fiscal administrator or overseas commander at one of the following address shown below: Director, TRICARE 16401 East Centretech Parkway Aurora, Colorado 80011–9043 Commercial: 303–676–3561 Director, TRICARE Europe Support Office Unit 10310 APO, AE 09094–0310.

(3) *Claims for counsel (attorney) fees.* Claims for counsel fees, bail and expenses are limited to cases in foreign tribunals and are processed under 10 U.S.C. § 1037 and AR 27–50.

(4) *Rewards for recovery of lost Army property.* If someone recovers lost Army property pursuant to an express invitation made by the authorized representative of the Army for the recovery of such property, see AR 735–5, chapter 9, for instructions on how to obtain the reward.

(5) *Payments for apprehension of deserters, prisoners, and absent-without-leave Soldiers.* Payment for apprehension of deserters, prisoners, and AWOL Soldiers is authorized when the prisoner is delivered. Actual expenses may be paid in lieu of reward, for example, travel, meals, phone calls, and property damage caused by the prisoner. See AR 190–9, chapter 6.

(6) *Salvage claims.* Process under AR 27–20, chapter 8 claims for towing and salvage service rendered to a vessel of or in the service of the Army.

(7) *Claims for assistance given to U.S. prisoners of war.* Claims for the provision of such assistance, whether given voluntarily or pursuant to a contractual arrangement, may be considered in accordance with the guidance in subparagraph e(1), above or under the Meritorious Claims Act.

f. Claims against the Army by federal agencies.

(1) *District of Columbia.* An agency of the District of Columbia is not considered a federal agency for the purpose of filing a claim (36 Comp. Gen. 457 (1956)), and thus is not barred from claiming under AR 27–20.

(2) *Interdepartmental waiver.* Tort or tort-type claims for damage to the property of one U.S. department or agency are not asserted against another U.S. department or agency, regardless of whether an agency is fully supported from appropriated funds or partly supported by revenue-producing activities, a government corporation, or a non-appropriated fund (NAF) activity, 25 Comp. Gen. 49 (1945). This interdepartmental waiver is predicated on the doctrine that

property belonging to the government is not owned by any department of the government. The government does not reimburse itself for the loss of its own property except where the law specifically provides. Forward to the Commander USARCS claims by other federal agencies and by organizations within the Army such as NAFIs or AAFES for property loss or damage, or for reimbursement of amounts paid as compensation or other benefits to injured persons or on behalf of deceased persons.

(3) *General Services Administration vehicle damage claims.* These claims are, in effect, charges by GSA to cover "elements of costs" and "increments for replacement costs." If arising from damage caused by an Army Soldier or employee, they are payable out of operational and maintenance funds, not as tort claims but as expenses incurred (41 Comp. Gen. 199 (1961); 40 U.S.C. §605). If the GSA vehicle was within the custody and control of the Army or DOD and a Soldier or civilian employee caused the damage through negligence, conduct a report of survey under AR 735-5. If the GSA vehicle was damaged through the negligence of someone other than a Soldier or civilian employee, send the file to the appropriate GSA regional counsel. For GSA vehicles over which the DOD or DA does not exercise custody or control, damage caused by the negligence of a Soldier, DOD or DA employee, or someone operating another vehicle is subject to the interdepartmental waiver rule. When the Soldier or employee operating a GSA vehicle negligently causes damage jointly with an employee of another federal agency, the interdepartmental waiver rule precludes the Army from seeking indemnification for what it must pay to GSA.

(4) *Railroad Retirement Board claims.* The Railroad Retirement Board is subrogated under the Railroad Unemployment Insurance Act to railroad employees injured by a federal government employee's negligence. As subrogee, the Board may be reimbursed from appropriations of the responsible federal agency for the amount of sick benefits the employee receives from the Railroad Unemployment Insurance Account (29 Comp. Gen. 470 (1950)). See 45 U.S.C. § 362(o). Process the Railroad Retirement Board's subrogation claims against the United States the same way any other cognizable subrogation claim is processed.

g. Claims against the Army by state or local governments.

(1) *Local governments.* Local governments within the United States may assert claims against the Army. The same principle generally applies to local foreign governments, except when counter to treaty provisions such as those found in Article VIII, NATO SOFA. However, AR 27-20 bars a state's claims for damage caused by activities of its own National Guard during federally funded training duty or service.

(2) *Access and replacement road claims.*

(a) Claims for road repairs are restricted by AR 55-80 to those occasioned by large-scale maneuvers and exercises, and surveys must be made before and after such activities. Further, regulations under the Defense Access Road Program preclude retroactive payments for improvements. Thus, damage that has already occurred should be paid under AR 27-20, chapters 3, 4, 5, 6, 7, or 10, as appropriate, except when a state is claiming for damage caused by its own National Guard. Process anticipated (future) damage under the Highways for National Defense Program (23 U.S.C. § 210 and AR 55-80) pursuant to AR 55-80.

(b) Damage caused to highways, railways, or utilities by the operation of any dam or reservoir project under the Army's control may be corrected by the use of funds for the project's construction, maintenance or operation. Such funds may be used to repair, relocate, restore or protect highways, railways or utilities. This provision does not apply, however, to highways, railways, and utilities provided for by the Army unless the damage exceeds that for which provision was previously made (33 U.S.C. § 701q).

(3) *Claims for local fire department services.* Claims for local fire department services used to extinguish fires started by Army operations (through weapons fire or negligence, for example) are not payable. As there is no loss of or damage to property, such claims are not considered to merit money damages, *Idaho ex. rel. Trombley v. U.S. Dept. of Army*, 666 F.2d 444 (9th Cir. 1982), cert. den. 459 U.S. 823 (1982). However, when the fire occurs on property under federal jurisdiction, FEMA may authorize payment under 15 U.S.C. § 2210. Contact the AAO for guidance on payment procedures. If the local fire department has been called in to assist and such assistance is not covered by a mutual support agreement, the claim may be processed on a small purchase basis under procurement procedures. See FAR, part 13.

(4) *Claims for taxes.* Claims for taxes by state and local governments that may affect the Army include those:

- (a) Against procurement contractors. See FAR subpart 29.3.
- (b) Against lessee's interest in Wherry Act housing. See AR 210-47.
- (c) Against exchange sales and services. See AR 60-20, paragraphs 6-2 through 6-4.
- (d) Arising out of purchase or sale of alcoholic beverages. See AR 60-20, paragraph 2-16 and AR 215-1, paragraph 7-23.
- (e) Against NAF fund activities. See AR 215-1, paragraph 3-13.

h. Other remedies.

(1) *Tucker Act.* (See 28 U.S.C. § 1346). Claims filed under the Tucker Act include those founded upon the U.S. Constitution (a Fifth Amendment taking of property), an Act of Congress, any regulation of a federal executive department, any express or implied contract with the United States or those seeking liquidated or unliquidated damages in cases not sounding in tort. However, the Tucker Act itself is not a waiver of sovereign immunity. Separate authority must provide the basis for jurisdiction. Tucker Act plaintiffs must file in the Court of Federal Claims in any amount, or

for amounts not over \$10,000 in a U.S. District Court, in which original jurisdiction is vested concurrently with the Court of Federal Claims., 28 U.S.C. § 1346. Claimants excluded from recovery under the FTCA by 28 U.S.C. § 2680 or by Army regulations may invoke Tucker Act jurisdiction when suing on an express or implied-in-fact contract, *Burt v. United States*, 176 Ct. Cl. 310 (1966).

(2) *Private relief legislation* The scope and nature of this remedy is within Congress' discretion, an authority stemming from the constitutional provisions empowering it to pay the debts of the United States (U.S. Const., Art. I, sec. 8) and to honor petitions for the redress of grievances (U.S. Const., Amendment I). This category includes debts or claims that rest on a merely equitable or honorary obligation and would not be recoverable in a court of law if brought against an individual, *United States v. Realty Co.*, 163 U.S. 427 (1896). There is no established procedure under which the DA sponsors private relief legislation; usually a claimant contacts a member of Congress directly. DA claims personnel will remain neutral in all private relief matters. They should make no statements or predictions about what headquarters DA will do after the member has introduced a Bill.

(3) *Privacy Act*. 5 U.S.C. § 522a, including Right to Financial Privacy Act, 12 U.S.C. §§ 3401–3422. This act permits suits against the U.S. for invasion of privacy in a variety of contexts. A Privacy Act suit does not preclude a common law suit under the FTCA.

(4) *Americans with Disabilities Act (ADA)*. 42 U.S.C. §§ 12101–12213. The ADA does not apply to federal agencies nor does failure to meet its standards provide a basis for suit under the FTCA.

(5) *Alien Tort Claims Act*. 28 U.S.C. § 1350. Provides a judicial remedy for persons in foreign countries for acts or omissions by U.S. employees or others.

(6) *Foreign Sovereign Immunities Act*. 28 U.S.C. §§ 1330, 1332, 1391, 1441, and 1602–1611. Permits recovery in U.S. federal courts by persons, including U.S. citizens, who were tortured or taken hostage by a foreign sovereign.

(7) *Federal Rehabilitation Act*. 29 U.S.C. §§ 701–797b and the Age Discrimination Act, 29 U.S.C. § 621. Both acts are self contained. Recovery of benefits thereunder does not permit a claim for negligent infliction of emotional distress under the FTCA.

(8) *Quiet Title Act*. 28 U.S.C. § 2409a. This act applies to actions in Federal District Court in ejectment for possession of property.

(9) *Veterans Judicial Review Act*. 38 U.S.C. § 511. Preempts the FTCA in actions for reduction in veterans benefits.

(10) *Miller Act*. 40 U.S.C. § 3131. Requires U.S. contractors to post bonds to protect payment of subcontractors.

(11) *Civil Rights Act, Title VII*. 42 U.S.C. §§ 2000e-3 - 2000e-7. Remedy for workplace harassment.

(12) *Prison Litigation Reform Act of 1996*. 42 U.S.C. § 1997e. Remedy for prisoners in addition to the FTCA.

(13) *Resource Conservation and Recovery Act*. 42 U.S.C. §§ 6961–6965. Covers remediation costs not recoverable under the FTCA.

Section IV

Investigative Methods and Techniques

2–18. Introduction

This section provides guidance for unit claims officers, ACOs and CPOs responsible for conducting tort claims investigations. The investigation is the most critical part of the administrative claims process. Its purpose is to learn, gather and preserve the facts as quickly and completely as possible. Facts are best collected and preserved while memories are fresh, witnesses are available, and physical evidence is unchanged. A well-developed investigation is essential in determining what law applies and is invaluable in negotiations. The elements of an investigation include identifying and interviewing of witnesses, identifying and preserving physical evidence, researching the law and procedural defenses, and using of experts, consultants and appraisers.

2–19. Role of claims officers and outside agencies

a. Unit claims officers. Unit claims officers are essential to the claims investigation. Paragraph 2–2 explains their relationship to the ACO, CPO, or USARCS.

(1) The unit claims officer, who usually is a member of the unit generating the alleged incident, is privy to crucial facts and information (such as the unit operating procedures).

(2) An ACO or CPO is responsible for guiding the claims officer throughout the latter's investigation. The unit claims officer should not hesitate to contact the ACO or CPO for assistance at any time during the investigation.

(3) The unit claims officer's investigation is limited to determining the facts and circumstances of the incident and describing the injuries of all participants. The unit claims officer's investigative report should not contain a conclusion as to liability and damages. The ACO or CPO will use the facts gathered during this investigation to determine liability and assess damages.

(4) While the unit claims officer usually prepares a report of investigation on DA 1208 (Report of Claims Officer) or SF 91 (Motor Vehicle Accident Report), this is within the ACO or CPO's discretion, since it may be more helpful if the report is prepared in a different format.

b. When applicable, the unit claims officer's report should include the following attachments:

- (1) MP, CID, and state or local police accident reports.
- (2) Report of survey on the government vehicle, with all attachments, regarding whether or not the government driver is pecuniarily liable. Attach appeals and reconsiderations when available. An investigation should not be delayed, however, pending final action on a report of survey.
- (3) Line-of-duty investigation, regarding whether or not the government driver's injury was determined to be in the line of duty.
- (4) SF Form 91 (Motor Vehicle Accident Report), completed by the government driver.
- (5) Scope of employment information, including the supervisor's or commander's certificate (sample format posted on the USARCS Web site at "Claims Resources," II, a, no. 22).
- (6) Incident scene diagram and photos.
- (7) Interview with government tortfeasor and all eyewitnesses and, where indicated, the police investigator.
- (8) Results of any civilian trial or court-martial or other adverse action taken against Army personnel.
- (9) Releasable portions of the safety investigation.
- (10) AR 15-6 investigation.

c. When the ACO or CPO may conduct all or part of the investigation. In most cases of death or serious injury, the ACO or CPO will inform the unit claims officer what information, if any, is needed. The ACO or CPO should explain the reason for this decision and keep the unit claims officer informed about the investigation's progress so the latter may furnish additional assistance.

d. Events that require coordination with the AAO. The AAO is responsible for technical supervision of the local claims investigation when an incident occurs that may result in the filing of claims that are reportable to USARCS or otherwise within USARCS' settlement authority. Accordingly, when the ACO or CPO learns of an incident that may result in a filing of a claim within USARCS' authority, or when a claim within USARCS' authority is filed, it should contact the AAO by telephone immediately and follow up with a written notice of the incident or claim. Close telephone and written contact on all claims investigated in the field is essential. Note that mirror file procedures apply to potential claims. See AR 27-20, paragraph 2-1c.

e. Coordinating claim investigations with other investigations. Although both civilian and military authorities may investigate an incident, the claims investigation pursues an independent inquiry into civil liability under state law. Follow this general guidance on claims investigation when other investigations are proceeding:

(1) Determine what other entities are investigating and why they are doing so. How useful their investigations will be depends on several factors beside the investigator's skill. For example, a report of survey is limited in purpose to determining whether a Soldier or an Army employee is financially liable for damage to government property. The survey may help in developing the facts surrounding liability, but it will probably be of little help in assessing comparative negligence or whether such defenses as last clear chance apply.

(2) Contact the investigating agency early and discuss the scope of both your and its investigations. Obtain copies of the agency's report and, if possible, advance copies of statements they take even if the report is not final. Include all other investigations in the claims report, tabbing them as enclosures. Always obtain final copies of other investigations.

2-20. Identification of witnesses

A witness is anyone who has personal knowledge of an incident by virtue of being at or near the scene at the time it occurred or shortly thereafter. Such witnesses may have observed the incident or its results.

a. Eyewitnesses. There is no substitute for an eyewitness. This person's knowledge of the incident comes from actually seeing or hearing the incident take place. An eyewitness version of the events leading up to the incident is often the deciding factor in determining liability. This is especially true if the witness is disinterested and impartial. Accordingly, it is imperative that all investigations include an exhaustive search for eyewitnesses.

b. Locating eyewitnesses. Any search for eyewitnesses should begin with a review of all available accident or incident reports. Most provide witnesses' names, addresses and telephone numbers. Sometimes, however, the authors of such reports do not list the names of all the witnesses they know of; this is especially true of police officers. Be sure to question police officers and other investigators to determine whether they know of any witnesses not mentioned in their reports. Also ask the claimant, claimant's attorney, all witnesses and any government employee(s) involved in the incident if they know of anyone else who witnessed the incident. Search for eyewitnesses by visiting homes and businesses located near the scene of an incident. A representative of the ACO or CPO should canvass door-to-door asking whether anyone saw or has information about the accident. House-to-house inquiry often turns up eyewitnesses who would not have been found otherwise.

c. Other witnesses. Locate other witnesses using the same methods. Although their statements may not be as compelling as those of eyewitnesses, do not underestimate their value; carefully interview these witnesses, particularly as to any statements or exclamations the injured parties made at the time. Persons who did not see the incident take place but have personal knowledge of it include—

- (1) Those who were at the scene of the incident but were looking away when it occurred.
- (2) Those who arrived at the incident scene shortly after it occurred, such as ambulance or medical personnel.

- (3) Those who have any personal knowledge of the incident's cause.

2-21. Identification and preservation of evidence

a. Physical evidence. Physical evidence must be preserved for analysis by Army experts, inspection by the claimant and use in future litigation. Subsequent paragraphs discuss in detail the types of physical evidence that may be pertinent to various types of claims. But generally, the ACO or CPO is responsible for storing physical evidence in a secure location. If necessary, claims personnel should take possession of evidence and safeguard it. Here are areas in which problems may arise:

(1) *Evidence in the possession of the criminal investigation division or military police.* The CID and MP evidence custodians are responsible for securing evidence in an evidence room to safeguard it for use in criminal prosecution. After it is used, the evidence is released to the owner or destroyed. The trial counsel responsible for the criminal prosecution or the Chief of Military Justice may permit release of the evidence. To avoid improper release, inform both the evidence custodian and the criminal law or military justice section that they may not release evidence without the ACO or CPO's concurrence.

(2) *Army aircraft and vehicles involved in accidents.* Prompt action to secure and preserve physical evidence is essential. The unit or organization responsible for the vehicle will usually want to repair or dispose of it. However, it is vital to preserve the evidence or create acceptable secondary evidence before the aircraft or vehicle is repaired or lost through salvage. Ideally, the part or portion that allegedly contributed to the accident should be preserved for expert analysis. For example, if faulty brakes or a defective tire allegedly caused a vehicle accident, they should be inspected and preserved until the AAO agrees that their preservation is no longer necessary.

(a) *Damaged vehicles or aircraft.* Photograph the damage and obtain a copy of the repair facility's estimated cost. Again, if equipment failure is a suspected cause of the accident, the involved part must be inspected and preserved. Where indicated, arrange examination of the aircraft by the Army Teardown Facility, Corpus Christi Army Depot, Texas, or of the motor vehicle by the Combat Readiness Center, Fort Rucker, Alabama.

(b) *Destroyed vehicles.* Destroyed vehicles must be preserved until their evidentiary value is ended. A unit will usually try to turn in the vehicle as surplus as soon as possible because it cannot requisition a replacement vehicle as long as the original is carried on the property book. Since serious accidents may require reconstruction or tear-down analysis, the vehicle should be preserved as long as possible. Coordinate with the director of logistics or the installation property book officer to prevent the vehicle's loss.

(3) *Property in the possession of investigating officers.* Always contact investigating officers or boards that have possession of physical evidence and ask them how they plan to dispose of it. Ask the officer or board to coordinate with the ACO or CPO before destroying or otherwise disposing of the evidence.

(4) *Testing of physical evidence.* Document the nature, state and condition of the evidence, including any changes or modifications made by the U.S. Army since the object was originally procured. Obtain all maintenance records. Notify the claimant or potential claimant, the manufacturer and supplier of the proposed test of any change likely to occur as a result of the test. Invite all interested parties including the manufacturer, supplier and the claimant or potential claimant to participate and witness the test but retain sole possession of the evidence even though one or all of the interested parties initiated the request for testing. Obtain an examiner who has no interest in the outcome of the test. If another interested party wishes to participate in the choice of an examiner, either agree on a mutual choice or develop a plan where both examiners may participate. Document each step of the test to include any disassembly or destruction. Any component not returned to service must be preserved in an identifiable state. Examples are medical evidence such as laboratory slides, equipment used during an operation, respirators, and electrical equipment.

b. Documentary evidence. The type of documentary evidence that may be available will vary according to the type of claim, for example, medical malpractice, motor vehicle accident or dram shop action. Subsequent paragraphs, discussing investigative techniques unique to specific types of claims, address what documentary evidence should be collected and preserved. As always, time is of the essence, as records tend to become less and less accessible with the passage of time.

2-22. Researching the law and procedural defenses

A proper claims investigation requires a thorough inquiry into procedural defenses (such as subject matter jurisdiction) as well as liability and damages. Before initiating an investigation, it is essential to form a complete understanding of the law relevant to the claim. The ACOs and CPOs are responsible for instructing claims investigators on the relevant legal issues. Only if approved by the AAO can the claims investigation be limited in scope.

a. Procedural defenses.

(1) *Claims barred by the incident to service doctrine.* Review paragraph 2-37. Investigate the facts establishing the defense. For example, if a Soldier is injured in an automobile accident, on or off-post, a finding that the injuries were incurred incident to service requires more support than the fact that an active duty Soldier claims for an apparent injury. It is crucial to know whether a Soldier is on an ordinary leave status. This limitation also applies to government employees injured or killed in the scope of employment. In both instances, obtain the personnel file as well as all documents pertaining to disability benefits.

(2) *Claims barred by the statute of limitations.* If the statute of limitations obviously applies, investigate only those facts pertaining to the defense. When it is questionable, investigate the merits of the claim. Always investigate all facets of a medical malpractice claim when the statute of limitations is an issue.

(3) *Claims where there is obviously no liability.* Occasionally a claim under AR 27–20 is not stated or the facts, as presented, do not support liability. In these cases, the claims investigator has two goals: to investigate liability thoroughly and to deter a suit by the claimant. Once the first goal is accomplished, discuss the claim with the claimant’s attorney, disclosing the facts you have discovered and your reasons for believing the claim should be denied. This approach may deter suit because the claimant’s attorney has the facts needed to evaluate liability. It also avoids the pitfall of needlessly requesting detailed damages information, such as physician’s statements or medical evaluations, where there is obviously no liability.

b. Applicable law. Knowledge of the law applicable to the claim is essential to a proper investigation. Legal research starts when the claim is first investigated so that legal issues are addressed during its course. Use the approach outlined below to assist in legal research and claims investigation.

(1) Gather the facts available at the time the incident is reported to the claims office or the claim is filed. Collect and analyze all reports, tangible evidence, and site visit memos before beginning in-depth interviews or investigation. Know what others before you have done. Learn who has investigated and make personal contact (by telephone, if possible), asking for copies of their reports. In many cases, you will have to press for information. Do not hesitate to insist that others provide you with copies of their investigations immediately. This is especially important in criminal investigations. Carefully coordinate with criminal investigators to avoid conflicts with their pending investigations. Air crash investigations require similar coordination. However, request the air crash safety investigator to conduct a collateral investigation as the safety investigation cannot be released for claims purposes.

(2) Start legal research immediately. Do not rely on what you learned in law school or from past cases. Take time to refresh your knowledge. Study the law of the state where the claim arose and keep an outline of the issues presented. Keep this research in a separate part of the investigation file.

c. Liability. Evaluate liability issues in light of the proof available and avoid prematurely assuming a defensive position. Remember, in investigating claims you represent the Army, not the local installation, the command or the tortfeasor. Learn the claim’s strengths and weaknesses and carefully evaluate the interests of witnesses and others involved in the incident or its investigation.

d. Damages. Always think of damages issues when interviewing witnesses. For example, when interviewing a police officer about a traffic accident, always ask whether vehicle occupants or pedestrians were injured or killed. The exact time of death is almost always an essential fact. Do not assume that the report contains everything. However, analyzing the strength of a claim solely in terms of potential damages is a mistake. A claim does not have settlement value simply because the damages are high.

2–23. Interviewing witnesses, claimants, and tortfeasors

a. General procedures.

(1) Key witnesses should be interviewed, even if they have given statements to other investigators. Witnesses often give claims investigators statements that differ from the version they give to police or other investigators. Personal interviews also allow them to clarify or expand on their previous interviews and let the investigator observe and form impressions about the witnesses.

(2) Procedures and techniques for interviewing, and pre and post interviewing actions, are similar for all types of claims. Claimant interviewing is covered in b of this paragraph. Witness interviewing techniques and techniques specific to interviewing potential or actual tortfeasors are discussed in paragraph 2–34 in the context of a medical malpractice investigation; however, the same general procedures can be applied in any type of claim.

(3) Before interviewing a witness, try to obtain copies of all of the prior statements made by the witness and review them carefully.

(4) Claims personnel conduct witness interviews orally and informally. The claims personnel conducting the interview will prepare an MFR of the interview. Put the interviewer’s observations and impressions relevant to assessing the witness credibility in a separate memorandum, which will not be released to the claimant’s attorney. Ask a witness to review and correct but not to sign the notes or memorandum; signing could make them discoverable. This method is designed to ensure that the investigation represents privileged attorney work product. It also speeds the investigation.

(5) Informal claimant interviews are indispensable to a fair evaluation. Such interviews are not often sought or permitted outside the government and, in fact, are not part of most federal agencies’ typical administrative claim process. If the claimant’s representative objects to an interview, offer to exchange information as an inducement. When this fails, request written interrogatories, even though they are not as satisfactory as a personal interview. Inform the claimant that refusal to submit to an interview or answer interrogatories will result in an evaluation based on only the information contained in the file.

(6) Do not obtain a written signed statement from the witness.

(7) Do not use a stenographer, tape recorder, or other means to create a verbatim statement.

- (8) Do not obtain sworn statements.
- (9) Requests by claimants or their attorneys for discovery of witnesses who are Soldiers or Federal employees will be met with the release of MFRs of interviews if—
 - (a) The ACO or CPO determines that their release will help in settling the claim.
 - (b) The claimant agrees to cooperate in a general exchange of information.
- (10) If the claimant or the claimant's attorney asks to interview federal witnesses, apply the following conditions:
 - (a) The claimant should explain why the claims memoranda or statements obtained in other investigations are inadequate.
 - (b) The claimant must agree to allow the United States to interview informally the claimant and other witnesses made available at the claimant's behest.
 - (c) The interviews may not be taped or otherwise recorded.
 - (d) A representative of the ACO or CPO must be present at the interview.
- (11) Avoid depositions. Report all requests for depositions to the AAO immediately. If a claimant makes such a request to a court while the administrative claim is pending, resist the request by informing the appropriate U.S. Attorney of it and of the policies of both the Army and the Torts Branch, DOJ, not to grant such a deposition.
- (12) The AAO and the DOJ must concur in any decision permitting a Soldier or federal employee witness to be deposed. A common example in which a deposition might be appropriate is the case of a party whose injury severely shortens normal life expectancy. Transfer of a witness to another area or country is not a sufficient basis for taking sworn recorded testimony.
 - b. *Claimant interview.* The claimant interview is a crucial part of the investigation. Use the Claimant Interview Checklist posted on the USARCS Web site as a guide. See the USARCS Web site at "Claims Resources," II, a, no. 5. Plan the timing of this interview wisely, considering several factors:
 - (1) *Claimant's situation.* What is the claimant's situation? If the claimant is terminally ill, moving away, or growing confused, complete the investigation quickly. Often, investigators who expect to interview claimants when their own schedules allow overlook such obstacles, only to find that the claimant is not available. Thus, one of the first steps in any investigation is finding out as much as possible about the claimant. The typical interview takes time. Make sure that the claimant's counsel understands that. Inform counsel of the estimated number of hours needed for the interview.
 - (2) *Preliminary witness interviews.* What other witnesses must be interviewed before the claimant is interviewed? Will they be available?
 - (3) *Claimant representation.* If the claimant is represented, it may be difficult to obtain an interview and the attorney will probably permit only one interview to take place.
 - (4) *Preliminary review of documents.* Ordinarily, an investigator will interview the claimant about liability and damages at the same time. Accordingly, assemble and study all documents pertaining to these issues before the interview and have them available at the interview. When planning preparation time for a claimant interview, do not forget that the claimant or the claimant's attorney must supply many documents.
 - (5) *Location.* If at all possible, especially when a claimant is seriously injured, conduct the interview at the claimant's home. It affords an invaluable opportunity to observe the claimant's lifestyle, interactions with family members, and ability or inability to perform some daily living activities.
 - (6) *Pre-interview preparation.*
 - (a) Obtain as many of the claimant's medical, military, and financial records as possible.
 - (b) Prepare a chronology of the medical care provided, relating it to key events in the claimant's life (marriage, birth, permanent move, and retirement).
 - (c) List any matters that need clarification (such as internal contradictions in the records or conflicts between records and allegations).
 - (d) Always prepare a detailed list of questions to ask the claimant. If not, you will invariably forget to ask an important question!
 - (e) Research the applicable state law on damages so that you can ask relevant questions.
 - (7) *Attendees at the interview.*
 - (a) When possible, two claims personnel should attend. It is extremely difficult for one individual to establish rapport, observe the claimant, ask questions, take detailed notes, and devise follow-up questions at the same time; it is even harder to do all these things without disrupting the interview.
 - (b) For complex injury cases that are likely to involve a medical trust (such as, brain damage or quadriplegia), it is helpful to bring the medical fund advisor and/or the life care planner who will be working with the family to serve as an additional observer or take notes.
 - (8) *Conducting the claimant interview.*
 - (a) Try to create a relaxed, informal atmosphere, not an interrogation. Keep your demeanor as informal as possible. If the claimant is willing and able, permit the claimant to narrate the incident without interruption.
 - (b) Since a structured settlement may be used, obtain detailed information about the claimant's family background and living arrangements, financial resources and family members, including grandchildren. Design the initial interview

questions to elicit as much background information as possible. Not only is this critical to a damages assessment, but the casual interchange in which the claimant reveals some personal information should relax the claimant and facilitate the subsequent exchange of more critical information. Even if you are familiar with the claimant's personal or military background (through review of the official military personnel file), let the claimant relate his or her own personal history. If you are already familiar with the information, you will spend less time taking notes and have greater opportunity to maintain eye contact and establish rapport. If the claimant's spouse is also present, make sure that you ask about the spouse's personal background and health, even if not a claimant. The spouse's own life expectancy may be a factor in settlement.

(c) Before ending the interview, always check your question list as well as your interview notes. Make sure the claimant's answers are clear, complete, and unambiguous. Make sure the claimant has no additional questions. Summarize what you have understood from the interview and give the claimant an opportunity to correct your understanding.

(d) At the end of the interview, try to have the claimant consent to a re-interview at a later date if necessary.

(9) *Interviewing claimant on liability.* A complete history of the claimant's medical care and treatment before the incident is critical to the investigation.

(a) Determine whether the claimant is a poor historian by referring to medical records. Elicit from the claimant the facts of any major or chronic illnesses, hospitalizations and long-term medication use. Bring a list of major medical conditions, such as hypertension, heart disease and diabetes and ask if the claimant now has, or has ever had, any of these conditions. Invariably, the claimant may forget to mention one or more chronic conditions, having learned to ignore them as an inevitable and manageable fact of life.

(b) Obtain the claimant's family medical history. Again, refer to the list of major medical problems and conditions. Make particular notes of any relevant family medical history that the claimant's medical record does not note (but which the claimant's physician, perhaps, should have elicited and noted). The claimant's family medical history is also useful in assessing the claimant's life expectancy and may serve to rebut or reinforce statistical figures.

(c) Have the claimant relate the incident by recall. Determine not only how much the claimant recalls independently, but also which events the claimant mentions or emphasizes, thereby shedding light on what really motivated the claimant to file a claim.

(d) Go back and review the same events with the claimant, referring specifically to the medical investigative reports and records or documents. Ask the specific questions that are key to a liability determination. These questions are case specific, and the interviewer should prepare them before the claimant interview with the AAO's assistance, as needed. Carefully explore any contradictions between the medical entries and the claimant's recollection of events.

(e) Make sure to cover all periods of non-treatment. How the claimant felt and what the claimant was doing during intervals between medical treatment is critical.

(f) After thoroughly exhausting the claimant's recollection of events, ask the claimant about any discrepancies between these recollected events and the medical records or those of the treating physician.

(10) *Interviewing the claimant on damages.* See section VI, Determination of Damages. When indicated, stress that although you have not yet determined whether liability exists, you want to avoid subsequent inconvenience or delay if liability is established.

(a) Ask how the alleged injury has affected the claimant's ability to perform or to enjoy the following:

1. Employment.
2. Conjugal duties.
3. Parental responsibilities.
4. Social responsibilities.
5. Leisure time activities.
6. Basic activities of daily living.

(b) In serious injury cases, ask the claimant to describe a typical day or week.

(c) If the claimant needs medication, therapy or other special care or treatment on a regular schedule as a result of the injury, have the claimant relate the nature and schedule of each administration.

(d) If permanent pain and suffering are alleged, ask the claimant to describe in detail the pain's nature and frequency as well as what course of action improves or worsens it.

(e) If the claimant seeks compensation for physical disfigurement, obtain "before" and "after" photos. The latter should be enlarged color photos taken by a medical photographer.

(f) In a devastating injury case, a video is helpful in ascertaining the nature and extent of the injured party's disabilities. The video should include, at a minimum, footage of the injured party eating, bathing, dressing, playing, undergoing therapies, communicating and interacting with family members and health caregivers.

(g) When a possible structured settlement is involved, elicit information bearing on future financial needs. Present financial status, to include all assets and liabilities, is needed. Future income regardless of source, for example, pensions and dividends, should be determined. In a wrongful death claim, the survivor's future income, assets and

liabilities are needed, including the ownership of a home or dwelling. Obtaining such information will enable a financial planner to formulate a plan of care for the future which can be converted into a structured settlement.

(11) *Interviewing the claimant on a statute of limitations issue.* See paragraph 2–44. Use these basic criteria and techniques during any claimant interview in which the statute of limitations may affect the claim.

(a) A statute of limitations investigation involves determining when the claimant, or the parent, when the claimant is a minor, reasonably should have known of the injury and its cause, but not when the claimant knew there was negligence. It is most frequently used in medical malpractice claims. Accordingly, it is one of the most difficult investigations to conduct.

(b) This investigation should involve collecting the patient’s complete medical records and obtaining a list of all attending HCPs pertinent to the claim. Additionally, the investigator must obtain the claimant’s comments on the outcome of the treatment in question and determine the current medical problems. The investigator must also identify which HCPs (such as doctors, nurses, physical therapists, and speech therapists) the claimant has consulted since the alleged injury, as well as schools and employers. This will develop into a list of witnesses to be interviewed.

(c) Allow the claimant to give a narrative account unless specific questioning is essential. Once the claimant commits to one story or one set of facts, try to reconcile differences between the claimant’s version, those of other witnesses, and that contained in the medical records. Ask for as specific information as possible about what the claimant was told, when and by whom. Obtain the names of corroborating witnesses.

(d) Use the medical records to establish dates of treatment and the specific medical condition by asking if the claimant agrees with the record description of the condition and dates of all visits. If the claimant disagrees with the notes in the records, ask with what complaint the claimant actually presented. Ask what the claimant was told regarding findings and treatment recommendations. Continue this line of questioning page by page until all the different examination dates or inpatient progress notes involving the alleged negligent care and its followup have been covered.

(e) Ask what the HCP told the claimant or the survivors about the cause of the injury. Have the claimant specify who furnished the information and when. Determine if the claimant discussed or complained about the injury or unexpected result with or to any government or Army official (such as, the Army Inspector General, a member of Congress, the hospital commander, a patient representative, a nurse or the claimant’s own commanding officer) or any neighbors. Then contact and interview these sources and obtain copies of any documents they may have. Find out when the claimant first sought legal advice.

(12) *Post-interview actions.*

(a) Draft an MFR of the interview as soon as possible. First, record a factual narrative of the claimant’s statements. Have the colleague who attended the interview with you review the MFR. Resolve any discrepancies and furnish a copy to the claimant for review. Then, in a separate MFR, record your personal observations of the claimant, the claimant’s home, family, and neighborhood, as well as your personal assessment of the claimant’s credibility.

(b) Verify information provided, as needed, and follow up on any leads, such as interviewing other witnesses or obtaining additional documentation.

(c) If you suspect the disability is not as severe as the claimant alleges, ask for statements from neighbors, friends, or associates and for permission to interview them if necessary.

(d) Speak with the claimant’s employer and coworkers to determine the claimant’s actual ability to perform the job as well as to assess the claimant’s future employment prospects.

2–24. Use of experts, consultants, and appraisers

This paragraph corresponds to AR 27–20, paragraph 2–21.

a. *General.* ACOs or CPOs are responsible for obtaining consultants and appraisers to assist them in evaluating a claim. Consider using such experts on any claim in which liability or damages are disputed and the issue cannot be resolved without resorting to an expert’s opinion. Examples of such issues are medical malpractice, damage to farm and ranching operations, automobile accident reconstruction, and equipment failure analysis. Whenever the consultant is furnished medical information protected by HIPAA, the consultant, whether a government employee or civilian, will sign an agreement designed to protect the patient’s privacy rights. Sample formats for a HIPAA Assurance Agreement for Medical Consultant and a HIPAA Assurance Agreement for an Independent Medical Examination are posted on the USARCS Web site at “Claims Resources,” II, c, nos. 15 and 16. The term “consultant” includes, but is not limited to, health care providers, independent medical examination sources, brokers, insurance companies, life care planners, economists and trust companies. An ACO should ensure that the SJA’s budget includes funds to hire experts. The AAO can assist in estimating local requirements.

b. *Use of U.S. government experts.* The U.S. government employs a variety of subject matter experts capable of assisting the claims process. For example, experts within the Army include The Army Depot, Corpus Christi, Texas (aircraft); Combat Readiness Center, Fort Rucker, Alabama; and Tank and Automotive Command, Warren, Michigan (vehicle accidents). Other federal agencies, such as the Agricultural Research Center, Beltsville, Maryland; National Institutes of Health, Bethesda, Maryland; and Center for Disease Control and Prevention, Atlanta, Georgia, can also provide expert opinions within specialty areas. Obtain such services in coordination with the AAO.

(1) When seeking a government expert, always consider first using local personnel who have expertise in a particular area. For example, many installations employ ordnance, aviation, real estate and automobile accident reconstruction experts who can help evaluate liability and damages.

(2) Each ACO should assemble and maintain a desk book of such experts on the installation. This will not only assist in handling future claims but will be available for any Army claims office that needs an expert opinion.

c. When to hire an external expert. As a general rule, an expert from outside the government should not be hired if a government expert's opinion will suffice, or if the cost outweighs the value of the claim. If a government expert cannot be located, hire an outside expert. An outside expert may be hired when the claimant's counsel agrees to accept an expert's opinion only if the expert is not a government employee. This sometimes occurs because claimant's counsel wants to ensure that the expert is absolutely impartial. In this situation, it is best to reach an agreement with claimant's counsel as to the expert you intend to hire. Depending on the circumstances, it may be appropriate to request that the claimant share the cost of hiring the expert. Consult the AAO for guidance.

d. Locating and hiring an expert.

(1) Always hire an expert who has recognized expertise on the subject evaluated. Avoid hiring experts with a reputation for plaintiff or defense bias. The AAO or the U.S. Attorney can often provide names of proper experts. Government experts usually know of capable civilian counterparts who are willing to provide expert opinions. For example, Army physicians often can provide the names of highly qualified civilian physicians who are willing to provide expert opinions.

(2) Never hire an expert and just hand over a copy of the file for review. Prepare a letter with issues to be reviewed and specific questions to be answered in the expert's report. When the claimant is cooperating with the expert's review, allow the claimant to submit questions for the expert.

(3) The expert must provide a written report to obtain payment. Consider releasing a copy of the report to the claimant if this will assist in settling the claim or deterring suit if the claim is denied. A copy of the report must be provided when the claimant has cooperated in hiring and preparing questions for the expert. All decisions to release or deny access to an expert report must be coordinated with the AAO.

e. Independent medical examination. Independent medical examinations (IMEs) may be used to resolve issues regarding causation or damages. Consider conducting an IME on cases in which a claimant alleges temporary or permanent disability or where there are unresolved questions on causation. Occasionally, a claimant or his attorney will refuse to grant informal interviews. Alternatively, schedule an IME to obtain necessary information either as an adjunct to or a substitute for claimant's case in chief. The claimant's representative should actively participate in the IME.

(1) An IME is often helpful in objectively defining the nature and extent of a claimant's injuries. An IME may also be essential in establishing a claimant's prognosis and the cost of future medical care.

(2) An IME may be used to determine damages in complex injury or medical malpractice claims when issues of causation have not been resolved through the usual exchange of expert medical opinions. In this situation, seek an agreement with claimant's counsel to have the claimant undergo an IME to resolve remaining causation or damages issues. Contact the AAO for guidance before discussing an IME with claimant's counsel. Be sure that the physician or hospital conducting the IME is satisfactory to both the government and claimant's counsel. Ask claimant's counsel for assurances that he or she will resolve the claim based on the IME's findings and conclusions. In some cases, it is appropriate to ask claimant's counsel to share the IME's cost. A medical report by the treating physician may suffice in lieu of an IME. If in doubt, have a same-specialty practitioner at the local MTF review the claimant's injury file and X-rays.

f. Property damage appraisals. Use property damage appraisers in cases where the ACO or CPO and claimant's counsel cannot agree on the monetary amount of property damage.

(1) Before hiring an appraiser, attempt the following steps:

(a) Request the claimant substantiate the claim with a second estimate. It is appropriate to provide claimants with the names of individuals or firms considered reliable and fair.

(b) Provide claimant's counsel information showing how the government arrived at its valuation of the claimant's property loss. Encourage claimant's counsel to share his or her property damage analysis. This exchange of information allows the government and claimant to understand each other's position. In many cases, this leads to a satisfactory settlement.

(2) Be sure that the appraiser is satisfactory to both the government and claimant's counsel and that claimant's counsel is willing to settle the claim based on the estimate of the hired appraiser. Request that claimant's counsel share the cost of the appraiser. If claimant's counsel wants to use his or her own appraiser, arrange for the appraisers to conduct a joint appraisal. Make sure the claimant is present at the appraisal. Consult the AAO for guidance.

2-25. Investigating motor vehicle accident claims

Motor vehicle accident claims are probably the most common claim that a field claims office must investigate. These accident claims range from "fender benders" to fatal multiple-vehicle crashes. This paragraph provides a starting point for the investigation by reviewing its components. Contact the AAO if you need assistance in conducting your investigation.

a. Interviewing the Government driver.

(1) Interview the government driver as soon as possible after the traffic accident. Follow the Government Driver Interview Checklist posted on the USARCS Web site at "Claims Resources," II, a, no. 6, which may be adapted to most accidents. Also use these guidelines when preparing to interview the government driver:

(2) As soon as you learn of the accident, contact the driver. Caution the driver not to discuss the accident with the claimant, an investigator or an attorney representing the claimant without first speaking to you. Instruct the driver to refer the claimant or the claimant's representative to you if either asks about the accident.

(3) Determine whether the driver is under criminal investigation or pending criminal charges. If either is pending, do not interview the driver until the investigation or charges are resolved or until the driver or driver's attorney consents to an interview. It is in the interest of the United States to ensure that the U.S. Attorney's Office appropriately represents or defends the government driver. The ACO or CPO should attend the criminal court proceeding and obtain a verbatim copy of the record of the proceeding.

(4) Before the interview, get copies of the driver's military driver's license, DA 348 (Equipment Operator's Qualification Record (except Aircraft)) and, if the driver is a Soldier, the driver's DA 201 (Military Personnel Records Jacket, U.S. Army) if still in existence, or official military performance file. Also obtain a copy of the accident report and any written statements the driver made. Analyze these documents carefully before the interview and bring them with you. When indicated, obtain the driver's civilian driving record. A copy of the DA 201 may be obtained from the National Personnel Records Center in St. Louis, MO, http://www.archives.gov/facilities/mo/st_louis/military_personnel_records/standard_form_180.html.

(5) The driver should be interviewed at the scene of the accident if at all possible. Conduct the initial interview outside the claimant's or the claimant's attorney's presence. When indicated, re-interview the driver at the scene when the other driver and attorney are present with a view toward resolving actual issues.

(6) Be prepared to fully explain the Westfall Act, § 2679 of the FTCA (28 U.S.C. § 2679)

(7) Be prepared to ask questions pertaining to whether the driver was acting within the scope of duty at the time of the accident. See the checklist for scope of duty analysis, posted on the USARCS Web site at "Claims Resources," II, a, no. 6. State law controls whether a driver was in scope at the time of the accident. Become familiar with state law before interviewing the driver.

(8) A rights warning will not ordinarily be necessary. Commissioned officers and noncommissioned officers (NCOs) senior to a Soldier suspected of an offense under the UCMJ must warn the Soldier of the Soldier's rights under Article 31, UCMJ. Rights warnings are not required if the driver is civilian, if the investigator is civilian, or if the charges have been resolved by court-martial, civil trial or non-judicial punishment. Ask the AAO about a rights warning.

b. Claimant's investigation.

(1) Always find out whether the claimant has hired an investigator or accident reconstructionist. If the claimant does not have an accident investigator, do not encourage the claimant to hire one. If the claimant's attorney asks, state that claims personnel will share information about the accident. Review all statutory and regulatory guidance on the release and sharing of information. See paragraph 1-18.

(2) Do not adopt an adversarial attitude toward a claimant's investigator. Try to find out as much as possible about the investigator's qualifications. The Army's level of cooperation will depend on the claimant's response in kind.

(3) If possible, interview the claimant at the scene with the investigator or reconstructionist present.

(4) Check with the Department of Motor Vehicles or the claimant's insurance carrier for his driving record and prior accidents.

(5) If the claimant's insurer has investigated, try to obtain a copy of its investigation.

c. Site investigation. A visit to the scene will assist in resolving questions about the accident. A site visit may also make it easier to understand how the accident happened. A site investigation should always be conducted when issues of liability exist or when substantial damages are involved.

(1) *Materials needed.* Any investigator can conduct a professional site investigation with the following simple tools: unlined or graph paper; a ruler; a pencil (not a pen, since erasure may be required on the diagram); a steel tape measure (with a loop on the end) or measuring wheel (may be available from the MPs); a large nail (for use as a stake to hold the tape measure loop); and a camera, preferably digital with panoramic capacity (do not use "instant" cameras as their photographs are difficult to copy).

(2) *Preparation.*

(a) Before visiting the scene, carefully analyze all available reports and bring copies. Be prepared to compare any previously prepared accident scene diagrams with the scene's actual layout. Have your equipment ready. In particular, be sure you know how to operate the camera, and bring extra film and flash equipment.

(b) Arrange for the government driver and other relevant witnesses to be present when you arrive. If you are to interview the claimant and attorney at the accident scene (always a good idea), arrange for them to arrive after you have had a chance to complete your interview with the driver and witnesses. Never interview the driver for the first time in the claimant's and attorney's presence.

(c) Know the time of day, weather conditions, and lighting that existed when the accident occurred. If the accident

occurred after dark, visit the scene during daylight and at night. Conduct a candlepower test to measure lighting where indicated.

(3) *Actions at the site of a vehicle accident.*

(a) *Measurements.* Begin by selecting a central reference point that allows triangulation of distances. Always correlate photos and measurements. Use the steel tape measure with a loop at the end and always measure to the center of an object. Measure the width of lanes and shoulders, the distances from point of impact to point of rest, the distance between the vehicles at rest, the distance between the point at which drivers or witnesses say a driver perceived the other vehicle in the accident to the point of impact, and the distance between witnesses and the point of impact or other relevant points.

(b) *Photographs.*

1. Obtain a digital camera with a telephoto lens and at least three megapixels.
2. On the back of the prints, record the date and time the photos were taken and the photographer's identity.
3. Take plentiful photos both panoramic and zoom at all possible angles. Include the entire scene, that is, the views of both drivers as they approached the collision site at the same angle as they viewed it. Photograph any skid marks, scrape marks, debris, potholes, and obstructions to vision (for example, a tree, building, bush, or parked vehicle). Use a person as a point of reference.
4. Photograph a vehicle inside and out from all angles including preexisting damage, the VIN number and license. Make sure the numbers correspond with those on the police report, repair estimate and vehicle registration. Photograph damage to the lower or underneath portion of the vehicle at the same level as the damage using a measuring device. Unless photographed at the scene make sure the vehicle is photographed on a level surface.
5. When adequate lighting is an issue, for example, if the accident occurred during twilight or darkness, photograph all artificial sources of light such as street lights, light from buildings or signs. Photograph at the same hour that the collision occurred.
6. Assume that your photographs will be available to the claimant's attorney.
7. Plan to prepare a detailed memorandum of your investigation, using the pictures as exhibits. Do not use only the pictures and your memory.
8. Print photos in color on 8x10 inch glossy paper.

(c) *Accident scene diagrams.* Accident scene diagrams need not be drawn to scale nor be overly detailed. Have such a diagram sketched at the scene, sufficiently accurate to correlate with photos. At a minimum, include the following information in every diagram:

1. The intersection involved, identifying the streets and indicating the type and location of traffic control devices.
2. The direction of each vehicle's approach, the point of impact, skid marks (length and direction), and each vehicle's final resting point (noting the distance from point of impact).
3. Any obstructions or road hazards that contributed to the accident. Be sure to show distances from the reference point.
4. Any source of artificial lighting and its distance from the point of impact for accidents occurring after lighting sources are activated.

(4) *Vehicle inspection.*

(a) *Initial actions.* As soon as you learn of the accident, identify the vehicles involved and determine their location and whether they are available for inspection. This is essential in multiple vehicle accidents and when there are serious injuries or questionable liability issues. Obtain a registration and title for all vehicles involved. Lapses in registration may indicate periods during which the vehicle was inoperable due to previous accidents. Make note of whether the vehicle is titled or registered in the owner's name. Also, note if the policyholder's address matches the regular use or garage location of the vehicle. If there are inconsistencies in any of the foregoing, then view the claim as questionable. Ask the claimant where his vehicle is normally repaired or serviced. Failure to disclose this information may indicate a previously damaged or salvaged vehicle. If possible, ascertain whether anyone has already inspected or photographed the vehicles. This may have been done by police, investigators, owners or witnesses. If so, attempt to get copies prior to your inspection. When inspecting the vehicles, attempt to determine the exact point of impact between the vehicles involved. Match the damage claimed to the points of contact. Take note of any severe damage that is being claimed but that does not match up. Be sure the damage claimed is consistent with the circumstances of the accident. Be alert for additional damage that may have been done after the collision. Also note any other vehicle discrepancies that may have existed prior to the accident such as condition of tires, vehicle modifications, and anything that could obstruct vision (for example, tinted windows, items attached to the rear view mirror, clutter in the vehicle, and so forth.)

(b) *Crash data recorders (black boxes).* During the investigation of a traffic accident, determine if any of the vehicles involved are equipped with a crash data recorder (a "black box"). This is especially critical if liability, speed, severity of injuries, and so forth, are in question. Take appropriate measures to ensure that the recorder is safeguarded and available for subsequent inspection. The crash data recorder preserves the following information starting five seconds before impact: vehicle speed, engine speed, brake status, and throttle position. It also reveals the following additional information: state of driver's seat belt switch (on/off), SIR (Supplemental Inflatable Restraint System) warning lamp status (on/off), passenger's air bag enabled or disabled (on/off), time from vehicle impact to airbag

deployment, ignition cycle count at event time, and ignition cycle count at time of reading. All of this information can be critical in helping to determine liability and severity of injuries. It enables an accident reconstructionist to more definitively recreate the events occurring before, during and after a collision. A listing of vehicles that currently contain the crash data recorder can be found at www.harris.technical.com. or at other sites available through a Web search.

d. Other investigations that may pertain to the accident. Motor vehicle accidents generate a number of other investigations. Obtain copies of them as your investigation begins.

(1) *Types of investigations.*

(a) The MP reports.

(b) The CID investigation.

(c) State or local police investigation.

(d) Report of survey.

(e) Line-of-duty investigation.

(f) Safety investigation.

(2) *Use of police investigations.* State or local police and MP accident investigations pose recurring problems to claims investigators. To understand why a police traffic investigation may not substitute for a claims investigation, the investigator should know some of the police motor vehicle accident investigation's purposes:

(a) *Law enforcement.* Police investigations are used to charge motorists with traffic or other offenses. In many cases, a police officer will not charge a motorist with an offense even if the motorist is at fault in causing an accident. Avoid drawing conclusions on liability from the absence of charges against an apparently responsible party. Even if charges are brought, it is often difficult to determine who is responsible.

(b) *Accident reporting.* Traffic reports are used to obtain statistics concerning accidents. This is why police accident reports enter data using codes and numbers. A copy of the code should be obtained and appended to each accident report. The code number may indicate the police's belief as to causation.

(c) *Safety.* Accident reports help officials determine whether corrective action is needed to prevent future accidents. Such correction may be general (such as establishing educational programs) or specific (such as altering a particular intersection). However, the local safety office is not always aware of accidents. The ACO or CPO should regularly communicate with the safety office to verify the occurrence of accidents. When assistance is needed, the ACO or CPO should ask the safety office for investigative help; it is usually willing to cooperate and provide the claims office with releasable portions of the safety report.

(3) *The police interview.* Interview the police officer who actually investigated the accident. See the Police Officer Interview Checklist, posted on the USARCS Web site at "Claims Resources," II, a, no. 7. In some cases, the official signing the accident report will not be the actual investigating officer, or the latter may have been assisted by another officer. Interview the police officer at the accident scene. Always ask the police officer to review any personal notes and bring them to the interview. It is crucial to ask the police officer's opinion about the cause of the accident and find out its basis.

(4) *Other interviews.* Interview ambulance personnel or paramedics as to their observations of the scene and the condition of the injured person. Find out if the injured person made any statement. Obtain the ambulance report.

2-26. Small claims traffic accident procedure

Any claims office may use the following procedure to screen, investigate, and settle automobile accident claims. Experience has shown that many field claims offices spend too much time and effort documenting liability investigations of small claims for motor vehicle property damage. Ideally, a claimant who files a meritorious small claim for such damage should receive an immediate settlement from the claims office. Such a claim may be resolved with the claimant when the claim is filed, if a system for discovering and investigating claims is followed regularly. This procedure reduces both the claimant's frustration and the number of open small claims. Paragraph 2-14 provides more information about small claims procedures.

a. Discovering potential claims. Review all the sources mentioned in subparagraph 2-2b, daily. Upon discovering a traffic accident that may generate liability, open a potential claim file and begin investigating. When the damage appears small and there is no evidence that anyone received medical treatment, investigate the matter as a small claim.

b. Securing report copies.

(1) *Police reports.* Obtain the MP or state or local police report immediately. The claims office should have a system in place allowing the office NCO in charge or a senior examiner to request the report by telephone, with written follow-up. Enter into an agreement with the MPs on this point. The Provost Marshal liaison office often can obtain state or local police reports.

(2) *Other reports.* Contact the unit supply or logistics staff and arrange to speak with the surveying officer about the accident. If possible, get a copy of the surveying officer's report. Follow the same procedure for other reports.

c. Obtaining scope of duty information. Request that the responsible officer or supervisor forward pertinent scope of duty information, along with the operator's accident report, SF 91, to your office. See the USARCS Web site at "Claims Resources," II, a, nos. 22 and 6 for a sample scope of duty statement and scope of duty checklist to use in drawing up a statement. Forward it to the unit for response with a suspense of five working days.

d. Maintaining the small claims file. In many cases, the accident reports and scope of duty information will arrive before the claim is filed. If the information confirms that the claim should be processed under small claims procedures, note that on the chronology sheet in the potential claim file. Keep the potential claim file where personnel who meet with claimants have access to it.

e. Actions when the claimant arrives. The goal is to obtain enough information to assess liability and settle the claim on the spot if the claimant can substantiate damages. If the potential claim file is fully documented, all that is necessary is documentation on damages.

(1) *Immediate interview.* When the claimant arrives to ask about filing a claim, a properly trained or experienced person should interview the claimant on the spot. This can be an ACO or CPO, a claims examiner, or an experienced claims clerk. At a minimum, all personnel who work at the front desk should be trained to interview the claimant about the accident by referring to the potential claim file and filling in missing information.

(2) *Damages.* Few claimants visit the claims office with estimates of repair in hand. This is the time to ask about the claimant's damages. The claims office should keep a camera to photograph any damage. Instruct the claimant on filling out the claim form and on local policy concerning repair estimates. Tell the claimant to return with the repair estimate and a completed claim form. If the claimant contends that the police or other reports are wrong, try to resolve the contradiction by visiting the scene, if nearby, with both drivers.

(3) *Incomplete claim files.* If the data on scope of duty or other information is missing, obtain it by telephoning the unit responsible for the accident either while the claimant is at the office or before the claimant returns. As long as the settlement authority is satisfied that the government is at fault, a handwritten memorandum of the conversation is sufficient. When the damage is minimal, try to agree on repair costs without an estimate.

(4) *Settlement.* When the claimant has secured an estimate of repair and completed a claim form, the claim should be settled while the claimant is still in the office. The key to this step is delegating authority to settle the claim. The ACOs and CPOs should allow experienced claims personnel to interview the claimant and settle the claim. Train new personnel to do this. The claimant should sign the settlement agreement before leaving the claims office.

2-27. Investigating premises liability claims

a. Variety of claims.

(1) The U.S. as a landowner receives a wide variety of claims based upon a duty to provide a safe place to persons entering lands, buildings, or other places under control of the government. Most numerous are slip and fall claims in places such as exchanges, commissaries, clubs or recreational facilities. The injured party must show that the U.S. had actual or constructive knowledge of the hazard. If the hazard existed only a short while and was not known despite regular policing, there is usually no liability. Prompt investigation by facility managers is the best method of establishing whether liability exists. The ACOs and CPOs should coordinate with facility managers and provide training to accomplish this goal.

(2) Claims based on injuries caused by improper design or construction occur in buildings, playgrounds, camping areas and recreational facilities and require the application of an industry or mandatory standard, which if not met can create liability. Sometimes the failure is obvious, such as routing public roads through a golf course without providing adequate fencing to protect motorists from flying golf balls. Other claims involve construction or design standards which must be complied with, or, if not, justified under the criteria set forth for discretionary function decisions discussed in paragraph 2-39b of this publication. Creation of a dangerous condition or the existence of a dangerous condition in an area for public use creates a duty to warn, which if improper or absent can be a basis to establish liability. A state recreational use statute may limit the duty to warn to willful, wanton or grossly negligent conditions but ACOs and CPOs should insist on proper warning being given in all activities which involve hazards or are inherently dangerous.

b. Specific issues to be addressed. Address the following issues specifically in the investigation, the claims officer's report, and the tort claims memorandum of opinion:

(1) *Scene investigation.* Compose a diagram of the scene, taking photographs that relate to it. Interview the claimant at the scene or later using photographs. If it is a slip and fall incident be sure to refer to the Slip and Fall Investigation Checklist that is posted on the USARCS Web site at "Claims Resources." II, a, no. 9.

(2) *Joint tortfeasors.* Place any joint tortfeasor on written notice. In premises liability cases, two types of joint tortfeasors should routinely be considered:

(a) *Building maintenance contractors.* Janitorial and maintenance services are often provided by independent contractors. Always determine whether the contractor may be responsible for the hazard that caused the claimant's injury.

(b) *Manufacturers of floor coverings or floor wax.* Always determine whether the claimant's injury was caused by a defective product. When you suspect that a product manufacturer is at fault, contact it with specifics of the accident and invite it to join the investigation.

(3) *The duty of care.* As paragraph 2-48 instructs, carefully research the law and determine the duty owed to the claimant. Then determine if and how that duty was breached. Avoid settling simply because the claimant fell.

(4) *Reason for claimant's fall.* If the claimant cannot state a reason, do not offer one. The investigation should always seek to determine the cause of the accident, even if the claimant cannot furnish one.

(5) *Expert evaluations.* If a claims investigation reveals the need for an expert, discuss this with the AAO, who can assist in locating one. Some areas in which expert evaluations have helped in the past are:

(a) *Friction tests.* When the claim alleges that a surface was excessively slippery, conduct a friction test on the surface.

(b) *Chemical analysis.* Floor wax may be chemically analyzed to determine if it is an appropriate product to apply to a floor.

(c) *Candlepower tests.* Many posts have equipment to test an area's illumination. Such a test should be conducted under the same lighting conditions present at the time of the incident, including both natural and artificial light. Check with the post safety office for assistance. The U.S. Army Center for Health Promotion and Preventive Medicine is also capable of conducting illumination tests and the AAO can provide additional assistance.

(6) *Weather data.* When weather is a contributing factor, obtain a summary from the U.S. Air Force. Combat Climatology Center (<https://notus2.afcc.af.mil/SCISPublic/>). For example, if the fall occurred in an area where the amount of natural light is a factor, get a weather summary showing cloud cover, sun and moon data and other illumination factors. If rain, snow or ice factored in the accident, the weather data should include a temperature summary and the amount and type of precipitation that fell that day (and on previous days, if relevant).

(7) *Applicable safety standards.* Safety issues raise factual and legal issues. Consult the post safety office to find out what standards apply under federal, state, and local law. For example, determine what Occupational Safety and Health Administration standards apply to the activity, make copies and add them to the file. In addition, determine what standards activity personnel recognized and applied. These should include local regulations and standard operating procedures, which also must be copied and filed. Finally, determine whether personnel followed the standards. Interview the individuals responsible for maintenance or safety. Look objectively at what happened and decide whether the rules were followed. Once this has been done, legal research should reveal whether the standard that was violated forms a basis for liability. The claimant's attorney will sometimes argue that federal law, as evidenced by statutes, rules, regulations, and SOPs applicable to the activity, establishes the standard of care. This is incorrect. State law sets the standards for liability and therefore establishes the duty. Stricter federal standards do not necessarily control.

c. Recreational users investigation.

(1) *General.* Whether the government is liable as landowner when the claimant is injured in a recreational activity is a recurring issue. On all claims involving outdoor recreational activities, personnel must specifically investigate whether the FTCA discretionary function exception (28 U.S.C. § 2680(a)) or individual state recreational use statutes apply. If a flood control project is involved, determine whether the flood or flood waters exception applies.

(2) *Discretionary function.* 28 U.S.C. § 2680(a). See paragraph 2–39b.

(a) The FTCA discretionary function exception bars claims based upon acts or omissions involving the exercise of discretion in the furtherance of public policy goals. Undertake a two-tier analysis to identify protected discretionary functions. The first inquiry is whether the governmental action involves an element of judgment or choice. If the government employee's act or omission is inconsistent with any mandatory federal statute, regulation or formal agency policy prescribing a specific course of action, the discretionary function exception does not apply.

(b) The second tier asks whether the choice or judgment is one based on, or susceptible to, public policy considerations (social, economic, political and military considerations). Allegations of negligence regarding the design, maintenance, and construction of recreational and other government facilities often involve the types of social, economic, and political policy considerations that the discretionary function exception has placed beyond the reach of the FTCA. See FTCH § II, B4c(2).

(c) At the onset of every claim investigation in which the discretionary function exception may apply, it is critical to identify and review any statutes, regulations, guidelines, directives or policy statements that may affect the activity forming the basis of the claim. Activities may be impacted by, for example, road or trail design, placement of warnings, guardrails or other precautions, and design of recreational areas. Interview an official familiar with the Army's policy considerations underlying the conduct in question to establish that no one has violated any mandatory standards, regulations, guidelines, directives or policies. Be prepared to state what policy considerations an Army representative will articulate in terms of the social, political, economic, or military factors influencing the discretionary activity.

(3) *State recreational use statutes.* See list posted on the USARCS Web site at "Claims Resources," II, a, 13.

(a) These statutes relax the standard of care imposed on landowners who make their land available to the public without fee. Because the government's FTCA liability mirrors that of a private party under like circumstances, recreational use statutes affect FTCA claims. They vary considerably from state to state. In some states, the statute's applicability is negated if the landowner receives direct or indirect compensation as a result of the activity, has actual knowledge of the dangerous condition on the land, or engages in conduct which is willful, wanton or grossly negligent. A fee is not necessarily considered compensation when used entirely to maintain the recreation project.

(b) In investigating whether a recreational use statute applies, determine, at a minimum:

1. Whether the United States fits the definition of landowner contemplated by the statute.

2. Whether the activity that resulted in the claimed injury was one of those the statute specified.
 3. The claimant's motive in entering the area.
 4. Whether the government charges entrance or user fees or receives a percentage of revenues from commercial activities conducted on the land.
 5. Whether the claimant or anyone in the claimant's party actually paid a fee, and whether the fee was used to maintain the project or activity or for another purpose. (Did the fee generate profits?)
 6. Whether the government had actual knowledge of the dangerous condition on the land.
 7. The history of prior similar incidents.
 8. If the condition is unique, whether there were appropriate warnings. See FTCH § II, B4c(2)(d).
- d. Under the Flood Control Act.* 33 U.S.C. § 702c. See paragraph 2–39b. The government is immune from liability for claims resulting from flood or waters emanating from flood control projects, including multipurpose works. Check the law of the federal circuit interpreting the act as different circuits have varying interpretations. In investigating a claim involving flood waters, determine which act of Congress authorized the project for flood control as well as the degree to which the project is currently used for flood control. Determine whether or not the act required the local beneficiary to assume liability for claims and, if so, obtain a copy of the local agreement. Ascertain the specific method of operation on the dates in question and whether or not they complied with established regulations or standard operating procedures (such as, a control plan for water fluctuation). Obtain the water levels for a relevant period of time, both before and after the date in question. Determine whether any underwater objects were involved in causing the claimed injury, for example, a tree stump or concrete marker. See FTCH § II, B4o.

2–28. Investigating explosion and blast damage claims

a. Property damage. When possible, claims for property damage caused by air blast or ground shock due to artillery firing and similar training activities, including claims arising from destruction of ordnance, should be paid under the MCA as incident to Army noncombat activities. If the claim is not payable, deny under both the FTCA and the MCA. However, if the explosion cannot be considered as part of an Army noncombat activity (for example, if caused by a contractor's manufacture or transport of ordnance), investigate state law. Explosion claims should not be settled for "nuisance" value alone since small nuisance settlements can easily result in other claims being filed once the neighbors learn that the local claims office is paying such claims.

b. Review by a ballistic research and analysis expert. All claims for property damage or loss due to explosions are investigated by local claims personnel who forward them to their AAO for review by a ballistics expert prior to adjudication. The requirement for a ballistics expert's review is based on USARCS' long experience with problems in adjudicating explosion claims. These problems include causation and the lack of a uniform approach to settling these claims at each installation. The ballistic expert's finding as to causation is binding on local claims offices in the absence of other expert opinions to the contrary. Experience has shown, however, that few experts really understand the effect explosions have on structures. See subpara h for more information about expert review.

c. Data maintenance and retention. Unit, range, and ordnance personnel should be required to maintain data needed for the ballistic expert's investigation for three years. Visiting units should be required to report the same data to range control.

d. Local procedures for receiving explosion damage complaints. All installations that conduct routine firing activities should designate one office to receive complaints. This office's existence, and its telephone number, should be widely and regularly publicized in the local media.

(1) When a complaint is received, take the following actions:

(a) Require the complainant to give specific information about the time of the explosion and the nature of any damage.

(b) A response team, consisting of a claims representative, a photographer, and an engineer representative should investigate serious complaints immediately.

(c) Coordinate all reports with the claims office. Both offices should treat all incidents involving property damage as potential claims.

(2) If the claimant alleges that firing activities conducted over a period of time caused damage, interview the claimant to establish the following facts as precisely as possible:

(a) The date the claimant first became aware of blasting or firing at the installation. Also establish subsequent firing dates. For example, has the firing gone on for years or just since the claimant moved in? How often has it occurred?

(b) The date the claimant first decided the firing was a problem and why. For example, the claimant may have been bothered by noise for years but tried at first to tolerate it.

(c) The date the claimant noticed damage and a precise description of it. This is especially important when a claimant alleges cumulative damage, such as cracks in walls, ceilings or driveways that will worsen with time.

(d) The date the claimant "connected" the damage with artillery firing and why.

e. Explosive ordnance demolition reports. When an incident involves or has been investigated by explosive ordnance demolition personnel, obtain a copy of DA 3265-R (Explosive Ordnance Incident Report) and forward it to USARCS.

f. Causation. Determining causation causes the most trouble in explosion damage claims. There are several reasons for this: claimants do not always report damage promptly; they may take weeks or months to come to the claims office. Poor reporting procedures within the command are often at the root of this problem. This can be avoided if the installation implements the procedures set forth in subparagraph g. Further, claimants often associate loud noises or slight earth tremors with structural damage they find upon inspecting their home after hearing the explosion. Typically, when a strong explosion occurs nearby, windows rattle and small objects fall down. Air blasts from explosions rarely cause structural damage, but most claimants will never believe that the crack in their wall or ceiling is not due to the blast they heard or felt.

g. Investigative procedures. Follow the procedures below when investigating property damage claims that are due to explosions and treated as incident to Army noncombat activities. (It is not necessary to investigate negligence issues unless it is obvious that FTCA litigation will result or unless the AAO directs.)

(1) Determine if and when an explosion actually occurred. Range control or a similar entity at most active Army installations will know of any training activity that could have caused the damage. Since many installations have multiple ranges and train many units simultaneously, it is important for the claimant to provide exact times.

(2) Determine who detonated the explosion. This information is usually available from range control, based on the time of the event.

(3) Determine whether the explosion caused the actual damage that the claimant alleges. The claimant must indicate what property was damaged or destroyed. Pictures and descriptions of the property (including locations) are very important.

h. Review by a ballistics expert. Forward a request for review by a ballistics expert to the AAO. It should contain:

(1) A topographic map showing the information listed below (an installation may submit an overlay only if it has previously submitted a topographic map with a request that it be retained for future reference.)

(a) Location of the damage.

(b) The impact area, if applicable.

(c) The firing point(s) involved, if applicable.

(d) The specific location, height, and nature of any obstruction to air blast or concussion if the obstruction is not shown on the map.

(2) A report or study on geological structure between the damage point and explosion point, if damage from ground shock is alleged. Such a report is available from various sources, including the U.S. Geological Survey or the COE. This report may be submitted once and referred to in future claims.

(3) A report by an installation employee or other person familiar with the type of construction involved, if structural damage is claimed. This report should include:

(a) Type of structure and its construction (general details), for example, "a two-story frame house with aluminum siding."

(b) Age of structure.

(c) Condition or state of repair of structure.

(d) Date and nature of any repairs to the structure.

(e) Date and nature of any additions or remodeling.

(f) Type of heating and air-conditioning system and the dates and types of changes to the system.

(4) Photographs of all alleged damage, including wall, ceiling, swimming pool and driveway cracks. Inspect the damage personally to estimate the age of the damage. For example, if the claimant alleges that a blast earlier in the day caused a crack in the basement wall and you see that the crack is full of dirt, report that observation. Do not rely on photographs alone to show the damage.

(5) Location and extent of any other damage in the vicinity. Also report the lack of any damage, especially to nearby structures.

(6) Other sources of the damage, including sonic booms, quarry blasting, severe weather disturbances or heavy vehicular traffic.

(7) Specific information about explosives:

(a) Amount and type.

(b) Date and time fired.

(c) The depth, if buried.

(d) Minimum and maximum weights of any propellant or filler used.

(e) The number of inert or "sand" rounds used, if any, as well as the total number of rounds fired.

(8) Wind speed and direction from true north at ground level and at all accessible altitudes to 5,000 feet.

(9) Temperature at all accessible altitudes from ground level to 5,000 feet.

i. Detonation of unexploded ordnance.

(1) *Duds.* Ranges and other areas where unexploded ordnance (duds) are present exist on many Army installations. Duds attract children and curiosity seekers as well as scavengers who salvage scrap by illegally entering ranges. Such persons are sometimes injured or killed by detonation of ordnance on the range or by items they remove.

(2) *Investigation and research.*

(a) Whether the claim involves an injury occurring within an impact area or one sustained when the claimant or others took munitions from a range, research state law to determine the existence and scope of a landowner's duty to warn of a hazardous condition and whether the Army breached this duty. In this regard, the Army is entitled to operate an impact area for training purposes but it must do so safely. The presence or absence of warning signs is especially important. Many states have adopted, and impose, strict liability on those who injure others by conducting ultrahazardous activities, such as blasting. Strict liability does not apply to claims brought against the United States because the FTCA requires that negligence be shown to recover compensation. However, the noncombat activity provisions of the MCA are applicable.

(b) Carefully investigate the existence of any published notices and any warning signs. The claims officer's report must include:

1. A picture of the signs used to mark the impact area. If possible, photograph any signs the claimant saw. Their wording and any symbols used must be clear and legible in the photograph.

2. A map showing the entry and exit points and the area that the claimant traversed inside the impact area. Clearly mark any warning signs on the map.

3. Any notices published in the local media about the impact area's hazards.

(c) Determine the claimant's actual knowledge of the hazard posed by the impact area from various sources. Interview the claimant and the claimant's friends, relatives and coworkers on this specific point. In the case of scavengers, check police, FBI, and Bureau of Alcohol, Tobacco and Firearms records to learn if the claimant has ever been investigated or arrested for trespass on, or theft from, the impact area.

(d) Investigate range-clearing activity. Request explosive ordnance demolition records of the dates and extent of destruction of duds on the range for at least one year before and one year after the incident. Determine the procedures used for clearing the range and identifying the duds, the type of ordnance removed, and the numbers of each type of ordnance. Review FM 4-30.5 before investigating the incident. (FM 4-30.5 is available to DOD personnel at <http://www.train.army.mil>)

(e) Find out how many prior incidents occurred at the site and obtain pertinent records. Range control can usually provide this information.

(f) If the claim involves an abandoned range or impact area, obtain or investigate the following:

1. Date when the range or impact area was deactivated and reasons why.

2. A map showing the extent of the major impact area, both at the time of deactivation and at the time of the incident.

3. Records of the procedures used to clear the range or impact area, or witnesses who supervised or actually performed the task. If a contractor performed the cleanup, obtain a copy of the contract file. Also determine the type and numbers of duds cleared or removed from the range.

4. The procedures followed to turn over the range or impact area for public inspection and use. Investigate whether any restrictions were placed on the use of the property.

5. If there were prior incidents in which authorities found ordnance on the abandoned range or impact area, determine what procedures they followed to dispose of the ordnance (and if such measures were appropriate). Find out if the Army or other federal agency was notified that ordnance was found and took part in its disposal. Obtain incident and police reports.

(g) If the explosion occurred at a distance from the range or impact area, but claimant alleges that the ordnance came, or was removed, from it, the investigator must determine whether the ordnance was actually removed—that is, whether the item that exploded was Army ordnance. In such a case, specifically investigate the following points (in addition to those noted above):

1. The precise type of ordnance that detonated.

2. The range or impact area from which the ordnance allegedly came. This is established by contacting range control to determine if training had been conducted using that type of ordnance.

3. How the item came into the claimant's possession and how long the claimant had it. In some cases, the item is passed from one person to the next by sale or gift. Many people collect ordnance as souvenirs or for other reasons. Remember that the item may actually have been in the possession of the claimant or others for many years.

4. Serial numbers of the exploded ordnance and of any other rounds at the scene or associated with the claimant. Obtain serial number identifications. For assistance in tracing the source of ordnance, CJAs or claims attorneys should contact:

Anniston Army Depot
7 Franklin Ave.

Anniston, Alabama 36201-4199
Voice Commercial: 256-235-6686

5. Photographs of the exploded shrapnel. Submit the shrapnel to an ordnance expert to identify the type of round and how long ago it was fired.

6. If the ordnance is not uniquely military (such as hand grenades), determine whether anyone else in the community possesses similar ordnance. Find out if anyone is conducting mining, logging or other activities in the area and if the item could have come from one of those sources.

2-29. Investigating overflight claims

a. Claims involving Army aircraft.

(1) An overflight claim alleges property damage due to low-flying aircraft. The claim may allege one overflight or a series of overflights. Overflight claims present problems in verifying the fact that an overflight occurred, identifying the origin of the aircraft involved, proving that the alleged damages were due to the overflight, and deciding whether the MCA or the FTCA applies to the claim. Overflight claims may also lead to inconsistent decisions.

(2) Certain requirements are unique to claims involving aircraft and overflights. To investigate an overflight claim successfully, a claims officer should consider the following points:

(a) Which aviation units are assigned to installations within the claims area, their missions, and the type of aircraft used by these units. Establish liaison with the appropriate staff agencies for major units to facilitate exchange of information should a claims investigation be necessary. With their assistance, the claims officer should maintain a map depicting the local flying area, marking well any low-flying training routes. The local flying area will extend beyond the installation.

(b) Installations with activities that fly frequently should designate an office to receive complaints concerning overflights.

(c) The Federal Aviation Agency's (FAA) suggested minimum safe altitude requirements are 1,000 feet for congested areas and 500 feet for others (14 C.F.R. § 91.119). DOT minimum safe altitudes do not apply to helicopters. Helicopters may be flown at less than minimum altitudes if they are operated without hazard to persons or property on the ground. Additionally, neither standard may apply when nap-of-the-earth (NOE) flying is involved. Determine the best available NOE route.

(d) The claims office should have a copy of any local regulations on aircraft operations and of FM 3-01.80 (available to DOD personnel at www.train.army.mil), which aids in eyewitness identification of aircraft by publishing photographs, silhouettes, and characteristics of U.S. and foreign aircraft. The claims office should also obtain a grid map that includes routes and location of the incident.

(e) Always seek an experienced aviator's help when investigating or evaluating an overflight claim. Such assistance is especially valuable in determining the identity of the aircraft and crew involved in an overflight.

(f) Retain files from past overflight claims in the claims office to allow comparison and to provide historic information about such incidents. The claims office should also keep information concerning the establishment and frequency of use of flight patterns and training routes; this can be critical to the evaluation of overflight claims. Such information should include file copies of studies and decision memoranda about establishing these routes.

b. Claims that do not involve Army aircraft.

(1) If the claim does not involve Army aircraft, find out whether another Service's aircraft is involved. The Air Force and Navy both use helicopters and subsonic fixed-wing aircraft. When it is possible that aircraft from these Services may be involved, be sure eyewitnesses examine silhouettes of these aircraft to identify them. A computer register for Air Force aircraft is available through the Aviation Claims Branch, U.S. Air Force Litigation and Claims Service, (703) 696-9055. If an alleged overflight involves subsonic aircraft, do not try to transfer the claim until you are absolutely certain that Army aircraft are not involved.

(2) The Army does not operate supersonic aircraft; in rare cases, however, Army claims offices handle sonic boom claims, for example, those involving NATO SOFA foreign aircraft. Claims involving sonic boom damage resulting from the flight of a foreign aircraft or crew may be cognizable under a SOFA (AR 27-20, chap 7). The Army is responsible for investigating and paying these claims. Contact the appropriate USARCS AAO for guidance. However, if the claim involves Air Force aircraft, contact the nearest Air Force claims office or the Aviation Branch, USAF Litigation and Claims Service, for assistance. They maintain a register of all sonic boom flights in accordance with AFI 13-201. When requesting assistance from Headquarters, U.S. Air Force, provide the date, Zulu time, north and west coordinates, and geographic location of the alleged damage.

c. The investigation. The following issues must be specifically addressed in the investigation, the claims officer's report, and the tort claims memorandum of opinion:

(1) *Identity of the aircraft.* The initial focus of the investigation is identifying the aircraft involved in the overflight, not ruling out overflight by Army aircraft. Therefore, do not use the claimant's inability to identify the aircraft positively as a primary basis for denial. When interviewing a claimant or witness, refer to FM 3-01.80 and consult an experienced aviator to establish the aircraft's class and identity. Silhouette charts are helpful. If the claimant or witness interviews are inconclusive, screen all units that normally train in the area, including Army Reserve and ARNG. Also

contact the SJA, HQ, U.S. Army Special Operations Command, for overflights involving aircraft that may be assigned to it.

(2) *Unit and crew.* If Army aircraft are responsible for the damage, determine the unit allegedly responsible for the overflight. This is easier to do if you are familiar with the units stationed within your claims area and have established liaison with the G-5 or G-3 (air). Once you identify the unit, you can usually identify the crew involved. Interview its members about the incident.

(3) *Map of the incident site.* Obtain a grid map that includes the affected area. If it does not already show the routes and location of the incident, these must be drawn on it. It should include the local flying area generally, aircraft routes and any other information relevant to the claim.

(4) *Applicability of the MCA, FTCA, and the Tucker Act.*

(a) Although it is possible to apply the FTCA to determine liability, traditionally claims personnel have paid overflight claims under the MCA. This is because negligence is hard for the claimant to prove and the amount of the claim is too small to justify a lawsuit. The overflight usually involves normal military activity conducted according to military requirements and thus is not subject to the same standards as civilian activity. In most cases, if the claim can be settled under either Act, it should be investigated and settled under the MCA. Where the claim is not payable, deny the claim under both the FTCA and the MCA.

(b) Overflight claims alleging that repeated overflights have interfered with the use and enjoyment of property may be cognizable under the Tucker Act (28 U.S.C. § 1491). Information on the establishment and use of training routes may be essential in evaluating these claims. The claims must be carefully investigated and coordinated with the AAO. Claims cognizable under the Tucker Act are not subject to the administrative claims procedure and filing an administrative claim does not toll the statute of limitations. Screen such claims carefully and inform the claimant that the statute of limitations continues to run on the Tucker Act claim.

(5) *Causation and damages.* Causation is an issue frequently presented in overflight claims. A finding of causation must be supported by facts, not assumptions. Deny the claim when the adjudicator determines that the flight met the FAA's suggested minimum altitude requirements (see para 2-29a(2)(c)), unless there is an acceptable expert opinion to the contrary. Note, however, that there are no known scientific studies establishing causation when an aircraft is flying at suggested minimum altitudes. The requirement is applicable to fixed wing aircraft but not to helicopters. In addition, it is often difficult to calculate the amount of damages sustained. Use of Army or civilian experts or appraisers may be essential in evaluating damage claims. Coordinate this action with your AAO.

d. *Interviewing eyewitnesses.*

(1) Elicit as much information as possible about the aircraft involved before showing the witness FM 3-01.-80. The description given by the eyewitness should include:

(a) Color, markings and tail number.

(b) Type (fixed wing or rotary).

(c) Unusual characteristics (fuel tanks, landing gear, armaments, and shape of tail).

(d) Sound made as it approached and departed.

(e) How long the sound could be heard.

(f) Intensity of the sound.

(g) Approximate height above the ground (avoid an estimate in feet unless the witness has experience to estimate).

(h) Could the witness see the crew members or passengers on the aircraft? Describe them.

(i) Did the aircraft hover? How long? How high?

(2) Show the witness FM 3-01.80. Do not just hand the book to the witness.

(a) If the identity of the aircraft is obvious, just show the page that contains the aircraft.

(b) If there is a question as to its identity, narrow down the aircraft as much as possible and show those pictures to the witness. For example, if the aircraft involved appears to be a helicopter, show the pictures of the helicopters. If the witness gives a description that fits several different helicopters, show those to the witness. Do not try to trick or mislead the witness.

(3) If necessary, confirm the identification by consulting an experienced aviator.

2-30. Investigating claims involving registered and insured mail

Consider the following issues when investigating claims under the MCA for loss of registered or insured mail:

a. The fact of loss while in the possession of the Army must be established. To that end, attach these documents as exhibits to the report:

(1) The mail registry reflecting that the lost mail was receipted by an Army postal clerk.

(2) Evidence that the Army mail clerk's signature is genuine. A mail clerk's statement to this effect will generally suffice. If the signature was allegedly forged, obtain a copy of the postal clerk's signature on a document of undisputed reliability, such as a personnel document. Compare the signatures. If there is no reliable evidence of forgery, there is no need for handwriting analysis to substantiate the loss.

(3) Evidence that the alleged recipient received the mail (the actual receipt) along with reliable evidence of the

recipient's signature. Again, handwriting analysis is not required if it can be determined that the signature is either genuine or forged.

b. A specific finding whether the sender or addressee owned the article.

c. The sender's and the intended recipient's statements about the loss. This ensures that each knows that a claim has been filed and that the proper claimant will receive any payment. Both parties should address the following issues in their statements:

(1) A description and valuation of the contents of the letter or parcel, supported by estimates, sales receipts, or other evidence.

(2) The registered or insured mail receipt reflecting the fee paid for insurance, postage and the parcel or letter's declared value.

(3) Evidence of the parcel or letter's damage or loss.

(4) The time and place the U.S. Postal Service first delivered the letter or parcel to the Military Postal Service or other authorized Army military or civilian personnel for distribution.

(5) Whether the letter or parcel was redelivered to the U.S. Postal Service for forwarding or any other purpose.

(6) Whether either received reimbursement from any other source, including private insurance.

d. A copy of any U.S. Postal Service investigation or other investigation concerning the loss.

e. DOD 4525.6-M is essential to conducting a proper investigation of these claims.

2-31. Investigating claims involving family childcare providers

See paragraph 12-9f of this publication.

a. *Conducting family childcare investigations.*

(1) Assemble the following basic documents in all family childcare claims:

(a) The MP and CID reports.

(b) The complete contents of the family childcare provider's file.

(c) The power of attorney and agreement between the family childcare caregiver and parent(s) of the injured or deceased child.

(d) The physical examination administered to the child prior to its entry into the family childcare program (family childcare providers usually have a copy).

(2) Visit the family childcare caregiver's home as soon as possible after the incident. Photograph the scene, even if others have done so.

(3) Examine the incident carefully to see if there is a basis for holding the United States liable independent of the care rendered to the child. For example, if a child is burned by hot water in a bathtub, claimant will almost certainly allege that the hot water heater was defectively maintained. Discuss federal liability issues in the tort claims memorandum of opinion.

(4) Investigate the incident with a view toward determining whether the United States or another party is liable for the injury. For example, an operator of leased housing may be responsible for premises liability, or the manufacturer of a hot water heater may be responsible under a products liability theory.

(5) Although family child care caregivers are not required to maintain private insurance, always interview the family child care caregiver about its existence. Always obtain a copy of any liability policy that covers the care given. Be sure that the caregiver complies with the insurance policy's notice provisions.

(6) Always decide whether to assert an affirmative claim when someone other than the Army or family childcare provider may be liable. Before doing so, coordinate with the AAO.

(7) Determine if the provider is certified by the family child care coordinator.

(8) Make sure the child was authorized to be kept in the home under the provisions of AR 608-10. If the child was not covered by a valid family child care agreement, find out whether the family child care director or inspector knew that unauthorized children were present. Always look beyond the agreement to ensure that the child was entitled to family childcare. The lack of a valid agreement will not necessarily invalidate the claim, if the parent and the family child care provider attempted to comply with the family child care requirements.

(9) Determine whether the claim falls within the coverage limits set forth in AR 27-20.

(10) Secure a copy of the state and local standards for licensing in-home daycare operations. On this point, remember that AR 608-10 allows, but does not require, state certification. If the family child care provider holds a current state certification, obtain a copy of the state certification file (this may require a release from the family child care provider). When interviewing the family child care provider, ask about prior state certifications in other locations. Always ask about prior allegations of child abuse or neglect, including those involving the family child care provider's own children.

(11) When the claim involves an allegation that the family child care provider burned the child with hot water while the child was bathing, test the hot water heater and plumbing system to determine the hot water temperature at the tap. Water heater thermostats in family childcare provider quarters should not be set higher than 110 degrees Fahrenheit. If

the home inspection records show that the temperature was properly set and that the thermostat was not accessible, no liability is indicated.

b. Determining of liability. Upon completion of the investigation, determine whether any U.S. employee was responsible for the injury. If not, the claim is payable under AR 27–20, chapter 12, but not under the FTCA or the MCA. Discuss how to proceed with the AAO.

2–32. Investigating claims arising from shoplifting

a. Claims by persons suspected of shoplifting usually arise from their physical detention by AAFES employees (typically store detectives). These claims must be adjudicated under the law of the state in which the claim arises. It is important to remember that under the FTCA, the United States is liable only to the same extent as a private person would be. Most states have enacted statutes authorizing merchants or their employees to detain or arrest suspects. These statutes also grant authority to conduct a reasonable search.

b. Under the FTCA, a claim arising from false arrest is excluded from consideration except when the arrest is made by a federal law enforcement officer. AAFES personnel have been held not to be federal law enforcement officers, despite their denomination as security personnel. See *Solomon v. United States*, 559 F.2d 309 (5th Cir. 1977). MP personnel have been held to be federal law enforcement officers. Accordingly, an MP's involvement in a shoplifting detention or arrest may bring the claim within the FTCA's purview.

c. The AAFES rules prohibit their personnel from searching a suspect. Store personnel should notify the MPs immediately and request that they come to the scene, take charge of the case, and conduct any search of suspects. However, store personnel need not call the MPs when it becomes evident that the suspected shoplifter does not have the merchandise.

d. The ACOs and CPOs must become familiar with their state shoplifting laws and properly advise local AAFES personnel. If possible, develop local procedures within the guidelines of AAFES Exchange Operating Procedures (EOP) 57–2 to avoid using MPs while nevertheless complying with its edict not to search a suspect. Suspects should always be given the opportunity to demonstrate voluntarily that they are not in possession of the suspected stolen merchandise. The goal of AAFES and claims personnel is to avoid occurrences that lead to the filing of claims.

e. The investigator should review the store's videotape, if any, and obtain a copy where indicated. Interview all witnesses, including the claimant, on location and devise an exact-time chronology based on these interviews. Rarely is the MP report adequate. Of primary importance is the physical description of the place where the suspect interview and search occurred, and whether it was open to public view.

2–33. Investigating dram shop and social host claims

See paragraph 2–48e(1).

a. General. Claims arising from the overuse of alcohol sold at Army clubs or stores or from over serving at Army functions, formal or informal, require investigation when an injury or death results from these activities. For review of statutory and case law, see FTCH § II, B4a(1)(d).

b. Nature of investigation.

(1) What regulatory restrictions, including those established at the installation and unit levels, were violated in holding the function at the particular time, place, and manner, or in celebrating that particular event?

(2) What regulatory restrictions, including those established at the installation and unit levels, did the federal employees violate in possessing, using, or serving alcoholic beverages at the particular time, place, or type of event in question? See, for example, AR 215–1.

(3) What additional guidance on this subject did the allegedly negligent actors receive through safety briefings, counseling sessions, or meetings?

(4) Was the site of the function the participants' assigned place of duty when the incident occurred?

(5) What was the participants' duty status at the time of the function?

(6) Was the function held during normal duty hours?

(7) Did anyone with supervisory authority compel or encourage personnel to attend or participate in the function?

(8) Was the function held in a government-controlled facility?

(9) Did any supervisor or military superior authorize the function or know of it in advance and somehow acquiesce in permitting it to be held?

(10) What was the source of the funds used to purchase the alcoholic beverages and other refreshments, food or supplies for the function?

(11) What levels or signs of intoxication or sobriety did the allegedly negligent actors observe? What was the character and duration of their contact with the intoxicated individual?

(12) If significant signs of intoxication were not observed, could that be because a particular individual, such as a doorkeeper or charge of quarters, failed to perform a mandatory inspection or other assigned duty?

(13) What was the military relationship between the allegedly negligent actor and the intoxicated individual?

(14) What measures, if any, did the allegedly negligent actor undertake to determine whether the allegedly intoxicated individual actually was intoxicated?

(15) What measures, if any, did the allegedly negligent actor undertake to discourage or prohibit the intoxicated individual's subsequent use of a motor vehicle, and why were those measures ineffective?

2-34. Investigating medical malpractice claims

a. Introduction. Medical malpractice cases resemble any other tort claim requiring specialized knowledge, and their scientific or technical aspects should be the subject of preliminary study. It is helpful to have certain reference materials on hand as one begins a medical malpractice investigation. Some suggested references include:

- (1) Pertinent Health Service Command and hospital regulations and standing operating procedures.
- (2) AR 27-40.
- (3) AR 40-3.
- (4) AR 40-66.
- (5) AR 40-68.
- (6) The Merck Manual of Diagnosis and Therapy or other general medical text.
- (7) Physicians' Desk Reference (PDR).
- (8) A medical dictionary such as Taber's Cyclopedic Medical Dictionary.
- (9) An anatomy text or atlas such as Gray's Anatomy of the Human Body.
- (10) Each MTF has teaching aids for various operative and medical procedures. These include textbooks that have graphic step-by-step photographs and diagrams of medical and operative procedures, and videotapes of actual operative procedures. These aids should be reviewed prior to factual investigation or interviewing of key personnel.
- (11) A plethora of information may be obtained from various sites available on the Web. Usually a key word search using one of the popular search engines produces good results. Only use medical reference Web sites to obtain basic and background information, deferring to experts for detailed analysis. Some organizations with reliable and useful medical reference Web sites include MedicineNet (<http://www.medicinenet.com/script/main/hp.asp>), Medline Plus (by the National Library of Medicine and National Institutes of Health) (<http://medlineplus.gov/>), the National Cancer Institute (<http://www.cancer.gov/>), the Army Medical Department (AMEDD) (<http://www.armymedicine.army.mil/>), and the Medem Web site (<http://www.medem.com/>) (produced by medical societies).

b. Risk management and patient safety regulation, AR 40-68.

(1) For tort claims purposes an investigation should begin as soon as a sentinel event or PCE is identified. Chapter 12 of AR 40-68 involves the CJA as part of a team to provide for better patient safety and risk management. See AR 40-68, paragraphs 12-1a, 12-4a(3), 13-1, 13-2, and 13-4a(1). This allows the CJA to be involved in the identification and investigation of medical malpractice prior to the filing of a tort claim. However, as access to a quality assurance investigation is restricted by 10 U.S.C. § 1102, the CJA must conduct a separate investigation using the same sources and medical records.

(2) The CJA should be involved in the establishment of a patient safety program as set forth in AR 40-68, para 12-13. Specific components of patient safety include the assessment, identification, classification, management, analysis and reporting, as appropriate, of medical/health care associated adverse events (to include sentinel events). Patient safety addresses incidents involving potential harm (close calls) to patients as well as those in which actual injury occurred (adverse events).

(3) Pursuant to AR 40-68, a representative from the ACO or CPO is informed by the risk management team of all adverse, sentinel, or potentially compensable events and participates in their management, AR 40-68, paragraph 12-4c(3). See AR 40-68, chapter 12 and 13 to determine the nature and extent of the role of the CJA. All requests for medical records from the injured patient or their representative arising from a PCE or claim will be referred to the CJA for reply, AR 40-68, paragraph 13-6a.

c. Medical records. One of the problems medical malpractice cases present is that health care providers (HCPs) store much of the pertinent evidence and documents (equipment, personal notes and letters, journal article drafts, computer data, pathology material) for only short periods. Furthermore, MTFs often maintain clinics at many different locations within their confines or their satellite facilities. Always request a printout from the Composite Health Care System (CHCS) records listing all visits, telephone consultations, lab procedures, etc. that the patient has had at a given hospital. The CHCS is integrated software for administrative and clinical information in use at DOD hospitals. Thus, the first goal of any medical malpractice investigation should be to locate, retrieve and safeguard all data and items associated with the patient's treatment. See the Sources of Medical Records Table posted on the USARCS Web site at "Claims Resources," II, a, no. 18.

d. Working relationships. To facilitate the investigation of a medical malpractice claim, the ACO or CPO should have a working relationship with the MTF staff. The importance of direct access to hospital personnel (Deputy Commander for Clinical Services, Chief of Nursing, Chief of Patient Affairs Division, Quality Improvement Coordinator, Risk Manager and chiefs of major medical departments) cannot be overstated. The representative from the ACO or CPO as part of the risk management team (see AR 40-68, chap 3) should visit frequently to determine if any incidents have occurred. The representative should attend all QA Committee meetings as a non-voting member. On an occasional

basis, the representative should attend morning report meetings. Such participation is necessary to learn of potential claims and commence early investigations. Claims personnel should not participate in any credentialing action because it is potentially a conflict of interest.

e. Identifying a potentially compensable event.

(1) The following are signals that may identify a PCE:

(a) Unexpected or unexplained death.

(b) Unexplained paralysis of any extremity.

(c) Coma.

(d) Any neurological damage that results in unexplained brain insult (brain damage).

(e) Loss of any sensory ability: hearing, sight, taste, smell or touch.

(f) Disfigurement resulting from chemical or electrical burns.

(g) Unexplained loss of sexual function.

(h) Unexplained loss of bladder or bowel control.

(i) Unexplained loss of any body part.

(j) Unexplained seizure activity.

(k) Any infant born with an APGAR score of less than four at one minute or less than six at five minutes.

(l) Any patient who dies within 24 hours after discharge from the MTF or emergency room.

(2) If the ACO or CPO learns of a PCE during an RM meeting or from a DA 4106 or other reporting system within the MTF, it should ensure that the PCE is informally investigated and the medical records secured. If the incident is serious, advise the AAO by the most expeditious means.

f. Preservation of evidence. As an investigation begins, the ACO or CPO must obtain and secure all relevant evidence, including all medical and pharmacy records, physician notes and orders, convenience files, laboratory results, X-rays, scans, and fetal tracings. See the Sources of Medical Records Table, posted on the USARCS Web site at "Claims Resources," II, a, no. 18. This evidence may be preserved through coordination with the Chief of the Patient Affairs Division. It should be stored in a separate locked container with the notation that the consent of the ACO or CPO is needed prior to retirement, destruction, transfer or release.

(1) The best evidence consists of contemporaneous notes, special studies and documents created at the time the treatment was provided. Such evidence is crucial because it reflects the physician's impartial impressions and care plan.

(2) The ACO or CPO should request the Patient Affairs Division in writing and in specific detail to sequester and preserve the necessary evidence and to submit copies of the medical records. See AR 40-68, chapter 13.

(3) Furnish a copy of the MTF records to claimant's counsel who should in turn furnish a copy of all civilian medical records and names of civilian treating facilities and physicians. If counsel responds to the request for civilian records by claiming that the expense is too great, obtain a release or permission to obtain such records (see the medical release forms posted on the USARCS Web site at "Claims Resources," II, c). If the civilian records are lengthy, the ACO or CPO should review them to determine which are necessary. Funds to purchase civilian records should be available locally.

g. Records review and analysis.

(1) Once the medical records have been obtained, review each page, outlining the dates of each treatment received, and create a detailed written chronology. These records contain many abbreviations unique to the medical field; AR 40-66 provides a list of authorized abbreviations. Often, the records will contain unauthorized abbreviations. If the records contain unauthorized abbreviations or the handwriting is illegible, request the HCP who prepared the record furnish a legible version. The chronology should include the patient's medical condition, the date and type of treatment rendered, and the name of the treating HCP(s). These entries may reveal gaps in the patient's treatment and provide clues to any civilian treatment not disclosed by the claimant or any visits omitted.

(2) Prepare a witness list containing the names of HCPs, their current and permanent addresses, and telephone numbers for present residence and permanent home of record. Obtain their expiration term of service or permanent change of station (PCS) dates. Service and department chiefs and their secretaries, the QA committee, the Graduate Medical Education Office, the relevant corps branch office (Medical Corps, Dental Corps, Nurse Corps, Medical Service Corps), the college or professional school from which they graduated, and the American Medical Association may prove helpful in locating HCPs.

h. Identifying healthcare providers. Establish each HCP's role in the patient's treatment. Was the HCP following the orders of another, such as a senior HCP? When was the medical care actually provided? Often, a senior medical staff member stays behind the scenes but actually directs and oversees the patient's treatment through the ward staff: the residents, interns, fellows, medical students, and registered nurses. Many times the senior medical officer will not write notes in the patient's chart and, if surgery occurs, will not even be listed as present in the operating room. This practice permits junior trainees to receive credit for performing medical procedures when they later seek board certification.

(1) *Employment status.* Determine the HCP's employment status: government employee (active duty or civilian), personal services contractor under 10 U.S.C. § 1089, independent contractor, TRICARE provider or civilian consultant.

(2) *Documentation.* If the HCP is not a government employee, obtain copies of these documents: credentials file, contract or partnership agreement, and certificate of insurance. See paragraph 2–45c.

(3) *Notification to insurance company.* Notify the HCP’s insurance company that the claim has been filed, and where indicated, that the United States is not liable for their insured’s conduct. Establish the existence of any third-party liability insurance. See paragraph 2–58 (subrogation).

(4) *Notification to claimant.* Inform the claimant’s attorney if the HCP is not a federal employee. Provide the attorney with information pertaining to the HCP’s insurance company. Be sure to inform the claimant’s attorney as soon as possible, particularly before the applicable state statute of limitations has run. Failure to do so will leave the claimant with little choice but to sue the United States to force a third-party action. Also, if the claim goes to suit, it may lead the claimant to assert that the government should be equitably estopped from invoking the independent contractor defense because it concealed or otherwise failed to reveal the status of the non-federal employee until the state statute of limitations had run. Where the HCP is employed as a personal services contractor, 10 U.S.C. § 1089 states that individual liability insurance is not required, but if the agency that furnished the personal services contract has insurance inform the claimant’s attorney.

(5) *Ex-parte provider interviews.* Military and DOD treating physicians are federal employees and may be interviewed without the claimant’s consent. However, before conducting an ex-parte interview of a TRICARE HCP or an independent contractor, research applicable state law. Some states deem the filing of a lawsuit to waive the plaintiff’s physician-patient privilege, others require the plaintiff’s consent before the physician may be interviewed. When researching, determine whether the state considers filing an FTCA claim analogous to filing a lawsuit. If the state law seems to favor claimant’s position or is not clear, inform claimant’s counsel that the claimant must sign a release allowing you to interview the HCP, that the claim cannot be investigated and processed without such a release and that you will provide them with a copy of a written summary of the interview.

i. Media requests. Any and all communications with the media concerning a sentinel event, adverse advent or significant patient safety issue will be coordinated by the local public affairs office with the CJA. Press inquiries and other media related issues will be referred by the local public affairs office, as appropriate, to: USAMEDCOM, Attn: MCPA, 2050 Worth Road, Fort Sam Houston, Texas 78234–6000.

j. Use of quality assurance investigations. Claims personnel, because they are DOD employees whose duties require it, have access to QA records. See 10 U.S.C. § 1102. These documents should always be obtained and made part of the file. But a claims office should never substitute QA investigations for a thorough claims investigation. A QA report or investigation sometimes provides insight into the medical care provided, potential witnesses’ names, and other leads or helpful directions. It may be necessary to re-interview witnesses and cover the same ground. Quality management, and involvement in it and access to it, of legal and claims personnel are covered fully in AR 40–68. See paragraph 1–18.

k. Research of a medical malpractice claim. Claims personnel should read and become familiar with the standard treatment approaches to the claimant’s original medical problem. Through such study, the ACO or CPO may learn that there is more than one acceptable treatment. This issue bears on the physician’s medical training, judgment, and length of time served as a clinician. Typically, every medical problem may be met with several valid and equally acceptable treatments. The primary physician may use a technique that is different from, but as valid as, the treatment another physician uses or recommends. If a particular technique is accepted in its medical specialty, the question of the best, most appropriate treatment comes down to one of medical judgment, not substandard care. The ACO or CPO must conduct research and interview witnesses and experts to establish the standard of practice in the particular medical field. More importantly, there is an acceptable percentage-of-failure rate for most medical procedures. Use the acceptable failure or complication rate as a guide to which methods of treatment usually lead to undesirable results. These rates are based on treatment experience, the physician’s technical ability, training and experience level, and the physician’s own percentage of failure based on the number of cases actually handled in the past. The goal here is to discover the standard of care and determine whether the outcome in claimant’s case was due to inherent treatment risks or to HCP negligence. There are several methods by which the ACO or CPO may spot problems with the care provided.

(1) *Standard medical textbooks and journal articles.* Be familiar with current medical textbooks, journal articles and other relevant literature before interviewing witnesses. These resources will help establish the standard of practice for a particular medical problem. Furthermore, they will also provide failure and complication rates and different but acceptable results of a particular medical procedure. Use the local MTF’s medical library.

(2) *Physicians’ Desk Reference.* The Physicians’ Desk Reference is the standard text that medical professionals use as a prescribing source or guide for the thousands of pharmaceutical products licensed and approved by the Food and Drug Administration. It provides information on prescribing, risk and complications, adverse reaction warnings and symptoms, treatment for overdose, drug interactions, and contraindications to use.

l. Medical malpractice claims deriving from defective drugs, medical equipment or devices.

(1) *Timeliness.* Timely investigations are important when equipment fails to perform properly or a drug is mislabeled or mistaken for another with a similar name or package. Often, items are designed to be discarded after a single use. They may be lost or destroyed if claims personnel fail to involve themselves immediately upon learning of an injury. The injury should be reported on DA 4106 to the head of the medical department or service within 24 hours of

the occurrence and to the risk manager within 48 hours. Upon receiving a DA 4106 or discovering the PCE by other means, the ACO or CPO should immediately secure the drug, equipment or device.

(2) *Necessary procedures.* When equipment fails (for instance, a needle snaps, a catheter breaks off subcutaneously, or an equipment item shocks, burns or injures a patient in any way), the claims investigator, after obtaining the equipment or device as rapidly as possible obtains and secures the MTF's Medical Equipment Division's maintenance records; the technical manuals for the operation of the equipment in question; the suggested maintenance schedule; and the manufacturer's sales brochures describing recommended uses. The claims investigator must interview the staff involved when the equipment failed to establish exactly how they were using it, for what purpose, and if there was an electrical power surge or failure at the time. The investigator should try to establish if the patient and equipment were properly grounded, if the equipment was being used as the manufacturer suggested, if the MTF staff put the manufacturer on written notice of the equipment's failure and of a patient's resultant injury, and if the Food and Drug Administration or the U.S. Army Medical Research and Development Command were notified of such failures or issued past warnings or recalls. The investigator should arrange for an independent analysis and invite the manufacturer to join in the analysis.

(3) *Notice and inspection.* Place the supplier and manufacturer on notice. Invite inspection of the equipment or device. Do not furnish the item for inspection or repair but maintain a chain of custody. If the MTF has modified the equipment notify the supplier and manufacturer. Obtain an expert to determine whether the failure was due to design or operation and what role modification played.

m. Use of medical experts in medical malpractice claims. See paragraph 2-48. To investigate and evaluate a medical malpractice claim properly, an ACO or CPO must discover the standard of care in a particular situation. Establishing the standard of care, common treatment outcomes, and failure rate percentage of such treatments is key to the investigation.

(1) Having a qualified medical provider within the appropriate medical specialty at the MTF involved review the records is a good starting point for determining the standard of care. Such review is helpful because the reviewing physician works at the MTF where the ACO or CPO is assigned. The reviewing physician can explain the condition's correct diagnosis and its proper treatment, the complications associated with each type of treatment, and which complications are considered unusual or unexpected, all information that the ACO or CPO needs to spot the key issues requiring in-depth investigation and analysis. Although such lateral review is helpful, the ACO or CPO should bear in mind that physicians working within the same MTF sometimes avoid criticizing each other.

(2) In conjunction with the AAO, the ACO may hire a civilian expert in the manner set forth in AR 27-20, paragraphs 2-21 or 2-24 of this publication. The expert should be recognized by peers as an authority and should be willing to testify in the event of suit. Claims personnel should obtain an expert opinion in response to written questions. Such expert opinion may be used to attempt a compromise or to convince the claimant to withdraw the administrative claim. This is indicated especially when conflicting expert opinions confront the claims reviewer.

n. Interviewing health care providers in medical malpractice claims. The objectives of an HCP interview are not unique—

(1) Obtain the witness' curriculum vitae, training and experience levels, number of procedures performed, and educational courses taken to qualify to perform the procedure in question. Establish the HCP's role in the patient's treatment, review the sequence of events (facts) leading to the injury, and learn the HCP's opinion of how or why the injury occurred.

(2) Witness interviewing sequence is extremely important because you must identify and interview the primary witnesses. You may want to interview the nursing staff first to establish the general facts and sequence of events and to identify the "key players" involved in the incident.

(3) Establish each medical staff member's role during the interview. What was the person's role in the patient's clinical treatment? Was this person following orders of another more senior person while treating the patient? When interviewing a medical witness, always try to identify all members of the treatment team on the ward, in the operating room or in a clinic treatment office.

(4) Each witness may have a unique perception of the facts. Remember that he or she can greatly assist claims personnel if approached correctly and treated with respect. The facts are best told in narrative form, but if the witness is unable to recall the events, the investigator must still obtain the witness' view of the facts. Insist that the witness review the standard of care and state if he or she thinks it was met. Keep in mind that in some medical malpractice cases, investigators may need to interview primary witnesses two or more times. This is not unusual when many people play different roles in the normal course of treatment. Someone who at first does not appear significant may provide critical data that requires re-interviewing the other witnesses; doing so may be the only way to establish, or flesh out, all the essential facts.

o. Preparing for the healthcare provider interview.

(1) *Preliminary actions.*

(a) Before the interview, review the chronology you have prepared.

(b) Review the applicable standard of care previously established.

(c) Review the HCP's credentials file. A credentials file documents a physician's training and licensure as well as

practice privileges that have been granted by the MTF. Similar documents for residents are obtainable from the MTF graduate medical education office or the director of the particular resident's training program. Determine whether any restrictions have been imposed. Review the file and, if indicated, the HCP's own medical records for other factors which might impede or affect the provider's ability to perform (such as visual handicap, lack of fine motor coordination, existing neurological conditions or substance abuse problems).

(d) Make sure that the HCP has had time to review the medical records and notes before the interview. Have two copies of the records present during the interview.

(2) *Conducting the interview.*

(a) Explain your role and the purpose of the interview. Tell the HCP that accuracy and honesty are crucial in determining the claim's merits. The medical records must always be present during the interview.

(b) Take notes during the interview and prepare a memorandum based on them after it concludes. Have the HCP review the memorandum. Do not create a verbatim recording of the interview or have the HCP provide a signed written statement.

(c) Discuss the HCP's experience in the medical field involved, such as the number of procedures he or she had performed (with and without assistance) before the incident.

(d) Have the HCP explain in narrative form all direct involvement with the patient and the medical care at issue. Prepare a specific list of open-ended questions designed to elicit the HCP's broadest response.

(e) After the HCP commits to one version of the facts, review the data set forth in the medical records with the HCP, such as:

1. How often did the HCP visit or attend the patient?

2. Why are certain visits not recorded?

3. What complaints did the patient present with at each visit and were these complaints recorded in the records?

4. Why are there conflicts between what the HCP states and the contemporaneous notes in the records?

5. What was the HCP's day-to-day involvement with the patient?

(f) Determine what treatment choices the treating medical staff considered. Determine whether it requested and obtained consultations with other departments. If so, discover who the consultants were and what treatment they recommended. If not, why were necessary consultations not obtained? You must also find out what the physician-witness told the patient about the latter's medical condition, treatment choices, and the expected treatment results. Did the physician tell the patient, in detail and in language the patient could understand, about the treatment choices and their known risks and complications?

(g) Ask about the HCP's own health at the time of treating the patient.

(h) Ask the HCP whether the Army should defend or settle the claim based on the medical records. The HCP should explain his or her involvement in the case and all interactions with other involved HCPs. Ask questions to clarify the events. Always allow the HCP to review the allegations stated on the claim form and any expert opinions the claimant has offered. Ask the HCP to comment about both the allegations and the claimant's expert medical opinion, if any. The HCP may make valid points about either or both, and these comments may in turn assist in the overall defense of the case.

(i) Establish what counseling the patient received, when and by whom, and what subjects were discussed with the patient.

(j) Avoid these situations:

1. Arguing with or confronting the witness.

2. Leading the witness rather than asking who, what, when, where, and why questions.

3. Failing to ask hard or tough questions (for example: Why didn't you do anything about the patient's elevated white blood count?)

4. Failing to prepare properly for the interview; not knowing the right terms or not understanding the medical records.

5. Not knowing the medical background (for example, normal values for blood chemistry, such as a complete blood count), subject matter, or treatment standards involved and not reviewing general medical texts and articles before conducting the interview.

6. Allowing the witness to respond at great length and not asking the witness to separate or break down the answer into understandable segments.

7. Allowing the witness to respond in "medicalese" and not asking the witness to explain the subject involved in plain, easily understandable English.

8. Failing to understand the witness' answer but not asking for clarification.

9. Failing to ask follow-up questions.

10. Letting the witness intimidate you.

p. *Documenting the opinion.* Obtain copies of any personal notes and research the HCP's files on the patient. Also request copies of:

(1) MFRs concerning treatment or discussions with the patient or patient's family.

- (2) Letters to and from civilian consultants used by the treating physician concerning the patient.
- (3) Photographs, slides and/or videotapes of the patient's condition before and after treatment or procedure performed (such as a videotape of an endoscopy or photographs of the patient before and after plastic surgery).
- (4) Personal computer files containing progress notes, personal notes, MFRs and drafts of medical journal.
- (5) Articles from magazines, journals, or the Web pertinent to the topic.

Section V

Determination of Liability

2-35. Basic information on liability

AR 27-20 does not provide a remedy for every claim that may be brought against the government. A prompt and thorough investigation of all the facts is the key to properly assessing liability in any claim. Even if an unsophisticated claimant or an incompetent attorney advances a meritless argument, the facts may indicate governmental liability on some other basis. Apply the entire law of the place where the act or omission occurred, including its choice of law rules, to determine liability and damages. In certain circumstances, the legal theory of depeceage will permit application of the law from a state other than where the incident arose on certain issues in a given claim. For example damages could be determined by the law of one state and who is a proper claimant could be controlled by the laws of another state. However, in the typical FTCA case, law of the situs of the incident usually applies to the determination of duty, breach of that duty, and causation. In small-value claims, determining the damage award is more likely to involve the law of the place of occurrence than the law of the place where the claimant currently resides. Where local law conflicts with federal statutes, the latter govern. In assessing the government's liability, it is important to remember that federal statutes and common law as well as state law may bar the claim or provide governmental immunity. Consider these issues when assessing the standard issues of duty, breach, causation, and damages. Additionally, where liability is not clear or the facts remain uncertain, consider compromise settlements. Compromise is particularly important in MCA claims, as the parties cannot litigate contested issues.

2-36. Constitutional torts

Claims for violations of constitutional rights are not cognizable under any chapter of AR 27-20. The FTCA holds the United States liable to the same extent as a private person would be according to the law of the place where the act occurred. The "law of the place" refers to state law, and state law cannot impose liability for the violation of federal constitutional rights. Therefore, constitutional wrongs cannot be remedied through the FTCA unless the alleged violation also constitutes a state tort, *Federal Deposit Ins. Corp. v. Meyer*, 510 U.S.C. 471 (1994). Specific types of claims to be analyzed in this regard may include:

a. Bivens-type actions. Suits alleging violation of constitutional rights may be brought against U.S. employees individually, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See FTCH § II, B1b. The Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679(b), provides absolute immunity from individual suit for employees of the United States acting within the scope of their employment; commonly known as the Westfall Act but part of the FTCA. This statute specifically excludes from FTCA coverage any civil action against a government employee "brought for a violation of the Constitution of the United States" or "for a violation of a statute of the United States under which such action against an individual is otherwise authorized," 28 U.S.C. § 2679(b)(2)(A) and (B). However, federal officials performing discretionary functions continue to have qualified immunity from liability as long as the officials' conduct did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known," *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Davis v. Scherer*, 468 U.S. 183 (1984); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Anderson v. Creighton*, 483 U.S. 635 (1987). The affirmative defense of qualified immunity is a judicially created doctrine spurred largely by the rise of suits against public officials under 42 U.S.C. § 1983 (holding public officials liable for violations of an individual's constitutional or federal statutory rights as a result of actions taken under color of state law). Additionally, the Westfall Act does not preclude suit against an HCP under the Gonzales Act (10 U.S.C. § 1089 (b)). For example, if an HCP acting within the scope of employment commits an excluded tort such as an assault or false imprisonment, the HCP may be sued individually despite the Westfall Act. However, in view of the provision of the Gonzales Act permitting suit against the United States for willful torts of HCPs, a suit against the United States rather than the individual HCP is likely. The Gonzales Act is discussed further at paragraph 2-39h, "*Intentional Torts.*" See FTCH § II, B1b and D1b(3) for case law.

b. Property damage and confiscation. Neither takings under the Fifth Amendment of the U.S. Constitution nor contract claims are cognizable under the FTCA.

(1) The Fifth Amendment to the U.S. Constitution provides in part ". . . nor shall private property be taken for public use without just compensation." The Tucker Act, 28 U.S.C. § 1346(a), provides exclusive jurisdiction in the Court of Federal Claims over causes of actions alleging property loss caused by a Fifth Amendment "taking." Such takings include inverse condemnation actions. See FTCH § II, B5c. AR 27-20 provides no basis for paying these claims; refer them to USARCS immediately. Investigate the facts of the claim thoroughly before referring it because often it is difficult to determine if there was, in fact, a taking (either temporary or permanent) or if the property was

damaged by a tort or noncombat activity. See FTCH § II, B5c(3). Real estate claims based on a Fifth Amendment taking include navigation easements and claims caused by a continuous invasion of property, such as overflight noise or smoke, gases or water emanating from government sources. See *United States v. Causby*, 328 U.S. 256 (1946), and *Griggs v. Allegheny County*, 369 U.S. 85 (1962) (both involving overflights). The Court of Federal Claims has exclusive jurisdiction of Tucker Act claims in excess of \$10,000. If the claimed amount is less than \$10,000, suit may be filed in the appropriate U.S. District Court or the Court of Federal Claims. See paragraph 2–17h(1).

(2) Contractual claims for rent, janitorial, custodial, utility and other contractual services; damage to real property sounding in express or implied-in-fact contract, and permanent or recurring damages to real property resulting in a government "taking" of an interest in the real estate may also be investigated and settled under AR 405–15. See AR 27–20, paragraph 3–3b. The COE is the Army agency that maintains liaison with the OMB for settlement of real estate claims sounding in contract. Claims based upon contract theory, either express or implied, have a six-year statute of limitations, 28 U.S.C. §§ 2401 and 2501. An implied-in-fact contract theory may be used to pay a maneuver damage claim presented after the MCA's two-year statute of limitations has expired. See paragraph 2–15m.

(3) Exclusive jurisdiction over intangible property losses rests with the Court of Federal Claims. Refer claims for such damage based on mistakes made by administrative personnel to the OMB (31 U.S.C. § 3702) as Tucker Act claims.

2–37. Incident to service

See parallel discussion at AR 27–20, paragraph 2–26.

a. Feres-type bar. A claim for the personal injury or death of, or the loss of or damage to property belonging to, a member of the Armed Forces of the United States that occurs "incident to service" is not payable under the FTCA, *Feres v. United States*, 340 U.S. 135 (1950). Additionally, the MCA expressly bars claims for personal injury to, or death of, a member of the Armed Forces or Coast Guard occurring outside the United States and "incident to service," 10 U.S.C. § 2733(b)(3); however, the MCA does permit recovery for property damage claims. The courts interpret "incident to service" very broadly; this concept is far greater in breadth than is "acting within the scope of one's employment."

b. Rationale. Here is a current list of significant justifications federal courts invoke to uphold the *Feres* or "incident to service" doctrine:

(1) The distinctively federal nature of the relationship between the government and members of its armed forces, which argues against subjecting the government to liability based on the fortuity of the situs of the injury.

(2) The availability of alternative compensation systems, such as military pay and benefits, including medical disability and retirement.

(3) Fear of disrupting the military command relationship, *United States v. Johnson*, 481 U.S. 681 (1987).

(4) Such factors as the Soldier's duty status, the location of the incident, what the claimant was doing at the time of the incident and the Soldier's access to a benefit not generally available to the public at the time of the incident (such as medical treatment at a federal facility, use of the post exchange or commissary or space available flights). See FTCH § I, E10.

c. Type of Investigation. All "incident to service" cases must be investigated in a timely fashion to determine the Soldier's exact status at the time of the incident, how much control the military service exercised over the action or conduct, and when and under what circumstances the alleged negligent act or omission occurred. Note that obvious facts such as whether the Soldier was on or off duty, or located on or off post, are not triggers for or against immunity: this exception does not operate automatically under any circumstances. Variations in case law demand detailed investigation of each claim. Compare *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980) with *Thomason v. Sanchez*, 398 F. Supp. 500 (D.N.J. 1975), aff'd 539 F.2d 955 (3d Cir. 1976), cert. denied, 429 U.S. 1072 (1977) and *Warner v. United States*, 720 F.2d 837 (5th Cir. 1983).

d. Persons included. The "incident to service" exception bars claims by members of the Army, Navy, Air Force, Marine Corps, Coast Guard and Public Health Service, including the Reserve components of the armed forces and National Guard. It applies also to Soldiers on convalescent leave, the extended enlistment program or the delayed enlistment program, to service academy cadets, military prisoners serving a sentence whether or not the discharge has been executed, and to members of visiting forces present in the United States under the NATO SOFA or similar international agreements. Currently, the question whether the "incident to service" exclusion applies to Soldiers on the temporary disability retirement list (TDRL) remains unsettled. The federal circuit courts of appeal are divided on the issue, *Kendrick v. United States*, 877 F.2d 1201 (4th Cir. 1989), cert. dismissed, 493 U.S. 1065 (1990), and *Ricks v. United States*, 842 F.2d 300 (11th Cir. 1988), cert. denied, 490 U.S. 1031 (1989) (held: *Feres* bar applied); contra, *Harvey v. United States*, 884 F.2d 857 (5th Cir. 1989), and *Cortez v. United States*, 854 F.2d 723 (5th Cir. 1988) (held: Soldiers on the TDRL are not barred by *Feres*). Where the claim is based on continuation of medical treatment or a medical condition which occurred while the Soldier was on active duty, the claim is excluded. Otherwise, the disposition of the claim depends on the law of the applicable circuit court. FTCH § I, E10x. The "incident to service" rule does not bar a veteran's claim if the tortious act occurred after the claimant retired from military service.

e. Claims barred. The "incident to service" doctrine bars constitutional and intentional tort claims brought by

Soldiers against the United States (FTCH § I, E10y), suits brought by one Soldier against another, or against a federal civilian employee, and third-party indemnity claims brought against the United States (FTCH § I, E10x).

f. Medical malpractice. If medical care is provided based on an individual's military status, a claim for medical malpractice will be barred by the "incident to service" doctrine. This doctrine has been held to bar suit for negligent medical examination at a pre-induction physical provided the applicant is subsequently enlisted or inducted; if the applicant is not sworn in, *Feres* will not apply. The doctrine has also been held to bar a claim for a post-service injury as a result of a negligent or wrongful act which occurred while the Soldier was on active duty, for example, failure to warn or to provide followup care. However, if an independent negligent act occurred after the Soldier retired, then the "incident to service" doctrine will not bar the claim.

g. Derivative claims. The "incident to service" doctrine has been extended to bar derivative claims where the directly injured party is a Soldier, FTCH § I, E9c. The doctrine has also been held to bar suits by Soldiers' dependents if the claim has its "genesis" in a service-related injury, for example, injuries caused by Agent Orange and World War II radiation exposure, because the Soldier's service-related injury is the basis for the claimant's injury. A Soldier may bring a derivative claim for injuries to a spouse or family member as long as those injuries were not incurred incident to the spouse's or family member's own service.

h. Prenatal care. *Feres* does not bar a claim by or on behalf of a fetus (miscarriage or stillbirth) or an infant (live birth) based on negligent prenatal care provided to the Soldier-mother or negligence at the time of delivery. *Feres* does bar a claim by the Soldier-mother for her own injury resulting from such care, including prenatal care. Care provided to the mother alone must be distinguished from care provided to both the mother and the fetus. For example, the administration of the antiemetic drug *Bendectin* to prevent nausea constitutes care of only the mother. Discuss claims involving prenatal or perinatal injuries to fetuses or infants of active duty mothers with the AAO.

i. Temporary Disability Retirement List (TDRL). The courts have carved out an exception where independent post-discharge negligence (such as failure to monitor, warn or report a diagnosis) or a direct injury to a military dependent while on TDRL status violates a continuing duty owed to the Soldier, FTCH § I, E10p. *United States v. Brown*, 348 U.S. 110 (1954); *Laswell v. Brown*, 683 F.2d 261 (8th Cir. 1982), cert. denied, 459 U.S. 1210 (1983); and *Molsbergen v. United States*, 757 F.2d 1016 (9th Cir. 1985), cert. dismissed, 473 U.S. 934 (1985). The courts have reached dissimilar results in similar cases when the facts differ. *Feres* may also bar third-party indemnity claims and Soldiers' claims against United States contractors where the "government contractor" defense is viable, *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977).

2-38. Federal Employees Compensation Act and Longshore and Harbor Workers Compensation Act claims exclusions

See parallel discussion at AR 27-20, paragraph 2-27.

a. Persons included. All federal civilian employees, except for NAFI employees, are entitled to receive workers' compensation coverage under the FECA, 5 U.S.C. §§ 8101-8193. The FECA defines who is considered a federal employee (5 U.S.C. § 8101). In addition, special legislation has extended FECA coverage to Peace Corps and Vista volunteers, federal petit or grand jurors, volunteer members of the Civil Air Patrol, Reserve Officers Training Corps Cadets (Senior ROTC) (5 U.S.C. § 8140), Job Corps and Youth Conservation Corps enrollees, certain nurses, interns or other health care personnel, such as student nurses (5 U.S.C. §§ 5351, 8144), and state or local law enforcement officers engaged in apprehending persons charged with committing crimes against the United States (5 U.S.C. § 8191). FECA coverage applies to temporary federal employees, covered on the same basis as permanent employees, and contract employees; volunteers and loaned employees may be covered under certain circumstances. Federal employment is a question of federal law. See FTCH § I, E9c.

b. Applicability of the Longshore and Harbor Workers Compensation Act to Nonappropriated Fund Instrumentalities employees. Civilian employees of nonappropriated fund (NAFI) activities of the United States receive workers' compensation coverage under the Longshore and Harbor Workers Compensation Act (LSHWCA), 5 U.S.C. § 8171; 33 U.S.C. §§ 901-950. The LSHWCA contains compensation and exclusivity provisions similar to those of the Federal Employees Compensation Act (FECA). The same regional offices that consider FECA claims consider LSHWCA claims. See FTCH § I, E9e.

c. Applicability of the Longshore and Harbor Workers Compensation Act and Federal Employees Compensation Act to certain federal civilian employees. Federal civilian employees who are not citizens or residents of the United States, such as foreign nationals hired in a foreign country, may be covered by FECA and LSHWCA, subject to certain provisions governing their pay rates. Compensation payments are calculated under international agreements and command directives that provide compensation benefits when such employees are injured as a result of the performance of their duties. If neither FECA nor LSHWCA applies or if the benefits permitted under international agreements and command directives are not an exclusive remedy, such persons' claims may be considered under the FCA or the MCA. The CJA or claims attorney or officer should make appropriate deductions, however, for payments from any other sources.

d. Actions upon receipt of a Federal Employees Compensation Act or Longshore and Harbor Workers Compensation Act cognizable claim. When a tort claim for personal injury or death is filed by or on behalf of a person who is listed in subparagraphs a, b, or c the claimant should be advised to file a claim with the Office of Workers

Compensation Programs for the region where the claim arose (see subpara f) if the injury or death arose in the performance of duty. The OWCP is the arbiter of whether an injury is cognizable under the FECA or LSHWCA, regardless of whether an award is made. If an employee or the survivors disagree with a final determination of the Office of Workers' Compensation Programs (OWCP), they may request a hearing, where the claimant may present evidence in further support of the claim. Also, the claimant has the right to appeal to the Employees' Compensation Appeals Board, a separate entity of the U. S. Department of Labor, and OWCP may review a case on its own initiative.

e. Actions when claim has already filed with Office of Workers' Compensation Programs. If the claimant has already filed with OCWP, and is receiving benefits, the tort claim should be denied as FECA OR LSHWA is the exclusive remedy against the U.S. If not, the claimant must file with the OWCP and final action on the tort claim will be held in abeyance until one of the following occurs at which time the tort claim will be denied.

- (1) The OWCP determines that the claim arose out of the performance of duty
- (2) The OWCP denies the claim because the claimant refuses to furnish documentation or otherwise cooperate.
- (3) The claimant refuses to appeal the OCWP denial despite the Army settlement authority's request because of his determination that the claim is properly under FECA or LSHWCA.
- (4) The claimant fails to file within the applicable three year statute of limitation.

f. Where to file Federal Employees Compensation Act or Longshore and Harbor Workers Compensation Act claims. Claims for personal injury or wrongful death under the FECA are considered by regional offices of the OWCP, Department of Labor. A listing of all of the regional offices for federal employees workers' compensation programs can be found on the USARCS Web site at "Claims Resources," II, no. 21. Its New York regional office considers most claims arising outside the United States. Initial determinations may be appealed administratively but DOL's provision or denial of benefits is final and its determination that a FECA claim is barred is not judicially reviewable. Federal case law is determinative. See FTCH § I, E9f. If there is a substantial question whether or not the FECA covers a claimed injury, and if the civilian employee or legal representative did not file a claim under FECA before filing an FTCA or MCA claim, advise the claimant immediately to file a FECA claim. If the claimant insists on pursuing an FTCA or MCA claim, then consult the AAO, who will coordinate with the Office of the Solicitor, Department of Labor. If a FECA claim is pending, final action on the FTCA or MCA claim should be held in abeyance pending a determination by the OWCP regarding the claimant's entitlement to benefits under FECA.

g. Negligence not required. The FECA provides compensation if the federal employee, located either in the United States or overseas, is killed or injured "while in the performance of . . . duty." As in many workers' compensation schemes, the employee may recover damages whether or not there is government negligence, and the employee's own (contributory) negligence does not bar recovery. In cases where it applies, FECA is the employee's exclusive remedy against the United States and bars any claim under the FTCA or MCA, *Johansen v. United States*, 343 U.S. 427 (1952); *United States v. Demko*, 385 U.S. 149 (1966); 5 U.S.C. § 8116(c); AR 27-20, para 2-39c; 10 U.S.C. § 2733 (b)(3); FTCH § I, E9, including both the civilian employee's direct claim and all other parties' derivative claims. See FTCH § I, E9d. The FECA bar does not extend to third-party claims for indemnity or contribution, *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983). Subsequent cases have limited Lockheed's application, however. See FTCH § I, E9h. The FECA bars only federal civilian employees' personal injury and wrongful death claims, not their property damage claims. Therefore, consider their meritorious property damage claims first under AR 27-20, chapter 11, and then under AR 27-20, chapter 4, or Chapter 3 for claims arising outside the continental U.S. (OCONUS).

h. Scope of employment. Coverage under the FECA and LSHWCA is contingent upon a determination whether or not the personal injury or wrongful death occurred while the federal employee was in the performance of duty or acting within the scope of employment.

(1) The Department of Labor makes this determination under the FECA in accordance with federal case law. However, the law of the place of the occurrence is applied to claims arising under LSHWCA. Generally, if the employee is injured on agency premises during working hours, the FECA and the LSHWCA will apply, unless the employee was engaged in an activity that is obviously outside the scope of employment.

(2) "Agency premises" include areas immediately outside a building or place of employment, such as steps or sidewalks, if these areas are federally owned and maintained, and any parking facilities that the agency owns, controls or manages. Coverage applies also to workers who perform services away from the agency's premises, such as drivers or messengers. It extends to workers sent on errands or special missions or who perform services at home. Employees who are present on the premises for a reasonable time before or after working hours are covered; the coverage does not extend, however, to employees who visit the premises for non-work-related reasons. Additionally, employees who are killed or injured en route between work or home are not covered, except when still on the premises (or military installation) or when the agency has furnished them transportation to and from work.

(3) Coverage extends to injuries that occur while the employee was performing assigned duties or engaging in an activity reasonably associated with the employment, including using facilities for employee's comfort, health and convenience as well as eating meals and snacks provided or available on the premises.

(4) Injuries occurring off the agency premises or installation during a lunch period are not ordinarily covered unless the employee is in a travel status or is performing regular duties off premises. Employees in travel status are covered

24 hours a day for all activities reasonably incident to their TDY; an employee injured while on a sight-seeing trip during TDY may not be covered.

(5) Employees are covered while engaged in officially organized recreation authorized as part of their training or assigned duties.

(6) An employee's intentional or willful misconduct or intoxication with alcohol or drugs may be grounds for denying FECA or LSHWCA coverage. If the factual and medical evidence indicates, however, that the employee was not in full possession of his or her faculties at the time of the act, the injury may be compensable. Suicide may thus be covered under FECA or LSHWCA if it results from a mental disturbance or physical condition arising from the performance of duty that produces a compulsion to commit suicide and prevents the employee from exercising sound discretion or judgment sufficient to control the compulsion. See FTCH § I, E9c.

i. Subsequent injury. FECA and LSHWCA coverage extends not only to the original duty-related injury but also to any subsequent injury which results from medical care or treatment received for the original injury. Therefore, FECA and LSHWCA may bar medical malpractice claims when the medical care or treatment was provided for a duty-related injury. See FTCH § I, E9g.

j. Limits on coverage. The FECA limits coverage for the harmful effects of agency-provided medical care to care provided under the following four classes of medical service programs authorized by 5 U.S.C. § 7901(c):

- (1) Treatment of on-the-job illness or injury and dental conditions requiring medical attention.
- (2) Pre-employment, annual and other examinations.
- (3) Referral of employees to private physicians and dentists.
- (4) Preventive programs relating to employee health.

k. Extension of coverage. Additionally, the Office of Workers' Compensation may extend coverage when any of the following applies:

- (1) The Office of Workers' Compensation has given specific authorization for the treatment.
- (2) The medical treatment is given when the employment's causal relationship to the injury is in question.
- (3) The employer furnishes emergency medical treatment to an employee for a non-work-related condition while the employee is at work (the "human instincts doctrine").

(4) The employee does not have the "freedom and opportunity" to receive treatment at alternative medical facilities. This issue takes on even greater importance when the United States renders medical care or treatment to a civilian employee who is entitled to receive all care in an overseas MTF as a benefit of employment. See *In the Matter of Beverly Sweeny and Department of Defense Overseas Schools; Employees' Compensation Appeals Board Docket No. 85-1199*, 25 June 1986; and "Workman's Compensation and the Overseas Civilian Employee: A New Development," *The Army Lawyer*, November 1986, at 71-72.

l. Unscheduled coverage. FECA covers the claims of federal civilian employees who allege violation of an employment right as well as any claim involving an injury for which the rules governing federal civilian employment provide a comprehensive remedy, *Bush v. Luca*, 462 U.S. 367 (1983). Such claimants often seek compensation for emotional distress or psychological injury as a result of alleged misconduct. For these claims, the administrative remedies provided under the civil service regulations are the employee's exclusive remedy. See FTCH § I, E9i. Additionally, constitutional ("Bivens"-type) claims do not lie against co-employees absent special factors (for example, where there is no comprehensive Congressionally mandated remedy available, *Bush*, *supra*; *Schweiker v. Chilicky*, 487 U.S. 412 (1988)). The exclusive remedy for a federal civil servant's discrimination claim is Title VII of the Civil Rights Act of 1964, *Brown v. General Services Administration*, 425 U.S. 820 (1976). Additionally, the Civil Service Reform Act of 1978, 5 U.S.C. § 2301, provides the exclusive civil remedy for federal employees claiming financial injury resulting from personnel actions, *Johansen v. United States*, 343 U.S. 427 (1952); *Coyle v. Adelman*, 705 F. Supp. 48 (D.D.C. 1989); *United States v. Fausto*, 484 U.S. 439 (1988).

2-39. Statutory exceptions

a. Introduction. By statute, the following exclusions apply to FTCA claims, 28 U.S.C. § 2680. AR 27-20, paragraph 2-28 sets forth when the exclusions apply to other chapters. Except for exclusion 14, they apply also to the MCA and NGCA. Additional exclusions are listed in individual chapters of AR 27-20. The FTCA expressly bars the following claims:

b. Discretionary function.

(1) Arising out of an act or omission of an employee of the federal government, exercising due care in the execution of a statute or regulation, even if such statute or regulation is invalid, 28 U.S.C. § 2680(a). This is generally referred to as the "due care" exclusion. Typically, claims involving this exclusion grow out of authorized government activities such as flood control or irrigation projects, where there is no evidence of negligence. The only basis for the claim is the contention that the same conduct by a private person would be deemed tortious under state law or that the enabling statute or regulation was invalid. In such claims, the only issue to be resolved is the statute or regulation's existence, not its validity.

(2) Arising from an act or omission classed as a discretionary function and excluded by 28 U.S.C. § 2680(a), which preserves sovereign immunity for the government's formulation and execution of policy decisions as well as its failure

to make policy decisions. This exclusion derives from the constitutional separation of powers between the executive and judicial branches of the federal government; it prevents the judiciary from "second guessing" public policy decisions and avoids basing potential tort liability on an executive agency's judgment. The U.S. Supreme Court has expressed its current reasoning in *Dalehite v. United States*, 346 U.S. 15 (1953); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984), *Barnson v. United States*, 816 F.2d 549 (10th Cir. 1987), cert. denied, 484 U.S. 896 (1987), *Berkovitz v. United States*, 486 U.S. 531 (1988), and *United States v. Gauber*, 499 U.S. 315 (1991). See also FTCH § II, B4c. Negligence is not relevant to the discretionary function analysis: the key issues are the nature and quality of the conduct; what social, political, economic or military factors influenced the policy decisions; whether discretion, choice or judgment were used or involved; and whether a specific mandatory policy rule, regulation, or directive was violated. However, claims arising out of the negligent non-discretionary implementation of the discretionary plan or design of such projects (ministerial acts), the negligent operation of such projects, or an agency's failure to act in accord with a specific mandatory directive are not barred. A list of discretionary function exception cases is posted on the USARCS Web site at "Claims Resources," II, a, no. 14. See subparagraph 2-44b.

c. Postal matter. Arising out of the transmission of postal matter, 28 U.S.C. § 2680(b). This exclusion applies to the loss, miscarriage or negligent transmission of letters or postal matter, *Marine Insurance Co. v. United States*, 378 F.2d 812 (2d Cir. 1967), cert. denied, 389 U.S. 953 (1967). FTCH § II, B4d, and has been applied to personal injuries caused by the delivery of postal matter. However, the exclusion may not bar claims in which state law recognizes a cause of action for invasion of privacy, postal regulations are violated, or letters or postal matter are in the possession of military personnel, even though the loss may be caused by a criminal act. Such losses may be payable by the uniformed services to the U.S. Postal Service under 39 U.S.C. § 411, or to third parties under the MCA as set forth in paragraph 2-15i(3).

d. Taxes, duties, and detention of goods. 28 U.S.C. § 2680(c); *Kosak v. United States*, 465 U.S. 848 (1984), *United States v. 2,116 Boxes of Boned Beef*, 726 F.2d 1481 (10th Cir. 1984), cert. denied, 469 U.S. 825 (1985). See also FTCH § II, B4e. Other adequate remedies are available to anyone aggrieved by the application of U.S. tax or customs laws, see 26 U.S.C. § 6213. Alternatively, the claimant may pay the tax and sue in the Court of Federal Claims or the appropriate U.S. District Court for a refund (28 U.S.C. §§ 1491 and 1346(a)(1)). Still other remedies are available for the loss or detention of goods or merchandise. The bailment provisions of the MCA may apply, or where state law permits a bailment for a constitutional taking, the FTCA may apply, *Hatzlachh Supply Co., Inc. v. United States*, 444 U.S. 460 (1980). See also AR 195-5, concerning destruction of scientific evidence. The detention of goods exclusion may apply to seizures government employees make in connection with an arrest. Most federal circuit courts have held that the exception applies to agencies other than the Customs Service. FTCH § II, B4e(4). See paragraph 2-17d(14) of this publication.

e. Maritime. Arising under the Suits in Admiralty Act or under the Public Vessels Act (46 U.S.C. §§ 31101-31113, 28 U.S.C. § 2680(d)). See chapter 8. To be cognizable under these statutes, the tort must have both a maritime situs and a maritime nexus; otherwise the claim is cognizable under the FTCA. *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249 (1972), reversing *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3rd Cir. 1963), cert. denied, 375 U.S. 940 (1963); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Generally, these Acts subject the United States to the same liability that admiralty law imposes on a private ship owner, apart from liability for seizure or arrest of a United States vessel. They permit suits on all types of claims cognizable in admiralty, including those for damage or injury done or consummated on land by a public vessel, inadequate supervision by government employees of cargo loading aboard private vessels, and injuries arising out of pleasure boating on navigable U.S. waters. See FTCH § II, B4f. Suit may be filed under SIA or PVA without filing an administrative claim. However, maritime claims may be considered under the Army Maritime Claims Settlement Act (AMCSA)(10 U.S.C. §§ 4801, 4802, and 4803). For additional discussion see also paragraph 2-15h and chapters 8 of this publication and AR 27-20.

f. Trading with the Enemy Act. Arising out of the administration of the Trading with the Enemy Act, 28 U.S.C. § 2680(e). This Act provides the sole remedy for any person claiming money or other property held by an alien property custodian. This exclusion should be construed broadly.

g. Quarantines. Seeks compensation for damages caused by imposing a quarantine, 28 U.S.C. § 2680(f). However, claims for failure to impose a quarantine or for delay in enforcing a quarantine fall within the discretionary function exclusion and claims for negligently testing persons allegedly exposed to a risk factor may involve the misrepresentation exclusion, 28 U.S.C. § 2680(h). See FTCH § II, B4h.

h. Intentional torts.

(1) *Assault or battery.* Arising out of an assault or battery, 28 U.S.C. § 2680(h); FTCH § II, B4I(1). Claims are not barred for actions committed on or after 16 March 1974 by U.S. investigative or law enforcement officers empowered by law to execute searches, seize evidence, or arrest persons for violations of federal law. Nor does § 2680(h) bar claims arising out of the performance of medical, dental, or related health care functions, the Gonzales Act, 10 U.S.C. § 1089(e). Case law consistently supports this exclusion's application to all other federal employees. Claims based on the acts or omissions of investigative or law enforcement officers most often arise from the alleged use of excessive force. See FTCH § II, B2j for a list of federal law enforcement officers. It is important to investigate thoroughly any

claims alleging the use of threatening or deadly force, especially by a law enforcement officer, to determine whether the circumstances justified the nature, amount and use of such force.

(2) *Negligence or negligent supervision.* Often, a claimant's attorney employs artful pleading to create a cause of action that sounds in negligence or negligent supervision. However, the Supreme Court has interpreted the exclusion to encompass any claim "arising out of" an assault or battery, thereby precluding claims sounding in negligence, *United States v. Shearer*, 473 U.S. 52 (1985), unless there is a special relationship prior to the assault by virtue of a mandatory directive or the nature of the relationship, such as physician-patient or caretaker-child created duty, *Sheridan v. United States*, 487 U.S. 392 (1988).

(3) *Intentional or negligent infliction of emotional distress.* Certain types of conduct such as intentional or negligent infliction of emotional distress may be actionable where recognized by state law. Claims for sexual harassment, for negligence, such as accidental discharge of a weapon; negligent supervision when the actor is not a government employee; or harmful physical contact that grows out of a special, fiduciary relationship (as in medical treatment or child care) may also be cognizable.

(4) *False imprisonment, false arrest, malicious prosecution, or abuse of process.* 28 U.S.C. § 2680(h). FTCH § II, B4i(2). This exclusion applies generally when a federal employee acts within the scope of employment. It bars claims even though the acts alleged may constitute a separate cause of action under state law, such as negligent infliction of emotional distress as a result of negligent recordkeeping that leads to an arrest. It does not apply to investigative and law enforcement officers of the United States. See FTCH § II, B4i(2). For false imprisonment and false arrest claims, the United States is entitled to all defenses the individual officer may raise, such as good faith, reasonable belief and probable cause; the arrest, however, must be otherwise lawful under state law. This exclusion should be broadly interpreted: it will bar claims for negligent conduct that aggravates or results from the government's antecedent negligence, causing mental anguish, humiliation, fear or loss of earnings. This exclusion also bars claims for malicious prosecution, groundless institution of criminal proceedings and abuse of process, that is, the use of legal process for a purpose for which it was not designed. Certain claims for unjust convictions are cognizable under 28 U.S.C. § 1495 and 28 U.S.C. § 2513. See paragraph 2-17c(2)(c).

(5) *Libel, slander, misrepresentation, or deceit.* 28 U.S.C. § 2680(h). This exclusion has been construed broadly to bar claims for negligent as well as intentional misrepresentation, *United States v. Neustadt*, 366 U.S. 696 (1961). It applies equally to affirmative or implied misstatements and negligent omissions, *Preston v. United States*, 596 F.2d 232 (7th Cir. 1979), cert. denied, 444 U.S. 915 (1979). The courts have applied it to bar invasion of privacy claims and claims against wrongdoers who furnish defamatory information to a prospective employer. It bars claims for the negligent failure to perform an operational task such as failing to convey vital public safety information, independent of any secondary misstatement resulting in personal injury or property damage. The exclusion does not bar claims against a physician who misdiagnoses a patient, since resulting damage sounds in medical malpractice, the gravamen of the action, and the misrepresentation (the stating of misinformation) is merely incidental. The misrepresentation exclusion did not apply when the federal government sold bomb casings to a scrap dealer, expressly warranting their safety and fitness for scrap metal processing, and one bomb casing later exploded. Before applying this exception to an administrative tort claim, consider the nature of the government's acts or omissions as well as any information upon which the claimant may have detrimentally relied. See FTCH § II, B4i(4).

(6) *Interference with contractual rights.* 28 U.S.C. § 2680(h). This exclusion bars claims for loss or infringement of future or prospective rights or economic advantage as well as existing rights. It also covers interference with employment rights *Dupree v. United States*, 264 F.2d 140 (3d Cir. 1959), cert. denied, 361 U.S. 823 (1959); *Chafin v. Pratt*, 358 F.2d 349 (5th Cir. 1966), cert. denied, 385 U.S. 878 (1966). See FTCH § II, B4i(5). DOJ policy requires that claims for damage to bailed property be excluded by this exception even where the damage results from a negligent or wrongful act or omission by a United States employee acting within scope of employment. Such claims should be referred to the contracting officer.

i. *Fiscal operations.* Arising from the Department of the Treasury's fiscal operations or from the regulation of the monetary system, 28 U.S.C. § 2680(i), FTCH II, B4j. This exclusion encompasses all government financial disbursing operations. Most claims barred by this section arise out of improper wage and salary payments made to federal employees or payments on government contracts. Forward these claims either to DFAS or through contract channels to the contracting officer for consideration.

j. *Combat activities.* Arising out of combat activities of the military or naval forces, including the Coast Guard during wartime, 28 U.S.C. § 2680(j). See paragraphs 2-17b(1) and (2). War need not be formally declared for this exclusion to apply. Although the "combat activities" exclusion has been held to bar claims arising from troop movements in anticipation of imminent attack, claims for wartime combat training and for peacetime medical malpractice on veterans injured in combat are not barred. See FTCH § II, B4k.

k. *Foreign countries.* 28 U.S.C. § 2680(k). There is as yet no clear, firm definition of a "foreign country," but the courts have held that U.S. embassies, leased military bases, territory occupied by the military services, trusteeships under the mandate of the United Nations, and the high seas fall within the "foreign country" category, *United States v. Spelar*, 338 U.S. 217 (1949); *Callas v. United States*, 152 F. Supp. 17 (E.D.N.Y. 1957), aff'd, 253 F.2d 838 (2d Cir. 1958), cert. denied, 357 U.S. 936 (1958); *Smith v. United States*, 507 U.S. 197 (1993). Claims arising in certain foreign countries still may be cognizable under the single-service responsibility delegated to a particular military

service under other statutes. Note, however, that under the "headquarters tort" theory, the foreign country exclusion does not bar a claim if actionable negligence takes place in the United States but its consequences occur in a foreign country. See FTCH § II, B1c(15) and § II, B4l. See AR 27–20, chapters 3, 7, and 10 for additional guidance on claims arising in a foreign country.

l. Tennessee Valley Authority. Arising from the activities of the Tennessee Valley Authority, 28 U.S.C. § 2680(l) (payable by the Tennessee Valley Authority under 16 U.S.C. §§ 831–831ee). See FTCH § II, B4m.

m. Panama Canal Commission. Arising from the activities of the Panama Canal Commission, 28 U.S.C. § 2680(m) and 22 U.S.C. § 3761. Canal Zone claims are no longer cognizable under the FTCA since the Zone ceased to exist on 1 October 1979, the date the Panama Canal Treaty was executed. See FTCH § II, B4m.

n. Federal land bank. Arising from the activities of a federal land bank, intermediate credit bank or bank for cooperatives, 28 U.S.C. § 2680(n).

2–40. Flood exclusion

No liability of any kind shall attach to or rest upon the U.S. for any damages from or by flood or flood waters at any place. See 33 U.S.C. § 702c. This exception has been broadly construed and covers damage from flood control and multipurpose projects and all phases of construction and operation. It has not been extended to, and does not bar, claims for damage caused by manmade floods. In many flood control projects, the enabling legislation requires the non-federal beneficiary (such as the flood control or levee district) to hold and save harmless the United States from damages caused by the project's construction, operation, and maintenance. Look for such clauses when investigating flood claims. Claims arising out of recreational activities at COE reservoirs are discussed in paragraph 2–27c and FTCH § II, B4o.

2–41. Army Reserve National Guard property

Claims are barred for damage to property of a state, commonwealth, territory, or the District of Columbia caused by ARNG personnel engaged in training or duty under 32 U.S.C. §§ 316, 502, 503, 504, or 505, who are assigned to a unit maintained by that state, commonwealth, territory, or the District of Columbia. This exception does not apply to property of a county, city town or other political subdivision of the state. If a state demands to be informed of the rationale for denial, the matter will be referred to the Commander USARCS. See AR 27–20, chapter 6.

2–42. Federal Disaster Relief Act

Claims are barred for damage to property or for death or personal injury arising out of the activities of any federal agency or employee carrying out the provisions of the Federal Disaster Relief Act of 1974. (See 42 U.S.C. § 5173). See FTCH § II, B5v, and paragraph 2–15l of this publication. This Act requires the local beneficiary (state or local government) to hold the government harmless and to assume the defense of all claims arising from the removal of debris and wreckage from public or private property. Agreements setting forth such procedures are made on each such emergency occasion.

2–43. Non-justiciability doctrine

Claims that invoke the non-justiciability or political question doctrine are barred, *Baker v. Carr*, 369 U.S. 186 (1962). Federal courts apply a six-prong test to determine these cases, any one of which, if found, may be grounds for dismissal. The following items are the six factors:

- a.* A commitment of the issue to a coordinate branch of government by the text of the Constitution.
 - b.* A lack of judicially discoverable and manageable standards for resolving the matter.
 - c.* The impossibility of deciding without a policy determination that calls for non-judicial discretion.
 - d.* The impossibility of undertaking independent resolution without expressing lack of respect for coordinate branches of government.
 - e.* An unusual need for unquestioning adherence to a political decision already made.
 - f.* The potential for embarrassment from multiple pronouncements by various federal departments on one question.
- This exclusion comprehends questions of judicial restraint and separation of powers. For examples of its application, see FTCH § II, B4r.

2–44. Statute of limitations

Each statute enumerated in AR 27–20 for the administrative settlement of claims specifies the time period during which the right to file a claim must be exercised, FTCH § I, D. State or local statutes of limitations do not apply to the United States. Additionally, state or local requirements to exhaust administrative remedies before filing suit do not delay the start of the statute of limitations on a claim against the United States (local law requiring an employee to exhaust the worker's compensation remedy before filing suit will not delay start of the FTCA statute of limitations window). Instead, the statute of limitations starts to run on the date the claim accrues. However, follow state or local law in determining whether a cause of action has been created. For example, in the context of an FTCA wrongful death claim, state law creates the cause of action. Even when a wrongful death claim is filed within two years of death, state

law may determine whether or not the claim is barred for the decedent's failure to timely pursue a personal injury claim. It is the policy of USARCS to interpret all statutes of limitations in accordance with federal decisions.

a. Accrual. Federal law determines the accrual date. A claim accrues on the date on which the injured party knows of an injury or loss and its cause. In claims for indemnity or contribution against the United States, the accrual date is the date payment is made by the parties seeking indemnity or contribution.

b. Discovery exception to accrual date.

(1) When the claimant does not know of the injury or damage or does not know of its cause, the claim does not accrue until the injured party, or someone acting on the party's behalf, knows or should know about the existence of both the injury and its cause.

(2) This so-called "discovery rule" was articulated in the Supreme Court case of *United States v. Kubrick*, 444 U.S. 111 (1979). This means that, in many medical malpractice cases, accrual may be deferred until the date the claimant is aware or, in the exercise of due diligence, should be aware of both the injury and its cause. Accrual is not delayed pending a determination by the claimant that the injury was negligently inflicted. In *Kubrick*, the plaintiff was administered an antibiotic for a leg infection in April 1968. Six weeks later, the plaintiff suffered a hearing loss. In January 1969, a private physician informed Mr. Kubrick that it was possible his hearing loss resulted from the antibiotic administration. In June, another civilian doctor informed Mr. Kubrick that the antibiotic had indeed caused the hearing loss and that it should never have been administered. The claim was filed in September 1972. The Supreme Court held that the claim accrued in January 1969, when Mr. Kubrick was aware of his injury and its cause; the statute of limitations was not tolled until June 1971, when he received actual notice that the administration of the antibiotic was substandard treatment. The Supreme Court stressed that accrual is to be judged by an objective standard of whether the plaintiff knew, or in the exercise of reasonable diligence should have known, of the injury and its cause.

(3) The "discovery rule" is not limited to medical malpractice claims but has been applied to diverse situations, including chemical and atomic testing, erosion, and hazardous work environments.

c. Other exceptions to accrual date rule.

(1) *Continuous treatment doctrine.* In medical malpractice actions, accrual may be delayed until the treatment is completed when a course of continuous treatment is provided for the same injury or illness over a period of time. The rationale for this doctrine seeks to protect a plaintiff from having to challenge or question a physician while receiving necessary medical care. Courts are divided over whether the doctrine should apply to treatment by successive government physicians.

(2) *Delayed accrual due to reasonable reliance on assurances.* Accrual may be delayed for the period of time during which the claimant reasonably relied on his or her physician's assurances that the condition was temporary, that it was a normal side effect or that it was not caused by substandard treatment. See, *Burgess v. United States*, 744 F.2d 771 (11th Cir. 1984); *Rosales v. United States*, 824 F.2d 799 (9th Cir. 1987); and *Chamness by and through Chamness v. United States*, 835 F.2d 1350 (11th Cir. 1988).

(3) *Blameless ignorance or credible explanation.* If the claimant was provided a credible explanation for the injury by the tortfeasor, such as a HCP, some courts have held that the claimant is not under any duty to seek another explanation.

(4) *Fraudulent concealment.* Although there is no affirmative duty to reveal negligence, if anyone affirmatively attempted to conceal the facts or the involvement of the United States or its employees in a negligent or wrongful act or omission, a court may find that the cause of action did not accrue until the claimant discovered the true facts.

(5) *Suppressed recollection.* Claimants may argue that the statute of limitations is extended in cases where the emotional injury was such that all memory of the negligent act or acts was suppressed, and that the claim does not accrue until the memory of the incident is recovered. Most courts addressing the issue have rejected this theory.

d. Tolling. See also paragraph 2-8.

(1) *Claimant's disability.* As a general rule, the claimant's disability does not toll the statute of limitations for tort actions during the period of disability. Therefore, the statute of limitations is not tolled during periods of infancy or minority (unlike state statute of limitations which may be tolled until the claimant reaches the age of majority), or during periods of incompetency, FTCH § I, D3a and b. When the claimant is both an infant and an orphan, however, the statute of limitations may be tolled until a guardian is appointed. See *Mann v. United States*, 399 F.2d 672 (9th Cir. 1968); contra: *Zavala by and through Ruiz v. United States*, 876 F.2d 780 (9th Cir. 1989). Additionally, some courts have held that where the claimant's incompetence is a direct result of the negligence of the United States, the statute of limitations may be tolled either until the period of incompetency ends or until a legal guardian is appointed. Some of the cases addressing this issue draw a distinction between incompetency, which does not toll the statute of limitations, and brain damage so severe that the plaintiff is unable to know the nature or cause of the injury, which does. Compare *Barren by Barren v. United States*, 839 F.2d 987 (3rd Cir. 1988), cert. denied, 488 U.S. 827 (1988) with *Clifford by Clifford v. United States*, 738 F.2d 977 (8th Cir. 1984).

(2) *Filing of a lawsuit.* The SOL is not tolled by filing a lawsuit based upon the same incident in a federal, state, or local court against the United States or other parties. However, if a party's FTCA suit against the United States, filed within the original statute of limitations, is dismissed without prejudice for failure to exhaust administrative remedies, the dismissal order will typically state a time period within which a subsequent administrative claim may still be timely

filed. Additionally, the Federal Employees Liability Reform and Tort Compensation Act (28 U.S.C. § 2679(b)) expressly provides for the tolling of the statute of limitations under § 2401(b) if a suit is timely filed against a federal employee for a common law tort committed within the scope of employment, 28 U.S.C. § 2679(d)(5). Lack of knowledge of U.S. involvement does not toll the statute of limitations.

(3) *Effect of military service.* The Servicemembers Civil Relief Act of 2003, Pub. L. No. 108–189, § 206, 117 Stat. 2853 (2003), codified at 50 U.S.C. app. §§ 501–596, suspends various civil liabilities of persons during their continuous active military service. Section 206 of the Service Members Civil Relief Act states that "the period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government . . ." This language has been held to toll the FTCA's two-year statute of limitations even though the Soldier was otherwise under no disability to prevent filing of suit, such as physical limitations or being outside CONUS. The Soldiers and Sailors Civil Relief Act (former Act of 1940) (that uses the same language as the Service Members Civil Relief Act) applies to only the Soldier's claim (assuming it is not Feres barred) and may operate to save the Soldier's derivative claim even when the principal claim (such as a military dependent's claim) is time barred, *Romero by Romero v. United States*, 806 F. Supp. 569 (E.D. Va. 1992), *aff'd*, 2 F.3d 1149 (4th Cir. 1993) (held: Soldiers and Sailors Civil Relief Act applied to Soldier-father of brain-damaged baby even though child's and mother's claims were barred by statute of limitations); *Kerstetter v. United States*, 57 F.3d 362 (4th Cir. 1995). The court did not require showing that military service prejudiced a Soldier's ability to pursue an action to recover his property sold in a tax sale more than 20 years ago, *Conroy v. Aniskoff*, 507 U.S. 511 (1993).

(4) *Equitable tolling.* The doctrine of equitable tolling applies generally to a claim or suit that has not been timely filed due to the defendant's action or inaction, for example, misleading a potential claimant as to the appropriate time limits and the procedure for filing a claim or misinforming a patient about the cause of an injury. Formerly, the FTCA's two-year statute of limitations was held to be jurisdictional, subject neither to waiver nor to equitable tolling. The Supreme Court held, in *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990), however, that the doctrine of equitable tolling applied to a requirement to file suit within ninety days of receiving notice of denial of an equal employment opportunity complaint under 42 U.S.C. § 2000e-16(c). The Court stated that statutes of limitations in actions against the United States are subject to the same rebuttable presumption of equitable tolling as are suits against private individuals. In the wake of *Irwin*, the Eighth Circuit Court of Appeals held that the FTCA's six-month requirement to file suit contained in 28 U.S.C. § 2401(b) was not jurisdictional but rather an affirmative defense to be established by the United States, *Schmidt v. United States*, 901 F.2d 680 (8th Cir. 1990), *vacated and remanded*, 498 U.S. 1077 (1991), *on remand*, 933 F.2d 639 (8th Cir. 1991). Since *Schmidt*, the federal circuit courts have widely acknowledged that equitable tolling applies to the FTCA, see, *Diltz v. United States*, 771 F. Supp. 95 (D. Del. 1991) (in which equitable tolling was applied to negligent eye surgery case); and *Glarner v. United States Department of Veterans Admin.*, 30 F.3d 697 (6th Cir. 1994) (equitable tolling applied in VA case in which patient who expressed a desire to file a negligence claim was given a benefits form rather than a claim form). See also, *McKewin v. United States*, Civ. No. V 91–131–CIV–5–7 (E.D.N.C. 1992); *Mutch v. United States*, 804 F. Supp. 838 (S.D. W. Va. 1992); *Justice v. United States*, 6 F.3d 1474 (11th Cir. 1993); *First Alabama Bank v. United States*, 981 F.2d 1226 (11th Cir. 1993) (decisions in which courts acknowledge general application of equitable tolling to FTCA cases even though held that it did not act to toll the statute of limitations under facts of individual cases). Any FTCA claim involving a settlement greater than \$200,000 on which an issue of equitable tolling is involved requires preliminary discussion with the DOJ before negotiation of any settlement. Because USARCS policy has been to interpret the statute of limitations in light of FTCA decisions, equitable tolling principles may be applied to all AR 27–20 claims. The doctrine places the burden on the United States to prove untimely filing. Procedures to inform potential claimants of their rights are essential, including full and forthright discussions of the undesired results of medical care.

2–45. Federal employee requirement

a. Definition. Because individuals conduct the activities of the United States, the government's tort liability is always derivative. Federal liability exists only when the responsible individual is an "employee of the government," 28 U.S.C. § 2672; 10 U.S.C. § 2733(a). That phrase, as the FTCA defines it, includes: "officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under sections 316, 502, 503, 504, or 506 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation," 28 U.S.C. § 2671. "Employee of the government" includes, but is not limited to, those categories of individuals listed at AR 27–20, paragraph 2–2b, and federal law determines whether one is an employee of the United States, *Logue v. United States*, 412 U.S. 521 (1973). The FTCA defines a "federal agency" as "the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States," 28 U.S.C. § 2671. However, the FTCA specifically excludes "any contractor with the United States" from its "federal agency" definition. Contractors are not federal agencies and their employees may not be considered "employees of the government" such that the United States is liable for their tortious acts or omissions under the FTCA (FTCH § II, B2d). In practice, courts have limited the "contractor" language in 28 U.S.C. § 2671 to track the "independent contractor" test

derived from the law of agency. See Restatement (2d) of Agency § 220 (factors to be considered include the degree of control exercised by the employer; whether or not the person hired is engaged in a distinct occupation or business; the kind of occupation; whether the work is usually done under the direction of the employer or by a specialist without supervision; the skill required in the particular occupation; whether the employer or the workman supplies the instrumentalities, tools, and the place of work; and the method of compensation, whether by time unit or by the job).

b. Independent contractors. See paragraphs 2–15f and 2–62b.

(1) *Injury to employees of an independent contractor.* When confronted with such a claim, conduct a thorough investigation to determine whether there was any direct negligence on the part of the United States or its employees. Next, scrutinize the terms of the government contract at issue for any language obligating the contractor to indemnify the United States for claims arising from contract operations. Then research state law to determine whether a specific duty has been created by either statute or case law. See also whether state or local law makes any defenses to the claim, such as statutory employer, available to the United States. See *Hyman v. United States*, 796 F. Supp. 905 (E.D. Va. 1992), which held that the United States is a “statutory employer” under Virginia law such that the state law defense of employer immunity was available to bar a contractor employee’s FTCA suit stemming from injuries incurred in an automobile accident on the Norfolk Naval Base. Also, consultation with the USARCS AAO is essential in cases alleging failure to inspect the worksite or to enforce safety provisions set forth in the contract because of the potential to invoke the discretionary function defense, FTCH § II, B2d, and B4c.

(2) *Injury to third parties.* Obviously, if the injury to the third party was caused in whole or in part by a government employee’s negligent act, the United States may be directly liable to the claimant under the FTCA.

(a) A more difficult question involves whether or not, and under what circumstances, an independent contractor or its employee may be considered an “employee of the government” such that the United States bears FTCA liability for the contractor’s tortious acts or omissions, as well as its own.

(b) The Supreme Court examined this question in *Logue v. United States*, 412 U.S. 521 (1973) citing “absence of authority in the principal to control the physical conduct of the contractor in performance of the contract” as determinative. In *Logue*, a federal prisoner was placed in a county jail pursuant to contractual arrangement. Due to the county jailers’ alleged negligence, the prisoner committed suicide. The Supreme Court refused to hold the United States liable for the jailers’ negligence because an examination of the relationship showed that federal employees did not run the day-to-day activities of the jail; instead, county employees conducted and supervised such activities in accordance with the terms of the government contract.

(c) The cases following in the wake of *Logue* have applied the “strict control test,” whether the United States exerts day-to-day supervision and control over the “detailed physical performance of the contractor,” *United States v. Orleans*, 425 U.S. 807, 814 (1976); reserving the right to specify conditions and to inspect work product is usually not sufficient to establish an “employee” relationship between the independent contractor’s employee and the United States.

(d) Detailed federal safety regulations and evaluations are similarly insufficient to demonstrate strict control, because the real test is whether or not the United States maintains detailed control over the primary activity for which it has contracted, not the peripheral, administrative acts relating to such activity, FTCH § II, B2d. In the same vein, the government’s reservation of a contractual right to ensure that contractor personnel are qualified has been held insufficient to demonstrate government control of the day-to-day operation.

(e) Under agency law, a principal who hires an independent contractor is not immune from liability for the contractor’s torts if performance of the contract is the principal’s “non-delegable duty,” or if the state has adopted the Restatement (2d) of Agency § 214. The degree of control the principal exercises is irrelevant. In the body of case law dealing with government contracts, non-delegable duties typically arise from the performance of inherently dangerous activities or from the manner in which buildings and grounds are maintained (“safe place to work” statutes), FTCH § II, B4a(1)(c). Liability may attach under the “non-delegable duty” theory when the government requires a contractor to engage in harmful conduct that foreseeably could cause injury absent proper instruction to avoid such injury. Absolute liability is not the issue: there must be negligence or a wrongful act, such as failure to issue warnings.

c. Healthcare providers. See paragraphs 2–34 and 2–62.

(1) Many HCPs within the military medical system provide services to DOD health care beneficiaries through a variety of programs and contracts established or authorized by Congress.

(a) *Personal and non-personal services contracts.* As amended, 10 U.S.C. § 1091 authorizes the DOD to contract for the provision of direct health services, including HCPs. All contracts under this statute are subject to the Federal Acquisition Regulation (FAR), the DOD FAR Supplement, and the Army FAR Supplement. A “services contract” is one in which the government directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply. A “non-personal services contract” is one in which the personnel providing the services are not subject, either by the contract’s terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the government and its employees. A “personal services contract” is one which, by its express terms or as administered, makes the contractor personnel appear to be, in effect, government employees, 48 C.F.R., chapter 1, subpart 37.1. On 18 November 1997, President Clinton signed the Defense Department FY 98–99 Authorization Bill, which became Public Law No. 105–85. Section 736 of that law amended the Gonzales Act, 10 U.S.C. § 1089, to add personal services contract physicians described in

10 U.S.C. § 1091. The effect of this amendment is to make personal services contract physicians "employees of the United States" for FTCA purposes. By analogy, personal services contract physicians also become U.S. employees under the MCA and the FCA. The effect of this amendment is not retroactive. Accordingly, for incidents dating after 18 November 1997, any claims involving personal services contract physicians will be investigated as if those physicians were U.S. employees and not independent contractors.

(b) *Military-Civilian Health Services Partnership Program*. The Partnership Program was created to improve the cost-effectiveness of the DOD health care delivery system. See DODD 6000.12, April 29, 1996. The most commonly used "internal" partnership agreement allows MTF commanders to enter into formal agreements whereby civilian HCPs use government facilities to treat beneficiaries eligible under TRICARE. The Program's basic purpose is to encourage TRICARE-eligible beneficiaries to seek care in an MTF by offering them increased access to care and a waiver of the TRICARE cost share or deductible. Partnership providers are only paid for treatment of TRICARE-eligible beneficiaries receiving TRICARE-authorized care, and they are paid through the TRICARE fiscal intermediary. Subject to credentialing and hospital peer review procedures, these partnership providers are neither government employees nor, technically speaking, "contractors," because the FAR does not permit non-personal contracting. However, the relationship created between an MTF and a partnership provider is similar to that existing between the United States and an independent contractor. As with independent contractors, partnership providers are non-government, civilian care providers whose negligent acts should not create vicarious federal liability. Inherent in their relationship with the United States is the critical fact that government employees do not exercise day-to-day duty supervision and control over the contractor or partnership provider in the partnership program.

(c) *Residents in training*. Civilian medical institutions will frequently send their interns, residents and other medical trainees to government MTFs for training purposes. Similarly, the United States sends its medical trainees to civilian medical institutions for training. (See para 3-8 for a discussion of this issue.) Whether the borrowing MTF is liable depends on how the state interprets the borrowed or loaned servant doctrine, which purports to shift vicarious liability from the employing or lending master of a negligent servant to the borrowing master. Thus, the United States may bear responsibility for the tortious acts of a civilian medical institution employee who is training in a MTF. Thoroughly investigate all claims involving health care trainees in MTFs to determine the nature and extent of the day-to-day supervision and control that government employees exercised over them. Additionally, research state agency law to ascertain the elements required to assert or refute a borrowed or loaned servant defense.

(2) The FTCA exclusion of contractors from the definition of a federal agency applies to contractors who provide medical services. Tests similar to the "strict control" test have been applied to physician groups and individual physicians providing medical services to MTFs. There are two basic tests which have been developed for doctors who contract with the government:

(a) The "strict control" test, stemming from the Logue and Orleans line of cases, and a variation on it, the "strict control aside from professional judgment" test, discussed in *Lurch v. United States*, 719 F.2d 333 (10th Cir. 1983), cert. denied, 466 U.S. 927 (1984).

(b) The Lurch court stated in dicta that the strict control test for determining employee or contractor status for FTCA purposes is inappropriate for cases involving doctors because, due to their training and ethical obligations, doctors can never be "controlled." The Court believed that a doctor must always be free to exercise independent professional judgment as to what is best for each patient. However, the Lurch Court did not analyze the facts in light of the modified test because the contract specified that the doctor would not be considered an employee of the government for any purposes.

(c) In *Wood v. Standard Products Co., Inc.*, 671 F.2d 825 (4th Cir. 1982), a progeny of Logue and Orleans, a private physician who contracted with the U.S. Public Health Service to provide medical services to seamen in a remote, little-used port was held to be an independent contractor because there was no evidence that the government supervised or controlled his day-to-day practice or treatment of patients. Among the significant facts the Wood court cited in reaching its holding were:

1. The contract referred to the physician as a "contract physician."
2. The contract specified that the physician was to provide outpatient medical care in the same manner and of the same high quality as he provided for his private patients.
3. The contract did not specify the physician's hours.
4. The physician had the right to refuse to treat patients.
5. The U.S. Public Health Service did not provide office space, support, services, supplies, or equipment to the physician.
6. The physician billed the U.S. Public Health Service under a predetermined fee schedule.
7. U.S. Public Health Service site visits were meant only to check the adequacy of the physician's facilities and not to "oversee" his practice.
8. Unlike contract physicians, a contract nurse may be directly supervised by, and under the control of, a government employee so as to make the nurse a government employee, even if the nurse is individually credentialed, for example, as a nurse-midwife or certified registered nurse anesthetist (CRNA). In the case of *Bird v. United States*, 949 F.2d 1079 (10th Cir. 1991), for example, the 10th Circuit Court of Appeals found that a CRNA was an employee of the

United States because the CRNA was under the control and supervision of government physicians; the CRNA was required to work with patients assigned by others; the CRNA had no separate office, used hospital equipment exclusively; and was under the same degree of control and supervision by the government surgeon as any government nurse in the hospital.

9. In every case involving non-government HCPs, it is imperative to investigate the facts to determine the nature and extent of government control over the HCPs as well as to rule out additional direct tortious activity on the part of a government employee, such as a negligent act or omission by a government nurse, technician, or other support person in the emergency department, operating room, intensive care unit, or laboratory. Additionally, conduct a factual investigation and research state law to determine whether there is potential federal liability for the acts of the non-government HCP under the theories of "ostensible agency," "apparent authority," or "agency by estoppel." See Restatement (2d) of Agency 26 and 27, FTCH § II, B2c. Also, be alert for potential governmental liability under the theories of negligent hiring or credentialing, particularly if the independent contractor or partnership provider has a "track record" of complaints or adverse events. These liability theories have been applied with equal force to independent contract physicians as well as to TRICARE partnership providers practicing in MTFs. Finally, research state law to determine the availability of the "captain of the ship" defense, commonly arising in claims against a non-government surgeon who could be held liable for the tortious acts of government operating room personnel (the retained sponge case).

d. Volunteers. See AR 608–1, chapter 5.

(1) The general rule on volunteers is set forth in 31 U.S.C. § 1342, which provides that no officer or employee of the United States shall accept voluntary service for the United States or employ personal services in excess of that authorized by law, except in case of emergency involving the safety of human life or the protection of property.

(2) The Congress has carved statutory exceptions to this general rule for student volunteers employed pursuant to 5 U.S.C. § 3111(b), who are to be considered federal employees for purposes of the FTCA and MCA. Red Cross volunteers meeting the criteria set forth in AR 40–3, paragraph 2–42, are also considered employees of the United States for claims purposes, FTCH § II, B2g.

(3) In 1983, Congress authorized the U.S. Armed Forces to accept voluntary services in military museums, natural resources and family support programs, Public Law 98–94, 97 Stat. 614, 10 U.S.C. § 1588. In 1995, Congress expanded the categories for which volunteers may be accepted by medical, dental, nursing and other health care services; Congress also expanded the types of family support programs authorized to accept volunteer services to include child development and youth services, library and education programs, religious programs, housing referral programs, spousal employment assistance programs, and other morale, welfare and recreation programs, Title X, Subtitle G, Defense Authorization Act, Pub. L. No. 103–337, 108 Stat. 2663 at 2845, (10 U.S.C. § 1588). Department of Defense Instruction (DODI) 1100.21, dated March 11, 2002, implements 10 U.S.C. § 1588 and sets forth procedures for the use of volunteers in DOD facilities.

(4) Both the 1983 Act and the 1995 expansion thereof provided that a volunteer providing services under the aforementioned categories shall be considered a federal employee for purposes of the FTCA and the MCA, 28 U.S.C., chapter 171; 10 U.S.C. § 2733. Persons undergoing training are similarly included. The Acts also provide for workers' compensation benefits under FECA or LSHWCA, 5 U.S.C., subchapter I, chap. 81, and subchapter II, chapter 81.

(5) Any claim for injury or death to a volunteer is excluded under the FTCA or MCA if it arose incident to service or performance of duty. The FECA and LSHWCA are the volunteer's exclusive remedy. To be deemed a federal employee, the volunteer must be properly accepted by the federal agency and be performing within the scope of the accepted voluntary services at the time of the incident.

(6) The 1983 Act and its 1995 expansion are both specific about the federal agencies' need to publish implementing regulations permitting them lawfully to accept voluntary services. The portion of the 1983 Act pertaining to family support programs has been implemented by AR 215–1, chapter 14, and AR 608–1, chapter 5. Any tort claim arising from the acts or omissions of a volunteer should be investigated and processed under the provisions of AR 27–20, following consultation with the area action officer (AAO), just as though the volunteer were a Soldier or a civilian employee.

e. Loaned employees. Employees who are permitted to serve another employer may be considered "loaned servants," provided the borrowing employer has the power to discharge, control, and direct the employee and decide how he or she will perform the tasks. Whoever has retained those powers is liable for the employee's torts under the principle of respondeat superior. When those elements of direction and control have been found, the United States has been liable; for example, for the torts of government employees loaned for medical training and emergency assistance, and of county and state employees discharging federal programs.

f. Nonappropriated Fund Instrumentalities employees. For NAFI employees, see chapter 12. Employees of NAFIs are considered employees of the United States if the activity or function is an instrumentality of the United States and thus a "federal agency" as the FTCA defines it, 28 U.S.C. § 2671. In determining whether or not a particular NAFI is a "federal agency," consider whether the NAFI is an integral part of the Army charged with an essential DA operational function in addition to the degree of control and supervision exercised by DA personnel over the NAFI employee, FTCH § II, B2i.

2-46. Scope of employment requirement

a. General rule. See chapter 5. Under most chapters of AR 27-20, the government's tort responsibility for employees' acts or omissions arises only when they are acting within the scope of their employment, 28 U.S.C. § 2672; 10 U.S.C. § 2733(a)(3). Under the FTCA, the question of whether a federal employee is acting within the scope of employment at the time of an accident so as to make the United States liable in tort is one to be decided by applying the law of the place where the incident occurred, 28 U.S.C. § 1346(b) and §§ 2671-2680; *Richards v. United States*, 369 U.S. 1 (1962), *Tucker v. United States*, 385 F. Supp. 717 (D.S.C. 1974). FTCH § II, B3. Scope of employment under other chapters is determined by federal law, following FTCA case law. See AR 27-20, paragraph 3-5a(3)(b).

b. Exceptions. Both the Non-Scope Claims Act, 10 U.S.C. § 2737, and the Foreign Claims Act, 10 U.S.C. § 2734, are exceptions to the requirement that a government employee must be acting within the scope of employment at the time of the incident. For further discussion, see chapters 5 and 10.

c. Exclusive remedy. If a government employee commits a tortious act or omission, within the United States, while acting within the scope of his or her employment, then a claimant's exclusive remedy is a cause of action against the United States rather than against the employee individually; see the Federal Employees Liability Reform and Tort Compensation Act of 1988 (FELRTCA), Pub. L. No. 100-694 (1988) (codified at and amending 28 U.S.C. §§ 2671, 2674, 2679). The DOJ is responsible for determining whether or not an employee was acting within the scope of employment sufficiently to entitle that person to immunity from personal liability and to representation by the United States in any personal action. Certification of scope by the Attorney General is conclusive for removal purposes but reviewable for purposes of substituting the United States as the defendant in place of the individual employee, *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995).

d. Line of duty. "Line of duty" as it appears in 28 U.S.C. § 2671 means the scope of employment as determined by the law of the jurisdiction in which the tort occurred, *Williams v. United States*, 350 U.S. 857 (1955). An "in line of duty" determination for military benefits purposes does not necessarily equal a determination that the Soldier was acting within the scope of employment at the time of the incident, FTCH § II, B3. However, because it is one factor to be considered in determining whether or not a federal employee acted within the scope of employment, obtain a copy of the line-of-duty investigation when investigating the claim.

e. Recurrent issues. While state laws vary, the scope of employment issue usually turns on the amount of control exercised by the employer over the employee and the degree to which the employer's purposes are served at the time of the incident. Always keep in mind that two persons may have been negligent: one, a supervisory employee acting within scope in addition to an employee-tortfeasor acting outside scope. The issues of negligent hiring, training, or supervising of the out-of-scope employee may coincide with issues such as whether the employee negligently maintained or provided the government property involved in the tortious act. Never limit the factual investigation to the claim's specific allegations. Recurring litigated issues include:

(1) Whether an employee can place his or her own conduct within the scope of employment by a unilateral decision to perform an act benefiting the master.

(2) Whether an employee's personal frolic so deviates from the employer's service as to remove the employee from the scope of employment.

(3) Whether the performance of a special errand for the employer on the way to or from work will place the employee in the scope of employment.

(4) Whether the existence of some continuing duty will keep an employee in scope even when nominally off duty, FTCH § II, B3a, and b.

f. Special cases.

(1) *Travel to and from work.* Most state court decisions hold that an employee traveling between home and workplace is not acting within the scope of employment unless:

(a) The accident site is on the employer's premises, such as on the government installation.

(b) The employee is specifically authorized to use a government owned vehicle (GOV) or POV.

(c) The official travel is to be reimbursed.

(d) The employee's use of a GOV or POV is authorized by customary use even though not expressly authorized, FTCH § II, B3g, AR 58-1.

(e) Military Reservists or members of the National Guard commuting by POV from home (or from hotel accommodations arranged for their own convenience rather than that of the government) to their weekend drill site are usually not considered to be acting within the scope of their federal duties while commuting, but are considered in scope when traveling on orders authorizing POV use to and from inactive duty training or annual training. Prospective military recruits may be provided transportation in connection with interviews, processing and orientation, AR 58-1, paragraph 2-5g and DODD 4500.36-R.

(f) Travel to and from weekend drill in the reservist's POV is not within scope but travel to and from annual training can be if use of a POV is authorized by written order.

(2) *Frolic and detour.* Scope is presumed when the government employee is in an official vehicle; this presumption may be rebutted by showing that the employee was engaged in activities clearly unrelated to work. Factors to be considered include the purpose of the detour, whether it had a single or dual purpose; the relationship of the

government employee's activities during the frolic or detour to the official duties; how much time elapsed during the frolic or detour; and whether the government employee was returning to the authorized route at the time of the incident, FTCH § II, B3b.

(3) *Temporary duty travel.* TDY travel by government employees has been consistently held as within the scope of employment. Use of POV for TDY travel should be specifically authorized by express verbal or written authorization by the approving official to avoid a scope issue, FTCH § II, B3f. To be considered within scope, activities the employee performs should be reasonably related to the trip's official purpose. For example, going to and from a hotel to the TDY workplace or from that workplace to a nearby restaurant is probably within scope; however, returning from bar to hotel in the wee hours is probably not within scope, FTCH § II, B3c.

(4) *Permanent change of station (PCS) travel.* Given the large number of military employees and the frequency of their transfer, accidents occur while they are changing duty stations pursuant to what is known as a "PCS move." The injured parties invariably sue the United States on the theory that the military employees were acting within the scope of their employment while changing duty stations pursuant to official government orders. Differences in local law and differing judicial attitudes toward the military command relationship make it difficult to reconcile these cases, FTCH § II, B3d. Some factors the courts consider are:

- (a) Evidence of federal control over travel.
- (b) Provisions for reimbursing military members on a mileage basis.
- (c) Whether the military member had a choice between using official government transportation or a POV.
- (d) Whether leave was granted and used in connection with the PCS move.
- (e) Whether the transfer was for the benefit of the government or personal convenience.
- (f) Whether an en route delay was just beginning or was ending at the time of the accident.
- (g) Whether the accident occurred on a reasonably direct route between the old and new duty stations.

(5) *Negligent or unauthorized entrustment.* The United States may be held liable for the out-of-scope activities of its employees if a government employee negligently entrusted to the tortfeasor the government equipment, vehicle or other property causing the claimant's personal injury or property damage. For example, federal liability may be found where a government employee dispatches a vehicle to a visibly intoxicated Soldier. However, if the government employee who entrusted the government property to the tortfeasor also exceeded or otherwise acted outside the bounds or scope of his or her own authority, then the United States may escape liability, FTCH § II, B3e.

(6) *Hitchhiker and unauthorized passenger liability.* Some courts have held the United States liable for injury to hitchhikers and other unauthorized passengers caused by negligent government drivers even when the passenger's presence was a clear violation of an agency rule. Other courts have held that the government employee acted outside the scope of employment by permitting an unauthorized passenger to ride in a government vehicle and, therefore, the United States is not liable for the passenger's injury, FTCH § II, B3h. Refer to state law precedent. Also, investigate the facts thoroughly to determine whether any specific rules or SOPs addressed the issue; whether the agency enforced its own rules; and whether the agency or any of its employees were on notice that a prohibited practice was occurring or had occurred in the past and failed to take corrective measures.

(7) *Sexual assault by HCPs.* While, historically, intentional torts were excluded from FTCA coverage, the Gonzales Act carved out an important exception: if an HCP commits an assault or battery while acting within the scope of employment, federal liability attaches. The usual claim involves sexual assault and battery of a mental health patient by a therapist or sexual assault and battery of an unconscious patient by anyone. In some cases, the government will argue that the HCP was not acting within the scope of employment at the time the patient was assaulted, FTCH § II, B4I(1)(e). Governmental liability may be based, however, on the theories of negligent hiring or credentialing, or failure to supervise the HCP properly, provided there is a special relationship created between the government and the injured party. Several cases have held the United States directly liable on the theory that it owes unconscious or otherwise mentally impaired patients a special or higher duty of care to prevent them from falling victim to unscrupulous HCPs acting outside the scope of their employment, FTCH § II, B4I(1)(c). Courts have applied similar reasoning to hold the United States liable for sexual abuse by others, such as child care providers. See, *Doe v. United States*, 838 F.2d 220 (7th Cir. 1988).

2-47. Negligence

See FTCH § II, B4.

a. Basis for liability. In any tort action brought against the United States, apply the basic principles of duty, breach, causation and damages, each of which should be thoroughly investigated before final action on a claim is taken.

b. Exclusions of claims based on absolute or strict liability. Principles of absolute or strict liability generally do not apply to tort claims under AR 27-20. The FTCA imposes liability for either negligent or wrongful acts. Some type of malfeasance or nonfeasance is required, *Dalehite v. United States*, 346 U.S. 15 (1953); *Free v. Bland*, 369 U.S. 663 (1962); *Laird v. Nelms*, 406 U.S. 797 (1972). Thus, liability does not arise merely from federal ownership of an inherently dangerous commodity or federal engagement in ultrahazardous activity and some courts have decided against absolute liability in these cases:

- (1) Air crashes where state law imposes absolute liability on the aircraft owner, *United States v. Praylou*, 208 F.2d

291 (4th Cir. 1953), cert. denied, 347 U.S. 934 (1954) (note that the withdrawal of the Uniform Aviation Act by the Commissioners on Uniform State Laws and the adoption of other legislation by many states reduces Praylou's significance).

(2) Conduct amounting to negligence per se under state law because it is egregious or it violates a statute: such as approval of a substandard drug, *Griffin v. United States*, 500 F.2d 1059 (3d Cir. 1974); using no warning flares at night, *Cronenberg v. United States, et al.*, 123 F. Supp. 693 (E.D. N.C. 1954); use of a spring-loaded gun, *Worley v. United States*, 119 F. Supp. 719 (D. Or. 1952); hitting a bystander when shooting a trespasser, *Cerri v. United States*, 80 F. Supp. 831 (N.D. Cal. 1948); and failing to warn of submerged tree stumps, *Stephens v. United States*, 472 F. Supp. 998 (C.D. Ill. 1979).

(3) Breaches of a landowner's or employer's non-delegable duty, such as the U.S. government's duty to provide contract employees with a safe place to work, whether pursuant to statute (such as the Illinois Scaffolding Act) or the state's adoption of the Restatement (2d) of Torts, which imposes upon employers a non-delegable duty to contract employees when they are engaged in an inherently dangerous activity, *McCall v. United States Department of Energy*, through *Bonneville Power Admin.*, 914 F.2d 191 (9th Cir. 1990), or self-imposed safety inspections if the inspection is viewed as a duty, not a right, *Dickerson, Inc. v. Holloway*, 685 F. Supp. 1555 (M.D. Fla. 1987).

(4) Situations in which circumstantial evidence supports the conclusion of *res ipsa loquitur*, in which no tort would have occurred in the absence of negligence, and there is no evidence of claimant's contributory negligence (aircraft accidents, *United States v. Johnson*, 288 F.2d 40 (5th Cir. 1961) and explosions, *Simpson v. United States*, 454 F.2d 691 (6th Cir. 1972)).

(5) Certain other situations where statutes or regulations impose a higher standard of care than does the common law (for example, state good Samaritan doctrine or statutes; state safe place statutes and state industrial commission rules and orders regarding stairway handrails, *American Exchange Bank of Madison, Wisconsin v. United States*, 257 F.2d 938 (7th Cir. 1958); and installation regulations with the force of law which create a mandatory duty, *Doggett v. United States*, 875 F.2d 684 (9th Cir. 1988).

(6) Claims arising from noncombat activities are discussed in chapter 3. Neither negligence nor duty is required to be proven but a claimant must show proximate cause.

2-48. Duty

a. General. Since the United States is liable under circumstances in which a private person would be held liable in accordance with the law of the place where the act or omission occurred, there must first exist a duty on the part of the United States to the injured party.

(1) Generally, there is no strict or absolute liability under the FTCA, *Dalehite v. United States*, 346 U.S. 15 (1953). The Supreme Court has interpreted the statutory language "under circumstances" to mean something other than "under the same circumstances," *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). Therefore, to recover from the United States, a claimant need not point to identical activity by a private individual. See *Rayonier Inc. v. United States*, 352 U.S. 315 (1957) (governmental liability for negligent firefighting), and *Indian Towing*, supra (governmental liability for improperly operating a channel light).

(2) The Supreme Court has interpreted the "law of the place" as referring to the whole law, including the jurisdiction's choice of law principles, *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Richards v. United States*, 369 U.S. 1 (1962). In *Richards*, the negligence of Federal Aviation Administration employees located in Oklahoma caused an airplane crash in Missouri. Since Missouri and Oklahoma laws differed on the damages recoverable in wrongful death actions, the Supreme Court applied a two-step analysis to determine which state's substantive law on damages should be applied: First, the Court referred to the whole law of Oklahoma, the place of the negligent act, and applied Oklahoma's choice of law rules to the facts of the case. Since Oklahoma treated the place of the injury as the significant factor for choice of law purposes, the Court then examined the Missouri wrongful death statute to determine awardable damages.

b. Establishing duty. Duty must exist by virtue of state law under the private person analogy. It may be imposed by either a state statute or case precedent. Since the FTCA waives sovereign immunity only for violations of state law, the United States cannot be held liable under the FTCA for violation of a federal statute or regulation or for failure to perform a duty imposed by federal law. See *Chen v. United States*, 854 F.2d 622 (2d Cir. 1988) (no liability for violation of federal manual); *Wyler v. Korean Air Lines Co., Ltd.*, 928 F.2d 1167 (D.C. Cir. 1991) (internal government directives that may benefit the public do not necessarily create duties to third persons); FTCH § II, B4a(1). However, claimants may use the United States' failure to follow its own regulations or SOPs as evidence of a breach of a duty created by state law (failure to follow internal hospital SOPs may be used as evidence of breach of the applicable state standard of care). Since the liability of the United States is equivalent to that of a private person under state law, common law duties may be greater or broader than those set forth in government manuals. See *In Re Greenwood Air Crash*, 873 F. Supp. 1257 (S.D. Ind. 1995) (common law duty to control aircraft is broader than that set forth in Federal Aviation Administration manual), FTCH § II, B4a(1).

c. Public duty doctrine. The extent of the United States' duty of care is a question whose answer is determined under state law.

(1) When the United States is sued for torts committed in the course of performing uniquely governmental functions, recovery normally is not allowed even if a state or local government would be liable under like circumstances, unless the action amounts to a state tort. The United States may not take advantage of immunities granted to state, county and municipal government officials, however. See *Anderson v. United States*, 55 F.3d 1379 (9th Cir. 1995).

(2) Under the "public duty doctrine," as set forth in either state statutory or case law, government officers and agents are under the duty to protect citizens against various activities such as crimes, contagious diseases, and destruction of property by fire or manmade floods. This duty is owed to the public at large, not to individual citizens. Therefore, a breach of this duty to a specific citizen gives rise to neither a state nor a FTCA cause of action absent some special relationship or the breach of a specific duty owed to a specific individual.

(3) To create liability on the part of the United States for an action by one of its officers, the claimant must show either that the officer directly caused an injury to the claimant in particular or that the officer made a specific promise or representation to the claimant under circumstances creating justifiable reliance by the claimant.

(4) Decisions construing the FTCA have rarely held the United States liable for breach of a public duty because it is difficult to establish the requisite "special relationship" between claimant and a public official, which usually requires a finding of direct contact or privity between them, setting the claimant apart from the general public, FTCH § II, B4a(1)(j). See *Sheridan v. United States*, 823 F.2d 820 (4th Cir. 1987), rev'd, 487 U.S. 392 (1988), summary judgment granted, 773 F. Supp. 786 (D. Md. 1991), aff'd, 969 F.2d 72 (4th Cir. 1992). Held: Maryland law imposed no duty on the federal government to protect motorists from the intentional criminal acts of a Soldier who shot randomly at passing cars. Yet in a claim for child abuse based on a HCP's alleged failure to diagnose and prevent further injury, the physician-patient relationship may rise to the level of "special relationship," thereby creating a duty.

d. Fireman's rule. Under this state statutory or common law rule, state or local fire and police officers are barred from filing suit for injuries or death sustained in the performance of duty against those whose negligence or lack of care caused the fire. The fireman's rule is based on the premise that risk of such harm to firemen and policemen is inherent in their jobs, that they have assumed that risk, and that they are adequately compensated through a legislatively established compensation scheme. The rule may be, and has been, applied in FTCA actions to bar claims against the United States by local fire and police personnel who have been harmed by government personnel's tortious acts, FTCH § II, B4a(1)(m). The courts have carved out exceptions to the fireman's rule where the fire is intentionally set or when the injury is caused by an "independent actor," that is, one whose tort is independent of the misconduct to which the fireman or policeman has responded. For example, if a traffic officer who stops to issue a parking ticket is struck by a passing government driver, the traffic officer is not barred from filing suit against the passing motorist.

e. Examples of duties imposed by state law.

(1) *Dram shop and social host liability.* See paragraph 2–33. When claimants allege that intoxicated government employees have caused personal injury or property damage, they may assert liability on the part of the United States based on either a state dram shop statute or common law negligence principles.

(a) At common law, it is not a tort to either sell or give alcoholic beverages to ordinary, able-bodied men (or women). Accordingly, in the absence of statute, those injured by an intoxicated person have no cause of action against the party who furnished the intoxicating beverage to the wrongdoer. The usual rationale for this rule is that the drinking, not the serving, of liquor is the proximate cause of the injury. Many states have enacted dram shop statutes which impose such liability and provide a remedy for someone injured by the intoxicated person who was served the liquor. In these states, liability under the dram shop statutes is directed at state-licensed commercial vendors of alcohol. Because Army clubs and Class-Six stores are not licensed by the state as vendors of alcohol, federal courts have held that state dram shop statutes do not create federal liability under the FTCA. See FTCH § II, B4a(1)(d). Additionally, as the FTCA does not impose absolute liability, and because most dram shop statutes are generally based on absolute liability, courts follow the Supreme Court's holding in *Dalehite*, supra, and do not apply the statutes to the United States.

(b) Some cases qualify the common law rule against imposing liability for furnishing alcohol to the extent of providing a right of action against someone who gives or sells alcohol to a person who is in such condition as to be deprived of willpower or responsibility for their behavior or to a habitual drunkard. A few federal courts have held Army clubs liable on this common law negligence principle. However, most states do not recognize "social host" liability. See FTCH § II, B4a(1)(d). Nevertheless, claims officers should be aware that social host liability may extend not only to the Army club system, but also to organization and office parties. It is essential, therefore, to investigate the facts thoroughly in each case and to research applicable state law.

(c) In cases arising outside the United States, the implementing regulations provide that claims will be evaluated under general principles of law applicable to a private individual in the majority of American jurisdictions. As dram shop liability is based on state statutes that have no extraterritoriality, it does not apply to claims arising overseas. Additionally, because social host liability is the exception rather than the rule in most American jurisdictions, it may not apply to these claims, whether they involve the Army club system or an office or an organization party.

(2) *"Good Samaritan" doctrine and related statutes.*

(a) The United States may be held liable for its agents' negligent failure to act as well as for affirmative conduct,

but only if the applicable state law would impose a duty to act upon a private person similarly situated. A duty may arise under state law requiring that aid or assistance be rendered to one in need. There are statutory and judicially created classes of people to whom special protection is owed (persons under arrest, witnesses, school children requiring immunization), FTCH § II, B4a(1)(b). The discretionary function defense may be available in such cases (for example, if it is within the employee's discretion whether or not to render assistance, as well as how to render it). However, if state law does not impose an affirmative duty to act, such as in rescue cases, the United States will not be held liable for a failure to act even if the federal agency involved has a statutory responsibility to do so. See *Bunting v. United States*, 884 F.2d 1143 (9th Cir. 1989) (Held: no duty on part of Coast Guard to go to the aid of downed pilot), FTCH § II, B4a(1)(b)(ii).

(b) Once the government assumes a function or service, it is under a duty to carry out that function or service in a non-negligent fashion. FTCH § II, B4a(1)(b). See *Huber v. United States*, 838 F.2d 398 (9th Cir. 1988). For example, once the Coast Guard participates in a rescue, it must complete it properly. The "Good Samaritan" doctrine, based on common law and explained in the Restatement (2d) of Torts § 323, states that one who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or property, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform the undertaking if, by his actions, he increased the risk of harm or caused the other to detrimentally rely on him.

(c) Liability under the "Good Samaritan" doctrine has been limited in most states by the passage of Good Samaritan statutes, which shield those who stop to render aid and assistance from liability for simple negligence, but not for gross negligence. The qualified immunity granted by these Good Samaritan statutes may be applied to the United States under the private person analogy, shielding it from FTCA liability.

(3) *Trespassers; the 'attractive nuisance' doctrine.* See paragraph 2–27.

(a) At common law, the nature and extent of the duty owed by a landowner to an individual depends on the individual's status as an invitee, a licensee, a guest or a trespasser. Research state law before initiating a claims investigation to ascertain whether or not these common law distinctions are still valid. In appropriate cases, learn whether the state in which the incident occurred has a "recreational use" statute applicable to the United States under the private person analogy. As a general rule, such recreational use statutes provide immunity from liability for simple negligence to landowners who make their land available without a fee to the general public.

(b) At common law, a landowner usually owed a higher duty of care to an individual who is invited onto the land or premises, particularly for business purposes, than to one who enters without invitation or permission. In general, landowners are not insurers of the safety of those who enter their land or premises with permission; instead, landowners are under the duty of reasonable care to protect them from dangerous conditions. Landowner liability turns on whether the landowner had actual or merely constructive knowledge of the dangerous condition; this issue is determined by reference to state law. Landowners may raise the defense that the condition causing the harm was "open and obvious" to the claimant, who remains under the common law duty to act reasonably and look out for personal safety. If the facts so indicate, the United States may invoke this defense by using the private person analogy.

(c) Trespassers are the third category of persons who may be injured on land. Generally, a landowner owes the trespasser only the duty not to act in a reckless or grossly negligent manner and to avoid creating "hidden traps" for the unwary. There are exceptions to this general rule. Liability attaches if an un-posted dangerous condition exists on the land or if the landowner is aware of frequent trespassing but fails to warn known trespassers (examples: the duty to properly mark a dud area to discourage trespassers, or warn of an unmarked wire strung across a trail used by motorcyclists). Additionally, if the trespasser is a child of "tender years" as determined by state law, then some states may hold the landowner liable for failing to take steps to prevent child trespassers from entering the premises, particularly if there is an "attractive nuisance," such as a swimming pool, on the property, FTCH § II, B4a(1)(g). In addition to visiting the scene and interviewing the allegedly responsible parties and the claimants, it is essential to talk to friends, neighbors and others in the community, such as local school boards and students, to determine not only the notoriety of the hazardous condition (how well known was it?) but also how often trespassing had occurred in the past and what steps, if any, the landowner had taken to prevent subsequent trespasses.

f. *Duty to occupants of government quarters.* The government's duty is similar to that of a landlord under state law: to provide safe habitation, FTCH § II, B4a(1)(h). Frequently, the federal government contracts out its responsibility for construction, maintenance, and repair of government quarters; in such cases, the independent contractor exception applies to shield the United States from FTCA liability. If the injured occupant was a Soldier, *Feres* usually bars a claim against the U.S.

g. *Responsibility for the actions of third parties.* The general rule is that, absent special circumstances, the United States is under no duty to anticipate and prevent the intentional or criminal acts of a third party. See *Henry v. Merck and Co., Inc.*, 877 F.2d 1489 (10th Cir. 1989). Exceptions to the general rule include cases in which the third party's tortious act was a reasonably foreseeable consequence of a government employee's negligent act, FTCH § II, B4a(1)(j). Additionally, the United States may be held liable if it had a special third-party relationship creating a duty to the victim, such as a psychiatrist's duty to warn a patient's intended victim of the foreseeable risk of harm that the patient posed. Usually a specific threat to a specific victim must be made before liability attaches; see *Brady v. Hopper*, 570 F. Supp. 1333 (D. Colo. 1983), *aff'd*, 751 F.2d 329 (10th Cir. 1984).

h. Duty to report under state statute. State law may impose a duty on a government employee to report a criminal act such as child abuse. While failure to report is a criminal violation, it does not create civil liability for subsequent foreseeable injury to or death of the victim. Liability may exist, however, where an HCP does not meet the standard of care by failing to diagnose child abuse and protect the patient.

i. Professional standards of care. See paragraph 2–34m. At common law, the duty owed by those practicing the “learned professions” (law, medicine religion) was a general one, to do no harm. The definition of “professional” has now greatly expanded. Expert testimony is generally required to establish the duty owed by a member of a particular profession. To establish the nature and extent of the duty the United States owes in professional negligence cases, refer to the standards of the profession rather than to state statutes or common law. Most state court decisions hold that the applicable standard of care is that practiced by a reasonably prudent practitioner with the same or similar qualifications under the same or similar circumstances. Professional standards of care may be established in the administrative phase by reference to professional treatises and texts. Professional standards of care may also be established through expert testimony. Expert testimony may also be sought to establish not only the duty owed, but also causation. Federal Rule of Evidence 702. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court set forth four non-exclusive factors for the court to consider in conducting a preliminary assessment of whether the reasoning or methodology underlying the expert testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue. Those factors include: (1) whether the theory or technique can (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) a consideration of the known or potential rate of error and the existence and the maintenance of standards controlling the technique’s operation; and (4) a consideration of the “general acceptance” of the theory or technique within the relevant scientific community; *id.* at pp. 593–595. The *Daubert* analysis has been extended to all expert testimony. See also *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

2–49. Breach of duty

The United States may not be held liable in tort unless there has been a breach of duty under applicable law. See FTCH § II, B4a(2).

a. Burden of proof. At trial, claimants have the burden of proof to establish that the United States breached a duty of care owed to them under state law. During the administrative claim phase, however, a claimant need only put the United States on sufficient notice to permit inquiry into the underlying facts. Therefore the United States, and thus an ACO or CPO, bears the burden to investigate thoroughly the facts of each claim and to determine whether liability exists.

b. Exceptions. Claimant is not under the burden of proof at trial in cases involving negligence per se, or the presence of negligence as a matter of law, which may arise from a state statutory violation or extreme wrongdoing, FTCH § II, B4a(2)(b).

c. Res ipsa loquitur. Another exception arises in cases involving the doctrine of *res ipsa loquitur*, wherein “the thing speaks for itself.” This is a rebuttable presumption by which, using circumstantial evidence, the claimant shifts the burden onto the defendant. The following elements must exist: the defendant had exclusive control of the instrumentality which caused the injury; the incident would not have occurred in the absence of negligence; and the victim committed no contributory negligence. Notable examples of *res ipsa loquitur* include aircraft accidents, explosions and certain types of medical malpractice (the retained sponge cases). *Res ipsa* liability may not be imposed on multiple tortfeasors in the absence of joint responsibility, FTCH § II, B4a(2)(c).

d. Medical malpractice cases.

(1) Under common law, medical malpractice liability arose only within the context of the physician-patient relationship. State statutes routinely broaden the scope of potential liability to include non-physician HCPs such as opticians, pharmacists, midwives and paramedics. Additionally, state case law has expanded liability to settings outside the traditional HCP-patient relationship. For example, while not the general rule, liability has been found on the part of a radiologist who found an abnormality on an X-ray film taken as part of a pre-employment physical but who failed to warn the plaintiff about the abnormality, *Daly v. United States*, 946 F.2d 1467 (9th Cir. 1991) (applying Washington law). If the subject of a pre-employment physical was a civilian employee, FECA would bar a tort claim.

(2) An HCP is not a guarantor of good results. An HCP who exercises reasonable medical judgment under the circumstances is not liable for a breach of the duty of care if subsequent events indicate an erroneous diagnosis or other mistake. It is important that a physician’s care be judged upon only the facts known at the time of the incident (diagnosis or treatment), not what is learned later.

(3) To establish breach of a medical standard of care, most cases require a written opinion or oral testimony by a qualified medical professional in the same general practice or specialty as the defendant HCP. Exceptions are cases involving “common knowledge” (such as basic hygiene measures) and *res ipsa loquitur*. A bad result or adverse outcome alone is not sufficient evidence of a breach of the standard of care. A bad result in conjunction with poor or missing documentation of appropriate care, or the fact that an HCP’s credentials have been stripped, however, could indicate the advisability of a settlement rather than the risk of an adverse judgment. See *Welsh v. United States*, 844 F.2d 1239 (6th Cir. 1988), finding an adverse presumption against the government for destruction of critical evidence;

Sweet v. Sisters of Providence in Washington, 895 P.2d 484 (Alaska 1995), negligence per se for the hospital and HCPs to fail to maintain or retain nursing records.

(4) A difference of medical opinion or practice is not sufficient evidence to establish a breach of the standard of care. The claimant's expert's opinion should be based on appropriate references to medical literature, not merely on what that expert's own practice is in a particular case.

(5) During the requisite interview in each claim, attempt to obtain not only the claimant's version of the facts but also the claimant's theory of liability and the specific instances believed to evidence a breach of duty. During the administrative stage, it is not prudent to request the claimant to submit an expert opinion supporting the allegations before conducting an initial inquiry into whether the government is exposed to potential liability. If an initial claims office investigation indicates that a breach of duty occurred, it is wiser to refrain from requesting such an opinion and spare the claimant the unnecessary expense. There is no duty to instruct the claimant and attorney about their case, and no benefit derived from doing so. It may be easier to negotiate a reasonable settlement when the claimant alleges minor injuries based on one theory of liability but, in fact, the United States is liable for major injuries for the same incident under another theory. As a general matter, however, before taking final denial action on a claim, send the claimant by certified mail a formal request for an expert opinion in support of the allegations. Where state law requires an affidavit of merit or medical expert opinion in order to file a medical malpractice suit, the claimant should be informed in writing of this requirement prior to final action. FTCH § I, B3c. See paragraphs 2-74 and 2-75.

2-50. Causation

See FTCH § II, B4a(3). Liability exists only where the negligent or wrongful act or omission causes the damage or injury sustained. The mere existence of a negligent act does not establish liability. Posted on the USARCS Web site at "Claims Resources," II, a, no.17 are lists of cases showing both the traditional approach to causation as well as loss of chance rulings in all states that have ruled on these points of law. Note that the lists are current though August 2003 and should be shepardized.

a. Traditional test. The traditional test required plaintiff to prove injury by a preponderance of the evidence, showing that it was "more likely than not" that the injury was caused by a breach of a duty the defendant owed to the plaintiff. There can be no recovery of damages otherwise, FTCH § II, B4a.

b. Loss of chance. Some jurisdictions have relaxed the traditional test of proximate causation in medical malpractice cases in which the plaintiff must show that there was a "reasonable medical probability," or greater than 50 percent chance, that the HCP's negligence caused the patient's injury or death. In those jurisdictions, courts have allowed a plaintiff to prevail upon a showing that there was "some chance of survival" or a "substantial possibility of survival" or improvement in the patient's condition but for the defendant's breach of the duty of care. Under the MCA, general principles of American law do not support loss of chance as it is not considered to be the majority rule, FTCH § II, B4a(3)(b)(i). Many states have not adopted this loss of chance theory of causation. It is crucial to research state cases thoroughly to determine whether or not loss of chance applies to the facts of the claim. Additionally, states differ in the weight and effect they give to the finding that plaintiff experienced a loss of chance of survival as a result of defendant's negligent act. In some states, the plaintiff is entitled to recover the full measure of damages suffered; in others, the plaintiff may recover only those damages corresponding to the percentage of the lost chance, for example, a 30 percent loss of chance results in a recovery of 30 percent of the total awardable damages. A list of cases, organized by state, discussing both traditional and loss of chance causation in medical malpractice claims, is posted to the USARCS Web site at "Claims Resources," II, a, no. 17.

Section VI

Determination of Damages

2-51. Applicable law

Claims personnel should investigate damages and liability at the same time. The following statutes prohibit compensation for punitive damages, attorneys' fees, and costs associated with filing the claim:

a. Federal Tort Claims Act.

(1) In claims filed pursuant to 28 U.S.C. § 1346(b), the United States may be held liable for damage to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his or her office or employment, under circumstances in which the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. Thus, the whole law of the state of occurrence, including its conflicts of laws provisions, applies. See *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Richards v. United States*, 369 U.S. 1 (1962). When the injured person is a resident of a state other than that in which the injury occurred, research both states' impact or comparative impairment rule. The law of the state of residence may apply to damages. Also consider that the legal theory of depechage may apply. Depechage permits application of the law from a state other than that where the incident arose on different aspects of a given case. *Simon v. U.S.*, F3d 193 (3d Cir. 2003). FTCH § II, C1a. See also paragraph 2-35.

(2) Elements of compensable damage vary among the different states. It is imperative that each ACO or CPO research applicable state law on damages when handling FTCA claims. Each ACO and CPO should create a state law

desk book containing legal research on damage issues in its geographic area of responsibility and update it regularly. Research the elements of damages in wrongful death and survival schemes, tort reform and no-fault statutes, and reported or published case decisions issued by the courts of each jurisdiction. Also, NATO SOFA claims that arise in the United States are adjudicated as FTCA claims; in other words, state law determines compensable damages.

b. Military Claims Act claims. AR 27–20, chapter 3 sets forth the applicable law on damages in claims under the MCA accruing on or after 1 September 1995. For claims accruing before 1 September 1995, compensable damages will be determined in accordance with the principles of general maritime law.

c. Foreign Claims Act claims. See para 10–4. Allowable elements of damage vary in foreign countries. Refer to AR 27–20, chapter 3, as a guide for determining FCA damages.

d. Army Maritime Claims Settlement Act claims. Follow maritime law in determining damages. Applicable case law can be found in decisions under the Suits in Admiralty Act and the Public Vessels Act (46 U.S.C. §§ 31101–31113).

e. International Agreements Claims Act, 10 U.S.C. § 2734a and 10 U.S.C. § 2734b. Under the applicable international agreements (SOFAs), claims arising in the U.S. are processed as if the tortfeasor were a U.S. service member. See chapter 7 for further guidance.

f. Other costs. The following costs are not payable under any chapter of AR 27–20.

(1) *Costs of preparing, filing and pursuing a claim, including expert fees.* Payment of costs is a matter between the claimant and attorney. The settlement or approval authority will make no effort to determine the value or the fairness of such costs. Settlement agreements will not include the value of costs even when the claimant and attorney agree on the amount.

(2) *Bail, interest, prejudgment or otherwise, or court costs.* See FTCH § II, C5 and 6 and 28 U.S.C. § 2411.

(3) *Attorney fees, 28 U.S.C. §§ 2412, 2678.* Under the American rule, attorney fees are deducted from the settlement amount; they are never considered payable as an addition to the settlement principal. The 20 percent attorney’s fee limit established for all tort claims under AR 27–20 will be specifically set forth in any separate settlement agreement when neither Financial Management Service (FMS) 197 nor a payment report is used as a settlement agreement.

(4) *Punitive damages, 28 U.S.C. § 2674.*

(a) Punitive or exemplary damages are those damages not payable if they are in addition to special and general damages allowed under state or local law, maritime law, or under the MCA. Under the FTCA, compensation for unconscious pain and suffering or loss of enjoyment of life is not considered punitive where authorized by state law, *Molzof v. United States*, 502 U.S. 301 (1992). Similarly, under the FTCA, payment of damages already paid by a collateral source is not considered punitive. See FTCH § II, C3.

(b) In a wrongful death claim, the FTCA limits damages to actual compensatory losses measured by pecuniary injuries to the persons for whose benefit the action was brought. Certain state wrongful death statutes have been held to be punitive, FTCH § II, C3a.

2–52. Mitigation of damages

Always investigate this issue. Do not assume that claimants will mitigate damages automatically. Always advise in writing an unrepresented claimant directly or the claimant’s attorney if represented, that damages must be mitigated. If you know that the claimant is not mitigating damages, be sure to inform the claimant explicitly and in writing that failure to do so will result in a deduction from any award. This practice prevents the claimant from asserting that the United States acquiesced in the claimant’s actions.

a. In personal property damage claims, see paragraph 2–56 and cases cited in the FTCH § II, C13.

b. In a claim involving a commercial loss, see paragraph 2–56e, and the cases cited in the FTCH § II, C22, and 27.

c. In a claim involving physical injuries, mitigation may mean undergoing medical treatment. A claimant may not be forced to undergo medical treatment or required to have a surgical procedure to mitigate damages. If a claimant refuses to undergo recommended medical or surgical treatment, undertake a risk-versus-benefit analysis. If the claimant will not submit to a medical procedure, then the damages that the procedure would alleviate are not compensable, *Verrett v. McDonough Marine Service*, 705 F.2d 1437 (5th Cir. 1983). Compare the known risks of the recommended surgical procedure (for example, is it routine and low-risk or complex and high-risk?) to the benefits expected from it (alleviation of pain and increase of function). If it appears upon analysis that a reasonably prudent person would submit to the surgical procedure, then the claimant may not recover for pain and suffering from the date a physician recommended the surgical procedure. See the cases cited in FTCH § II, C11.

d. In a claim involving physical injuries, examine the claimant’s failure to follow medical orders as a possible failure to mitigate damages. In certain situations, it may rise to the level of contributory negligence. The claimant must fully understand the nature and reason for the medical order and should be questioned about his or her understanding of its meaning and necessity. Likewise, the health care provider should be queried concerning whether the claimant (patient) was fully informed as to the necessity and reason for the order. See the cases cited in FTCH § II, C12.

2–53. General damages

Carefully research which elements of general damages the applicable state law allows. Compensable general damage elements may include: pain and suffering, both past and future, physical disfigurement, mental or physical disability,

loss of enjoyment of life, emotional distress, loss of consortium and survivors' mental anguish in wrongful death cases. A thorough claimant interview is necessary to assess each possible element of damages. As AR 27–20, chapter 3 states, the total award for non-economic damages under the MCA will not exceed \$500,000. In light of the various state statutes establishing damage "caps" or ceilings and the DOJ's position supporting such caps, assess non-economic damages under all chapters of AR 27–20 with the \$500,000 ceiling in mind. See the cases cited in the FTCH § II, C1b.

a. Pain and suffering. These elements are difficult to quantify because of their highly subjective nature. Reviewing the claimant's medical records and thoroughly interviewing the claimant, family members, and HCPs may provide insight. See the cases cited in FTCH § II, C16.

(1) To ascertain the extent of past pain and suffering, request copies of all medical and pharmacy records, chronologize each doctor's visit and prescription and note all record entries about improvement since the last visit. Study how the claimant described the pain's nature and extent to the HCP. Review these individual visits during the claimant interview. Note any references to prognoses made by the treating physicians or therapists and ask the claimant about any related discussions.

(2) Ask the claimant for a copy of a written report from the treating physician(s) before the claimant interview. It is important to obtain the written report of the physician or physicians who actually provided medical treatment to the injured person. Do not confuse this with a report written by a specialist, who has merely examined the claimant or injured person at the request of the claimant's attorney. In preparing a chronology of the claimant's medical treatment, be alert to the fact that in many instances, a treating physician may discharge the claimant from further treatment but the claimant may continue to seek treatment from a chiropractor, physical therapist, or other similar professional when the attorney suggests doing so.

(3) In assessing the severity of pain and suffering, claims personnel may seek assistance from DA physicians practicing the appropriate specialty at the local MTF. Review the medical records in detail with the physician to elicit a professional opinion regarding the nature of the injury, the reasonableness of the treatment provided to the claimant, such treatment's usual success rate and normal recovery time, any reasonably expected disability after recovery, and the reasonableness of claimant's complaints of pain and suffering. Remember that there is a big difference between the time it takes to get back on your feet after an operation and the time it takes for a normal body to heal thoroughly. Consult a medical specialist about concomitant effects of other surgeries or injuries, and conduct an IME if indicated at an MTF even if the claimant is not otherwise entitled to care at an MTF, AR 27–20, paragraph 1–14.

(4) In some circumstances, and after discussion with the AAO, consider an IME by an independent medical examiner to assess future pain and suffering. (See para 2–34.) In arranging an IME, choose an examiner or team of examiners who are experienced in the particular area of medicine involved in the claim's specific allegations. If possible, the IME should be scheduled in the same geographic area or region as the claimant's place of residence. Consult with your AAO for specific information on procedures for setting up an IME. Prepare questions designed to elicit the information necessary to determine the full nature and extent of the injuries. These may be included in the letter arranging for the IME. Ascertain whether, in the IME examiner's or team's opinion, remedial care or treatment is indicated, its current costs, and usual success rate. A sample letter arranging for an IME is posted on the USARCS Web site at "Claims Resources," II, a, no. 19. See also AR 27–20, paragraph 2–21 which further discusses the use of consultants and appraisers.

(5) Never use a factoring method to quantify pain and suffering (that is, do not multiply the special damages by an arbitrary number to arrive at a sum). Following the steps suggested here should result in a fair evaluation and proper dollar amounts.

b. Loss of enjoyment of life. Also known as hedonic damages, loss of enjoyment of life may include impairment of mental health, loss or impairment of one of the senses, inability to participate in daily, family, or recreational activities, interference with sexual relations or childbearing, and shortening of life expectancy. A list of states permitting the loss of enjoyment of life element is posted on the USARCS Web site at "Claims Resources," II, a, no. 16. The FTCA permits compensation for loss of enjoyment of life as an element of damages if the applicable state law recognizes it as such. It is also allowable under the MCA; see AR 27–20, chapter 3. In certain jurisdictions, pain and suffering may include loss of enjoyment of life. In others, however, pain and suffering and loss of enjoyment of life may be separately compensable. Research whether the state has codified life expectancy tables. In their absence, calculate life expectancy by using the "Present Value" and "Future Damage" calculator tables published annually by the Lawyers and Judges Publishing Company. These tools are based on mortality information published annually by the Bureau of Labor Statistics. By using them one can estimate life expectancy, work-life expectancy, and present value of anticipated future earnings. All AAOs at USARCS have these tools available and can assist with these calculations. The amount of damages allowed is tied directly to life expectancy; therefore, be aware that the life expectancy tables or charts provide normal life expectancy. An individual claimant may have a less than normal life expectancy (a "rated age") due to a congenital or medical condition. The loss of enjoyment of life is assessed over the individual claimant's life expectancy. See FTCH § II, C17. Hedonic damages may overlap other elements of damage, so avoid granting double recovery when calculating this element of damages.

c. Emotional distress. This element of damages usually covers mental suffering resulting from grief, anxiety, fright, and despair.

(1) For claims brought pursuant to the FTCA, research applicable state law to learn the elements claimants must

prove to receive compensation for emotional distress in the absence of any physical impact to each claimant. See FTCH § II, B1c(4) and II, C8, and 28.

(2) Under the MCA, claims for negligent infliction of emotional distress are limited by AR 27–20, paragraph 3–5a(3)(g).

(3) Claims for intentional infliction of emotional distress do not require physical impact and should be evaluated in accordance with the applicable state law or under the MCA, with the majority rule in American jurisdictions.

(4) Moral damages.

(a) Local law applies to emotional distress claims brought under the FCA. However, the element of damages set forth in AR 27–20, paragraph 3–5, usually will provide adequate guidance. Additionally, moral damages are permitted if the law of the country of occurrence permits them. Moral damages are those affecting the health, welfare, and happiness of the injured or deceased person’s immediate family members, such as spouse, children (including children born out of wedlock), parents or grandparents. Countries that follow the Civil Code permit moral damages. The value of these moral damages is based in part on the nature of the claimant’s relationship to the person injured, not on the relationship alone. For example, a child who has left home and severed ties with an injured parent would be entitled to a nominal award at best.

(b) There is no requirement that the claimant witness the injury or death or that the injury or death cause a physical impact. If either or both of these factors are actually present, the value could increase.

(c) The nature and severity of the harm form a basis for assessing the amount. Moral damages were allowed when an airline failed to inform its passengers that they needed a visa to enter Spain and one of them, a cancer patient, died one year after he was denied a chance to visit his homeland, *Compagnie Nationale Air France v. Castano*, 358 F.3d 203 (1st Cir. 1966). A court also awarded moral damages to a wife who, for four weeks, cared for her 265-pound husband whose twisted knee prevented him from walking. The court concluded that Puerto Rican law did not consider basic conjugal duties part of compensable moral damages, *Ganapolsky v. Park Gardens Development Corp.*, 439 F.2d 844 (1st Cir. 1971). Moral damages were awarded to a wife who tried to have her husband, who had suffered a heart attack, admitted to a federal government hospital. That hospital discharged him to a psychiatric hospital, which in turn transferred him to yet a third hospital where he died shortly after arrival. The court found that the thought of their three children left fatherless intensified the wife’s anguish, *Santa v. United States*, 252 F. Supp 615 (D.P.R. 1966). The nature of the relationship has to be one of affection. *Lopez Nieves v. Vergel*, 939 F. Supp. 124 (D.P.R. 1996).

(d) Exercise care to distinguish moral damages from loss of consortium in a personal injury case. Moral damage in a wrongful death case is akin to compensation for survivors’ mental anguish. Some American jurisdictions permit it, but AR 27–20, chapter 3, does not.

d. Physical disfigurement. Some states do not permit physical disfigurement as a separate element. To establish this element of damages, conduct a complete review of the medical records and interview the claimant, claimant’s family members, and HCPs. In addition, a plastic surgeon may need to conduct an IME or review recent 8-inch by 10-inch color photographs taken by a medical photographer. If an IME is not required, review the physical disfigurement claim with a plastic surgeon to ascertain the possibility of any reconstructive surgery, its likelihood of success and anticipated cost, and whether there is any chance that the disfiguring condition will improve in time without surgery. Since many MTFs do not have a qualified plastic surgeon, telemedicine can be used to obtain the necessary review. A resource for this is the Telemedicine Directorate, Walter Reed Army Medical Center at 202–782–7908.

e. Loss of consortium. An injured spouse may recover for the loss of consortium, that is, loss of love, companionship, society, affection, conjugal fellowship, and sexual relations. Interview the claimant and acquaintances to determine the nature of the relationship both before and after the injury. Some jurisdictions recognize a child’s loss of a parent’s consortium as an element of damages, FTCH § II, C25. It is common practice to file a claim for child’s loss of a parent’s consortium even though the applicable state law does not recognize such a claim. The claimant should be informed upon filing of this, thereby avoiding the need to withdrawal or deny such claim upon settlement of the claim for the parent’s injuries. The MCA does not permit this type of claim, AR 27–20, paragraph 3–5b(1)(b).

2–54. Special damages

Because elements of special damages vary among states, it is critical to know which are compensable in the particular state. Some typical special damage elements are past lost wages, loss of future income or earning capacity, past out-of-pocket medical expenses, future medical expenses, loss of household services, and any loss stemming from a permanent disability. When confronted with an economist’s report from a claimant or claimant’s attorney asserting some or all of these damage elements, consult the AAO to obtain an economist’s report for rebuttal, if necessary.

a. Loss of past income. In addition to loss of salary, this element of damages includes both fringe benefits and leave, such as the employer’s contribution to Social Security, bonuses, sick and annual leave, employer health insurance benefits, free (covered) housing or transportation, and pension benefits, FTCH § II, C10. It may also represent loss of profit from a business, FTCH § II, C14.

(1) The amount of loss should be established through the claimant’s past federal income tax returns (returns for three to five years preceding the injury or death is generally appropriate). Request them as soon as you anticipate a damages award, informing the claimant or claimant’s attorney that there is no substitute for these returns. A claimant

may submit W-2 forms to substantiate past income; while useable, they may show earnings only as of the date of injury or death. It is necessary to see the entire amount of family income declared to apply the proper income tax offset.

(2) It may be difficult to determine certain types of income, such as tips. If the claimant earned this type of income but did not report it on past federal income tax returns, do not exclude it altogether as an element of damages. If the claimant did earn and report this income on past federal income tax returns, claims personnel may average the past amounts or, in the alternative, estimate the amount using information obtained from co-workers or similarly employed individuals.

b. Loss of future income or earning capacity. The claimant must establish that this loss is reasonably certain to occur. This element of damages may represent a temporary loss of future earnings due to physical injury or to a total loss of future income or earning capacity in cases of catastrophic injury. To calculate this element of damages for an adult with an established work history, average the claimant's past earnings for a period of five years immediately preceding the accident or injury. For a child without an established work history, refer to the parents' educational level and assume that the child would have graduated high school or college if the parents did.

(1) In situations involving allegations of loss of future earnings due to temporary disability, the claimant must establish the temporary disability with medical evidence from the treating physician. There is often a conflict between the claimant's desire or lack of desire to return to work and the physician's medical opinion of the claimant's ability to return to work. Rely on the physician's statement in determining whether to allow a temporary loss of future earnings. For example, a claimant with a back injury may feel subjective pain and believe that he or she is unable to return to work despite the physician's objective findings that the injury has healed and there is no physical basis for the claimant's complaints. This may represent a situation in which the claimant has developed a psychological condition, such as post-traumatic stress disorder, as a result of the back injury. In this case, the claimant must prove the contention of temporary disability with medical evidence from a neurologist or other physician who has examined the claimant and administered appropriate diagnostic tests to support the diagnosis of a temporary disability.

(2) In situations involving catastrophic injuries and a total loss of future earnings, calculate the loss over the claimant's future work life. Be aware that a future work life is normally shorter than an individual's normal remaining life expectancy because it is assumed that an individual will retire from the work force before the end of normal life expectancy. Making this calculation includes data on work life expectancy as discussed in paragraph 2-53b.

(3) During the course of the interview, determine the claimant's complete earnings/work history and potential by asking questions about educational experience, actual employment with previous employers, and any plans for future education or career changes. Request copies of all employment and personnel records, school records, and tax returns. The Bureau of Labor Statistics can provide economic information about similar jobs. Remember that the claimant has the duty to mitigate any loss of future earnings or earning capacity. See the cases cited in the FTCH § II, C14h and i.

(4) In personal injury cases, lost future earnings must be reduced to their present value and reduced by the value of income taxes, unless the amount of earned income is low. FTCH § II, C10e. In wrongful death cases, this element should also be reduced for the decedent's personal consumption to determine the actual loss to the survivors. There are various methods for reducing economic damages to present value; applying a discount rate between 1 and 3 percent is a general rule. See AR 27-20, chapter 3; see *Jones & Laughlin Steel Corp. v. Pfeiffer*, 462 U.S. 523 (1983), *Culver v. Slater Boat Co.*, 688 F.2d 324 (5th Cir. 1982), reversed by 722 F.2d 114 (5th Cir. 1983), cert. denied, 469 U.S. 819 (1984). See the cases cited in FTCH § II, C14. Georgia has a statutory discount rate. An example of the methodology for calculating lost future earnings is posted on the USARCS Web site at "Claims Resources," II, a, no. 20.

c. Permanent disability or injury. This may be a separate element of damages or it may be the basis for a total loss of future earnings. The permanence of an alleged disability or injury should be ascertained through an IME. See AR 27-20, paragraphs 2-21 and 2-24 of this publication. Additionally, conduct a thorough review of all available medical records that reflect treatment by both military and civilian physicians or therapists. It is important to explore the impact of a permanent disability on future lost earnings or earning capacity with the IME reviewer and treating physicians or therapists.

(1) Request a written statement from the claimant's treating physician(s), setting forth the basis for the contention of permanent disability or impairment. This statement should be prepared by the treating physician(s).

(2) Always try to have an orthopedist or related specialist evaluate orthopedic injuries. When the specialist is reluctant to state a numerical rating, request an opinion on everyday activity limitations. Several publications are available to assist attorneys in the evaluation of permanent impairment. Among these are the Guides to the Evaluation of Permanent Impairment published by the American Medical Association, available for purchase through the American Medical Association Web site, or available at USARCS by contacting your AAO. Additionally, 38 C.F.R. Part 4, the Schedule for Rating Disabilities of the Department of Veterans Affairs, is a useful tool to assist attorneys in evaluation of permanent impairment.

(3) Allegations of permanent disability due to emotional or psychological injuries are more difficult to evaluate. Assistance from a neurologist, psychiatrist or associated professional, such as a psychologist or therapist at the local MTF, is invaluable in assessing these allegations.

d. Loss of household services. This element provides compensation for performing household services that the

injured party would normally perform but for the injury. Calculate by multiplying the average or regional hourly or weekly wage (obtained from the Bureau of Labor Statistics) times the number of hours the person performed the services. Such services may include housekeeping, cooking, yard maintenance, and/or childcare/rearing. Information concerning the specific activities of the claimant's household should be established during the claimant interview.

e. Medical expenses, past, and future. Reasonable and necessary medical expenses are compensable.

(1) This element may cover the value of nursing or attendant care furnished by a member of the immediate family to another member, as when a parent stops working outside the home to provide nursing or attendant services to the child. The value of such services is the market value of a similar level of nursing or attendant services, not of the family member's regular employment.

(2) A claim for past medical expenses, if filed, is paid to the person responsible for furnishing the care, such as to a parent who pays for a child's care. Future medical expenses may be paid to either the guardian or custodial parent until a child reaches adulthood or directly to the child after majority. A medical trust should be used to ensure availability of funds for a child's future medical care.

(3) For past medical expenses, the claimant must submit copies of actual bills and medical records from hospitals, physicians or therapists, rather than the attorney's estimate. Review the medical records to ensure that the bills reflect treatment arising from the claimed injury or death. When the costs appear excessive, have a physician at the local MTF review the records.

(4) The majority rule is that future medical expenses are compensable only when based on a physician's report, not on a medical economist's report. In certain situations, it may be necessary to establish a reversionary medical trust for payment of future medical costs over time. See AR 27-20, paragraph 2-63. In those cases, a life-care plan (a projection of all the injured party's future medical and life-care needs) may be needed to estimate future medical expenses. Develop this in consultation with the AAO and a structured settlement broker.

(5) In any interview with the claimant it is important to learn the nature and extent of necessary future medical care anticipated and all costs associated therewith. This information helps claims personnel determine whether a structured settlement or a cash only settlement offer is appropriate under the particular circumstances.

(6) Normally, future medical expenses are not discounted as the rate of inflation exceeds interest rates. A zero discount rate is usually used. The difference is made up by using a medical trust in which the annuity feeding the trust is increased monthly by a percentage (such as 3 or 4 percent).

2-55. Wrongful death claims

At common law, survivors had no right of recovery for wrongful death. Such recovery is a creation of state statutory law. For FTCA claims, refer to the appropriate state statute(s). For MCA and FCA claims, the elements recoverable are set forth in AR 27-20, paragraph 3-5c. Since permissible damages may vary widely under state wrongful death and survival statutes, it is imperative to research the appropriate jurisdiction's law. There are two types of losses. One is to the estate; the other, loss to the beneficiaries or survivors, usually limited by statute to family members. Some states permit recovery for both in separate actions; other states have combined the two types of claims in one statute. In a few states the statute is limited to loss to the estate. See comments below.

a. Loss to beneficiaries. This method focuses on compensating the decedent's beneficiaries for the loss of the economic benefit they reasonably could have expected to receive from the decedent. This represents a pure wrongful death cause of action. Under the FTCA, elements of damages, depending on applicable state law, may consist of some or all of the following:

- (1) Loss of financial contributions and support.
- (2) Loss of services.
- (3) Loss of nurture, guidance, care, and training of minors.
- (4) Loss of society, comfort, love, and affection.
- (5) Loss of inheritance or net accumulation.

b. Loss to the estate. In states where loss to survivors includes the elements in a above, loss to the estate is limited to medical expenses and pre-death pain and suffering. This is true whether there are two statutes or one combined statute. Several states, for example, Georgia, have defined loss to the estate as being the gross future earnings of the estate reduced by a statutory discount rate; earnings may include the pecuniary value of contributions to the survivors such as services and the value of the relationship. Such a statute conflicts with the FTCA in that it states that liability is limited to the actual or compensatory damages measured by the eligible survivor's pecuniary loss, 28 U.S.C. § 2674. In most states, pecuniary loss is calculated as set forth in subparagraph d below.

c. Other damages recoverable. Recovery for the deceased person's medical and funeral expenses and pain and suffering from the time of injury to the time of death is usually allowable as a loss to the estate under a survival of actions statute. Mental anguish of the survivors may also be allowable. In any event, research state law to determine the allowable damages.

d. MCA damages. Under the MCA, the allowable elements of damages in wrongful death claims, as set forth in AR 27-20, paragraph 3-5c, are divided into economic and noneconomic loss. Eligible claimants are limited to the

decedent's spouse, parent, child or dependent relative. A separate amount must be stated for each claimant where represented by one party.

(1) *Economic loss.* The following elements of economic loss are compensable:

(a) Loss of a family member's financial support from the date of injury causing death until the end of work-life expectancy. Estimates of this future monetary support must be discounted to present value at one to three percent, after deducting for taxes and personal consumption.

(b) Loss of retirement benefits are compensable and similarly discounted after deductions.

(c) Loss of contributions, such as money or gifts to other than family member claimants, when substantiated by documentation or statements from those concerned.

(d) Loss of household services from date of injury to end of life expectancy of decedent or of person (spouse) reasonably expected to receive such services, whichever is shorter.

(e) Past expenses, including medical, hospital and related expenses. Nursing and similar services furnished gratuitously by a family member are compensable. In addition, burial expenses are allowable. Itemized bills or other suitable proof must be furnished. Expenses paid by or recoverable from insurance policies or other sources are not recoverable.

(2) *Noneconomic loss.* The following elements of noneconomic loss are compensable.

(a) Pre-death conscious pain and suffering.

(b) Loss of companionship, comfort, society, protection and consortium suffered by a spouse for the death of a spouse; a child for the death of a parent; or a parent for the death of a child.

(c) Loss of training, guidance, education and nurture suffered by a child under the age of 18 for the death of a parent until the child reaches 18 years of age.

e. Interview of survivors. When interviewing survivors in a wrongful death claim, frame questions to ascertain the individual decedent's family relationships, future plans and sources of income, to construct a settlement placing the family members in the same financial position they would have been in had the decedent lived. Review the Claimant Interview Checklist, posted on the USARCS Web site at "Claims Resources," II, a, no. 5, and see the guidance on interviewing claimants at paragraph 2-23.

f. Assessment of information. One needs to assess the information obtained to determine whether a structured settlement or an all cash settlement offer is appropriate, based on the claim's particular circumstances. Consider the following cases:

(1) Claimant A is a sole surviving spouse, age 50, who is gainfully employed in his own right. His routine financial needs are already met by his own salary and fringe benefit package and his personal investments. An all cash settlement offer might appear appropriate in this situation. During the interview, however, the claimant reveals that he has two adult children both of whom are independently wealthy but have demonstrated spendthrift tendencies. He expresses concern over his four grandchildren's future financial condition. Assuming these additional considerations, an offer of a structured settlement with deferred payments may be more appropriate because it may be tailored to the claimant's financial desires or needs.

(2) Claimant B is a surviving spouse, age 29, who is on active duty and has three minor children, all of whom are under age 10. A structured settlement offer is appropriate in this situation because it provides income over a period of time, ensuring that there will be adequate financial resources to permit the widowed active duty Soldier to provide a stable home environment during each child's years of minority. In addition, future payments may be scheduled to provide income for all the children after they reach the age of majority.

2-56. Property damage or loss

a. Definition. Such claims are limited to loss of, or damage to, actual or tangible property. Compensation does not include consequential damages, such as loss of a semester of school or a job due to erroneous enlistment, loss due to issuance of improper orders or charges for services furnished by a fire department. Research the remedies set forth in paragraph 2-17. For additional examples of consequential damages, see paragraph 3-4b.

b. Property damage. The method of determining damage to property varies depending on the circumstances of the loss and the condition of the property. Initially, the adjudicator must determine whether the property is economically repairable, that is, where the cost of restoration exceeds the pre-accident value of the property. Determine the cost of repairs and compare with the value of the property at the time of loss. In making this calculation add a factor of depreciated value due to repairs (10 to 20 percent) for high value items, cost of towing and loss of use. For example, the value of the vehicle at the time of loss is \$60,000. The cost of repairing it is \$55,000. As it has a one-of-a-kind piece of equipment it must be towed 500 miles for repair costing \$3,000. To the foregoing add a factor of 15 per cent or \$4,000 for reduction in marketability if properly repaired. Thus the cost of repair is \$62,000 which exceeds the pre-accident value of the vehicle. This formula can be applied to non-commercial vehicles, particularly where the repair requires parts to be obtained from a distant location, increasing the value of loss of use. The foregoing illustrates the need for paying property claims expeditiously. In order to use the split claims procedure discussed at AR 27-20, paragraph 2-48 and paragraph 2-70 of this publication, notice to your AAO is necessary where the amount exceeds your monetary jurisdiction.

(1) *Diminution in value.* Take the property's fair market value immediately before the loss and subtract its residual value. Use this method of determining damage in total or constructive total loss situations and in cases where property is not totally destroyed. See the cases cited in the FTCH § II, C19.

(2) *Cost of repair.* This is the cost necessary to restore real or personal property to its pre-loss condition. Payment for estimates or actual repairs is limited to the expense necessary to restore the damaged personal property substantially to its pre-damage condition. To determine whether the property is economically repairable, the cost of repairs should not exceed the property's pre-damage value. Appreciation or an increase in value associated with the repairs is deductible from the cost of repairs. However, an allowance of 10 to 20 percent depreciation in future marketability may be added to the cost of repair where it will not effectively restore the property to its pre-damage value. This allowance usually applies to recently purchased high-value items.

(3) *Lost or unrepairable property.* For lost personal property or for property which is not economically repairable, compensation will comprise the pre-damage value minus salvage where applicable. Depreciation may be based on guidance set forth in the Allowance List Depreciation Guide posted on the USARCS Web site at "Claims Resources," III, no. 1.

c. Loss of use of property. This element of damages depends on state law. Normally, it is limited to economically repairable property for the period of time required to repair the property. One's lack of funds to repair does not extend the period of loss. However, loss of use may be allowed for the period of time needed to obtain a replacement even though there is a total loss. For example, in an automobile accident claim, assume that the claimant's car is a total loss. The claimant owns only one car and needs it to perform the essential activities of daily living, such as going to work and to the grocery store. The claimant is entitled to recover the cost of renting a car similar to the totaled car for the length of time it would normally take to buy a replacement car. However, lack of funds to obtain a replacement does not justify failure to replace and does not justify excessive rental charges. It is necessary to substantiate rental of similar property or the expense of substitute capability.

d. Towing and storage charges. These are normally allowable elements of damages, provided the charges are reasonable and necessary. For example, fees for towing a disabled vehicle to a nearby repair facility are allowable but fees for towing a disabled vehicle from New York to Virginia are not because they are not reasonable. Even when a car is a total loss, towing charges are allowable to determine if it is economically repairable or simply to get it off the road. Normally, storage charges are allowable only for the length of time it takes to determine if the vehicle is economically repairable, and if it is, to have the car repaired, which includes downtime at the repair facility while waiting for parts. Storage charges for totaled vehicles are authorized only for the length of time necessary to determine that the vehicle is not economically repairable.

e. Loss of business or profits. This element is limited to direct interference by physical damage to a commercial enterprise, such as a retail outlet or commercial vehicle. It must be evidenced by an unavoidable interruption, such as time to repair a building or vehicle. Direct proof that there was an actual loss is required. Damages for loss of opportunity are speculative and not allowable. For example, if the claimant is a commercial trucking firm which has 50 trucks available for use but usually has actual contracts that keep only 40 trucks busy, then damage to one of the claimant's trucks would not cause a loss of profits because other trucks remain in the fleet to fulfill the contracts. In that situation, only the costs of repair of the damaged truck, not lost profits, are recoverable. However, if the business regularly kept all 50 of its trucks busy, then damage to one truck might require the business to rent a substitute vehicle in order to fulfill the contractual commitments already in place. If a substitute truck is rented and the rental fee includes the cost of a driver for the rental truck, deduct the salary the claimant normally pays its driver (who cannot drive the rental truck) and the costs associated with the operation of the truck in calculating the damages. See the cases cited in the FTCH § II, C22. Consult the AAO on questions concerning loss of business or commercial profits.

f. Overhead. This is the cost not of filing a claim but of administering actual repairs, such as those made by a public utility. Generally, overhead beyond 10 percent must be strictly proven as being necessitated by the repair project. Read the following cases on permissible overhead charges. See also FTCH § II, C21.

(1) Department of Water and Power of Los Angeles v. United States, 131 F. Supp. 329 (S.D. Cal. 1955).

(2) United States v. Peavey Barge Line, 748 F.2d 395 (7th Cir. 1984).

(3) Shappert Engineering Co. v. Steel City Marine Transport Inc., 620 F. Supp. 1377 (E.D. Mo. 1985).

(4) United States v. Motor Vessel Gopher State, 614 F.2d 1186 (8th Cir. 1980).

(5) United States v. Denver & Rio Grande Western R.R. Co., 547 F.2d 1101 (10th Cir.1977).

(6) Freeport Sulphur Co. v. S.S. Hermosa, 526 F.2d 300 (5th Cir. 1976).

g. Special situations of property loss or damage.

(1) *Registered or insured mail.* If the loss occurs while the article is in Military Postal Service channels, the insured or registered value is the measure of damages. Since the Military Postal Service operates under procedures similar to those of the U.S. Postal Service, the risks of loss are substantially the same as the sender chose to insure against. If the loss occurs while the article is in general military possession, such as that of a unit clerk, but after it has left the Military Postal Service, the measure of damages is determined in the same way as any other MCA property damage claim.

(2) *Annual crops.* The allowable compensation is based on the number of acres or other unit measure, the average

yield per acre in the neighborhood, the degree of crop maturity, and price on the local market at maturity reduced by the anticipated cost of production (cultivation, harvesting, storage, and marketing).

(3) *Perennial crops, including tree plantations or pasture land.* The allowable compensation is ordinarily the amount of damage to the growing crop plus the diminution in the land's value.

(4) *Timberland, excluding tree plantations.* Generally, the allowable compensation is the difference between the before and after value of the land and the stand. To evaluate the stand, determine the value of the trees by their age at the time of their loss, not at maturity.

(5) *Turf and soil.* The allowable compensation is generally the cost of reconditioning the soil to its former state, provided the cost does not exceed the land's value. If the damage is permanent, the allowable compensation is the difference between the before and after values of the land.

(6) *Domestic animals and fowl.*

(a) The general rule, that the measure of damages for the loss or destruction of property is ordinarily its market value, applies to animals and fowl. In determining the market value, an animal's particular qualities and capabilities may be considered. When an animal has no market value, damages may be based on its actual or intrinsic value or its value to the owner. The measure of damages for animals having special breeding value, or which have been bred, generally is based on market value only. Normally, an allowance for the anticipated progeny is not authorized as it would constitute a double award. Disallowance is based on the presumption that the market value is established and determined by the special value of the injured animals as breeders. Accordingly, the value of the anticipated progeny is included in determining an animal's market value.

(b) Allowable compensation in cases involving damage to agricultural ventures conducted for profit, such as dairy, poultry and fur farms, is usually measured by determining the extent of lost profits and additional expenses resulting from the incident. Property damage such as loss of milk base or government subsidy payments is also compensable if definitely ascertainable. Although the damages' nature and origin must be clearly ascertained, the liable party may not escape its obligation merely because the damages are difficult to ascertain or impossible to measure precisely. In these cases, the measure of damages usually can be determined by records from previous years if the claimant had an established business. Reports from dealers, veterinarians, and agricultural extension agents are similarly relevant in determining or verifying production statistics, normal mortality rates, and other data necessary for an informed computation of the claimant's net loss.

(7) *Shade trees.* These are usually defined as trees that shade a dwelling. In determining the monetary value of shade and ornamental trees, the following factors must be considered: size, class, condition, and location. A list of trees growing in a specified area must be segregated into classes based on relative value. Trees in class I are valued at 100 percent, class II at 80 percent, class III at 60 percent, class IV at 40 percent, and class V at 20 percent. Texas A&M University Extension Forestry Service, on the Web site at <http://extensionforestry.tamu.edu/publications/shadetree1.htm>, can provide more information on valuing shade trees. This Web site includes a list of which species have been placed into which classes.

h. Use of appraisers. See paragraph 2–24 for guidance on when to use appraisers. Wherever possible, arrange with the claimant to agree upon an appraiser and split the cost. Always make certain that the claimant or their representative is present to point out the damage.

i. Estimate of damage to vehicles.

(1) Settling vehicle claims usually requires the use of damage estimates from body shops, car dealerships and insurance companies. An estimate is usually prepared according to a standard sequence. This sequence should be reflected on the estimate sheet that the body shop prepares. Be suspicious if the repair estimate jumps around and does not seem to follow a sequence.

(a) Starting at the front.

(b) Examining under the hood.

(c) Examining the exterior beginning at the left front side and going to the rear and then up the right side to the front.

(2) The body shop must then estimate the cost of the labor and materials to repair the car. Most shops use an estimating guide, which resembles a large telephone directory and is published monthly or quarterly. Chilton (<http://www.chiltonsonline.com>) publishes estimating guides as well as separate issues for domestic, foreign, and older cars. Each guide contains useful general information about estimating damages as well as specific information about each make and model it covers. The guide also has diagrams providing great detail about how to make specific repairs.

(3) Using an estimating guide allows the repair shop to estimate the cost of repairs fairly and to ensure that it is adequately paid for its work. By using an estimating guide, the shop avoids overcharging. Insurance companies require adjusters to check estimates for overcharges. "Overlap" is an excess labor charge that results from a body shop charging for duplicate repair operations to adjacent components. For example, the place where a quarter panel joins a rear panel is considered overlap. Less time is required to remove both together than separately and the repair estimate should be reduced accordingly. Estimating guides contain detailed discussions and deductions for overlap.

(4) "Included operations" are tasks that can be performed separately but are also part of another operation. For example, replacing a fender panel may include the time to remove and replace the headlight assembly and aim the

headlight. Separate labor charges for replacing the fender panel, replacing the headlight, and aiming it are unwarranted and may double the repair estimate. Estimating guides list operations separately and allow you to spot included operations.

(5) Estimates may include a charge for hidden damage or damage that the estimator cannot assess until the vehicle is taken apart. Hidden damage may also be listed as an open item on an estimate. Always call the body shop and inquire about open items. Estimating guides, with their detailed "blow apart" diagrams of automobile components, help spot hidden damage. Sometimes simply questioning the estimate will resolve the matter and cause the body shop to remove the charge or estimate the cost of repair satisfactorily.

(6) Normally, loss of use is limited to those situations in which the claimant needs a rental car because a car is essential to the claimant's family (as in cases where the claimant's family has only one car for everyday use). It is not allowable for rental of a substitute vehicle for recreational purposes. Normally, loss of use is payable for the length of time it takes to get the car repaired, starting from the time of the accident. If the car is drivable, and the claimant can use the vehicle pending receipt of parts, then loss of use is allowed only for the time needed to actually repair the car or as stated by a repair facility report. Claims officers are encouraged to inspect damaged vehicles themselves; they should arrange with the local garage to expedite repair work on cars involved in claims.

(7) Many body shops estimate repair work according to the factory list price for new parts in the estimating guide, then repair the car with discounted, used or reconditioned parts. In many cases, the claimant is not entitled to replacement of damaged parts with new parts, if used parts will return a used car to substantially the same condition that it was in before the accident. Body shops routinely use rechromed bumpers, used wheel covers, fenders and other nonmoving parts. Always negotiate this point with the body shop and the claimant.

(8) Glass is almost always subject to a substantial discount. Check repair shops that specialize in replacing glass to determine their estimate to repair it. The cost may be substantially less than that charged by a body shop or car dealership.

(9) Always deduct for fair wear and tear on tires and ensure that claimant's tires are replaced with the same type and quality of tire. Either use a tire depth gauge to measure the depth of existing tread or call a store that sells the same tire. Avoid allowing a body shop to list a price for tires when the claimant can purchase them elsewhere at a discount.

(10) A claimant is entitled to recover the cost to repaint an area damaged in a collision. Sometimes a body shop will allege that the entire car must be repainted so the paint will match; make the body shop justify this claim. Automobile identification numbers include codes identifying the paint applied during manufacture. A body shop uses these codes to mix paint to match the existing paint job. If paint cannot be mixed to match, the discrepancy may be because the existing paint has oxidized or weathered. In this case, deduct for appreciation from the estimate because the claimant is in a better position after repair than before the damage to the car.

(11) Claims offices that process a significant number of automobile damage claims should evaluate automobile damage estimates aggressively. Use the local motor pool garage to assist in evaluating a claimant's estimate. Subscribe to an estimating guide to check damage estimates.

2-57. Collateral source rule

a. Generally. The collateral source rule allows the victim of a tort to recover for damages caused by the tortfeasor regardless of compensation received from other independent or "collateral" sources. Thus, the collateral source doctrine permits a tort victim to recover more than once for the same injury, provided these recoveries come from different sources. For example, an accident victim may recover medical expenses from a tortfeasor even though the victim's own insurance policy covers such costs. The rationale for the doctrine is that a double recovery may be justified where the claimant supplied the original source for the recovery (the claimant's own insurance policy) from resources (the cost of the insurance policy) that would otherwise have been available for other purposes (the claimant could have used that money to purchase a new car). A few states are limiting the collateral source doctrine. Make sure that any allowance for collateral source payments under the FTCA accord with state law.

b. Federal government as tortfeasor. When the federal government is the tortfeasor, questions arise as to what, if any, payments under other federal programs or by other federal agencies the adjudicator may use to offset the damages otherwise payable to a claimant. The general rule is that whether a setoff is available to the government depends on the source of the other federal payment. If the payment is made from unfunded general revenues of the United States, a setoff or deduction is usually permitted because FTCA awards are disbursed from general revenues. See *Feeley v. United States*, 337 F.2d 924 (3d Cir. 1964) (both DVA hospital benefits and FTCA recoveries are funded from general revenues). If the payment comes from a special fund into which the claimant made contributions, then it is considered "collateral" and no setoff or deduction is permitted. See *Smith v. United States*, 587 F.2d 1013 (3d Cir. 1978). Since Social Security benefits are funded almost entirely from employer and employee contributions and not from general revenues, these benefits are collateral. See the cases cited in the FTCH § II, C10.

c. MCA or FCA claims. The collateral source doctrine does not apply to MCA or FCA claims.

d. TRICARE benefits. TRICARE benefits are not a collateral source. See the cases cited in the FTCH § II, C10h.

e. Past medical care furnished at government expense. Past medical care furnished at government expense, such as at an MTF, is not a collateral source. See the cases cited in the FTCH § II, C10a and g.

f. DVA benefits. DVA benefits, either monetary or medical, should be considered in calculating damages. In some cases, past benefits should be credited against the award and future benefits should be deducted from it.

(1) *Settlements for service-connected disabilities.* See paragraph 2–73 for more information on drafting settlement agreements.

(a) When monetary benefits are paid for the injury claimed and the claim is not barred by the incident-to-service doctrine, past benefits should be credited against the award and future benefits should be deducted from it, *Brooks v. United States*, 337 U.S. 49 (1949). These benefits include disability compensation (38 U.S.C. §§ 1110, 1131), dependency and indemnity compensation (38 U.S.C. § 410(a)), specially adapted housing (38 U.S.C. § 2102), a specially adapted automobile (38 U.S.C. § 1310), vocational rehabilitation benefits (38 U.S.C. chapter 31), dependents' education benefits (38 U.S.C. chapter 35) and clothing allowance (38 U.S.C. §1162). Disability compensation may include an additional benefit for requiring an attendant, without regard to whether or not the veteran actually employs one, 38 U.S.C. § 1114. Disability compensation and dependency and indemnity compensation will continue to be paid regardless of any tort settlement or judgment. There is no statutory mechanism for suspending these benefits because of a tort award. Thus, to avoid a double recovery, the amount of a tort settlement or judgment must be reduced by the amount of these past and future DVA benefits.

(b) When the injury on which a claim is based aggravates a service-connected disability, the claimant's benefits may be increased to reflect the increased severity of the disability. In negotiating a settlement in such a case, limit the credit to the increased compensation. When the claimant is a retiree, the proper deduction is the excess of increased benefits over retired pay, *O'Keefe v. United States*, 490 F. Supp. 70 (W.D. Okla. 1980).

(c) When the claim is for injury or death arising from care furnished a veteran or retiree on behalf of the DVA (by designation, agreement or otherwise) for other than a service-connected disability for which compensation will be increased, the individual may qualify for benefits under 38 U.S.C. § 1151. This permits payment of disability or death benefits as if the injury incurred in medical treatment were service-connected. A DVA award under § 1151 entitles eligible service-connected veterans to medical and home nursing care. In negotiating a settlement when § 1151 benefits are being paid, credit past benefits to reduce the settlement amount. However, since the tort settlement does not credit future § 1151 benefits, notify the DVA about the settlement or judgment. Upon receiving such notification, the DVA will suspend future § 1151 benefits by statutory mandate until the amount that it would have paid the claimant completely offsets the amount of the tort settlement or judgment, including attorney's fees.

(d) Eligibility for future DVA medical care will be lost during the period monetary benefits are suspended unless the settlement or judgment expressly provides that medical care shall continue, 38 U.S.C. § 1710(a)(2)(C). However, the monetary benefits themselves cannot be similarly continued by agreement between the government and the claimant. To reduce the tort award for medical expenses, ensure that a provision to that effect is included in the settlement or judgment.

(e) A claim may be brought for the death of an individual whom the DVA rated totally disabled for a specific period before death and whose death was not caused or aggravated by the total service-connected disability (such as a traffic accident on a military base). In such a case, death benefits as though the death were service-connected may be paid under 38 U.S.C. § 1318(b). Past benefits under this section should be credited toward the tort award. DVA will suspend future benefits under 38 U.S.C. § 1151 until the total amount of the settlement or judgment is offset. Thus, there should be no credit for future benefits in the tort award. Notify the DVA about the settlement or judgment.

(2) *Settlements involving DVA pension for nonservice connected disability or death.* When the subject of a claim results in the permanent and total disability or death of a wartime veteran, the veteran or the veteran's survivors may be eligible for DVA disability or death pension under 38 U.S.C. chapter 15. The claimant must meet stringent income limitations, however. These benefits are need-based and any tort claim settlement will count as income, resulting in their reduction or termination. Credit past pension benefits paid for the disability or death for which a tort claim is made in the settlement or judgment and consider future pension benefits lost because of the increase in income from the tort settlement in evaluating the case.

(3) *Medical care for non-service-connected disability.* When a claimant needs home nursing care or rehabilitation services for injuries that are not service-connected, the DVA may be able to provide such care on a space-available basis, 38 U.S.C. §§ 1710, 1720. By their nature, these services are not available at MTFs. It may be possible to use DVA care to limit medical expenses during protracted settlement negotiations or litigation. Realistically, however, DVA home nursing care often will not be available.

g. Medicare liens. Although Medicare benefits are sometimes considered a collateral source, claimants are not compensated for payments made to them or on their behalf under Medicare. The Centers for Medicare and Medicaid Services (CMMS), U.S. Department of Health and Human Services, considers a lien to exist in the amount of Medicare benefits expended as a consequence of the Army's tortious conduct. Coordinate with the AAO before settling any claim involving Medicare benefits. Financial Management Service (FMS) will pay CMMS directly and USARCS can negotiate the amount to be paid directly with CMMS. Special language is required in the settlement agreement if there is a Medicaid lien. See paragraph 2–73 for more information on drafting settlement agreements.

h. Medicaid liens. Where there is an outstanding lien in favor of a state agency for past medical or equipment expenses due to the state's implementation of a program using Medicaid funds, the state agency will generally

negotiate repayment of a percentage of the total amount expended and may permit the claimant's attorney to deduct an attorney's fee on the amount of the lien. Usually, the claimant's attorney is responsible for notifying the appropriate state agency that a settlement with the United States is going to take place. Therefore, in drafting a settlement involving a Medicaid lien, negotiate a reduced lien amount. Usually, it is possible to reduce the attorney's fee by agreement. If there are other possible defenses, demand a further reduction. If the attorney is unwilling to waive the fee on the amount of the lien, then consider attributing a fixed amount to the lien (less than the lien's full amount since you know that the claimant's attorney will negotiate to repay the state less than the full amount of the lien) and include that fixed amount in the up front cash payment during negotiations. See paragraph 2-73 for more information on drafting settlement agreements.

2-58. Subrogation

a. Subrogation arises from the substitution of one person in the place of another with regard to a claim, demand or right. Insurance companies generally have a right of subrogation for the benefits paid to their insured. In the absence of a right to subrogation, the claimant is entitled to the amount of loss paid by a third party, subject to the collateral source rule. The difference between a subrogee and a lienholder is a matter of state law.

b. A lienholder may not file a separate claim. In claims where there are lienholders or potential lienholders the settlement agreement must include release of claims language naming all of the lienholders and potential lienholders. Paragraph 2-6b discusses properly identifying a party with subrogation rights. A sample settlement agreement containing release language directed at lienholders, or potential lienholders, is posted on the USARCS Web site at "Claims Resources," II, b, no. 8. Paragraph 2-73 (Settlement Agreements) discusses settlement agreements in detail.

c. Subrogated claims are payable under AR 27-20, chapters 4, 8 and Section III (Claims in Foreign countries) of chapter 7.

d. Subrogated claims are not payable under AR 27-20, chapters 3, 5, 6, and 10.

Section VII Evaluation

2-59. General rules and guidelines

The claim evaluation is linked to the liability and damages determinations and, in fact, constitutes a bridge between them. Taking this step involves weighing factors common to all negligence claims but unique to each, such as the factual circumstances surrounding the injury or loss, witnesses' credibility, the existence or absence of physical or documentary evidence and its probative value.

a. Rules. Settlement and approval authorities evaluate claims based on the extent of government liability and the injuries resulting therefrom. Apply the following rules to gauge a claim's strengths or weaknesses and to determine whether to settle it or deny it with a view toward litigation or appeal.

(1) *Claims with a jurisdictional or procedural bar normally should not be settled.* Claims arising from combat operations or barred by the incident-to-service exclusion or FECA are not paid. This rule applies when the law precludes recovery and there is no set of facts allowing the claimant to overcome the defense. Claims that may be barred by the statute of limitations may be compromised in certain circumstances. For example, both parents individually and on behalf of their child file a claim for birth injuries which occurred ten years previously and for which they have known the cause for at least eight years. The father has been in the Army continuously since the birth. Assuming liability, deny all claims but the father's. Due to the Servicemembers Civil Relief Act, 50 U.S.C. app. §§ 501-596 (history: Oct. 17, 1940, chapter 888; § 1 of Act of Dec. 19, 2003, P.L. 108-189; formerly the Soldiers and Sailors Civil Relief Act of 1940, codified at 50 U.S.C. app. §§ 101-165 and originally codified in 1918, but amended from time to time), he may be reimbursed for the added costs of raising and caring for the damaged child during minority and, depending on the degree of disability and state law, during adulthood, but not for emotional injuries or loss of services or consortium.

(2) *Completely frivolous claims should not be settled.* When there are no facts supporting the claim or no state law tort exists, deny the claim. A claimant does not become entitled to recover damages merely by filing a claim. Promptly investigate and deny such claims instead of executing a "nuisance settlement." Often, suit may be avoided by informing the claimant what facts the investigation disclosed.

(3) *Cases in which liability is not in doubt or liability may be probable should be settled.* If investigation reveals that the United States cannot defend on liability, attempt to settle the claim. Usually there are liability issues which should be used in adjudicating damages proportionate to the exposure of the United States to a possible adverse judgment. If the claimant asks if liability is being conceded, answer by stating that on FTCA or MCA cases only the Department of Justice has that authority. In any event, it is a non-issue as you are attempting to enter negotiations to pay the claim. Open settlement negotiations by asking the claimant to provide damage information and then fully investigate each recoverable element. Seek the claimant's attorney's cooperation in establishing damages. Consult the AAO on claims in which liability is doubtful.

b. Guidelines.

(1) *Local law.* A knowledge of applicable law is essential. Know which elements of damages the jurisdiction recognizes. See Section VI, Determination of Damages.

(2) *Alternative sources of compensation.* The federal government funds a number of social insurance programs, such as Medicare, Medicaid and DVA benefits. If the claimant is entitled to them, help the claimant tap these alternative means of compensation in the following ways:

(a) Contact the offices responsible for processing and approving the claim for benefits. Find a responsible official who can help determine if benefits are available. If the claimant is entitled to benefits, personally contact the individual employee who will assist the claimant in applying for them.

(b) Learn whether the benefits available to the claimant are a collateral source. Even if you determine that they are, take the position that any settlement entered should reflect the benefits the claimant receives. See paragraph 2-57.

(c) Approach the claimant's attorney with a settlement package that includes the benefits. This reduces the likelihood that the claimant will try to assert the collateral source doctrine. If you are seen as trying to help the claimant, settlement will be easier.

(3) *Coordination with the local Office of the U.S. Attorney.* Knowing the local U.S. Attorney's policies on litigating or settling tort claims will help determine the value of claims in which liability is in doubt. Discuss the claim, and various ideas about and approaches to settlement, with an Assistant U.S. Attorney. Keep memoranda of these conversations.

(4) *Factoring methods.* Never resort to factoring methods or valuation handbooks to determine a claim's settlement value. Not all "whiplash" cases in which the claimant incurred \$1,000 of medical expenses are alike. The specific facts in each case will dictate the damages. A claimant's attorney who tries to use a factoring approach is usually doing so because the facts have not been fully developed or they weigh against the claimant. Take a look at the facts and the law; then make an offer.

(5) *Reported cases.* Study reported cases on excessive and inadequate damages awarded for the same or similar injuries, paying particular attention to how their facts differ from those in the claimant's case. See FTCH § II, C16 and 28.

(6) *Past and future damages.* Evaluate past and future damages separately when determining a claim's settlement value. See Section VI, Determination of Damages, for a detailed discussion about payable damages.

2-60. Claims memorandum of opinion

Upon completion of the investigation and determination of liability and damages, the ACO or CPO will prepare a memorandum of opinion on claims which must be forwarded to USARCS for action. This requirement to write a memorandum may be waived for a given claim by agreement between the ACO or CPO and the AAO. Compose the report in the following format:

a. Identifying data.

(1) Each claimant's or plaintiff's name, current address, permanent address, date of birth, and social security number (SSN).

(2) Each attorney's name, address, and telephone number.

(3) Date and place of incident.

(4) Date and amount of claim or ad damnum of complaint.

(5) Brief (one-sentence) description of claim or case.

(6) Actual or potential companion claims (their nature and status).

b. Jurisdiction. Discuss any applicable statute(s), whether the claim was timely and properly filed and other jurisdictional matters.

c. Facts. Provide a complete statement of the facts upon which the claim and any defenses thereto are predicated. In each instance in which witness statements support a fact, make reference to an exhibit documenting the fact. Use subparagraphs with descriptive headings, if appropriate (for example, background facts or facts about the incident).

d. Legal analysis. List issues related to liability and the controlling law with applicable citations. Again, use subparagraphs with descriptive headings as appropriate and necessary (for example: law controlling factual issues, factual bases for the claim as related to each issue, duty, proximate cause, defenses, existence of joint tortfeasors). If the claim is barred by a jurisdictional defense, for example, Feres, FECA, or the SOL, discuss this separately. State your position on liability at the end of the section.

e. Damages. Discuss the following issues under appropriate subheadings in the order listed:

(1) Who may claim under applicable law.

(2) Elements of damages for wrongful death or personal injuries.

(3) Description of injuries and treatment, including the injured party's or decedent's pre-morbid life expectancy.

(4) Description of property loss and proof offered.

(5) Types of special damages (such as loss of earnings, loss of services, past and future medical care).

(6) Type of noneconomic or general damages (use a summary in tabular form, if necessary, for special and general damages).

- (7) Effect of diminished liability on the claims value.
- (8) Effect of subrogation, if any, and the subrogor's identity.

f. Proposed settlement or action. Discuss any proposed structured settlement. Discuss any prior offers or negotiations and their status. If a denial or final offer is indicated, so state.

g. Recommendation. State whether the claim should be denied or settled. A recommendation to settle a claim should include a monetary range.

h. Documents and witness list.

(1) The witness list will include the name, SSN, telephone number, and present and permanent address for each witness or medical reviewer.

(2) Identify each document in the file.

i. Responses to pleadings. (for claims in litigation only).

(1) Proposed answer.

(2) Defenses.

(3) Counterclaims.

(4) Cross claims.

(5) Dispositive motions (identify and list).

2-61. Joint tortfeasors

When federal and non-federal joint tortfeasors are involved, either concurrently or successively, in a tort in which a claim against the United States has been filed, several issues arise. It is crucial to know the applicable law because the presence of additional tortfeasors, or other parties from whom recovery may be obtained separately or through indemnity or contribution, complicates the evaluation process. To evaluate all actual or potential claims in such a case, it is necessary to weigh the relative strengths and weaknesses of each tortfeasor's defense.

a. Federal Tort Claims Act. The common and statutory law of the state where the claim arose, including its conflicts of law rules, controls how joint tortfeasors will share legal liability. Each claims office should maintain and periodically review and update its state law desk book on this topic.

b. Military Claims Act. The doctrine of joint and several liability does not apply to claims occurring on or after 1 September 1995. The United States will be liable only for its own negligence on a proportional basis.

c. Foreign Claims Act. The law of the place where the claim arose determines federal liability under the FCA. In most instances, the United States will be liable only for its own negligence on a proportional basis. However, claims personnel will deduct for any insurance recovery or any amount reasonably expected to be recovered which has been or will be paid to the claimant. Claims personnel will take appropriate steps, such as obtaining an assignment, when an insurance settlement is not reasonably available. Deductions will also be made for any other amounts recovered or reasonably expected to be recovered from a tortfeasor or the third party as a result of the injuries or loss giving rise to the claim.

d. National Guard Claims Act. The United States may have a remedy for contribution from the state that employed the tortious National Guard Soldier or employee. Such a remedy may arise from any of three actions: the state has waived its sovereign immunity and is a self-insurer, has purchased liability insurance coverage, or has executed an agreement with the Army to share the cost of administrative claims settlements to which both the Army and the state are parties.

e. Army Maritime Claims Settlement Act. This statute provides for the administrative settlement and compromise of admiralty and maritime claims both in favor of and against the United States. General maritime law has long recognized the concept of proportional fault, which applies to claims against the government. In addition, the Army is authorized by statute to demand compensation for damage to property it owns or property under its jurisdiction or for which the DA has assumed third-party liability, 10 U.S.C. § 4803. The DA is further authorized to seek compensation for any salvage services performed by it or its authorized contractors, 10 U.S.C. § 4804.

f. General concepts.

(1) At common law, there is no right of contribution among joint tortfeasors. In re General Dynamics Asbestos Cases, 602 F. Supp. 497 (D. Conn. 1984). Many state courts have adopted the doctrine of joint and several liability, in which one tortfeasor may be held liable for all damages regardless of its share of liability.

(2) Other states have enacted some form of the model statute "Uniform Contribution Among Joint Tortfeasors Act," which permits an equitable apportionment of damages. Some states (such as Kansas and Louisiana) adhere to the doctrine of proportional fault, while others (Texas) permit non-settling defendants a credit for amounts paid by settling or adjudged defendants. Where another tortfeasor has been adjudged liable or has already settled with the claimant, it is important to review the pre-judgment stipulation or settlement documents to determine whether the United States has been released from all claims, Barrett v. United States, 668 F. Supp. 339 (S.D. N.Y. 1987) aff'd 853 F.2d 124 (2d Cir. 1988), cert. denied, 488 U.S. 1041 (1988). AR 27-20 implements other statutes that impose or allow proportional fault.

g. Identifying the joint tortfeasor.

(1) This step is critical to the analysis. Who are joint tortfeasors? Either the parties must act together in committing

the wrong or their acts, if independent of each other, must unite in causing a single injury. As an example, if Driver X and Driver Y collide and injure Claimant C after and as a result of negligent traffic directions that a public safety or construction employee gave Driver Y, all parties are joint tortfeasors. In some factual situations, the damages may be apportioned among two or more causes where there are distinct harms or where a reasonable basis exists for determining the contribution of each cause to a single harm.

(2) Some states permit division of both liability and damages; the parties are then considered successive, not joint, tortfeasors. This fact-driven conclusion depends greatly on the extent to which the injuries or damages may be allocated or severed between the separate or competing causes and tortfeasors. Apportioning damages according to a fair share of liability allows direct, independent compensation by a third-party tortfeasor.

(3) In other states, the harm is severable into distinct parts, as when a person receives subsequent negligent medical treatment. As a matter of public policy, the original tortfeasor often will be held responsible for all subsequent harm, unless the preponderance of the evidence proves that later harm resulted from an intervening force caused by a superseding tortfeasor. See Restatement (2d) of Torts §§ 433A, 439, 441–453.

(4) Regardless of the facts, some tortfeasors, such as state or local governments or the injured party's employer, remain immune from suit by the injured party so that indemnity or contribution from them may not be available, *Hill v. United States*, 453 F.2d 839 (6th Cir. 1972). The United States may bring an action against a state but doing so is difficult and requires the Attorney General's permission. See FTCH § II, D5b.

2–62. Indemnity or contribution

See also paragraph 2–15f (third-party claims involving a federal contractor), 2–15k (motor vehicle damage claims arising from the use of non-government vehicles), 2–45a, b, and c (FECA and contractors), and 2–58 (subrogation).

a. Sought by the United States from a non-federal third party. The claims investigation and analysis of the tortfeasors' respective liabilities may lead claims personnel to conclude that the United States is entitled to contribution or indemnity, under either a contract theory or the applicable local law governing joint tortfeasors. If so, pursue it. A table that provides a list of state indemnity and contribution laws is posted on the USARCS Web site at "Claims Resources," II, a, no. 15.

(1) The injured claimant might plead equitable tolling of the statute of limitations if the United States did not provide timely notice of the existence of another tortfeasor, such as a contractor or its employee. Avoid this problem by providing prompt written notice to the other tortfeasor and to the claimant. It is the policy of both the DOJ and USARCS that the government notify the other tortfeasor of the claim and ask it to honor its contractual obligation to the United States or accept its share of joint liability.

(2) Provide the other tortfeasor a copy of the claim, setting forth the factual and legal bases for the government's request for indemnity or contribution as well as notice that 28 U.S.C. § 2415 provides the United States a lengthy period in which to enforce its request. That law grants the United States six years in which to file a complaint and to pursue a right of action in contract, or three years in tort, from the date the government's right to indemnity or contribution accrues. Citing this provision in a notice to another tortfeasor may seem premature because, as a practical matter, these rights do not accrue until either judgment is entered against the United States or the government pays a settlement. A party has no right to seek indemnity or contribution until its liability is fixed. The intent of providing the notice, however, is to impress upon the tortfeasor that 28 U.S.C. § 2415, not state law, imposes the applicable statute of limitations for any third-party action, which will not even begin while the administrative claim process is pending. Thus, the tortfeasor's delay will not hinder prosecution of the government's right of action. The tortfeasor should also be encouraged to forward the notice and request to its counsel or insurer so they may contact the claims office.

(3) Notify the claimant at the same time as the tortfeasor, providing information about the tortfeasor's identity and insurer (if known) and copies of all information and notice provided to the tortfeasor. If the claimant's right of action against the tortfeasor under local law seems clear, strongly encourage the claimant to file suit against the tortfeasor. This way, the government gains maximum leverage over a party otherwise reluctant to participate in settlement discussions.

(4) The key to obtaining the other tortfeasor's participation and contribution is a dialogue between the parties.

(a) The result will be enhanced by cooperating with the other tortfeasor in the claim investigation and by sharing information already developed, much as one shares with a claimant. The two parties' interests are not compatible, however. The claimant seeks compensation now; the tortfeasor seeks to delay paying compensation as long as possible. Thus, sharing discoverable information may accommodate those intrinsically opposed interests. Establishing common ground for agreement, much as a mediator would, goes a long way toward obtaining the other tortfeasor's participation in the settlement.

(b) Usually, the claimant and the other tortfeasor are content to negotiate through the ACO or CPO rather than directly with each other. At times, the other tortfeasor will permit the ACO or CPO to negotiate its interest as well. This situation is best as long as all liable parties maintain close communication and agree on their respective shares and offers, and the negotiating tortfeasor keeps the other tortfeasor abreast of the negotiations. This allows the ACO or CPO to control the dialogue through the information that flows between or among the other parties and to maximize the amount or share the third party is willing to contribute to a settlement.

(c) Full payment may be made in either of two ways. The United States may pay the entire claim and then accept proportionate contribution from the other tortfeasor or each liable party may pay its agreed share directly to the claimant. Be aware that either the liability insurance policy limits or a state statutory damage cap may limit the other tortfeasor's contribution. Depending on the extent of the claimant's injuries and its own insured's liability, the other tortfeasor's insurer may be willing to tender its policy limits rather than risk an allegation of negotiating in bad faith. When a legal and factual analysis leads to the conclusion that the other tortfeasor bears greater liability (for example, with custodial and maintenance contractors at commissaries and hospitals), tender the defense of the claim to that tortfeasor.

(5) If the issue of indemnity or contribution is not adjusted satisfactorily, the claim will be compromised or settled only after consulting with the AAO. In these situations, pay particular attention to the scope of the language in the settlement agreement. It should specify that the settlement covers only those injuries and damage caused by the negligence of the United States and does not release the other tortfeasor. Otherwise, in many states, a settlement will release the other tortfeasor, thus jeopardizing any right of action the claimant, and perhaps the United States, may have against it.

(6) When the claimant refuses to accept an offer of an amount the appropriate settlement authority has determined to be the United States' fair share, it is better to deny the claim than to pay the entire amount and then to seek contribution or indemnification from the other tortfeasor. This avoids the necessity of convincing the U.S. Attorney to file an affirmative claim and permits joinder of the other tortfeasor as a third-party defendant.

b. Sought from a federal contractor.

(1) Often, the United States will share liability with a federal contractor in injury or wrongful death claims arising at worksites or MTFs by an employee of the contractor or its subcontractor. In a worksite case, in addition to reviewing state law, scrutinize the federal contract carefully to ascertain whether it contains language identical or similar to that employed in *United States v. Seckinger*, 397 U.S. 203 (1970) to the effect that the contractor "shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work." Such language creates a contractual cause of action for indemnity or contribution, regardless of how state law treats joint tortfeasors, even if the contractor is immune under the state workers' compensation statute (as when the claimant is a contractor employee). Some courts have held that a Seckinger clause is implied despite the fact that the contract does not contain such a clause. Courts have interpreted the Seckinger clause as permitting a form of proportional fault in which the United States is liable only for its own negligence. See FTCH § II, D6.

(2) It is imperative, therefore, that claims personnel obtain and review the contract promptly in any claim arising from a worksite injury or death and assess whether contractor employees met the applicable standards of performance. With HCPs, such as TRICARE partnership providers, civilian contract HCPs, or scarce medical specialists hired at a fixed annual sum, the ACO or CPO should ascertain whether the contract provides personal or nonpersonal services.

(3) The ACO and CPO will continue to focus their investigations on the factual issues necessary to resolve whether the principal lacked authority to control the contractor's physical conduct in its performance or whether it maintained supervision and control of its day-to-day operations. They will look at, for example, the type of medical services rendered, whether a written contract exists, whether they used off-base offices or military office space or kept regular office hours. Cases discussing these points include:

(a) *Broussard v. United States*, 989 F.2d 171 (5th Cir. 1993).

(b) *Lurch v. United States*, 719 F.2d 333 (10th Cir. 1983); cert. denied, 466 U.S. 927 (1984).

(c) *Lilly v. Fieldstone*, 876 F.2d 857 (10th Cir. 1989).

(d) *Bird v. United States*, 949 F.2d 1079 (10th Cir. 1991).

c. Sought by the United States from a state as the result of Army National Guard activities. See paragraphs 2–15e, 2–17d, and chapter 6.

(1) If a state provides a remedy because it has either waived its sovereign immunity or purchased liability insurance coverage, the responsible area claims authority will monitor the action against the state or its insurer and encourage direct settlement between the claimant and the state or its insurer.

(2) If the state is insured, it is preferable for the ACO to pursue direct contact with the state ARNG point of contact (listed on the USARCS Web site at "Claims Resources," VI, a) rather than with its insurer. Establish and follow regular procedures designed to ensure that federal and local authorities do not issue conflicting instructions for processing claims and that, when possible, they arrange for the disposition of such claims in accordance with local and federal law. The appropriate claims and local authorities should agree on such procedures, subject to concurrence of the Commander USARCS.

(3) A settlement or approval authority will deduct from the amount otherwise payable amounts recovered or recoverable by the claimant from any insurer, other than the claimant's insurer, which has obtained a subrogated interest against the United States.

(4) A settlement or approval authority may seek contribution from an involved state that has waived sovereign immunity or maintains private insurance to cover the incident giving rise to the claim. If the state denies the request for contribution, forward the file to the Commander USARCS, who is authorized to enter into an agreement with a state,

territory, or commonwealth to share the settlement costs of claims generated by the ARNG personnel or activities of that political entity.

(5) Advise the claimant about any remedy available against the state or its insurer. If the payment by the state or its insurer does not fully compensate the claimant, the settlement or approval authority may pay an additional amount. If liability is clear and the claimant settles with the state or its insurer for less than the maximum amount recoverable, the settlement or approval authority will deduct the difference between the maximum amount recoverable and the settlement amount from its payment.

(6) If the state or its insurer seeks to pay less than its maximum jurisdiction or policy limit, but agrees to pay 50 percent or more of the entire claim's actual value, any federal payment must be made directly to the claimant. The settlement or approval authority may accomplish this by either paying the entire amount to the claimant and seeking reimbursement from the state or its insurer for their portions, or having each party pay its agreed share directly to the claimant.

(7) If the state or its insurer seeks to pay less than 50 percent of the claim's actual value and the claimant has filed an administrative claim against the United States, forward the file with the tort claims memorandum to the Commander USARCS. Include information on the status of any judicial or administrative action the claimant has taken against the state or its insurer. The Commander USARCS will determine whether the claimant will be required to exhaust all remedies against the State or its insurer or whether the settlement or approval authority may settle the claim against the United States without requiring the claimant to pursue those remedies. If the Commander USARCS approves the second course of action, the settlement or approval authority will also determine whether to seek an assignment of the claim against the state or its insurer, notifying the state or its insurer in accordance with state law that either party may seek contribution or indemnification.

d. Sought from vehicle insurers of federal employees. If the United States is potentially liable for the operation of a federal employee's POV or rental car, the contractual language may hold that the United States is an additional named insured under the policy covering the POV, *Government Employees Insurance Co. v. United States*, 349 F.2d 83 (10th Cir. 1965), cert. denied, 382 U.S. 1026 (1966). This may be true even if the policy contains a clause excluding coverage, *Government Employees Insurance Co. v. United States*, 400 F.2d 172 (10th Cir. 1968). Additionally, the law of the state where the insurance contract was executed may invalidate the exclusionary clause. When interviewing the federal employee, ascertain whether the rental agency reduced the premium in any way because of the FTCA exclusion. Where the insurer settles with the injured party, the general rule is that the United States is not released but is entitled to an offset should the injured party file a claim against it. If no settlement has occurred, the ACO or CPO should obtain and review a copy of the insurance policy and request contribution from the insurance company. See FTCH § II, D8.

e. Sought from rental car companies or their insurers. See also paragraphs 2–15k (Determining the correct statute), 2–25 (Investigating motor vehicle accident claims), and 2–61 (Joint tortfeasors) and in AR 27–20, see paragraphs 2–15k (Determining the correct statute), and 2–48 (Splitting personal injury and property damage claims).

(1) The Army has been successful in tendering to a rental company or its insurer the defense of third-party claims arising from the authorized use of a rental vehicle by an employee acting within the scope of employment.

(a) The United States Government Car Rental Agreement applies to the Army; most car rental companies in the United States are signatories to it. The contract is administered by the Contracting Office, Surface Deployment and Distribution Command (SDDC) (formerly the Military Traffic Management Command (MTMC)) (<http://www.sddc.army.mil/>). The agreement mandates that the signatories must provide to the United States and its employees minimum insurance coverage of \$100,000 for injury to each individual in an accident, \$300,000 for all individuals in an accident, and \$25,000 for property damage from any one accident.

(b) The agreement intends this coverage to be the primary mode of recovery against the United States, serving as the equivalent of an excess limits policy. The coverage is to be maintained solely at the cost of the car rental companies and its conditions, restrictions, and exclusions shall not be less favorable to the United States and its employees than those afforded under standard automobile liability policies. For damage to the rented vehicle only, the government Visa travel card provides coverage for the entire vehicle.

(c) The exceptions to recovery under this agreement include willful and wanton misconduct by the Army driver, obtaining the vehicle through fraud or misrepresentation, operation of the vehicle under the influence of alcohol or any prohibited drugs, and operation by a person other than the authorized Army driver. However, the agreement states that authorized drivers include "the renter's fellow employees" while acting within the scope of their employment.

(d) When a claim is filed against the United States, the ACO or CPO should obtain the employee's travel orders and vehicle rental agreement. Attempt to obtain a written acknowledgment of insurance coverage from the rental car company. Inform the claimant about the rental car company's responsibility. Maintain contact with the company or its insurer to monitor the status of any claim filed against either entity. If the value of damages exceeds the policy limits investigate the incident. Attempt to determine liability. If a claim is filed against the United States and it is obvious that the policy limit will be exceeded, the ACO or CPO, in conjunction with the AAO, should determine whether the rental agency or the United States will act as lead defendant.

(e) If the Army employee is personally sued, the ACO or CPO should notify the rental car company or its insurer

immediately since failure to do so may result in a denial of coverage under applicable local law. Some jurisdictions permit the injured party to sue the rental car company directly, which then will attempt to sue the United States or its employee for indemnification. In either situation, notify the Litigation Division. See AR 27–40, chapter 4.

(2) A claims office should expect to see claims falling outside the scope of the rental car agreement, especially those caused by excepted conduct such as intoxication or willful or wanton negligence. Upon completing the claims investigation, the ACO or CPO should determine whether the rental company’s refusal to consider the matter due to excepted conduct is correct. If not, notify the AAO and discuss the matter with the Contracting Office, Surface Deployment and Distribution Command (SDDC). Otherwise, process any third-party damage claims under the appropriate tort claims statute and process claims for damage to the rental car under the JFTR. Where the driver was acting outside the scope of employment, individual liability may attach to the driver’s actions; such liability may be covered under the government driver’s POV liability insurance policy. If so, inform the third party or rental car company claimant.

(3) If the driver rented the vehicle from a non-signatory rental car company, ask what third-party liability coverage is provided to the ordinary renter. If coverage is part of the rental contract, follow the procedures set forth above.

(4) If the value of damages exceeds the policy limits, the incident should be investigated to determine liability. If a claim is filed against the U.S. and it is obvious that policy limits will be exceeded, the ACO or CPO in conjunction with the AAO should determine whether the rental company or the U.S. will act as lead defendant.

f. Sought from the United States by other tortfeasors. Claims for indemnity or contribution from the United States will be compromised or settled if liability exists under applicable law, provided that the incident giving rise to such claim is otherwise cognizable under one of the tort claims statutes. Such claims are valid under the FTCA if permitted by state law under the private person analogy, 28 U.S.C. § 2674, *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951); *Rayonier Inc. v. United States*, 352 U.S. 315 (1957).

(1) An exception may exist when a Soldier sues a federal contractor and the contractor files a claim for indemnity. The Feres defense may bar both the Soldier’s suit against the contractor and the latter’s claim for indemnity, particularly where the “government contractor” defense is viable under state law (as when the contractor followed federal specifications or the government had final approval of the item manufactured), FTCH § I, E10c. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977). When the “government contractor” defense is not available, the Feres defense may still shield the United States, but it would not protect the contractor.

(2) Immunity extends to individual suits against all federal employees acting within the scope of employment, including federal vehicle drivers and health care personnel, 10 U.S.C. § 1089, 28 U.S.C. § 2679. If an employee is sued individually, the suit may be removed to federal court upon the defendant’s request, 28 U.S.C. §§ 1441–1451, 28 C.F.R. Part 15. Simple removal does not vest jurisdiction in a federal court; the DOJ must certify the employee as acting within the scope of employment.

(3) Regardless of an employee’s or Soldier’s personal immunity, there may be times when an individual will not be protected by the FTCA, as when a claimant alleges deprivation of Constitutional rights or the employee is a borrowed servant of a civilian entity. Even though it may appear that the actor was outside the scope of employment, it may still be in the United States’ best interest to certify and represent the employee or Soldier, 28 U.S.C. § 517. However, DOJ scope certifications are not conclusive and are reviewable for substitution, or scope, purposes, *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995). Therefore, a federal court may hold that an employee was not acting in the scope of federal employment or find that the actor was employed by an entity other than the United States (for example, a medical resident in training at a civilian hospital). In those situations, the employee may eventually request indemnification. It may be in the best interests of a federal program or policy to indemnify such individuals. Specific federal legislation permits indemnification of military health care personnel (10 U.S.C. § 1089(f)) and military legal personnel held liable (10 U.S.C. § 1054(f)). Consider all requests for indemnification by following the guidance provided in these statutes and in AR 27–20, chapter 3.

2–63. Structured settlements

For more information on settlement agreements see paragraph 2–73. Sample settlement agreements for various situations are posted on the USARCS Web site at “Claims Resources,” II, b.

a. FTCA. The FTCA and other federal tort statutes contain no provisions authorizing structured settlements. State statutes mandating structured settlements do not apply to the United States. Nevertheless, the United States is permitted to use structured settlements that, when appropriate, may include a grantor trust owned by the United States to provide future medical and attendant care to the injured party, FTCH § II, F7, *Reilly v. United States*, 863 F.2d 149 (1st Cir. 1988); *Hull v. United States*, 971 F.2d 1499 (10th Cir. 1992), cert. denied, 507 U.S. 1030 (1993). Accordingly, the United States may voluntarily negotiate and enter into structured settlements. Approval and settlement authorities are strongly encouraged to use structured settlements in all appropriate claims.

b. Other statutes. Under other statutes implemented by AR 27–20, the Commander USARCS, may require or recommend to a higher authority that an award incorporate an acceptable structured settlement as a condition precedent for paying such award, notwithstanding objection by the claimant or representative, when:

(1) It is necessary to ensure adequate and secure care and compensation to a minor or other incompetent claimant over a period of years.

(2) A medical trust is necessary to ensure the long-term availability of funds for anticipated future medical care, the cost of which is difficult to predict.

(3) The injured party's life expectancy cannot be reasonably determined or is likely to be shortened by the injury giving rise to the claim.

c. When used. Structured settlements are used primarily in claims involving catastrophic injuries, severe diminution or elimination of the claimant's ability to earn a living, wrongful death of a spouse or parent, or injuries to a minor child. They are helpful in claims with large verdict potential, where the United States can mitigate its settlement costs by satisfying the claimant's long-term needs. Any properly structured settlement should be designed to meet those needs. The claim amount does not need to be high to merit a structured settlement, however. These arrangements are effective in amounts within the settlement authority of area claims authorities, particularly in ensuring a minor is compensated for his injuries by providing an annuity payable at the age of majority. If the offer is rejected, insist that the award be placed in a secure bank account until the age of majority. A structured settlement may compensate for pain and suffering and for medical, custodial and rehabilitative costs, and it may provide financial support for dependent family members. Offering the distinct advantage of avoiding premature dissipation of funds through mismanagement, a structured settlement insures that an injured party, not the party's parents, guardians or caretakers, receives the award's full benefit. Periodic payments received under a structured settlement are currently excluded from federal taxation (Internal Revenue Code § 104(a)(2)). In accordance with current DOJ policy, however, do not disclose or discuss this fact during negotiations.

d. Substantiation. During the claim investigation, especially the claimant interview, make every effort to identify and substantiate the claimant's needs. They will likely involve readily identifiable damages such as medical bills, future medical and rehabilitation expenses and lost income. The claimant's needs do not always mirror the traditional damage elements, however. Taken together, they often represent what it would take to make the claimant "whole" or as close to it as possible. Identifiable needs include a child's higher education, purchase of a business or home or, if the injured party's life expectancy is severely shortened, the adult survivors' long-term plans. Therefore, gather information about these contingencies as well as the parties' health, age, educational status, job history and stability, and personal income. Check the availability of private and government medical care plans.

e. Coordination. Coordinate the use of a structured settlement with the AAO, who will provide guidance about whether its use is appropriate in a specific case, offer brokers' names and the documentation necessary to obtain premium quotations, and help design the structure. When negotiating a structured settlement, draft the settlement and trust agreements in conjunction with the USARCS representative. This coordination ensures consistent language throughout the settlement documents. Such consistency is important because the DOJ, which is responsible for monitoring all FTCA structured settlements after payment, and USARCS, which is responsible under other federal statutes, will likely review the documents.

Section VIII Negotiations

2-64. Purpose and extent

See FTCH § II, G for discussion of methods of negotiation.

a. Undertaking negotiations.

(1) The purpose of negotiating is to reach a prompt agreement to settle a claim at an amount that is fair to both the claimant and the United States. If the parties cannot agree on an amount, they should clearly define the liability and damages issues in the event suit is filed under the FTCA or AMCSA or an administrative appeal is brought. Because claims statutes represent a partial waiver of sovereign immunity, the legislative intent behind them clearly authorizes the government to pay meritorious claims in a fair amount.

(2) From the outset of a claim, claims personnel should fully inform the claimant or the claimant's representative about the applicable procedures and, when indicated, the nature and extent of the government's investigation. A meaningful negotiation is usually enhanced by the mutual exchange of information derived from both sides' investigations. Where a claim is barred or excluded from jurisdiction, as by the incident-to-service doctrine or the statute of limitations, claims personnel should inform the claimant that an investigation of the merits either is not necessary or, if undertaken, may be limited in extent.

(3) Where negotiations result in an irreconcilable difference in the value of the claim or interpretation of law, consider mediation prior to making a final offer.

b. Admissions of liability. Government representatives should not make admissions of liability, either written or oral, during negotiations. This is standard procedure whether or not a judicial remedy exists. Such statements constitute admissions against interest which are admissible in evidence.

(1) It is not necessary to admit liability to settle a claim. Admitting liability may even make settlement more difficult to achieve. Many claims settlements represent a compromise, reflecting all the strengths and weaknesses of the

claimant's claim on liability and damages. Admitting liability removes any incentive to compromise that a strong government case might present. It creates the impression that the claim should be settled for full value, regardless of factual or legal strengths or weaknesses. For example, if the government is able to raise a meritorious contributory negligence defense, it may justifiably reduce the settlement offer. Admitting liability eliminates any chance to do this.

(2) During negotiation of FTCA claims, withholding an admission of liability forces the claimant's attorney to assess the risks of litigation. This represents a real incentive to settle, considering the time and expense involved in litigation as well as its uncertain results. Withholding an admission of liability also serves to encourage the claimant's attorney to cooperate in investigating the claim.

(3) There are several ways to settle claims without admitting liability. The simplest and most effective way is to shift the focus of discussion from liability to damages. For example, telling a claimant's attorney that the parties need to discuss damages rather than liability usually suffices to turn most attorneys' attention to settlement.

(4) When the government's own investigation establishes liability, it is counterproductive to require the claimant's attorney to prove liability, through either written opinions from hired experts or letters or memoranda citing legal authorities. Insisting on a full-scale showing not only increases the claimant's legal costs, but also indicates to the claimant's attorney how strong the claim is and, hence, its higher value.

(5) The amount of the compromise settlement should represent a reduction in the claim's full value in accordance with the strength of the arguments mitigating full values, whether based on comparative negligence or uncertainty as to the injuries.

c. Claimant interview. When the initial claimant interview has been limited to liability issues request an additional interview to gather information about damages. See paragraph 2-23b(10) for information on how to interview on damages.

d. Knowledge of facts. Settlement is not possible without a full understanding of the facts. To this end, obtain as much firsthand knowledge as possible. When a factual disagreement develops, try to resolve it. If the disagreement arises because the claimant's attorney does not understand the case, try to disclose the facts that your investigation has developed through IMEs, interviews, or site visits. For example, if the parties disagree about whether an intersection is blind, offer to visit the scene and show the attorney the intersection. Never allow the disagreement to escalate into a dispute. Simply state, for example, what you saw when you visited the scene. The claimant's attorney should realize that your position is stronger because it is based on direct investigation.

2-65. Who should negotiate

a. Obtaining advance authority. Determining who is the appropriate officer to negotiate a settlement is directly related to the amount of the claim, the authorized settlement and approval limits of various claims officials and the statute that the claim falls under. Settlement and approval limits are set forth at paragraph 2-69. An AAO or, upon delegation, a representative of an ACO or CPO may settle a claim in any amount subject to approval by higher authority, in accordance with the settlement limits that are authorized. An AAO need not obtain advance authority from the DOJ or DA when the settlement amount will not exceed USARCS' authority: \$200,000 for FTCA claims and \$25,000 for MCA claims. A USARCS representative will conduct advance discussion with the DOJ when implementing regulations require it. See 28 C.F.R. § 14.6(b). If the settlement amount is subject to approval by a higher authority, let the claimant know this at the outset. If the claimant states a preference for direct negotiation with the DOJ or the Army General Counsel, tell the claimant that the FTCA does not confer upon the DOJ authority to settle any agency claim during its administrative stage. Under other statutes, only the Commander USARCS represents the Army.

b. Authorized settlement limits. An ACO, a CPO, or Claims Service may settle any claim in a stated amount within his or her authority as set forth in paragraph 2-69. Where a claim's stated amount exceeds the settlement authority, the ACO or CPO and the AAO will determine who should settle. Because they can and do settle many claims for higher amounts, it is not proper for the ACO or CPO to inform a claimant that only USARCS exercises jurisdiction on claims seeking amounts over the ACO's or CPO's delegated authority. Moreover, USARCS has made it a case-by-case practice to delegate greater authority to ACOs or CPOs with the requisite ability and experience.

c. Responsibility of negotiator.

(1) The ACO or CPO should try to negotiate a tentative settlement. Non-attorney claims personnel may conduct negotiations only with a claimant or a non-attorney. Only an attorney should negotiate with a claimant's attorney. All persons who negotiate for the government should always disclose that they are seeking a tentative settlement.

(2) After reaching the tentative settlement, the attorney who settled the claim will prepare a settlement memorandum with the AAO's help.

(3) Forward the settlement memorandum to the appropriate settlement or approval authority for approval of the tentative settlement. Once the settlement is approved, forward it for payment as outlined in Section X, Payment Procedures.

d. Disclosure of settlement authority. For claims in which the settlement amount exceeds the negotiator's settlement authority, disclose appropriately, following these guidelines:

(1) Always explain the settlement procedure to a claimant's attorney before negotiations begin, summarizing the limits of settlement authority existing within both the Army and the DOJ. Otherwise, the claimant's attorney will

assume that authority exists for any offer the negotiator makes. Explain that the DOJ must approve any FTCA settlement over \$200,000, and that a delegee of TJAG or the Secretary of the Army, as appropriate, must approve settlements over \$25,000 for the MCA, and \$100,000 for the AMCSA or FCA.

(2) A settlement made by one who lacks authority is void. It is a source of potential embarrassment both to the Army and to the individual who negotiates it. Any such settlement is certain to create difficulties in managing the case.

(3) Avoid disclosing specific instructions included in a grant of negotiating authority for a specific claim, except in the most unusual case after consulting the AAO.

2-66. What should be compromised

a. Special damages.

(1) Practically any claim, regardless of amount, may be compromised through direct negotiation. Scrutinize small property damage claims for governmental liability and damages and compromise accordingly. Damage estimates should be reviewed by either well-trained claims personnel or an expert to determine if the repair costs and the parts to be repaired are justified. Similarly, have a government physician scrutinize medical bills and records to determine whether the care furnished was reasonable and necessary. The fact that an insurer paid a certain amount to its insured does not govern the extent of the Army's liability. The insurer, as subrogee, stands in the shoes of its insured as subrogor, and so is entitled to only that amount to which the subrogor is entitled.

(2) In cases of companion claims, where an insurer demands immediate payment on behalf of its insured, the negotiator should offer less than full value at first because the AAO must authorize all split payments. Once the offer is made, the ACO or CPO should consult the AAO. Review Section VI, Determination of Damages, and ensure that all special damages are justified before approval. The claimant should support past lost wages with income tax forms and future medical costs with a competent medical opinion. Where the proof is questionable, negotiate a lesser amount.

b. General damages. These are not only difficult to estimate but they are also the award component most subject to fluctuation in amount. The difficulty may be alleviated by studying past medical records and conducting interviews with the claimant, family and friends or acquaintances. Obviously, special damages are easier to quantify and negotiate than are general damages. While the claimant may agree to accept reductions in special damages, the claimant may cancel out any reduction by demanding higher general damages. The key to negotiating general damages is learning what amount the claimant will accept as settlement. In view of the tort reform legislation pending in Congress at the time of this writing, which seeks to limit general damages on FTCA awards, the DOJ's current position severely limits the acceptable general damages amount in an administrative settlement. This policy has succeeded mostly because in those jurisdictions well known for "runaway" general damage awards granted either by judge or jury, FTCA administrative settlements still occur frequently. Perhaps this approach is succeeding also because of the length of time required to obtain a final judgment. In an all too typical situation, after various appeals, a brain-damaged baby whose claim is filed by age two does not receive compensation for personal injuries until reaching age eight. By regulation, a \$500,000 damages cap has been set for MCA and NGCA claims. See AR 27-20, paragraph 3-5a(3)(h) and paragraph 2-53 of this publication. Damages under the FCA will be limited by host country law. General damages under the FTCA should be scaled accordingly.

c. Compromising statute of limitations cases. Whether or not a claim has been timely filed is a question of fact that should be answered only after a thorough investigation, including questioning the claimant, treating physicians and anyone else who cared for the claimant during the relevant time period. See paragraph 2-23 b(11). If a thorough investigation does not reveal a definitive answer, then consider compromise and consult the USARCS AAO, who will coordinate with the DOJ as needed. The claim settlement value should reflect the unresolved statute of limitation issue and the fact that the claimant might not recover damages if the case was successfully defended at trial on the basis that it was not timely filed. Claims personnel frequently compromise large claims involving serious injuries, such as brain damage and quadriplegia, with structured settlements that address the claimant's lifelong medical and personal care expenses through the use of a reversionary medical trust, which provides an immediate payment award sufficient to cover past expenses and attorneys' fees, taking the statute of limitation issue into account.

2-67. How to negotiate

a. Extent of preliminary instructions. Successful negotiation is a matter of style and temperament. Good practice dictates against instructing the chosen negotiator in too much detail how to reach agreement at the authorized settlement amount. Nevertheless, the DOJ's informal policy is to start low to approach a fair settlement. In fact, the DOJ requires that all settlement memoranda sent to it for approval include a negotiation history. Keep the DOJ's policy in mind. It is usually not too difficult to "start low" since most claimants file for amounts much higher than what they deserve or reasonably expect. Once claimants file suit, it is difficult to obtain an increase in the amount claimed, 28 U.S.C. § 2675(b), FTCH § I, B6e.

b. Caution in formulating offer. The ability to conclude a successful negotiation depends in large part upon determining what the claimant will accept. For example, when a claim seeks \$1,000,000 and the government evaluates the claim at \$200,000, the government should not open with an offer of \$175,000 unless the negotiator knows that the claimant is willing to enter into meaningful negotiations from that starting point. The government, by offering

\$175,000, then enters any pretrial settlement conference with the potential to split the difference between \$175,000 and \$1,000,000.

c. Preliminary knowledge. Knowing the other attorney's reputation and background, including his or her ability to try cases, assists in determining the negotiation methods. When attorneys are expected to split their fees, the likelihood of executing an administrative settlement is enhanced since the referring attorney's fee will be reduced if there is a trial. Refuse to negotiate with a paralegal or junior attorney; deal only with the attorney empowered to make the decision. When negotiating a disputed claim with an insurance company, deal only with its senior adjudicator or attorney. Prior to any negotiations, make sure that the attorney has obtained authority to settle from the client and secure a promise that the attorney will pass your offer to the client in accordance with the legal profession's ethical requirements. Remember that you are dealing with the claimant through an attorney and your aim is to meet the claimant's desires, not the attorney's. Always refer a claimant's direct inquiry (for example, a claimant's complaint to a member of Congress) to the attorney. In a delegated claim within USARCS' authorized jurisdiction, negotiate in person, at least initially. Subsequently, it is permissible to use the phone or e-mail. A personal relationship with the claimant's attorney is always best.

d. Initial offer. It is hoped that following these guidelines will assist in formulating and determining the government's initial offer. If the negotiator is uncertain, ask the claimant's attorney for a demand. If the response is meaningless, do not make an initial offer of \$175,000 (when the authorization is \$200,000 and demand is \$1,000,000.) A better initial offer would be \$100,000. If the attorney will not name a figure, ask the attorney to identify the key elements of damages and deal on a point-by-point basis. Successful negotiation is conducted through dialogue. Try to start a dialogue by identifying the disputed points. Do not mention a figure unless you intend it as an offer. To continue with the above example, do not state that the offer is \$100,000 but you will go to \$150,000 if the attorney will come down. By doing so, you have offered \$150,000 without forcing your opponent to drop below the \$1,000,000 claimed. Never bid against yourself! Never raise your offer in the absence of a reasonable counteroffer.

e. Final offer. If an impasse is reached, do not immediately make a final offer. Wait until the attorney has had time to reflect. Make certain the attorney knows that once suit is filed, the case is no longer under the Army's jurisdiction. If the attorney demands a written confirmation of your verbal offer, do not provide such an offer. A written offer's only legitimate purpose during negotiations is to provide the opposing attorney the means to convince the client that the latter's expectations are unreasonable. In this situation, write a letter for the claimant's consumption. Include your arguments, not merely a figure. In a FTCA case, a final offer may be in order when there is no reasonable expectation of continued negotiations. When the six-month administrative period for filing suit has expired and meaningful negotiations have never commenced, inform the claimant's attorney that suit may be filed at any time as there is no reasonable expectation of a settlement. When administrative appeal, not suit, is the next step, a notice containing a final offer, detailing the reasons therefore, is in order so that an informed appeal may be made.

2-68. Settlement negotiations with unrepresented claimants

a. An ACO or CPO deals with unrepresented claimants in four situations.:

- (1) When investigating the incident before the claim is filed.
- (2) When the claimant seeks information about filing a claim against the United States.
- (3) When the claims attorney or investigator seeks to interview or obtain information from the claimant after the claim has been filed.
- (4) When attempting to settle the claim.

b. Establishing trust. When dealing with unrepresented claimants in these situations, follow the principles outlined below. Certain disclosures are intended to foster an atmosphere of trust and confidence. They may be made orally or in writing. If making oral disclosures in an interview with an unrepresented claimant, prepare a memorandum for record and place it in the claim file. These disclosures should be made in writing, however, if it appears that these matters may form the basis of a dispute.

- (1) Fully explain the administrative claims process to an unrepresented claimant.
- (2) CJAs and claims attorneys must disclose their status as attorneys. Claims personnel who are not attorneys will not represent themselves as such or create the impression that they are attorneys.

(3) Claims personnel should not indicate, or create the impression, that they are disinterested in the outcome of the claim. Accordingly, claims personnel should tell the claimant that they represent the United States and not the claimant. This is especially important with unrepresented claimants, who are often confused about the status of claims personnel.

c. Explaining the administrative process. Claims personnel are specifically authorized to communicate with claimants about the filing and processing of claims. When a claimant is represented by an attorney, however, any direct communication with the claimant is unauthorized.

- (1) AR 27-20 authorizes claims personnel to explain how to file a claim and to disseminate information about the administrative claims procedures, including how a claim will be investigated, what law will be applied, and how a settlement will be determined. This limited authority does not mean, however, that claims personnel may advise the claimant whether or not to file a claim. The claimant should always be told to file even when personnel believe that the claim is barred by the incident to service doctrine or the statute of limitations.

(2) Avoiding an advisory role means that claims personnel may not tell a claimant what amount to claim. The ACO or CPO may, however, discuss with the claimant the elements of damages deemed payable. Avoiding an advisory role, usually has three practical effects:

- (a) It almost always forces a claimant to think about hiring an attorney.
- (b) It prevents claims personnel from having to explain valuation of the claim.
- (c) It prevents allegations that the representative of the ACO or CPO promised to pay the claimant the amount demanded on the claim form.

d. Answering questions about hiring an attorney. Claimants often ask whether they should hire an attorney to file and settle a claim. Take the following approach in response:

(1) Advise the claimant that the administrative procedure does not require the claimant to hire an attorney. It is up to the claimant whether to hire legal counsel or not.

(2) If the claimant objects to the amount of the attorney's fee, suggest that the claimant consider hiring an attorney on an hourly basis solely to evaluate damages.

(3) If it is obvious that a claimant will need representation, as, for example, in a complex claim requiring difficult decisions or a level of knowledge beyond the claimant's capability, it is best to suggest that the claimant hire an attorney. This straightforward approach avoids later charges that the office took unfair advantage of an unrepresented claimant.

(4) When the claim involves a minor or an incompetent and its settlement requires judicial approval, attorney representation is usually required. Inform the claimant that judicial approval of settlement will be required.

(5) When a claimant requests the name of an attorney, do not refer the claimant to a specific attorney or suggest any individual attorney's name. Legal assistance officers are prohibited from assisting clients with potential claims against the United States. Claims personnel may, however, refer persons eligible for legal assistance to the legal assistance office for advice about hiring a lawyer and for a standard referral list. Many legal assistance offices hand out such lists. If the claimant is not eligible for legal assistance, direct the claimant to a lawyer referral service.

(6) It is permissible for an ACO or CPO to give the claimant the following information:

(a) The FTCA expressly limits attorney fees to 20 percent of any administrative settlement. After suit is filed on a FTCA case, fees are limited to 25 percent of the settlement or judgment amount. AR 27-20 limits attorney fees to 20 percent under all other chapters. The claimant pays these fees from the settlement and is also responsible for court costs.

(b) The attorney may not charge a fee that exceeds the percentages mentioned in (a), above, but only the claimant and the attorney negotiate the attorney fee between them.

(c) If the legal assistance office has compiled an informational handout for claimants to use in selecting an attorney, it may give one to the claimant (whether or not entitled to legal assistance). Do not distribute any referral list or other document that contains the names of individual lawyers or law firms.

e. Negotiating. Much of the information on negotiating settlements set forth in paragraph 2-64 applies also to unrepresented claimants. If a meaningful negotiation has occurred, offer the full amount that the settlement authority has authorized. Do not offer this amount, however, unless you have established both rapport and trust with the claimant. The government should not be placed in a position where its offer represents full value, only to have the claimant hire an attorney who in turn demands an increase. If the claimant refuses to enter into meaningful negotiations, insist that the claimant hire an attorney. If the claimant refuses to enter into meaningful negotiations or to hire an attorney in an FTCA case in which the six-month period has expired, inform the claimant that suit may be brought as settlement is not possible. In both FCA and MCA claims, where suit is not possible, make a final offer.

f. Preparing memoranda for record. Claims personnel should prepare MFRs of the discussions held with the claimant about claims procedures and about the claimant's need to hire an attorney, providing a copy to the claimant. They should prepare a separate memorandum of their personal observations of the claimant for the file.

Section IX

Settlement Procedures

2-69. Settlement or approval authority

a. General. "Settlement authority" is a statutory term meaning that officer authorized to approve, deny or compromise a claim, or make a final action; see 10 U.S.C. § 2731. "Approval authority" means the officer empowered to settle, pay or compromise a claim in full or in part, provided the claimant agrees. "Final action authority" means the officer empowered to deny or make a final offer on a claim. Determining the proper officer empowered to approve or make final action on a claim depends on the claims statute involved and any limitations that apply under that statute. Any applicable limitations are discussed more fully in the appropriate chapter of AR 27-20 and this publication. Generally speaking, final action authority is maintained at higher level than settlement or approval authority. As emphasized in Sections I and III of this chapter, Claims Investigative Responsibility and Processing of Claims, respectively, an ACO or a CPO must investigate all claims incidents fully and account for all claimants, actual and potential, as well as estimate an incident's total settlement value. Otherwise, it is not possible to identify the proper

settlement authority. In any incident in which the amounts claimed or to be claimed exceed the ACO's or CPO's monetary jurisdiction, it is essential to notify the appropriate AAO and to establish a mirror file. Through such coordination and discussion with the AAO, the representatives of the ACO or CPO may estimate settlement value. If the representatives of the ACO or CPO wish to begin settling, in properly delegated amounts, USARCS may grant permission to do so. For individual claims, a higher authority, located either within or without USARCS, may approve an increase in an ACO or a CPO representative's settlement authority beyond that granted by AR 27-20, based on the officer's experience, willingness, and ability. Any increase in the monetary settlement authority is subject to the same limitations and procedures that apply to a USARCS AAO.

b. Military Claims Act or National Guard Claims Act. See AR 27-20, paragraph 3-6.

(1) *Approval authority.* The settlement authority is that person who exercises monetary jurisdiction over the claim that is the greatest in amount. When all actual or potential claims for \$25,000 or less arising out of one incident may be settled by approval either in full or in part, that ACO or CPO has approval authority over all the claims. If only one actual or potential claim for an amount greater than \$25,000 is anticipated, it must be coordinated with the appropriate AAO, based on the mirror file sent to USARCS. If each claim cannot be settled for \$25,000 or less, forward them to USARCS for final action. The Commander USARCS, may make a final offer for \$100,000 or less, subject to approval by TJAG, or for more than \$100,000, subject to the Army General Counsel's approval. Claimants who refuse USARCS' final offer have the right to appeal.

(2) *Final action authority.* When all actual or potential claims arising out of one incident are, or will be, filed for \$25,000 or less, the head of an ACO (not of a CPO) has the authority to deny (or make a final offer) on any claim in a stated amount of \$25,000 or less, subject to appeal to the next higher authority. This authority may not be delegated. Within the United States, that authority is USARCS. Outside the United States, that authority is held by a command claims service, if any. If there is no command claims service, it is USARCS. Otherwise, the Commander USARCS, is the final action authority subject to appeal to higher authority.

(3) *Multiple claims arising out of one incident.* Where multiple claims arise out of one incident, USARCS may settle in any amount subject to approval by higher authority, even though its authorized monetary limit is \$25,000, the same as that of an ACO or a CPO. Close coordination with the appropriate AAO may result in a delegation of approval authority similar to that made in certain FTCA claims.

c. The Federal Tort Claims Act. See AR 27-20, paragraph 4-6.

(1) *Approval authority.* The settlement authority is that person who exercises monetary jurisdiction over the estimated settlement value of all actual or potential claims arising out of one incident. When each actual or potential claim arising out of one incident may be settled either in full or in part for no more than \$50,000, and the value of all settled claims arising out of the incident does not exceed \$100,000, the settlement authority in the ACO or CPO has approval authority over all the claims. If the claims cannot be settled for those amounts, forward them to USARCS for final action.

(2) *Final action authority.* The head of an ACO, but not of a CPO, has authority to deny or make a final offer on one or more claims in the stated amount of \$50,000 or less, if the total amount of all actual or potential claims does not exceed, or is not anticipated to exceed, \$100,000. This authority may not be delegated. All denials are subject to reconsideration by USARCS, which also exercises denial or final offer authority on claims for more than \$50,000. A sample memorandum seeking approval of a settlement on a claim in the amount of \$150,000 (format used for up to \$200,000) is posted on the USARCS site at "Claims Resources," II, a, no. 26.

(3) *Total value exceeds \$200,000.* If the total value of an FTCA incident exceeds \$200,000, the ACO or CPO may obtain permission to settle from the Department of Justice Civil Litigation Division (DOJ Lit Div) through USARCS by submitting a claims memorandum of opinion. A sample memorandum seeking approval by the Department of Justice for \$200,000 (or more) is posted on the USARCS Web site at "Claims Resources," II, a, no. 26. It must contain the names of all claimants, actual and potential, as well as each claim's estimated settlement value and the entire incident's settlement value.

d. Nonscope Claims Act. (See AR 27-20, paragraph 5-5). There is no limit to the number of claims arising out of a single incident that may be paid. While a subrogee may not be paid, it must agree that the settlement is final and not subject to filing of suit under the FTCA or appeal under the MCA; that is, a subrogee must agree that the Army pays only the insurance deductible.

e. Army Maritime Claims Settlement Act. See AR 27-20, paragraph 8-8.

(1) *Approval authority pertaining to both claims against and in favor of the United States.* An ACO may approve a claim in an amount of \$50,000 or less. Chief Counsel, Division Counsel and District Counsel, COE, may approve each claim in an amount of \$100,000 or less. The Commander USARCS has identical authority. The Army General Counsel may approve a claim in any amount, provided that claims approved in excess of \$500,000 are sent to Congress for a deficiency appropriation.

(2) *Final action authority.* If a claim is denied as non-meritorious or if the claimant refuses to accept a final offer, inform the claimant of the two-year filing requirement for both the Suits in Admiralty Act (SIA) and the Public Vessels Act (PVA). An ACO has authority to deny or make a final offer on claims in a stated amount up to \$50,000; COE authorities may deny or make a final offer on claims up to \$100,000. If denial is recommended or a final offer is

indicated, forward claims seeking more than those amounts to the Commander USARCS, who has final action authority.

f. Foreign Claims Act. See AR 27–20, paragraph 10–9.

(1) *Approval authority.* A one-member Foreign Claims Commission (FCC), if a JA or claims attorney, may settle all claims arising out of one incident for not more than \$15,000 each, regardless of the amounts claimed. If the one-member FCC is neither a JA nor a claims attorney, the settlement limit is \$5,000. A three-member FCC may approve all claims arising out of a single incident in amounts up to \$50,000 each, regardless of the amounts claimed, if the total amount of all claims settled does not exceed \$100,000. If it does, approval of the Commander USARCS is required. If the amount of any individual settlement exceeds \$100,000, it is subject to approval by the Army General Counsel.

(2) *Disapproval authority.* A one-member FCC, if a JA or a claims attorney, may disapprove all claims arising out of a single incident, if the stated amount of any one claim does not exceed \$15,000. A one-member FCC who is not a JA or claims attorney has no disapproval authority. When disapproval is recommended, the claim will be forwarded to the appointing authority. A three-member FCC may disapprove a claim in any amount.

g. Affirmative claims. See AR 27–20, paragraph 14–11.

(1) *Approval authority.* An ACO or CPO may compromise collection action on a claim asserted for \$50,000 or less unless recovery action is reserved by a command claims service, in which event the command claims service will have such authority.

(2) *Final action authority.* An ACO or CPO may terminate collection on a claim asserted for \$50,000 or less unless action is reserved by a command claims service, in which event the command claims service shall have such authority.

2–70. Splitting property damage and personal injury claims

a. As a general rule, a claimant may be paid only once, except for advance payments under the MCA or FCA. For example, if a property damage claim is paid either in full or in part pursuant to a settlement, the claimant may not be paid later for hidden damages discovered after settlement or for loss of use. The claimant is bound by the statutory text of 28 U.S.C. § 2672, the language appearing on both the signed FMS Form 197 (Judgment Fund Voucher for Payment) and on DA Form 7500 (Payment Report). See the headings for sections III and IV of appendix A for Web sites where blank copies of the forms may be downloaded. In addition, sample completed forms are posted for viewing on the USARCS Web site at “Claims Resources,” II, b, nos. 15 and 17. An exception to this rule is that a claim may be paid for property damage at one time and paid for personal injury subsequently. If the claimant files both claims at the same time, only one claim number will be assigned. If the claimant files them at different times, two claim numbers will be assigned. The later personal injury claim, however, must be filed within the two-year statute of limitations. When a claimant is unable to pay the repair bill, issue a written statement to the repair facility that the cost of repairs will be paid to the claimant upon receipt of an exact amount. This may enable the claimant to obtain possession and avoid further loss of use charges. Do not use this method unless it is certain that the claimant will pay the repair facility.

b. Follow these criteria:

(1) Mark either the DA 7500 or the FMS Form 197 with the language: “For Property Damage Only.”

(2) On a claim in which the government is clearly liable, the amount stated on the low estimate may be paid if it is determined to be correct. When liability or damages are in doubt, pay only that amount which reflects the government’s liability or the degree of comparative negligence.

(3) When the predicted value of all claims, actual and potential, arising from one incident exceeds \$100,000, based on the ACO or CPO estimate, no claim may be paid absent discussion with and assent by the AAO. If the total value of a FTCA claim exceeds \$200,000, USARCS must obtain the DOJ’s written approval to proceed with a settlement.

(4) When the claimant is an active duty Soldier whose personal injury claim is barred by the incident to service doctrine, the claimant must agree that any settlement is final and conclusive for both property damage and personal injury. Do not mark the file, “For Property Damage Only.”

(5) Strictly define property damage and ensure that it does not include medical bills and lost wages, whether or not subrogated.

c. It is anticipated that claims personnel will apply the following procedure mostly in minor vehicle accidents. Furthermore, it is improper practice with some ACOs or CPOs to require a claimant or passengers in the claimant’s vehicle (potential claimants) to waive any personal injury claim before receiving payment for property damage. Claims personnel should not solicit unnecessary waivers. The following are examples of property damage claims that should be paid promptly:

(1) A GOV rear-ends a privately-owned vehicle (POV) because the GOV operator was not paying attention (was negligent). Minor property damage results to the POV. Both drivers drive away and do not report any injuries at the scene. The ACO may proceed to pay without contacting the AAO.

(2) A GOV loses its brake power and hits the rear of a POV that is slowing down for heavy traffic on a highway. This action in turn causes a five-POV chain collision, involving ten persons in all. One person is taken to the hospital. All POVs remain drivable. The ACO should contact all ten persons for statements on the extent of their injuries to determine whether the incident’s total predicted value will exceed \$200,000. The ACO or CPO may use other means to

make this determination, such as interviewing witnesses or police officers. The ACO or CPO must forward a mirror file to USARCS and then telephone the USARCS AAO about the matter.

(3) A GOV driver runs through a red light on a military installation and collides with a Soldier's POV. The Soldier files a claim for property damage and for his personal injuries and loss of consortium of the spouse passenger. Both injuries are minor and valued within the ACO's monetary authority. The Soldier should be paid under the MCA for property damage but under the FTCA for loss of consortium only, provided that he agrees to relinquish his own personal injury claim. Any claim that the Soldier brings under the FTCA for either personal injury or property damage is barred by the Feres doctrine; however, the MCA's statutory incident to service exclusion bars only a claim for personal injury, not for property damage. The spouse's personal injury claim should be paid under the FTCA, or outside the United States under the MCA, as there is no bar on the face of the claim. If the incident's total predicted value exceeds \$100,000, the ACO should discuss it with the USARCS AAO.

(4) A GOV and a POV collide and all persons involved are injured. The incident's total predicted value will exceed the ACO's monetary authority. The first claim is filed by the POV insurer, seeking compensation for property damage to the POV as well as lost earnings and medical bills of the injured driver and her passengers. Discussion between the ACO and AAO indicates that government liability is greater than fifty percent and that the incident's total value is less than \$200,000. The insurer, properly subrogated under state law for all three elements claimed, demands immediate payment. The ACO or CPO may pay the claim only for repair to the POV in an amount reflecting the government's proportional liability. This policy's major purpose is to permit claimants to receive expeditious payment for POV damage before looking to their own collision coverage; however, these payments must compensate claimants for property damage, including hidden damages and loss of use.

2-71. Advance payments

In the case of a person who is injured or killed, or whose property is damaged or lost, under circumstances for which the Secretary of a military department is authorized by law to allow a claim, the Secretary may make a payment to or for the person, or the legal representatives of the person, in advance of the submission of such a claim or, if such a claim is submitted, in advance of the final settlement of the claim. The amount of such a payment may not exceed \$100,000. (10 U.S.C. § 2736) It may be made pursuant to the MCA, NGCA, or FCA. An ACO, CPO, or FCC may pay up to \$10,000. It must request authority for amounts over \$10,000 from USARCS. If USARCS already has a mirror file, submit a written request for increased authority, outlining the immediate need. Otherwise, enclose a mirror file with the request. USARCS may approve \$25,000 or less and DJAG, \$100,000 or less. Two sample advance payment acceptance agreements are posted on the USARCS Web site at "Claims Resources," II, b, nos. 4 and 5.

2-72. Action memorandums

An action is required on all settlements, whether approved, denied or the subject of a final offer, including those paid electronically. Two sample memorandums, prepared to seek approval for settlements on FTCA claims for \$150,000 to \$199,999, and those above \$200,000, respectively, are posted on the USARCS Web site at "Claims Resources," II, b, nos. 25, and 26. A Small Claims Certificate (DA Form 1668) constitutes an action memorandum when small claims procedures are used. A sample completed DA Form 1668 is posted on the USARCS Web site at "Claims Resources," II, a, no. 29. A blank copy is available at www.apd.army.mil.

2-73. Settlement agreements

a. Requirement. A settlement agreement is required on all claims before payment may be made. Inform claimants seeking compensation for property damage that they may not later file personal injury claims and that signing the settlement agreement precludes further claims. This restriction does not apply to split payments. To obtain blank copies of the forms discussed in this paragraph see the headings for sections III and IV of appendix A for Web sites where copies may be downloaded. Sample completed forms may be viewed on the USARCS Web site at "Claims Resources," II, b.

b. Types of settlement agreements. There are three basic standardized forms that may serve as settlement agreements, dependent largely on the fund sources for the payment of the claim. Paragraph 2-80 breaks down fund sources for many different types of claims and states with greater specificity in which claims the following forms are used.

(1) *Tort Claim Payment Report, (DA Form 7500).* Use DA Form 7500 for settlement agreements for any claims that will be paid out of the Army claims expenditure allowance. Examples are FTCA settlements for \$2,500 or under and MCA settlements of \$100,000 or under per claimant.

(2) *Department of the Treasury Financial Management Service (FMS) Form 197.* FMS Form 197 (Judgment Fund Voucher for Payment) serves as settlement agreement for payments that are to be made out of the Judgment Fund. See paragraph 2-81e for information about how to access up-to-date Department of the Treasury FMS forms, including the FMS Form 197.

(3) *DA Form 1666.* DA Form 1666 serves as a settlement agreement for claims' payments on claims paid from COE, NAFI, or AAFES funds.

c. Exceptions. None of these above forms will suffice as a settlement agreement if the claim falls under any of the categories listed below. Examples for the first seven settlement agreements listed below are posted on the USARCS

Web site at "Claims Resources," II, b, nos. 1–7. In all of these cases, field attorneys should call their AAO for assistance. These examples will be modified as necessary to reflect the circumstances of a particular claim.

- (1) Where the claimant is represented by an attorney;
- (2) Where the claimant is a minor or an incompetent;
- (3) Where lienholders have a known interest;
- (4) Where Medicare is a lienholder;
- (5) Where a joint tortfeasor is participating in the settlement;
- (6) Where there is a joint tortfeasor who is not participating in the settlement and a hold harmless agreement is required;
- (7) Where the claim is for wrongful death;
- (8) Where the claimant's assets have been taken over by a bankruptcy court. In that case call your AAO.

d. Claims falling under more than one chapter. When a claim has been considered under more than one chapter (statute), the settlement agreement must so state and expressly release the United States from liability under all statutes under which the claim was considered.

2–74. Final offers

a. The administrative claims process is designed to avoid litigation or appeals and their attendant costs. A compromise usually obtains better results than a lawsuit or a protracted appeal. Do not rely on an Assistant U.S. Attorney to do a better job than claims personnel can do. If a true compromise cannot be reached, however, claims personnel should try to have the claimant define and limit the issues to be decided at suit or in an administrative appeal.

b. Face-to-face discussion between parties is usually successful in either reaching an agreed settlement or identifying the issues at dispute. If there are clear issues of interpretation of applicable law, whether as to liability, who has the right to claim, or the elements of damages payable, mediation should be considered. Similarly, where the amount or value of damages is at issue, particularly where local precedent is involved, mediation can help. A mediator should be jointly selected and jointly compensated. Where issues of law are involved, try to obtain a current or retired federal judge. Where amounts only are involved, an experienced attorney may be best. Be aware of the two different styles of mediation; one is where the mediator actively takes a position and is willing to state his position; the other is where the mediator listens to each party separately and goes back and forth relaying what he has heard.

c. A final offer notice should be drafted to clearly justify the amount offered in sufficient detail and plain language so that the notice is self contained and easily understood by the claimant. The legal representative should be requested to pass on the entire notice to the claimant.

d. If the claimant refuses to be interviewed, submit to an IME or furnish essential documents such as medical records or wage and tax information, mail the claimant a request listing what actions are necessary and why. If this fails and the claimant still refuses to cooperate, make a final offer based on what the file already contains. The offer notice should refer to all earlier requests for information and explain why it is limited.

e. Sample formats for final offer notices are posted on the USARCS Web site at "Claims Resources," II, b, nos. 7 and 8. Note that an FTCA notice must inform the claimant of the right both to file suit and to request reconsideration. On the other hand, notices for MCA, NGCA, or maritime claims must contain an appeal paragraph.

2–75. Denial notice

a. Much of the guidance set forth at paragraph 2–74, regarding exhausting all efforts to reach a settlement and fully investigating each claim, also applies to a denial. Before denying a claim solely because failure to prove liability or damages, inform the claimant in writing of these preliminary findings, providing additional opportunity to strengthen the showing. Three sample denial notices are posted on the USARCS Web site at "Claims Resources," II, b, nos. 9–11. These notices must describe the claimant's further remedies and they should state the factual grounds for denying the claim, particularly if the claimant has the right to appeal. These procedures will be used as well for abandoned and withdrawn claims.

b. A lawsuit for professional negligence may be filed only if supported by an expert opinion, except in the special circumstance where the doctrine of *res ipsa loquitur* applies. If the Army's expert review indicates there was no negligence, request the claimant in writing to furnish an expert opinion. Provide the claimant a brief summary of the Army's position, without identifying the Army's expert. For example, "Our review indicates as follows..." The claimant's refusal to furnish an expert opinion in an FTCA claim is grounds for denial, in accordance with Federal Rule of Civil Procedure 11, or by regulation in an MCA or FCA claim. AR 27–20, paragraph 2–38a(2), states that failure to provide an expert opinion is a basis for denial. The same rationale applies to a claimant's refusal to submit to an interview or an IME. Include this information in the denial notice.

c. Where a medical malpractice claim by a Soldier is denied as it arose incident to service, and there has been no investigation on the merits, the following language should be used in lieu of a discussion of the merits, "Because of the above cited bar to suit, this Service has not conducted any claims investigation into the merits of the claim. Therefore, I have made no determination as to whether the claim is otherwise payable. However, the claim has been referred to

Army medical authorities in order to ensure that a quality assurance review has been or will be conducted in accordance with existing directives and procedures.”

d. A denial letter should never contain any statements to the effect that the Army was negligent but the claimant’s negligence was greater. This constitutes an admission against interest which is admissible in court. It is better to state that the claimant caused the injury.

e. A notice of final denial action on a claim considered under more than one chapter (or statute) must reflect that the claim was considered under more than one statute and name each statute specifically. If appellate rights exist under any statute, the claimant must be so informed. Beware of special database entry requirements that apply when a claim has been considered as both a personnel and tort claim. See paragraph 13–1e for more information.

2–76. The Parker denial

a. If a claimant files suit under the FTCA before the agency takes final administrative action, DOJ policy requires the issuing of what is known as a Parker denial. See *Parker v. United States*, 935 F.2d 176 (9th Cir. 1991). Its purpose is to prevent refiling of an administrative claim if the lawsuit is dismissed without prejudice. An ACO or USARCS issues such a denial notice only at the request of the trial attorney (usually an Assistant U.S. Attorney assigned to the case). The denial notice does not contain the usual language affording opportunity to request reconsideration.

b. If a lawsuit is filed on only one claim while its companion claims are pending in the administrative phase, issue a Parker denial on all the claims, thereby forcing them all into suit. However, if actual negotiations are ongoing in a companion claim, consult the trial attorney about whether to proceed to administrative settlement, for example, on a claim in which the Army’s liability is obvious.

c. Where a claimant files suit prematurely, that is, before the requisite six-month period expires, discuss the matter with the claimant with a view toward persuading the claimant to withdraw the suit. If the claimant refuses to withdraw the suit, a Parker denial is not in order. Inform the trial attorney, furnishing copies of necessary documents so that the attorney can obtain a dismissal. Retain the original file for further processing.

d. Sometimes claimants file suit because they mistakenly interpret the FTCA to require doing so no later than two years from the date the claim accrues. If the claim is meritorious, request the claimant to withdraw suit either immediately or as a condition of any subsequent settlement. If the claimant refuses, issue a Parker denial.

e. When suit is filed, route all communications with the trial attorney through a representative of the Army Litigation Center.

2–77. Mailing procedure

a. Mail a final offer or denial notice by certified mail, return receipt requested. By a memorandum dated 1 June 1987, TJAG now permits use of special mail services (such as Federal Express).

b. Place the signed U.S. Postal Service mailing certificate in the claim file as proof of the date of mailing and of receipt. On an FTCA claim, the date the notice was mailed is the date that the six-month period for filing suit begins. On an MCA claim, the date of receipt is the date the appeal period begins. When mailing to a foreign mail service, claims personnel may attach a statement for the claimant to enter the date of receipt along with a return envelope. If the receipt is lost or not returned, retain a copy of the mail log.

c. Keep all correspondence returned as undeliverable and make every effort to determine the claimant’s new address. If these efforts fail, attempt a second mailing to the address entered on the SF 95. If this is returned, prepare a memorandum detailing the efforts to notify the claimant of the denial or final offer. In an MCA claim, the appeal period expires 60 days after the date the second letter is sent, unless there is evidence that the claimant received one of the letters. If the claimant receives the second letter, the appeal period is computed from the date of its receipt. In an FTCA claim, the six-month period begins on the date the second letter is mailed.

2–78. Appeal or reconsideration

a. Claims personnel should note whether the applicable statute allows for appeal or reconsideration. The right to appeal ensures that a claim is considered by the appellate or higher authority, while reconsideration, such as under the FCA, gives a claimant the right to have the original decisional authority reconsider its determinations.

b. Claims personnel should acknowledge an appeal or request for reconsideration upon receipt. Under the FTCA, a request for reconsideration re-invokes the six-month administrative period during which suit may not be filed, 28 C.F.R. § 14.9(b). A sample acknowledgment letter to use when an appeal or reconsideration is requested is posted on the USARCS Web site at “Claims Resources,” II, b, no. 5. It is very important that the acknowledgement letter notify the claimant that the six-month administrative period starts again.

c. The “appeal or reconsideration” paragraph in all final offers or denial letters directs the claimant to send the appeal or reconsideration through the settlement authority who took action. This ensures that all matters set forth in the appeal or request for reconsideration are fully investigated. If the investigation indicates that there should be a different outcome on the claim, such as approval or a higher offer, the settlement authority may take such action subject to any statutory or regulatory limitations. If a different action is not warranted, the settlement authority will prepare a

supplemental action stating the reason and forward the claim with the appropriate recommendation to the higher settlement authority.

d. The non-FTCA claims statutes provide only an administrative remedy. The original settlement authority may, even in the absence of an appeal or request for reconsideration, correct and modify the original action even if a claim has been approved for payment. A successor settlement authority is limited to taking corrective action on the basis of fraud, substantial new evidence, errors in calculation or mistake of law (misinterpretation).

e. The FTCA settlement authority's limits upon considering an appeal or request for reconsideration are set forth in AR 27-20, paragraph 4-7. However, the provisions of the FTCA limit the original or successor settlement authority in that an award, compromise, or settlement is final and conclusive and constitutes a complete release.

2-79. Retention of file

See AR 27-20, paragraph 13-4.

a. When a claim is denied, the ACO or CPO should retain the claim file until at least 3-4 months after the six-month period for filing suit, or the 60-day appeal period, has expired.

b. When a claim is paid, the file should be retained until a comeback copy of the payment report or other proof of payment is received.

c. Because a file cannot be retired until the reason for its disposition is entered into the database, proper entries are required prior to forwarding the file for retirement.

d. A closed file should be retained until final action is taken on any companion claim arising out of the same incident.

e. When a file is forwarded to the USARCS as a matter beyond the local monetary jurisdiction, consider retaining a duplicate file. If the mirror file system is used, only the originals or essential documents, such as SF 95, (and attachments) proof of authority to file, and so forth., need to be forwarded upon transfer. Thereby, a complete file is available at the ACO or CPO if suit or appeal is filed.

Section X Payment Procedures

2-80. Fund sources

See AR 27-20, paragraph 2-59.

a. *Military Claims Act.* Amounts less than \$100,000 are paid from Army funds and amounts over \$100,000 are paid by the Department of the Treasury Financial Management Service from the Judgment Fund (see 31 U.S.C. § 1304). This monetary limit applies to each claim, not to each claims incident. For example, one incident may give rise to a claim for personal injury and a claim by the injured party's spouse for loss of consortium. These are considered two separate claims even though they arise from one incident. The limit applies also to claims filed jointly. Thus, settlement of a joint claim must specify the settlement amount for each claimant.

b. *Federal Tort Claims Act.* FTCA settlements of \$2,500 or less are paid from Army funds on all claims except civil works claims, which are paid from civil works funds at the COE district level. FMS pays all settlements above \$2,500 on all FTCA claims, including civil works claims, from the Judgment Fund. This monetary limit applies to each claim, not each claims incident. For example, a subrogee's claim for \$3,000, which includes the subrogor's paid and fully subrogated \$500 deductible, constitutes one claim and is payable by the FMS. If the insurer is merely acting as its insured's collection agent, however, and has not paid the deductible, both claims are payable from Army funds.

c. *Non-Scope Claims Act.* Claims brought pursuant to this statute are payable from Army funds, even though the aggregate payment for all claims resulting from one incident exceeds \$2,500.

d. *NATO Status of Forces Agreement.* NATO SOFA, including Partnership for Peace (PFP) claims arising in the United States are paid in the same manner as FTCA or MCA claims, 10 U.S.C. § 2734b. After paying these claims, USARCS seeks reimbursement from the sending State for its share in accordance with the treaty's terms.

e. *Army Maritime Claims Settlement Act.*

(1) Claims against the United States brought pursuant to this statute are paid from Army funds except where the claim arises out of civil works activities, in which case the claim is paid from civil works funds for amounts not to exceed \$500,000. The Secretary of the Army certifies settlements greater than \$500,000 in their entirety to Congress for payment.

(2) An AMCSA claim in favor of the United States is paid into the U.S. Treasury upon settlement but a claim paid under the Rivers and Harbors Act arising from a civil works activity is paid into COE operating funds at the COE district level.

f. *Foreign Claims Act.* FCA claims payments are funded from the same source as are MCA claims. The methods for issuing these payments differ. The check will be drawn on the currency of the country in which payment is to be made in accordance with AR 27-20, paragraph 10-9, at the Foreign Currency Fluctuation Account exchange rate in effect on the date of approval action. Obtain permission from the Commander USARCS if a payee requests payment in U.S. currency, or the currency of a country other than that of the payee's country of residence. Where payment must be

approved at USARCS or a higher authority, USARCS will complete and sign the voucher and forward it to the original commission for local payment.

g. United States Postal Service. Claims by the U.S. Postal Service are settled by USARCS and are paid from Army funds.

h. AAFES or NAFI claims. AAFES or NAFI claims are paid from nonappropriated funds. Depending on the settlement amount, send the claim to the appropriate office listed below.

(1) *CONUS AAFES.* Send payable claims generated by CONUS AAFES activities to: Headquarters, AAFES ATTN: FA-T P.O. Box 650428 Dallas, Texas 75265-0428.

(2) *Korean AAFES.*

(a) Send claims payable for under \$2,500 generated by Korean AAFES to: Korea Sales District ATTN: FA, Unit 15555 APO AP 99205-0003.

(b) Send claims payable for \$2,500 or more generated by Korean AAFES to: Headquarters, AAFES ATTN: FA-T P.O. Box 650428 Dallas, Texas 75265-0428.

(3) *Japanese AAFES.*

(a) Send claims payable for under \$2,500 generated by Japan AAFES activities to: AAFES-Yokata ATTN: PACRIM-FA-JAPAN Unit 5203 APO AP 96328-5203.

(b) Send claims payable for \$2,500 or more generated by Japanese AAFES to: ATTN: FA-T P.O. Box 650428 Dallas, Texas 75265-0428

(4) *Okinawan, Guam and Thailand, etc. AAFES.*

(a) Send claims payable for under \$2,500 generated by AAFES activities in Okinawa, Guam, Thailand, and other Pacific areas not specifically listed above to: AAFES-PACRIM-ASC ATTN: FA Unit 35163 APO AP 97378-5163.

(b) Send claims payable for \$2,500 or more generated by AAFES activities in Okinawa, Guam, Thailand, and other Pacific areas not specifically listed above to: Headquarters, AAFES ATTN: FA-T P.O. Box 650428 Dallas, Texas 75265-0428.

(5) *European Regional AAFES.* Send all claims payable in any amount generated by European Regional AAFES activities to: Headquarters, AAFES ATTN: FA-T P.O. Box 650428 Dallas, Texas 75265-0428.

(6) *Other NAFI claims.*

(a) *Other NAFI claims over \$100.* Send claims over \$100 generated by other NAF activities to the address shown below. When sending household goods or hold baggage shipment claims for payment, forward the entire claim file so the Army Central Insurance Fund can pursue carrier recovery. Use the "NF" PCMS database transaction code. Army Central Insurance Fund ATTN: CFSC-FM-I 4700 King Street Alexandria, Virginia 22302-4406.

(b) *Other NAFI claims under \$100.* Send claims of \$100 or less generated by other NAFI activities to the NAFI activity responsible for payment from its funds (see AR 215-1, para 14-19).

(c) *COE claims.* See paragraph 2-81e for information about where to send payment documents for this type of claim.

i. AAFES or NAFI claims: proportionate liability.

(1) Such claims may be paid proportionally from appropriated and nonappropriated funds if entities funded by both are liable. The following are examples:

(a) AAFES or a NAFI is responsible for maintaining a building and its surrounding area (such as a parking lot). If the claimant was injured by a hazard known to the NAFI occupant, that agency's failure to place a work order with the local Directorate of Public Works (DPW) or similar agency should result in payment from the NAFI. A different outcome may result, however, if the NAFI submitted a work order and DPW unreasonably failed to correct the hazard.

(b) A claim for a child's hot water physical injury arises from the family child care provider program. In this case, DPW was required by regulation to adjust the water temperature to a maximum of 110 degrees Fahrenheit. Its failure to do so results in a claim payable from appropriated funds, in the absence of negligence by the family childcare provider.

(c) A claim for damage from a struck golf ball is not payable from nonappropriated funds unless actions under the control of the golf course manager, such as placing a practice tee too close to a fairway, caused the damage. In contrast, if the damage results from placing public roads in or around the golf course, the claim should be paid from appropriated funds. Damage resulting from a golfer's act is that golfer's responsibility.

(d) A personal injury may occur at a NAFI facility or program in which the negligent employees' salaries or wages are paid from both appropriated and nonappropriated funds. Liability must be apportioned after an investigation, as the injury may have been caused by both lack of supervision (a NAFI tort) and faulty architectural design (an appropriated fund responsibility).

(2) The goal of an apportionment is to reach a resolution that is satisfactory to both the NAFI or AAFES on one hand and FMS on the other. The Judgment Fund cannot be used if a claim is payable from other government funds or programs, including nonappropriated funds. Record this aspect of the claims investigation, making sure to justify the percentage of apportionment assessed.

j. Jointly payable claims. Claims payable by both the United States and a joint or successor tortfeasor require the same type of investigation and analysis used in single payor claims.

k. Rental vehicles. Claims involving rented vehicles that fall within the SDDC rental car contract are payable by the rental company or its insurer up to policy limits. The government pays any excess above policy limits under FTCA, MCA, or FCA procedures.

l. Flying club claims. The Central Insurance Fund maintains full insurance coverage on NAFI flying clubs. If, however, the settlement reaches or exceeds the policy limits, FTCA liability may attach, in which case the excess is paid under FTCA procedures. An example is a midair collision between a flying club plane and a civilian plane caused by both pilot error and faulty weather information supplied by an Army controller.

m. Effect of subrogation. A subrogee may be paid as a claimant but not as a lienholder. Subrogation results from a preexisting agreement or contract or by operation of state law. A claimant's vehicle and health insurance carriers are obliged under contract to pay medical bills up to the policy limits. State law determines whether either carrier is a subrogee or a lienholder. If the insurer is not a subrogee, payment must be made to the injured party who assumes the duty to pay the lien by executing the settlement agreement. As an exception, the Centers for Medicare and Medicaid Services may be paid directly for a Medicare lien. A sample letter providing authorization for such payment as well as a sample settlement agreement are posted on the USARCS Web site at "Claims Resources," II, a, no. 27 and II, b, no. 9, respectively. A state Medicaid lien is paid through the claimant to the state medical or similar agency. TRICARE is not a subrogee or lienholder and is not paid at all, either by payment made through the claimant or direct payment.

n. Structured settlement. Make the check payable to the broker who will distribute the funds in the manner set forth in the settlement agreement.

2-81. Payment documents

See also, AR 27-20, paragraph 2-59.

a. Notification. Once prepared, the original payment documents must be sent to the claimant or the claimant's attorney to obtain the required signatures. Sample transmittal letters are posted on the USARCS Web site at "Claims Resources," II, c, nos. 17 and 18. Separate samples are provided for pro se and represented claimants. In addition, at this site, readers may view completed samples of all of the forms discussed in this paragraph. To obtain blank copies of these forms see the heading for section II of appendix A for Web sites where blank copies may be downloaded.

b. General. For tort claims paid from Army funds, prepare the following documents:

(1) For all claims, a DA Form 7500 (Tort Claim Payment Report) is required. It must be signed by a properly designated settlement or approval authority who is certifying the payment. The Tort Claim Payment Report for a given claim may be generated from the Claim Transaction screen in the Tort and Special Claims Application database by clicking the link "payment report." The form will appear with most of the information pre-supplied from the claim record. You may add or modify information as necessary. The payment report serves as a settlement agreement and will be signed by the claimant unless a separate agreement is needed. A separate Tort Claim Payment Report will be completed for each claimant, except in a structured settlement where the payee is the broker on behalf of all claimants. The proper accounting classification must be entered on the payment report except for claims paid by a NAFI, AAFES, or the COE.

(2) A copy of a settlement agreement when a separate settlement agreement is used. If a separate agreement is used, the claimant's attorney's signature may appear as acknowledgment of the settlement; the claimant's attorney may not sign as a party to the settlement. Attorney fees will not be made payable separately from the cash sum payable to the claimant.

(3) A copy of the claim, usually an SF 95, and proof of authority to sign (guardianship decree, attorney's representation agreement, documents authorizing a corporate officer or a representative of the estate to sign, as appropriate).

(4) A copy of an action (see para 2-72) or a DA Form 1668 (Small Claims Certificate), as appropriate.

(5) The SF 95 or claim form and DA Form 7500 (Tort Claim Payment Report) will be faxed to the DFAS office. Retain an original of the documents listed above in the claim file. It is suggested that claims officers meet with their DFAS point of contact and review the payment report to ensure acceptance by DFAS.

c. Tort Claim Payment Report, DA Form 7500. Enter the described information in each of the corresponding block numbers, as listed below.

- (1) Identification number of your servicing DFAS office.
- (2) Date document prepared.
- (3) Name of claims office submitting Tort Claim Payment Report.
- (4) Office code of submitting claims office.
- (5) Agency/office mailing address.
- (6) Date claim filed.
- (7) Claim number(s).
- (8) Amount claimed.

(9) Fund cite.

(a) *Accounting citation.* Charging an approved claim against a particular accounting citation creates an obligation against the claims appropriation for the current fiscal year. Accordingly, the payment report will bear the correct account code for both the appropriation charged and the current fiscal year, regardless of the date the claim accrued or was filed. Confusion sometimes arises at the end of a fiscal year. For example, an approved claim is certified for payment on 28 September, but it is obvious that the payment will not actually be processed until the next fiscal year, beginning 1 October. At the time the check is issued, the accounting code will not be advanced to the next fiscal year. Only the accounting code for the fiscal year in which the funds were obligated and the claim was certified for payment (the payment report was signed) should be charged.

(b) *Accounting codes.* Each fiscal year, the AR 37–100 series publishes separate payment and refund codes for claims payments made pursuant to each chapter of AR 27–20. All elements of the accounting code for each type of claim, except the third digit, remain constant (unless otherwise notified by fiscal authorities). The third digit represents the second digit of the fiscal year. For example, in the payment of an FY 07 FTCA claim, the FTCA payment code would appear as 2172020 22 0203 P436099.21–4200 FAJA S99999.

(10) Name of payee.

(11) Address of payee.

(12) Social Security number or Taxpayer Identification Number (TIN). Please note, in a structured settlement where the total monetary award will be paid to the broker for distribution as outlined in the structured settlement agreement, the Employer Identification Number (EIN) of the broker to whom payment is made will be reflected.

(13) Payment amount.

(14) Type of payment (for aN MCA claim enter either “advance payment” or final payment. For other payments enter “final payment.”

(15) ABA routing number for electronic payment

(16) Payee’s account name and number.

(17) Name and address of financial institution where payment to be made.

(18) Specify either “checking” or “savings” account.

(19) Signature of claimant.

(20) Date of claimant’s signature.

(21) Signature of authorized certifying officer.

(22) Date of signature of authorized certifying officer.

(23) Title of authorized certifying officer.

(24) Date payment recorded in claim record/database.

d. Tort Claim payment report - additional information. The area of the DA Form 7500 (Tort Claim Payment Report) identified as “Section B - Acceptance by Claimant” is to be dated and signed in original by claimant, except where another settlement acceptance agreement has been executed. The area of the DA Form 7500 identified as “Section C - Agency Certifying Officer” is to be completed by the CJA or claims attorney authorized to approve payment of settlement award.

e. Payment documents for AAFES and NAFI Claims. For claims to be paid from AAFES funds, submit the following documents to the appropriate AAFES activity. Specific addresses are provided at para 2–80h. Sample transmittal memos for forwarding payment documents to a specific AAFES Service office (see para 2–80h) or to the Army Central Insurance Fund (for NAFI claims other than AAFES claims, as discussed in para 2–80h(6)) are posted on the USARCS Web site at “Claims Resources,” II, b, nos. 1 and 2.

(1) Action Memorandum, (see para 2–72).

(2) SF 95, Claim.

(3) DA Form 1666–Claims Settlement Agreement, or other form of settlement agreement, if appropriate.

(4) For claims generated by NAFI activities other than AAFES, prepare the documents listed below. See subpara 2–80h(6) for information as to where to send the documents.

(a) Action Memorandum, (see para 2–72).

(b) SF 95, Claim.

(c) DA Form 1666, Claims Settlement Agreement, or other form of settlement agreement, if appropriate.

f. Payment of COE claims.

(1) *Claims payable under \$2,500.*

(a) COE civil works claims are paid by the responsible COE district from civil works funds if the amount is \$2,500 or under.

(b) If an approval authority other than a COE authority approves a claim arising out of the activities of the COE district, for \$2,500 or less, the action, the SF 95 and DA Form 1666 will be referred to the responsible district for payment. A sample transmittal letter to COE is posted on the USARCS Web site at “Claims Resources,” II, b, no. 3.

(2) *Amounts paid over \$2,500.* COE claims payable in an amount greater than \$2,500 will be paid from the Judgment Fund using the procedures set forth below.

g. Judgment fund payments. For all claims to be paid from the Judgment Fund, in whole or in part, submit the following documents to the Department of the Treasury, Financial Management Service (FMS). In addition to being able to access these forms as discussed in subpara a of this paragraph, these forms are available as fillable forms for any claim entered in the TSCA database. In the Claim Transaction screen for the claim, click on the link “Create DA Form 7500, 1666, or 1668.” The database will automatically fill some of the blocks. Any block may be edited or filled by the user as needed. These forms may also be obtained from a Web site maintained by the Department of Treasury, FMS at <http://fms.treas.gov/judgefund>. The Treasury Financial Manual is available the home page <http://fms.treas.gov>

(1) Original of FMS Form 194, Judgment Fund Transmittal. A sample completed FMS Form 194 is posted on the USARCS Web site at “Claims Resources,” II, b, no. 13.

(2) Original of the FMS Form 196 (Judgment Fund Award Data Sheet) is prepared for each claimant receiving a monetary award. A sample of a completed FMS Form 196 is posted on the USARCS Web site at “Claims Resources,” II, b, no. 14.

(3) Original of Page 1 of the FMS Form 197, (Judgment Fund Voucher For Payment).

(4) Where a claimant has not signed another agreement and is not represented by an attorney, page 2 of FMS Form 197 will be signed and dated by the claimant at item 10. This serves as a settlement agreement and acceptance by the claimant. Block 11 of FMS Form 197 will be signed and dated by the claims officer certifying the payment on all payments submitted to FMS, regardless of the type of settlement agreement used. A sample of a completed FMS Form 197 is posted on the USARCS Web site at “Claims Resources,” II, b, no. 15.

(5) Original of the claim, usually SF 95, and proof of authority to sign (guardianship decree, attorney’s representation agreement, documents authorizing a corporate officer or a representative of the estate to sign, as appropriate).

(6) Original of the settlement agreement, when a separate settlement agreement is used in lieu of FMS Form 197.

(7) An action (see para 2–72) or, where the settlement has been approved by the Attorney General’s designee for a FTCA claim or by DJAG or Army General Counsel for a MCA, NGCA, or FCA claim, a copy of the approval document.

2–82. Finality of settlement

Payment of a claim pursuant to a duly executed and agreed settlement precludes further payment; the settlement is final, 28 U.S.C. § 2672 (FTCA) and 10 U.S.C. § 2735. Since all claims are paid under a limited waiver of sovereign immunity, there is no authority to pay additional amounts later. Under the FTCA a paid settlement amount may be corrected only where error results in a payment less than the mutually understood settlement amount, see AR 27–20, paragraph 4–7. For settlements paid under other statutes see paragraph 2–78c. Claimants must be advised before accepting payment of their right to either request reconsideration or appeal, as specified in the chapter of AR 27–20 under which final action was taken. See FTCH § II, B5a(9) and F8 for a discussion of cases on the finality of settlement.

Chapter 3 Claims Cognizable Under the Military Claims Act

3–1. Statutory authority

a. The Military Claims Act (MCA), 10 U.S.C. § 2733, was enacted on 3 July 1943. It provided retroactive coverage of claims occurring on or after 27 May 1941; President Roosevelt declared a national emergency on that date. The MCA was intended primarily to establish a new system of compensation for both personal injuries and property losses caused by newly mobilized troops in civilian communities throughout the United States, its territories and possessions and provided a corollary to the Foreign Claims Act (FCA), (10 U.S.C. § 2734).

b. When enacted, the MCA repealed earlier statutes authorizing compensation for damage caused by various Army activities, such as firing site activities, maneuvers, or other military operations (Act of 24 August 1912, 37 Stat. 586), as well as for property damage caused by the U.S. Army Corps of Engineers’ (COE) river and harbor work. Act of 23 June 1910, 36 Stat. 630, 676. Congress intended the MCA to replace and expand upon these various authorities.

c. The MCA provides a limited waiver of sovereign immunity. Instead of a judicial remedy, it grants claimants the right to an administrative appeal. The MCA authorizes the Secretaries of the military services to issue regulations governing these claims. Courts have consistently upheld the constitutionality of these administrative regulations; decisions made thereunder are final and conclusive, *Rodrique v. United States*, 968 F.2d 1430 (1st Cir. 1992), *Hata v. United States*, 23 F.3d 230 (9th Cir. 1994), *Schneider v. United States*, 27 F.3d 1327 (8th Cir. 1994) cert. denied, 513 U.S. 1077 (1995).

d. Initially, the MCA limited payment of personal injury or death claims to costs of medical, hospital, or burial services actually incurred, 57 Stat. 372, chapter 189. The MCA initially limited payments to \$500 (\$1,000 per claim in

time of war). Any settlement constituted full and final satisfaction of the claim. Over the years, Congress raised the \$500 monetary limitation by increments; presently, there is no maximum. Until the 1970s USARCS was required to submit annually to Congress the name and amount of each claim settled. It was also required to refer any claim settled for more than \$100,000 to Congress for a deficiency appropriation for the excess, since only the initial \$100,000 was paid from agency funds. This schedule remains in effect, except that any amount over \$100,000 for each claim is now paid from the Judgment Fund, 31 U.S.C. § 1304.

3-2. Scope

a. History. From the outset, the MCA has had worldwide application. For many years, however, it was used primarily to process claims arising within the United States. (The FCA was used to process claims brought by persons residing overseas during the time when few dependents accompanied troops abroad.) Until the enactment of the Federal Tort Claims Act (FTCA), the MCA was the paramount statute for administering tort claims based on Soldiers' negligent or wrongful acts or omissions within the United States. While the FTCA did not repeal the MCA, by its terms it became the preemptive federal negligence remedy, Act of 2 August 1946 as part of the Legislative Reorganization Act of 1946, chap. 753, §§ 401 through 424 (FTCA), Pub. L. No. 79-601, 60 Stat. 812-844 at 842. However, the FTCA did not attenuate the MCA's other provisions governing claims arising from noncombat activities. Additionally, the MCA continues to cover claims for loss of or damage to bailed personal property or insured mail in the Army's possession or claims engendered by the military's use and occupancy of real property. The FTCA had no effect on the administration of claims occurring outside the United States or claims by Soldiers for property damage or loss incident to service not cognizable under the Personnel Claims Act (PCA). Thus, the Army claims system continues to process a broad variety of claims under the MCA that neither the FTCA nor the FCA covers.

b. Negligence claims. As a matter of policy and to the extent possible, MCA negligence claims are processed and interpreted through the FTCA's implementing regulations and case law. The MCA applies to claims caused by an act or omission determined to be negligent, wrongful or otherwise involving fault of military personnel or civilian officers or employees acting within the scope of their employment outside the United States. Claimants are usually United States residents who are not proper claimants under the FCA or a Status of Forces Agreement (SOFA). To be payable, a claim must assert a tort under general principles of law applicable to a private individual in the majority of U.S. jurisdictions. See FTCH § II, B1 through B4(a) for guidance.

c. Noncombat activity claims. The MCA governs claims arising throughout the world, incident to authorized activities which are essentially military in nature, that have few parallels in civilian pursuits, and which historically are a proper basis for payment of claims. Examples are practice firing of missiles and weapons; training and field exercises, and military maneuvers, including the operation of aircraft and vehicles; use and occupancy of real estate; movement of combat and other vehicles designed for military use; and certain civilian activities over which the COE historically has had exclusive jurisdiction. Activities carried out incident to combat, whether in time of war or not, and the use of military personnel and civilian employees in connection with civil disturbances or disasters are excluded from consideration under the MCA.

3-3. Claims payable

a. General. A valid MCA claim is based on the negligent or wrongful act or omission of a Soldier or civilian employee, see AR 27-20, paragraph 2-2b. As an exception, the acts or omissions of members of the Army National Guard (ARNG) while employed in training duty under the National Guard Claims Act (NGCA), 32 U.S.C. §§ 316, 502, 503, or 505 are outside the MCA's scope of coverage. Within the United States, ARNG claims fall under Title 31 and the FTCA. Outside the United States, all ARNG claims fall under Title 10 and either the MCA or the FCA may be applied. If such claims arise from noncombat Army activities that are not normally activities of a state, they may fall under the NGCA. Similarly, contractors of the United States are not employees under the MCA. See chapter 2, Section V, Determination of Liability.

b. Noncombat activity claims.

(1) Noncombat activity claims are payable based on causation alone, so there is no requirement for a finding of negligence. Advance payments may be made in certain situations such as disasters. Thus, if a military aircraft crashes into a shopping center and causes serious injuries and property damage, the adjudicating authority may make advance payments almost immediately for medical care and other essential services, including business rehabilitation. These payments should not be made to possible joint tortfeasors, such as contractor employees aboard the aircraft, or to federal, state, local or nongovernmental organizations that provide monetary or in-kind assistance. Payments must be made to injured parties. Where there is a large number of actual or potential claims, coordination with the Commander USARCS is required prior to making a payment. For guidance concerning real estate claims see paragraph 2-15m of this publication.

(2) Claims arising from noncombat activities should be processed under the MCA, even though subsequent investigation may indicate a negligent or wrongful act or omission by a Soldier or employee. If the claimant elects the FTCA and files suit, follow normal FTCA procedures thereafter. Take care, however, to restrict the use of the noncombat activities provision to those activities historically falling within its definition. For example, if a military sedan causes an accident on a paved highway during a maneuver within the continental U.S. (CONUS), the claim should be

processed under the FTCA, but a claim arising from an accident involving a tank on a paved highway during a maneuver within CONUS should be processed under the MCA.

(3) Frequently, claims incident to noncombat activities are processed under the MCA without investigating the issue of negligence. Blast damage claims are payable if the Army caused the damage. A blast damage claim might involve a possibly negligent act such as locating a new impact area near an off-post housing area. Similar damage claims caused by nap-of-the-earth flying are payable under the MCA as noncombat activity claims, even though the act of determining whether such flight constitutes a violation of the Federal Aviation Administration's suggested flying limit of 500 feet above ground may fall under the FTCA's discretionary function exception. See FTCH § II, B4c(1).

(4) Advance payments should not be made if the claimant was wholly or partially negligent and the incident occurred in any place whose courts impose the legal doctrine of either contributory or comparative negligence. The MCA permits payment of such claims only to the extent that the law of the place of occurrence would allow individual recovery in similar circumstances. While the contributory negligence bar probably would not prevent advance payments to persons injured in the shopping mall incident described above, it would likely affect the claims of scavengers injured while removing a dud from an impact area on a military installation.

(5) Similarly, advance payments should not be made when the principal tortfeasor is a contractor engaged in manufacturing, storing or transporting ordnance or in demilitarizing chemicals or other toxic materials.

(6) Claims personnel may consider claims arising out of some civil works activities under the noncombat activity provision. Historically, the COE has exercised sole jurisdiction over certain civil works activities. As an example: in constructing a new dam, the COE will take an easement to the estimated water boundary, failing to anticipate resultant crop damage. The COE must then take an enhanced easement. However, crop damage sustained before this enhancement is compensable as a noncombat activity claim.

(7) While the MCA's noncombat activity provision should be used to pay such claims within the United States, denials should be processed under both the MCA and the FTCA, as claims are often allegedly grounded in negligence. Sample denial letters are posted on the USARCS Web site at "Claims Resources," II, b, nos. 9 and 10.

c. Soldiers' claims.

(1) A Soldier is a proper MCA claimant for an incident-to-service property loss that is not compensable under the PCA. See subparagraph 2-15a(3). But a Soldier may not recover for an incident-to-service personal injury or death under the MCA, 10 U.S.C. § 2733(b)(3). However, both the MCA and PCA bar all subrogees from recovery. To succeed on an otherwise payable MCA claim, the claimant must show negligence on the part of the United States.

(2) A foreign Soldier stationed in the United States under NATO SOFA is entitled to identical recovery. The law provides that a claim arising in the United States under a reciprocal agreement be processed in the same manner as a claim arising from acts of the U.S. Armed Forces, 10 U.S.C. §§ 2734b and 2734b, the International Agreements Claims Act (IACA). One court interpreted this language to mean that a German Soldier's personal injury claim brought in the United States under the NATO SOFA was barred by the incident-to-service doctrine, *Daberkow v. United States*, 581 F.2d 785 (9th Cir. 1978). Since the German Soldier's claim for property damage would be similarly barred under the FTCA, it would fall under the MCA, if the foreign government had no law equivalent to the PCA.

d. Bailments.

(1) Bailment claims fall under the MCA. Property of a person other than a Soldier on active duty is not covered by the PCA but is compensable under the MCA. Property damaged by a dry cleaning concessionaire is the responsibility of the concessionaire, however, and thus outside the MCA's coverage. Property left in an unattended Army club cloakroom is not covered and claims for its loss are not payable under the MCA. The mere absence of warning signs at the Army club does not provide a basis for payment. Property stored at other activities operated by morale services (such as, stables, marinas and golf courses) is usually not considered bailed property as it is stored either at the owner's risk or outside the NAFI's control.

(2) Seized and abandoned property.

(a) Property seized as evidence by military police and not returned, or returned in a damaged condition, is not compensable if the detention of goods exclusion applies, 28 U.S.C. § 2680(c). See FTCH § II, B4e. It is possible that a Fifth Amendment taking has occurred; a bailment may have been created that is cognizable under the MCA (10 U.S.C. § 2733) or the Tucker Act (28 U.S.C. § 1346). Seek guidance from USARCS.

(b) Whenever personal property is seized, minimum due process includes affording the person from whom it was seized, or its registered owner, the opportunity to regain custody. Conducting an initial inventory of the condition and amount of property seized and another inventory upon the property's return is the best way to determine damage.

(c) A claim for property abandoned on a military reservation and damaged or improperly disposed of may be compensable if the persons responsible failed to follow the disposal procedures set forth in DFAS-IN 37-1, chapter 14, para 1404. In any case, the amount for which the property was sold is recoverable from the Defense Reutilization and Marketing Office.

e. Claims for rent, utilities, custodial services and incidental damages. Claims for damages incidental to the use of real property occupied under an express or implied lease, usually during an operation, deployment or maneuver are contractual claims and should be considered under COE procedures. See paragraph 2-15m.

f. *Registered and insured mail.* See discussion at paragraphs 2–15i(3) and 2–56g.

3–4. Claims not payable

a. Claims in foreign countries.

(1) Outside the United States, the MCA provides remedies for United States inhabitants similar to those the FTCA provides within the United States. The MCA may be invoked by Soldiers, U.S. civilian employees, family members of Soldiers and U.S. civilian employees, and U.S. civilians, tourists or citizens not permanently residing in a foreign country, unless a current SOFA governs, in which case the latter provides these claimants a preemptive remedy. In both the Federal Republic of Germany (FRG) and Korea, members of the U.S. Armed Forces and its civilian component as well as their family members must file under the MCA, both for claims arising from an act or omission by a U.S. service member or civilian employee done in the performance of official duty, or for any other matter for which the force is legally responsible under receiving State law. Neither country considers the foregoing as proper claimants under the SOFA. A retired U.S. Soldier residing permanently in a NATO SOFA foreign country qualifies as a third-party claimant under the FCA or SOFA unless the retiree is currently employed by DOD and is a member of the civilian component. In certain other countries (such as Belgium, the Netherlands, France and Denmark), Soldiers and U.S. civilian employees and their family members may claim under the NATO SOFA. These parties may also file claims under the MCA if a consistent and widely available alternative claims process of this nature has been established within the receiving State.

(2) A remedy under the SOFA is preemptive. See the FTCH § II, B5h. In FRG, the German Implementation Law requires a claimant to file a NATO SOFA claim within three months of the date of accrual; Korean law sets out a requirement to file a Korean SOFA claim within three years of the date of accrual. A claim accrues on the date the claimant knew or reasonably should have known that he or she may have a claim against a member of the U.S. forces. Command claims services should direct eligible claimants to the appropriate receiving State claims office and advise them of the relevant filing period. The filing period normally starts to run immediately (for example, following a car accident with a military vehicle). It is not tolled until the claimant learns of a specific remedy or how and where to file a claim. If the filing period has expired, claimants may request the Commander USARCS to consider their cause of action under either the MCA or the FCA for good cause or excusable delay. Any such request must be filed within two years of accrual. Reinstatement is never granted without such a request, no matter how good the cause. Inform the claimant where to file a claim with the receiving State claims office (RSCO) and of the filing time requirement. If the RSCO denies the claim on the merits, for example, by finding neither liability nor damages, both the MCA and the FCA normally will bar recovery. The claimant's only option is to appeal such decision to a host nation court within the appropriate time period established by the host nation after receipt of the RSCO decision. The command claims service will review the RSCO rejection for jurisdictional reasons (for example, not a proper party claimant) and discuss the rejection with the RSCO before requesting permission from the Commander USARCS, through the Foreign Torts Branch, to consider the claim under the MCA or the FCA. See AR 27–20, paragraph 7–12. The Commander USARCS may in his discretion grant recovery if the claim is otherwise meritorious. While the SOFA claims process is exclusive, a waiver may be granted in appropriate cases; for example, where the claimant has been misadvised by government officials as to the proper remedy, provided the claimant has exercised due diligence pursuing the claim.

b. Prohibition on incidental or consequential property damage.

(1) Both the MCA and the FTCA limit compensation for property loss or damage to tangible property. See subparagraph 2–56a and the FTCH § II, C26. Incidental or consequential damages are not compensable. Examples of indirect or consequential damages include attorneys' fees associated with defending administrative or criminal charges (except where a tort for malicious prosecution lies); loss of schooling or employment due to an erroneous enlistment; bad check charges; loss of rental deposits; medical bills resulting from an adverse decision under TRICARE; third-party claim paid by a volunteer ("rich uncle"); expenses incurred in connection with erroneous permanent change of station (PCS) orders. Upon receiving such a claim, screen the related remedies found at paragraph 2–17 and direct the claimant to the appropriate one. In the absence of another remedy, accept the claim and deny it under the MCA or the FTCA, as applicable. A claimant should never be denied the right to file a claim.

(2) In any given case, if command interest so dictates and the claim, after investigation, is deemed otherwise meritorious, advise the unit commander to pursue the matter through command channels for consideration of settlement from the Secretary's contingency fund. Ensure that the claimant's consequential loss was unavoidable and resulted solely from the Army's or Department of Defense's (DOD's) actions or omissions.

(3) The claimant may send claims arising out of DOD finance operations directly to the Department of Defense Office of Hearings and Appeals (DOHA) for consideration under the Meritorious Claims Act, 31 U.S.C. § 3702. It is a prerequisite, however, that the claim not be payable by other means, such as from agency funds.

(4) Do not advise a claimant to seek a private relief bill (considered by Congress) as such advice implies that the executive branch would view the requested relief with favor.

3–5. Applicable law

a. Until 1958, the MCA expressly limited payment of personal injury and death claims to out-of-pocket expenses. In enacting the MCA, Congress permitted the military services to conduct their necessary operations while maintaining

public cooperation and, in particular, the local community's good will. Payments duplicating those already made by others (such as insurers) would hinder, rather than further, these aims. Collateral source payments fall into this category. For definition, discussion, and current case law on the collateral source rule, see FTCH § II, C10. Similarly, payments to insurance companies as subrogees are barred. The regulations implementing both the PCA and the FCA have always barred such payments. Since the MCA serves the same general purposes as does the FCA, it provides no new reason to pay subrogees. Note, however, that a Soldier may file for property loss or damage pursuant to the MCA without first filing with an insurer.

b. Only one claim is permitted for wrongful death. Where multiple claims are submitted, inform the representative in writing that separate claims for the estate and each survivor are not permitted and the multiple claims will be acted on as one claim. If denied, all claims will be denied as one. If paid, they will be incorporated into one settlement agreement. Because all parties are in effect filing one claim, the initial \$100,000 to be paid from the claims expenditure allowance (CEA) is paid only once, the rest by the Judgment Fund.

3-6. Settlement authority

See paragraph 2-69.

3-7. Action on appeal

Appeals are time-consuming and costly. The higher authority will consider an appeal only if the issues are clearly defined, the Army's position is well supported, and the claimant has been given a meaningful opportunity to support the claim (and has failed to do so) after full disclosure of the legal requirements for considering the claim and the appeal. See paragraphs 2-74 through 2-76 inclusive, and paragraph 2-78.

a. Upon receipt of an appeal, follow these guidelines before forwarding the file to the appellate authority for final action:

(1) Under principles of American tort law, the burden of proof is on the claimant. This means that a claim should not be denied until the claimant has been informed in very specific terms what proof is necessary, particularly if the claimant is unrepresented and has thus far failed to submit the required proof. Tell the claimant exactly what documents or proof is needed and why. Follow up these discussions with written confirmation. The same holds true for claimant interviews. If the claimant asks the reason for the interview, respond that it is being held to determine the basis for the claim (liability) as well as to obtain information concerning damages.

(2) Rather than rely on a police report in an accident case, go to the scene with the claimant, the Army driver and the police, if necessary. During a damages interview, inform the claimant that settlement is being considered, but never concede liability. In a medical malpractice or other professional negligence action, outline the Army's position after the Army's expert review is completed, without naming the source, except, perhaps, where claimants agree to reciprocate by supplying their own expert opinions. In outlining the Army's position, inform the claimant that, under the FTCA, the court would require an expert opinion before filing suit and that, even though the MCA does not offer a judicial remedy, its procedures also require an expert opinion. See chapter 2 for guidance on investigative methods and techniques and settlement procedures.

b. In a property damage claim, compensation should be limited to documented damages and based on applicable law. Do not add nuisance value solely to settle the claim. This may lead to conflict about whether consequential damages are recoverable. AR 27-20, paragraph 3-5d, lists elements of damages that are not payable. On the other hand, for a claim outside the United States, do not impose the restrictions set forth in AR 27-20, chapter 11 (such as the requirement to order parts through Army and Air Force Exchange Service (AAFES) to avoid the imposition of duty in a foreign country) unless general state or federal law upholds the restriction.

3-8. Payment of costs, settlements, and judgments related to certain medical malpractice claims

a. The MCA procedures may be used to process a claim against the United States for the actions of Army medical trainees engaged in training agreements under which Army health care personnel train at civilian medical treatment facilities (MTFs). Most of these agreements provide that the Army, not the civilian institution, will consider claims arising out of Army trainees' related actions. Applicable state law may subsume such claims under the FTCA; however, the Department of Justice (DOJ) maintains that if the trainee is a loaned servant under state law, then the claim is not payable thereunder despite the plain language of the training agreement. Since this position could deter civilian institutions from entering into future training agreements, in such cases process the claim under the MCA and base any unauthorized payments on state law, since the medical trainee's tort is not cognizable as a noncombat activity claim.

b. The FTCA's procedures may not be advisable for handling certain incidents such as those in which the non-Department of the Army (DA) attending physician, not the DA trainee, is the primary tortfeasor. Discuss the individual case with the appropriate area action officer (AAO). Perhaps the injured party has filed a civil suit against the institution, and the latter is requesting indemnification or contribution. On the other hand, the trainee may be the principal tortfeasor, even if the patient has filed against only the institution or attending physician. Forward all such requests for indemnification or contribution to USARCS.

c. Along with their movement orders, DA health care personnel training at civilian MTFs receive detailed information about their responsibilities if they are involved in a potentially compensable event (PCE). They are instructed to report any lawsuit filed against the trainee individually to both USARCS and, under AR 27–40, the Army Litigation Center. Nevertheless, there have been unreported individual lawsuits in which a government health care provider hired an attorney and prepared a defense. Courts have held that the FTCA’s immunity provisions do not preclude such suits, despite the Westfall Act, 28 U.S.C. § 2679; they may be filed under the Gonzales Act, 10 U.S.C. § 1089. The Westfall Act did not repeal the earlier-enacted Gonzales Act, which permits suit on willful torts, waiving the FTCA exclusion found at 28 U.S.C. § 2680(h). Thus, a plaintiff may file an individual lawsuit against the Department of the Army trainee for physician-patient sexual assault despite the statutory bar at 28 U.S.C. § 2679. See subpara 2–47f(7). Costs and fees as well as awards may be paid under the MCA. See FTCH § II, D1.

d. Notify Army Litigation Division, Tort Litigation Branch, of any lawsuits filed against the training institution regarding the care provided by DA health care personnel training at civilian MTFs.

3–9. Payment of costs, settlements, and judgments related to certain legal malpractice claims

a. The Westfall Act amended the FTCA to preclude suit against a federal employee acting within the scope of employment, 28 U.S.C. § 2679. Accordingly, within the United States, there should be little reliance on the MCA’s procedures. In fact, USARCS has not processed any such claims.

b. The MCA may be used outside the United States to award costs resulting from a suit in a foreign court. NATO SOFA, Article VIII, para 5(g) precludes the enforcement of any such judgment against a member of the force or civilian component acting within the performance of official duties. USARCS has not processed any such claims.

Chapter 4 Claims Cognizable under the Federal Tort Claims Act

4–1. Authority

Culminating years of effort, Congress enacted the Federal Tort Claims Act (FTCA), in 1946, applying it retroactively to claims accruing on or after 1 January 1945, 60 Stat. 842, 28 U.S.C. §§ 2671–2680. Since the early 1920s, Congress had considered earlier versions of the FTCA in order to stanch the flow of private relief bills besieging it, finally doing so by enacting the FTCA. This law waives the government’s sovereign immunity to tort liability. Its waiver is limited by the conditions it imposes on filing and by numerous exclusions to its coverage. These limitations and restrictions must be strictly construed in favor of the United States, *McNeil v. United States*, 508 U.S. 106 (1993).

4–2. Scope

a. Under the FTCA, the United States is liable in the same manner and to the same extent as a private individual under like circumstances, 28 U.S.C. § 2674. The whole law of the place of occurrence applies. An act or omission rises to the status of an FTCA tort only if the act or omission is an actionable tort in the state where the cause of action arose. The FTCA does not waive immunity for a tort arising from a violation of the U.S. Constitution unless the violation constitutes a state tort as well. If the applicable state law deems the violation a tort, the action must be brought as a state tort rather than as a constitutional tort. See paragraphs 2–35, 2–36, and 2–51.

b. Originally, the FTCA permitted persons to sue without first filing an administrative claim, although claims for amounts up to \$1,000 could be brought against the agency concerned. Seeking to lighten the load on the courts and to permit agencies to settle meritorious claims, the Congress amended the FTCA in 1966, requiring an administrative claim as a condition precedent to suit. Under that amendment, effective February 1967, the claimant may file suit six months after the date of filing an administrative claim, for any reason and without regard to the status of any negotiations, 28 U.S.C. § 2675. When suit is filed, the federal agency loses control of the claim and any settlement executed thereafter is controlled by the Department of Justice (DOJ) or the U.S. Attorney. The federal agency plays an advisory role and frequently conducts most pretrial discovery. For Army cases, the Army Litigation Center or its delegee fulfills the Department of Army (DA’s) role.

c. Whether the tortfeasor is, or is not, a federal employee is a question of federal law in any claim arising under the FTCA. The compilation of federal employees set forth at AR 27–20, paragraph 2–2b, is based on USARCS’ experience over the years but is not intended to be inclusive. Similarly, whether the FTCA claim involves a federal agency is a question of federal law, but the courts have decided most of these issues. For example, the courts have long considered NAFIs and AAFES to be federal agencies. Questions still exist, however, about military spouses’ clubs, thrift shops, and other private organizations operating on post or existing solely to support the military community. Depending primarily on the benefits accruing to the government, a private association may be a federal agency for FTCA purposes. Interpretation of the statute of limitations is also a federal question. See paragraph 2–44. The DOJ has always considered the statute of limitations requirement contained in 28 U.S.C. § 2401(b) jurisdictional in nature. The doctrine of equitable tolling discussed in a 1990 Supreme Court decision casts doubt on this position, however, *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), modified by *Lampf, Pleva, Lipkind, Prupis and Petigrow v.*

Gilbertson, 501 U.S. 350 (1991). See FTCH § I, D1c. Scope of employment is a state law question. See paragraph 2–46 and FTCH § I, B3.

d. The Army’s administrative claims settlement program has been a success since its inception in 1967. Many federal agencies have no such program. Others maintain only minimal programs. The Army’s program has succeeded because it calls for the area claims office (ACO) or claims processing office (CPO) to coordinate from the outset with the appropriate area action officer (AAO), to investigate and select claims for favorable action promptly, and to communicate with the claimant to maintain the latter’s interest in pursuing the administrative process instead of suing. The brief six-month period before suit is permitted is designed to compel attention and quick action.

e. The U.S. Attorney General’s regulations implementing the FTCA, 28 C.F.R. §§ 14.1–14.11 are available on www.gpoaccess.gov. A legislative history of the FTCA that includes a bibliography is posted on the USARCS Web site on JAGCNet at “Claims Resources,” I, a, 3(a).

4–3. Claims payable

For discussion on whether to consider a claim under the FTCA or the MCA’s noncombat activities provision, see paragraph 3–3. See also, chapter 2, Sections V and VI, Determination of Liability and Determination of Damages, respectively.

4–4. Claims not payable

A claim is not payable if it is identified as an exclusion in paragraphs 2–36 through 2–43.

4–5. Applicable law

See para 4–2, as well as chapter 2, Sections V and VI, Determination of Liability and Determination of Damages, respectively.

4–6. Settlement authority

See paragraph 2–69.

4–7. Reconsideration

See paragraph 2–78.

Chapter 5 Non-Scope Claims Act

5–1. Statutory authority

The Non-Scope Claims Act (NSCA), 10 U.S.C. § 2737, was enacted in 1962 as a supplement to Article 139, Uniform Code of Military Justice (UCMJ), a recovery statute that requires proof of a willful act and limits compensation to property loss or damage. The NSCA does not require proof of willful act and covers personal injury as well as property damage. Both the NSCA and Article 139 are designed to provide compensation for damage caused by Soldiers who are not acting within the scope of their employment. In this sense, they parallel the Foreign Claims Act (FCA), which also has no scope requirement.

5–2. Scope

Payments under the NSCA are limited to \$1,000 of non-indemnifiable (out-of-pocket) expenses arising from property loss, personal injury or death caused by the non-scope use of a government-owned vehicle (GOV), whether on or off post, or the non-scope use of other government property, such as a weapon or golf cart, on post. Because it is Department of Justice (DOJ) policy that a claim may not be settled if other claims, actual or potential, arising out of the same incident might lead to litigation, all parties to the settlement must agree that it is final. This requirement even applies to the insurer who may have paid for property loss or medical bills, even though the insurer is not a proper claimant under the Act, 28 C.F.R. § 14.6. Where the evidence of a non-scope act is clear and convincing, the requirement that all parties agree to the settlement poses no problem. Often, however, the scope determination may not be clear and the agreement of all parties may be difficult to obtain.

5–3. Claims payable

a. Consider applying the NSCA whenever a decision is reached to deny an FTCA, Military Claims Act (MCA), or National Guard Claims Act (NGCA) claim because the government driver or user was not within scope.

b. To enable such a determination, the officer or government employee who supervised the user of the property should furnish a scope certificate, posted on the USARCS Web site at “Claims Resources,” II, a, no. 22. The sixth numbered paragraph of the scope certificate applies solely to the NGCA. Other formats may be used. A checklist for scope of duty analysis is also posted on the USARCS Web site at “Claims Resources,” II, a, no. 8. The scope

certificate is not definitive and additional investigation should be conducted when circumstances indicate, for example, where time and distance factors appear suspicious (such as a recruiter driving an applicant home in a GOV at 0200, and home is 50 miles away from the recruiter's office). Using a GOV without authority is punishable under the UCMJ, but it is not necessarily outside scope if such use is usual and customary, for example, driving a GOV off post to a fast food establishment. Using a vehicle to drop off one's dry cleaning while on a mission to obtain supplies is not necessarily non scope, if the applicable state law has adopted the dual purpose doctrine, which means that an employee may be acting for himself and his employer simultaneously. Intoxication alone may not remove a driver from the scope of employment. Always examine the applicable state law in light of the factual setting.

c. Practical aspects are usually involved in a scope determination. Scope is presumed whenever an authorized driver is operating an Army or official vehicle. This means that the burden of proving otherwise rests on the United States. Court decisions in FTCA cases indicate a general reluctance to hold a driver outside scope. This is true particularly when the United States is the sole source for paying a claim, as, for example, when the government driver or employee does not have POV or personal liability insurance or when such coverage is limited, the injuries are serious, and fair compensation would exceed the monetary limits of the personal insurance coverage. See FTCH § II, B3.

d. Experience indicates that a thorough and prompt investigation of a scope issue may result in a court finding that the Soldier or employee was not acting within the scope of employment. In doubtful cases, consider compromising the value of FTCA, MCA, or NGCA claims if the claimant rejects a chapter 5 settlement.

5-4. Claims partially payable

These are examples of claims that are partially payable:

a. Collision insurance covers the claimant's automobile, with a deductible amount of \$250. While the claimant is sitting in the properly parked vehicle, it is struck from the rear by an Army truck driven by a DA civilian, who has misappropriated the truck. The claimant sustains personal injuries requiring hospitalization for six days and incurs, during that time, actual medical and hospital expenses amounting to \$1,500. The claimant has no medical or hospitalization insurance. The damage to the vehicle amounts to \$1,000. The insurance carrier reimburses the claimant \$750 for the vehicle damage and becomes subrogated in that amount under the policy terms. The claimant files a claim in the amount of \$1,500 for medical and hospital expenses. The claim is allowable in the total amount of \$1,000, consisting of \$250, the insurance deductible for property damage, and \$750 of the medical and hospital expenses. The amounts claimed for medical and hospital expenses and for property damage constitute separable interests in a single claim that are not allowed in excess of \$1,000 under this chapter. The claimant's insurer is not a proper party claimant, and no payment is allowable for the insurer's subrogated interest. The insurer must agree to the settlement.

b. Claimant holds an insurance policy authorizing reimbursement of up to \$500 for the reasonable costs of medical and hospital expense incurred for personal injuries. While visiting an Army installation, the claimant is wounded when a Soldier who has stolen a government-issue 9-mm pistol negligently discharges it. The claimant is hospitalized at a civilian hospital and incurs medical and hospital expenses of \$750. The claimant may be paid \$250, the amount allowable for reasonable medical and hospital expenses actually incurred after deducting \$500 legally recoverable under the insurance policy.

5-5. Settlement authority

The settlement authority will usually be the same official as the settlement authority for the original claim filed under the FTCA, MCA or NGCA as applicable. Any denial based on non scope, however, must first be considered under the NSCA. The applicable law is found in FTCH, § II, B3.

5-6. Reconsideration

Since a claim is not presented first under the NSCA, consider a request for reconsideration under the procedures that apply to the FTCA or, if it is not cognizable under the FTCA, as an appeal under the MCA or NGCA.

Chapter 6 National Guard Claims Act

6-1. Statutory authority

a. Following an explosion at a missile site in Middletown, New Jersey, Congress in 1960 enacted the National Guard Claims Act (NGCA), 32 U.S.C. § 715. At the time, one half of all Army missile sites were manned by the active Army and the other half by U.S. Army National Guard (ARNG) members employed in civilian technician status. The explosion occurred at an Army site and resulting claims were settled under the Military Claims Act (MCA). Because the MCA was intended not to cover claims arising out of the acts or omissions of state ARNG personnel serving in technician status under state control, Congress enacted a statute with language identical to that of the MCA, intending that it cover the acts of technicians performing federal missions as well as ARNG members serving in a federally funded training or duty status, under state control and on state-issued orders.

b. In 1968, all National Guard technicians were designated federal employees, 32 U.S.C. § 709. Because these employees perform both federal and state duties, the federal-state dichotomy affecting their status remains alive today. Additionally, a technician undergoing federally funded training is considered to hold the same status as any ARNG member on federally funded training or duty. ARNG personnel performing federally funded training duty under 32 U.S.C. §§ 316, 502, 503, 504, and 505 were subsumed into FTCA coverage on 29 December 1981 by amendment to 28 U.S.C. § 2671. This amendment sought to ensure that ARNG personnel were protected by the Driver's Act when subjected to individual suits, 28 U.S.C. § 2679.

6-2. Scope

a. The ARNG, as a community-based force, often performs work incident to full-time National Guard duty training (FTNGDT), or incident to duty training (IDT) in support of the local community and various private organizations. Such activities are authorized under a variety of statutes (such as 10 U.S.C. §§ 2012, 2558, and 32 U.S.C. § 508), a number of which apply to all the military components, not just the ARNG. Claims arising from the involvement of ARNG Soldiers in such statutorily sanctioned activities are within the scope of employment for purposes of the FTCA. The fact that such activities might also be performed in a state active duty status, with exclusively state claims liability, is irrelevant in processing claims arising from such activities conducted in a FTNGD or IDT status under the FTCA.

b. Because claims arising from the acts or omissions of both technicians and ARNG personnel on training or other federally-funded duty fall under the FTCA, the NGCA's scope differs from that of the MCA, even though pertinent language in the two statutes is identical. Both technicians and ARNG personnel performing training or other federally-funded training duty remain under state control. If a person in either category is performing a state mission or function, particularly at state installation armories, the investigation must determine where there is a direct benefit to the federal government. Each claim, particularly those arising at ARNG installations and armories, must be investigated with this difference in mind. See FTCH § II, B5b for applicable case law.

6-3. Claims payable

See chapter 3 of this publication.

6-4. Claims not payable

a. See the list of claims not payable set forth at AR 27-20, paragraph 3-4, and the discussion at paragraph 3-4 of this publication.

b. Additionally, claims for damage to state-owned property caused by an ARNG member of that particular state are not payable.

c. Claims for injuries or death arising from the operation or administration of a state owned or leased ARNG camp or armory are not payable. Examples of such claims are a slip and fall injury due to a defective or improperly maintained surface and an injury from removing an explosive device from an impact area.

6-5. Applicable law

See chapter 3 of this publication.

6-6. Settlement authority

See chapter 3 of this publication.

6-7. Action on appeal

See chapter 3 of this publication.

Chapter 7

Status of Forces and Other International Agreements

Section I

General

7-1. Statutory authority

a. *Treaties.* In 1954, Congress enacted the International Agreements Claims Act (IACA), which authorizes payment of obligations under Treaties and other similar international agreements. The IACA is codified in two separate U.S. Code sections, 10 U.S.C. §§ 2734a and 2734b. The statute provides authority for payment of obligations arising under reciprocal claims provisions in treaties and other similar international agreements, but is not applicable to executive agreements. Section 2734a provides authority for the U.S. government to pay claims arising out of incidents within the U.S. caused by members of other forces. Section 2734b provides the authority for the U.S. government to reimburse foreign governments for the U.S. share of claims paid under an international reciprocal claims agreement. The North

Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA) is the first international agreement to which the IACA applied and in fact the IACA was enacted to provide for payment of obligations arising under the NATO SOFA. The NATO SOFA is supplemented by the 1996 Partnership for Peace Agreement, which extended the provisions of Article VIII to claims arising within its signatory States. The IACA also applies to other agreements. A current list of known agreements in force is maintained on the USARCS Web site at "Claims Resources," I, a, 8, (k). For further information contact the Foreign Torts Branch of USARCS.

b. Common terminology from applicable SOFAs.

(1) *Contracting party and third party.* SOFAs generally recognize two kinds of claimants:

(a) A member of the sending State forces may be a proper party claimant. However, under most SOFAs, members of the U.S. forces overseas and their family members are not proper party claimants.

(b) A third party is a person or entity, such as an individual, association, enterprise, organization, or even another nation, that is not a party to the SOFA. A political subdivision of a Party may be a third party.

(2) *Force and civilian component.* Many provisions of SOFAs apply to damages and injuries caused by members of a force or civilian component. These terms are usually defined in the SOFA as follows:

(a) "Force" means the personnel belonging to the land, sea, or air armed services of one Party, when situated in the territory of another Party in the North Atlantic Treaty area in connection with their official duties, provided that the two contracting parties concerned may agree that certain individuals, units, or formations shall not be regarded as constituting or included in a force for the purposes of the present agreement (NATO SOFA, Article I, para 1(a)). For example, agreements between the United States and other NATO countries further implementing the NATO SOFA often provide that attachés, Military Assistance Advisory Group (MAAG) personnel, or other personnel who enjoy diplomatic immunity are not considered members of the U.S. force. The German Supplemental Agreement to the NATO SOFA provides that service attachés, members of their staffs, and any other service personnel enjoying diplomatic or other special status in the Federal Republic of Germany (FRG) shall not be regarded as constituting or included in a force (T.I.A.S. No. 5351). However, other agreements differ from the German agreement. For example, agreements between the United States and Norway (T.I.A.S. No. 2950) and the United States and Denmark (T.I.A.S. No. 4002) provide that members of the U.S. MAAG will not be considered in a force. The latter agreements also exclude offshore procurement program personnel. U.S. Army regulations state that claims arising from the activities of MAAG personnel in foreign countries are not generally processed under the NATO SOFA or similar agreements but by U.S. authorities under the standard procedures for the administrative settlement of foreign claims, AR 1-75, chapter 6. "Standard procedures" here refers to settlements under the Military Claims Act (MCA) or FCA (see AR 27-20, chaps 3 and 10).

(b) "Civilian component" means the civilians accompanying a force of a Party, who are employed by an armed service of that party, who are not stateless persons or nationals of any state that is not a party to the North Atlantic Treaty, and who are neither nationals of, nor ordinarily resident in, the state in which the force is located (NATO SOFA, Art. I, para 1(b)). Most U.S. citizen civilian employees of the U.S. armed services and their supporting nonappropriated fund (NAF) activities located in NATO countries may be classified as members of a civilian component. Most locally hired foreign employees of the U.S. armed services and their NAF activities do not qualify as members of a civilian component, however, because such persons ordinarily are nationals of, or resident in, the state in which the force is located. Dependents of members of a force or a civilian component are not members of a force or a civilian component unless they are employed by an armed service. Damages and injuries caused by dependents who do not qualify as members of the civilian component fall outside the claims provisions of the NATO SOFA.

(3) *Sending State and receiving State.* Two other terms are pertinent to the claims provisions of the NATO SOFA:

(a) "Sending State" is the Party whose force is situated in a foreign country, (NATO SOFA, Art. I, para 1(d)).

(b) "Receiving State" is the Party in whose territory the sending State force or civilian component is located, whether it is stationed there or passing in transit (NATO SOFA Art. I, para 1(e)).

c. Single-service responsibility. The Department of Defense (DOD) has assigned single-service responsibility for the investigation and settlement of claims including but not limited to countries in which a SOFA is in force. See Department of Defense Directive (DODI) 5515.08. A mailing address list for single-service claims offices is also on the USARCS Web site at VI, "Tables Listing Claims Offices Worldwide."

7-2. Scope of current agreements in force

a. Types of claims. Articles of SOFAs applicable to claims cover three types of claims:

(1) Intergovernmental claims by one Party against another Party; for example, NATO SOFA, Art. VIII, paragraphs 1 through 4.

(2) Claims by third parties for damages they sustain in a receiving State, that arise either out of the acts or omissions of members of a force or civilian component done in the performance of official duty or out of any other act, omission, or occurrence for which a force or civilian component is legally responsible. These are the "scope" claims falling under, for example, the NATO SOFA, Article VIII, paragraph 5.

(3) Claims by Parties or third parties, which, but for the Agreement's provisions, would be asserted against individual members of a force or civilian component, and which arise out of tortious acts or omissions in the receiving

State done outside the performance of official duty. These are the "non-scope" claims falling under, for example, NATO SOFA, Article VIII, paragraph 6. These claims are processed under the Foreign Claims Act (FCA), see chapter 10.

(4) Certain types of claims are expressly excluded from consideration under Article VIII. These include contractual claims based upon private contracts of members of the force or civilian component with third parties, for example, NATO SOFA, Art. VIII, para 5; and third-party claims of a maritime nature, for example, NATO SOFA, Art. VIII, paragraph 5(h). However, claims for death or personal injury arising from maritime operations that are not waived may be covered under the SOFA. In addition, certain claims of Parties against each other are waived either wholly or in part.

b. Discussion. The following is a discussion of each of the three types of Article VIII claims. The same analysis applies to the other applicable SOFAs.

(1) *Intergovernmental claims.* Paras 1 through 4 of Article VIII concern claims that one Party may bring against another Party. Of course, intergovernmental claims covered by Article VIII are limited to those exhibiting some connection with the North Atlantic Treaty implementation. International claims of one member nation against another member nation that do not arise from NATO-related activities are beyond Article VIII scope. Moreover, the scope of intergovernmental claims covered by Article VIII is rather narrowly defined, so some claims related to NATO operations, for example, contractual claims between parties (NATO SOFA, Art. VIII, paras 1 and 2) and war damage claims (NATO SOFA, Art. XV, para 1), do not necessarily fall within its terms. Intergovernmental claims are divided into four categories:

(a) *Claims for damage to military property.* Pursuant to Article VIII, para 1, each Party waives its claims for damage to property owned by it and used by its armed services when the damage is caused by a member or employee of the armed services of another Party in the execution of the latter Party's duties in connection with the operation of the North Atlantic Treaty. The waiver would apply, for example, when a receiving State vehicle is damaged in a collision with a sending State vehicle during a joint training exercise. The waiver also applies when the property damage is caused by the use of a vehicle, vessel, or aircraft owned by another Party and used by its armed services in connection with the North Atlantic Treaty. Further, even when the military vehicle, vessel, or aircraft that caused the damage is not being used in connection with North Atlantic Treaty operation, claims are waived (NATO SOFA, Art. VIII, para 1(ii)). For the waiver provisions to operate, the military property damaged or the military personnel or instrumentalities causing the damage must have some relationship with the North Atlantic Treaty operation. In practice, however, military property belonging to a NATO sending State located within a NATO receiving State is normally presumed to provide the needed NATO link.

(b) *Claims for damage to nonmilitary property.* Article VIII, para 2, provides for a waiver, in an amount of \$1,400 or its equivalent, for damage to property owned by a Party but not used by that Party's armed services, NATO SOFA, Art. VIII, paragraph 2(f). DOD does not construe this waiver as establishing a "deductible" rule. If, for example, a vehicle belonging to a political subdivision of the Federal Republic of Germany is damaged in a collision with a U.S. forces vehicle while the U.S. vehicle is being operated in the scope of duty, the political subdivision claim will not be waived unless the damage sustained was less than \$1,400. Liability for damage to nonmilitary national property in amounts in excess of \$1,400 is apportioned between the Party responsible for the damage and the Party whose property is damaged in accordance with the formulas set out in Article VIII, paras 5(e)(i), (ii), and (iii). If the Parties are unable to resolve the issue of liability for damage to nonmilitary property by mutual agreement, the SOFA provides for arbitration procedure (NATO SOFA, Art. VIII, para 2(a)). Property owned by a Party's political subdivision is not property owned by the Party unless determined to be national property. If it is determined that the property of the political subdivision is not national property, the political subdivision may then be recognized as a proper third-party claimant under Article VIII, para 5.

(c) *Maritime salvage claims.* Article VIII, para 1, provides that claims for maritime salvage by one Party against another will be waived when the vessel or cargo salvaged is owned by another Party and used by its armed services in scope of duty. In addition to the usual concepts relied upon to establish ownership, a vessel is considered to be owned by a Party when the shipowner has leased it to the Party under bareboat charter (in a "bareboat charter" the Party taking the vessel under lease, the charterer, maintains sole possession, control, and management of the vessel), the Party has requisitioned the vessel on bareboat terms, or has seized it as a prize. A prize is a vessel belonging to a belligerent power, apprehended or forcibly captured at sea by a warship of the other belligerent, claimed as enemy property. Such a prize is therefore liable to appropriation and condemnation under the law of war. These concepts of vessel ownership (bareboat charter or seized prize) also apply to military vessels.

(d) *Claims for injury to or death of a Soldier.* Each Party to the NATO SOFA waives any claims it might have against other Parties for injury to or death of members of its armed services occurring while they are engaged in the performance of official duties (NATO SOFA, Art. VIII, para 4). However, the waiver does not extend to injuries to or deaths of civilian employees of the armed services of the Parties. It applies only to claims that one Party might assert against another and does not in any way affect a proper third-party claimant's right to assert a claim under Article VIII, para 5 or 6.

(2) *Third-party scope claims.* As stated in subparagraph 7-1b, a third party is an individual or entity that is not a Party to the NATO SOFA. A political subdivision of a Party is considered a third party, provided that it is established

as an entity separate from the national government. Article VIII, para 5, sets forth procedures for settling and paying certain claims asserted by third parties for damages and injuries attributable to the duty-related acts, omissions or activities of Parties' visiting forces and civilian components while located in the territory of other Parties. A claim for damage or personal injury arising out of an act or omission of a member of a force or civilian component in the performance of official duties or under circumstances that would make the force otherwise "legally responsible" under the receiving State's law falls under NATO SOFA Art. VIII, para 5. An act, omission or occurrence for which a force or civilian component is legally responsible may include liability under the law of the receiving State based on absolute or strict liability. The term "legally responsible" is defined by local law and custom rather than by American concepts of tort liability. Third parties are the only claimants to whom Article VIII, paragraph 5, applies. In the Korean SOFA, Article V holds the U.S. harmless from claims by third parties arising from the U.S. use of installations in Korea.

(3) *Non-scope claims.* Non-scope claims fall under the FCA as discussed in chapter 10 of this publication.

c. Presentation of claims. NATO SOFA Article VIII, paragraph 5, provides that third-party claimants will file their claims in accordance with the laws and regulations of the receiving State as though the claim had arisen from activities of that State's own armed forces. Thus, a claim arising from U.S. Army activities in Germany would properly be presented to German authorities and not to the U.S. Army. The German authorities would then adjudicate the claim under German law. Receiving State authorities must designate offices where claims may be presented. While claims predicated upon a sending State's responsibility under the SOFA are properly filed with the receiving State's designated authorities, claimants may also seek redress from the individual tortfeasor by any means available under local law (NATO SOFA, Art. VIII, para 9). Both sending and receiving States must be alert to discover actions brought against individual tortfeasors so that the remedy provided by Article VIII may be substituted for direct action against the individual. Although possibly subject to personal judgment, a member of a force or civilian component is immune from proceedings for enforcement of any judgment against him or her as long as the claim arose out of the performance of official duties.

Section II

Claims Arising in the United States

7-3. Claims payable

See paragraphs 3-3, 4-3, and 8-4 of this publication.

7-4. Claims not payable

See paragraphs 3-4, 4-4, and 8-5 of this publication.

7-5. Notification of incidents

a. An area claims office (ACO) or claims processing office (CPO) that learns of an incident must report it to USARCS immediately. As USARCS is the receiving State office in the United States, this requirement applies to all uniformed services as well as to DOD. Puerto Rico and part of Hawaii do not fall under the NATO SOFA as they are south of the 20th parallel or Tropic of Cancer.

b. USARCS, as sole liaison to sending State representatives, should be informed of any local contact or inquiry such as one related to a joint maneuver by a member of the NATO SOFA force.

7-6. Investigation

Claims personnel will process claims arising from acts or omissions done in the performance of official duty by members of a foreign force or civilian component under the same provisions as those governing the acts or omissions of the U.S. armed services' Soldiers or civilian employees; responsibility and the manner of investigation are the same. Forward a mirror file to USARCS as required for claims arising under chapters 3, 4, and 8, regardless of the amount claimed. See chapter 2, Sections I and II, Claims Investigative Responsibility and Filing and Receipt of Claims, respectively. The term "in the performance of official duty" is considered to be the same as "within scope of employment." USARCS will obtain a statement on whether the claim arose from the performance of official duties from the sending State.

7-7. Settlement authority

Settlement authority is not delegated to any ACO or CPO but is reserved for the Commander USARCS and higher authority as set forth in chapters 3, 4, or 8. DODI 5515.08 assigns USARCS single service responsibility for all SOFA claims arising within the United States.

7-8. Assistance to foreign forces

NATO SOFA, Article VIII, para 10, provides for mutual cooperation in the procuring of evidence. Claims personnel should provide sending State forces the same assistance and guidance as they do unit claims officers.

Section III

Claims in Foreign Countries

7-9. Claims procedures

See AR 27-20, paragraph 7-13.

7-10. Responsibilities

See AR 27-20, paragraph 7-14

Chapter 8

Maritime Claims

Section I

General

8-1. Statutory authority

a. The Army Maritime Claims Settlement Act (AMCSA), Act of 29 November 1989, Pub. L. No. 101-189, 10 U.S.C. §§ 4804, 4806, authorizes the Army to settle maritime tort and salvage claims for or against it. (See FTCH § II, B4f, for case law.)

(1) Upon its enactment on 10 August 1956, ch 1041, § 1, 70 Stat. 270, the AMCSA authorized the Army to settle claims in amounts up to \$500,000 and required Congress to certify any payment in settlement above that amount. The present AMCSA retains the same requirement. When it was first enacted, the statute authorized the service Secretary to delegate only \$1,000 in settlement authority. By amendment, Congress raised the level of delegable settlement authority to \$10,000, Act of 29 August 1972, Pub. L. No. 92-415, and then to \$100,000, the level presently in effect. Act of 29 November 1989, Pub. L. No. 101-189. Similar Acts conferred corresponding maritime claims settlement authority upon the Department of the Navy (10 U.S.C. § 7363 and §§ 7621-7623) and the Department of the Air Force (10 U.S.C. §§ 9801-9804 and § 9806).

(2) When first enacted, the AMCSA limited the Army's settlement authority to claims for damage caused by an Army vessel and for towing or salvage of an Army vessel. Subsequent amendments expanded settlement authority over any maritime tort committed by an Army agent or employee, 10 U.S.C. § 4802.

(3) The Army's settlement authority is not restricted to claims arising only within the United States or upon the high seas. Maritime claims arising within another country's territorial waters may be paid under either the AMCSA, the Military Claims Act (MCA) or the Foreign Claims Act (FCA). Normally, the AMCSA authority and procedures will be the primary basis for settlement of maritime claims arising in the territorial waters of other countries. See AR 27-20, paragraphs 3-3c and 10-2c.

(4) The AMCSA requires that affirmative maritime claims brought by the Army must fall "within the admiralty jurisdiction of the United States," unless the Army seeks compensation for damage caused by a vessel or floating object, 10 U.S.C. § 4803(a)(1). Therefore, if collection efforts fail, a foreign court is the only appropriate venue for a lawsuit, and the claim is not for damage caused by a vessel or floating object, the Army must report it to the Department of Justice (DOJ) for resolution.

(5) Unlike several other affirmative claims statutes, the AMCSA's provisions prohibit the Army from retaining the funds it recovers; the Army must remit these monies to the Financial Management Service (FMS) for deposit to the U.S. Treasury.

b. The Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401-467n, specifically authorizes the U.S. Army Corps of Engineers (COE) to assert claims against shipowners and vessels causing damage to the COE's navigational structures, 33 U.S.C. §§ 408 and 412. This statute does not require a finding of fault for the imposition of liability and the Limitation of Shipowners Liability Act does not limit the shipowner's liability on these claims. Funds that the COE recovers this way are credited to the appropriation for the improvement of the waterway in which the damage occurred, 33 U.S.C. § 412.

c. The North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA) (<http://www.nato.int/docu/basicxt/b510619a.htm>) obligates the United States, as the receiving State, to adjudicate and pay any claim arising within the United States incident to the official duties of a member of a sending State force. Once the claim has been paid, the sending State reimburses the receiving State according to a formula set forth in the treaty. See NATO SOFA, Article VIII, and AR 27-20, chapter 7. Under 10 U.S.C. § 2734a and § 2734b, the International Agreements Claims Act (IACA) that implements the NATO SOFA, the United States, as the receiving State, is responsible for settling maritime personal injury claims, but not maritime property damage claims, arising from the operation of any sending State's naval vessels in U.S. territorial waters. The corresponding settlement authority is set forth therein.

8-2. Related statutes

a. The AMCSA authorizes the Army to settle maritime claims but, unlike the FTCA, it does not expressly waive the United States' sovereign immunity from such claims. The primary statutory waivers of sovereign immunity allowing maritime claims against the United States are found in the Suits in Admiralty Act (SIAA), 46 U.S.C. §§ 30901-30918, and the Public Vessels Act (PVA), 46 U.S.C. §§ 31101-31113.

(1) Because both the SIAA and PVA were enacted before the FTCA, they are the exclusive remedies for maritime claims brought against the United States. The FTCA specifically bars claims falling within the federal maritime jurisdiction for which either the SIAA or the PVA provides a remedy, 28 U.S.C. § 2680(d).

(2) Upon its 1922 enactment, the SIAA waived sovereign immunity for maritime claims under circumstances similar to those in which the plaintiff could sue a private person. It covered claims arising from the operation of a vessel, but only one "employed as a merchant vessel." The PVA, enacted in 1925, authorized settlement of suits arising from the operation of other public vessels, such as warships. Notably, a 1960 amendment repealed the SIAA's "merchant vessel" restriction. Because the PVA was not repealed, however, the coverage that these two statutes provide overlaps.

(3) The SIAA permits payment of prejudgment interest but the PVA does not, except in certain contractual cases, 46 U.S.C. § 31107. An alien may sue under the PVA only if his or her country of origin permits U.S. citizens to bring suit in the alien's country of origin, 46 U.S.C. § 31111.

(4) Neither the SIAA, the PVA, nor the AMCSA requires claimants to file administrative claims with the Army before filing suit. Because the AMCSA authorizes the Army to settle such claims, however, claimants may elect to file them. Filing an administrative claim does not toll the two-year statute of limitations on suing the United States.

b. While it does not expressly waive sovereign immunity, the Admiralty Extension Act (AEA) affects the Army maritime claims process in important ways. It extends U.S. maritime jurisdiction to claims for property damage or personal injury caused by a vessel on navigable waters, even when the damage or injury occurs or is consummated on land. Before Congress enacted the AEA in 1948, these claims were not deemed maritime at all. The statute states that the SIAA and PVA are the exclusive remedies for any such claims against the United States. It further requires that a suit based on this extension may not be filed against the United States until six months after the claim has been presented in writing to the federal agency owning or operating the vessel. Unlike the FTCA, the AEA does not permit filing an administrative claim to toll the statute of limitations. Nevertheless, if an AMCSA claim is filed and settled under AEA jurisdiction, all action must be completed within the two-year statute of limitations. For example, on 1 January 2002 an AMCSA claim is filed for which the judicial remedy is under the AEA. The claim accrued on 1 February 2000. If payment action is not completed by 31 January 2002, suit under the AEA does not lie, as the six month period from the date of filing expires after the expiration of the two-year statute of limitations.

Section II

Claims Against the United States

8-3. Scope

It is important to recognize a maritime claim promptly. Generally, a claim falls within the federal maritime jurisdiction if it arises in or from a maritime location and involves some traditional maritime nexus or activity, Admiralty Jurisdiction: Maritime Nature of Tort, 80 A.L.R. Fed. 105.

a. Maritime location. Traditionally, U.S. maritime jurisdiction extended only to injuries or damage sustained on the high seas or on domestic waters that were navigable in fact in interstate or international commerce, even if an act on land caused the injury. "Maritime location" was critical—that is, did the incident occur on navigable waters? Case law defines "navigable waters" as any body of water or any waterway used or capable of being used for trade or travel between two states or between the United States and a foreign country. To determine a waterway's navigability, the courts look to both its current and historical uses. For example, if a dam is constructed across a waterway without a lock for sending boats upstream, the area above the dam will no longer lie within the maritime jurisdiction regardless of its historical uses. See, for example, *Adams v. Montana Power Company*, 528 F.2d 437 (9th Cir. 1975). And a large reservoir straddling two states' boundaries may lie within the maritime jurisdiction even though the river above or below it does not. The traditional rule did not allow a suit in admiralty to lie if an act on navigable waters caused an injury on land. For example, a court would have dismissed a wharf owner's claim for damages caused by a vessel colliding with the wharf because the traditional rule considered wharves, piers, and jetties to be extensions of the land. The AEA changed that rule and made injury on land resulting from an act on navigable waters subject to a suit in admiralty.

b. Traditional maritime nexus or activity. In 1972, the Supreme Court appeared to narrow the scope of United States maritime jurisdiction when it held that a maritime location was not necessarily sufficient to confer maritime jurisdiction.

(1) In *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), a jet aircraft en route from Cleveland to New York lost power when its engines sucked in a flock of birds during takeoff. The jet descended suddenly and skidded down the runway through the airport fence, coming to rest about one fifth of a mile offshore in Lake Erie. There were no injuries to the crew, but the aircraft soon sank and became a total loss. The Supreme Court held that a

maritime location was not sufficient to confer maritime jurisdiction in the case. Stating that the case at bar was "only fortuitously and incidentally connected to navigable waters" and bore "no relationship to traditional maritime activity," the Court saw no reason why Ohio tort law should not apply to the facts. The Justices noted that even if the wind or wave forces affecting the downed aircraft resemble those that a sinking ship might encounter, the plane's unexpected descent "will almost invariably have been attributable to a cause unrelated to the sea," and held that there must be both a maritime location and a connection to a traditional maritime activity. In general, recent federal court decisions interpret this principle to require some impact on commercial shipping or navigation.

(2) Following *Executive Jet Aviation*, many courts held that a traditional maritime activity must involve commerce. Therefore, accidents caused by pleasure boats were held not to fall within the federal maritime jurisdiction. Yet the Supreme Court subsequently held that many accidents involving pleasure boats and other vessels not engaged in traditional maritime commercial activity may give rise to a maritime claim. If the pleasure boat was in navigation or operated in the course of some activity that could disrupt maritime commerce, then the claim sounded in maritime jurisdiction, *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982); *Sisson v. Ruby*, 497 U.S. 358 (1990). The courts interpret this potential impact on navigation or commerce broadly. For example, the *Sisson* court found maritime jurisdiction where a fire destroyed a pleasure boat while it was moored to a marina dock.

(3) Aircraft crashes into navigable water typically will not give rise to maritime claims if the intended flight route is between two points within the continental United States. However, claims from airplane crashes in navigable waters may fall within the maritime jurisdiction if the intended flight route is to or from an offshore island or a drilling rig.

(4) *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), a case involving someone on land who fired shots at poachers fleeing by boat across the Mississippi River, provides an excellent analytical framework. The court considered the parties' functions and roles, the types of vessels and instrumentalities involved, the causation and type of injury and the traditional concepts of maritime jurisdiction.

c. Applicable statute. Because the FTCA excludes maritime claims, such claims, even those arising within a state's territorial waters, are not adjudicated according to that state's law. Instead, general maritime law or special maritime statutes such as the Jones Act (46 U.S.C. §§ 30101–30106) or the Death on the High Seas Act (46 U.S.C. §§ 30301–30308) apply. These Acts' provisions and implementing regulations may differ from those of the various states' on such issues as the effect of the plaintiff's negligence or the type and amount of compensable damages. For example, general maritime law applies the pure comparative negligence rule and allows no recovery for loss of society, *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). Similarly, both the Jones Act and the Death on the High Seas Act limit wrongful death damages more narrowly than most state laws do.

(1) Maritime claims arising outside the United States are not within the scope of the Army's single-service responsibility for tort claims.

(2) Property damage claims arising out of a ship's navigation or operation or the loading, discharge or carriage of cargo are not covered by host country adjudication provisions of the NATO SOFA and some other SOFAs. See NATO SOFA, Article VIII.

(3) Unlike FTCA claims payments over \$2,500 and FCA or MCA claims payments over \$100,000, none of the money paid to settle an administrative maritime claim is disbursed from the FMS Judgment Fund. Rather, the Army's claims appropriation funds the entire payment, up to the \$500,000 limit of its authority, on an Army maritime claim. However, if the DOJ resolves a claim after a claimant files suit, the payment will be made from the Judgment Fund.

8-4. Claims payable

a. Every field claims office should ensure that all claims personnel who receive claims notify the area claims office (ACO) or the claims processing office (CPO) immediately about any claims that might be maritime in nature, whether or not they are labeled as such. See AR 27-20, paragraph 8-4 for a list of such incidents. Potential maritime claims include those involving:

- (1) Damage to any type of ship, boat or watercraft, such as jet skis, canoes, or rafts, occurring on any body of water.
- (2) Damages resulting from any Army aircraft caused by crashing into any body of water.
- (3) Damage or injury sustained in or on any body of water, involving a boat or other watercraft.
- (4) Damage or injury sustained on land or on water, allegedly due to the negligent operation of an Army-owned or -leased ship, boat or barge.
- (5) Damage to any wharf, pier, jetty or other structure on or adjacent to any body of water.
- (6) Any injury alleged to have occurred on board any Army vessel.

b. Upon receiving such claims, the ACO or CPO must determine whether the claim falls within the federal maritime jurisdiction. In most cases, this determination will be fairly easy to make, but there will be many times when the issue is in doubt. If that is the case, consult the area action officer (AAO) on the question of maritime jurisdiction immediately.

8-5. Claims not payable

See AR 27-20, paragraph 8-5.

8-6. Limitation of settlement

a. A settled claim must be approved for payment by the appropriate settlement authority. Neither presentation of a claim nor the Army's consideration of it waives or extends the two-year statute of limitations. Claims personnel should so inform the claimant when the claim is received. A sample letter to the claimant is posted on the USARCS Web site at "Claims Resources," II, c, no. 6.. If the claimant files a civil action in a U.S. District Court before the end of the two-year statutory period, the Commander USARCS may negotiate an administrative settlement with the claimant, even though the two-year period has elapsed since the cause of action accrued, provided the claimant obtains the written consent of the appropriate DOJ office charged with defending the complaint. The claimant must agree to dismiss a timely filed suit as part of any settlement. Payment may be made upon dismissal of the complaint.

b. Upon receiving a maritime claim under this section, a notice of damage, invitation to a damage survey, or other written document indicating an intention to hold the United States liable, the ACO or CPO will immediately forward such document to the Commander USARCS. The ACO or CPO receiving notice of the claim will promptly advise the claimant or potential claimant in writing of the statute of limitations comprehensive application.

c. When a maritime claim is presented to an ACO or a CPO and action on the claim by that office may be appropriate pursuant to the delegation of authority set forth in AR 27-20, paras 8-8 and 8-11, that office will promptly advise the claimant in writing of the time limitation on the Army's authority to settle the claim as well as of the fact that filing the claim does not toll the statute of limitations.

d. If the injury or damage giving rise to the claim is sustained on or in navigable waters, claimants are not required to file an administrative claim before filing suit. However, an administrative claim must be filed before a civil suit in cases where maritime jurisdiction is based on the AEA (such as damage or injury on land resulting from an act on navigable waters, see para 8-3). Even in those cases, however, the filing of an administrative claim neither tolls the two-year statute of limitations nor extends the Army's authority to settle a claim. Claims personnel should bring any such claim filed within six months of the running of the statute of limitations to USARCS' attention immediately and make every reasonable effort to complete final agency action before the statute of limitations expires.

8-7. Limitation of liability

a. Limitation of liability under the Limitation of Shipowners' Liability Act, 46 U.S.C. §§ 30501-30512, applies to all vessels, whether seagoing or used on lakes and rivers for inland navigation, such as canal boats, barges, and lighters, 46 U.S.C. § 30502. This Act covers pleasure craft as well. The statute limits liability to the amount or value of the owner's interest in the vessel and her freight, 46 U.S.C. § 30505. If the vessel is wrecked or sunk, the District Court determines its value.

b. If a maritime claim involves an Army vessel, the United States may limit its liability to the value of that vessel after the accident, if the DOJ files a special limitation action within six months of receipt of the claim. This means that the ACO or CPO must notify the AAO of such claims within 10 days of receipt.

8-8. Settlement authority

See AR 27-20, paragraph 8-8.

Section III

Claims in Favor of the United States

8-9. Scope

a. The Army may pursue affirmative claims for property damage, including damage caused by a vessel to an Army structure on land. Usually, such incidents involve vessels striking a lock, dock or other structure under the Army's control. Usually such claims are processed under the Rivers and Harbors Act as indicated in paragraph 8-1b. Such claims may involve determining whether the vessel was properly moored during a severe storm. Process them as a normal claim, and send a mirror copy to USARCS if the potential recovery exceeds the field office's authority.

b. The U.S. Army Corps of Engineers (COE) is responsible for wreck removal, 33 U.S.C. §§ 403, 406, 409, 414 and 415. These authorities impose on the shipowner the duty to mark the wreck with a buoy and commence its removal immediately, regardless of whether the wreck was caused by an accident or otherwise and whether the wreck is located in a channel. Where the maintenance of a navigation channel is involved, the Army may raise and remove the wreck at the expense of the owner or the person who negligently sank the vessel, 33 U.S.C. § 414. The COE may mark and remove the wreck at the owner's request and expense, 33 U.S.C. § 409.

c. This list is neither definitive nor all-inclusive. For calculation of damages, including overhead, see chapter 2, Section VI, Determination of damages.

8-10. Civil works claims

The COE has authority to recover compensation for certain types of damage, such as to a lock, dam or other structure on land. However, where such recovery effort fails, the COE should process the affirmative claim under the AMCSA and forward it to USARCS together with a memorandum as set forth in paragraph 2-60. USARCS will determine whether further demand is indicated. If suit by the United States is indicated, the Commander USARCS will forward

the claim to the Admiralty Section, DOJ, with a memorandum explaining past recovery efforts, and an opinion stating why those efforts did not succeed.

8–11. Settlement authority

See AR 27–20, paragraph 8–8.

8–12. Demands

See AR 27–20, paragraph 8–12.

Chapter 9

Article 139, Uniform Code of Military Justice

9–1. Statutory authority

Article 139 of the Uniform Code of Military Justice (UCMJ), entitled "Redress of Injuries to Property" (10 U.S.C. §939) states that:

a. Whenever complaint is made to any commanding officer that willful damage has been done to the property of any person or that a person's property has been wrongfully taken by members of the armed forces, he may, under such regulations as the Secretary concerned may prescribe, convene a board to investigate the complaint. The board shall consist of one to three commissioned officers and, for the purpose of that investigation, it has power to summon witnesses and examine them upon oath, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by the board is subject to the approval of the commanding officer, and in the amount approved by him shall be charged against the pay of the offenders. The order of the commanding officer directing charges herein authorized is conclusive on any disbursing officer for the payment by him to the injured parties of the damages as assessed and approved.

b. If the offenders cannot be ascertained, but the organization or detachment to which they belong is known, charges totaling the amount of damages assessed and approved may be made in such proportion as may be considered just upon the individual members thereof who are shown to have been present at the scene at the time the damages complained of were inflicted, as determined by the approved findings of the board.

9–2. Purpose

a. Scope. Article 139, UCMJ, provides an administrative mechanism for assessing and paying restitution to the victims of certain types of criminal offenses committed by military personnel subject to the UCMJ (see para 9–5). Victims of these offenses often have no other adequate means of obtaining restitution. Article 139 ensures that a victim is compensated directly from the wrongdoer's military pay rather than from the United States Treasury. This serves both to implement the goals embodied in the Victim and Witness Protection Act of 1982 and to promote military discipline and protect the civilian or military community from these types of disorders. Article 139 provides, however, an extraordinary administrative claims settlement authority. In essence, commanders are granted special powers normally reserved to the civil judicial authority. This authority must not be expanded beyond its strict limits; doing so could raise serious constitutional issues.

b. Historical background. Throughout its history, Article 139 has provided redress for the offenses of wasting, spoiling, or destroying nonmilitary property, presently proscribed by Article 109, UCMJ. Because disorderly Soldiers often commit acts of depredation in groups, the Article contains a unique provision allowing a commander to levy against the pay of all members of a unit who were present when damages were inflicted if an individual offender cannot be identified.

9–3. Proper claimants

a. AR 27–20, paragraph 9–3 lists the categories of proper claimants under Article 139.

b. Essentially, any person, business, organization, or other legally recognized entity is a proper claimant. Only the United States and its nonappropriated fund instrumentalities (NAFIs) are ineligible.

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

a. Disciplinary action. Disciplinary action taken against an offender is entirely separate from action taken under Article 139. Under no circumstances should the approval authority or anyone acting for, or appointed by, the approval authority to act on the claim delay action under Article 139 pending resolution of disciplinary action. Because different evidence is admissible and a different standard of proof is applied, acquittal on the charges underlying an Article 139 claim is not in itself a basis for dismissal of the claim or for modification on reconsideration. Action under Article 139 requires an independent inquiry. Furthermore, once disciplinary action is imposed, the claimant may be left with no effective remedy due to the discharge, reduction in rank or forfeitures of pay of the Soldier responsible.

b. Voluntary restitution. The approval authority may terminate Article 139 proceedings without findings if the

Soldier voluntarily makes full restitution to the claimant. Any amount paid to the claimant as partial restitution will be deducted from the amount assessed.

c. Contributory negligence. Because an Article 139 claim is founded upon a criminal act, a claim otherwise cognizable and meritorious is payable whether or not the claimant was negligent.

9-5. Claims cognizable

a. Persons against whom claim is cognizable. Article 139 provides compensation only for loss of, or damage to, real or personal property that has been willfully damaged or wrongfully taken by a member of the U.S. armed forces, to include active duty personnel, retired personnel against whom an Article 139 claim was brought while the offender was still serving on active duty, and Reserve and National Guard personnel when their status subjects them to the UCMJ.

b. Willful damage. Willful damage falls into two categories. The first category involves damage caused intentionally without justification. Such damage is essentially the result of vandalism. The second category involves riotous, violent, or disorderly acts, acts of depredation or acts showing a reckless and wanton disregard for the property rights of others. Loss or damage caused thoughtlessly or inadvertently by a Soldier's negligent conduct is not covered.

(1) A claim that a Soldier accidentally broke a lamp during a drunken brawl is cognizable. Even though the Soldier did not intend to break the lamp and the breaking alone may be construed as simple negligence, the Soldier's conduct shows a reckless and wanton disregard for the property rights of others.

(2) Claims involving damage resulting from the operation of a motor vehicle must be carefully examined. While in most situations such damage is the result of conduct that is merely negligent, and hence not cognizable, in some circumstances the conduct of the operator may be so extreme as to constitute reckless and wanton disregard for the property rights of others. Examples are operating a vehicle at an extreme rate of speed (such as driving at 90 miles per hour in a 45 miles per hour zone), or in an extremely high state of intoxication (such as driving with a Blood Alcohol Content of .25, where the legal limit is .08). However, a mere statutory violation, such as exceeding the speed limit by 5 miles per hour, or driving with a blood alcohol content of .10, is not sufficient by itself to give rise to liability under Article 139.

c. Wrongful takings. A wrongful taking is essentially a theft, that is, an unauthorized taking or withholding of property with the intent to deprive the owner of either temporary or permanent possession. Claims for property taken through larceny, forgery, embezzlement, misappropriation, fraud or similar conduct are normally cognizable. Takings that involve a dispute over the conduct of a Soldier acting as the claimant's agent, over the terms of a contract or over ownership of property are not cognizable unless the dispute is merely a cloak for an intent to steal. Article 139 is not a mechanism for the collection of debts, and the Army has no interest in mediating business disputes under the guise of preventing theft.

(1) A claim that a Soldier borrowed a DVD player and did not return it on the promised date is not cognizable unless the Soldier borrowed the DVD player as a pretext and sold it or kept it permanently. This is evidence of an intent to steal.

(2) A claim that a Soldier issued a worthless check and received property in return is cognizable if evidence establishes an intent to defraud. Such intent may be inferred when the Soldier fails to make good on a bad check within a reasonable time after receiving notice of insufficient funds.

(3) A claim that a Soldier stole a check or credit card and used it to obtain items of value is cognizable.

d. Definition of property. Article 139 provides a remedy for "property" willfully damaged or wrongfully taken (see para 9-1). It does not provide a remedy for all types of financial losses (such as theft of services, see subpara 9-6f). Nevertheless the definition of property covered under Article 139 (see AR 27-20, para 9-5d) is broader than the definition of property under the Personnel Claims Act and AR 27-20, chapter 11.

9-6. Claims not cognizable

a. Negligence. Article 139 may not be used to hold a Soldier liable for negligent acts. Negligence is the failure to use the degree of care that a reasonably prudent person would use under the same or similar circumstances. Negligent conduct differs from conduct in which a Soldier clearly sees or should see that his or her actions are likely to cause damage to property but willfully disregards that risk and causes property damage. For example, if a Soldier accidentally breaks a dish in a china shop, that Soldier may not be held liable under Article 139 unless additional facts prove that the act was willful.

b. Personal injuries or wrongful death. Article 139 is designed to compensate victims only for loss of or damage to property. Hence, claims for personal injury and wrongful death are not cognizable and are treated elsewhere.

c. Scope of employment. Soldiers may not be held liable under Article 139 for acts or omissions which are made within the scope of their employment. This includes combat activities and noncombat activities, as defined in the Glossary of AR 27-20. For example, a Soldier who drives a tank through a field during an exercise is not liable under Article 139 for damage to the crops in that field, even though his actions were intentional and he recognized that it was highly likely that the crops would be damaged. Even if the Soldier's acts are later determined to be reckless or otherwise wrongful, he cannot be held personally liable under Article 139, although the government may be held liable to the property owner under other provisions of law.

d. Reserve and National Guard personnel. Claims resulting from the conduct of Reserve component personnel who were not in a Title 10 duty status at the time of the conduct are not cognizable under Article 139.

e. Subrogated (third-party) claims. Subrogated claims are those in which a third party, such as an insurance company, asserts the claimant's rights. Article 139 will not be used to pay subrogated claims, including those brought by insurers. However, an insurance company may be a proper claimant if its property has been willfully damaged or wrongfully taken. For example, when an insurance company has made a settlement payment to a Soldier who has filed a fraudulent insurance claim, the company is a proper party claimant.

f. Theft of services. Because the language of Article 139 provides a remedy only for "property" willfully damaged or wrongfully taken, other types of financial losses are not cognizable, even if the conduct of the Soldier causing the loss is a violation of the UCMJ. The most common example of this is theft of services in violation of Article 134. For example, a claimant alleges that a Soldier houseguest has used the telephone and incurred long distance charges without permission. This is not cognizable because no property has been taken, even though the unauthorized use of the telephone services results in a financial loss.

g. Claims for indirect, remote, or consequential damages. Consequential damages flow indirectly from the wrongful act. They differ from direct damages. Article 139 may be used to recover only direct damages from the wrongdoer. There is no bright line test for distinguishing direct damages from indirect, remote or consequential damages.

(1) The costs of telephone calls, mileage, postage, copies, or attorneys' fees incurred to pursue a claim under Article 139 are consequential damages and are not compensable.

(2) Where expenses are necessary to repair a damaged item, such as the cost of moving it to a repair shop (drayage), such costs directly result from the Soldier's willful damage and are compensable as direct damages.

(3) The cost of a rental car may be considered direct, compensable damage when a Soldier steals or willfully damages a claimant's privately-owned vehicle (POV). Such costs, such as rental of a vehicle comparable in value to the claimant's POV, must be reasonable.

h. Claims by persons or entities in conflict with or hostile to the United States. While in most circumstances damage to the property of such persons or entities would occur as a result of acts done by Soldiers within the scope of their duties, and thus be non-cognizable pursuant to subpara 9-6c, this section makes it clear that claims by such persons or entities are not cognizable regardless of the circumstances under which their property damage or loss may have occurred.

9-7. Limitations on assessments

Limitations on the amount of money that may be paid to a claimant depend on the level of authority at which the claim is handled. The Special Court-Martial Convening Authority (SPCMCA) with jurisdiction over the claim may approve any claim for a single incident up to \$5,000 per claimant. The General Court-Martial Convening Authority (GCMCA) or designee may approve any claim up to \$10,000. Only the Judge Advocate General (TJAG), the Deputy Judge Advocate General (DJAG) and the Commander USARCS, or designee may approve claims for more than \$10,000. Pursuant to Rule for Court-Martial 1107, a convening authority who approves an Article 139 claim may be disqualified from taking final action in a court martial that arises out of the same incident. Consequently, if the judge advocate or head of the area claims office (usually the staff judge advocate (SJA)) advising the convening authority determines that the convening authority will be required to take final action in a court-martial arising out of the same incident as the Article 139 claim, the convening authority should forward the claim to the next higher level for action or approval. If the SPCMCA forwards the claim to the GCMCA for this reason before an investigation pursuant to AR 15-6 has been conducted, the GCMCA must appoint an investigating officer (IO) and follow the other procedures set forth in para 9-8. See para 9-8g and para 9-8h(2) for application of Rule for Courts-Martial (RCM) 1107.

9-8. Procedure

a. Time limitations on submission of a claim. A claim must be submitted within 90 days of the incident that gave rise to it, unless good cause for the delay is shown. The SPCMCA acting on the claim determines what constitutes good cause. Generally, a person who is not aware of Article 139 or does not know the identity of the offender has good cause for delay in submitting a claim.

b. Form of a claim. A claim may be submitted orally, but it must be reduced to writing and signed by the claimant within ten calendar days. Anyone with knowledge of the Article 139 process should encourage the claimant to do this promptly. An oral claim that is not reduced to writing within ten calendar days may be dismissed. The claim must also seek a definite amount. An amount stated in a foreign currency must be converted to U.S. dollars. The claims judge advocate (CJA) or claims attorney should encourage claimants to use the language and format of the sample claim letter posted on the USARCS Web site at "Claims Resources," V, a, but claimants are not required to do so.

c. Action on receipt of a claim. Any Army officer who receives an Article 139 complaint must forward it to the SPCMCA having UCMJ jurisdiction over the alleged offender or offenders within two working days. The SPCMCA is a commander authorized to convene a special court-martial under the UCMJ and Army regulations, including commanders of units in reserve components, regardless of whether the exercise of such jurisdiction has been withheld. Special rules apply if more than one SPCMCA may have authority over the alleged offender or offenders or if the claim is against a member of another military service. If all SPCMCA's who have potential jurisdiction over the alleged

offender or offenders fall under the command of a single GCMCA, the CJA or claims attorney should forward the claim to that GCMCA, who will designate one of the SPCMCA's to process the claim. If the SPCMCA's who have potential jurisdiction fall under the command of different GCMCA's, then the SPCMCA whose headquarters is closest to the place where the incident giving rise to the claim occurred has jurisdiction. Finally, if the claim is brought against a member of one of the other military services, then it should be forwarded to the commander of the nearest command of that military service equivalent to a major Army command (MACOM).

d. Initial action by the SPCMCA. If the claim appears cognizable, the SPCMCA will appoint an IO (see sample appointment letter posted to the USARCS Web site at "Claims Resources," V, b) to conduct an investigation using the informal procedures of AR 27-20, chapter 9, and AR 15-6, chapter 4, within four working days of receiving the claim. If the claim does not appear cognizable, the SPCMCA may refer it for legal review within four days of receipt. If after legal review the SPCMCA determines that the claim is not cognizable, they may disapprove the claim without appointing an IO.

e. Expediting payment through Personnel Claims Act and Foreign Claims Act procedures. There are times when a delayed payment may result in hardship to a claimant. If the Article 139 claim resolution will be unduly delayed, the area claims office may process the claim under the Personnel Claims Act (PCA), 31 U.S.C. § 3721, pursuant to AR 27-20, chapter 11, or under the Foreign Claims Act (FCA), 10 U.S.C. § 2734, pursuant to AR 27-20, chapter 10, if it is otherwise cognizable under that authority. If claims personnel handle the claim under chapter 11 or chapter 10, then the claims office must inform the claimant of the responsibility to repay to the government any overpayment should the Article 139 claim later succeed. Payment of an Article 139 claim under chapters 11 or 10 should be approved only when necessary to prevent financial hardship to the claimant, not merely to avoid an inconvenience.

f. Action by the IO. Within ten working days of appointment, the IO will complete a claims investigation. The SPCMCA may extend this ten-day period for good cause. The CJA or claims attorney should advise the IO before the investigation begins on the scope of the investigation, procedural steps to follow and restrictions on evidence. The IO will promptly notify the Soldier against whom the claim has been brought (see the sample letter posted to the USARCS Web site at "Claims Resources," V, c. In addition, the IO will submit findings of fact and a recommendation based on those findings to the SPCMCA through the claims office and will provide the Soldier against whom the claim is brought with a copy of such findings and recommendations so the Soldier has an opportunity to respond. The IO should contact the CJA or claims attorney for guidance on legal and procedural questions.

(1) *Generally.* The IO should interview all available witnesses and obtain copies of police reports and other relevant documents. Evidence need not be in the form of sworn statements nor need it be admissible under the rules of evidence applicable in a court of law (see AR 15-6, para 3-6). For example, the IO may accept unsworn statements or consider hearsay evidence. When taking oral evidence in person or over the telephone, the IO should contemporaneously summarize the substance of the conversation in a memorandum for record. The IO should physically inspect all damaged items claimed and record findings in the same memorandum.

(2) *Restrictions on evidence.* Although the standards of evidence that apply to this administrative procedure are flexible and permissive, there are some restrictions on the questions that the IO may ask and the evidence that he or she may use. The IO should consult the CJA or claims attorney before asking a witness or suspected offender any question that may be impermissible. When interviewing a Soldier suspected of an offense, the IO must warn the suspect of his or her rights against self-incrimination under Article 31, UCMJ. The IO should use DA 3881 (Rights Warning Procedure/Waiver Certificate) for this purpose. He or she should not consider any evidence specifically prohibited from consideration, listed in AR 15-6, paragraph 3-6.

(3) *Standard of proof.* A preponderance of the evidence is necessary for a finding of pecuniary liability under Article 139. This means that, to recommend liability, the IO must conclude that it is more likely than not that the claim is valid. The IO should base this judgment on the weight of the admissible evidence gathered during the investigation.

(4) *Valuation of a claimant's loss.* Normally, the measure of a loss is either the repair cost or the depreciated replacement cost for the same or a similar item. Most items depreciate at rates that depend on their age and condition. The Military Allowance List-Depreciation Guide (ALDG) may (but is not required to) be used to determine depreciated replacement cost.

(5) *Findings and recommendation.* The IO should submit findings and recommendation to the SPCMCA on DA Form 1574 (Report of Proceedings by Investigating Officer/Board of Officers) and will address each of the following conditions for payment:

- (a) Whether the claim is brought by a proper claimant, in writing, and seeks a definite sum.
- (b) Whether the claim is brought within 90 days of the incident that gave rise to it, or the claimant has shown good cause for the delay.
- (c) Whether the claim seeks compensation for property belonging to the claimant that was wrongfully taken or willfully damaged by a member or members of the U.S. Army.
- (d) Whether the claim is meritorious in a specific amount.

(6) *Claims against more than one Soldier.* If the claim is brought against more than one Soldier, the IO will make a determination with respect to each named Soldier. Several Soldiers may be present when property is wrongfully taken or willfully damaged. If the IO determines that one or more of them committed the act but cannot determine who, the

IO may recommend that equal amounts be assessed against each Soldier who was present. If a Soldier is in a no pay due status, the Defense Accounting officer will notify the approval authority.

(7) *Processing claims against Soldiers absent without leave.* If a Soldier found liable pursuant to Article 139 is absent without leave (AWOL), and thus cannot be notified of the impending assessment, then the approval authority may act on the claim in the Soldier's absence. If the claim against the AWOL Soldier is approved, the approval authority will ensure that a copy of the claim and a memorandum authorizing a pay assessment against the Soldier is transmitted to the servicing Defense Accounting Office (DAO) to process an offset against the Soldier's pay account.

g. *Legal review by the CJA or claims attorney.* Within five working days (which the SPCMCA may extend for good cause), the CJA or claims attorney will review the IO's findings and recommendation, and will consider whether or not action by the SPCMCA on the claim would interfere with the SPCMCA's obligations under RCM 1107. The SPCMCA should not take action on the claim if the SPCMCA will be required to take final action on a court martial of the Soldier against whom the claim was filed for offenses arising from the incident which is the subject of the claim. If not, the CJA or claims attorney will advise the SPCMCA whether the findings and recommendations are legally sufficient and supported by the evidence. See the sample review letter posted to the USARCS Web site at "Claims Resources," V, d. If they are not, the CJA or claims attorney will return the claim to the IO for additional findings. The CJA or claims attorney may review the findings and recommendation even after providing earlier legal or procedural advice to the IO. The CJA or claims attorney will prepare letters to the claimant and to the Soldier against whom the claim is brought for signature by the SPCMCA. Samples of letters to the wrongdoer and to the claimant are posted to the USARCS Web site at "Claims Resources," V, e and f. If the claim is legally sufficient, and the SPCMCA determines that the claim should be approved in an amount of \$5,000 or less, the CJA or claims attorney will prepare an action for the SPCMCA's signature, directing the appropriate DAO to withhold pay from the Soldier for disbursement to the claimant. A sample disbursement request letter is posted on the USARCS web site at "Claims Resources," V, g.

h. *Final action by the convening authority.*

(1) *Action at the SPCMCA level.* The SPCMCA may disapprove the claim regardless of the amount or, if the findings and recommendation are legally sufficient, approve it in an amount equal to or less than \$5,000. The SPCMCA will notify both the Soldier and claimant(s) in writing of the decision and of their right to request reconsideration. The SPCMCA will then delay final action on the claim(s) for ten working days pending receipt of a request for reconsideration unless this delay will result in an injustice (such as the discharge of the liable Soldier from active duty and thus the Army's inability to disburse funds by pay assessment). If either party requests reconsideration within that time, the SPCMCA shall reconsider the claim within five days. If the SPCMCA approves a claim against a Soldier subject to his or her jurisdiction, the SPCMCA will direct the appropriate DAO to withhold pay from that Soldier in an amount up to \$5,000 per claim and to pay that sum to the claimant. The SPCMCA should then return the claim file to the claims office for disposition.

(a) *Soldiers not subject to the SPCMCA's jurisdiction.* For Soldiers not subject to the SPCMCA's jurisdiction, the SPCMCA will forward a copy of the claim to the SPCMCA who does exercise jurisdiction. This SPCMCA is bound by the determination made by the first SPCMCA and will direct the appropriate DAO to withhold pay from that Soldier in an amount up to \$5,000 and pay it to the claimant.

(b) *Forwarding claims to the GCMCA.* If the SPCMCA determines that an assessment in excess of \$5,000 per claimant is warranted, or if action by the SPCMCA on the claim would interfere with the SPCMCA's obligations under RCM 1107, the CJA or claims attorney will forward the file to the head of the area claims office. In most cases, the head of the area claims office will also be the GCMCA's SJA.

(2) *Action at the GCMCA level.* Within five working days of receipt of the claim, the head of the area claims office will review the claim for legal sufficiency and determine whether or not action by the GCMCA on the claim would interfere with the GCMCA's obligations under RCM 1107. The GCMCA should not take action on the claim if the GCMCA will be required to take final action on the court-martial of the Soldier against whom the claim was filed for offenses arising from the incident which is the subject matter of the claim. If the head of the area claims office (usually the GCMCA's SJA) determines such a conflict exists, that officer, on the GCMCA's behalf, will forward the claim with an explanation of the problem to the Commander USARCS for final review. (See AR 27-20, subpara 9-7a(2)(b)). If there is no conflict of interest under RCM 1107, the GCMCA shall disapprove or approve the claim in an amount up to \$10,000 per claimant, within five working days. The GCMCA will notify the Soldier and the claimant in writing of the decision and of their right to request reconsideration. The GCMCA will postpone final action for ten working days to allow either party to request reconsideration. If a request is received within that time, the GCMCA has five working days from the date of receipt to reconsider the claim. If the GCMCA decides to approve the claim in whole or in part, he or she will then take final action by directing the appropriate DAO to withhold an amount up to \$10,000 per claimant from the Soldier's pay. If the GCMCA determines that the claimant is entitled to an amount in excess of \$10,000, then the GCMCA will approve the claim for \$10,000 and forward the claim, along with his or her recommendation, to the Commander USARCS for final action. If, as a result of reconsideration, the GCMCA disapproves the claim the GCMCA will take final action by notifying the parties in writing of the decision.

(3) *Final action by USARCS.* If the Commander USARCS, or a designee, determines that a claim in excess of \$10,000 should be approved, he or she will send a memorandum to the GCMCA approving a cumulative assessment in

an amount over \$10,000 and authorizing the appropriate DAO to withhold additional monies from the offending Soldier's pay and to make restitution to the victim.

i. Assessment. Upon receipt of the Article 139 assessment, the appropriate DAO will withhold the amount directed by the approval authority. The assessment is binding on the DAO. It is not subject to appeal. However, the assessment is subject to the limitations set forth in regulations governing military personnel pay administration. If the DAO to whom the assessment is directed cannot withhold the Soldier's pay because it does not have the Soldier's pay record or the Soldier is in a no-pay-due status, it must promptly notify the approval authority in writing.

j. Post-settlement action. After action on the claim is completed, the servicing claims office will retain the original claim file and forward a complete copy to the SPCMCA. The claim file will be filed locally, per AR 25-400-2. If a personnel claim is filed for the same incident under AR 27-20, chapter 11, the claims office will incorporate a copy of the Article 139 claim into the chapter 11 claim file.

k. Remission of indebtedness. By statute and regulation, an enlisted Soldier is entitled to seek remission of a debt which is owed to the U.S. government. In an Article 139 claim, the debt is owed to the Soldier's victim, not to the United States; therefore, remission of indebtedness procedures do not apply to Article 139 claims. A Soldier may not be relieved of a financial obligation arising under Article 139 through the remission of indebtedness process.

9-9. Reconsideration

Upon receiving a request for reconsideration from either the claimant or a Soldier who has been assessed pecuniary liability, the approval authority or successor in command will direct the legal advisor to provide a recommendation. If the request raises an issue of fact, the approval authority may appoint an IO to make further findings of fact. If the approval authority contemplates modifying the decision, he or she shall provide all parties to the claim with notice and an opportunity to respond. The approval authority will record the basis upon which the decision is modified and notify all parties.

a. Action by the original approval authority. The approval authority should not modify a decision on a request submitted more than ten days after the original decision was issued except on the basis of newly discovered evidence, fraud, or obvious error of fact or law.

b. Action by a successor in command. A successor in command to the original approval authority may not modify a decision on any request except on the basis of newly discovered evidence, fraud, or error of fact or law apparent from the file.

c. Disposition of files. The approval authority will ensure that a copy of the reconsideration is filed with the claim.

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

In addition to conducting legal review of Article 139 claims, the CJA or claims attorney is responsible for:

a. Forwarding copies of completed actions to USARCS. Within ten working days of final action on the claim, the CJA or claims attorney will prepare a cover sheet for the claim and forward it, along with a copy of the claim, to the Commander USARCS, ATTN: JACS-PC. The cover sheet will state the claimant's name, the offender's name, the convening authority, the amount of the assessment, the date approved or disapproved and, if applicable, whether an additional assessment by USARCS is recommended. The CJA or claims attorney must also state whether DAO action was completed if pecuniary liability was recommended.

b. Monitoring time requirements. The CJA or claims attorney will maintain an Article 139 log and monitor time requirements ("suspenses") on pending Article 139 claims, acting to ensure that they are met. Timely completion of Article 139 actions is essential since delays may prevent proper assessment against an offender's pay account. If the offender is separated from active duty it may be impossible to collect anything from his or her pay account. If the offender is tried by court-martial any resulting forfeitures may also preclude proper assessments.

c. Publicizing the Article 139 program. The CJA or claims attorney has a duty to publicize the Article 139 program to commanders, Soldiers and the general public. Methods of disseminating Article 139 information include publishing articles, ensuring that attorneys involved in legal assistance and military justice know about the Article 139 process so they can advise victims, and teaching Article 139 procedures in Army legal classes.

Chapter 10 Foreign Claims Act

Section I General

10-1. Statutory authority

a. The Foreign Claims Act (FCA) (10 U.S.C. § 2734) was enacted on 2 January 1942, retroactive to 27 May 1941, the date on which President Roosevelt proclaimed that the threat of a German advance in western Europe constituted a national emergency for the United States. The FCA was designed to engender good will and promote friendly relations

between the U.S. armed forces and host countries. On 7 July 1941, after the government of Iceland formally invited the U.S. Marine Corps to that nation, the Secretary of the Navy urged Congress to enact the FCA to provide coverage for claims resulting from the Marines' presence in Iceland. Originally, the FCA was intended to remain in effect only during the national emergency; by various amendments, however, Congress continued it in force until 1956, when the FCA entered into permanent law. Act of 28 July 1956, Ch. 769, 70 Stat. 703.

b. Upon its enactment, the FCA authorized compensation only to a friendly inhabitant of a friendly foreign country filing a claim within one year of the incident giving rise to it, limiting payment to \$1,000. The 1943 amendment raised this threshold to \$5,000. The 1956 amendment expanded upon the requirement that the claim arise in a foreign country, recognizing as actionable claims arising anywhere outside the United States, thus broadening the FCA's scope to include maritime claims. Additionally, the 1956 amendment no longer required the claimant to be an inhabitant of the country in which the claim arose. Since 1956, any inhabitant of a foreign country has been able to bring a claim under the FCA. Subsequent amendments repealed the limitation on amounts payable by the Service Secretary, and increased to \$100,000 the amount that persons designated by the Secretary may approve for payment. See the Federal Tort Claims Handbook (FTCH) § II, B41 for cases defining a foreign country.

10-2. Scope

a. Eligible claimants.

(1) *Inhabitants of foreign countries.* The word "inhabitant" conveys a broader meaning than do either the words "citizen" or "national." Usually, it is obvious whether the claimant qualifies as an inhabitant. Soldiers and civilian employees of the U.S. armed forces or other agencies and their family members, who reside in a foreign country mainly because of their own or their sponsors' military orders, are not considered inhabitants of that country. Similarly, a U.S. domiciliary who is in a foreign country as a tourist or visitor or on a business trip will not be considered an inhabitant of the foreign country. In those uncommon situations in which the claimant is a U.S. citizen or national, the test for determining foreign country inhabitant status is whether the claimant dwells in and has assumed a definite place in the economic and social life of a foreign country. Command claims services or area claims offices (ACOs) should design a questionnaire for routine use. A list of recommended questions is posted on the USARCS Web site at "Claims Resources," II, a, no. 10.

(a) *Inhabitants of third countries.* The foreign country in which the claimant lives and that of the situs of the tort need not be the same because neither the FCA nor its implementing regulations require the claimant to be an inhabitant of the country in which the claim arises. Thus, a French citizen injured by a U.S. Army vehicle while visiting Bosnia is a proper claimant under the FCA.

(b) *Death claims.* In a wrongful death case, only the decedent must be an inhabitant of a foreign country. Anyone, not otherwise excluded, who would be eligible to assert a claim for the decedent's death under the laws of the country in which the incident causing the death occurred may be a proper claimant.

(2) *Corporations.* A corporation or other foreign business located in a foreign country may be a proper claimant even though it is organized under U.S. law. Branches, subsidiaries or affiliates of private corporations organized in the U.S. but located and doing business in foreign countries may be proper claimants. The test is whether the corporation or its branch has assumed a definite place in the economic life of a foreign country. If so, it is considered an inhabitant of the country whether or not it is a separate juridical entity.

(3) *Enemy nationals.* The FCA prohibits paying claims presented by nationals of a country at war with the United States or of countries allied with a country at war with the United States (Armed conflict falls within the meaning of the term "war"). An exception may be made when an FCC or local military commander determines that the claimant is friendly to the United States, or for enemy prisoners of war or interned enemy aliens for torts arising after their capture or surrender, 10 U.S.C. § 2734(b)(2).

(4) *Unfriendly nationals.* The Commander USARCS may provide instructions to FCCs regarding the processing of claims presented by inhabitants of, or arising in, unfriendly foreign countries. Where the propriety of settling such claims is in doubt, the FCC receiving the claim should seek advice from the commander of its command claims service or the Commander USARCS. Additionally, FCCs may forward to USARCS for adjudication claims brought by inhabitants of countries not at war with, but considered "unfriendly" to, the U.S., or claims brought by persons who, individually, are considered unfriendly to the U.S. This provision grants greater flexibility than a blanket disqualification excluding all nationals of a country at war with the United States unless the individual claimant is considered friendly. "Enemy national" status is a factor in determining whether a potential claimant is eligible to bring a claim under the FCA. This question presents a threshold issue; after that initial finding, a claimant's "unfriendly" status is infused into the exercise of discretion in considering a claim on its merits.

(5) *Foreign governmental bodies.* Foreign national governments and political subdivisions of foreign countries, including municipalities and local governmental bodies, are proper claimants. The standard exclusion for subrogated claims applies to them. For example, a foreign government may not recover Social Security payments made to an injured beneficiary who files an FCA claim. In considering claims of foreign governmental bodies, however, the adjudicating authority must determine whether any treaty, agreement, or understanding between the U.S. and the foreign country concerned precludes considering the claim under the FCA.

(6) *Subrogees.* A property damage claim brought by a subrogee is not payable, regardless of whether subrogation

arises by operation of law or under the express terms of an insurance policy. Furthermore, a claim or any part of a claim is not payable if it has been recovered or will be recoverable from an employee's workers' compensation or health insurance plan, Social Security, or other indemnifying law or contract.

b. Cognizable claims.

(1) The FCA authorizes compensation for personal injury or death or for damage to or loss of real and personal property.

(2) Claims for damage to or loss of real property incident to its use and occupancy by the U.S. armed forces and for damage to or loss of personal property bailed to the United States are cognizable. See paragraph 2–15m for discussion of real estate claims. Unless the property owner has expressly assumed the risk, claims for loss of or damage to personal property loaned, rented or bailed to the United States are cognizable. However, a claim for property, such as building materials seized without following proper procurement procedures during a deployment should be administered according to procurement law.

c. American Battle Monuments Commission claims. The Army has sole responsibility for claims brought by foreign country inhabitants and arising in foreign countries that seek compensation for loss, damage or injury caused by the wrongful acts or omissions of officers or civilian employees of the American Battle Monuments Commission while acting within the scope of their employment. Such claims are cognizable and may be settled by military FCCs. If meritorious, such claims are paid from the American Battle Monuments Commission's appropriations; see 36 U.S.C. § 2110.

d. Maritime claims. Maritime claims are cognizable if they—

(1) Arise on the high seas.

(2) Involve incidents occurring in the territorial waters of foreign countries. A claim arising from a maritime incident that sounds in tort also may be brought under the Army Maritime Claims Settlement Act, 10 U.S.C. §§ 4801, 4802, and 4806, or by lawsuit under the Suits in Admiralty Act, 46 U.S.C. §§ 30901–30918, or the Public Vessels Act, 46 U.S.C. §§ 31101–31113. See chapter 8 of this publication.

10–3. Claims payable

a. Noncombat activities. A claim arising out of noncombat activities is payable. The glossary in AR 27–20 defines noncombat activities that give rise to cognizable claims. The principles underlying this definition also apply to noncombat claims cognizable under the FCA. See chapter 3 for a discussion of these principles.

b. Combat activities. Claims arising "directly or indirectly" from combat activities of the U.S. armed forces are not payable. Whether damages sustained in areas of armed conflict are attributable to combat activities or noncombat activities depends upon the facts of each case. Damages caused by enemy action, or by the U.S. armed services resisting or attacking an enemy or preparing for immediate combat with an enemy, are certain to be considered as arising from combat activities. The combat exclusion applies whether or not war is declared and applies to hostile actions against the U.S. even where peacekeeping or humanitarian assistance is involved until actual hostilities cease, a determination that can be made by the appropriate operational commander. Prior to any payment, the claimant must be determined to be friendly to the U.S. Training for combat and the operation of military facilities not directly involved in combat actions often will not be classified as combat activities, even though their purpose may be to prepare for combat operations. See FTCH § II, B4k. Similarly, the operation of an aircraft (including its airborne ordnance) while preparing for, going to or returning from a combat mission will not be considered as combat.

c. Acts of Soldiers and civilian employees.

(1) Liability under the FCA may be based on acts or omissions of U.S. Soldiers or civilian employees of a U.S. military department only if they are considered negligent or wrongful. These persons need not be acting within the scope of their employment for their negligent conduct to cause actionable loss, damage or injury. Additionally, there is no bar to claims arising from off-duty or criminal conduct of U.S. Soldiers or civilian employees.

(2) The "scope of employment" restriction to the waiver of sovereign immunity does apply, however, to non-U.S. citizens who are hired locally by the U.S. armed forces and whose negligent or wrongful conduct causes damage, injuries or death in the country in which they were hired to work. The FCA's purpose, to maintain friendly relations with foreign countries and their inhabitants, is not furthered by accepting responsibility for the off-duty acts of local citizens whose only tie to the U.S. Army or other military department is their employment.

(3) Liability may be based on non-scope acts of civilian employees who are not U.S. citizens but who are hired in one country to work in another country. The adjudicating authority may consider the place of hire, the place of employment, and the place of the incident giving rise to the claim in determining liability. For example, the United States need not accept liability for a British citizen's off-duty acts occurring in England simply because a U.S. military department hired this tortfeasor to work in Germany.

10–4. Claims not payable

See the exclusions set forth in AR 27–20, chapter 2, section V, Determination of liability, which are further discussed in paragraphs 2–36 through 2–43 of this publication. See also AR 27–20, paragraph 10–4.

a. Domestic obligations. Claims arising from private domestic obligations rather than government transactions are

not payable. Such claims arise through off-duty conduct of U.S. military or civilian personnel for which the persons incurring them may be held personally accountable. At times, claimants may seek compensation for damage to or loss of personal property bailed to individual members of a U.S. armed force. If the damage or loss results from a noncombat activity, the bailor's claim may be payable. However, although the United States accepts liability for damage to and loss of property bailed to the United States, it will not accept liability for bailments that constitute private domestic obligations.

b. Contractual claims. Claims brought pursuant to a personal contract with a U.S. Soldier or civilian employee are not payable. For example, a claim for damages resulting from a U.S. Soldier passing a bad check would not be payable, nor would one for property damage to a privately owned vehicle loaned to a U.S. Soldier for personal purposes. Note, however, that if the U.S. Soldier caused a vehicle collision, any damage to a third party's car would be payable. Similarly, a FCA claim brought by the immediate relatives of a foreign citizen spouse of a U.S. Soldier who murdered the spouse is cognizable because the damages arise not out of the marriage contract but from the murder, a criminal act.

10-5. Applicable law

The amount allowed for compensation will not exceed the amount normally allowed in the place of occurrence, whether by law or custom. Since many countries pay social benefits which replace the monetary damages normally allowed by local courts, the adjudicating authority should take this into consideration when determining the amount allowed. (Remember that the FCA does not permit subrogation, even when governmental agencies are the subrogees). Generally, AR 27-20, subparagraphs 3-5(b) through (d), provides sufficient guidance to determine allowable elements of damages. However, where moral damages are permitted under the law of the place of occurrence, a claim for such damages is payable to a member of the immediate family despite the absence of physical impact. See subparagraph 2-53c(4).

Section II Foreign Claims Commissions

10-6. Appointment and functions

a. Appointing authority.

(1) The Commander USARCS, or the senior judge advocate (JA) of a command having a command claims service, such as U.S. Army Claims Service Europe (USAREUR), or 8th U.S. Army-Korea, or his or her delegee, is authorized to appoint a Foreign Claims Commission (FCC). Normally, a senior JA will appoint an FCC to process claims arising in the command's area of geographic responsibility. USARCS will appoint them throughout the rest of the world.

(2) Because of rapid troop deployment, the senior JA must closely coordinate the appointment of FCCs with USARCS. For example, when troops drawn from a senior JA's area of responsibility are deployed outside that area, the senior JA should coordinate with USARCS as to who will appoint the FCC. If the troops are drawn from posts within the United States, USARCS will appoint the FCC. The appropriate authority is responsible for the FCC's training and support; this enhances the authority's responsibility. USARCS must be informed immediately of the FCC appointment, however. A copy of the appointing orders will be sent to USARCS, which will assign an office code to the FCC. The office code enables claims to be monitored, and payments thereon to be recorded, in the Tort and Special Claims Application database. FCCs must request funding from the USARCS budget office as needed basis. Funds are not automatically supplied to an FCC.

b. The FCA claims are processed by an FCC composed of either one or three members. If a one-member FCC cannot reach a settlement or believes that the claim should be presented before a three-member FCC, that one-member FCC should investigate and evaluate the claim in accordance with the guidance set forth in AR 27-20, paragraph 10-6, and the provisions of chapter 2 of this publication. Where available, a unit claims officer should conduct the initial investigation. Before forwarding the file to a three-member FCC, the one-member FCC should discuss with the claimant the basis for the claim and, if meritorious, the amount the claimant seeks. If a claimant maintains that the claim is meritorious, despite the FCC's position to the contrary, the claimant should state that position in writing whenever possible. The one-member FCC must consult with an attorney versed in applicable local law, such as a claims judge advocate or claims attorney working for the Army or an attorney connected with the military mission. If none is available, consult USARCS. The one-member FCC report should include the information set forth in paragraph 2-60, including the FCC's observations of the claimant based on personal interviews and a site visit. Photographs should be taken for use by the three-member FCC.

10-7. Composition

Upon approval by the Commander USARCS, an FCC may be composed of one or more members from another uniformed service. If another service has single-service responsibility for claims arising in the foreign country where the particular claim arose, that service is responsible for the claim. If requested, USARCS, a command claims service, or an ACO should cooperate either in conducting the investigation or by furnishing a member.

10–8. Qualification of members

The qualifications required of FCC members are set forth at AR 27–20, paragraph 10–8.

10–9. Settlement authority

See AR 27–20, paragraph 10–9.

10–10. Solatia payments

a. In certain countries, particularly those within Asia and the Middle East, an individual involved in an incident in which another is injured or killed or property is damaged may, in accordance with local custom, pay solatia to a victim, the victim's family or another person authorized by the victim (such as a tribal leader) without regard to liability. An offering of solatia seeks to convey personal feelings of sympathy or condolence toward the victim or the victim's family. Such feelings do not necessarily derive from legal responsibility; the payment is intended to express the remorse of the person involved in an incident. Such payments usually are made as quickly as possible after the incident, and in a nominal amount that varies according both according to the involved person's ability to pay and to local custom. In certain countries, the payment is not always made in money. A custom need not be of ancient origin or common to an entire country to be a basis for the payment of solatia, but should predate U.S. military involvement in the area.

b. Solatia payments are made from the unit's operation and maintenance funds pursuant to directives established by the appropriate commander for the area concerned. They are not disbursed from claims funds. Local custom will dictate whether the involved party should personally present the solatia payment, even though the funds are provided by the unit. Although solatia programs are usually administered under the supervision of a command claims service, they are essentially a theater command function, whose propriety is based on a local finding that solatia payments are consistent with prevailing customs.

c. A solatia payment may not be used in lieu of an advance payment, if such is warranted and authorized under the provisions of 10 U.S.C. § 2736 and AR 27–20, chapter 2. The adjudicating authority may consider the amount of solatia paid when determining the claim award. Normally, a nominal solatia payment is not offset from a subsequent award based on statutory liability. However, when a solatia payment amount is high in relation to the claim's value, the adjudicating authority may consider this in determining the claim award.

Chapter 11

Personnel Claims and Related Recovery Actions

Section I

General

11–1. Authority

a. Purpose. 31 U.S.C. § 3721, the Military Personnel and Civilian Employees Claims Act (also known as the Personnel Claims Act or PCA) and as implemented by AR 27–20, chapter 11, authorizes the payment of Soldiers' and civilian employees' claims for the fair market value of personal property lost, damaged, or destroyed incident to service. The PCA is a gratuitous payment statute. It is not insurance, nor is payment conditioned on tort liability. Congress instead determined to lessen the hardships of military life by providing prompt and fair recompense for certain types of property losses, especially those caused by frequent moves and transient assignments to areas with limited police and fire protection.

b. The Army Claims System. The Army Claims System intends that, within approved guidelines, Soldiers and civilian employees will be compensated for such losses to the maximum extent possible. The PCA provides that the administrative settlement of such claims is final and conclusive (31 U.S.C. § 3721(k)), although under our regulations, if a claimant requests a reconsideration, the settlement is not final until the appropriate reconsideration authority takes action on the request.

c. History. Private relief acts passed by Congress were the first means of compensating Soldiers for property losses suffered incident to their service. Because of the number of Soldiers seeking such acts, Congress enacted a law to settle Soldiers' claims for the loss of personal military equipment and horses after the War of 1812 (3 Stat. 261 (1816)). That law was reenacted following the Mexican War (9 Stat. 414 (1849)). In 1885, a new personnel claims statute was enacted covering the loss of all types of personal property in certain circumstances (23 Stat. 350 (1885)). In 1918, this coverage was extended to other types of losses, including losses of property in shipment pursuant to orders (40 Stat. 880 (1918)). In 1921, Congress shifted settlement authority from the Department of the Treasury to the Secretary of War (41 Stat. 1436 (1921)). During World War II, the Secretary of War was permitted to delegate authority to subordinates as the volume of claims increased (see 55 Stat. 880 (1942); 57 Stat. 357 (1943)). In 1945, Congress repealed existing legislation and substituted a comprehensive act for the settlement of claims for losses of personal property incident to the service of Army personnel (59 Stat. 135 (1945)). In 1952, after the Department of Defense

(DOD) was formed, coverage was extended to all DOD personnel (66 Stat. 548 (1952)). In 1964, it was extended to employees of all federal agencies (78 Stat. 767 (1964)). The legislative history of the 1964 Act reflects that improved morale occasioned by the prompt and fair payment of losses incident to service benefited the government, and that the regulations and settlement experience of the military departments provided guidelines for the extension of coverage to the other federal agencies (S. Rep. No. 1423, 88th Cong., 2d Sess., reprinted in 1964 U.S. Code Cong. & Admin. News 3407, 3413). In 1982, the statute was recodified as 31 U.S.C. § 3721 without substantive change. The maximum payment per claim originally authorized in 1945 was \$2,500. This was successively increased to \$6,500 (70 Stat. 376 (1956)), to \$10,000 (79 Stat. 789 (1965)), to \$15,000 (88 Stat. 1381 (1974)), and to \$25,000 (96 Stat. 245 (1982)). A special provision enacted in 1980 authorized payment of up to \$40,000 for evacuation and hostile act claims (94 Stat. 3031 (1980)), and 1988 legislation increased the maximum payment for all claims accruing after 31 October 1988 to \$40,000 (Pub. L. No. 100-565 (1988)). In 1996, Congress amended the statute to increase the maximum payment from \$40,000 to \$100,000 in situations where the loss of, or damage to, personal property arose from certain types of emergency evacuations or other extraordinary circumstances (110 Stat. 458 (1996)).

11-2. Delegation of authority

a. The PCA empowers the head of each agency to issue rules for settling claims. AR 27-20, paragraph 1-17e authorizes the Commander USARCS to interpret and grant exceptions to rules issued for Army personnel. The Army is also authorized, pursuant to DOD Directive (DODD) 5515.10, to settle personnel claims presented by DOD employees who are not employees of one of the military services such as the Navy or the Air Force. Although the PCA does not provide for the payment of claims of nonappropriated fund (NAF) employees, AR 27-20, chapter 12, provides that such employees' personnel claims are adjudicated under the same principles and paid from NAFs. Within DA, the following settlement authority is delegated.

b. The 1996 amendment to subparagraph (b)(1) of the PCA provides that claims for loss of, or damage to, personal property due to emergency evacuations or extraordinary circumstances may be paid up to \$100,000. Only the Commander USARCS or the Chief, Personnel Claims and Recovery Division, USARCS can determine that a loss is due to extraordinary circumstances. This increase in the statutory amount does not change the respective monetary authorities of the heads of area claims offices or claims offices with approval authority. If a field claims office believes that a claim merits payment in excess of \$40,000, then it will pay the claim up to the limit of its authority. Once that payment has been verified, the claim should be forwarded to USARCS with a seven-paragraph memorandum recommending payment of the additional amount. The memorandum must explain why the incident is considered "extraordinary." Claimants will not be told what the field claims office recommended. Extraordinary is defined as beyond what is common or usual. For example, the eruption of a dormant volcano that causes personal property loss may be extraordinary, whereas damage or loss of a few items during a government sponsored move would not.

c. Regardless of the amount claimed, the Commander USARCS or a designee may pay any amount up to the statutory maximum and deny claims in any amount.

d. The head of an area claims office (ACO) or the chief of a command claims service may pay up to \$40,000 and deny claims in any amount.

e. If authority is delegated to them by the head of the area claims office, a Claims Judge Advocate or Claims Attorney of an area claims office may pay up to \$25,000 and deny payment on specific line items in the claim, but may not deny payment of the entire claim.

f. U.S. Army Corps of Engineers (COE) ACOs do not have approval or settlement authority on personnel claims. Claims of Corps of Engineers personnel must be submitted to the appropriate area claims office for adjudication and settlement.

g. A claims processing office (CPO) with approval authority may pay up to \$10,000 and deny payment for specific line items in the claim, but it may not deny the entire claim. A CPO must transfer denials and claims that are payable in an amount greater than its approval authority to the ACO with a personnel claims memorandum of opinion. For example, if a CPO with approval authority receives a claim for \$30,000 and determines that it is meritorious in the amount of \$12,000; the CPO will pay \$10,000 and forward the file to the ACO for payment of the additional \$2,000.

h. The head of an area claims office, or Chief of command claims service may redelegate up to \$25,000 of his or her approval authority to subordinate JAs and to claims attorneys. The head of an ACO or chief of a command claims service must, however, act personally on denials, transmittals of personnel claims to the next higher settlement authority, waivers of maximum allowances, payments for more than \$25,000, and requests for reconsideration (see para 11-20g, below for a discussion of the approval and settlement authority responsibilities for processing requests for reconsideration).

11-3. Scope

Claims cognizable under other claims payment statutes (see AR 27-20, para 11-3c) should be processed as follows:

a. *Claims cognizable as tort claims.* Except for claims cognizable under Article 139, UCMJ, claims cognizable under other claims statutes will first be considered for payment under the PCA. As an exception to this general rule, if a privately owned vehicle (POV) driven under orders for the convenience of the government, is damaged by the negligence of another government employee, other than the owner or the owner's agent, and the negligent employee

was acting within the scope of their employment at the time of the accident, the claim will first be considered under applicable tort claims statutes. See AR 27–20, chapter 3, implementing the Military Claims Act. If another military service is responsible for the loss, but refuses to pay the claim as a tort because their regulations do not permit it, then the claim may be paid by the Army under the PCA. If a claim is not compensable under the PCA, it will be considered under any other applicable claims statute and, if appropriate, forwarded for investigation and settled under the provisions applicable to that statute. For claims involving personal injury as well as property damage, an investigation must be conducted to determine if payment or emergency partial payment may be made. The incident giving rise to the claim cannot have been caused by the claimant’s negligence.

b. Claims cognizable under Article 139, Uniform Code of Military Justice. If a claim that appears cognizable and meritorious under Article 139 is presented, the field claims office should so inform the claimant and assist in completing a claim against the Soldier(s) who stole, damaged, or vandalized the claimant’s property. Action on the claim as a loss incident to service should be deferred pending resolution of the Article 139 claim. Should recovery under Article 139 appear unlikely or inordinately delayed, the claim may be processed as a loss incident to service and paid under this chapter, directing the claimant to repay the field claims office if the offender makes payment under Article 139.

c. Foreign Military Sales. Some claims from Army National Guard (ARNG), Army Material Command, or COE personnel may arise from shipments to or from overseas assignments or other activities in support of the FMS program. As these programs must be self supporting, money used to pay for the FMS program should be used to pay claims arising out of the program. In the past, claims identified as being from FMS activities were adjudicated by the receiving office, but then had to be sent to Army Material Command headquarters, or the appropriate COE office, for payment. Because there were relatively few such claims, there was much confusion in the payment process. Consequently, all payments on personnel claims that arise out of FMS activities will be paid by the office that received and adjudicated the claim. Once payment to the claimant has been verified, the claim will be forwarded to USARCS. Mark the file in large red letters with “FMS” on the front cover and enter FMS in the Special Code field. If the claim was filed online, enter “FMS” in the note section. If the claim is one that involves recovery from a third party, forward the claim to the address shown below. USARCS will then seek reimbursement from the appropriate FMS case manager.

U.S. Army Claims Service
ATTN: JACS–PCR
4411 Llewellyn Ave.
Ft. Meade, Maryland 20755–5360

11–4. Claimants

a. General. Congress granted the right to be compensated for a loss incident to service to certain classes of people. While the PCA applies to all federal employees, Army claims offices are authorized to compensate only:

- (1) Soldiers on active duty.
- (2) Members of the U.S. Army Reserve (USAR) or the ARNG engaged in active service or inactive duty training.
- (3) Civilian employees of the Army or the ARNG.
- (4) Civilian employees of DOD agencies who are not employees of the Air Force, Navy, or Marine Corps, subject to the limitations in paragraph 11–4c, below.
- (5) Entitlement to present a claim is based on one’s status at the time the claim accrued. For example, if a Soldier’s vehicle is vandalized at quarters on the installation while the Soldier is on active duty, that Soldier is still a proper claimant for that particular claim even if no longer on active duty when the claim is filed. However, an exception to this general rule is personnel who go AWOL or who are sentenced to confinement before their claim is settled. See AR 27–20, paragraph 11–4f and paragraph 11–4k of this chapter for further guidance.

b. Civilian employees transferring between services. By agreement among the services, a claim brought by a civilian employee transferring from one service to another—from the Army to the Navy, for example—is processed by the gaining service. The same rule applies to Soldiers leaving active duty with the Army to accept a civilian position with another service. Most of these claims will arise out of the shipment of personal property in connection with the transfer. In these cases, it does not matter which service paid for the shipment. The claim is processed and paid by the gaining service.

c. DOD Educational Activity teachers. By agreement among the services, the claims of DOD Education Activity (DODEA, formerly DODDS) employees are processed by the service operating the installation where the schoolteacher is employed. If the claim is presented by a DODEA teacher who is leaving DODEA employment, the service operating the installation where the teacher was last employed should process the claim. See DODD 5515.10.

d. Defense Commissary Agency. Personnel claims from employees of the Commissary Agency, like claims from DODEA employees, will be processed and paid by the service that is responsible for the installation on which the employee is working at the time of the loss. If the claim is presented by a Defense Commissary Agency (DeCA) employee who is leaving DeCA employment, the service operating the installation where the employee was last employed should process the claim. See DODD 5515.10.

e. Reserve Officers' Training Corps cadets. A Reserve Officers' Training Corps (ROTC) cadet is a proper claimant while traveling at government expense or while attending military summer camp or a service school.

f. Nonappropriated fund (NAF) employees. NAF employees may be compensated from NAFs for losses incident to their employment. The PCA, subsection (a)(1), specifically states that NAF activities are not agencies for purposes of the Act, and its legislative history states that NAF employees were not intended as beneficiaries (S. Rep. No. 1423, 88th Cong., 2d Sess., reprinted in 1964 U.S. Code Cong. & Admin. News 3407, 3410).

(1) *NAF employees are employees whose salaries are paid from NAFs.* Day care providers, independent contractors, employees of independent contractors, concession operators, volunteer workers, and persons paid from appropriated funds (APF) assigned to NAF organizations are not NAF employees. Soldiers who are also part-time NAF employees will be considered NAF employees for claims purposes, if the loss occurred while they were functioning as such. Claims by NAF employees for losses incident to service are processed in exactly the same way as such claims by Soldiers or APF employees, except that they must be forwarded to the appropriate NAF activity's payment office for payment from NAFs as per paragraph 2-80h, above.

(2) *Household goods or hold baggage claims.* For Army and Air Force Exchange Service (AAFES) household goods or hold baggage claims, the entire claim file should be sent for both payment and recovery to the appropriate AAFES office (see para 2-80h) with a cover letter, as AAFES does its own recovery action on such claims. For other claims, a copy of DD Form 1842, Claim for Loss or Damage to Personal Property Incident to Service, should be sent with a cover letter. A sample completed DD Form 1842 is posted on the USARCS Web site at "Claims Resources," III, no. 16; a blank copy may be downloaded from www.dtic.mil.whs/directives/infomgt/forms/formsprogram.htm. In all instances, the NAF entity should be directed to send the claims office a copy of the check sent to the claimant or other proof showing the date and amount for which the claimant was paid. NAF entities have no discretion about whether to pay a claim. However, they should be encouraged to contact the claims office if they believe an error has been made.

(3) *Nonappropriated fund organization member claims.* Claims by members of NAF organizations, such as riding clubs, sport parachute clubs, and boating clubs, for losses arising from organizational activities or property stored in a building used by the organization are not cognizable as losses incident to service. This is so even when the club member is a proper claimant, such as an active duty Soldier. Such claims should be denied under the PCA, but may be considered under any applicable tort claim statutes.

(4) *Customer complaints and claims for losses occurring at NAF facilities.* Customer complaints for defective items purchased, inadequate repairs, and counterfeit money received in change are not proper claims under the PCA and should be processed through AAFES channels. Claims by Soldiers or APF employees for losses that may be considered incident to service, such as theft from a vehicle parked at a NAF facility, should be treated as normal personnel claims and paid from APF even if the losses occurred at an AAFES facility.

g. Civilian employees. A loss unconnected with the performance of duty, particularly a loss occurring outside of normal duty hours, is often not incident to a civilian employee's service, even though the same loss might be deemed incident to a Soldier's service. In general, a loss that does not occur at the workplace during duty hours or incident to temporary duty travel would not be incident to a civilian employee's service. This is especially true of losses by foreign national employees. In particular, an unlawful confiscation by a foreign power of property belonging to its nationals would not be incident to service.

h. Agents or legal representatives (including spouses) of living claimants and survivors of deceased claimants.

(1) *Initiation of a claim by an agent.* The authorized agent or legal representative of a proper claimant may file on behalf of the claimant if the agent provides a power of attorney that was properly executed in accordance with the law of the place where it was signed, and is either a general power of attorney or a special power of attorney that grants specific permission to file the claim. A limited power of attorney that authorizes the agent only to accept a shipment does not provide authorization to file a claim.

(2) *By a spouse without a power of attorney.* A spouse may file on a claimant's behalf if the latter has signed an authorization for the spouse to do so. Any writing, such as a letter signed by the claimant and authorizing the spouse to file a claim will be accepted in lieu of a power of attorney. This policy is designed to facilitate action by the spouse on the claimant's behalf; the spouse has no independent right to file except as a survivor of a deceased claimant (see subpara (5)(a) below). Because of the increased risk of duplicate or fraudulent claims, claims personnel should take great care, particularly when they know that the spouse is estranged from the claimant. In such instances, contact the claimant by telephone to confirm that the claimant has indeed authorized the spouse to act.

(3) *By a guardian.* The legal guardian of a minor or claimant declared incompetent by a court may file a claim on the claimant's behalf. The claims office must maintain a copy of the agent's power of attorney, or the spouse's letter of authorization, or the guardian's appointment document in the file. Payment is made in the claimant's name and sent to the address of record. If the agent does not provide the claimant's written authorization to file the claim, the claim should be considered the agent's claim rather than the claimant's and, if the "agent" is not a proper claimant in his or her own right, claims personnel should deny the claim. An agent should sign the claim form as follows: Claimant By: Claimant's Agent, Attorney in Fact.

(4) *By a claims preparation service.* When the agent presenting a claim is a private company, especially one that

specializes in preparing claims in return for ten percent of the amount received (the maximum permitted by the PCA); the claims office must look beyond the power of attorney creating the agency to see if an assignment exists. Assignment of claims is prohibited except as provided by 31 U.S.C. § 3727. Whenever a claimant hires an agent to prepare and submit a claim, the claimant will be required to examine the completed claim and sign the DD Form 1842 to ensure correctness (a completed sample of DD Form 1842 is posted on the USARCS Web site at "Claims Resources," III, no. 16; a blank copy may be downloaded from www.dtic.mil.whs/directives/infomgt/forms/formsprogram.htm.) If evidence indicates that the claimant did not do so, return the claim directly to the claimant to certify in writing that it is correct. In addition, payment will be made in the claimant's name and sent with the settlement letter directly to the claimant, regardless of any agreement the claimant may have entered into to the contrary. If the claimant declines to certify that the claim is correct or the agent refuses to provide the claimant's address, the claim may be denied as an unlawful assignment. Claims personnel should closely examine estimates of repair provided by claims preparation services and reject any inflated estimates. In addition, if it appears that a particular claims preparation service is submitting its own estimates as estimates ostensibly prepared by a disinterested repair firm, claims personnel should investigate this practice for possible fraud (see para 11-6f for a thorough discussion of fraud and its applicability to claims).

(5) *Survivors of deceased claimants.* Certain relatives of a deceased proper claimant may file any claim the claimant could have filed. Survivors are ranked in order, and a claiming survivor must establish that there is no survivor higher in order. However, if more than one person is equal in order, the first claim settled will extinguish the rights of all the others. The estate of a deceased proper party claimant is not a proper claimant, nor is an executor or personal representative who cannot file as a survivor. Survivors are ranked in the following order of relationship to the claimant:

- (a) Spouse.
- (b) Child or children.
- (c) Father, mother, or both.
- (d) Brother, sister, or both.

(6) *Determining appropriate claimants.* Claims personnel needing additional information should check with the Summary Court Officer or the Survivor Assistance Officer, especially on claims where the decedent leaves behind a minor child or children.

i. Members or employees of other services or federal agencies. Claims by members or employees of other services or agencies will be logged into the automated database using a claimant type code of "S" which, in the current database, allows minimal transactions to be later entered into the record. A transaction code of "TS" will be used to show the date the claim was transferred to the responsible service. Claims personnel should note on the claim form the date it was received from the claimant, review the claim to see if all supporting documents have been submitted, and advise the claimant if any are missing and likely to be requested by the adjudicating office of the other service.

- (1) Forward claims by Air Force or Navy personnel to the nearest legal office of that service.
- (2) Forward claims by Marine Corps personnel to:

Commandant of the Marine Corps
Headquarters U.S. Marine Corps
ATTN: M&RA (MRP-2)
3280 Russell Road
Quantico, Virginia 22134-5103

- (3) Forward claims by Coast Guard personnel to:

Household Goods Claims and Carrier Recoveries
U.S. Coast Guard Finance Center
ATTN: Claims and Carrier Recovery
PO Box 4121
Chesapeake, Virginia 23327-4121

(4) Forward claims by members of other federal agencies, such as the American Battle Monuments Commission or the Public Health Service, to the Office of the General Counsel or Chief Counsel of that agency.

j. Claims by other persons.

(1) *Claims by private employees and contractors.* Contractors' employees, Red Cross employees, United Service Organization (USO) employees, university personnel, and independent contractors (such as a physical fitness instructor who contracts with a Morale Support Activity to provide aerobics classes) are not proper claimants. Claims by such persons should be considered under other chapters, or denied. For example, a Red Cross employee's household goods are shipped to Germany on a government bill of lading (GBL) and damaged. The employee is not a proper claimant. In the absence of evidence suggesting that the loss occurred while the property was in the hands of government personnel and is cognizable as a loss of bailment under the Military Claims Act (MCA), the claim should be denied. However, for claims arising from household goods shipment or storage, remind such claimants when their claim is denied under the PCA that they have the right to file their claim directly with the responsible carrier or warehouse.

(2) *Claims by insurers and other third parties.* Claims by insurers, subrogees, assignees, and other third parties are not cognizable under the PCA. If the property owner could have presented a claim for the loss under the PCA, claims by such third-parties are barred from consideration under the provisions of any other claims statute. Effective 1 September 1995, claims for subrogation under the MCA are excluded. In addition, such claims are not cognizable under the Federal Tort Claims Act (FTCA); Preferred Insurance Co. v. United States, 222 F.2d 942 (9th Cir. 1954), cert. denied 350 U.S. 837 (1955); and United States v. United Services Auto. Ass'n, 238 F.2d 364 (8th Cir. 1956). See also Wallis v. United States, 126 F. Supp. 673 (E.D.N.C. 1954); Lund v. United States, 104 F. Supp. 756 (D. Mass. 1952); Rivera-Grau v. United States, 324 F. Supp. 394 (D. N.M. 1971); and Pratt v. United States, 207 F. Supp. 132 (D. Mass. 1962). For this reason, an insurer's claim that faulty wiring caused a fire in government quarters or that military police officers failed to take adequate measures to prevent a Soldier's vehicle from being vandalized in a fenced lot would not be considered under other claims statutes. It should be disapproved as a personnel claim. The allegation that government personnel were negligent is irrelevant under these circumstances, and there is no need to investigate the incident exhaustively or to assert that the government was free from negligence.

k. Personnel claims by absent without leave personnel or personnel sentenced to confinement. Occasionally, a claims office processes a personnel claim from a Soldier who later is absent without leave (AWOL) or who has been sentenced to confinement. In addition to the practical problems involved in locating such persons to obtain additional evidence or to pay claims, an ethical dilemma arises from using a gratuitous payment statute to compensate wayward Soldiers. Accordingly, if the claim arose out of an incident before the Soldier went AWOL or was sentenced to confinement, adjudicate and pay the claim, but do not delay action awaiting information from the claimant. If the claimant failed to provide adequate substantiation, before he or she went AWOL or was confined, adjudicate it to the extent possible and deny payment on any item, or the whole claim, if it is not substantiated. Send the notice of final action or denial letter to the claimant's last known duty address for AWOL Soldiers, or the appropriate confinement facility if the claimant is still confined. If an AWOL Soldier later returns to military control and submits a request for reconsideration, within 60 days of the claim settlement date, the office should consider the reconsideration request. Claims from Soldiers, or former Soldiers, alleging loss of or damage to their good resulting from their going AWOL or being sentenced to confinement will be denied under the PCA. Such claims may include allegations of loss of damage to their goods while being held as evidence, or allegations that the unit failed to safeguard their goods after they had departed the unit. Such allegations may be considered for payment as a tort under the Military Claims Act, but will not be paid under the PCA. If personal property is shipped in connection with such a Soldier's confinement, separation, or being dropped from the rolls, the claim will be denied regardless of whether it was at government expense. Claims office personnel will advise those claimants of their rights to file against the carrier.

11-5. Claims payable

The following are nonexclusive categories of damage to or loss of property that may be considered incident to service and therefore payable under the PCA.

a. Claims occasioned by the negligent acts of contractor personnel.

(1) Except for claims arising out of loss of or damage to property while in transit or storage, claims for loss or damage caused by the negligent act or omission of a government contractor, such as flooded on-post quarters caused by faulty contractor work, should first be referred to the contractor and to the contracting officer for settlement. The claims office should make every effort to assist the claimant in obtaining compensation from the contractor or the contractor's insurer. Assist the claimant in completing DD Form 1844, List of Property and Claims Analysis Chart, and in preparing a written demand on the contractor (in lieu of the DD Form 1842, which presents a claim against the United States), and in obtaining necessary substantiation. Sample completed DD Forms 1842 and 1844 are posted on the USARCS Web site at "Claims Resources," III, nos. 16 and 18-23; blank copies may be downloaded from www.dtic.mil.whs/directives/infomgt/forms/formsprogram.htm.

(2) Should the contractor fail to resolve the matter promptly, claims personnel may settle it as a loss incident to service as long as it is otherwise meritorious as a personnel claim. The claims office should then pursue recovery action against the contractor for the amount paid the claimant. If the contractor continues to deny liability, the claims office should coordinate with the contracting officer to offset the appropriate amount due the claimant from moneys payable to the contractor, as long as the contract contains such a clause. As an important preventive measure, the claims office should coordinate closely with local contracting officers to ensure that contracts routinely include liability, claim, and offset clauses.

b. Tangible personal property. The PCA provides only for payment for losses of personal property. Accordingly, compensation is authorized only for loss of or damage to personal property, for expenses associated with the repair or replacement of personal property, or for expenses so closely associated with the damage as to be a part of the damages. Examples of those expenses are fees to obtain certain documents, drayage, value added taxes, and repair estimates. Refer to paragraph 11-15 of this chapter for a more inclusive list and definitions of compensable incidental services. Examples of non-compensable incidental services are contained in paragraph 11-6d of this chapter. Loss of or damage to real property is not compensable, nor are other types of incidental expenses or consequential damages. Personal property is defined as any type of tangible property (for example, cars, stereos, pets, potted plants, and similar items) that is not real property.

(1) *Negotiable instruments.* A negotiable instrument such as a check is considered personal property. See paragraph 11-6c for treatment of other types of instruments. Except in emergency situations, however, a claim for the loss of a negotiable instrument will not be considered if the instrument can be reissued or the bank on which the instrument is drawn is obliged to honor it.

(2) *Items made or written by the claimant.* Compensation for an unpublished manuscript, a thesis, an unsold painting or similar artistic work created by the claimant or the claimant's friends or relatives is limited to the cost of materials. The value of such items is speculative. However, compensation for a utilitarian object made by the claimant, such as a quilt or a bookcase, is instead limited to the value of an item of similar quality.

(3) *Ownership or custody of property.* A claim for property owned by the claimant or immediate family members residing with the claimant is cognizable. The claimant may claim for items purchased on an installment plan even if title is not transferred until the item is paid for in full. A claim for borrowed items over which the claimant exercised dominion and control at the time of the loss is also cognizable. Items stored or transported to accommodate another individual are not considered borrowed items, however, and special rules govern payment of claims for loaned vehicles. Contact the actual owner when the claimant does not own an item claimed.

c. Extraordinary hazards. The PCA is not a substitute for insurance. Quarters losses, losses of clothing and other items worn, and most vehicle losses are compensable only if caused by "fire, flood, hurricane, or other unusual occurrence, or by theft or vandalism." The PCA provides protection only from extraordinary hazards (broadly categorized as losses due to abnormal climatic conditions or to the condition of the military installation that other Soldiers and civilians do not face to the same degree) and the intentional torts of theft and vandalism, which may or may not have a service connection.

(1) *Fire.* Losses caused by fires are compensable, regardless of whether the fire was caused by an act of God or by a human agency, such as faulty wiring or arson. However, a fire in a vehicle's engine compartment resulting from the operation of the vehicle is normally caused by a mechanical defect and thus is not considered in this category. A claimant is expected to maintain quarters and to supervise small children to minimize the risk of fire. Claims offices are never bound by the determination in a report of survey that the claimant was not negligent; instead, they are required to reach an independent conclusion based on all the evidence, particularly that provided by the fire marshal or other experts. See paragraph 11-6i(1) for fires caused by the negligent conduct of a claimant's family members or houseguests.

(a) When a fire starts in a Soldier's government quarters and destroys personal property therein, claims personnel must determine whether preliminary findings indicate that the quarter's occupant, or the occupant's family members or agents, may have caused the fire before making an emergency partial payment from claims funds under the PCA. While claims personnel are willing to alleviate hardship in these situations, the law may not entitle the Soldier to any payment, and the government actually may hold the Soldier financially liable for damage to the quarters. The prohibition against paying claims for property that a claimant loses or damages due to his or her own negligence is statutory; paying such claims violates the Anti-Deficiency Act. Thus, until an investigation is complete, an emergency partial payment to a Soldier in whose quarters a fire of unknown origin occurred is almost always inappropriate. AR 27-20, paragraph 11-18, authorizes an emergency partial payment if the claim is clearly payable in an amount exceeding the proposed emergency partial payment.

(b) Withstanding the temptation to make emergency partial payment becomes even more crucial when personal injuries or deaths result from the fire, potentially leading to claims by the occupants against the United States under the MCA or the Federal Torts Claims Act (FTCA). In such instances, claims personnel may resolve the question of negligence and determine whether an emergency partial payment is allowable only by consulting with the overseas command claims service or the Tort Claims Division area action officer (AAO) at USARCS, who may, in turn, consult with the Department of Justice or with higher authority within DA. Note, however, that these restrictions do not limit payment under the PCA if a fire spreads from its point of origin, destroying property belonging to other occupants of a multifamily building, provided they were not negligent.

(c) Whenever a quarters fire occurs, claims personnel should investigate the scene immediately to determine what items the claimant should salvage and to note the general nature of the property the claimant owned to avoid substantiation problems.

(d) If possible, claims personnel should photograph the scene. The CJA or claims attorney should then obtain the evidence necessary to determine independently whether the claimant's negligence caused the fire. In making this determination, the CJA or claims attorney is not bound by the report of survey, usually produced by an officer without expertise in determining the cause of fires. The fire marshal's assessment and the Criminal Investigation Division report are the best sources of evidence. However, these reports are not adequate if serious injury or death has occurred; in such instances, claims personnel should contact the USARCS AAO or the command claims service to determine whether to hire an outside expert.

(e) The PCA is not a disaster relief statute and is not the only source of assistance available in emergency situations. Claims personnel can steer Soldiers who have been overwhelmed by catastrophic events to agencies that provide immediate assistance, such as Army Emergency Relief, the Red Cross, Army Community Service, or the installation chaplain's office. Some of these agencies can process grants or loans for immediate necessities. A claims examiner

who has determined that payment under the PCA is proper can make emergency partial payment so that the claimant can repay these loans.

(2) *Flood.* Losses due to flooding caused by weather conditions or burst pipes in quarters are compensable. However, in areas plagued by frequent flooding below ground level, the claimant is expected to store items off the floor. Few items are destroyed merely by becoming wet, and claimants have a duty to mitigate, or lessen, damage by drying out wet items promptly; deterioration caused by failure to do so is not compensable.

(3) *Unusual occurrence.* Losses due to an unusual occurrence, defined as a hazard outside the normal risks of day-to-day living and working, are compensable. An unusual occurrence takes place at a particular time and location; it is not an accumulation of damage due to a continuing condition. Unusual occurrences do not normally result from human error (for example, a rock thrown by a lawn mower, or tearing one's trousers on the edge of a filing cabinet, is not an unusual occurrence). Two different types of incidents may be considered unusual occurrences: those of an unusual nature, such as a lightning bolt striking and destroying a vehicle, and those of a common nature that occur in an unexpected degree of severity, such as a golf ball-sized hailstone striking and denting a vehicle.

(a) *Lightning and power surges.* Storms, power surges, and power outages are not unusual occurrences, and damage caused by such incidents is normally not compensable. Claims that electrical or electronic devices were damaged by a power surge may be paid when lightning has actually struck the claimant's residence or objects outside it, such as the transformer box, or when power company records or similar evidence show that a particular residence or group of residences were subjected to an unusually intense power surge. However, it is virtually impossible to distinguish damage caused by a mechanical defect from surge damage by inspecting the item; therefore, a claimant's honest belief that the loss occurred as a result of a power surge during a storm may not be sufficient to show what caused the damage. In such cases, the opinion of a qualified repair technician may be required. Moreover, in areas subject to frequent thunderstorms or power fluctuations, claimants are expected to use a surge suppressor, if available, to protect delicate items such as computers or videocassette recorders.

(b) *Power failure.* Claims that electrical or electronic devices were damaged by a power outage are not compensable. An outage unaccompanied by a power surge will not damage a properly designed electrical or electronic device. Claims that food was spoiled by a power outage may be considered if the outage is of unusual duration. What constitutes "unusual duration" is determined by how long it normally takes food to spoil under local climatic conditions. In tropical countries, this might be less than one full day. Before paying such a claim, the approval authority must determine that the food did not spoil as a result of either the claimant's negligence in repeatedly opening and closing the refrigerator door or the food's existing condition.

(c) *Collapse of walls and fixtures.* The sudden manifestation of a substantial defect in a building may be considered an unusual occurrence. For example, it is an unusual occurrence for a large ceiling light fixture in government quarters to suddenly break loose and fall, damaging a table underneath. Minor deficiencies in a building are considered ordinary hazards of day-to-day living. When damage to personal property is caused by a defect in economy quarters outside the United States, the claimant should first examine the landlord's insurance, if any, for coverage.

(d) *Gradual deterioration.* Gradual deterioration of furniture and other items due to prevailing climatic conditions, such as cracking or shrinkage of wooden panels in an extremely dry area, or rusting of outdoor furniture in very damp climates, is not an unusual occurrence.

(e) *Termite and other insect or rodent infestation.* In areas where these pests are common, infestation is not considered an unusual occurrence. Tropical and subtropical areas are particularly subject to termite infestation, and many installations in CONUS encounter seasonal mouse problems. If, however, installation facilities engineers are scheduled to correct the problem but fail to do so over an extended time, the occurrence may be considered unusual and the additional damage compensable to the extent that the claimant took reasonable steps to lessen the damage. The CJA or claims attorney at field claims offices located in such infested areas will periodically publish warnings in local media.

(f) *Ice and snow.* In regions subject to very cold weather, ice and snow sliding off a roof onto a vehicle or collapsing the roof of a utility shed are not unusual occurrences. In areas where this may be considered unusual, apply a negligence analysis to determine whether it was reasonable for the claimant to park in the location where the damage occurred. It is not an unusual occurrence for a vehicle to skid off the road during bad weather.

(g) *Hail.* While a hailstorm is normally not considered an unusual occurrence, an exceptionally severe hailstorm, with golf ball-sized hail, is unusual.

(h) *Airborne emissions.* Spotting, etching, discoloration, or other damage allegedly caused by precipitation of various airborne chemicals or other discharges from Army activities is not normally considered an unusual occurrence. Such a claim should be investigated as a tort and warrants particular scrutiny because of the potential for widespread damage. The Army often has a duty to warn potential claimants of known property or health hazards, and personnel may solicit technical advice and recommendations from the U.S. Army Center for Health Promotion and Preventive Medicine (USACHPPM) and the U.S. Army Environmental Center (USAEC) for remedial action to avoid future exposure. Such occurrences may be considered unusual only when investigation reveals that the precipitation was caused by unusual weather conditions. It is not an unusual occurrence for sap from trees to settle on vehicles.

(i) *Damage to vehicles from baseballs, golf balls, and other sporting equipment.* Soldiers' vehicles and other

property at their quarters are sometimes damaged by golf balls, baseballs, soccer balls and other such items that are hit out of bounds of the normal playing area or sports venue (for example, golf course, ball field). This is usually not an unusual occurrence when the damage is to a vehicle parked at the sports venue or driving on an access road that leads into that sports venue. However, there may be occasions when damage is inflicted to property at quarters adjacent to a sports venue, or is inflicted on a vehicle that is parked in an adjacent office parking lot or that is passing by on an adjacent road. In these cases, the incident may be considered an unusual occurrence and may be payable if the other requirements of the act are met, to include the requirement that the vehicle was properly on the installation. A claim for damage to a vehicle from a golf ball or similar item may also be payable under the PCA regardless of where the vehicle is located if, at the time of the damage, the vehicle was being used under orders for the convenience of the government and the claim is otherwise payable. In cases that are not payable under the PCA, the incident should be investigated for possible payment under a tort claims statute, such as the Military Claims Act, the Foreign Claims Act, or the Federal Tort Claims Act.

(j) *Potholes and other road hazards.* Damage to moving vehicles caused by defects or foreign objects in the road is not considered the result of an unusual occurrence. Such incidents may be paid as personnel claims only when the claimant used the vehicle under orders for the convenience of the government and the claim is otherwise meritorious as a personnel claim. Otherwise, if the damage is from a hazard on a military installation, investigate such claims as torts.

(k) *Paint overspray and damage from rocks thrown up by lawnmowers and vehicles.* Paint overspray of vehicles and damage to vehicles from rocks or debris thrown up by lawnmowers or other vehicles is not an unusual occurrence. Investigate such claims as torts. When the overspray or damage from rocks thrown up by mowers is caused by the negligence of contractor personnel, refer the claim to the contractor and contracting officer for payment.

(l) *Collisions, including hit-and-run and those involving animals or shopping carts.* Collisions are not unusual occurrences. Claims for damages arising from such incidents may be paid as personnel claims only when the vehicle was being used under orders for the convenience of the government. For example, it is not an unusual occurrence for a parked vehicle to be struck by a shopping cart in a commissary parking lot or by a hit-and-run driver, nor is it an unusual occurrence for a motor vehicle to strike a deer on the installation. Unless the vehicle was used for the convenience of the government, claims for these incidents would only be payable if the government was liable under a tort claim authority.

(m) *Wind damage.* Damage to a vehicle's paint or exterior trim caused by high winds blowing sand is common in certain areas and is considered gradual deterioration, rather than the result of an unusual occurrence. However, extraordinary damage to the paint or exterior trim caused on a particular occasion, as well as broken or cracked glass or severe pitting of windows and windshield caused by debris thrown up by high winds on a particular occasion, is considered an unusual occurrence. In determining whether other types of damage resulted from an unusual occurrence, consider the nature of the damage rather than whether the measured wind speed on a given day exceeded some arbitrary figure. In areas subject to wind damage, publicize the fact that most wind damage is not compensable. This will encourage Soldiers to purchase insurance protection against this hazard. For example, it is not an unusual occurrence for a car's paint to be abraded by blown sand, allegedly during a windstorm. However, it is an unusual occurrence for high winds to drive a pebble through a windshield or to roll a dumpster into a parked vehicle.

(n) *Falling trees and branches.* While falling branches are not unusual, it is unusual for a large, apparently healthy tree or a significant portion of one to fall.

(o) *Paint, battery acid, ink, and oil spilled on clothing.* Such incidents are usually considered normal hazards of day-to-day living and working. Spillage while handling such materials is not an unusual occurrence, even if the claimant's normal duties do not include painting or transporting batteries. Commanders who have Soldiers working in areas where damage is likely to occur can provide protective clothing or direct exchange items. However, for enlisted Soldiers, the clothing replacement allowance is intended to replace damaged or worn items, and it is not appropriate to use claims funds to supplement that allowance for this type of loss. For example, it is not unusual for Soldiers painting a building to drip paint on their clothing. It is unusual, however, for a Soldier not engaged in painting to be splashed by a bucket of paint while walking past an open window.

(p) *Tears, rips, or snags in clothing.* Such incidents are usually considered normal hazards of daily living and working. Such damage is not considered unusual, even if the claimant does not normally perform the task that resulted in the damage. For example, it is not an unusual occurrence for a Soldier or civilian employee to tear clothing on a nail protruding from a wall. It is an unusual occurrence, however, for a paratrooper to rip clothing when caught by a freakish gust of wind and dragged several hundred feet across a parking lot. The incident is unusual in degree although not in nature.

(q) *Contamination.* Contamination of clothing and other items by toxic chemicals is considered an unusual occurrence. For purposes of this paragraph, toxic chemicals are those that are highly poisonous, and do not include common chemicals such as paint, battery acid, ink or oil. Consider compensation for cleaning or replacement costs when evidence substantiates that contamination occurred. AR 700-84, paragraph 5-4, provides for the free issue of uniforms to replace those condemned by medical personnel. Alleged staining of clothing by excessive amounts of iron in an area's water supply is not normally considered an unusual occurrence.

(r) *Clothing cut away to administer first aid.* Although cutting clothing to administer medical treatment is not an unusual occurrence, the need for such first aid or emergency aid is normally the result of an unusual occurrence and

may be paid if the injury was sustained incident to the claimant's service and not a result of the claimant's negligence. Military uniforms damaged in this manner may be replaced in kind. See AR 700-84. If persons administering first aid damage their own clothing to make a bandage, apply rules governing public service losses.

(s) *Mildew and mold.* Quarters occupants are expected to maintain their quarters in such a manner as to minimize mold and mildew growth. In tropical areas, areas with above average annual rain fall (for example, coastal areas of the Gulf of Mexico, Hawaii, parts of Alaska, and western Oregon and Washington), and areas with occasional high humidity during the summer, mold and mildew is normally not considered an unusual occurrence. In addition, most surface mold on clothing and household furnishings can be easily cleaned by the owners. However, extremely toxic mold or mildew that develops in quarters because of defects in design of the quarters, improper grading for storm water runoff, faulty sewage systems, or hidden leaks inside of walls or ceilings, may be payable under tort claims authority.

(4) *Theft.* Theft incurred incident to service is compensable, although failure to report the theft immediately or as soon as practicable is normally deemed a failure to substantiate it. Theft is an intentional, wrongful taking of someone else's property. Incidents reflecting quarrels over property ownership should not be considered thefts. The fact that the thief's identity is known does not mean the claim is not payable, although Article 139 procedures should be invoked if the thief is a Soldier. The following standards of care apply to various types of property and are used to determine whether a claimant was negligent. A claimant's negligence will bar payment of a claim. See subparagraph 11-6g, below.

(a) *Thefts from barracks rooms.* Cameras, binoculars, and similar expensive items that are not used every day should be secured in a locked wall locker or foot locker when not being used. Stereos and other similar electronic items should be secured in a wall locker or unit supply room when the Soldier is going on leave or will be absent for an extended period. A barracks room is not a proper place to store cash and valuable jewelry. These policies should be publicized and reflected in unit standing operating procedures (SOPs), and unit commanders must be made aware of their obligation to promptly secure and inventory property belonging to Soldiers who are hospitalized, AWOL, imprisoned, or on emergency leave.

(b) *Thefts from quarters and the "no signs of forced entry" rule.* Claimants are expected to secure the windows and doors of their barracks rooms and family quarters, and to lock wall lockers and other storage areas so that a thief must force an entry. If a police report states that there were no signs of forced entry and the claimant asserts that the area was in fact secure, the claim file must reflect that the claims office considered whether forced entry would have left visible signs. Certain doors and window latches may be forced with a credit card or a putty knife without leaving visible marks. Other windows and locks cannot be forced without leaving scratches, imprints in dust, or other signs. Normally, the police investigators who examined the scene should be questioned and their pertinent observations recorded on the claim chronology sheet.

(c) *Theft of money and small, valuable items, and the "double lock" rule.* A claimant is expected to take extra measures to protect cash, valuable jewelry, and similar small, easily pilfered items. Normally, for personnel in barracks, such possessions should be kept in a locked container when the owner is not present in the room. For personnel in family quarters, the need to secure or conceal small high value items within the home only arises if the occupants will be away for an extended period. In the negligence analysis, however, a claimant's failure to double lock such valuable items is not the cause of the loss if the evidence indicates that a locked container would not have deterred an obviously experienced thief. Likewise, the size and value of the lost items, the presence or absence of the occupants at the time of loss, and, if absent, the duration of the absence should all be considered. At the workplace, claims for the loss of a purse or of cash would generally be denied. Such items should not be left unattended for even short periods of time unless they are secured in a locked drawer, and they should not be left overnight.

(d) *Theft of money and small valuable items incident to shipment.* Money, and small, easily pilfered items of high value, such as jewelry, that are not being shipped with the Soldier's household goods should be secured when carrier personnel are in the residence to pack, to pickup the goods and to deliver and unpack the goods. These items should be secured either in the owner's POV or in a locked room to which the carrier's employees will not have access. While DOD regulations permit shipment of such items, the "It's Your Move" pamphlet warns against doing so and it is preferable for claimants to hand-carry them. Money, to include valuable coin collections, should never be shipped with household goods. If money is shipped, the claimant does so at his or her own risk. Loss of money, in any amount, during shipment is not compensable. However, if claimants ship small, valuable items other than money, they are expected to remain present in the residence while carriers pack the items to ensure that the items are actually placed in the box, and ensure that the inventory specifically reflects tender of each of the expensive items. Normally, claims for the loss of such items are denied because the claimant cannot substantiate that they were owned or shipped. Loss of items at origin is considered a loss incident to shipment, whether or not the claimant intended to ship them, unless there is clear and convincing proof that the items were stolen before they were packed. Loss of hand-carried items at delivery is considered a theft from quarters.

(e) *Theft of lawn decorations and other property kept outside of quarters.* Normally, it is not unreasonable for a claimant to keep decorative items on display outside quarters. However, claimants are expected to exercise a degree of care commensurate with the risk of loss, and at installations where the risk of loss is high, claimants are expected to secure items of any significant value to make them difficult to steal. Items that most Soldiers do not normally keep

outside should not be considered for payment if they are lost while stored outside. Publicize local policy on this issue periodically.

(f) *Theft of clothing at dining facilities and clubs.* Thefts of clothing from installation dining facility coat racks are cognizable as losses incident to service if the clothing belongs to proper claimants authorized to use such facilities. Claims for clothing left on a coat rack or in the cloakroom of an Officers', NCOs', or Enlisted Men's club are cognizable only if the claimant was attending a mandatory staff or command activity, or similar function. If attendance was voluntary, the claim should be considered under any applicable tort claims statute. In determining whether the claimant was negligent under the circumstances, consider these factors: any disclaimer notices posted, the type of property involved, and whether it was feasible for the claimant to wear or carry the item into the dining area, as well as other pertinent facts and circumstances.

(g) *Theft of property from gym lockers.* Because the Army has placed great emphasis on military personnel maintaining physical fitness, theft of Soldiers' property from installation gymnasium lockers is considered incident to service, even if it occurs outside normal duty hours. Unless the commander has determined that the gymnasium is a high-risk area, such claims are payable even if the facility has posted signs intended to relieve it of any tort liability. Theft of property belonging to family members, however, is not considered incident to service, and theft of property belonging to civilian employees would be considered incident to service only during duty hours. Care should be taken to pay for only those items the possession of which is reasonable under the circumstances.

(h) *Theft of property stored inside a vehicle.*

1. Although an experienced car thief can often enter a locked vehicle without leaving signs, claimants are expected to lock car doors and windows. Neither the passenger compartment nor the trunk of a vehicle is a proper place for the long-term storage of property unconnected with the use of the vehicle. Normally, such items stored overnight and for longer periods, even in the trunk, are not considered reasonable or useful under the circumstances. As an exception to this rule, a reasonable amount of sports equipment and clothing, such as tennis rackets, baseball bats and gloves, golf clubs, running shoes, and gym bags are routinely carried in the trunk of vehicles and left there for long periods of time so that they are readily available for use.

2. The pamphlet, *Shipping Your POV*, distributed by the Surface Deployment Distribution Command (SDDC) through Personal Property Shipping Offices (PPSOs), and available on line at www.sddc.army.mil (enter the title in the Search block) lists items authorized for shipment inside POVs in transit (see para 11-6e(1)(d), below). As a general rule, only the items listed for shipment with a POV are reasonable or useful to keep in the vehicle while it is parked on the installation or at quarters on other than a temporary basis. An exception may be made for campers or other recreational vehicles parked at quarters or on the installation. Outdoor use items that are not normally removed from such vehicles, such as sleeping bags, lanterns, outdoor grills, paddles, oars and utensils, may be considered reasonable and useful.

3. For other property, the passenger compartment of a vehicle does not provide adequate security except for very short periods; the length of such periods depends on the circumstances (such as the claimant's reason for keeping the property in the vehicle and measures the claimant could have taken to better secure the property) and its value. Except for maps, child car seats, a reasonable number of audio tapes, digital video disks, or compact disks and similar items kept in the passenger compartment for immediate use, claimants are expected to remove their property when exiting the vehicle, lock items in the trunk or, for longer periods, remove the property from the vehicle altogether. This is especially true of valuable, easily pilfered items such as cameras and cellular telephones.

(i) *Theft of property attached to a vehicle.* A claimant is expected to bolt to the vehicle items that are not factory-installed, such as tape and compact disc players, speakers, citizens' band radios, and similar accessories. Such items are not secured merely by mounting them on a slide. Similarly, loss of car covers and car bras are payable only if these items are bolted or secured to the vehicle with a wire locking device. An item may be considered permanently affixed if one needs tools or a key to detach it. Manufacturers continue to develop "theft-proof" products. One such product is a car radio with a removable faceplate. Drivers should remove the faceplate when exiting the vehicle. Barring unusual circumstances, failure to take the faceplate would prohibit payment if the radio is stolen.

(j) *Theft of bicycles and motorcycles.* A claimant is expected to keep a bicycle, motorbike, or motorcycle indoors or to chain it to a fixed object outdoors (such as a rack, pole, post, or tree), if one is reasonably available, to prevent the item from being stolen. Locking handlebars or locking the wheels together normally does not provide sufficient protection. If a very large motorcycle is stolen, however, consider whether chaining it would have deterred the thief. A claimant may be deemed to have acted reasonably if no fixed, immovable object is available. However, except in an emergency, a claimant who chooses a more convenient parking area that lacks such an object instead of an area within walking distance where the motorcycle or bicycle could have been secured should be deemed to have acted negligently.

(k) *Theft of motorcycle helmets.* Because chinstraps can be easily cut, securing a helmet to a motorcycle by the chinstrap or by a lock run through the chinstrap does not provide sufficient protection. The owner should take the helmet inside or secure it by a wire-locking device run through a hole in the helmet.

(5) *Vandalism.* Vandalism incurred incident to service is compensable and need not be considered an unusual occurrence. Vandalism results from intentional damage. Stray marks caused by children playing, rocks or gravel thrown up by vehicles, falling branches, and similar occurrences do not result from vandalism. Claims offices are never bound

by a police report that particular damage resulted from vandalism; they are, instead, required to reach an independent conclusion based on all the evidence. Vandalism to vehicles is compensable when a claimant can prove by clear and convincing evidence that the vandalism occurred on-post or at certain off-post locations or was directly related to and attributable to the claimants' official duties (see subparas h(3) and (4), below). The fact that the vandal's identity is known does not mean the claim is not payable, although if the vandal is a Soldier, the victim should bring a claim pursuant to Article 139, UCMJ, and chapter 9 of this publication.

d. Losses from quarters or other authorized places. Losses at quarters due to fire, flood, hurricane, or unusual occurrence, or to theft or vandalism, are cognizable. A number of "incident to service" rules apply to these types of losses. A loss by a Soldier who is visiting another Soldier's quarters is not cognizable as a loss incident to the visitor's service, although the Soldier residing in the quarters may be entitled to submit a claim if he or she borrowed the lost property.

(1) *Assigned quarters.* Losses from government-owned or -leased housing assigned or otherwise provided in kind to the claimant are cognizable. In addition, losses from temporary quarters are also cognizable. However, the PCA specifically provides that within a state or the District of Columbia, losses from quarters that are not assigned or provided in kind by the government are not cognizable. Whether quarters are "assigned or provided in kind," especially privatized quarters owned and operated on an installation under the DOD Residential Communities Initiative (RCI), is a question of fact and depends on the degree of control the Army exercises over the quarters. Quarters can be "assigned or provided in kind," even though the occupants are not required to occupy them, even though the occupants receive all or part of their Basic Allowance for Housing (BAH), and even though the government does not own or lease the quarters. As a general rule, quarters on a military installation that are owned and maintained by the government are quarters that are "assigned or provided in kind." Likewise, quarters off the installation that are leased by the government and made available to DOD personnel assigned to the installation are also considered "assigned or provided in kind." Quarters that are not on an installation, and which are owned by the occupant or rented from an individual or a commercial company that is not an RCI contractor, are generally not considered to be "assigned or provided in kind." For all other types of quarters, especially quarters transferred to or built by a private contractor under the RCI program on property leased to the contractor by the government, field offices should seek guidance from USARCS.

(2) *Overseas quarters.* Losses from authorized as well as assigned quarters that are not within a state or the District of Columbia are cognizable except when the claimant is considered a local inhabitant.

(a) *Authorized quarters.* Use local regulations to determine what constitutes authorization to live in a particular residence on the local economy. For example, a Soldier serving in Europe who is not authorized family housing rents an apartment to bring over non-command sponsored dependents. Losses from these quarters are not cognizable.

(b) *Local inhabitants.* In an overseas area, a civilian employee who is not a U.S. citizen is normally deemed to be a local inhabitant. A U.S. citizen hired as a civilian employee while residing abroad or after moving abroad to reside with a foreign spouse or relative is also deemed to be a local inhabitant. In doubtful cases, consult the local civilian personnel office to determine whether a particular employee is entitled to full logistical support. Soldiers who were serving overseas on active or reserve duty at the time they were hired as civilian employees are not considered to be "residing abroad" at the time they were hired. A Soldier is never deemed to be a local inhabitant; however, a loss from overseas quarters occupied by a Soldier's family is not compensable if the Soldier is permanently stationed elsewhere. This rule does not apply when the sponsor, who normally resides with the family, is away on operational deployment. See AR 27-20, paragraph 11-5d(2)(d) for policy on USAR and ARNG, especially Active Guard Reserve (AGR) Soldiers, who are local inhabitants of a U.S. territory.

(3) *Temporary quarters.* Losses from temporary quarters that the claimant is authorized to occupy in the performance of temporary duty (TDY) are cognizable, wherever those quarters are situated. For example, a Soldier on TDY who is participating in a conference occupies a hotel room from which a suitcase is stolen. The claim would be cognizable. Permissive TDY, which is not at government expense, is not considered temporary duty for personnel claims purposes. Finally, losses from temporary quarters (such as visiting officer's quarters) occupied by a Soldier while on leave are not cognizable.

(4) *Other authorized places.* Losses from any other place on the installation where the claimant was directed to store property by competent authority are cognizable. For example, a superior directs personnel to secure their duffle bags temporarily in a vacant shed during in-processing and does not post a guard. Even though the shed is not an authorized area, the superior had "apparent authority" to direct the Soldiers to place their duffle bags in it and the claimant acted reasonably in obeying the order.

e. Government-sponsored transportation losses.

(1) *During shipment or storage at government expense.* Such losses are compensable unless the loss was the result of a mechanical defect or inherent vice in the item, or due to negligence of the claimant. Although transportation losses normally occur while the property is in the hands of a common carrier or warehouse firm, they can also occur while property being shipped or stored at government expense is in the hands of military personnel, airline personnel, or postal authorities.

(2) *Self-procured moves.*

(a) Soldiers and civilian employees are authorized to procure their own moving and storage services, rather than use government contractors. In rare cases, they may be directed to self-procure their own services because government contractors are not available or willing to take the shipment. Members who self-procure moving services may elect to hire an independent contractor to move their goods. As an alternative, they may elect to lease equipment and do the work themselves, with or without help from friends or paid helpers who are under their direct supervision and control. This form of self-procured move is known as a Do-It-Yourself, or DITY move.

(b) Loss of, or damage to, property during a Do-it-yourself (DITY) move, whether a complete DITY or partial DITY move, is compensable only if the loss is not due to the negligence of the claimant, or someone working under the claimants supervision and control. However, claimants are required to substantiate the fact of loss or damage in shipment. Claimants who do not prepare inventories have difficulty proving ownership, substantiating theft or differentiating between new and preexisting damage (PED). In addition, unless evidence shows that something outside the claimant's control caused the damage, breakage is presumed to be the result of improper packing by the claimant. But claims may be paid if the claimant can substantiate ownership and value and prove that the cause of the loss was not within the claimant's control. For example, a claimant who rented a truck for a DITY move is rear-ended by a drunken driver during the course of the move. The police report substantiates that the claimant was free from negligence; the damage to the personal property caused by the collision is compensable.

(c) On moves where the member's household goods are transported by a government contractor, these same rules on DITY moves apply to those items that members and their families transport themselves.

(d) If the member is directed to self-procure moving services and elects to contract with a commercial carrier under a commercial bill of lading, the member may file a claim with the government and the government will pay the member under the PCA and seek reimbursement from the contract carrier. However, under commercial practices, times for providing notice of loss or damage, and times for filing a claim are much shorter than under military moving contracts. In most commercial contracts, claims for loss or damage must be filed within nine months of delivery. If the Army pays a claim on a commercially contracted shipment, the Army's only right to recover is a subrogation right from the claimant's assignment (see sample of a completed form, DD Form 1842 , block 16 at the USARCS Web site at "Claims Resources," III, no. 16; blank copies may be downloaded from www.dtic.mil/whs/directives/infomgt/forms/formsprogram.htm). Therefore, before paying a claim on a directed, self-procured commercial contract shipment, claims offices must obtain a copy of the contract and determine if the claimant has preserved his right to file a claim. If the claimant failed to provide timely notice or failed to submit a claim to the Army with enough time for the Army to file against the carrier, then the claim payment should be reduced for any lost potential carrier recovery.

(3) *Shipment or storage at the claimant's expense.* Shipment or storage is considered government-sponsored if the government later reimburses the claimant for it. However, loss or damage that occurs while property is being shipped or stored at the claimant's expense is not compensable.

(4) *Shipment or storage partly at government expense and partly at the claimant's expense.* If property is shipped partly at the claimant's expense and partly at government expense, the loss or damage will be presumed to have occurred while it was in the custody of the last company that handled the goods, unless that company can prove that the loss or damage occurred before it took possession. The same rule applies to property that was in storage at government expense for part of the time, and at the member's expense for part of the time. This rule also applies to property that claimant picks up at the warehouse, although the claimant's failure to note obvious damage or missing boxes at the warehouse would be evidence that no such loss occurred during government-sponsored shipment. However, if a shipment at government expense is delivered and the claimant later ships it again without noting damages, any loss subsequently discovered would be presumed to have occurred during shipment at the claimant's expense.

(5) *Shipment of property directly from a retailer.* Occasionally, transportation offices will authorize carriers to ship Soldiers' new furniture or other property directly from a retailer. Carriers will often accept such items without taking exceptions, and the Soldier is in no position to verify the item's condition before shipment. (The law is unclear on whether a carrier has a duty to inspect factory packed items. The Tender of Service states that the "carrier has the responsibility to inspect all prepackaged goods.") When the evidence does not clearly indicate damage in transit, no allowance should be made for such items, particularly when the property delivered is not what the claimant intended to purchase. In determining whether the claimant has substantiated that such items were damaged in shipment, approval and settlement authorities should consider exceptions taken at time of pickup, the nature of the damage, the condition both of the shipping container and of other property in the shipment. When denying payment on such items, direct the claimant to seek legal assistance to obtain satisfaction from the retailer. Transportation personnel should be instructed to advise claimants about the risks inherent in such shipments.

(6) *During travel in a vehicle, vessel, or aircraft in performance of military duty or "space available" travel.* When a claimant is traveling in a public, private, or military conveyance pursuant to orders authorizing travel at government expense, loss of luggage or hand-carried property is compensable. In addition, losses that occur while the claimant is awaiting public transportation in a bus, airline, or subway terminal may be compensable. As a general rule, travel is deemed to be in the performance of military duty if the government will reimburse the claimant for it. Permissive TDY and similar travel is not deemed to be in the performance of military duty. If, however, the claimant is traveling on a

military conveyance in a space available status pursuant to military leave orders, loss of the claimant's luggage or of property the claimant is carrying is compensable.

f. Public service losses.

(1) *Belligerent or enemy activity or unjust confiscation.* Unjust confiscation is the taking of personal property belonging to Soldiers or U.S. national civilian employees by a foreign government without compensation or without any right that would be recognized under international law. Damage to or loss of property in such circumstances is compensable, unless the taking was entirely unconnected with a Soldier's or civilian employee's duty in a foreign country.

(2) *Hostile acts.* These include losses caused by terrorist acts, acts of mob violence, and other hostile acts directed against the U.S. government or its Soldiers and employees. Under this provision, only acts that are anti-U.S. government in nature are payable. Not all riotous actions overseas in which American personnel are caught up are directed against the U.S. government or its Soldiers and employees.

(3) *Evacuations.* Claims brought by personnel who are evacuated from a foreign country upon recommendation or order of the Secretary of State, or other competent authority, in response to an act of political unrest or a hostile act by people in that country are payable. Soldiers and civilian employees entitled to shipment of property at government expense may be compensated for property that is left behind and not recovered undamaged. Compensation is not authorized, however, for property belonging either to civilian employees who are not authorized shipment at government expense or to family members who are not command sponsored. It is also not authorized for indirect losses or for loss of nontangible property such as forfeited lease deposits. Claimants are entitled to present a single claim for all property left behind, including POVs.

(4) *Action to quell civil disturbances or alleviate a public disaster.* Losses incurred in quelling riots, rendering emergency first aid, or assisting people during a declared public disaster are compensable.

(5) *Action to save human life or government property.* Losses sustained during attempts to save human life or government property are compensable. Saving private property belonging to another person is considered incident to service only if the Army would be required to compensate the owner for its loss. For example, an Army landing craft collides with a privately owned sailboat. Subsequently, a Soldier on the landing craft boards the sailboat and tears his clothing in an effort to beach the boat to keep it from sinking. The damaged clothing would be compensable.

g. Loss of money delivered to an agent of the United States. The loss of money delivered to a person authorized or apparently authorized to accept the funds is cognizable. Money given to unit personnel for safekeeping, to military postal personnel for conversion into postal money orders, or to other such personnel for similar purposes is considered lost if it is not applied as directed by the owner or returned. Persons are apparently authorized to receive funds if they appear to have the authority to do so by virtue of rank or position, regardless of whether they have actually been authorized to do so by regulation. The loss of money delivered to a person acting in a private capacity, such as a friend of the owner, or an officer in a private organization, would not be payable.

h. Vehicle losses. Vehicle losses can be paid in a number of different situations. Whenever possible, claims personnel should inspect vehicles before payment, and claimants should be directed to drive their vehicles to the claims office when presenting their claims. Compensable vehicle losses include automobiles, motorcycles, mopeds, utility trailers, ramping trailers, trucks with mounted camper bodies, motor homes, boats, boat trailers, and aircraft. Compensable vehicle losses also include bicycles, but only if they are owned and operated by the proper party claimant at the time of the loss or located at the claimant's quarters.

(1) *Vehicles used pursuant to orders for the convenience of the government.* Loss or damage to the claimant's vehicle may be considered if the vehicle is used pursuant to orders for the convenience of the government unless the loss is due to a mechanical or structural defect in the vehicle, is due in part to the negligence of the claimant or if there is another bar to payment. Claimants are required to file with their insurers prior to settling a claim with the United States. There is no requirement that the loss be due to fire, flood, hurricane, or other unusual occurrence, or to theft or vandalism. Travel is not considered to be for the convenience of the government unless it was pursuant to written orders authorizing use for which the claimant is entitled to reimbursement. Although travel from temporary quarters to a TDY site pursuant to orders is considered use in the performance of military duty, commuting from quarters to or from a permanent place of duty is not. Permissive TDY and similar travel is not considered to be for the convenience of the government. Note that the maximum payment of \$3,000 authorized by the Allowance List-Depreciation Guide (ALDG) applies to loss of or damage to vehicles and their contents used for the convenience of the government (the ALDG is posted on the USARCS Web site at "Claims Resources," III, no 1). However, this maximum allowance does not apply to loss or damage to a POV while it is being driven to a new assignment or to/from a VPC pursuant to permanent change of station orders. Driving a POV on PCS travel or to/from a VPC in connection with government funded shipment of that POV is considered a type of DITY move and these types of losses are considered under paragraph 11-5e(2), as losses during shipment.

(a) *Written orders.* Written orders are required to establish that a claimant was using his or her vehicle for the convenience of the government. Many claimants choose or are encouraged to use their own vehicles to accomplish routine tasks on the installation. Travel to other buildings on the claimant's installation is not considered to be under orders for the convenience of the government and should be considered instead under the provisions of subpara h(3),

covering loss or damage to vehicles located on the military installation. In addition, travel off the installation without written orders may be deemed to be for the convenience of the government only if the claimant's superior directed the use of a POV to accomplish the mission. The issuance of written orders after the fact raises the presumption that travel was not for the convenience of the government.

(b) *Leave in connection with temporary duty or permanent change of station.* Losses that occur while the claimant is in a leave status in conjunction with authorized TDY should not be considered, nor should losses that occur while the claimant is engaged in a significant deviation en route while on TDY or traveling under PCS orders. To be significant, a deviation must take the claimant well away from the most direct route. A loss that occurs before the claimant has deviated or after the claimant has resumed the mission is incident to service. For example, a claimant authorized to use a vehicle to travel from Fort Drum, NY, to Fort Meade, MD, pursuant to a permanent change of station (PCS), travels by way of Maine to visit relatives. The vehicle is rear-ended in Maine. Since the deviation is significant and the loss occurred during the deviation, the claim is not payable. In determining whether a deviation is significant, consider its extent and the reason for it. For example, if a claimant traveling on orders from Fort Drum, NY, to Fort Meade, MD, deviates 20 miles from the most direct route in order to find a motel for the night, this deviation is not significant and any damage incurred at the motel may be compensable. Finally, losses occurring during a stopover made for personal reasons while on PCS travel, when leave is authorized in conjunction with such travel, are not payable.

(c) *Collisions.* Damage due to a collision, including a hit-and-run incident, is compensable if the claimant is free from negligence and the vehicle is being used under orders for the convenience of the government. When a vehicle is being so used, there is no requirement that a loss result from fire, flood, hurricane, or other unusual occurrence, or from theft or vandalism. If the vehicle collides with a vehicle being driven by another Army or DOD employee who is acting within the scope of his or her employment at the time of the accident, consider the claim as a tort claim instead of a personnel claim.

(d) *Single-vehicle accidents.* While normal negligence principles apply in determining whether there is a bar to payment, as a general rule a claimant who slides off the road during bad weather is deemed to be inattentive or driving too fast for road conditions, whether or not police authorities cite the claimant for an offense. Single-vehicle accidents, including those attributed to poor road conditions, will normally be presumed to be at least partly due to the claimant's negligence in the absence of strong indications to the contrary. There is no merit in the disingenuous argument that a claimant who negligently damages his vehicle while driving it under orders is acting within scope of employment and should therefore be compensated on a tort theory.

(2) *Mechanical defect.* Loss or damage caused by a vehicle's structural failure or mechanical defect is not payable. Without clear evidence indicating another cause, internal damage to the vehicle is presumed to result from a mechanical defect. Damage due to wear and tear or to faulty repairs or maintenance is also considered to be the result of a mechanical defect. Pay particular attention to the vehicle's age, condition, and odometer reading.

(3) *Rental vehicles.* Damage to rental vehicles is considered under the Joint Travel Regulations (JTR) rather than as a loss incident to service. Under the current agreement with rental companies administered by the Surface Deployment and Distribution Command (SDDC) (www.sddc.army.mil), the rental company will absorb such losses in most instances (see para 11-6j below).

(4) *Vehicles in shipment.* Loss of, or damage to, a vehicle shipped at government expense (including government-sponsored inland shipment) is compensable, unless the damage is the result of a mechanical defect or due to normal deterioration. Damage caused during shipment at the claimant's expense is not payable. However, damage that occurs while a vehicle is being driven between the Soldier's duty location and a vehicle processing center (VPC) may be considered using the guidance contained in para 11-5h(1), above. Damage that is due to the negligence of the owner or his agent is not payable.

(a) A vehicle shipped by the government on a space-available or space-required reimbursable basis is considered to be shipped at the claimant's expense. Moreover, unless both spouses are Soldiers, no more than one vehicle may be shipped for a family unit. If a second vehicle is inadvertently shipped, the owner will be required to reimburse the government fully for the second shipment. Contact the destination Personal Property Shipping Office to verify if this is the case.

(b) If evidence shows that a vehicle shipped at the claimant's expense was damaged while on a government-operated ship or in the hands of military personnel, rather than in the hands of government contractors, a claim may be payable under the MCA (see chapter 3 of this publication). For example, a Soldier buys a foreign car overseas and is not authorized to ship it to the United States at government expense, pursuant to the Congressional policy underlying the "Buy American Act." The Soldier applies for space-available shipment. The vehicle is shipped in a space on the vessel that otherwise would be empty. The Soldier is required to reimburse the government for all costs except those the government would incur for not fully using the vessel's cargo space. A claim for damage incurred in shipment is not payable as a personnel claim. Instead, claims personnel should obtain a copy of the contractor Vehicle Inspection and Shipping Form that accompanied the vehicle from the destination port to determine whether the damage was caused by negligence of military personnel or civilian government employees handling the POV. If so, a claim may be payable under the MCA.

(c) Soldiers shipping vehicles on a space-available or space-required reimbursable basis should be counseled to maintain comprehensive insurance policies that cover shipment damage or to consider obtaining transit coverage.

(5) *Vehicles properly located on the installation or at quarters.* Loss of or damage to a vehicle or property in a vehicle properly on the installation or at assigned quarters or authorized overseas quarters is presumed incident to service and therefore cognizable, if the loss or damage is the result of theft, vandalism, fire, flood, hurricane, or other unusual occurrence. A number of incident to service rules apply to these types of losses.

(a) *Definition of installation.* The "installation" is normally a military reservation under the Army's control. It is also a military reservation operated by another military service if the claimant is stationed there. In addition, if the claimant is assigned to duty off a military reservation, the building and adjacent parking areas where the claimant works are the "installation." For example, the claimant is a professor of military science in a university ROTC program. A loss from the building that houses the ROTC department or from its parking area would be a loss occurring on an installation.

(b) *Definition of "properly located" on the installation.* A vehicle is presumed to be properly located on the installation unless it is unreasonable to so locate it under the particular circumstances. This presumption applies whenever the claimant or family members living with the claimant drive the vehicle while participating in activities or using facilities open to them only by virtue of the claimant's status. The presumption does not apply where the connection is tenuous or nonexistent. A vehicle left in a remote area of the installation for an undue length of time would not be presumed to be on the installation incident to service, nor would a vehicle driven onto the installation by the claimant's spouse pursuant to employment with the Red Cross. A vehicle driven by a civilian employee after duty hours because the employee is a retired Soldier entitled to use the commissary also would not be presumed to be incident to service, nor would a vehicle driven by an emancipated child or a visiting relative to sightsee. A vehicle that is not properly registered or insured in accordance with local regulation or local law is not properly on the installation. However, the head of an area claims office may waive this requirement for good cause. See AR 27-20, para 11-6h, for authority to waive this requirement.

(c) *Standard of proof for vandalism and theft claims.* On claims involving theft or vandalism of a vehicle, the presumption is that the loss did not occur at assigned quarters or on the military installation. The claimant has the burden of rebutting this presumption and must show by clear and convincing evidence that the loss occurred incident to service at assigned quarters or on the military installation in order to be compensated. An MP report that corroborates that broken glass from the claimant's vehicle was found on the parking lot outside the claimants' place of duty will be sufficient to rebut this presumption. Similarly, a statement by a disinterested third party who saw that the claimant's vehicle and a number of other vehicles parked near it in the PX parking lot were vandalized in a similar manner will be sufficient to rebut this presumption. However, the claimant's uncorroborated statement that a vehicle was vandalized on the military installation or at quarters will not be sufficient.

(6) *Vehicles not located on the installation or at quarters.* Theft or vandalism involving vehicles not located on the installation or at quarters, as defined above, may be compensable if the claimant can establish that these acts occurred incident to service. A claimant must establish a clear connection between the vandalism and the claimant's duties supporting a conclusion that the damage occurred directly incident to the claimant's service. Damage caused by random acts of vandalism or theft that occur off-post are not compensable. This risk should be covered by private insurance. The use of a vehicle off the military installation for commuting to or from work does not make the use incident to service for purposes of this paragraph. If a rock is thrown from an off-post overpass and breaks a claimant's car windshield while he is driving to work, the damage is not incident to service and is not compensable. If a Soldier's vehicle bearing a military sticker is spray-painted at an off-post location with the phrase "Soldiers kill babies," there is a direct connection between the claimant's service and the damage; therefore, a claim for such damage could be paid. Vandalism and theft that occurs at quarters in a state or the District of Columbia that are not assigned or provided in kind is not compensable, even if it is incident to service as defined in this subparagraph. The PCA specifically prohibits compensation for damages incurred at such quarters in a state or the District of Columbia.

(7) *Loaned vehicles.* As an exception to the general rules governing borrowed property (see AR 27-20, para 11-13, about property ownership or custody), damage to a vehicle borrowed by a proper claimant is not compensable unless both the claimant and the owner are proper claimants or the vehicle is borrowed on a long-term or emergency basis from a close relative. For example, a young civilian employee living with his parents regularly drives a vehicle registered and insured in his parents' name; the parents allow the child to consider it "his" vehicle. The bank that made the car loan holds the title. Despite this, the vehicle would not be deemed to be loaned and, if the vehicle is damaged in a flood on post, and is otherwise located there incident to his service, the civilian employee would have a payable claim. In such instances, the owner should be contacted before payment even though the loss is not incident to the owner's service; if the owner and the claimant do not agree on proceeding with the claim, the claim may be denied. For purposes of this rule, claimants are deemed to "own" any vehicle registered in their name or in the name of their spouse, whether or not a bank, credit agency or someone else with a lien on the car holds actual title to it. Cohabitation is not equivalent to a marriage, however, and damage to a vehicle belonging to a person the claimant is "living with" is not compensable unless the owner is also a proper claimant.

(8) *Soft top vehicles.* Theft from the interior of a multi-purpose vehicle, such as a Jeep, raises the issue of whether the vehicle was properly secured. Multi-purpose vehicles include vehicles having a soft (canvas) top, nonmetal doors and non-glass windows that do not lock. Such a vehicle may be opened easily by removing the doors from their hinges,

unzipping the windows, or unsnapping the top from the vehicle's sides. Normally, thefts from these types of vehicles are not considered compensable because the vehicles offer no deterrence to any would-be thief. Owners of such vehicles who purchase factory-installed stereo or radio equipment or who install stereo or radio equipment should be warned that thefts from these vehicles normally will not be compensable barring extraordinary circumstances. Advise these individuals of the risks involved and of the need to consider purchasing insurance to cover the contents of the vehicle. This provision does not apply to convertible tops that cannot be removed or opened without unlocking the vehicle or cutting through the top; theft from such vehicles may be compensable if the other requirements of this chapter are met.

i. Loss of clothing and other items being worn. Loss of clothing or other items, (for example, hearing aids, eyeglasses, jewelry) worn on the installation or in the actual performance of duty is cognizable if the loss is the result of theft, fire, flood, hurricane, or other unusual occurrence or hostile action. However, uniforms, especially battle dress uniforms, wear out and may be torn or soiled in connection with a Soldier's duties, either in garrison or on operation deployments. Claims for such deterioration or damage are not payable. For losses resulting from theft, rules governing on-post robbery (see subpara j, below) apply. A number of incident-to-service rules apply to these types of losses.

(1) *Actual performance of duty.* Performance of organized physical training off the installation or other military missions is considered actual performance of duty. In addition, a claimant on TDY, though not in the performance of actual duty for the duration of the TDY, may be considered to be performing duty while at the duty site, at temporary quarters, or at functions associated with the TDY.

(2) *Gratuitous issue of clothing.* AR 700-84, paragraph 5-4, governs gratuitous issue of clothing. Military clothing destroyed by medical personnel to prevent the spread of disease, cut away to administer first aid, or damaged in a government-operated laundry may be replaced in this manner. When applicable, use gratuitous issue procedures instead of claims procedures.

(3) *Other items.* Claims for loss of, or damage to, clothing and other items being worn (such as hearing aids and eyeglasses) often present unique challenges to claims judge advocates. Some offices misidentify other types of losses as "CZ-Clothing and other items worn" losses in assigning Personnel Claims Management Program category codes, while other offices pay clothing claims improperly. In categorizing losses, AR 27-20, paragraph 11-5i, states that the "clothing and items worn" category is limited to the loss of clothing and similar items while they are actually being worn. Field claims offices should not use the "CZ" code for claims involving lost laundry, lost duffel bags, or losses of clothing stored in unit supply rooms and other authorized places. Instead, those losses should be categorized as "ZZ" or "Q" losses. Moreover, claims offices should not use the "CZ" code in certain peculiar situations in which other category codes apply. Field claims offices should consider claims for loss of, or damage to, clothing and other items being worn incident to combat, lifesaving and on-post robberies under the provisions of AR 27-20, subparagraphs 11-5f(1), f(4), and j respectively. Combat and lifesaving losses should be characterized as "PZ" claims, while robberies should be considered as "RZ" claims. Similarly, claims offices should consider claims for damage to clothing being worn while the claimant is traveling on an Air Mobility Command flight and categorize them as "FZ" claims. All claims judge advocates and claims attorneys must review category codes regularly and ensure that they are accurate and consistent.

(4) *Test to apply.* AR 27-20, paragraph 11-5f, authorizes payment for the loss of, or damage to, clothing or other items worn if two tests are met:

(a) The loss must have occurred on a military installation or in the performance of military duty. If a Soldier is assigned to duty away from a typical military reservation, that Soldier's "installation" could be a single building on a university campus.

(b) The loss must have been caused by hurricane, fire, flood or other unusual occurrence, theft, vandalism, hostile action, belligerent or enemy activity, or in connection with other public service actions listed in paragraph 11-5f, above. This requirement presents some problems. Claims for clothing worn that is lost or damaged because of hurricane, fire, or flood are rare, although occasionally a Soldier whose unit is deployed to fight a forest fire might have clothing burned. Most claims for theft of clothing and other items being worn are covered by the rules for on-post robbery, which preclude payment for pick-pocketed items. The fundamental problem lies in determining whether a loss is due to an "unusual occurrence." An "unusual occurrence" is defined as an occurrence beyond the normal risks associated with day-to-day living and working; it is not a reasonably foreseeable consequence of normal human activity. Many incidents that may not appear to be "common" are not unusual occurrences. As a rule, any loss that is a predictable result of the type of work the claimant is performing is not an unusual occurrence, whether or not the claimant usually does that particular type of work. For example, contamination of clothing by highly toxic chemicals is considered an unusual occurrence, even when the Soldier or employee works with these materials regularly. Except under very peculiar circumstances, however, paint, battery acid, oil, or ink spilling on a Soldier's or civilian employees' clothes while the person is working with such fluids is not an unusual occurrence. Similarly, a Soldier's or civilian employee's snagging or tearing clothing on a desk's rough edge, a fence, or a seat's loose spring is not an unusual occurrence; nor is damage to an injured person's clothing when medical personnel must cut it away to render treatment. Any decision to pay a loss of this nature must be coordinated with USARCS and fully explained in the claim file. Similar rules apply to claims for eyeglasses. If a customer accidentally knocks an employee's eye glasses to the floor, or if a claimant inadvertently collides with a protruding box and the glasses shatter, such mishap is not an

unusual occurrence; nor is it unusual if a Soldier playing volleyball breaks her eyeglasses. Rather, these are normal hazards of day-to-day living and working. Although a Soldier's participation in a volleyball game for physical training would be considered "performance of duty," to be payable the loss must result from an unusual occurrence. Claims for losses of jewelry and watches being worn are not often compensable. Losing a ring or wristwatch during a field exercise or parachute jump is no more unusual than tearing clothing on an office desk. In short, there is no "unusual occurrence" unless the nature or the severity of the occurrence is extraordinary. Lightning striking a jogger is an example of an occurrence that is unusual by its very nature. While a tile falling on a maintenance worker repairing a ceiling would not be unusual, the sudden collapse of an entire ceiling would be unusual. The magnitude of the ceiling collapse makes it extraordinary. Claims personnel must understand the principles underlying "unusual occurrences" and conscientiously apply the two tests when adjudicating claims for clothing and other items being worn. When claims are deemed to result from unusual occurrences, claims personnel also should consider the claimant's possible negligence, recording the basis for their determinations on the chronology sheets.

j. On-post robbery and robbery during performance of duty. A loss occurring when a proper claimant is robbed on the installation or during the actual performance of official duty is cognizable. A robbery is a theft from the claimant's person by force, violence, or the threat of bodily harm. Such incidents are not substantiated unless reported immediately to appropriate police or command authorities, or as soon thereafter as is practicable.

(1) *Picking pockets.* A pickpocket lifts a wallet without force, violence, or the threat of bodily harm. Such incidents are not cognizable.

(2) *Robbery of family members on the installation.* The robbery of a family member of a proper claimant is not cognizable unless the robbery occurs at the family's quarters or unless the family member is acting as an agent for the claimant in performing a task at the claimant's direction or directly for the claimant's benefit. This exception should be construed narrowly. For example, a thief sneaks up on a Soldier's spouse in the commissary parking lot and snatches the spouse's tote bag. At the time, the victim was engaged in purchasing groceries for the Soldier's family. The theft was accomplished by violence and the spouse was acting directly for the Soldier's benefit. Thus, the claim is payable.

k. Property held as evidence. If property belonging to a crime victim is destroyed or damaged as a result of its use as evidence in a criminal proceeding, this loss is compensable. In addition, if property belonging to a crime victim is to be held as evidence for an extended period of time and the temporary loss of the property will work a grave hardship on the victim, a claim for the loss may be considered for payment. In determining if a grave hardship will result from detention of the claimant's property, consider the nature of the item, and the length of time it is expected to be detained. As a general rule, you should not pay for nonessential items unless they will be held for more than 60 days. But claims for some items, such a child's car seat might be payable if the item will only be held for a week. This provision will not be used unless every effort has been made to determine whether secondary evidence, such as photographs, may be substituted for the item. Generally, no compensation is allowed for property seized from the person suspected of an offense unless all of the evidence, to include any evidence that may have been excluded at trial, clearly exonerates the suspect of all crimes. In all other cases, where items seized from a suspect are lost or damaged, the claim should be considered under any applicable tort claims authorities.

l. Damage to computers. Computers are sensitive and do not last forever. Parts and batteries wear out or develop loose connections; disks and drives develop bad sectors over time. When a computer accumulates enough internal problems, it stops working. If this occurs following a government-sponsored move, the claimant may genuinely believe that the computer was damaged by rough handling in transit.

(1) *Causes of damage to computers.* Sometimes internal computer problems following shipment are due to rough handling. Often, however, they are caused by inadequate maintenance or defects in computer components. Temperature fluctuations, humidity, static electricity, problems with power sources, foreign objects and airborne contaminants such as cigarette smoke all affect computer operation. Consequently, a computer that worked at point of origin may not work after shipment. Before adjudicating claims for internal damage to computers, claims personnel and claimants should be familiar with the problems that plague computers.

(a) A major cause of computer problems is the expansion and contraction of components due to changing temperatures. Computers are affected by changes in the external temperature; they also heat up when they operate and cool down when they are turned off. Repeated heating and cooling create problems, mainly in memory boards, the hard disk drive and controller, and the power supply.

(b) Socketed components in the power supply and on memory boards such as memory chips "creep" as the computer heats and cools when it is turned on and off. These components gradually work their way out of their sockets as the metal around them expands and contracts, loosening the glue that holds the connection together and corroding the joint. Ultimately, the connection often fails as a result. Many "blown" power supplies are the result of a failed solder joint or a transistor that burned out when it became separated from its heat sink because of expansion and contraction. Also, repeated heating and cooling makes the solder brittle, causing it to develop hairline cracks that sometimes break during movement. All types of socketed components are subject to this type of wear.

(c) Hard disk drives, particularly inexpensive "stepper motor" disk drives, suffer the same problems from expansion and contraction. Generally, a stepper motor hard drive will fail. For a hard disk drive to function properly, the "head" must write data to the precise location on the track where the system expects it to be. Stepper motor drives have inherent problems tracking. As the drive expands with changing temperatures, the heads of the hard drive no longer

write data to the same locations. When enough problems accumulate, the drive ceases to track where data is written and where track and sector identification marks are located; the drive then stops working. Indeed, even tightening the screws too much on one of these drives can distort the physical shape and cause the heads to write data to the wrong location.

(d) The greatest expansion problems are caused by turning the computer on and off; the quick temperature change causes a great amount of sudden stress. Marginal components manufactured poorly to begin with often simply fail when the system is turned on. This happens especially frequently when the system has not been turned on for an extended period of time and the computer has cooled down more than usual. Because computers are not turned on during shipment and are also subject to outside temperature extremes, shipment is often the last straw. When the computer is turned on again, chips stop working and poorly manufactured hard drives refuse to "boot." Many computer owners leave their computers on continuously to avoid expansion problems, but this is not a viable option during shipment.

(2) *Periodic maintenance.* Periodic maintenance reduces the likelihood that problems will occur during shipment. Dirt and debris collected by the computer's air flow must be cleaned out periodically to keep components from failing. Regularly reseating chips is a good idea; the boards, however, normally must be removed to accomplish this. Periodic low-level reformatting of hard disk drives (after backing up the data) is also good preventive maintenance. Periodic reformatting lays down a new set of track and sector identification marks that better correspond to the physical locations where the "heads" actually read and write the data.

(3) *Repairs.* Unfortunately, preventive maintenance does not prevent every problem, and repairs are needed sometimes. Repairing a computer often presents as much trouble as repairing a car. Most computer components are intended to be thrown away rather than repaired, and many shops will not take the time and trouble needed to determine what caused a problem. Further, a shortage of good computer repair personnel exists, and many firms that offer repairs lack expertise. Some of them will replace an entire board or hard drive rather than replace a loose chip or reformat a drive. Like some automobile repair firms, they practice "dart board" diagnosis—that is, they simply replace components until the system works. Advanced diagnostic programs are necessary to isolate errors, but they are no substitute for skill; indeed, many diagnostic programs are poor at identifying disk drive problems. Hard drive problems are particularly difficult to identify. Very few repair shops can open a hard drive and examine it. As a rule, if a hard drive develops major problems that reformatting cannot fix, it is simply discarded without any attempt to determine the nature or cause of the damage. Accordingly, without knowing the cause of the damage, it is difficult to substantiate that the damage to a hard drive resulted from rough handling in shipment.

(4) *Internal damage to computers.* Claims for internal damage to computers should not be paid unless sufficient evidence exists to conclude that the loss was due to rough handling in shipment. Obviously, when dealing with internal damage to computers, the information a good repair firm provides is essential in determining whether or not a claim is payable. The amount of damage other items in the same shipment sustained may also indicate rough handling. The mere fact that the computer worked well before shipment is not a sufficient basis to pay a claim.

(5) *Documenting the cause of damage.* Knowing the precise nature of the damage is critical. As with all internal damage claims, the fact that the repair estimate states "shipment damage" is of little evidentiary value. Question the repair firm closely to determine what the damage was and what may have caused it. Cracked or broken boards and components may be deemed to be the result of rough handling. Conversely, payment should not be allowed when parts work themselves loose and stop functioning or burn out. Some computers, particularly laptops, have their internal components shock-mounted to withstand a tremendous amount of "g" force; this is also a factor to consider. In determining whether internal damage to a hard drive is incident to shipment, consider the type of hard drive, whether reformatting was attempted, and whether the drive automatically parks the heads whenever the system is turned off. Most claims for internal damage to hard disk drives will not be payable. Claims for internal damage to computers create problems. It can be difficult to convince a claimant whose computer worked well before shipment that the damage was not caused by rough handling during shipment. CJAs and claims attorneys must exercise caution in this area to avoid making improper payments. They should note also that even in meritorious claims, obsolescence is almost always a factor in determining appropriate compensation.

(6) *Preventive law.* Because computer repairs can be expensive, CJAs and claims attorneys should practice preventive law by warning Soldiers about the Army claims system's approach to computer damage. Information in this subparagraph can serve as a basis for a preventive law article. Because private insurance companies similarly will not cover damage when rough handling cannot be substantiated, claims personnel also should encourage Soldiers who own computers to consider alternate methods of transporting them. Advance warning should reduce the number of uncompensated computer claims.

m. Claims involving animals. Although they are unique in that they are living organisms capable of locomotion, domestic animals such as dogs traditionally fit within legal definitions of personal property. The original claims statutes, 3 Stat. 261 (1816); 9 Stat. 414 (1849), authorized payment to Soldiers for the loss of horses. The military services, therefore, have agreed that payment for loss of, or injury to, animals lawfully held for personal use is allowed. In most cases, these claims will be brought for household pets because of theft, intentional wounding, or fire at quarters. This policy is recognized in the current ALDG, which allows a maximum of \$250 per pet and \$750 per claim. Because the cost of veterinary treatment for an animal is analogous to repair of inanimate objects, claim payments for

the costs of such treatments should not exceed the fair market value. When determining the fair market value of an animal you must consider all factors, such as the type of animal, its age, the market for such animals in the local area, and any special training of the animal.

n. Vandalism claims when the vandal is known. Most personnel claims for vandalism involve unknown perpetrators. When a vandal is identified, however, the government has an interest in ensuring that person—rather than the government—ultimately compensates the crime victim.

(1) Whether or not the vandal's identity is known, a Soldier or other proper claimant may present a claim and receive compensation for an on-post vandalism loss. Compensation, of course, is subject to the normal requirements that the loss must have occurred incident to service, that it must be substantiated and that the victim must first look to any private insurance (see subpara h, above, for limitations on vandalism to vehicles).

(2) If a vandal is identified as a Soldier, the victim must assert a claim against the vandal under Article 139, UCMJ, before the claims office can process the victim's personnel claim. If settlement of the Article 139 claim will be unduly delayed, the CJA or claims attorney may pay the personnel claim or, if not within his or her monetary authority, recommend it for payment and counsel the claimant to repay the United States if the claimant ever receives payment through the Article 139 process. Such a payment of a personnel claim in advance of settlement of the Article 139 claim should only be done when delay in repairing or replacing the damaged item would cause a significant hardship on the claimant or the claimant's family.

(3) Often, however, the vandal is a person not subject to the UCMJ. If the vandal does not reimburse the claimant voluntarily, the claims office should pay the victim's personnel claim and pursue recovery from the vandal under local law. Restitution often may be obtained in connection with adverse administrative actions, such as suspending the vandal's privileges or barring the vandal from the installation. The magistrate's court, located on many installations, may be able to assist. Frequently, the vandal is a minor child. Accordingly, in States that hold the parents of these children liable, the claims office should pursue recovery from their parents.

(4) The limitations in AR 27–20, subparagraphs 14–6b and c, on recovering for damage to government property from negligent, uninsured Soldiers, do not apply to personnel claims recovery actions against Soldiers for intentional damage to personal property.

(5) Claims personnel should categorize recovery from a vandal or other tortfeasor on a personnel claim as "Non-GBL Recovery," in the note field enter "recovery from tortfeasor" and enter the name of the tortfeasor or vandal in the "Payer" field of the Non-GBL Recovery screen, and deposit the money in the recovery account.

o. Repairs to fitness machines. When presented with a claimant's request for replacement rather than repair of exercise equipment, for example, a NordicTrack exercise machine, do not overlook the possibility that the manufacturer replaces damaged parts. Contact the customer service department to inquire about replacement parts. Most major companies have toll-free numbers (usually found in owner's manuals, warranty books or from directory assistance).

p. Other meritorious losses. If a loss that does not fall within one of the above categories is deemed meritorious, or if the guidance set forth above leads to denial of payment for a loss that appears meritorious because of the peculiar circumstances, request an exception to policy and approval to pay the claim from USARCS by sending a personnel claims memorandum or opinion relating all of the facts and special circumstances to the Chief, Personnel Claims and Recovery Division, USARCS. A telephonic or e-mail discussion of the claim with the Deputy Chief, Personnel Claims and Recovery Division, or with the Chief, Personnel Claims Branch, prior to preparation of the claims memorandum is recommended.

11–6. Claims not payable

a. Real property (real estate).

(1) The PCA does not provide for loss of, or damage to, land, crops, garden flowers, trees, and other things permanently joined to the land. Portable houses, house trailers, mobile homes, fences, storage bins, sheds, and other objects temporarily joined to someone else's land that may be removed by the claimant at a later date are considered personal property. Appliances such as washers or dryers are considered personal property. Other types of fixtures, such as furnaces and doors, are not considered personal property if they are permanently made part of a house or other structure.

(2) In determining whether something is permanently or temporarily joined to the land, consider the claimant's lease, license, or other contractual arrangement in determining what the parties to the agreement intended. With on-post housing, consider post regulations or directives that specify what the occupant is authorized or required to remove. For example, a claimant living in authorized off-post housing in Germany builds a shed, attaching a door and light fixtures. By agreement, the shed will become the property of the landlord after the claimant departs. The shed is real property, and the door became real property when it became part of the shed. However, by the terms of the agreement and according to German custom, the claimant is entitled to remove the light fixtures. They remain personal property.

b. Unusable airline tickets. The claim of a Soldier who purchases a nonrefundable airline ticket and whose leave is later canceled or whose orders are changed so that the tickets become worthless is not compensable. The fact that a Soldier cannot use a purchased ticket does not constitute a loss of tangible personal property within the meaning of the

PCA. An installation's claims education program should publicize this fact to alert Soldiers that purchasing nonrefundable tickets carries this risk.

c. Intangible property. Compensation will not be allowed for the loss of intangible property—that is, property that is merely representative of value and has no value in itself, such as nonnegotiable stock certificates, bank books, insurance policies, oil leases, and so forth. When such documents are lost, the owner retains the property rights they represent. The cost of replacing such documents is compensable.

d. Expenses that are not compensable.

(1) *General.* Expenses that are not directly connected with loss of, or damage to, personal property are not compensable. These include interest charges, attorneys' fees, costs of food or lodging while awaiting shipment, costs of preparing, filing, and pursuing a claim, postage, and long-distance telephone charges. Compensable incidental expenses are limited to those described in para 11–15 of this chapter and include replacement of certain documents, photographs, and various taxes and fees.

(a) *Telephone reconnect charges and similar relocation costs.* Relocation costs incurred at a commander's direction may not be considered under 31 U.S.C. § 3721; refer such matters to the appropriate Defense Accounting Office for payment from command operation and maintenance funds. For trailer relocation costs, see 52 Comp. Gen. 69 (1972); for telephone reconnect charges, see 56 Comp. Gen. 767 (1977).

(b) *Inconvenience or loss of use.* Food or lodging costs, vehicle rental costs, or similar expenses incurred because a claimant's goods or vehicle were not delivered in a timely manner may not be considered under the Personnel Claims Act (31 U.S.C. § 3721) and this chapter. JFTR, paragraph 5410D, authorizes military finance offices to pay Soldiers \$30 a day for up to 7 days in the event a POV shipped at government expense is not delivered on time. Costs for any delay beyond 7 days can be recovered directly from the contractor that transported the vehicle if the delay was caused by the contractor. If a common carrier caused the delay in delivery of other property, a claim should be made directly against that carrier. These are known as inconvenience claims and should be only for the cost of purchasing or renting essential items and for other living expenses incurred as a direct result of the failure to make delivery on time. Expenses should be documented by receipts or sworn statements. If the carrier refuses to pay the claim or makes an offer that appears to be unfair, the claimant can seek assistance from the installation transportation office. As this is not a claim against the government, claimants may also wish to seek advice from their legal assistance office. If the installation transportation and legal assistance offices cannot settle with the carrier, they may refer the matter to the Qualification and Quality Control Branch, Personal Property and Passenger Travel Division, Surface Deployment and Distribution Command (SDDC). The expense incurred for an additional delivery of household goods occasioned by circumstances that were not the Soldier's fault may be referred to the Defense Accounting Office (DAO) for consideration under the federal travel regulations. (See para C, chapter 410, Defense Transportation Regulation Part IV).

(2) *Appraisal fees.* An appraisal—as distinguished from a replacement or repair estimate—is a valuation of an item provided by a person who is not in the business of selling or repairing that type of property. Many people will obtain appraisals of antiques or art works before they are shipped, because they need to establish their value for insurance purposes or for some other reason. We should not pay for such an appraisal because it was not required by us to substantiate the value on the claim. Likewise, for relatively common items for which we can obtain the replacement cost from catalogs or manufacturers, or the Internet, we would not pay for an "appraisal" because it would not be required to establish the price. But where you have a unique item and an appraisal from a specialist is the only way to prove the value of the item at the time and place of loss, payment for an estimate of an item's value is appropriate, even if it is called an "appraisal" by the person who prepares it. Appraisers should be used in claims where an appraisal is reasonably necessary and useful to determine an item's value. If an appraisal is considered necessary, the CJA or claims attorney and the claimant should agree upon a disinterested appraiser and the approximate cost of the appraisal. Call USARCS if a question arises about the use of an appraiser and the field claims office is not sure that an appraiser should be used.

(3) *Fees paid by claimants to attorneys and representatives.* Attorney fees and similar expenses are not compensable under the PCA. Subsection 3721(i) of the PCA provides, "Notwithstanding a contract, the representative of a claimant may not receive more than ten percent of a payment made under this section for services related to the claim. A person violating this subsection shall be fined not more than \$1,000." Whenever PCA claimants are represented by counsel, the settlement letter should cite this statutory language.

e. Types or quantities of property that are not reasonable or useful.

(1) *Items not reasonable or useful under the circumstances.* Under some circumstances, particular items serve no useful purpose and are not reasonable for a claimant to own. Some items that are perfectly reasonable to possess in quarters serve no useful purpose in the field or on TDY travel. For example, it is usually not reasonable for a Soldier to bring a set of golf clubs on maneuvers, on one-day TDY, or to store them in an office.

(a) *Personal tools and other equipment used to perform official duties.*

1. Normally, it is not reasonable for a Soldier to use personal tools and equipment, such as GPS receivers, sleeping bags, and computers, in the performance of official duties. Use of personal property in place of government tools and equipment circumvents the Army supply system and is normally done for personal convenience; payment for the loss

of such items is deemed an improper use of claims funds. Privately owned personal computers are particularly inappropriate for use in performing official duties because of both the stringent requirements for obtaining such equipment through government channels and the fact that proper security for such expensive items is rarely available. This policy does not apply to small items of military equipment, such as canteens or ammunition pouches; it is reasonable and permissible for a Soldier to have more than the authorized number.

2. The loss of personal tools and equipment is compensable if the claimant used them to perform assigned tasks on a temporary basis and had the unit commander's specific authorization. Such authorization would be granted if government equipment was requested but was not available or if the claimant is a civilian employee who is required to provide his or her own tools as a condition of employment. Agencies hiring such employees must provide the employee with a list of all basic required tools, provide a method to substantiate ownership and possession of the tools, provide for the security of such tools, and inform each employee periodically of the maximum payment of \$1,500 for tools and \$500 for toolbox. When AAFES employees are required to provide their own tools as a condition of employment, AAFES may waive the maximum allowance for the loss of such tools and toolboxes as a matter of policy. Check with AAFES to determine if waiver is appropriate. For example, a claimant brings in several hand tools to perform work more efficiently and the section chief approves. Such use was neither temporary in nature nor was it authorized by the unit commander. The theft of the tools from the office is not compensable.

(b) *Property kept permanently at the workplace.* With limited exceptions, the workplace is not a proper place for storing personal property. Items such as televisions, used at lunch or during breaks or to decorate the office, would not be considered reasonable or useful. However, coffeepots, microwave ovens, and similar items may be considered reasonable and useful to keep at the workplace, if the owner's supervisor approved of their use and they comply with local regulations. Decorative items such as framed pictures or plants, and utilitarian items such as professional books, would similarly be considered for payment. Likewise small radios and personal electronic items such as cell phones, and personal digital assistants (PDAs) are normally considered useful and reasonable to have in a person's office. Generally, except for small, easily pilfered, high value items such as cell phones and PDA's, claimants are not deemed negligent for leaving such items in the office overnight or during weekends even if they are not secured in a locked area.

(c) *Money.* Normally, \$100 is a reasonable amount of cash to carry. Persons should bank amounts over \$100 or store them in a safe. It is not considered reasonable to keep an excessive amount on hand unless the claimant had no opportunity to bank the excess or had a specific reason for carrying it (such as the intention to purchase an expensive item after work or to begin vacation travel that day). When it is reasonable for the claimant to carry more than \$100 for purposes such as travel, the claimant is expected to carry traveler's checks instead of cash if possible. If the claimant's unit publishes guidance that an amount less than \$100 is reasonable to keep on hand, the claimant will normally be held to that standard.

(d) *Property shipped in vehicles.* The pamphlet, Shipping Your POV, distributed by SDDC through Personal Property Shipping Offices (PPSOs), and available on line at www.sddc.army.mil (enter the title in the Search block) lists items authorized for shipment inside POVs in transit. The only items appropriate to ship in a vehicle are portable child cribs, strollers or car seats; hand tools, not to exceed \$200 in value; emergency equipment such as jacks, tire irons, tire inflators, fire extinguisher, flares, jumper cables, first aid kits, and warning triangles; one spare tire and two snow or mud tires with wheels (either mounted or unmounted); the catalytic converter and components; and small comfort items like thermos bottles or car cushions, if they can fit into the carton that will be provided by the carrier for all loose items. Other items or types of tools are not appropriate to ship with a vehicle, and even more stringent restrictions govern property shipped in vehicles to Hawaii and Guam. Televisions and VCRs are listed as items not authorized for this type of shipment, unless they are factory installed. Consequently, claims for the loss of such items are not payable. Likewise, because importation and ownership of CB radios is prohibited in most overseas areas, such radios may not be shipped with a vehicle, even if they are permanently mounted to the vehicle.

(2) *Property never deemed reasonable or useful.* Congress intended to authorize compensation only for losses incurred incident to service. Certain types of property do not serve any purpose that could be considered incident to service or useful within the meaning of the statute.

(a) *Items acquired for resale or for use in a private business.*

1. *Property acquired or kept for resale, or acquired for or used in a private profession or business, is not reasonable or useful to possess.* Loss of, or damage to, such property is not considered incident to service, whether or not the claimant actually sold or used the item in a private business. A claimant's assertion that an item was intended for personal use is not dispositive, and a determination should be based on the nature of the item and all other evidence. In doubtful cases, the claimant may be required to provide copies of tax returns showing properly deductible business expenses. Additionally, claims personnel may contact the manufacturer to ascertain the intended market for the item(s) in question. Items manufactured for professional use (such as the vehicle diagnostic oscilloscope used in the claimant's hobby of vehicle restoration) are not normally payable.

2. *Some personal-use items are kept both for personal and for business use.* If the business use is only occasional, allow compensation unless the items are actually lost or damaged while being used for business. Compensation will not be allowed if the business use is substantial or if the item is designed for professional use and not normally intended for personal use. For example, a claimant's spouse, an active tennis player, contracts with Morale Support Activities to

teach tennis classes. A fine tennis racket is subsequently destroyed in shipment. Under these circumstances, the business use is not substantial, and the claim is payable. As another example, however, a claimant acquires a professional sewing machine used to stitch upholstery. Although the claimant asserts that the machine is intended for personal use and actually is used to repair the family's furniture, the item's nature indicates that it is intended for business use, and its loss would not be payable.

3. *Large quantities of items acquired for both business and personal use.* If the claimant owns so many tools or similar items that it is impossible to distinguish those that are intended for business use from those intended for personal use, the claimant may be compensated in a reasonable amount for items normally kept for personal use. For example, a claimant obtains and ships a large number of tools for automotive repair and they are lost in shipment. Although the claimant used many of the tools to repair his own vehicle, he acquired most of them to use as a paid mechanic after leaving the service. The claims office would exclude tools that are clearly of a professional nature and pay for only a reasonable number of the other tools.

4. *Items sold or traded by collectors.* Collectors of coins, stamps, or similar items often trade or sell parts of their collection. If, however, it appears that the claimant is operating as a dealer, no compensation should be allowed for any part of the collection.

(b) *Radar detectors.* No compensation will be allowed for loss of a radar detector. Even in states where it is lawful to possess such items, they serve no proper purpose but are used instead to evade established speed limits without penalty. In addition, no compensation will be allowed for damage to a vehicle when the evidence indicates that it was broken into solely to steal a radar detector.

(c) *Enemy property or war trophies.* Compensation will not be allowed for loss of enemy property or war trophies identified by regulation, directive or order as inappropriate or unlawful to possess. However, the prohibition against the claimed item must be in effect when the claim is brought. For example, it may have been unlawful to possess certain World War II enemy property for a few years after the war; today, however, because of expiration or repeal of a valid prohibition, possession of such enemy property would be lawful.

(d) *Money in shipment or storage.* No compensation will be allowed for any type of money, including coin collections, lost in shipment or storage. This prohibition does not apply to coins that have been converted into jewelry, such as an interesting coin mounted in a necklace or belt buckle.

(e) *Property acquired, possessed, or transported in violation of law, regulations, or directives.* Such property is not considered reasonable or useful. Loss of, or damage to, vehicles or weapons that are not licensed, registered, or insured in accordance with local law or regulations is not considered incident to service. Loss of, or damage to, property shipped to accommodate another person, such as a friend or relative, is not compensable; when the claimant has improperly shipped such items, no allowance should be made for items that cannot clearly be shown to have belonged to the claimant and immediate family members. The head of an ACO may waive this prohibition and pay a claim if good cause exists as to why the claimant failed to comply with the local requirements.

(f) *Government property.* Soldiers often claim for the loss of government-issued TA-50 equipment and for money or property belonging to unit funds. The Army Claims System is not an appropriate mechanism for handling the loss of government property.

(g) *Quantities of property not reasonable or useful.* Quantities of property far in excess of what a claimant can use under the attendant circumstances are not reasonable or useful. In determining whether the quantity possessed was excessive under the circumstances, consider the claimant's living conditions, family size, social obligations and any particular need to have more than average quantities as well as the actual circumstances surrounding acquisition and loss. In many instances, claims for excessive amounts of property may be denied or awards reduced based on the claimant's failure to substantiate ownership in the quantity claimed. For example, a Soldier claims the loss of 50 handmade silk suits during shipment. The evidence fails to substantiate that the claimant shipped more than an average quantity of clothing and indicates an intent to defraud the United States. No allowance should be made for the suits and the matter should be referred for criminal investigation.

(h) *Overweight shipments.* Property lost or damaged in shipment at government expense is considered lost or damaged incident to service even if the shipment is overweight and the claimant is required to pay part of the shipping costs.

(i) *Property purchased and shipped after the issuance of orders.* It is permissible to ship at government expense property purchased after the issuance of travel orders. Note, however, that transportation regulations prohibit shipment of property acquired only after the effective date of such orders (the date the claimant is required to begin travel to arrive at the new duty station on the date authorized).

(j) *Pornographic materials.* USARCS and its field claims authorities are not censors. Pornographic books and tapes lost incident to service may be considered for payment. However, seizure by customs inspectors or other police personnel is not considered a loss incident to service.

f. Fraud.

(1) *General.* Most claimants are honest. In the absence of clear evidence, a claimant will be assumed to be mistaken rather than dishonest, and great care should be taken to avoid characterizing a disagreement over the value of a loss as an intent to defraud. When fraud is detected in whole or in part, however, it is important to reduce the claim as

appropriate. Such action will be taken even if the claimant alleges that another person, such as a spouse, completed the paperwork on the claimant's behalf.

(2) *Detecting fraud.* Most claimants who intend to defraud make it obvious from a cursory inspection of their forms that they are overreaching.

(a) Fraud may be discovered by inspecting questionable items and reviewing estimates for alteration. Listed repair firms should be encouraged to report instances in which the claimant requested them to inflate estimates artificially or to provide copies of estimates. Claims personnel should always inspect, if practicable, damaged property on large or questionable claims as well as vehicles driven to the claims office when the claimant comes to obtain forms or file the claim. The inspector should record handwritten observations and sign, date, and file the inspection report. In addition, instruct claimants to bring in small broken items of high value when no inspection is contemplated. This decreases the probability that a claimant will be induced to commit fraud. Claims personnel often rely on their own experience with claimants in these situations to reach a practical and equitable resolution. However, a complete lack of substantiation or the presence of other factors sometimes leads claims personnel to question the accuracy or honesty of a claimant's representations. Claims officials are authorized to deny a claim under this chapter in its totality if the claim was "tainted by fraud" even if it contains some legitimate items.

(b) Fraud is an intentional perversion of the truth made in an effort to obtain a more favorable payment on a claim. A misunderstanding or inadvertent falsification is not fraud. In addition, a claimant's inability to substantiate ownership, the item's value, quality, purchase price, replacement cost, extent of damage or PED does not constitute fraud, although it may be evidence of fraud. A claims examiner or attorney who determines, by a preponderance of the evidence, that a claimant has engaged in fraud, may take or recommend the action described below.

(c) Some cases of fraud are clear and unmistakable (changing dollar numbers on repair estimates). Refer these claims to the military police or Criminal Investigation Division Command for appropriate criminal investigation. Because the criminal proceeding and the administrative claims proceeding are governed by different standards, the result of a criminal investigation or proceeding is not binding on the claims adjudication process. The claims examiner must assess the available evidence independently.

(d) The more difficult claims are those involving questions of ownership, value, purchase price, replacement cost, extent of new or PED, and item quality. Prematurely referring these claims for criminal investigation—based on the claim as submitted—may be nonproductive. The investigation often is too inconclusive to permit prosecution and provides little help to the claims office.

(e) The better approach is to seek clarification. Write the claimant and provide a clear explanation of the standards for substantiation of ownership or replacement costs. Ask the claimant to review appropriate portions of the claim submitted in light of this information to ensure that it is complete and accurate and represents the property claimed. This approach affords the claimant an opportunity to resolve any misunderstanding, to clarify questionable entries, and to reaffirm that the information is accurate. Often a claimant may not fully understand what is required as supporting evidence for replacement costs or ownership.

(f) When requesting additional information, members of the claims office are not acting as criminal investigators. They have an independent responsibility to ascertain the facts necessary for proper payment of valid claims. When requesting clarifying information to substantiate a pending claim and not for purposes of disciplinary action or criminal prosecution, claims personnel need not issue UCMJ, Article 31 warnings, provided they are not acting as agents of a law enforcement agency or disciplinary official.

(3) *Fraud detected before payment.* When fraud is detected before payment, the entire claim, or only the line items tainted by fraud, may be denied.

(a) *Denial of payment on line items tainted by fraud.* When a claimant has committed fraud, claims personnel should deny all line items tainted by the fraud, whether or not a lower award on the item is substantiated. A line item that is not tainted by fraud may be allowed to the extent that an award on the item is substantiated. For example, a claimant alters a \$30 repair estimate for a bookcase damaged in shipment to read \$300 and also claims \$50 for a vase. Since the bookcase is tainted by fraud, no allowance should be made for it. However, an award could be made on the vase if the claimant has substantiated the value of this item.

(b) *Denial of entire claim.* If the head of an ACO determines by a preponderance of the evidence that a claimant has engaged in fraud, he or she may decide to deny the entire claim. In deciding whether to deny the entire claim, the head of an ACO should consider the nature and extent of the fraud. The decision to deny an entire claim when a claimant has engaged in fraud, however, is within the discretion of the head of an ACO—that individual may deny an entire claim even if only one line item is tainted by fraud.

(4) *Fraud detected after payment.* When fraud is detected after payment is made, the claim should be re-adjudicated to exclude items tainted by fraud. Again, the ACO should consider the nature and extent of the fraud. The ACO has the authority to disallow the claim in its entirety or to allow for items legitimately claimed and substantiated. AR 27–20, paragraph 11–14g and DD Form 1842 (See block 16) authorize withholding for any payments made on the basis of incorrect or untrue information. The claimant will be issued a written demand for payment in accordance with paragraph 11–37 of this publication. If the claimant refuses to repay an amount incorrectly paid, the Defense

Accounting Office will be directed to withhold the money and credit it to claims funds, using DD Form 139 (Pay Adjustment Authorizations).

(5) *Criminal action.* Action reducing the award is independent of any criminal action taken against the claimant. An award may be reduced for fraud whether or not charges are brought. When claims personnel reasonably suspect fraud, they should immediately inform the CJA or claims attorney. Sometimes a CJA or claims attorney determines that further clarification from the claimant is inappropriate or the claimant fails to provide a reasonable explanation for the actions taken. In such cases, the CJA, claims attorney and SJA should refer the matter to appropriate police authorities or to the claimant's chain of command and make every effort to ensure that the claimant is prosecuted to deter other persons from committing fraud. Convictions should be publicized.

g. Negligent acts. A claimant may not be paid for any loss or damage that is the direct, proximate result of negligence by the claimant, a member of the claimant's household, or of an agent or employee of the claimant. This rule is the old common law rule of contributory negligence under which negligence by the claimant bars payment even if the negligence of another party also contributed to the loss.

(1) *Analysis.* Negligence is a failure to exercise the degree of care expected under the circumstances, which is the proximate cause of a loss. A loss that is due, in whole or in part, to the negligence of the claimant or of the claimant's spouse, child, houseguest, employee, or agent, is not compensable. The analysis is broken into two parts: what the claimant was expected to do under the circumstances and whether the claimant's action wholly or partly caused the loss.

(2) *Degree of care.* A claimant is expected to exercise the same degree of care that a "reasonable and prudent" person would have exercised under the same circumstances. In general, if the claimant does something a reasonable and prudent person would not have done, the claimant is deemed negligent. What is expected will vary with the circumstances, including the locale. In areas plagued by theft, for example, claimants are expected to exercise a high degree of care. In a particular case, however, if the claimant does something that normally would be considered negligent but does so because it is the best option available, the claimant has done what a reasonable and prudent person would have done under similar circumstances. For example, a Soldier moving from one set of quarters to another packs belongings in the passenger compartment and trunk of the family's POV. While the Soldier is taking a last look around the old quarters to check for items left behind, a thief breaks into the locked vehicle and steals four suitcases full of clothing from the passenger compartment. Although the automobile passenger compartment is normally not considered a proper place to store personal property, this claimant had no better place to keep the property under the circumstances and has done all that a reasonable and prudent person would do. Note that this claimant would still be expected to keep the most valuable possessions in the trunk of the vehicle.

(3) *Proximate cause.* If the loss would have occurred whether or not the claimant committed the negligent act, the loss did not result from claimant's negligence. For example, a claimant properly parks a POV at quarters, leaving a tape deck on the back seat and the doors unlocked. A bolt of lightning destroys both the car and the tape deck. Although the claimant failed to take adequate precautions to protect the tape deck from theft, this had no bearing on the loss and the claim for the damage to the car and the tape deck is payable. If the claimant had locked the car and affixed the tape deck properly, lightning still would have destroyed them. As a second example, a claimant leaves a diamond bracelet on the nightstand in government quarters. A skillful burglar breaks into the house and steals the bracelet, but also cracks the indoor safe and empties it of valuables. Although the claimant failed to take adequate precautions to safeguard the bracelet, this failure had no bearing on the loss and the claim for the diamond bracelet is payable. If the claimant had kept the bracelet in the safe, the burglar still would have stolen it.

h. Wrongful acts. Property acquired, possessed, or transported illegally or in violation of competent regulations is not reasonable or useful, and thus its loss is not compensable regardless of whether the violation was a proximate cause of the loss. However, the head of an ACO may waive this rule if good cause exists as to why a claimant failed to comply with the local law, regulation, or directives. If the claimant's conduct was criminal in nature, a loss is not considered incident to service. If, however, personal property is damaged or lost while the claimant is in violation of a non-punitive regulation, the loss may be considered incident to service if the claimant's conduct was not a proximate cause of the loss. For example, a Soldier parks an unlicensed, unregistered vehicle in front of the barracks, where it is destroyed by a lightning bolt. The Soldier's failure to properly insure and register the vehicle had nothing to do with the loss (in other words, it was not a proximate cause). However, the vehicle was not properly on the installation, and the claim would be denied unless the Soldier shows good cause for failing to properly insure and register the vehicle. As a second example, a Soldier improperly parks her properly licensed and registered vehicle in a no-parking zone, where it is vandalized. The Soldier's failure to park in a proper parking place is considered neither a criminal act nor a proximate cause of the loss. This claim would be payable.

i. Other persons whose negligent or wrongful acts will bar payment. See list below. Because denial of a claim on the basis of the negligence of the claimant or another person (agent, employee, member of household) requires analysis of complicated legal issues such as proximate cause, agency/employee relationships, and the presence of superceding intervening causes, claims adjudicators should always seek the advice of their supervising claims attorney or CJA before denying all or part of a claim on the basis of negligence.

(1) *Family members, spouses, and houseguests.*

(a) Losses resulting from the negligent or wrongful conduct of spouses, children over the age of seven, adult family

members, and houseguests are not compensable. For example, the day after signing a separation agreement, a Soldier's spouse takes a sledgehammer to the Soldier's car while it is properly parked in front of the Soldier's barracks. The loss is the result of the spouse's wrongful act and is not compensable. (Note, however, that roommates and other persons with a legal right to live in a dwelling would not be considered houseguests.)

(b) Children under the age of seven are deemed to be incapable of negligence, and a lesser degree of care is expected of children between the ages of 7 and 14 than is expected of adults. However, parents and persons to whom young children are entrusted are expected to supervise such children properly. For example, the claimant's three-year-old son finds a cigarette lighter on a low nightstand and sets the claimant's government quarters on fire while the claimant's spouse is asleep upstairs and the claimant is on duty. The son is incapable of negligence. However, the claimant's spouse's failure to put the lighter out of reach and to supervise the child is negligence, which is a proximate cause of the loss.

(2) *Agents*. Agents are persons selected by the claimant to carry out particular actions on the claimant's behalf. Claims resulting from an agent's negligent or wrongful conduct are barred so long as the conduct occurs within the scope of his or her agency and reasonably relates to the tasks the agent was engaged to perform. For example, the claimant asks a friend to watch over his on-post quarters and feed his cat while he is away on TDY. The claimant parks his car in front of the barracks and departs. The friend, as agent, fails to lock the back door of the house. A burglar notices this and ransacks the house. Seeing this, the "friend" steals the claimant's television and also breaks into the claimant's car and steals the jack. The loss of the jack is compensable because the agent's wrongful conduct in stealing it does not reasonably relate to the tasks entrusted to him. The loss of the television and other property is not compensable.

(3) *Employees*. Employees are persons, such as maids, who work for the claimant. Claims resulting from an employee's negligent or wrongful conduct are barred as long as the conduct occurs within the scope of employment. For example, the claimant's maid goes out for a walk and leaves open the back door to the claimant's on-post quarters. A burglar notices this and ransacks the house. Seeing this, the maid steals a sweater from the closet. The loss of the sweater is compensable because the maid stepped outside the scope of employment in stealing the sweater and there is no other bar to compensation. The loss of the other property is not compensable because it resulted from the maid's negligent conduct within the scope of employment.

(4) *Independent contractors*. In evaluating whether the negligence of another person will bar payment to the claimant, it is important to understand the difference between an agent or employee and an independent contractor. If a Soldier asks some friends to help him load a rental truck with his belongings as part of a DITY move, and one of those friends negligently packed an item so that it was damaged in transit, the negligence of the friend would bar payment to the Soldier because the friend was acting as an agent. The same would be true if the Soldier making the DITY move went to a local labor office and hired several people to help pack and load his goods. They would be working under his direct supervision and control and would be his employees. However, if the Soldier contracted with a commercial moving company to move his goods, the negligence of the employees of that contractor would not bar payment to the Soldier because the negligent person was not his agent or employee but an employee of an independent contractor.

j. *Damage to rented vehicles*. Claims for reimbursement of damage to vehicles rented pursuant to official orders are not payable under the PCA. In most cases, the rental car company should not assert demands for payment for such damage against the renter. Personnel who rent vehicles under TDY or other orders are required to rent the vehicle under the provisions of the Car Rental Agreement that SDDC has negotiated on behalf of the armed services with most of the major domestic and overseas car rental companies. This agreement is available on the SDDC Web (www.sddc.army.mil) site by selecting "passenger" on the main menu and then selecting "Car Rental Agreement" under Carriers and Programs on the next menu that appears.

(1) This agreement is of interest to claims personnel because the insurance and damage liability paragraph provides coverage for government drivers with a few exceptions. The agreement says that government renters will not be subject to any fee for loss or collision damage waiver and, in the event of an accident, will not be responsible for loss or damage to the vehicle except as stated below. Personal accident insurance or personal effects coverage may be offered to a renter, but is not a prerequisite for renting a vehicle. Notwithstanding the provisions of any rental agreement executed by the government employee, the company will maintain in force, at its sole cost, insurance coverage, which will protect the United States government and its employees against liability for personal injury, death, and property damage arising from the use of the vehicle. This coverage includes collision damage to the rented vehicle. To the extent permitted by law, the liability and property damage coverage provided are primary in all respects to other sources of compensation, including claims statutes or insurance available to the government, renter, or authorized driver.

(2) Notwithstanding the provisions of any vehicle rental agreement executed by the government renter, the rental car company, under the SDDC agreement, assumes the entire risk of loss of or damage to the rented vehicles (including costs of towing, administrative costs, loss of use, and replacements), from any and every cause whatsoever, including without limitation casualty, collision, fire, upset, malicious mischief, vandalism, falling objects, overhead damage, glass breakage, strike, civil commotion, theft and mysterious disappearance, except where the loss or damage is caused by one or more of the following:

(a) The loss is caused intentionally by an authorized driver.

- (b) Obtaining the vehicle through fraud or misrepresentation.
- (c) Operation of the vehicle by a driver who is under the influence of alcohol or any prohibited drugs.
- (d) Use of the vehicle for any illegal purpose.
- (e) Use of the vehicle in pushing or towing another vehicle.
- (f) Using or permitting the vehicle to carry passengers or property for hire.
- (g) Operation of the vehicle in a test, race or contest.
- (h) Operation of the vehicle by a person other than an authorized driver.
- (i) Operation across international boundaries unless specifically authorized at the time of rental.
- (j) Operation of the vehicle off paved, graded or maintained roads, or driveways, except when the company has agreed to this in writing beforehand.
- (k) Theft of the vehicle and the renter cannot produce the vehicle keys, unless the renter can show the keys were stolen through theft or robbery.
- (l) The above exceptions are not valid where prohibited by state law.

(3) The local installation travel office knows which car rental companies participate in this agreement, and it should attempt to make reservations with these participating companies where at all possible. Should a potential claim arise, contact the installation travel office (if it made the reservation) to confirm a car rental company's participation and, if necessary, contact the car rental agency that has asserted a demand against the Soldier to review the agreement and to request withdrawal of the demand.

(4) The agreement does not cover all types of vehicles. In addition, there may not be a participating rental company in some locations. If a member receives a demand for payment of damage to a rental vehicle that is not covered by the SDDC agreement, or if the vehicle is covered by the agreement but one of the exceptions listed above applies, the rental company's demand should be referred to the finance office for payment as a travel expense out of unit travel funds.

k. Insurance premiums and deductibles. The PCA does not provide for the payment of insurance premiums or the deductible amount of an insurance policy. When an insurance payment is involved in a claim, follow the procedures set forth in paragraph 11–21a. This involves computing how much the government would have paid for each item and subtracting what the insurance company paid. The claimant is generally paid the difference. While this amount may be equivalent to the amount of the insurance deductible, it often is not. For example, if the claimant has insurance that pays the replacement cost of lost items, the insurance company may determine the value of a lost leather coat to be \$500. If the deductible amount is \$200, the insurance company will pay the claimant \$300. The government may calculate the value of the same coat to be \$400, after deducting depreciation. In this case, the government will pay the claimant only \$100 (\$400 minus the \$300 insurance payment). However, on POV claims where the claim is only for repair costs, we will generally use the same repair estimate as the private insurer. In these cases, the determination will almost always be to pay an amount equal to the claimant's deductible. Finally, on policies that pay the full replacement value (new-for-old, or undepreciated replacement cost coverage) an insurance company may make a partial payment to a claimant and list on its settlement letter a "hold-back" amount. This is an amount the insurer will not pay until it receives proof the claimant purchased a replacement item. On those claims, the entire amount allowed by the insurer, to include the hold-back amount, is the amount that the claims office should use when determining if further payment is justified.

11–7. Time prescribed for filing

a. Time limitations on presentation.

(1) *General.* A claim must be presented in writing to a military installation within two years after it accrues (31 U.S.C. § 3721(g)). For purposes of presentation within the two-year period, the claim is presented when it is received at a U.S. military establishment or the offices within a U.S. Embassy or consular facility that normally receive similar claims for the Department of State. The postmark date of a claim does not toll the statute of limitations (SOL). Submission of DD Form 1840/1840R, Joint Statement of Loss or Damage at Delivery/Notice of Loss or Damage, to the claims office does not stop the running of the two years. USARCS policy aims to assist claimants rather than entrap them, and claims personnel should make every effort to advise claimants about the two-year time limitation and what must be done to stop it from running. For example, a claimant comes in near the expiration of the two years to pick up paperwork on a large claim. Claims personnel should advise the claimant about the time limitation, allow the claimant to complete and present DD Form 1842, and inform the claimant in writing that the claim will be denied if the remaining documentation is not submitted within 30 days. Sample completed DD Forms 1840, 1840R, and 1842 are posted on the USARCS Web site at, "Claims Resources," III, nos. 13, 14, and 16; blank copies of all three may be downloaded from www.dtic.mil/whs/directives/infomgt/forms/formsprogram.htm.

(2) *Computing the two years.* In computing the two years, exclude the first day and include the last day (the day the claim was received) unless the last day falls on a Saturday, Sunday, or legal holiday. If the last day falls on a non-workday, extend the two years to the next workday. For example, a Soldier's claim accrues on 18 January 1995. Normally, the claim must be presented by the close of business on 18 January 1997, but 18 January 1997 is a Saturday,

19 January 1997 is a Sunday, and 20 January 1997 is a legal holiday. The Soldier's claim must be presented by the close of business on 21 January 1997, the next workday.

(3) *Claims accruing during time of war or armed conflict.* If a claim accrues during time of war or if war intervenes before the two years have run, and if good cause is shown, the claim may be presented not later than two years after the cause no longer exists, or after the end of the war or armed conflict. The Commander USARCS or the Chief, Personnel Claims and Recovery Division, USARCS will make all determinations that good cause exists. Claims attorneys and Claims Judge Advocates should prepare a memorandum giving a recommendation and all of the relevant facts and dates and e-mail it to USARCS for a decision.

(4) *Periods of captivity.* In computing the two years, exclude the time the claimant is held as a prisoner of war or as a hostage.

b. When a claim accrues.

(1) *General.* A claim accrues on the day that the claimant knows or should know of the loss. This begins the running of the two-year SOL. The claimant does not need to know of the complete extent of the loss or damage, only that some loss or damage resulted from an incident.

(2) *Loss in shipment or storage.* A claimant knows or should know of obvious loss or damage on the date of delivery. A claim normally accrues on that day. This general rule is modified in certain instances:

(a) If a claimant's entitlement to government storage terminates but the property is later delivered out at government expense, the claim accrues on delivery unless the claimant received actual notice of loss or damage when the shipment converted from storage at government expense to storage at the claimant's expense. However, if the delivering carrier noted any loss or damage when it picked up the items at the warehouse, the presumption is that the loss or damage noted at that time occurred during the period when the goods were stored at the claimant's expense. The member must produce evidence to overcome this presumption or payment for those items will be denied.

(b) If the only damage being claimed is internal (for example, there is no external damage to an electronic item), the claim accrues when the claimant should have known of this damage.

(c) If a shipment sustains no damage but inventory items are missing, the claim accrues at the time the claimant should know that tracer action has failed to turn up the missing items. Normally, if a response to the tracer is not received within 30 days, the claimant should assume that the items are missing.

(3) *Loss in storage.* If the claimant is informed that the goods sustained partial or total loss in storage, the claim accrues on receipt of the notice. The claimant is expected to exercise due diligence in attempting to ascertain the full extent of the loss. If the claimant is not able to determine the full extent of his or her loss within two years, the claimant should file a claim based on the loss or damage that is known, and request the claims office hold the claim in suspense until a final inspection of all of his or her goods can be completed.

(4) *Multiple deliveries.* USARCS frequently receives claims for reconsideration that involve "split" or multiple deliveries made on the same bill of lading. In these cases, the claim accrues for items damaged or lost in subsequent deliveries on the date those items are delivered—not on the date that the first shipment was delivered. The claim accrues for items damaged or lost in the first delivery on the date those items are delivered.

(5) *Advising claimants of time limits.* The "bad advice" issue arises when claims personnel inform claimants that they cannot file a claim until the entire shipment has been delivered. Claimants must be told to file timely claims for items they know to be lost or damaged and to amend their claims if they sustain additional damage or loss in subsequent deliveries. When possible, refrain from giving oral advice about the various time limitations—such as the time for submitting the DD Form 1840R or for filing a claim. It is better to prepare and distribute a written handout specifying the various time limits. This eliminates confusion, provides claimants with accurate information to file their claims in a timely manner, and protects the claims office from the claimant who runs afoul of the SOL, then alleges that some unknown person in the claims office provided misinformation. Claims instructions, whether printed or on a Web site, must make clear that all the claimant needs to submit to meet the two-year limit is a written demand for payment. Instructions should differentiate between what must be submitted to substantiate a claim and the minimal written demand that is sufficient to meet the two-year limit.

(6) *Application of statute of limitations.* The two-year statute of limitations only applies to claims against the government under the Personnel Claims Act. It does not apply to claims directly against warehouses and transportation providers who store or transport a member's household goods under contracts with the government. In the commercial world, the Carmack Amendment to the Interstate Commerce Act (49 U.S.C. § 14706) permits carriers that ship goods under a bill of lading to limit the time for an owner to file a claim, but sets a minimum time of nine months. However, any such limitation must be clearly noted on the bill of lading. Neither the bill of lading (BOL) used on international DOD shipments, nor the generic bill of lading (BOL) now used on domestic DOD shipments has any time limitation. Therefore, the only limit applicable to a claim against a government contractor is the six-year limit set by statute in 28 U.S.C. § 2415. If a claim is denied under this chapter because it was not properly filed within two years of the date the claim arose, the denial letter should advise the claimant of any possible remedies against third parties. A sample denial letter and comprehensive guidance to field claims offices are included on the USARCS Web site. Sample settlement

letter formats that include full or partial denial and approval of claims are also posted on the USARCS Web site. All may be viewed at "Claims Resources," III, nos. 45-47.

11-8. Form of claim

Any written demand for compensation may be considered a claim, even if no specific sum is mentioned or supporting documentation provided. However, while such a minimal submission is sufficient to toll the SOL it is not sufficient to permit settlement of the claim.

11-9. Presentation

a. General. Normally, a claim is not presented until it is received by an active military installation of one of the services or the appropriate office at a U.S. embassy or consular facility. If the claim was mailed and is received by the claims office a few days after the time limitation on presentation has run out, contact the mail room or APO to ascertain when the installation actually received the claim. Merely mailing a claim does not constitute presentation, nor does receipt by a federal agency outside DOD; however, for ARNG and USAR claims, a claim may be presented to any full-time officer or employee of the ARNG or USAR, other than the claimant.

b. What constitutes a presentation. Initially, the claim does not need to be submitted on DD Forms 1842 and 1844; however, these forms must be submitted before the claim may be paid. Submission of DD Form 1840 or DD Form 1840R does not constitute presentation of a claim. If a claimant chooses to submit incomplete paperwork, claims personnel may not refuse to accept a written demand that constitutes a claim. Such claims must be accepted and logged in. Claimants submitting such claims, however, should be informed in writing that they must submit properly completed forms or necessary substantiation within a fixed period of time (normally 30 days); otherwise, the claim will be denied or paid only in the amount substantiated. A sample completed DD Form 1842 is posted on the USARCS Web site at "Claims Resources," II, no. 16; a blank copy may be downloaded from www.dtic.mil/whs/directives/infomgt/forms/formsprogram.htm.

c. Where to file-United States. Claims offices are assigned specific geographical areas of responsibility shown on the chart posted on the USARCS Web site at "Claims Resources," VI. Generally, this area of responsibility extends only within the state borders and usually assigns a single post the responsibility of handling tort claims within the state. However, these boundaries may be less rigidly imposed for personnel claims handling. In the interest of providing customer service, claimants will be allowed to submit claims to field offices that are most convenient to their residence or place of duty. Claims should normally be filed at the claims office that has responsibility for the geographic area in which the claimant is living at the time of filing. However, in some areas, claimants may live in an area for which one office is responsible, but commute to work on another claims office's installation. In those cases, the claimants may file their claims at the claims office on the installation where they work because it is more convenient to them. Likewise, some claimants who live near the boundary between two geographic of two ACOs may be closer to the one that does not have responsibility for the location where they actually live. Those claimants may also file their claim at the installation that is most convenient. The recent realignment of geographic areas of responsibility in CONUS to facilitate tort claims management may make this practice more likely in the future. For example, Fort Jackson, South Carolina is the ACO responsible for all of South Carolina. But claimants living across the river from Augusta, Georgia, in North Augusta, South Carolina, are about 70 miles from Fort Jackson but only about 15 miles from Fort Gordon. These claimants can file their claims at Fort Gordon, and the Fort Gordon office should resolve their claims rather than transfer them to Fort Jackson.

d. Where to file - Overseas. For personnel stationed at military installations outside the United States, claims should be filed at the military claims office that services their unit or installation. For claimants who are assigned to or work out of U.S. Embassies, the following rules apply:

- (1) For embassies in Europe, the claims should go to—

U.S. Army Claims Service Europe (USACSEUR)
ATTN: AEAJA-CD-PC
Unit # 30010, Box 37 (Manheim)
APO, AE 09166-0010

- (2) For embassies in eastern Asia, other than Japan (that is, Myanmar, Singapore, Malaysia, Indonesia, Thailand, Cambodia, Vietnam, Philippines, Taiwan, Korea, and China) claims should be submitted to—

OJA, USFK (Claims)
Unit 15322
APO, AP 96205-0084

- (3) For all other embassies in Africa, South America, Central America, Caribbean area, Central Asia, Southwest Asia, Australia, New Zealand, and the Pacific island nations, claims should be forwarded to—

U.S. Army Claims Service (USARCS)

ATTN: JACS-PC
4411 Llewellyn Ave.
Ft. Meade, Maryland 20755-5360

e. Where to file-online. USARCS is currently developing and testing a program that will incorporate an online filing capability in the Personnel Claims Management System (PCMS). When perfected, it will permit claimants to file PCA claims from anywhere in the world via the Internet. The current plan is to allow the PCMS to select the field claims office that will adjudicate the claim but give the claimant the ability to override that designation and select another office that may be geographically more convenient. However, USARCS may also develop a system of regional offices that will handle all online claims. Guidance on filing online claims will be disseminated once the system is operational.

Section II

Evaluation, Adjudication, and Settlement of Claims

11-10. Policy

The Personnel Claims Act limits payment to losses incurred incident to service. Under this Act, "incident to service" is a broad term that encompasses the circumstances of military living, such as frequent moves pursuant to orders, assignment to quarters, and duty in foreign countries. (It does not have the same meaning under the FTCA.) Many losses that neither relate to the actual performance of duty nor result from the tortious conduct of other federal employees are considered incident to service losses. Generally, mirroring positions taken by the Air Force and the Navy, AR 27-20 sets forth specific categories of such losses. Refer losses that appear to be incident to service but do not fall within these categories to the Commander USARCS. Losses that are not incident to service are not compensable.

a. Prompt, fair disposition of claims. The claims payment process is not an adversarial one. The policy underlying the PCA endorses prompt and fair payment of meritorious personnel claims to maintain morale and avoid financial hardship. Soldiers who have suffered loss or damage are entitled to helpful, friendly, and courteous service.

b. Small claims procedure. The small claims procedure applies to claims that can be settled for less than \$500 (although the claimant may claim more than \$500) and that do not require extensive investigation.

(1) This procedure requires the claims office, when first receiving and reviewing claims, to distinguish those that can be settled quickly from those that require more extensive processing. The former can then be separated out and processed as soon as possible, preferably by the end of the next working day after the claim is filed.

(2) Claims personnel relax the evidentiary requirements slightly in these claims, and place greater emphasis on catalog prices, telephone calls to confirm prices, and agreed cost of repairs (AGC) and loss of value (LOV) procedures.

(3) The small claims procedure is not a "giveaway" program, but a method permitting claims personnel to concentrate effort on those claims that require greater investigation, regardless of amount, while allowing them to accomplish the overall mission of prompt and fair claims processing. "First in, first out" processing of all claims, large or small, is contrary to Army policy; however, field claims offices must guard against letting more difficult claims languish while small claims are pushed through.

(a) Technique. Where local resources permit, formal adjudication techniques should be set aside, and an experienced claims examiner should adjudicate the claim while the claimant is present to explain the details. The claimant should be directed to bring in small damaged items, particularly valuable ones, for inspection. This means the person who first counsels the claimant must have enough experience to recognize a small claim and to tell the claimant what evidence is needed before scheduling an appointment with the examiner to adjudicate the claim. If amounts claimed seem reasonable based on the face-to-face interview, the examiner should waive substantiation for replacement costs of inexpensive items and use catalog prices and telephone calls to confirm other replacement costs. The examiner should also make full use of LOV and AGC procedures for minor furniture damage.

(b) Payment procedures. In the United States, all payments on personnel claims are processed through the Defense Finance and Accounting Service office at Rome, New York (DFAS-Rome). Claims offices should transmit the DA Form 7501, Personnel Claims Payment Report, to DFAS-Rome on the same day that the payment is approved. The payment office at DFAS-Rome has agreed to process requests and issue checks or EFT payments within 5 days of receipt of DA Form 7501. At overseas locations, if local finance procedures permit, small claims should be approved on the spot so the claimant can hand-carry the voucher to the Defense Accounting Office (DAO) for immediate cash payment. A sample completed DA Form 7501 is posted on the USARCS Web site, "Claims Resources," III, no. 6; a blank copy may be downloaded from www.apd.army.mil.

c. Rounding sums. Compensation for each line item on a personnel claim is rounded to the nearest whole dollar. After the examiner takes depreciation and makes any other proper adjustments, amounts ending in 50 cents or more are rounded up and amounts ending in 49 cents or less are rounded down. In some instances, this results in the claimant receiving a few cents more than the amount claimed.

d. Repair or replacement costs stated in a foreign currency. After receiving a claim, claims office personnel must convert repair or replacement costs stated in a foreign currency into U.S. dollars. Purchase prices may be entered in a foreign currency or the U.S. dollar equivalent at the claims office's option. For items that have been replaced or

repaired and paid for in foreign currency before submission of the claim, claims personnel should convert using the exchange rate in effect at the time the item was repaired or replaced. For items that have not been repaired or replaced, they should use the exchange rate in effect on the day the claim is received. Claims personnel may use the military exchange rate or a commercial exchange rate obtained from a newspaper listing or commercial bank.

(1) The amount allowed for items that will later be repaired or replaced using a foreign currency should be adjusted up or down if the exchange rate changes significantly between the time the claim is received and the time it is adjudicated. If the amount allowed on the claim exceeds the amount claimed as a result of currency fluctuation, claims personnel must change the amount claimed on the claims form and in the PCMS database.

(2) A field claims office is authorized to deviate from this general rule if it appears that the claimant would receive a windfall as a result. Any deviation must be fully explained on the chronology sheet. A change in the exchange rate occurring after a claim is settled is not a basis for further payment on reconsideration.

e. Shortage of claims funds. If a claims office runs short of claims funds and is unable to obtain more money from USARCS, it should send written notice to all claimants it cannot pay, advising them when they may expect payment. To continue paying small claims and to avoid a large backlog in adjudicated claims awaiting payment and recovery action, a claims office may make partial payments on very large claims, informing these claimants in writing when they may expect final payment. Such payments are logged as emergency partial payments.

f. Use of chronology sheets. Claims personnel must explain on the chronology sheet the basis for the actions they take. In addition, they must enter any information received from the claimant or other persons that the claims file does not otherwise reflect. The chronology sheet is attached as the top document on the left-hand side of the claim file, and additional sheets may be used. Claims personnel should not write abusive or derogatory language about a claimant or other individuals on the chronology sheet or on any claims document. Unlike tort claims files, all entries in a personnel claims file must be released to the claimant under the access and amendment provisions of the Privacy Act. All entries on the chronology sheet should indicate the date the entry was made and the name of the individual who made the entry. Do not use initials to indicate who made the entry, unless the name is already given at a prior entry. Claims personnel may also use the LOG feature in the PCMS as the chronology sheet as long as a printed copy is maintained with the paper file. When a paper file is transferred or forwarded to another claims office or command claims service, the most current copy of the LOG should be enclosed with the file.

g. Amendment of claims and supplemental claims. Until a claim is settled, a claimant may amend a claim simply by changing DD Form 1844. Thereafter, a claimant may submit a supplemental DD Form 1844 as part of a request for reconsideration. Relief will be granted based only on facts that were not apparent when the original claim was settled.

h. Abandoned claims. A personnel claim may be considered abandoned when the claimant either withdraws it or does not follow it through. If the claimant can be contacted, a personnel claim may be abandoned only if the claimant expresses a desire to do so. Claims personnel should notify claimants who do not provide complete documentation about what they must provide, further informing them that the claim will be processed as is unless the required paperwork is submitted within a specified time (normally 10 or 15 days). If the claimant fails to respond within the time specified, the claim should be processed for payment to the extent it is substantiated, or denied if no amount is meritorious. It should not be listed in the data base as abandoned.

i. Transfer of claims.

(1) *A transferred claim is a claim that is still open within the claims system.* Except as provided in subparas (2) to (5) below, a personnel claim will not be transferred to another Army field claims office. It is inappropriate to transfer a personnel claim merely because the incident occurred in another claims office's geographic area of responsibility unless justification exists for such transfer. It is equally inappropriate to return a claim and suggest that the claimant resubmit it to another claims office. One Army field claims office may request another to assist in investigating a claim at any time without coordination with USARCS or a command claims service; however, such claims remain open on the database of the office requesting assistance. A list of all of the settlement and approval authorities and their areas of responsibility for tort and personnel claims can be viewed on the USARCS Web site at "Claims Resources," VI.

(2) *Transfers to a higher settlement authority.* A field claims office that does not have authority to take final action on a claim will transfer it to the next higher settlement authority, along with a personnel claims memorandum of opinion citing the basis for settlement. The claim will be completely adjudicated, investigated, and substantiated by the originating field claims office before forwarding the file. The originating office will dispatch the DD Form 1840R before transfer. The receiving office will review the file and make any changes it deems necessary before settlement. If the claim is to be paid, the receiving claims office will sign the DD Form 1842 and generate the payment form forwarded to finance.

(3) *Claims cognizable under tort claims statutes.* A claim not meritorious as a personnel claim but cognizable as a tort claim will be converted to the Tort and Special Claims Application database. It will then be transferred to the office having jurisdiction over the area in which the claim occurred in the same manner as a tort claim, using a tort claims memorandum of opinion.

(4) *Claims of settlement authorities and their raters.* The head of a claims office is the SJA or Command JA. That person may settle claims brought by any subordinate working in that claims office. However, claims presented by the head of a claims office or by persons rating that officer will be forwarded to the next higher settlement authority to

avoid a conflict of interest. Such claims will be fully adjudicated, investigated, and substantiated prior to forwarding. The originating claims office will dispatch the DD Form 1840R before transfer.

(5) *Transfers with the approval of USARCS or a command claims service.* Prompt payment of meritorious claims is a fundamental claims policy; transfers delay settlement. Except as provided above, transfers must be approved by USARCS or by a command claims service, neither of which will grant approval unless the claim merits investigation and another claims office is better situated to process the claim. Requests for transfer may be approved by telephone or automated means (for example, e-mail). Factors to consider include the place of the loss, the claimant's and the property's present location, and the location of the office receiving the original claim. If a transfer is approved, the forwarding office will prepare a transmittal letter stating, "Authority to transfer this claim was granted by (name) at (organization) on (date)." Make the appropriate entries by using the "TA" status code and change the group to reflect the receiving group in PCMS. The file may be sent immediately. If the claim record was created in the former personnel claims database (prior to August 15, 2005), all claim files transferred will include a computer screen printout and a data disk with the claim records on it. Offices transferring special interest claims (those generating Inspector General or Congressional interest and those brought by SJAs and their raters) will mark the files as such on the outside cover in red. Offices receiving improperly transferred personnel claims should inform USARCS. Transferred claims will be adjudicated, substantiated, and investigated to the fullest degree possible prior to transfer.

(6) *Translation of documents.* Documents written in a foreign language must be translated before the claim is forwarded for reconsideration, recovery, or retirement. Translations should also accompany recovery packets sent to U.S. carriers and warehouse firms. Brief estimates of repair, receipts, and similar items necessary for payment should be translated verbatim. Lengthy estimates, foreign police reports, and similar documents may be summarized. If claims office personnel do not have the necessary skill, they should seek help from other organizations on the installation.

j. *Erroneous payments.* A payment is erroneous if it is based on facts the claimant provides that are later determined to be incorrect, or if it is determined to have been made improperly or without legal authority, such as payment after the expiration of the statute of limitations or payment in excess of the maximum allowable limit without approval of a waiver. Normally, erroneous payments should be recouped from the claimant, when misinformation or fraud by the claimant has contributed to the error, when the error is discovered within a few days of payment and can be recouped without financial hardship on the claimant, or when the error would have been obvious from the amount paid (for example, claim for \$100 and payment is for \$1,000). (See para 11-37, below, about recoupment procedures.) However, many errors in calculating the amount due, such a failure to deduct PED or application of the wrong depreciation rate, should normally not be recouped unless misinformation from the claimant contributed to the error. Claimants who are overpaid through no fault of their own will spend the funds they receive in good faith. Recoupment thereafter can often be a serious financial burden on the claimant. If the claimant refuses to repay voluntarily or fails to meet an arranged payment schedule, the CJA or claims attorney will prepare DD Form 139, Pay Adjustment Authorization, for submission to the DFAS center responsible for the member's pay to recoup the money from the claimant's pay. (A fillable copy of DD Form 139 is at www.dtic/mil/whs/directives/infomgt/forms/formsprogram.htm). By signing DD Form 1842, the claimant consents to this action. The entire file, with the DD Form 139 and supporting documents will then be sent to the Personnel Claims Branch, USARCS for review and dispatch to DFAS. If the claimant is no longer receiving pay from DOD, then the local office will send a demand letter and pursue recoupment in accordance with the procedures in paragraph 11-37 below.

k. *Liaison with local offices.* Each CJA or claims attorney must personally contact local transportation officers regularly to ensure, at a minimum, that outbound personnel receive adequate counseling and that inspections are performed when requested by claims personnel to the extent possible (see para 11-14h(1)(g)) on DD Form 1841, Government Inspection Report. A sample completed DD Form 1841 is posted on the USARCS Web site at "Claims Resources," III, no. 15; for a blank copy, go to www.dtic/mil/whs/directives/infomgt/forms/formsprogram.htm. Personal contact should also be made with the contracting officers who administer the Direct Procurement Method (DPM) contracts in the claims office's area of responsibility to insure that final decisions on disputed DPM claims are made promptly and that offsets are accomplished quickly. These persons should freely turn to the CJA or claims attorney for help in resolving problems that affect claims administration.

(1) *Transportation officers.* Transportation officers (TOs) should not be asked routinely to inspect shipments with less than \$1,000 worth of damaged items. However, to the extent possible, they should inspect all shipments for which the damage claimed exceeds \$1,000 or the claimant's credibility is in doubt. Experienced claims personnel should brief new inspectors on what to look for when completing DD Form 1841. To accomplish this, the CJA or claims attorney should establish a good working relationship with the TO. If transportation inspectors are not available, CJAs or claims attorneys should have claims personnel inspect shipments, especially where the claimant's credibility is in doubt or the quality and quantity of the personal property are disputed.

(2) *Contracting officers.* The CJA or claims attorney should try to explain the mechanics of DPM recovery to contracting officers, to ensure that appropriate claims are offset promptly. In addition, contracting officers should be aware of their responsibility to resolve claims arising out of the negligent acts of government contractors.

l. *Fees paid by claimants to attorneys and representatives.* Attorney fees and similar expenses are not compensable under the PCA. Subsection 3721(i) of the PCA provides, "Notwithstanding a contract, the representative of a claimant may not receive more than ten percent of a payment made under this section for services related to the claim. A person

violating this subsection shall be fined not more than \$1,000." When dealing with PCA claimants who are represented by counsel, claims personnel should cite the statutory language in the settlement letter. Sample settlement letter formats that include full or partial denial and approval of claims are posted on the USARCS Web site at "Claims Resources," III, nos. 45–47.

11–11. Preliminary findings required

These findings are necessary to award compensation under the PCA—

- a. The claim was timely filed.
- b. The claimant is a proper claimant.
- c. The loss was incident to the claimant's service.
- d. The type of property claimed (the lost or damaged tangible personal property and compensable associated expenses) and the amount or quantity possessed were reasonable or useful under the attendant circumstances.
- e. The evidence substantiates ownership and value of the property, and the fact of loss or damage as claimed.
- f. There is no bar to payment, such as fraud or negligence by the claimant that contributed to the loss.
- g. The amount otherwise allowable has been reduced to reflect compensation from other sources, including insurance. Generally, if a claimant has private insurance, he or she must first settle with their insurer before receiving compensation from the government. The exception to this rule is when the claim is for loss and damage to personal property shipped or stored at government expense, shipped or stored by government personnel (for example, luggage lost on an AMC aircraft), or property stored in government facilities during deployments. On all other claims, hold the claim in suspense until the insurance company takes action. If the claimant has insurance but elects not to file with the insurer, adjudicate the claim as if the claimant had been paid in full minus any deductible by the insurer. A CJA or claims attorney may pay a claim before settlement with an insurance company if the claimant shows good cause for not filing with them first. See paragraph 11–21a(7) of this chapter for a discussion of what constitutes good cause.

11–12. Guides for computing amounts allowable

a. *Allowance List-Depreciation Guide.* Periodically the Commander USARCS, will update this information for use by claims personnel. The current Allowance List-Depreciation Guide (ALDG) is posted on the USARCS Web site at "Claims Resources," III, no. 1.

b. *Standard abbreviations.* The claims examiner's findings should be clear and unmistakable to anyone reviewing the Remarks section of DD Form 1844 (also posted on the USARCS Web site at "Claims Resources," III). The standardized abbreviations set forth below are used in completing the Remarks section. Other abbreviations should not be used. When one or more abbreviations do not adequately explain how the claimant has been compensated, the examiner should briefly explain in the comments section at the bottom of DD Form 1844, on the chronology sheet, or the appropriate field in the Personnel Claims Management System.

(1) *AC — amount claimed.* The amount claimed was awarded to the claimant. This abbreviation is not used if the item award is based on an estimate of repair.

(2) *AGC — Agreed cost of repairs.* The claimant did not present an estimate but instead, after discussing the matter with claims personnel, entered an amount that represents the claimant's guess of the cost to repair the damaged item. The claims office may accept this amount as a fair estimation of the cost of repair based on the amount of damage, the value of the item, and the cost of similar repairs in the area. A claimant may be allowed up to \$50 as an agreed cost of repairs without an inspection, and between \$50 and \$100 if claims personnel inspect the item. The use of agreed cost of repairs is an integral part of small claims procedures.

(3) *CR — Carrier recovery.* The carrier paid the claimant this amount for the item. The payment is recorded in the remarks column, and the total carrier payment is deducted at the bottom of DD Form 1844 in the same manner as insurance recovery.

(4) *D — Depreciation.* Yearly depreciation was taken on the destroyed or missing item in accordance with the appropriate depreciation guide in effect at the time of the loss. Explain any deviations from standard rates.

(5) *DV — Depreciated value.* A claimant's repair cost exceeded the value of the item, so the depreciated value was awarded instead. When a claimant claims a repair cost that is very high, relative to the item's age and probable replacement cost, obtain the replacement cost and determine the depreciated value.

(6) *ER — Estimate of repair.* The claimant provided an estimate of repair that was used to value the loss. If multiple estimates were provided, number them as exhibits.

(7) *EX — Exhibit.* When numerous documents have been provided to substantiate a claim, number them as exhibits.

(8) *FR — Flat rate depreciation.* Flat rate depreciation was taken on an item in accordance with the ALDG in effect at the time of the loss. Claims personnel must explain any deviations from the normal rate.

(9) *F&R — Fair and reasonable.* A fair and reasonable award was made to the claimant based on the examiner's determination that it fairly represents the amount of the loss.

(10) *LOV — loss of value.* LOV was awarded (see para 11–14d(1) for a discussion on appropriate use of LOV).

(11) *MA — Maximum allowance.* The adjudicated value, listed in the "Amount Allowed" column, exceeds the

maximum allowance for that item. The amount in excess of the maximum allowance is subtracted at the bottom of the DD Form 1844 (see para 11-14b for a discussion of MA).

(12) *NP — Not payable.* The claimed item is not payable. Note the reason for this comment (for example, "not substantiated") in the Remarks section or in the Comment section, if space allows; if not, explain the finding on the chronology sheet, or in the PCMS log.

(13) *OBS — Obsolescence.* A percentage was deducted for obsolescence (see para 11-14g(4) for a discussion of obsolescence(OBS)).

(14) *PCR — Potential carrier recovery.* A deduction was made for lost PCR (see para 11-14i(5) for a discussion of potential carrier recovery (PCR)).

(15) *PED — Preexisting damage.* A deduction was made for PED (see para 11-14d(2) for a discussion of preexisting damage (PED)).

(16) *PP — Purchase price.* The purchase price (PP) was used to value the loss. Normally, the purchase price is not an adequate measure of the claimant's loss. However, if the claimant submitted the replacement cost of a dissimilar item or otherwise failed to substantiate the true replacement cost, claims personnel may, at their discretion, use a recent purchase price if a true replacement cost is not available.

(17) *PX — Post exchange replacement cost.* A replacement cost from the post exchange (PX) was used.

(18) *RC — Replacement cost.* A replacement cost (RC) was used. List the store or catalog from which the replacement cost was obtained.

(19) *SV/T — Salvage value, item turned in.* A destroyed item was determined to have salvage value, and the claimant chose not to keep the item. If the shipment was delivered in the United States and was not a DPM or self-procured shipment, the claimant must keep it for the carrier to pick up. Otherwise, the claimant must turn in the item before receiving payment on the claim (see para 11-14j for a discussion of salvage value salvage value, item turned in (SV/T)).

(20) *SV/R — Salvage value, item retained.* A destroyed item was determined to have salvage value, and the claimant chose to keep the item. Accordingly, a deduction was made for its salvage value.

(21) *SV/N — Item has no salvage value.* A destroyed item was determined to have no salvage value.

11-13. Ownership or custody of property

A claim for property owned by the claimant and immediate family members residing with the claimant is cognizable. The claimant may claim for items purchased on an installment plan even if title is not transferred until the item is paid for. A claimant may also claim for items borrowed from others over which he or she has dominion and control at the time of the loss. Items stored or transported to accommodate another individual (including relatives who are not immediate family members) are not considered borrowed items, however, and special rules govern payment of claims for loaned vehicles (see para 11-5h(5)). The actual owner should be contacted when the claimant does not own an item claimed.

11-14. Determination of compensation

Completed samples of all of the DA, DD, and SF Forms discussed in this paragraph are posted on the USARCS Web site at "Claims Resources," III. See the heading for section III of appendix A for Web sites where blank copies of all of them may be downloaded.

a. The adjudication analysis. In essence, adjudication of a claim consists of making findings on issues necessary to award compensation (listed in para 11-11 above), determining the amount that will be paid for each item, and determining the amount to be paid for items such as drayage and repair estimate costs.

b. Item and category maximum allowances.

(1) *Application of maximum allowances.* The military services agreed to a single Table of Maximum Allowances contained within the ALDG to ensure uniform application among the services of the statutory requirement that property be reasonable or useful. A maximum allowance per item indicates that the allowance for a single item of a certain type will not exceed that amount. A maximum allowance per claim indicates that the total allowance for all items of a certain type is limited to that amount. Where both maximum amounts per item and per claim apply, the total allowance for all items will be limited to the maximum per claim, which will reflect the allowance of not more than the maximum per item for any one individual item. To the extent that the value of property exceeds a per item or per claim maximum allowance, that property is not deemed reasonable or useful.

(2) *Waiver of maximum allowances.* The head of an ACO, or a higher settlement authority, may waive the maximum allowance for good cause in certain situations. Before doing so, the settlement authority must personally sign a written memorandum for the file explaining the determination of good cause in that instance. The mere fact that application of the maximum allowable limit will result in a significant financial loss to the claimant is not, by itself, sufficient good cause for waiver. Examples of good cause that may justify a waiver include:

(a) The claim would also be payable under the Military Claims Act, as implemented by AR 27-20, chapter 3, which does not have a maximum allowable limit.

(b) In claims for loss or damage to goods in transit, the claimant can prove by clear and convincing evidence that

the transportation counselor at origin did not provide any verbal or written notice of the limit (for example, the "It's Your Move" pamphlet), the claimant had never received such information in any prior counseling, and had never filed a claim in which the limit was applied.

(c) The evidence establishes that the claimant requested increased protection (Option 1 or Option 2) on the shipment, but the transportation office failed to arrange for the higher level of coverage with the carrier.

(d) The claimant has been paid by private insurance for an item but has filed a claim with the Army seeking reimbursement of the deductible. When calculating the amount payable, the maximum allowable limit should be waived to the extent of the insurance payment. For example, an item of furniture with a depreciated replacement value of \$4,000 is missing or destroyed. The private insurance evaluates the loss at \$4,000 but only pays \$3,500 because the claimant has a \$500 deductible on the policy. When the member files with the Army, if we applied the maximum allowable limit of \$3,000, the Army would not pay any additional amount. But if the maximum allowable limit is waived, and the loss is assessed at \$4,000, then the claimant could be paid \$500.

(e) In claims for loss or damage during government-funded transportation or storage, if the carrier or warehouse liability is sufficient to pay the full value of the item, and the evidence clearly indicates that the Army will be able to recover the full value from the carrier or warehouse, then the maximum allowable limit should be waived. In the past, many offices have paid the claimant only up to the maximum allowable limit, and made the claimant wait for full payment until after recovery of the full amount from the carrier. This merely delays payment of the full value to the claimant until the lengthy recovery process is completed.

c. *Time and place of the loss.* The claimant is entitled to the reasonable cost of repair or loss of value on damaged property or to the fair market value of destroyed or missing property, measured at the time and place of the loss. The "time" of the loss is when the claim accrues. The "place" of the loss is where the loss occurred. For shipment claims, this is the place to which the property was delivered. For administrative ease, each claims office may use the time the claim was filed and the local area as the time and place of the loss, unless the result would be markedly inequitable.

(1) If a claimant delays presenting a claim and produces a current estimate that is far higher than the replacement or repair cost at the time and place of the loss, the claims office, to avoid providing a windfall, may determine the replacement or repair cost at the time of the loss and use this value instead. In determining this lower cost, the claims office may examine outdated catalogs or contact the firm providing the claimant's estimate to discover how much its prices have increased between the time of the loss and the time the estimate was prepared. This cost must be based on evidence, however, and may not be determined arbitrarily by adjusting for inflation. For example, a claimant's furniture is damaged in shipment to Fort Huachuca. The claimant obtains a reasonable estimate of repair from a repair firm in the local area. One year and 11 months later, the claimant obtains a second, higher estimate from the same repair firm and submits a claim. The claimant is entitled to only the original cost of repair. It would be inappropriate to award a higher amount merely because the claimant chose to delay presenting a claim.

(2) If a claimant delays presenting a claim and produces an estimate of the cost at the time and place of the loss that is far higher than the current repair or replacement cost, the claims office, again to avoid providing a windfall, may use current costs unless the claimant actually repaired or replaced the items at the higher cost.

d. *Repair of items.* For items that can be repaired economically, the measure of the loss is the cost of repair or an appropriate loss in value. The cost of repair may be the actual cost, as demonstrated by a paid bill; reasonable estimated costs, as demonstrated by an estimate of repair prepared by a person in the business of repairing that type of property; or an agreed cost of repair (AGC).

(1) *Loss of value.*

(a) *Minor damage not worth repairing.* LOV, rather than replacement cost, should be awarded when an item suffers minor damage that is not economical to repair but the item remains useful for its intended purpose. LOV is particularly appropriate when the item is not of great value and has PED. LOV is also appropriate to compensate claimants for minor damage, such as a chip or surface crack to a figurine or knickknack. For example, a cheap, fiberboard coffee table with extensive PED is scratched. The cost to repair the scratch would exceed the table's value. Under the circumstances, LOV is appropriate.

(b) *Damage to upholstered furniture.* If damage can be repaired imperceptibly by cleaning or reweaving, the claimant is entitled to only repair cost. If repairs would be somewhat noticeable but the damage affects an area not normally seen, repair costs plus LOV are appropriate. Alternatively, if repairs would be somewhat noticeable but the item is of no great value and has already suffered PED, repair costs and LOV are appropriate even if the damage is in an obvious area. If, however, repairs would be so noticeable as to destroy the item's usefulness, the item should be reupholstered or replaced. What is noticeable will depend on the item's nature and value and the nature of the damage. Claims personnel should exercise sound judgment to avoid being too lenient or too harsh (see the ALDG, note 3).

(c) *Cosmetic damage to nondecorative items.* LOV should also be awarded to compensate for cosmetic damage to items that were not purchased for purposes of display or decoration. For example, the casing of a washing machine is dented. The washing machine is not decorative in nature and still functions perfectly. LOV, rather than replacement of the washing machine or its casing, is the appropriate measure of the claimant's loss.

(2) *Preexisting damage to repairable items.* PED is damage that predates the incident giving rise to a claim. It is

most commonly identified by the use of the exceptions and locations symbols on household goods shipment inventories. Whenever PED is listed on an inventory, claims personnel must determine whether the PED did in fact exist and whether the cost of repairing the item includes repair of PED. These findings are essential for recovery purposes. Often, inspecting the item or calling the repair firm that prepared the estimate is the only way to make an effective determination.

(a) *Estimates that do not include repair of preexisting damage.* If the estimate does not include repair of PED, even if PED is listed on the inventory, no deduction should be made. This fact should be recorded on the chronology sheet or in the appropriate PCMS log field and on carrier recovery documents. If the estimate does not address PED, do not hesitate to call the repair firm to inquire whether it included repair of PED in its estimate.

(b) *Estimates that include repair of preexisting damage.* If the estimate includes repair of PED, deduct the percentage attributable to repair of PED unless the PED needs to be repaired in order to repair the new damage.

(c) *Repair of preexisting damage in order to repair new damage.* Whenever new damage to an item necessitates repair of PED, the entire repair cost should be allowed unless repairing the PED significantly enhances the item's value. For example, a claimant's inventory lists a scratch to a tabletop as PED. During shipment, the table top is so deeply gouged that it must be completely refinished. Because the PED is minor in comparison with the new damage and must be repaired to repair the new damage, the full repair cost should be allowed.

(d) *Enhancement.* If the extent of PED that must be repaired is roughly equal to or greater than the new damage, repair enhances the claimant's property and a deduction for the amount of PED repaired should be made. For example, a tabletop with two preexisting scratches sustains two more scratches during shipment. The repair firm must refinish the entire top to repair the new scratches. Because the new damage is roughly equal to the old damage in severity, however, repair has enhanced the claimant's property, and a deduction for PED is appropriate.

(3) *Mechanical defects.* The PCA authorizes compensation only for losses incurred incident to service. Damage resulting from a manufacturing defect or normal wear and tear is not compensable. Damage to the engine or transmission of an old vehicle during shipment is probably due to a mechanical defect. Internal damage to appliances, such as old televisions, is also often due to a mechanical defect, particularly when there is no external damage to the item. (See ALDG, note 2; also see para 11-5c(3)(a) of this publication about damage attributed to lightning, power surge, and power failure.) Claims for internal damage to small appliances that are not normally repaired, such as toasters or hair dryers, should be assessed based on damage to other items in the carton and the shipment, the age of the item, whether there are loose parts inside, and the claimant's honesty. If the evidence suggests that rough handling caused the damage, a claim for the item should be paid. Internal damage to larger items such as televisions or stereos should be evaluated by a repair firm. Evidence that suggests rough handling, such as smashed or broken circuit boards, provides a basis for payment. Evidence that suggests a fault in the item, such as burned-out circuits, does not. Deterioration occurring because an item in storage was not used for a long time, rather than because the item was mishandled or the conditions of storage were improper, is also considered due to a mechanical defect. For example, a claim for replacement of faulty gaskets on a refrigerator stored for seven years would not be payable. For claims in which appliances or electronic items sustain internal damage but no external damage, claims personnel must obtain a personal written statement from the claimant as well as an estimate of repair detailing what caused the damage and how it occurred. The claimant's statement should describe the condition of the item before shipment and how the claimant knew that it functioned (for instance, the claimant used the VCR the night before the packers came and it "worked fine"). The statement MUST be in the claimant's own words. It MUST NOT be a form letter prepared by the field claims office.

(4) *Normal maintenance.* Normal maintenance expenses are not considered damage to property within the meaning of the PCA unless these expenses are necessitated by actual damage. Charges for cleaning and servicing, sometimes included in repair estimates, are typical maintenance expenses and are usually not compensable. Color alignment of televisions and piano tuning are considered normal maintenance and are not compensable unless necessitated by other damage.

(5) *Wrinkled clothing.* Clothing wrinkled in shipment presents special problems. Normally, unless the wrinkling is so severe as to amount to actual damage, the cost to press wrinkles out of clothing after a move is not compensable. The mere fact that clothing was "wadded up" or "used as packing material" is not, in itself, sufficient. The wrinkling must be such that professional pressing is necessary to make the clothing usable. This determination will depend on the wrinkling and the nature of the material.

(6) *Wet and mildewed items.* A claimant has a duty to lessen damages by drying wet items to prevent further deterioration. Items that have been wet are not necessarily damaged, and claimants who throw them away have difficulty substantiating a loss. Mildew is a fungus that sometimes infests wet fabric and similar material. Although a severe mildew infestation is almost impossible to remove completely, items slightly infested can often be cleaned. For example, a claimant's rug is delivered wet and slightly mildewed. Instead of drying the rug, the claimant leaves it rolled up in the basement. Three months later, the claimant files for damage, and inspection of the rug shows such extensive mildew that it cannot be cleaned. Because the rug was repairable and claimant's inaction caused its condition to deteriorate, the claimant would be entitled to only cleaning costs. The claimant would be entitled to the replacement cost only if the claims office determined that the rug had been irreparably damaged at time of delivery. If the rug had been merely wet when delivered, the claimant may not be entitled to any compensation.

e. Estimate of repair. Most repair firms charge a fee for providing written estimates. Claimants can be reimbursed for these fees unless the firm has a policy of applying the fee to any repair work that is actually done. Therefore, field claims offices should receive the most useful information possible. Field claims offices will add the following criteria to the written instructions given to a claimant and explain to the claimant what is required in an estimate of repair. The claimant should be further instructed to find another firm if the repair firm refuses to provide such information. An acceptable estimate of repair should meet the following criteria:

- (1) It should be legible.
- (2) It should be from a company that is willing to stand behind its estimate and complete repairs indicated to the customer's satisfaction.
- (3) It should differentiate between shipment damage, identifying its location on the item damaged, and normal wear and tear or PED. Additionally, it should describe the repairs to be made, and if an item is not repairable, state why not. Examples of statements substantiating non-repairability include, but are not limited to, the following: "the item costs more to repair than it is worth," or "the item cannot be repaired because damage is too severe and it can never be used for its intended purpose." It does a claims examiner little good to receive an estimate of repair showing merely that an item is damaged and needs to be repaired or refinished, and nothing more. Upholstered furniture is a unique category of items needing repair. Here, a repair estimate should separate costs for material and labor, indicate the yards of material to be used and its cost per yard, and state whether or not the material selected is equivalent to the material damaged. The above criteria are extremely important, especially when a field claims office deducts for PED on an item or recommends an unearned freight charge deduction.
- (4) It should include the date the estimate was made, identify by inventory number the items evaluated, and fully identify the individual and firm preparing the estimate of repair. A claimant should show a copy of the inventory to the repair firm so its staff can consider the carrier's description of PED when preparing the estimate.
- (5) It should state whether the firm will deduct the cost of the estimate from the work to be performed or whether the estimate cost is a separate charge.
- (6) It should be prepared by a firm that has expertise in repairing the items damaged. For example, a furniture repair person should not provide a repair estimate on a damaged stereo unless the person has expertise in that area.
- (7) It should include drayage fees, when appropriate.
- (8) Field claims offices have the discretion to accept an estimate of repair that does not meet the above criteria if insisting on another estimate will result in an undue hardship in filing a claim. Exercise discretion in exceptional cases where the availability of repair firms agreeing to meet the criteria is limited. The chronology sheet should be annotated to reflect this exercise of discretion. Field claims offices should contact local repair firms that provide the most estimates of repair for claimants and inform them of the need for this information.

f. Replacement of items. A claimant is entitled to the value of missing and destroyed items. An item that has sustained damage is considered destroyed if the cost of repairing it exceeds its value. Value is measured in the following ways:

(1) *Similar used items.* If there is a regular market for used items of that particular type, the loss may be measured by the cost of a similar item of similar age. Prices obtained from industry guides or estimates from dealers in this type of property are acceptable to establish value. There is a regular market in used cars, and the value of a used automobile is always measured according to the Automobile Red Book rather than the depreciated replacement cost. Similarly, the Mobile Home Manufactured Housing Replacement Guide may be used to value a destroyed mobile home. Where there is no regular market in a particular type of used item, however, estimates from dealers in "collector's items" should be avoided.

(2) *Depreciated replacement cost.* This is the normal measure of a claimant's loss. Depreciate a catalog or store price for a new item similar in size and quality according to the ALDG to reflect wear and tear on the missing or destroyed item. The replacement cost for identical items—particularly decorative items—should be used whenever the item is readily available in the local area, but a claimant who is eligible to use the PX should not be allowed the replacement cost of an item such as a television from a high-priced retail specialty store when the PX carries an item comparable in size, quality, and features from another manufacturer.

(3) *Use of the Post Exchange Overseas catalog.* When a claimant is eligible to purchase a replacement item through the overseas section of the PX catalog at a lower cost, a PX replacement cost should be used to value the loss. When requested, CJAs or claims attorneys will provide a statement addressed to AAFES as additional substantiation for the claimant to use in placing an order, certifying that a particular catalog item is a replacement for an item missing or destroyed incident to service. Postage or customs duties may be paid after the claimant incurs these expenses.

(4) *"Fair and reasonable" awards.* A fair and reasonable award should be used sparingly when other measures would compensate the claimant appropriately. Overuse of such awards impedes carrier recovery, and Fair and reasonable ("F&R") should never be used when a more precise abbreviation is available. A fair and reasonable award for a missing or destroyed item should reflect the value of an item similar in quality, description, age, condition, and function to the greatest extent possible. A fair and reasonable award for a damaged item should reflect either the amount a firm would charge for repair or its current reduced value. When such an award is made, explain the basis for

the award on the chronology sheet, in the comments block of DD Form 1844, or in a separate memorandum. A fair and reasonable award may be considered in the following instances:

- (a) The item is obsolete, and a simple percentage deduction for obsolescence is not appropriate.
 - (b) The claimant cannot replace the item locally.
 - (c) The claimant cannot replace the item at any cost.
 - (d) Repair costs or replacement costs are excessive for the item, and LOV is not appropriate.
 - (e) The claimant has substantiated a loss in some amount but has failed to substantiate a loss in the amount claimed.
- (5) *Adjusted Dollar Value Guide*. If there is no better method of valuing a claimant's loss, the purchase price of an item may be multiplied by the cost of living index figure in the Adjusted Dollar Value Guide, posted on the USARCS Web site at "Claims Resources," III, no. 4, and the resulting number depreciated. This guide should be used only when there is no other readily available means of calculating an item's value. It is not a substitute for lack of substantiation. A current version of this guide is published annually in February on the Claims Forum on JAGCNet.

(6) *Defense Reutilization Marketing Office auctions*. For all items purchased at a Defense Reutilization Marketing Office (DRMO) or similar government auction, the amount paid for repair or replacement of these items will not exceed the purchase price paid to the DRMO. The benefit derived from the reduced purchase price through DRMO is the basis for limiting the maximum payment to the purchase price.

g. *Depreciation*. The PCA is intended to compensate claimants for only the fair market value of their loss (see para 11-14, AR 27-20.). Except in unusual cases, a used item that has been lost or destroyed is worth less than a new item of the same type. The price of a replacement item must be depreciated to award the claimant only the value of the lost or destroyed item. Average yearly and flat rates of depreciation have been established to determine the fair value of used property in various categories; these rates are listed in the ALDG, posted on the USARCS Web site at "Claims Resources," III, no. 1. The listed depreciation rate should be adjusted if an item has been subjected to greater or lesser wear and tear than normal or if the replacement cost the claimant provides is for a used item rather than a new one. The decision to adjust an item's depreciation rate would usually require an inspection of the item by the field claims office. Special depreciation rates apply during periods of storage and are contained in the Non-Temporary Storage (NTS) Depreciation Guide, also posted to the USARCS Web site at "Claims Resources," III, no. 2.

(1) *Six month rule for depreciation*. Normally no depreciation is taken on repair costs or replacement cost for items less than six months old, excluding the month of purchase and the month the claim accrued. Tires, most clothing items, and most toys rapidly lose their value, as the high depreciation rate for these items reflects. Depreciation should be taken on such items even when they are less than six months old.

(2) *Depreciating replacement parts*. No depreciation should be taken on replacement parts for damaged items unless these parts are separately purchased or normally replaced during the useful life of the item. For example, clothes washing machine belts and surface burners for electric stoves are replaced during these appliances' useful lives. The replacement cost for these items should be depreciated. A glass table top is not normally replaced during the useful life of the table, however, and should not be depreciated.

(3) *Depreciating fabric for reupholstery*. Fabric is normally replaced during the useful life of upholstered furniture. When upholstered furniture is reupholstered because the damage is too severe to be repaired and a LOV award is not appropriate, the cost of new fabric is depreciated at a rate of 5 percent per year, measured from the date the item was last reupholstered rather than from the date the item was originally purchased. Labor costs are allowed as claimed. If the estimate does not list separate costs for fabric and labor, the labor costs may be assumed to be 50 percent of the total bill.

(4) *Obsolescence*. Even though items do not depreciate from wear and tear due to normal usage during periods of storage, the value of items also decreases over time due to obsolescence because of changes in style or technological innovations.

(5) *Depreciating automobile paint jobs*. The discussion about "Automobile Paint Jobs" (Item No. 10) in the old ALDG stated, "On complete paint jobs, depreciate both labor and material. On minor paint jobs, do not depreciate labor or material." However, depreciation should be taken on extensive paint jobs, even if every inch of a vehicle is not repainted; the rule of thumb here is substantial repainting. At a certain point, a paint job is no longer minor and should be considered complete. A repaint of three fenders, the hood and the trunk is not minor; many repair firms would repaint the entire vehicle for almost the same price. The claims examiner's decision to take depreciation on a paint job should depend on whether the claimant has been enriched, not whether the repair firm has been creative in preparing the estimate. To further define the rule of thumb set forth above, a claims office should consider a paint job complete when more than two-thirds of the vehicle is repainted.

(a) A claims examiner who does not depreciate a paint job should consider any PED. Allow the full cost of repair if the PED is minor compared to the new damage. If, however, the old damage is equal to or greater than the new damage, the examiner should deduct an appropriate amount for PED.

(b) An inspection is absolutely essential to determine these factors. Obviously, it is difficult for a claims examiner to determine whether a paint job is complete or whether a deduction for PED is appropriate without inspecting the vehicle. Although some claimants mail their claims or file them online via PCMS, most go to the field claims office in person. When the claimant comes to file a vehicle claim, claims personnel should inspect the claimant's vehicle where

possible and photograph or note its condition. This should be a part of every field claims office's claims reception procedures. All photos and notes should be signed, dated, and filed until the claimant presents a claim.

(c) In many instances, an inspection will show that damage to an older car is not worth repairing. For example, replacing a lightly damaged bumper is inappropriate if a vehicle has a significant amount of PED or is nearing the end of its useful life—the appropriate measure for this damage would be LOV.

(d) While LOV usually is not appropriate for damage to paint because the exposed surface will rust, LOV should be considered for minor damage to paint if a vehicle badly needs repainting or is rusting out. It is important to determine early in the claims process whether LOV is appropriate. A claimant who has not been put to the trouble of obtaining a repair estimate for a higher amount is much more likely to be satisfied with a small LOV award. In the counseling process, do not instruct a claimant to obtain a repair estimate if a LOV award is appropriate.

(6) *Military uniforms.*

(a) Normally, military uniforms depreciate from wear and should be depreciated at a flat rate of 10 percent, except for dress uniforms, which are not depreciated (see Note 10, ALDG). Uniforms will not be counted toward the maximum allowance for clothing. T-shirts, underwear, socks, low quarter shoes, gym clothes, and towels are not considered military uniform items, even if they are colored brown, olive drab, or Army grey and will be depreciated at the same rate as regular clothing. Military uniform items include military shirts, pants, skirts, jackets, field jackets, windbreakers, raincoats, belts, ties, insignia, gloves, hats, combat boots, and similar items.

(b) Uniform items that are being phased out but are still authorized for use will be depreciated at the same rate as normal clothing.

(c) Items that have been phased out and are no longer authorized for wear are not considered uniforms.

(d) Although enlisted personnel receive a clothing replacement allowance, it is intended to replace items that need to be replaced due to normal wear and tear, or that have been phased out and are no longer authorized for wear. Therefore, this allowance should not be considered when adjudicating claims for loss or damage to uniforms. Personnel who are separating from the Service, either by "normal" ETS or retirement procedures, will have their uniform items depreciated under the regular clothing rule/rate. However, if the claimant can prove he/she is going into the National Guard or Reserves, depreciation will be at the uniform rate. See note 10, ALDG.

(7) *Depreciation on items with uncertain purchase dates.* Occasionally, claimants do not state, cannot remember, or simply guess when they purchased certain items. Claims personnel should presume that items claimed were purchased in the month and year listed on DD Form 1844. If, however, the purchase dates that a claimant lists appear improbable, the claims examiner first should determine whether the claimant's purchase dates are accurate and credible, and then take appropriate depreciation on the items if they are not. Factors that may indicate inaccurate purchase dates include large numbers of items purchased shortly before pickup; recently purchased but obsolete consumer items, such as 8-track tape decks or Beta system videocassette recorders; expensive items that a claimant who would have had difficulty affording them purchased shortly before the shipment; and items allegedly bought after the pickup date. Also consider the claimant's overall credibility.

(a) If only a few dates or a few relatively inexpensive items appear inaccurate, the claims examiner should resolve doubts in the claimant's favor. Factors to consider in making this determination include the item's useful life; the age of other items the claimant owns, and the claimant's credibility. When doubts persist, the claims examiner should direct the claimant to substantiate purchase dates by providing receipts, cancelled checks, credit card statements, or photographs. Destroyed items should be inspected.

(b) When the purchase dates do not appear accurate and purchase evidence is unavailable, a claims examiner should ask the claimant for more information, for example: Was the item purchased new or used? Was it a gift? Where were you stationed when you got the item? These questions often help a claimant better remember when and how the items were obtained. A claimant often will respond, "I don't remember the exact date, but I was stationed at Fort Hood. I was stationed there from...until..." This response provides enough information for a claims examiner to establish a basis for an adjudication. If, on the other hand, these questions do not help a claimant remember, depreciate the item as though it were at least five years old unless the weight of the evidence indicates that it is older.

(c) A few claimants list false purchase dates to avoid depreciation. If the evidence clearly indicates that the claimant not only submitted inaccurate dates but actually falsified them, the claims examiner should consider denying payment on those items or the whole claim on the basis of fraud (see subpara 11-6f, above).

(d) The claims examiner must annotate the chronology sheets to reflect the basis for adjusting depreciation because of uncertain purchase dates. Additionally, the examiner must inform the claimant why the action was taken.

h. Substantiation. The PCA requires substantiation of claims. See 31 U.S.C. § 3721(f)(1). The key to determining whether a claimant is entitled to compensation is ascertaining whether both the occurrence of the loss as alleged and the value of that loss have been substantiated. There is no set rule on how much proof claimants are expected to provide. As a rule of thumb, claimants should normally not be required to provide a purchase receipt or similar evidence to confirm ownership and value, if the total amount claimed is \$500 or less. On other claims, they should normally be required to provide a purchase receipt or similar evidence to confirm the value of items for which more than \$100 is claimed and to show ownership when claiming missing items that would normally be listed on an inventory but do not appear. The exception to both the \$500 and \$100 limit is for inoperable appliances and electronic

items that were alleged to have been damaged in transit or storage but which did not sustain any new external damage. Regardless of the amount claimed for those items, a statement by a competent repair firm and a statement by the owner are needed. The repair firm should provide evidence that the loss occurred during shipment or storage and, therefore, is a loss incident to service. The claimant should indicate knowledge about the working condition of item(s) before shipment or storage. In all cases, factors to consider include the documentary evidence, the timeliness of the report of loss, and the claimant's overall credibility. A claimant who cannot prove that a loss has occurred as alleged is not entitled to compensation. A claimant who proves that the loss has occurred but fails to confirm the value is entitled to an award in some amount.

(1) *Documentary evidence.* Most claims are settled based on the documentary evidence claimants supply to establish that a loss has occurred and the value of the loss. These documents vary considerably in reliability.

(a) *Inventories.* The Household Goods (HHG) Inventory is the most important document used in evaluating a household goods or hold baggage claim. A sample inventory is posted on the USARCS Web site at "Claims Resources" III, no. 29. A small claim that appears proper may be paid pending receipt of the inventory, but the claim should be reviewed later. PED reflected on the inventory must be considered and claimants should be questioned closely about discrepancies between the inventory description and the item claimed. A claimant whose inventory lists a 13-inch television should not be paid for a 19-inch television. As a general rule, if the inventory is well prepared, detailing carton contents, and the claimant asserts that unlisted, but similar, items are missing, the claimant must provide purchase receipts for these similar items to establish ownership and shipment. For example, if claiming loss of an armchair not listed on the inventory, a claimant is expected to produce some evidence of ownership of an armchair to validate the claim, such as a statement from a neighbor, a purchase receipt or a recent photograph. Note, however, the different levels of proof required to substantiate claims for loss of, or damage to, unlisted items: if damage to an armchair not listed on the inventory is claimed, its mere presence in the claimant's new quarters usually suffices to prove that it was shipped. Expensive items, such as jewelry, furs, sterling silver flatware, china or figurines must be listed on the inventory with specificity. Make sure the inventory identifies those expensive items, and it does not merely list a general description of the carton in which these expensive items are located, labeling them as "figurines," "dishes," or "clothes."

(b) *Catalogs.* A page taken from a catalog shows merely the source of the replacement cost of an item that the claimant asserts is similar to the lost or damaged item. It does not prove that the claimant owned or shipped a similar item.

(c) *Statements.* A claimant's statements may reinforce what the claim form alleges. In settling issues such as proof of tender for items not listed on the inventory, whether an electronic item worked before pickup, or classification of discrepancies on the various claims forms, a detailed written statement by the claimant may help resolve the issues. Claims examiners must recognize early in the adjudication process the need for a claimant's statement and they should request it. Statements by friends, relatives, or disinterested persons may also shed light on an issue. However, if a question of credibility arises, the person providing the statement should be interviewed, if possible. The interview may be conducted over the telephone. Record any conversation in the chronology sheet. Do not give weight to a statement if it becomes apparent that another person merely signed something prepared by the claimant.

(d) *Purchase receipts and prior appraisals.* Purchase receipts and prior appraisals are the best evidence to show the existence and value of a missing item.

(e) *Estimates, paid bills, and subsequent appraisals.* This is the best evidence to show the replacement or repair cost of items; however, discretion should be exercised. An estimate from a person who is not in the business of repairing or selling that particular type of property is essentially worthless, and an estimate prepared by someone who did not examine the item depends on the claimant's credibility. Sometimes, claimants obtain inflated estimates on stereo equipment, typically from stores that do not specialize in such equipment. Carefully review repair estimates for stereo components. Claims personnel should know which repair firms can be relied on to provide estimates for only new damage and which firms will provide estimates that cover PED. When an estimate raises questions, contact the person providing the estimate.

(f) *Police reports.* Police reports vary considerably in their helpfulness to the adjudication process. Where the police made an independent inquiry, the report may be used instead of an inspection to assist in determining whether a claimant was negligent, although the claims office still must reach an independent determination and may not merely repeat the police officer's conclusions. If the police merely wrote what the claimant said, the report is valuable only to determine whether the claimant's story is consistent. Obviously, a claimant is expected to explain any inconsistencies.

(g) *DD Form 1841, Government Inspection Report (GIR).* DD Form 1841 should be prepared, when possible, by transportation personnel within ten working days after claims personnel request an inspection. Coordination should be made with servicing transportation offices to ensure accurate and timely inspections. A GIR should reflect an actual physical inspection of damaged property by the inspector signing the document, and it should adequately describe damage and its location using correct inventory numbers. Where possible, the inspector should try to distinguish new damage from PED. Because the inspector is recording damage some time after delivery, however, the mere fact that damage is listed on DD Form 1841 is not necessarily evidence that this damage was in fact incurred in shipment. Field claims offices should conduct inspections when they are indicated but transportation personnel are not available.

(2) *Report of loss.* Claimants are expected to report losses promptly. The longer the delay in reporting a loss, the more substantiation the claimant is expected to provide.

(a) *Obvious damage or loss not reported at delivery.* Claimants are expected to list missing inventory items and obvious damage at time of delivery. Some claimants will simply not notice readily apparent damage. Claimants should provide a written explanation of why the damage was not noted on the DD Form 1840 at delivery. If the claimant cannot do so or lacks credibility, payment should be denied based on lack of evidence that the item was lost or damaged in shipment. For example, a claimant whose property was delivered at midnight would be entitled to far more consideration for failing to note that a piano leg was severely gouged than would a claimant who waited 30 days to report a missing sofa, unless the latter claimant could reasonably assume that the sofa was still in NTS or was in the second half of a split shipment.

(b) *Later-discovered loss or damage.* A claimant has 75 days to unpack and discover loss and damage that is not noticed at delivery. The most common notice form, the DD Form 1840/1840R advises the claimant to submit the form within 70 days in order to give claims offices five days to dispatch the claim to the carrier. In most cases, later-discovered loss or damage that is reported in a timely manner is deemed to have been incurred in shipment, and, therefore, is a loss incident to service. Exceptions may be made when a claimant promptly reports minor loss and damage but then later reports extensive loss and damage without an adequate explanation. Loss and damage not reported in a timely manner should be considered on a case-by-case basis to determine whether the claimant should be paid for that loss and damage. Even if the claimant appears honest, consider whether the damage could have occurred after receipt of the shipment. For example, an apparently honest claimant reports scratches to the leg of a chair nine months after delivery. The chair was in normal use, and the claimant has two children and a dog in the home. There is little evidence to show how the damage occurred, and under the circumstances, the claimant has failed to show that the damage was incident to shipment.

(c) *Shipment damage to privately owned vehicles.* Persons shipping POVs are expected to list all new damage on DD Form 788 (Private Vehicle Shipping Document for Automobile) or the contractor's Vehicle Inspection and Shipping Form (VISF, provided by the contractor when they pick up their vehicles at the delivery vehicle processing center (VPC). Obvious external damage that is not listed may not be payable. Damage the claimant could not reasonably be expected to notice at the VPC should be considered if the claimant reports the damage to the VPC within a short time, normally a few hours after leaving the VPC. Preventive law efforts at installation claims offices should include periodic notices to the military population served by the office that they should thoroughly inspect the inside as well as the outside of their vehicles at the joint pickup inspection. They should also turn on and test all operating systems, such as wipers, air conditioners, heaters, radios, electronic windows and electronic seats, during this inspection. In addition, because most joint inspections are stationary inspections, owners should be alert for any operating problems as they drive out of the VPC and during the first few miles of operation. If they think they have a mechanical problem shortly after they leave the VPC they should return immediately and bring it to the attention of the contractor who operates the VPC.

(d) *Prompt reporting of other types of loss.* Occupants should report damaged quarters property to housing authorities within a few days. Thefts and vandalism should normally be reported to police authorities within 24 hours. Other incidents should be viewed in light of whether a reasonable person would have reported them.

(3) *Credibility.* Most claimants are honest and attempt to claim only what is due them. These persons are entitled to the presumption that their claim is correct, although it may not be. Some claimants lack credibility and their claims require careful scrutiny. Factors indicating that a claimant's credibility is questionable include amounts claimed that are exaggerated in comparison with the cost of similar items, insignificant or almost undetectable damage, very recent purchase dates for most items claimed, and statements that appear incredible. Such claimants should be required to provide more evidence than is normally expected. Lacking this proof, claims by such persons should be severely reduced or denied altogether. Where evidence of fraud exists, follow the procedures set forth in paragraph 11-6f, above.

(4) *Inspections.* Whenever a question arises about property damage, the best way to determine a proper award is to examine the nature of the damage. For furniture, it is advisable to examine under surfaces and the edges of drawers and doors to determine whether the material is solid hardwood, fine quality veneer over hardwood, veneer over pressed wood, or other material. If conducting the inspection at the claimant's quarters, claims personnel should determine the general quality of property. They should direct claimants to bring in vehicles and small valuable items such as figurines for inspection, and should conduct inspections on all large claims. Observations by repair firms and transportation inspectors are very valuable, but sometimes claims personnel must leave the office and inspect items themselves, to reduce both the number of requests for reconsideration and fraudulent claims. A hands-on inspection may be invaluable in enabling claims personnel to understand the facts.

i. *Notice of loss or damage after delivery.* The Army pays claims for loss or damage to goods sustained during DOD-funded transportation or storage, because the Soldier or employee has an entitlement to such transportation and storage under the Joint Federal Travel Regulation (JFTR) or Joint Travel Regulation (JTR). Therefore, any loss in the course of government funded transportation or storage is deemed to be incident to the claimant's service. To be payable, there must be proof that the loss occurred while the goods were in transit or storage and did not occur before the goods were tendered to the carrier or after they were delivered back to the owner. The household goods inventory

is used to show what damage existed before the goods were tendered to the carrier for shipment. The best evidence that goods were damaged in transit or storage is a notation made on the inventory, or some other form, on the day of delivery. The most widely used form for such notice is the DD Form 1840/1840R. This is a two-sided pink form, with the DD Form 1840 side prepared jointly by the delivery carrier's agent and the owner or the owner's agent on the day of delivery. The delivery carrier's agent keeps a copy of this form along with all of the other delivery documents. Because not all goods can be thoroughly inspected on the day of delivery, it is logical to assume that some damage or loss may not be noted until after delivery. To accommodate this reality, the reverse side of the form, the DD Form 1840R, is completed by the owner to note loss or damage discovered after delivery.

(1) *Timely notice.* The submission of the DD Form 1840R within 75 days of delivery to a military claims office creates a presumption that items listed on the form were lost in transit and, therefore, were lost or damaged incident to service. If the form is dispatched to the carrier within 75 days of delivery, either by the claimant or by a claims office, then the presumption of loss or damage in transit or storage applies to the carrier's liability as well. In most cases the form is submitted to an Army claims office by the claimant and the claims office dispatches a copy of the form to the carrier. While the agreement between the Army and the carrier industry that established this rule specifies a 75 day period, the form advises the claimants to submit it within 70 days, in order to give the claims office time to dispatch a copy to the carrier within 75 days. So long as the carrier provides the claimant with a DD Form 1840 at delivery, the carrier is entitled to timely notice of all loss and damage occurring in shipment. Claimants are required to list specific loss and damage (with inventory numbers) either on DD Form 1840 at delivery or on DD Form 1840R within 70 days of delivery. The claims office, upon receipt of a DD Form 1840R or other form giving notice of loss or damage after delivery, must review the form and send it to the carrier, keeping a signed file copy. The form must be dispatched within 75 days of delivery. Pursuant to the Military-Industry Agreement on Loss and Damage Rules (posted on the USARCS Web site at "Claims Resources," III, no. 41), this 75-day period may be extended for good cause, which is usually because the claimant is hospitalized or on TDY (see para 11-14i(2)). Claims offices will expeditiously dispatch the DD Form 1840R if it is presented between the 70th and 75th day. If the form is presented to the claims office between the 70th and 75th day, and the carrier has included a facsimile telephone (fax) number in block 9 of the DD Form 1840, the claims office will fax a copy of the form to the carrier. Claims office should also promptly dispatch the DD Form 1840R even if it is submitted after the 75th day. Dispatching such a "late" DD Form 1840R may enable the government to recover against the carrier, if the claimant was hospitalized or on TDY. In addition, dispatch of a "late" DD Form 1840R may help locate missing items. (See subpara 11-21g(2), below).

(2) *Failure to provide timely notice.* Every claim received that alleges loss of or damage to goods while in transit must be screened for timely notice as soon after receipt as possible, even if permission to transfer the claim has been obtained. When the claimant has failed to provide timely notice, the claim file must reflect that the claims office contacted the claimant, preferably in writing, to determine his or her reason for not giving the claims office or the carrier timely notice. Such contact may be omitted only when failure to provide notice was obviously due to claims or transportation personnel. The claimant should be directed to reply within a given period, preferably 14 days. The approval or settlement authority must then determine whether the claimant had good cause (as defined below) for failing to provide timely notice. In the absence of good cause, no payment may be made on items for which there was no timely notice. However, even if the claims office did not receive timely notice of the loss of or damage to an item, if the carrier received actual notice of such loss or damage in some way other than timely notice on a DD Form 1840R, the Army will accept the presumption that the loss was incident to service and may pay the claim. Carriers may receive actual notice by notations on the regular household goods inventory or on a high-value inventory; by sending an inspector to the claimant's residence within 75 days of delivery to inspect items that were listed on the DD Form 1840 and seeing other items that the claimant alleges were damaged; by a letter from the claimant or by submission of a claim by the claimant during the 75 day period.

(3) *Good cause.* When good cause is shown, the 75 day period for dispatching notice to the carrier or the government claims office is tolled. A circumstance "directly contributes" to a claimant's failure to provide timely notice when the claimant cannot reasonably be expected to comply as a result; an approval or settlement authority may find good cause and waive deduction only when one of the following circumstances directly contribute to the claimant's failure to provide timely notice.

(a) *Officially recognized absence or hospitalization.* An officially recognized absence (such as TDY or off-post training exercises) that results in the claimant's absence from his or her official duty station for a significant portion of the notice period, or hospitalization of the claimant for a significant portion of the notice period, is good cause. Generally, when an absence or hospitalization is not unexpected or lengthy (normally in excess of 45 days), or does not overlap the end of the notice period, it does not directly contribute to the claimant's failure to provide timely notice. The 75 day period is suspended during the period that constitutes good cause, and begins to run again when the absence or other circumstances establishing the good cause ends. If the cause extends beyond the 75 day period, the claimant should be advised to submit the notice within a reasonable time of his or her return to home station or the end of the good cause. While the facts and circumstances in each case must be considered to determine what is a reasonable time, 10-15 days would be considered reasonable in almost all cases.

(b) *Substantiated misinformation by government personnel.* Substantiated misinformation concerning notice requirements that claims or transportation personnel give the claimant is good cause. Allegations of misinformation should be

considered in light of all attendant circumstances, including age, experience, and credibility of the claimant. Misinformation does not directly contribute when the claimant did not rely or should not have relied on the misinformation. When a claimant makes a good faith effort to comply with notice requirements by presenting a partially completed DD Form 1840R to claims personnel who fail to instruct the claimant properly on correcting errors, the claimant may be deemed to have been misinformed.

(4) *Waiver by the U.S. Army Claims Service.* When the approval or settlement authority believes there was good cause for a claimant's failure to provide timely notice in circumstances other than those listed in 3(a) or 3(b) above, he or she will obtain a determination from the Chief, Personnel Claims and Recovery Division, USARCS, either by electronic mail or by faxing a personnel claims memorandum, prior to the final adjudication of the claim. Particular care should be taken to ensure proper consideration for young, first-move claimants.

(5) *Lost potential carrier recovery.* There may be rare cases involving loss or damage to household goods, or POVs in transit or storage, or losses to accompanied (that is, checked) baggage, in which there will be sufficient evidence that the loss or damage occurred while the goods were in transit, but notice does not get to the contractor on time. If the claims office is responsible for the failure to dispatch timely notice, the claim should be paid even though potential recovery may have been lost.

j. Mobile homes. Soldiers and civilian employees of the Army and DOD are entitled to transportation of a mobile home at government expense within CONUS. While the Army receives only a handful of claims each year for loss or damage to mobile homes, they can be very difficult to resolve due to the requirements imposed on the owners to prepare their homes for movement. Please see detailed guidance on these claims posted on the USARCS Web site at "Claims Resources," III, no. 35. Guidance on mobile home recovery claims is at paragraph 11-33c, below.

k. Sets. Normally, when component parts of a set are missing or destroyed, the claimant is entitled to only the replacement cost of the missing or destroyed components. In some instances, however, a claimant would be entitled to replacement of the entire set or to additional LOV. Some claimants will assert that all the furniture pieces in a room are part of a set. However, pieces that are sold separately are ordinarily not considered parts of a set, and pieces that merely complement other items, such as a loveseat purchased to complement a particular living room table, are never considered part of a set. When a part of a set is missing or destroyed and cannot be replaced with a matching item or, after necessary repairs, no longer matches other component parts of the set, the following rules apply:

(1) *The set is no longer useful for its intended purpose.* When a set is no longer useful for its intended purpose because component parts are missing or destroyed, the entire set may be replaced. Note that several firms will match discontinued sets of china and crystal, and that replacement of the full set is not authorized if replacement items can be thus obtained. The value of china and crystal sets is not destroyed unless more than 25 percent of the place settings are unusable. Exceptions may be made if the claimant demonstrates a particular need for a certain number of place settings because of family size or social obligations. In those rare instances when an entire set is replaced, the claimant will be required to turn in undamaged pieces to the DRMO or hold them for salvage by the carrier.

(2) *The set is still useful for its intended purpose.* When missing pieces cannot be matched and there is a measurable decrease in the set's value but it is still useful for its intended purpose, the claimant is awarded the value of the missing pieces plus an amount for the decrease in value of the entire set. The LOV award will vary depending on the exact circumstances.

(3) *Mattresses and upholstered furniture are recovered.* During normal use, a mattress and box spring set is covered by bedding. Such a set is still useful for its intended purpose even if one piece of the set must be reupholstered in a different fabric. No award will be made for the undamaged piece. When one piece of a set of upholstered furniture sustains damage that cannot be repaired or redone in matching fabric, claims personnel should consider reupholstering the entire set or only the damaged piece and paying LOV. Factors to consider include the set's value, any PED, the nature of the current damage and the extent to which the claimant's furniture is already mismatched.

l. Salvage value. Whenever a claimant has been paid the depreciated replacement cost for an item because it was damaged so badly that the cost of repair was more than the value of the item, the claimant should be instructed to either turn the item into the government, if practical, or retain it until a carrier that is entitled to salvage the item can take possession of it in accordance with the Joint Military Industry Memorandum of Understanding on Salvage, posted on the USARCS Web site at "Claims Resources," III, no. 42. The claimant should also be advised that the claimant has the option of retaining the item and taking a deduction for its salvage value.

(1) *Maximum allowances.* A claimant who will not be fully compensated for an item because its claimed amount exceeds the maximum allowance is not required to turn in the item to the DRMO. However, if the carrier recovery efforts result in reimbursement of the item's full value, the carrier may choose to pick it up. In cases where you are likely to recover the full amount of the item from the carrier and the carrier is entitled to salvage (that is, delivery in the United States; carrier liability at \$1.25 times the weight of the shipment in pounds; and total loss is less than carrier's maximum liability), waiver of the maximum allowable limit should be approved to permit payment of the full value, or the full value less a salvage deduction if the claimant wants to retain the set. See paragraph 11-14b(2)(e), above. Then, depending on the claimant's decision, the Army can seek recovery of either the full value and let the carrier claim salvage, or seek recovery of an amount less than full value.

(2) *Turn-in to the carrier.* On IRV shipments (that is, carrier liability is \$1.25 times the weight of the shipment in

pounds) delivered in the United States, the carrier may choose to pick up items for which it will fully reimburse the government. Pursuant to a Joint Military-Industry Memorandum on Salvage (posted on the USARCS Web site at "Claims Resources," III, no. 42), claimants may discard hazardous items such as mildewed dry goods or broken glass but must keep items such as figurines and crystal with a per item value of more than \$50. Field claims offices will instruct claimants to retain other items for at least 90 days after settlement to allow the carrier to pick them up. The claimant should be instructed to contact the field claims office for permission before disposing of the items. Pursuant to the Salvage MOU, the carrier will take possession of salvage items no later than 30 days after receipt of the government's claim against the carrier. The 30-day period will not end until the period for the carrier's right to inspect the property has expired.

(3) *Identification of files.* Field claims offices must identify files in which the carrier is entitled to salvage and must process these claims for recovery action within 30 days so that the claimant does not dispose of salvageable items before the end of the period allotted for carrier pickup. Field claims offices must ensure that their written instructions to the claimants in these cases inform the claimant that the carrier has a right to salvage, and advise the claimant to retain the salvageable items for 90 days. The instructions should advise the claimant to call the claims office if they have not heard from the carrier at the end of the 90 day period, so that the claims office can determine if a demand has been sent to the carrier and if the 30 day period to claim salvage has expired.

(4) *Turn-in to the government.* On claims that do not involve IRV, if the claimant does not choose to retain the items and accept a reduction for salvage value, the CJA or claims attorney will require the claimant to turn in the items to a Defense Reutilization and Marketing Office (DRMO) facility. Normally, the amount that the government may obtain from selling such items is very low. A CJA or claims attorney who determines that the salvage value is less than \$25 may advise the claimant to dispose of the items by other means, either discarding them or donating them to charity. Claimants may also be directed to make alternative disposition of items a particular DRMO will not accept, but claims personnel must note this alternative disposition on the chronology sheet or in the PCMS log. Claims personnel may not divert such items to personal use or furnish government offices with them. In determining whether an item has salvage value, consider both its size and the distance the claimant must travel to turn it in. Claims personnel should ask the claimant's command to make transportation available to assist the claimant in appropriate cases, particularly when items are large or bulky. Claims offices may also be able to make arrangements with their servicing DRMO that will permit the claims office to accept items and make consolidated turn ins on a monthly basis. Normally, it is unreasonable to expect a claimant to turn in a piano or refrigerator to the DRMO without assistance. Sound claims practice prohibits requiring a claimant living far from a DRMO to turn in an item of relatively slight value.

(5) *Failure to exercise salvage rights.* If the carrier states that it does not intend to exercise its salvage rights to high value items, such as figurines or schranks, and the item has salvage value greater than \$25, field claims offices will direct the claimant to turn in the item to DRMO. Otherwise, the claimant would be unjustly enriched by receiving replacement value for the item and keeping it as well. Be sure to annotate the chronology sheet on the action taken. If turn-in to DRMO is unrealistic or DRMO will not accept the item(s), the CJA or claims attorney may permit the claimant to retain the item.

(6) *Practice pointers.*

(a) The only claims on which the government is still entitled to salvage are DPM shipments where carrier liability is only \$.60 per pound time the weight of the item, and international GBL shipments delivered outside the United States (customs laws prevent carriers from taking possession of items shipped into foreign countries under a GBL). In exercising the government's salvage rights, claims offices must take into consideration the real salvage value of destroyed items, the cost to the claimant of turning in the items, whether or not DRMO will accept the item for salvage and the cost to the government of the turn-in and reutilization process. In most cases, the items are worthless junk and the biggest problem the claimant will have is finding some way to get rid of the item.

(b) Except in unusual circumstances, claims personnel should not pay a claim in full and then ask the claimant to turn in items for salvage. Nor should claims personnel hold a claim open for months, waiting for a claimant to turn in an item as agreed. Claims personnel must afford the claimant an opportunity to decide whether to retain items before the claim is settled.

(c) If claimants want to turn in items, the claims office should provide them with the necessary DRMO forms and inform them that if they do not turn in the item and return the paperwork to the claims office within a stated time period-usually fourteen calendar days-the office will assume that the claimant wants to keep the item and will settle the claim after deducting a stated amount for salvage value. This approach minimizes problems associated with turn-in.

(d) All claims attorneys and CJA should know the location of the DRMOs facilities that serve their area of responsibility, and what items that facility will take for reuse or disposal.

m. *Substantiating the loss of original audio and video tapes.* Both commercially recorded (prerecorded) and home-recorded video or audio tapes are often stolen from shipments. Under the PCA, a claimant who cannot establish loss of an original, prerecorded tape is entitled only to the depreciated value of a blank tape. Because the PCA authorizes compensation only for actual loss, such claimants are not entitled to additional compensation for any time and trouble involved in copying such tapes, or for the cost of renting a tape to copy. The same rule applies to digital recording media such as digital video disks (DVDs).

(1) The substantiation required to establish that missing tapes were prerecorded depends on the circumstances. Claims personnel should note the basis for their decision on the chronology sheet or in the PCMS log. A Soldier claiming the loss of two original prerecorded cassette tapes and forty-five copies is not expected to provide substantiation; on the other hand, a Soldier who claims the loss of fifty prerecorded tapes is expected to provide purchase receipts or other evidence.

(2) Similarly, a Soldier claiming the loss of expensive computer software is normally entitled to the depreciated value of blank floppy disks unless it is established that the missing software was commercial by evidence such as the original software documentation, registration information, purchase receipts or other information. Even if the claimant establishes that the software is commercial, the claimant is entitled to be compensated for only the amount the manufacturer charges to reissue the software to registered users. Most software manufacturers will reissue lost software to a registered user for a nominal fee.

n. Claims for inherited and used property. Claimants will sometimes claim the catalog price for new items to replace missing or destroyed items that they inherited or acquired in used condition. Frequently, they have no true knowledge of when the item was manufactured or originally purchased.

(1) As a general rule of thumb and in the absence of specific evidence to the contrary, an item acquired in used condition may be deemed to be five years old at the time the claimant acquired it. Claims personnel should modify this rule if its application will result in an injustice. In doing so, claims personnel should consider the item's useful life as well as the possibility of reducing or increasing the depreciation rate if the item has been subjected to either less than or more than average usage.

(2) In Germany and in other locations with similar bulk waste, many Soldiers acquire items that German families leave outside for trash pickup; this practice is known as "junking." A small F&R award is normally appropriate for loss or damage to such property.

o. Recreational vehicles, lots, stables and boat marinas. Many installations have storage lots where Soldiers may park recreational or non-operational vehicles, stables where Soldiers can store their riding tack, or marinas where Soldiers can moor boats. Inevitably, some property stored at such facilities is stolen, vandalized, or otherwise damaged.

(1) Claims for losses occurring at recreational and non-operational vehicle lots, stables, and marinas should be denied. These facilities exist primarily as conveniences, and losses of property stored at them normally should not be considered losses incident to service.

(2) Field claims offices should ensure that commanders post signs at such facilities informing users that the PCA does not authorize compensation for loss of, or damage to, personal property stored there and that they should consider purchasing private insurance. Where appropriate, redraft registration or waiver forms that Soldiers sign to state this warning clearly.

(3) An exception should be made for loss of or damage to recreational vehicles or boats that are stored at a special secured lot pursuant to an installation commander's order prohibiting parking of such items in family housing areas and directing storage in a specified lot. If the owner is required to store his or her vehicle or boat in such a yard, then such storage is not for the owner's convenience and would be incident to service.

p. Poor repairs provided by repair firms. A claimant is entitled to the fair repair cost of damage incurred incident to service. A claimant is not entitled to any additional amount to cover inadequate repairs by the firm he or she chose to use, even if the claims office listed the repair firm on a claims instruction packet. Additional repair costs occasioned by inadequate repairs are consequential damages and are not compensable under the PCA. Similarly, a claimant is not entitled to payment for loss of, or additional damage to, an item while it is in the repair firm's possession. If, for example, someone stole a bicycle damaged in shipment from the repair shop, the CJA or claims attorney may compensate the claimant for the cost of repairs, not for the value of the bicycle.

(1) Claimants who allege inadequate repairs are entitled to additional compensation only if they demonstrate that the original estimate of repairs understated the true cost of repairing the item—for example, by failing to include the cost of repairing certain hidden damage. In determining whether additional payment is appropriate, claims personnel should contact the repair firm and may direct the claimant to obtain another estimate. An approval or settlement authority may allow additional compensation only if evidence shows that the original allowance was insufficient to repair the original, shipment-related damage to the item.

(2) For this reason, the current list of repair firms that field claims offices are required to provide to claimants must state that inclusion of a repair firm does not provide any warranty or guarantee of the quality of service rendered by that firm. Field claims offices should, of course, remove from their lists firms that consistently provide inadequate repairs. A claimant who is dissatisfied with the quality of repairs provided by a repair firm may have legal recourse against that firm. Claims personnel should advise those claimants to consult a legal assistance attorney in these instances.

(3) Additionally, a claimant may choose a repair firm selected by a carrier rather than file a claim. In some instances, these firms provide inadequate repairs. When a repair firm selected by a carrier provides repairs that the CJA or claims attorney determines are inadequate, claims personnel should advise the carrier of this finding and state that it will be fully liable for the damages unless and until the carrier's repair firm makes adequate repairs.

q. Describing a lost or damaged item. DD Form 1844, block 7, "Lost or Damaged Items," directs the claimant to

"describe the item fully, including brand name, model and size. . ." Field claims offices should instruct claimants orally and in their written claims instructions to provide descriptive details, especially for major appliances-such as audio and video equipment, washers, dryers and refrigerators. This description should include the information discussed on the DD Forms 1840/1840R and, where possible, provide the model number for the major appliance. If the claimant does not have or cannot provide this information (such as for missing items or mail-in claims without information), field claims offices must decide if they can adjudicate the claim and conduct successful recovery without it. Requiring this additional information should not burden claimants, but it does enable field claims offices to better determine the accuracy of purchase prices, replacement costs, and correct amounts.

r. POV transportation and storage claims.

(1) *Vehicle inspection and shipping forms .*

(a) Prior to November 1998, most POV's were shipped between vehicle processing centers (VPC) operated by government employees and the DD Form 788 (Private Vehicle Shipping Document for Automobile), was the only vehicle inspection and shipping forms (VISF). Since November 1998, most POVs have been shipped under the Global POV Contract (GPC). The prime contractor, American Auto Logistics (AAL) either directly or through subcontractors, operates all of the Vehicle Processing Centers (VPC) in the United States and most of the overseas VPC. The SDDC has approved the use of a VISF developed by the contractor. It resembles the DD Form 788 but across the top in bold letters are the words "American Auto Logistics Vehicle Inspection and Shipping Form-(VISF)." If a vehicle is shipped between two VPCs operated by AAL, it is known as a full service move, and the contractor's VISF will be used. If a vehicle is moved between a contractor operated VPC and a government operated VPC, it is known as a partial service move, and the VISF form used will depend on who operated the origin VPC. If the origin VPC is government operated, then the DD Form 788 will be used. Although many claims personnel still refer to all VISFs as "the 788," the contractor's VISF will be used on the vast majority of claims. A relatively small number of POVs are shipped from countries that do not have a VPC. They are shipped under Department of State contracts, and although they will eventually be delivered to the owner at a contractor operated VPC in this country, the only inspection document will be one prepared by the commercial shipper at origin.

(b) The VISF, whether contractor's form or DD Form 788, has three purposes.

1. To conduct a joint inspection and document the condition of the POV at the time of turn-in for shipment. An "X" code identifies PED. Accessory items will be inventoried and listed in the "accessories" block. The owner or owner's agent will acknowledge, by signing and dating the VISF ,that the inspection of the vehicle, as recorded, is a true representation of the POV's condition at time of turn-in. The owner may object to any of the PED notations that are entered by the contractor's inspector and should note the objection on the form at the time. If a government contracting officer's representative (COR) is present at the VPC, the contractor is required to call the COR to try and settle any such disputes. However, because of the limited number of COR's, there may not be one available. If the COR is not available, the contractors representative should note that in the remarks section on the back of the form.

2. To determine the validity of claims for loss or damage. Transit damage is annotated at each phase of the shipment process, using the appropriate user and condition codes. The final inspection phase occurs when the owner or owner's agent picks up the POV at destination. An authorized inspector or contractor's representative will perform a joint inspection of the POV with the owner or agent, noting on the reverse of the VISF any damage or discrepancies not previously annotated. Usually, the owner will be told to inspect the vehicle and note all new damage in a block on the back of the form.

3. To determine third party responsibility for damage. Even on full service move shipments, the ocean carrier is an independent contractor and the GPC prime contractor may not be liable for all loss and damage. In addition, on every shipment, the vehicle will be inspected whenever it changes hands from one contractor or subcontractor to another, because the prime contractor will charge its subcontractors for damage that they do. Responsibility for loss or damage may be assigned to the stevedore, ocean carrier, or inland carrier in whose custody the damage occurred. A set of user codes or marks is provided on the form ("X," "T," square, diamond, circle, asterisk) for use during each successive inspection of the POV condition. These condition codes are used to identify the type and location of exterior or interior damage.

(c) The VISFs are seven-ply documents. Two copies of the form should be available to claims personnel. The owner is issued one copy at the port of embarkation. This is a carbon entry copy, and will reflect all PED ("X" codes) annotated during the joint inspection when the POV was turned-in for shipment. No transit damage codes will appear. This copy specifies any damage existing when the POV is tendered and before any compensable damage occurs. Copy #1 of the form reflects user and condition codes for all damage occurring in transit. It also reflects the lift information (vessel/voyage number) necessary to identify the liable ocean carrier. Some VPCs may release the document directly to the POV-owner. If not, or if the POV-owner has lost it, then claims personnel should proceed to adjudicate the claim with out it, and the office that asserts the recovery claim will try and obtain a copy.

(2) *The repair estimate.* The POV transit chain typically involves two independent contractors, each performing separate services: the ocean carrier and the GPC contractor for all land transportation and processing. Each contractor works independently and is liable only for loss or damage that occurs while the POV is in its possession. Therefore,

POV claims may require more than one recovery claim. For example, the ocean carrier's stevedore may have dented the roof, while a subcontracting of the GPC prime contractor may have scraped the left door.

(a) Because each contractor bears separate liability, the claims office must ensure that each item of damage is evaluated and listed separately.

(b) Effective adjudication begins by obtaining properly itemized repair estimates. Repair estimates must identify and provide itemized cost for each element of the repair. The term "element" does not refer to each nut and bolt in the repair but rather to each major component of the POV that sustains damage, such as the left front fender, hatchback or roof. The repair estimate must be itemized to reflect the cost of labor, paint, and parts necessary to repair each element.

(c) Estimates that list only a single amount for labor, painting, and parts cannot be adjudicated on a line-item by line-item basis. In addition, repair firms that refuse to provide an itemized estimate should be viewed as highly suspect sources of repair work and may even be in violation of local consumer protection laws.

(3) *POV claims inspection and worksheet.*

(a) Many claims offices have prepared their own POV inspection form or worksheet to assist with their evaluation of a claim. Claimants assigned to or living on the installation should be advised to drive their POV to the claims office when they submit their claim and every effort should be made to inspect it while it is at the claims office.

(b) The purpose of a POV claims inspection is to provide claims personnel an opportunity to assess objectively the extent of transit damage, to assess the accuracy of the contractor's damage notations on the VISF, and to identify issues relevant to adjudicating the claim. A claims inspection cannot serve in place of the joint inspection conducted by the owner or agent and the authorized government inspector or the contractor's representative. A claims inspection cannot cure a waiver of notice and the specific damage verification that the joint inspection provides. As a general rule, a government inspector or a contractor's representative cannot verify any loss or damage discovered after the joint inspection and departure from the pickup point, and a claim for those items may not be honored. However, there are instances when the extent of damage, such as mechanical damage, is not readily apparent. The POV claims inspector worksheet will help insure that inspections are conducted in a uniform manner, regardless of who is making the inspection. This worksheet must be designed so that claims personnel may record accurate and detailed descriptions of each claim element. These elements may be subject to different degrees of PED, different depreciation factors, or different adjudication issues. For example, a POV's left door may have 50 percent PED, the right rear fender 25 percent PED, and the roof none at all. Because each element will cost a different sum to repair, claims personnel must deduct the correct percentage of PED for each element. A "lump sum" PED deduction, such as 25 percent for the entire POV, will result in either overpayment or underpayment to the claimant. A worksheet that clarifies the inspection process objectively not only ensures fair claims settlement but also validates the recovery action. A POV claims worksheet also can be an effective checklist. As part of the inspection, claims personnel should match the DD Form 1844 to the VISF and to the repair estimate. Are all the claimed damages documented as transit-related? Are the repairs on the estimate limited to the damages claimed? Frequently, normal maintenance costs or non-transit damages are claimed. Sometimes these non-transit repairs are not claimed on the DD Form 1844, but the field claims office pays them by mistake because they were included in the estimate.

(4) *The DD Form 1844 (List of Property and Claims Analysis Chart).* Each element of the claim must be identified (schedule of property), and each element of the claim must be adjudicated on a line-by-line basis (claims analysis chart). The field claims office uses the claims analysis chart to determine the correct settlement and recovery amounts. The chart also plainly sets forth the details of the settlement process for a claimant, another field claims office, another government agency, or an industry member. Uniformity of application by claims personnel is essential to ensure uniformity of interpretation by other claims examiners.

(a) The claimant must identify each element of the claim (such as left front fender or right rear door), listing each as a separate line item on the DD Form 1844. The claimant must state how each element was damaged and provide a repair cost for each line item. This, of course, requires an itemized repair estimate. Unless the POV is a total loss, it is incorrect to describe the damage on the DD Form 1844 as a "1996 Ford," and claims personnel must ensure that the claimant corrects the DD Form 1844 as quickly as possible.

(b) The adjudication must list a specific sum for the amount allowed on each line item. A lump sum for the entire claim or one that combines the repair costs for several elements of the claim is unacceptable and results in lost recovery dollars. Body work that involves repairing a door, a fender, and trunk lid must be itemized for each element. An element of the claim may involve several cost factors: parts, labor, and painting. The adjudicator must assemble these costs into the correct amount allowed for each element, and the amount allowed must reflect the appropriate PED, LOV, or applicable depreciation factor. It is incorrect to apply a lump sum PED percentage to the entire claim. Because different contractors may be liable for separate elements, the amount allowed must be tailored to the correct percentage of PED.

(c) For POV recovery, specificity in the adjudication process is uniquely important. Unlike household goods recovery, in which a single carrier normally has responsibility for all the damage to a shipment, contractors in the POV shipment system are independent: no agency relationship exists. They are entitled to know the specific amount of their liability. This can be accomplished only if the DD Form 1844 accomplishes its aim as a claims analysis chart.

(5) *Mechanical damage.* Missing items and new damage to the exterior or interior of the vehicle is presumed to be

compensable as loss or damage in transit. The same is not true for damage to operating or mechanical systems such as the engine, engine components (for example, starter, fan belts, thermostat), transmission, wipers, electric windows, electric locks, etc. These items wear out and become inoperable through normal usage and the mere fact that they finally stopped working during shipment is not a basis to compensate the claimant. The claimant has the burden of proving that the loss resulted from misuse during shipment and not from normal wear and use.

(a) Claims for inoperable electrical or mechanical systems should be treated the same as internal damage to appliances and household electronic items. The claimant must support her claim with a written statement explaining how she knows the system was working when she turned in her vehicle at the destination VPC, and a written statement from the repair facility explaining exactly what is wrong with the system. The repair estimate should say which components were damaged and, if possible, say whether the damage is normal wear or the result of rough usage during transportation.

(b) All of the facts should be considered, such as the age and mileage on the vehicle, any repairs or replacement of the component since the vehicle was purchased, the operation condition at the time of turn-in to the carrier, and the reason the system is not working.

(c) Claims personnel must understand that mechanical systems on POVs can be damaged in shipment, because the vehicles are driven by the contractor. At the very least, they will be driven from the inspection point to a parking lot before they are driven into a container. On arrival at the destination port, the POV will be driven out of the container, parked and then driven to the inspection point when the owner arrives to take delivery. Vehicles shipped on a roll-on/roll-off (RO/RO) ships are driven from the VPC to the side of the RO/RO ship, and then driven by the ship owner's stevedores onto the vessel, which is like a very large, floating parking garage, where they are secured to the deck with tie down straps or chains. The same process is done in reverse on arrival at the in bound port. In addition, many vehicles are loaded onto car carriers and driven from one VPC to another.

(d) The delivery VPC operator may be aware of a problem because one of the people who drove the vehicle during the transportation process reported the problem. But unless it renders the car inoperable, they will usually not tell the owner, even if it is listed on the copy of the VISF that the contractor uses to charge its subcontractors. Therefore, before denying a claim because there is insufficient evidence that it existed at the time of delivery, contact the VPC and ask them to check their copy of the VISF to see if the same problem had been noted before the owner picked up the vehicle.

(e) The joint inspections at the VPC tend to be stationary inspections of the vehicle. At the turn-in inspection, the VPC staff will usually turn on the engine to hear if there are any obvious problems, and they should inspect the interior of the vehicle. But they will not check all of the operating systems. On delivery, they will have the car parked with the motor off when they bring the owner out to inspect it. Too many owners merely check for the presence of all of the accessories shipped with the vehicle and do a walk around inspection looking for cosmetic damage. Therefore, they are likely to miss many mechanical or electrical problems at the joint inspection. But they should notify the VPC as soon as they detect a problem, and if possible, return to the VPC to show the problem to the contractor's personnel.

(6) *Cosmetic damage.* (See para 11-14g(5) above on depreciation of vehicle paint jobs.) It is easy to determine the compensation for a broken or missing item. If tools are missing, their replacement cost can be easily determined. (Recall however, that claimants are not authorized to ship more than \$200 worth of hand tools.) If a headlight is broken, it must be repaired and a repair shop will quote a price for parts and labor. However, on determining whether to compensate a claimant for scratches, minor dents, or rub marks on the finish of a vehicle, claims personnel must assess the extent of the damage in light of the preexisting damage to the vehicle. A small scratch on a brand new car, or a car that has been maintained in excellent condition will obviously diminish the value and the cost of repairing the dent or scratch is the appropriate compensation. However, the same scratch or a minor dent on a vehicle that has significant preexisting damage, including extensive scratches and dents to the finish, will not reduce the value of the car to the extent that the claimant should be paid the cost of repair. The owner in this case should be compensated for a loss of value and, in an extreme case where there is very extensive PED, the claimant may not be entitled to any compensation. This is always going to be a judgment call within the discretion of the claims attorney or CJA, but adjudicators must be advised not to automatically pay the body shop repair costs on all claims for damage to the finish of the car. Their first reaction should be to consider an LOV payment, except for new cars or cars with minimal PED.

(7) *Preventive law guidance.* The preventive law program of every claims office should include guidance, repeated as often as possible through all media and command information channels, that Soldiers, on picking up their vehicles should turn on the engine and check every possible electrical and mechanical system on the vehicle. They should turn on the AC and heater, the lights, the wipers, and the radio; and they should operate all electric windows, seats, and mirrors. They should listen to the engine for any unusual noise. At the time of the inspection they may not be permitted to move the vehicle. But before they leave the VPC they should pay close attention to how the vehicle is driving, check the brakes for noise and be sensitive to changes in how the transmission shifts. If they find a problem before they leave the VPC or within a few miles of the VPC, they should go back to the VPC and report it immediately. Unlike shipments of household goods, there is no provision for giving timely notice of loss or damage within 70 days of delivery. The presumption is that if a problem was not found on the day of delivery, it did not happen in transit. The preventive law program should also advise personnel that a COR may be present at the VPC. If they dispute any of the

notations by the contractor's inspector, owners should ask that the COR be called to try and resolve the dispute on the spot.

11–15. Payable incidental expenses

a. Expenses associated with repair or replacement.

(1) *General.* Certain expenses are necessary to repair or replace personal property, and payment has been authorized on the theory that these expenses are so closely tied to the actual item that they are a measure of the amount of damage itself. These expenses are payable after the claimant has paid them or become obligated to pay them. The best evidence of this is a paid bill.

(2) *Drayage.* Drayage is the cost of having property transported to or from a repair shop or of shipping replacement items or parts. Normally, drayage costs are incurred when the property is actually transported. Reasonable drayage costs are compensable. If a claimant incurs unnecessary or inordinate drayage costs, only reasonable costs should be allowed. Drayage costs up to \$50 per claim can be allowed before they are incurred, but payment in excess of this will require the claimant to substantiate that the cost has been incurred. This \$50 limit is combined with the limit for sales tax; the maximum per claim that can be paid for both expenses combined, prior to their being incurred, is \$50.

(3) *Estimate fees.* An estimate fee is a fixed cost charged by a person in the business of repairing property to provide an estimate of what it would cost to repair property. An estimate fee should not be confused with an appraisal fee. Claims personnel should examine estimate fees higher than \$50 with great care to determine whether they are reasonable. A person becomes obligated to pay an estimate fee when the estimate is prepared. A reasonable estimate fee is compensable if the firm will not credit it toward the cost of repair. If an estimate fee will be credited toward the cost of repair, the estimate fee is not compensable, whether or not the claimant chooses to have the work done. When an estimate fee is claimed, the claim file must reflect whether the fee is to be credited. For example, at the request of claims personnel, a claimant obtains estimates for repair of a table and sofa from a furniture repair firm and a upholsterer, respectively, for \$30 each. Both repair firms are contacted, and both state that they will credit the fee if they are hired to do the work. The table, however, cannot be repaired. The estimate fee for the table is compensable; the estimate fee for the sofa is not.

(a) Field claims offices may pay for repair or replacement estimate fees even if the items ultimately are not compensable. In practice, field claims offices have claimants obtain estimates to substantiate the loss or damage, and claimants, for the most part, do not know whether or not the damage or loss was caused incident to shipment. A classic example is the claimant whose stereo receiver does not work. The claimant does not know why it is not working, and there is no external damage. The claimant then obtains an estimate of repair and the repair firm states that the damage is not shipment-related. The claimant should not bear the loss of the fee paid to the estimator.

(b) Whether to pay the estimate fee will be determined based on the facts of each claim. If a field claims office determines that the claimant knew that the damage claimed was not caused incident to shipment (for example, evidence indicates that the claimant knew that the claimed damage to an item existed before shipment of the household goods) or the item is never compensable for policy reasons (as a radar detector is not), then it may not be appropriate to pay the estimate cost.

(4) *Sales tax.* Sales tax or value added tax, such as the German Mehrwertsteuer, is compensable after it is incurred unless the claimant could have avoided paying the tax by purchasing through the local Morale Support Activity or from the Army PX for the same or lower price. Sales tax up to \$50 per claim can be allowed before it is incurred, but payment in excess of this will require the claimant to substantiate that the tax has been paid. (This \$50 limit is combined with the limit on drayage; the maximum per claim that can be paid for both expenses combined, prior to their being incurred, is \$50. See subpara 11–15a(2), above.) Additionally, the cost of obtaining and processing the value added tax relief forms are compensable but included in the \$50.00 limit for substantiation purposes.

b. Fees for obtaining certain documents. The fees for replacing birth or marriage certificates, college diplomas, passports, or similar documents may be allowed if the original or certified copy is lost or destroyed incident to service. No compensation will be allowed for documents that are representative of value, such as stock certificates, or for personal letters or records. An exception to this rule is the allowance of fees for obtaining copies of checks from banking institutions that substantiate the purchase price or ownership of an item that has been lost or damaged.

11–16. Property recovered

a. When a carrier or contractor informs the government that missing property has been located after payment of the claim, the carrier or contractor should be directed immediately to hold the property pending disposition instructions.

b. The claimant should be contacted and advised of the option to accept or reject the property.

c. If the claimant furnishes a written statement disclaiming further interest in the property, the approval or settlement authority should have the property inspected to detect any possible fraud and determine what disposition would be most advantageous to the government. In every instance, payment of the carrier's full liability will be required.

(1) On shipments with carrier liability of at least \$1.25 times the net weight of the shipment in pounds, advise the carrier that the government waives further interest in the property (unless the amount paid on the claim far exceeds the

carrier's liability at \$1.25 times the net weight of the shipment). Disposition of the property is at the carrier's or contractor's discretion.

(2) On DPM shipments with carrier liability of \$.60 times the net weight of the item, advise the carrier or contractor to deliver the property to the DRMO nearest the area where it is being held, unless it clearly appears that the carrier would be entitled to receive more money for completing delivery than the government could expect to realize from sale of the property. Direct the carrier or contractor to provide the field claims office with a copy of the DD Form 1348-1A (Issue Release/Receipt Document) or DA Form 3161 (Request for Issue or Turn-In) it will receive as a receipt. Include this copy of the turn-in receipt in the claim file.

(3) If it appears that the carrier would be entitled to receive more money for completing delivery of the property (after deduction of unearned freight) than the government could expect to realize from sale of the property, the carrier or contractor should be advised that the government waives any further interest in the property. This normally occurs only if the entire shipment is lost. Claims personnel should contact the destination Personal Property Shipping Office (PPSO) for guidance in determining what the carrier would be paid for completing delivery.

11-17. Companion claims

When two or more claims arise out of the same incident (such as a theft, storm, fire, or act of vandalism), one claim may be designated the master file. To avoid unnecessary duplication, that file, rather than its companion files, will contain the investigation report. List each companion claim number on the chronology sheet or in the PCMS log. The computerized claims record and the chronology sheet of each companion claim will list the master file number.

11-18. Emergency partial payments

Frequently, a claimant needs money immediately to repair or replace essential items, such as seasonal clothing, beds, and kitchen items. In such instances, the claims office may make an emergency partial payment that allows the claimant to repair or replace the property. This step reduces the hardship to a claimant who has sustained a large loss or one that will take time to substantiate fully. But such payment is not granted to relieve hardship unconnected with the claimant's loss. If the amount claimed will exceed a CPO's settlement authority, then that office should contact the area claims authority by telephone for permission to make the emergency partial payment. Claims attorneys, Claims Judge Advocates at any level, heads of area claims offices, and the chiefs of overseas command claims services can approve emergency payments up to \$5,000. The Commander USARCS, or the Chief, Personnel Claims and Recovery Division, USARCS may approve emergency partial payments over \$5,000.

a. Procedure. The claimant will complete DD Form 1842 and at least one DD Form 1844 listing items for which immediate compensation is sought, and will provide whatever evidence is needed for payment of these items. If the claims office determines that a hardship exists and that, based on documentation, the claim is clearly payable in an amount equal to or exceeding the proposed emergency partial payment, the field claims office will execute an acceptance agreement with the claimant and arrange for the claimant to receive an immediate cash payment. Sample completed DD 1842 and 1844 Forms are posted on the USARCS Web site at "Claims Resources," III, nos. 16 and 18-23; blank copies may be downloaded from www.dtic.mil/whs/directives/infomgt/forms/formsprogram.htm.

b. Acceptance agreement. The field claims office will keep in the file one copy of a signed and dated acceptance agreement in the following format and give one copy to the claimant: "I, _____, agree to accept the sum of \$_____ as a partial payment to relieve immediate hardship. I understand that this sum will be deducted from any award made in final settlement of my claim. I understand that if I do not provide the documentation needed to complete my claim within ____ days, my claim will be processed for final settlement."

11-19. Personnel claims memorandum

a. Personnel claims memorandum of opinion. The claims officer, CJA or claims attorney must draft a memorandum of opinion addressed to the SJA head of an ACO for every claim that is denied, that is routed through the SJA for action to a higher settlement authority or that is transferred to another office for action. The memorandum will be arranged as set forth in subpara b and must sufficiently and clearly detail the basis for the action recommended.

b. Necessary information. Include the following information in the memorandum:

(1) *Claimant's name and address.* The claimant's rank or pay grade, and the claimant's status as a NAF employee, Red Cross employee, Army retiree, ROTC cadet, reservist on active duty, or foreign national employee should be identified. This information is needed to determine that the claimant is a proper party claimant.

(2) *Date and place of the incident giving rise to the claim.* Describe the nature and location of the incident. It is not sufficient to list a building number without further elaboration. The memorandum should clearly state whether the incident occurred on or off the military installation. For shipment claims, the place of the incident is the residence where the property was delivered.

(3) *Amount of claim, date it was filed, and the date action was taken and/or reconsideration was requested.* The CJA or claims attorney should also explain any excessive delays in settling the claim or taking action on the request for reconsideration.

(4) *Chapters under which the claim was considered.* Chapters under which the claim was considered and a brief

description of the incident or the issues raised by the claimant on reconsideration. State the nature of the claim and the chapter or chapters of AR 27–20 under which it is being considered.

(5) *Facts*. Set forth in detail the relevant facts.

(6) *Opinion*. Provide all factual or legal bases supporting the recommended action. A claimant's negligence should not be cited as the sole basis for a disapproval recommendation when other valid bases exist. Any analysis of the claimant's negligence should state what conduct was expected of the claimant under the circumstances. A summation that the claimant was negligent without further elaboration is of little use, and it is wise to consider both the standard of care and proximate cause.

(7) *Recommended action*. Specify the action recommended. If the claim is deemed payable, state the specific amount recommended. On reconsideration, the office should pay any amount within its authority deemed meritorious and forward the claim with the recommendation that no further payment be made.

11–20. Reconsideration

a. General. Claims personnel have a duty to ensure that claimants are compensated fairly for losses incident to service. The reconsideration process is an opportunity to continue a dialogue with a dissatisfied claimant, and claims personnel should be sensitive to claimants' assertions of unfair treatment. They must fully explore any indication that the claimant's grievance is well-founded and correct any error. On average only 7 percent – 9 percent of claims result in reconsideration. Therefore, under no circumstances should all recovery demands be delayed merely to see if a request for reconsideration will be filed. As carriers have 120 days to respond to government recovery demands, very few recovery actions are completed during the time that a claimant has to request reconsideration. If a request is received, the recovery action can be suspended until final action has been taken on the request. Then, if additional payment has been made, the amount of the recovery demand can be increased.

b. Who may request reconsideration. The claimant, the claimant's authorized agent or legal representative, or a spouse acting on the claimant's behalf may request reconsideration. A claimant's complaint made through a Member of Congress that the settlement was inappropriate should be treated as a request for reconsideration.

c. Effect of a settlement agreement. Since a settlement agreement is used to settle a personnel claim only when the claim is cognizable under another claims statute, the execution of a settlement has no effect whatsoever on a claimant's right to request reconsideration under the PCA.

d. Time limitations on requests for reconsideration. No relief will be granted on reconsideration more than 60 days after the date the original action was taken, but the head of an ACO may waive this time limit in exceptional cases. Claims personnel should ask the claimant to submit a written explanation for requesting reconsideration beyond the 60 day time period. The CJA or claims attorney should submit a recommendation in writing to the head of an ACO. If the request is received only a few days after the deadline and there is strong evidence in favor of granting the request, then the extension should be granted. In general, the more time that has passed since the 60 day limit expired, the stronger the evidence supporting the request must be. Consider also whether the delay in submitting the request has made it more difficult for the claims office to verify essential information or to increase any recovery demand that may have been dispatched.

e. Request for return of files. If the claim file has been forwarded for centralized recovery or retirement, the field claims office normally must request its return from USARCS before taking action on reconsideration. In such cases, the field claims office should request the claim file in writing. The date the request for reconsideration is received at the claims office should be entered into the data base along with the RW code and then an AD code may be used while awaiting return of the file. If the file is lost, it must be reconstructed as thoroughly as possible; mark the new file, "RECONSTRUCTED FILE," in red on the outside cover and use the same claim number so that it will match the original if this is ever located. If the claimant asks for payment of drayage that was not yet incurred when the claim was settled, the field claims office may pay the drayage to facilitate settlement and forward a copy of the voucher to USARCS with a personnel claims memorandum of opinion explaining the action taken and asking that it be incorporated into the claim file.

f. Reconsideration without a written request. Reconsideration without a written request is entirely at the discretion of the field claims office. If there is an error or miscalculation, or if the claimant provides additional information, the field claims office may reopen the claim and pay the claimant an additional amount without requiring the claimant to submit a written request. This is a particularly appropriate way to pay drayage or sales taxes incurred after settlement. The chronology sheet and other documents in the file must reflect the basis for any additional payment. If a claimant expresses dissatisfaction orally and the field claims office cannot justify an additional payment, it should not reopen the claim but instead advise the claimant to submit a written request clearly stating the factual or legal basis for relief.

g. Reconsideration upon a written request.

(1) *Authority*. An approval or settlement authority must act on a written request for reconsideration. The field claims office should encourage the claimant to fully explain the basis for requesting relief and fully explore any factual issues. Field claims offices must act on requests that do not present new information or a factual or legal basis for relief but they should advise claimants that such requests are normally denied.

(2) *Action by the original approval or settlement authority*. The original approval or settlement authority may

modify the original action if he or she believes this to be appropriate. A settlement or approval authority may take final action on a request for reconsideration if the action taken results in the claimant's acceptance as full relief on the claim. If the request for reconsideration does not contain a request for a specific amount, the amount requested by the claimant will be considered to be the amount requested in the original claim for the items included in the request for reconsideration. If there is a question as to the amount in dispute, err on the side of determining that the amount is over \$1,000 and forward the request to USARCS. In addition, the head of an ACO (typically an SJA) or higher settlement authority may take final action on a request for reconsideration if:

- (a) The action taken on reconsideration results in the claimant's acceptance as full relief on the claim; or
- (b) The reconsideration request does not contain a new factual or legal basis for requesting reconsideration; or
- (c) There was no timely request for reconsideration and no exceptional circumstances are present; or
- (d) The total amount in dispute after the head of an ACO has acted on the request for reconsideration does not exceed \$1,000. The amount in dispute is the difference between the amount requested by the claimant in the request for reconsideration and any amount granted in response to the request for reconsideration. In determining this amount deduct the amount claimed for items which the claimant voluntarily withdraws from reconsideration for any reason. Also deduct the amount claimed in the request for items where the claimant accepts the amount offered in full relief for the damage or loss.

(3) *Forwarding the request for reconsideration.* The head of an ACO must forward a request for reconsideration to USARCS, Office of the Judge Advocate, U.S. Forces Korea (Claims) or U.S. Army Claims Service, Europe (USACSEUR) for final action if it:

- (a) Does not meet the criteria in subparagraph 11-20g(2)(a) through (d), above.
- (b) Involves a claim on which the head of an ACO has personally acted, where that individual believes the request for reconsideration should be denied.
- (c) Involves a question of policy or practice that the head of an ACO believes is appropriate for resolution by USARCS, Office of the Judge Advocate, U.S. Forces Korea (Claims) or U.S. Army Claims Service, Europe (USACSEUR).

(4) *Action by a successor or a higher approval or settlement authority.* A successor to the original approval or settlement authority will modify the original action only if that officer determines that the original action was incorrect or is now incorrect based on new evidence. Reasonable men and women may differ over whether a claimant acted negligently or provided enough evidence to justify a particular payment, and approval and settlement authorities are granted considerable discretion. Successor authorities, however, should not substitute their judgment for that of the original approval or settlement authority.

(5) *Procedure.* Each settlement or approval authority must act on the request personally; this authority may not be delegated. If additional payment is made, the chronology sheet and other documents in the file must reflect the basis for it.

- (a) The settlement or approval authority should notify the claimant in writing of the action taken on the request for reconsideration. If the action taken on the request modifies the original action, the settlement or approval authority should make any additional payment involved and determine if the modification satisfies the claimant.

- (b) The settlement or approval authority should forward appropriate claim files and personnel claims memoranda of opinion to the head of the ACO. The head of the ACO may take final action on a request for reconsideration according to the criteria set forth above; this authority may not be delegated.

- (c) If the request must be forwarded to USARCS, Office of the Judge Advocate, U.S. Forces Korea (Claims), or USACSEUR, the outside cover of the file must be clearly marked, "RECONSIDERATION." The claimant should be told that the claim has been forwarded, but not what action the claims office has recommended. The head of the ACO may concur in a previous memorandum of opinion or may attach a supplemental memorandum.

- (d) When a request for reconsideration is forwarded to USARCS, Office of the Judge Advocate, U.S. Forces Korea (Claims), or USACSEUR for final action, the file should contain a memorandum or endorsement personally signed by the head of the ACO. This memorandum or endorsement must contain, at a minimum, a specific recommendation on the request for reconsideration.

- (e) If the CJA or claims attorney increases the amount paid, the CJA or claims attorney should notify the claimant in writing of the action taken and determine if he or she is satisfied. If the claimant is not satisfied, the CJA or claims attorney should forward the file with a personnel claims memorandum of opinion to the head of the ACO.

- (f) The head of the ACO may take final action on the request for reconsideration or forward the claim if he or she believes the request involves an issue of policy which is appropriate for resolution by USARCS or the appropriate command claims service chief. If the head of the ACO forwards the claim to USARCS or a command claims service, he or she may prepare a new personnel claims memorandum of opinion or an endorsement concurring in the previous memorandum of opinion. In either case, the memorandum or endorsement must be personally signed by the head of the ACO and recommend a specific action to be taken on the request for reconsideration.

(6) *Subsequent requests for reconsideration.* If a claimant submits a request for reconsideration after USARCS or a command claims service has taken action, the subsequent request should be forwarded to USARCS or a command

claims service with a cover letter for action. If the claimant raises a new issue or provides additional information, a memorandum of opinion should accompany the request.

(7) *Completing the DD Form 1844 on reconsideration.* Field claims personnel may inadvertently create additional work for themselves and for the claims services in adjudicating requests for reconsideration, including requests for items that were not claimed earlier (so-called "supplemental" claims). On reconsideration, claims personnel should never alter or erase information previously entered on the DD Form 1844 (List of Property and Claims Analysis Chart). Nor should claims personnel reenter line items from the original DD Form 1844 to show the action taken on reconsideration. These methods are time-consuming and make it difficult to determine what action was taken originally. Field claims personnel will simply enter changes made on reconsideration on the original DD Form 1844 above the information previously entered, adding the notation, "On Reconsideration," in any free space on the line. They should make such entries in red or another color to clearly distinguish the reconsideration action from the original action. "Supplemental" claims for items never claimed previously are also treated as requests for reconsideration, but they present slightly different problems. Often, claims personnel do not indicate which items were claimed on reconsideration. If there is sufficient space on the original DD Form 1844 to enter the additional items, simply have the claimant add them at the bottom. Claims personnel should have the claimant separate these supplemental items from the items originally claimed with the words "Supplemental Claim" and the date reconsideration was requested. If there is not enough space to list the supplemental items on the original form, have the claimant complete a new DD Form 1844; however, the additional form should be marked clearly with the words "Supplemental Claim" and the date. Note that if a supplemental claim for loss or damage in shipment is presented within 75 days of delivery, the claims office should immediately dispatch a supplemental DD Form 1840R listing the additional items. If a supplemental claim for loss or damage to goods in shipment is received more than 75 days after delivery, it should usually be denied on the basis that there is insufficient evidence that the loss was incident to shipment.

(8) *Forwarding files to U.S. Army Claims Office.* Be sure to forward files with reconsideration requests to USARCS Personnel Claims Branch (office code CO3) and not the Personnel Claims Recovery/Retirement Branch (office code C04). Enter the former as the group and use the TA transaction code in the electronic claims record. Forward the file immediately. If the claim record was created on the old personnel claims database, the system will prompt you to create a transfer diskette after you enter the TA code. The diskette must accompany the paper file that enables the file to be uploaded immediately into the corresponding old personnel claims database of the Personnel Claims Branch (office code C03) and reduces the possibility that duplicate files or errors will be entered into the personnel claims database. Failure to include the transfer diskette causes processing to be delayed. There is no requirement to create and submit a transfer diskette on PCMS.

11–21. Judge advocate

a. Private insurance.

(1) *General.* As a general rule, claimants who have private insurance must file and settle claims with their insurers before settling a claim with the United States. As an exception, claimants have the option of filing with their insurance first, or filing with the Army for the full loss, on claims for loss or damage to goods while they were in government funded transit or storage. This includes loss or damage to POVs while in transit or storage. However, once claimants file with the Army, they assign their claim to the Army and may no longer file with their private insurance. This exception was established because the government can usually recover the full amount on such claims from the carrier or warehouse that is liable for the loss. In addition, it helps our members limit the number of claims they file. (Most property and casualty insurers will consider the number of claims a person has submitted when deciding whether to insure the person. Many will deny coverage to anyone who has filed more than three claims in three years.) Claimants should be given "Guidance on Claims Involving Insurance," that discusses whether they should file against their private insurance before filing with the Army or file only with the Army. "Guidance on Claims Involving Insurance" is posted on the USARCS Web site at "Claims Resources," III, no. 33.

(2) Computing compensation.

(a) Claimants who file claims against their private insurance will often seek compensation for the same loss from the Army, as most insurance policies include a deductible amount that is subtracted from the total loss. As a general rule, the Army does not merely pay the deductible amount. Rather, the Army must determine how much the Army would pay for the same items, and deduct the amount paid by private insurance. If the insurance payment is less than what the Army would have paid, then the Army will pay the difference. Differences between what insurance pays and what the Army pays may be due to use of different depreciation rates, or different estimates. However, an estimate for repair of an automobile prepared by an insurance adjuster is a valid estimate for determining the amount the Army would pay.

(b) To compute compensation for claimants who have received payment from their insurer, determine what the insurer paid for each line item. If there is only one line item, as with a vehicle loss, the amount the insurer paid is the amount stated on the insurer's check. If there is more than one item, obtain the insurer's line-by-line breakdown of the amount awarded. If the total on the breakdown differs from the total on the check (because the insurer applied a deductible or policy maximum), divide the amount on the check (the smaller number) by the total on the breakdown (the larger number). Carry the result to six (6) decimal places (example: .631752). Then multiply each line on the

breakdown by this percentage to figure out what the insurer paid on each item. This gives the claimant the benefit of the higher payment (by the insurer or by the government) on every item. If the insurer did not prepare a breakdown, then and only then may the amount the insurer paid simply be subtracted from the amount otherwise payable per item. Some household goods insurance policies provide for Full Replacement Value protection (that is, new-for-old replacement). Many companies that pay Full Replacement Value will pay only the depreciated replacement cost of an item in response to the initial demand and will withhold payment of the full replacement value until they receive proof that the insured has purchased a replacement item. The difference between the depreciated replacement cost, which is paid immediately, and the full replacement value cost is often referred to as a "hold-back." When determining whether the Army will pay any additional amount for an item, if the insurance policy provided for full replacement value, then any hold-back amount should be included in the total amount paid by insurance.

(3) *Item and category maximums and private insurance.* Individuals purchasing private insurance are allowed the benefit of that insurance. A claimant who is partially compensated for an item to which a maximum allowance applies would be allowed to retain both the insurance payment and an amount not to exceed the maximum allowance, up to the substantiated value of the loss. For example, a claimant owns a \$6,000 ring that it is stolen from quarters. A per item maximum allowance of \$1,000 applies to the ring. If the claimant's insurer paid \$4,000, the claims office could pay an additional \$1,000, leaving \$1,000 of the ring's value uncompensated. If, however, the claimant's insurer paid \$5,500 on the item, the claimant would be entitled to only \$500.

(4) *Vehicle insurance.* For claims on which claimants are required to file with private insurance, they should provide copies of their vehicle insurance policies in effect at the time of loss or a denial letter from their insurance company if they state that they have insurance but that it does not cover the loss. Comprehensive policies will cover most loss and damage cognizable under the PCA; some, including USAA and AFIA, cover even loss and damage incurred during government sponsored shipment. Local law or regulation requires liability coverage on almost every installation, and failure to maintain such coverage is normally a basis for denial.

(5) *Effect of claimant's refusal to take required action.* If the claimant refuses to provide a copy of his or her insurance policy or a denial letter, submit a demand on the insurer, or take other action necessary to present a demand on the insurer, the field claims office will, absent good cause, deny the claim. In the absence of clear evidence to the contrary in such cases, the field claims office may assume that the claimant's insurer would have fully compensated the claimant and may deny the claim on this basis. See paragraph 11-11g above, on procedures to follow when claimant refuses to provide information concerning private insurance.

(6) *Effect of claimant's failure to provide timely notice.* If, instead of refusing to take action, the claimant negligently fails to give notice of the loss or to file a claim within the time limits specified in his or her policy, allowing the insurer to deny the insurance demand, the claims office generally will not deduct any amount from the claim. However, if it appears that the "failure" was intentional, the claims office may deny the claim.

(7) *Approval of claim prior to settlement with insurer.* A CJA or claims attorney may decide to approve a claim for payment under this chapter without a claimant first settling with his or her insurance company if:

(a) The insurance company improperly refuses to pay the claim.

(b) The claimant has good cause. Good cause exists if the CJA or claims attorney (or higher authority) determines that it would be appropriate to pay the claimant immediately because of hardship to the claimant or other good reason. The CJA or claims attorney should consider all factors, including the difficulty which may result in subsequent recovery actions based on the claim.

(c) The claims office can determine, from a copy of the insurance policy, if the claim would be paid in full minus any deductible amount. The claim will then be adjudicated as if the insurance company had settled the claim minus the deductible amount. Advise the claimant to provide a copy of the insurance settlement as soon as possible but do not hold the paper file for more than 30 days pending receipt. Forward the claim for recovery or retirement, whichever is applicable, regardless. If the file is forwarded for recovery, mark the file as such in accordance with paragraph 11-31.

b. Increased released value and full replacement protection. Domestic DOD shipments moving on a BOL generally hold the carrier to a maximum liability of \$1.25 times the net weight of the shipment, in pounds. Because this level of liability was a significant increase over the traditional liability of \$.60 per pound per item, it is often referred to as Increased Release Valuation (IRV). On domestic shipments, members may purchase a higher limit of liability at their own expense. These two liability options are known as "Option 1" (higher IRV) and "Option 2" (full replacement protection), both of which the claimant purchases from the carrier through the transportation office that books the shipment.

(1) *Normal increased released valuation (basic).* The carrier is liable for the depreciated replacement cost or repair cost, whichever is less, up to the limit of \$1.25 times the weight of the shipment in pounds. Claimants may file their claims either directly with the carrier or with a military claims office. If the claimant files with a military claims office, the military will pay the claimant up to the maximum amount permitted by the Personnel Claims Act (currently \$40,000) and will seek to recover the full amount of any loss or damage from the carrier, subject to the carrier's maximum liability. The claimant is entitled to an additional payment from money recovered by the government only if the amount recovered exceeds the amount the government has already paid the claimant.

(2) *Higher increased released valuation (Option 1).* Option 1 is depreciated value coverage for which the claimant

agreed to pay at the outbound counseling when the shipment was booked. The increase over the basic \$1.25 times the weight of the shipment is expressed either as a valuation in excess of \$1.25 per pound times the weight of the shipment or as a lump sum declaration. It must be reflected in the Remarks section of the bill of lading. The cost of this increased valuation to the owner is currently \$.64 per \$100 of declared value. Although the owner may declare a specific value of his or her shipment, or specify a higher amount per pound, such as \$2.00 per pound times the weight of the shipment, the carrier is still liable only for the depreciated replacement cost or repair cost, whichever is less. The claimant may file his or her claim directly with the carrier or directly with a military claims office. If the claimant files his or her claim with an Army claims office, we will pay the depreciated replacement cost or repair cost, whichever is less, and then seek recovery from the carrier. The claimant may receive additional compensation from the money recovered if we recover more than we initially paid to the claimant. (We may recover more than we paid because the maximum allowable limit was not waived or because the claim included items held for private business.)

(3) *Undepreciated replacement value coverage (Option 2)*. Owners order this coverage through the transportation office (TO) at the time they receive their outbound counseling. The TO notes this coverage in the remarks section on the bill of lading, the carrier charges the government a higher rate for the shipment and then the government collects the additional cost for the higher coverage from the member after delivery. The cost is currently about \$0.85 per each \$100.00 of declared value, and the minimum valuation is \$21,000 or \$3.50 per pound, whichever is greater. Because the rate solicitation affords the carrier the option to repair or replace items, the claimant must first submit a claim directly with the carrier. If delay would cause hardship, or if the carrier denies the claim or fails to settle it within 30 days, the claimant may then submit a claim against the government. A claim against the government is processed normally, and the claimant is paid depreciated value, subject to maximum allowances. The undepreciated value will be placed in the "Amount Allowed" column of DD Form 1844, however, and a demand against the carrier will be prepared for the full adjudicated, undepreciated value. If the additional money is collected, it will be paid to the claimant. Collection of the additional money (as well as the depreciated amount paid to the claimant) depends on the strength of the evidence in the claim file supporting the demand.

c. Disapproval of claim or payment of amount less than that claimed. Whenever a claim is disapproved or is approved in an amount less than that claimed, give the claimant a detailed, clear, and understandable explanation of the reasons. An essential part of the claims process is to inform a dissatisfied claimant of the basis for the action taken, both to afford the claimant a meaningful opportunity to request reconsideration and to demonstrate fair and impartial treatment. Claims personnel sometimes use preprinted forms on which they check one general reason for paying less than the amount claimed without reference to the particular item involved. These form memoranda are not helpful to the claimant and in most instances they should not be used. A claimant may be given a copy of the adjudicated DD Form 1844, but this is not a substitute for a detailed explanation. A copy of any written explanation must be kept in the claim file. Explanations of disapprovals must be made in writing; explanation of approvals in less than the amount claimed may be made in writing or orally by the claims examiner who adjudicated the file, as long as the chronology sheet reflects that this was done.

d. Publicity. The claims program exists not only to pay meritorious claims but also to encourage potential claimants to adopt measures that reduce the risk of loss and to assist them in substantiating losses that do occur. Daily bulletins and other installation periodicals should be used to publicize such matters as the importance of completing household goods inventories, use of DD Form 1840/1840R, the maximum allowances for various types of property, problems associated with self-procured (DITY) moves, problems with shipping mobile homes, problems with shipping expensive items such as jewelry, rules about securing bicycles, and limits on payment for items stored in vehicles. Information posted in the Claims Forum on the JAGCNet is intended to be used as a resource, not only to clarify policies and answer questions regarding specific claims, but to provide claims offices with information that will assist them in their efforts to publish articles in local bulletins and installation periodicals.

e. Risk management. Risk management is an important part of an installation's personnel claims program. A CJA or claims attorney is not merely the administrator of a claims office but also an advisor to the SJA and commanders. To provide commanders with the best professional guidance, the CJA or claims attorney must assess how installation and unit policies—local regulations, directives, and SOPs—affect claims. Prompt payment of claims is not a substitute for policies that reduce the occurrence of preventable losses. An effective claims prevention program can affect both the flow of claims funds in an era of tight fiscal restraints and the installation's overall quality of life. Four areas are of particular concern:

(1) *Installation parking policies.* Bicycles and motorcycles are particularly vulnerable to theft. Where bike racks are not installed, directives that prohibit securing bicycles to trees and other objects promote an unacceptably high degree of risk. Recreational, resale, or nonoperational vehicle storage lots are also a focus for concern, and where the command cannot provide adequate security and control, thought should be given to declaring them high-risk areas.

(2) *Contractor operations.* The PCA is not intended to provide a remedy for losses caused by the negligence of government contractors. Laundry, spray-painting, and quarters renovation contracts are particularly prone to cause damage Soldiers' property. If such contracts are not drafted and administered to force the contractor to assume liability for such losses, claimants are often left without effective redress. Maintain close contact with the procurement law attorney in the SJA office to ensure that such contracts contain an adequate claims clause that allows the contracting officer to offset the contractor's revenues for damage, and they must guarantee that the contractor carries adequate

insurance for risk. If contractors do not readily pay claims for losses that are compensable under this chapter, then the Army will pay the claimant and then try and recover under subrogation law from the contractor.

(3) *Physical security.* Properly drafted and enforced unit SOPs, especially combined with the installation of security devices and publicity about Soldiers' potential liability under Article 139, UCMJ, help reduce the incidence of barracks theft.

(4) *Personal property of absent Soldiers.* Unit commanders of Soldiers who are absent on emergency leave, hospitalized, AWOL, or imprisoned have a duty both to inventory and safeguard that Soldier's property promptly and to maintain documentary records. Failure to do so encourages both theft and false claims.

f. Counseling claimants. A claimant's perception of the claims process will depend largely on the adequacy of the initial counseling received. To see samples of completed DA, DD, and SF forms discussed in this subparagraph go to the USARCS Web site at "Claims Resources," Section III. In addition, see the heading for section III of appendix A for Web sites where blank copies of the forms may be downloaded.

(1) *Information on time limitations and notification requirements.* Every claimant who visits a field claims office without submitting a claim should be informed of the two-year time limitation on presenting a claim. Your oral and written instructions must clearly state the difference between the minimal written demand for payment that is needed to meet the two year statutory limit and the more detailed information and forms that are needed to completely substantiate a claim. The claimant should also be informed of any requirement to notify a carrier or insurer and of the consequences of not doing so. Claimants calling or writing the field claims office for advice should be given similar instruction.

(2) *Assistance with forms.* Give everyone who wants to present a claim the appropriate claim forms (DD Forms 1842 and 1844). Sample completed forms are posted on the USARCS Web site at "Claims Resources," III; blank copies may be downloaded from www.dtic.mil/whs/directives/infomgt/forms/formsprogram.htm. Make every effort to explain the forms and assist claimants in completing them correctly. Claims personnel should make a special effort to help claimants accurately describe the facts and circumstances giving rise to the claim on DD Form 1842, and accurately list items and damage on DD Form 1844. Claimants are required to provide only one completed copy of each form and one copy of any documents needed to substantiate the claim. Claimants should be provided with a copy of any original repair estimate or inventory they submit. Claimants are not required to complete DD Form 1843, Demand on Carrier/Contractor.

(3) *Instructions and advice.* Every field claims office should prepare a small instruction packet containing forms and guidance for prospective claimants. The same information should be placed on the legal office's Web site in a format that permits it to be downloaded by potential claimants. In the very near future, the Personnel Claims Management System (PCMS) will offer claimants the ability to file claims online from any location where an Internet connection can be made. Claimants may be able to access, download, and print some associated claims forms from the PCMS. Still, substantiation and other requirements will mandate interaction with a field office. Where resources permit, claims personnel should individually assist every claimant who comes into the office. At a minimum, explain the claim forms and how to substantiate ownership. When appropriate, tell the claimant about using catalog prices and explain the agreed cost of repairs (AGC) and loss of value (LOV) concepts.

(4) *Lists of local repair firms.* Every field claims office should maintain a current list of local firms that repair various types of property at a reasonable cost, especially those firms that will provide a detailed estimate of repairs. At a minimum, field claims offices should provide lists for electronics, appliances, vehicles, and furniture repairs, preferably containing three names each. Advise claimants that a firm's inclusion in the list constitutes neither an endorsement of the firm nor a guarantee as to the quality of the repairs performed by the firm. Also, before obtaining an estimate from an unlisted firm, the claimant should consult the field claims office. If the claimant selects a firm which cannot repair the property in question or is known for inadequate work, exorbitant estimate fees, or unusually high repair charges, advise the claimant in writing to find another firm.

(5) *Catalogs.* Every field claims office should maintain current catalogs from the PX and local retail stores and provide an area where claimants may read them.

(6) *Inspections by carriers.* Advise claimants that the carrier has the right to inspect whatever damaged items are available. An inspection is just that; except on full-replacement-protection shipments, a carrier has no right to repair items. The carrier must make arrangements with the claimant to exercise this right of inspection within 45 calendar days of delivery, or 45 days from the date of dispatch of each DD Form 1840R, whichever is later. (See Part II, MOU on Loss and Damage Rules, posted on the USARCS Web site at "Claims Resources," III, no. 41.) Do not delay settlement of claims merely because the carrier inspection period has not expired. If the field claims office learns that a claimant has refused the carrier the right to inspect, the field claims office will contact the claimant and advise him or her that the carrier has a right to inspect all damaged items. Such inspections should take place at a time convenient to the claimant, but both the claimant and the carrier must be reasonable in trying to accommodate each other's schedule. If advised by the carrier before payment that the claimant refuses to let the carrier inspect, the claims attorney or CJA should inform the claimant that no action will be taken on the claim until the carrier has a chance to inspect. If the member continues to deny the carrier access to the damaged items, the claims office may deny payment on any items that the carrier is not permitted to inspect. If the carrier attempts to deny a recovery claim on the basis that the claimant refused to cooperate with an inspection, and the carrier did not request assistance from the claims office within the

applicable 45 day period, then the carrier's denial should not be accepted. In all cases where the carrier alleges that it was denied its right to inspect, the claims office must make a thorough investigation of the facts to determine if the carrier vigorously pursued its right to inspect.

(7) *Settlement by claimants directly with the carrier.* A claimant may choose to settle a claim directly with the carrier. Inform claimants, except for those who have purchased full-replacement protection, that the carrier has no right to repair items unless the claimant so wishes. On full-replacement-protection shipments under Option 2, the carrier does have the right to replace or repair, and the claimant must first try to settle the claim with the carrier.

(8) *Discarding items and salvage value.* On shipments delivered in the United States, if the carrier pays or agrees to pay the full, depreciated value of a lost or destroyed item, the carrier has a right to take possession of most such items for salvage. However, to do so, it must make arrangements to pick up salvageable items within 30 days of receipt of the claim from the owner or from the Army. (See the Joint Military Industry MOU on Salvage, posted on the USARCS Web site at "Claims Resources," III, no. 42). Advise claimants not to discard any items before settlement of the claim and expiration of the carrier's inspection period. Normally, the carrier will take possession of salvage items at the claimant's residence or other location acceptable to the claimant and the carrier not later than 30 days after the carrier receives the government's demand. Field claims offices may instruct claimants to discard items that the field claims offices determine to be hazardous to the health and safety of the claimant's family, such as broken glassware or mirrors and spoiled foodstuffs. However, claimants will retain antiques, figurines, and crystal with a single item value of \$50 or more so the carrier may exercise its salvage rights. At a minimum, claimants should retain salvageable items for 90 calendar days; then consult with the field claims office before disposing of them. If local recovery is involved, the field claims office will notify the carrier of possible salvage. If the claim has been forwarded to USARCS for recovery and the 90 days have passed, the field claims office will notify USARCS of the claimant's request to resolve the salvage issue and USARCS will provide guidance on this question. On claims where the carrier has no salvage rights, claims personnel should tell claimants which items to turn in to the DRMO when the claim is settled.

(9) *Property turned in by claimants.* A field claims office will never accept property from a claimant and use it to furnish the claims office. This is an improper way to dispose of property belonging to the government. All property turned in for salvage to the government must be turned in to a DRMO. If, however, the field claims office can demonstrate a need to furnish its workplace with particular items, some DRMOs will issue turned in items to the field claims office on a proper hand receipt.

g. *Notice of loss and dispatch of DD Form 1840R.* The joint DD Form 1840/1840R is used to notify government claims personnel, carriers (including mobile home carriers), and warehouse firms making local deliveries of loss or damage in shipment. Timely submission of these forms creates a presumption that the damage noted on them occurred in transit or storage. At delivery, the claimant must list loss and damage on DD Form 1840. The carrier must give the claimant three completed copies of the form; if the carrier fails to do so, the carrier is not entitled to notice of loss and damage. Within the time limits prescribed in subparagraph 11-21g(2) below, the claimant must specifically list later-discovered loss or damage on DD Form 1840R (located on the back of DD Form 1840) and submit this form to a military claims office (or Navy transportation office), which in turn must dispatch the form to the carrier. In the alternative, a claimant may mail a copy of the DD Form 1840R directly to the carrier at the address listed in block 9 of DD Form 1840, but should record the date of mailing and address to which it was mailed in block 4 of DD Form 1840R. If the carrier is not provided with notice on some or all items within the time prescribed, the carrier is not liable for those items. Notice may be presumed from timely dispatch of a DD Form 1840R or may be established by actual notice in some other way, such as a notation on the delivery copy of the inventory that was retained by the carrier or by a letter received from the claimant within the 75 day period. If the claimant provided notice within the 75 day period to a government claims office, but the claims office failed to dispatch the notice to the carrier, then the member can be paid, even though the government will not be able to recover from the carrier. Generally, if the member failed to give the Army timely notice of the loss and there is no good cause for missing the 75 day deadline, the claims should not be paid. Army field claims offices are required to file and dispatch DD Forms 1840R presented by members of other military services. To see samples of completed DA, DD, and SF forms discussed in this subparagraph go to the USARCS Web site at "Claims Resources," Section III. In addition, see the heading for section III of appendix A for Web sites where blank copies of the forms may be downloaded.

(1) *Completion of DD Form 1840.* The carrier must complete "Section A-General" and should note use of any continuation sheets. A continuation sheet may be used at delivery if there is insufficient room on the DD Form 1840. Such a continuation sheet should be signed by the Soldier and the carrier. The carrier should not use any other form to list damage or loss. If no damage or loss is recorded, the "Description of Loss or Damage" should state "none." Both the claimant (or the claimant's agent) and the delivering carrier's representative will complete Section B (record of loss or damage) and sign the form in blocks 14g and 15e.

(2) *Time limits on dispatch of DD Form 1840R.* A claimant must list additional shipment loss and damage noted after delivery on DD Form 1840R and present it to the claims office within 70 days of delivery. Claims personnel will ensure that the carrier's address and other information from section A on DD Form 1840 are copied onto the DD Form 1840R. Claims personnel must sign and dispatch the form and all continuation sheets to the carrier within 75 days of delivery, listing the date the form was sent. A second signed and dated copy is retained in the field claims office, and a third is returned to the claimant as a receipt.

(3) *Extension of time limits.* Pursuant to the Military-Industry Agreement on Loss and Damage Rules (posted on the USARCS Web site at "Claims Resources," III, no. 41), this 75-day period may be extended for good cause, such as the claimant's hospitalization or absence on official duty for a significant period of time that either overlaps the end of the notice period or exceeds 45 days; in such instances, claims personnel should note this on the form. Such a decision should be explained on the chronology sheet. The field claims office must assist the claimant as much as resources permit.

(4) *Proper Dispatch of DD Form 1840R.* Periodically, the carrier industry complains to USARCS that a field claims office has dispatched DD Form 1840R improperly. Most commonly, a carrier will complain that it has received multiple DD Forms 1840R with different dates in the same envelope or that the postmark date on an envelope differs by several days from the date of dispatch indicated on the enclosed form. Obviously, many of these complaints involve notices that come into the possession of claims personnel near the 75-day expiration point.

(a) Our agreement with industry requires that the DD Form 1840R be dispatched within 75 days of delivery. The General Accounting Office (GAO) and the Defense Office of Hearings and Appeals (DOHA) have consistently upheld the presumption that the date of dispatch recorded on the bottom of the form, and not the postmark date or the date of carrier receipt, is the date that determines whether the form was dispatched in time.

(b) To avoid needless litigation, a field claims office must mail each DD Form 1840R promptly on the date indicated on the bottom of the form. Moreover, the office will avoid sending multiple DD Forms 1840R with different dates in the same envelope.

(c) If a DD Form 1840R is received on or after the 70th day, and there is a fax number in block 9 of the DD Form 1840, then you must fax a copy of the DD Form 1840R to the number in block 9, and then dispatch the paper copy of the form. Fax telephone numbers may also be obtained from the Approved Carrier list on the SDDC Web site (www.sddc.army.mil). See para 11-21g(4)(d) for instructions on accessing the list.

(d) If the carrier provides a complete address in block 9 of the DD Form 1840, the claims office must send the DD Form 1840R to that address, even if that address is not the same as the corporate address or home office of the bill of lading carrier whose Standard Carrier Alpa Code (SCAC) is listed in block 11 of the DD Form 1840. Although the "To" block in Section B of the DD Form 1840R says in parentheses "Home Office of Carrier/Contractor," a carrier may designate another office to receive its claims information. If the address is incomplete, or if there is no address in block 9, then the claims office should identify the responsible carrier by referring to the SCAC code in block 11 of the DD Form 1840, or by referring to the bill of lading or service order. Once the name and SCAC of the bill of lading carrier is known, the mailing address and telephone numbers listed for the carrier can be found on the list of approved carriers on the SDDC Web site www.sddc.army.mil. At the main menu select Personal Property/POV; at next screen, under Carrier Qualification/ Performance select "Approved Carriers"). Dispatch the DD Form 1840R to the address listed by SDDC for the carrier. If an address for the bill of lading carrier cannot be found, but an address is listed for the delivering carrier/ agent in block 15c of the DD Form 1840, mail the DD Form 1840R to that address.

(e) If a carrier receives a DD Form 1840R with a postmark date after the 75th day, and there is more than 7 days difference between the dispatch date and the post mark date, the carrier may contact the claims office directly for an explanation or contact USARCS and ask USARCS to inquire on their behalf.

(5) *Dispatch of DD Form 1840R to a carrier other than the listed carrier.* If it appears that a DPM carrier other than the delivering carrier is responsible for all or part of the loss, DD Form 1840R must also be sent to the responsible intermediate DPM carrier. When a GBL is converted to storage at the owner's expense, DD Form 1840R must also be sent to the delivering carrier or warehouse firm.

(6) *Dispatch of supplemental DD Forms 1840R.* If a claimant discovers additional loss or damage after DD Form 1840R has been sent, but within 75 days of delivery of the property, claims personnel will help the claimant record the additional loss or damage on a photocopy of the original DD Form 1840R or on a blank DD Form 1840R for dispatch to the carrier. If a photocopy of the original form is used, the field claims office will mark it "SUPPLEMENTAL" and will cross out the original "Date of Dispatch", "Signature," and "Date Signed" and enter new ones. If a blank DD Form 1840R is used, the claimant will complete Section A. The field claims office will mark it "SUPPLEMENTAL" and will fully complete Section B, entering the new date signed and the dispatch date. Signed and dated copies of supplemental DD Forms 1840R will be given to the claimant and filed in accordance with standard procedures.

(7) *Review of DD Forms 1840 and 1840R by claims personnel.* The field claims office must review these forms for completeness and legibility before dispatching them. Ideally, it should do this while the claimant is still in the field claims office and can make necessary changes to the form. On both forms, the claimant should properly describe the item, list its inventory number, and fully record the nature and location of new damage, particularly when PED is involved. A thorough review when the form is received is essential to an effective carrier recovery program.

(a) *Review of DD Form 1840.* Claims personnel should help claimants clarify inadequate descriptions on DD Form 1840 and have them submit missing inventory numbers. Clarifications and corrections will be entered on DD Form 1840R. Items added to DD Form 1840 in original ink are invariably afterthoughts by the claimant, which must be entered on DD Form 1840R instead. If the claimant alleges that DD Form 1840 continuation sheets were used and this is not reflected in block 14a of DD Form 1840, the field claims office should contact the carrier. It may be necessary to list these items again on the DD Form 1840R.

(b) *Review of DD Form 1840R.* All blocks on this form must be completed. If a claim is received at the same time as DD Form 1840R, claims personnel should compare DD Form 1844 with DD Form 1840R. Reconcile discrepancies in damage descriptions between the two forms; for example, a carrier will try to deny liability if DD Form 1840R states that an item was "scratched" but DD Form 1844 states that it was "gouged." Claims personnel who discover items listed on a DD Form 1844 that were inadvertently omitted from a timely dispatched DD Form 1840R should sign, date, and dispatch to the carrier a copy of the DD Form 1844 pointing out the items omitted from the DD Form 1840R. In completing DD Form 1840R, claimants often provide second and third copies that are illegible, and they sometimes fail to turn around the carbon sheets, resulting in reversed images. In such instances, send the best copy to the carrier and attach a photocopy to the others. If using continuation pages, claims personnel must number, date, and sign them; each page should indicate the claimant's name and GBL number; and DD Form 1840R must indicate how many continuation sheets, if any, are attached.

(8) *File copies.* A signed and dated copy of each dispatched DD Form 1840R must be filed alphabetically by claimant's name in a DD Form 1840R filing system. Smaller offices may keep all DD Forms 1840R in a single file for each fiscal year, but larger offices should subdivide their files alphabetically by year. Once a claim is received, the file copy must be incorporated into the claim file. Forms for which no claim is submitted must be maintained for three years after dispatch.

(9) *When to give carrier copy.* The field claims office need not dispatch the DD Form 1840R when a carrier gives an owner a blank DD Form 1840. However, if a carrier provides its SCAC, the GBL number, or its delivery agent's address, then the field claims office should determine which carrier was responsible for the shipment or serve the DD Form 1840R on the delivery agent. Whenever possible, determine the carrier's address and dispatch timely notice to it.

(10) *Other forms for notice of loss and damage at delivery and notice of loss or damage after delivery.* The SDDC is developing a new program for the shipment of household goods and unaccompanied baggage. As part of this program new forms are being developed that will not be DoD or Army forms. If a replacement form for notice at delivery and after delivery is approved by SDDC, then the above rules will apply to that form as well, although some of the block numbers may change.

h. Processing of payment requests.

(1) Claims offices in CONUS, Hawaii and Puerto Rico will request payment of a personnel claim by transmitting a DA Form 7501, Personnel Claim Payment Report, to DFAS Rome. Claims offices must check to ensure that the claimant's social security number is properly entered on the form. In addition, if the claimant's address on the DD Form 1842 has changed, the new address should be entered on both the DA Form 7501 and corrected on the DD Form 1842. DFAS Rome no longer requires the DD1842 to be sent along with the DA Form 7501, but some OCONUS finance offices do not accept the DA Form 7501 and/or require the submission of the DD Form 1842 in addition to the payment form (usually the SF 1034). Therefore, the addresses should match in the event it is required by DFAS to make a payment. In general, the vendor pay section at the DFAS Rome operating facility will issue payments within four to six days of receipt of a properly prepared payment request. To see samples of completed DA, DD, and SF forms discussed in this subparagraph go to the USARCS Web site at "Claims Resources," Section III. In addition, see the heading for section III of appendix A for Web sites where blank copies of the forms may be downloaded.

(2) Claims offices in Europe, Korea, Okinawa, and Japan will process payments in accordance guidance issued by their respective command claims services.

(3) Claims Judge Advocates and claims attorneys should establish procedures to ensure that Payment Requests are signed and dispatched the same day that the payment is approved on the DD Form 1842. In the field office program of the current PCMS, the PF code can be entered independently of creating the DA Form 7501 or SF 1034. Therefore, to ensure processing times are accurate, the PF code should not be entered until the approving authority signs SF 1034 or DA Form 7501.

(4) Verifying payments using Standard Financial System Redesign (STANFINS SRD1) or the DFAS Web site. The STANFINS system provides computerized read-only access to the DFAS payments system that is used to pay Army personnel claims.

(a) Each field claims office using STANFINS SRD1 should be able to conduct a data query, which lets the field claims office obtain automated reports on claims payments and refund deposits.

(b) Claims offices that do not have access to STANFINS SRD1 can verify payment has been made through the Internet by accessing DFAS' Vendor Pay Inquiry System. The URL is www.dfas.mil. At the first screen click on "Money Matters," then select "Vendor Pay Inquiry System." At the next screen under Non-MOCAS system click on "Query by Contract Number." You will then have to enter a contract number, which is constructed as follows:

1. Positions 1–3 JAG.
2. Positions 4–6 Three digit claims office code.
3. Position 7 & 8 Last two digits of calendar year in which payment is made.
4. Position 9 U.
5. Positions 10–17 Last eight digits of the claim number, so if the claim number is 04–121–1234, the last eight digits of the contract number will be 41211234.
6. Enter all but the last four digits of the contract number in the block for "contract number." The last four digits are

entered in the block for "Deliver Order." As guidance on verifying payments changes it will be posted by USARCS in the claims forum on JAGCNet.

(c) The proof of payment, whether from SRD 1 or the DFAS Web site, will be printed and included in the file.

i. *Fiscal Integrity.* The centralized funding of claims operations in the Army and the scarcity of claims resources make proper management of claims funds—including recovery deposits—essential. USARCS has seen far too many cases in which field claims offices have recorded deposits inaccurately, have mistakenly deposited affirmative claims funds in recovery accounts, and have persisted in using improper fiscal year codes. These inaccuracies have a substantial impact on the recovery dollars that fund Soldier claims. USARCS uses funds deposited by field claims offices to modify or increase claims expenditure allowances. A field claims office's failure to maintain accurate deposit records harms individual Soldiers. Moreover, fiscal problems left uncorrected for several months are often extremely difficult to resolve. The claims attorney or CJA is responsible for ensuring that claims funds are properly deposited and that they do not approve payments in excess of the amount in their CEA. Field claims offices will continue to forward their CEA Status of Funds Account promptly each month as specified in AR 27-20, chapter 13 when any activity is recorded on the old personnel claims database.

j. *Updating fiscal procedures.* DFAS is continually improving and modifying its procedures and its automated systems for processing payment requests, for verification of payments, and for deposit of recovery funds. As changes are made to the above procedures, the USARCS budget office will post the changes on the claims forum of the JAGCNet and notify individual offices by e-mail. On receiving notice of a change, claims personnel should immediately change their office SOP and note the changes in the margin of this pamphlet.

11-22. Finality of settlement

A settlement agreement is not required to pay a personnel claim. It may be required only as a precautionary measure if the claim is cognizable under another claims statute. Settlement agreements may not be used as a means to prevent a claimant from requesting reconsideration.

Section III

Recovery From Third Parties

To see samples of completed DA, DD, and SF forms discussed in this section go to the USARCS Web site at "Claims Resources," Section III. In addition, see the heading for section III of appendix A for Web sites where blank copies of the forms may be downloaded.

11-23. Scope

a. The USARCS household goods recovery program pursues affirmative claims against carriers, warehousemen, or other third parties responsible for loss or damage occurring during the storage or transport of household goods and other personal property. Recovery from the carrier is based primarily on the carrier's contractual responsibility to deliver the property shipped in satisfactory condition. Under the common law of the United States, both the party that pays for a shipment, (for example, the shipper), and the owner/consignee of the property have a right to assert a claim for loss of or damage to the property that was shipped. The carrier is only liable for one payment. If the claim is asserted by the shipper, the shipper must hold any payments from the carrier in trust for the owner/consignee to the extent that the shipper has not already paid the owner/consignee. If the owner/consignee brings the claim against the carrier, the owner/consignee is bound by the terms of the contract relating to claims and carrier liability. As the United States is the party that pays for the shipment (that is, the shipper), the right of the Army to seek payment from a carrier or warehouse for loss or damage is not based on a theory of subrogation, but is a contractual claim. The Army normally does not assert claims against carriers until the Army has received a claim from the owner/consignee because the amount of the loss is not known until the owner/consignee provides information about the age and preexisting condition of the property, and proof of the repair or replacement cost. However, because claimants assign their right to file a claim against the carrier to the United States when they submit a claim (see block 16, DD Form 1842) the United States is also subrogated to the recovery rights of the Soldier or employee whose property was shipped. In very rare cases involving self-procured moves, a Soldier may contract with a commercial moving company. As the United States is not a party to such contracts, if the government pays the Soldier and seeks recovery from the contractor, our claim is purely a subrogation claim. The statutory authority for recovery claims against third parties is the Federal Claims Collection Act, 31 U.S.C. §§ 3701 through 3720E. For claims that arise out of shipments under a contract subject to the Federal Acquisition Regulation (FAR), the Contract Disputes Act controls the claims process.

b. The vast majority of recovery claims are against transportation contractors or warehouses for loss or damage to property shipped or stored under a contract with the government. However, claims office should be alert for possible recovery against third parties in other contexts. For example, a contractor hired to maintain or repair government quarters, or to maintain the grounds on an installation, may cause damage to a Soldier's property. If the contractor does not readily pay the Soldier for the damage, the Soldier may file a claim with the Army, and if the Army pays it can then seek recovery from the contractor. If a Soldier on TDY is staying at a hotel and loses property in a hotel fire, he or she may file a claim with the Army rather than wait for the determination of who was at fault for the fire. The Army would then have a subrogation claim against the hotel or any other third party responsible for the fire.

c. In order to be paid for loss or damage to goods in government funded transit or storage, claimants must prove that an item was tendered to a carrier for transport or to a warehouse for storage; that it was not returned or returned in a worse condition than when it was tendered; and the cost to the claimant of the loss or damage. This last element can be a loss of value, the cost or repair, or the cost to replace the item. The basis for successful recovery requires the government to establish a prima facie case on the same three elements of proof:

(1) *Tender*. Showing that the lost or damaged goods were received into the custody of the carrier in a certain condition. This involves identifying items by number as they appear on the inventory prepared at the origin residence or, in the case of an item missing from a packed carton, showing that a reasonable and logical relationship existed between the stated contents of the carton and the missing item. Ownership or possession must be substantiated. A personal account of the packing procedure in the claimant's own words and handwriting may be required.

(2) *Non-delivery or extent of damage*. Showing that goods were delivered in worse condition than when picked up at origin or showing that goods were not delivered. This involves identifying, by inventory number, items not received at destination or identifying how the condition of items delivered differs from the condition of those items noted on the origin inventory.

(3) *Amount of loss or damage*. Showing the value of the item lost or showing the cost to repair or restore an item to its pre-move condition.

11-24. Duties and responsibilities

The following responsibilities expand upon, or augment, those set forth in AR 27-20.

a. Claims personnel must obtain from the claimant or from the transportation office (TO) the following documents needed to process recovery actions:

(1) A copy of the bill of lading (BOL). GBL, DD Form 1164 (Service Order for Personal Property) or other document authorizing shipment or storage. See paragraph 11-25a(2), below, on where to obtain bills of lading.

(2) A copy of the origin inventory, and any related riders/exception sheets, prepared if NTS occurred.

(3) A copy of DD Forms 1840 and 1840R, or other documents giving notice of loss or damage discovered at delivery or after delivery. Such documents may be DD Form 619-1, Statement of Accessorial Services Performed, a letter from the claimants to the carrier or a notation on the inventory.

(4) A copy of the authorization from the TO allowing an extension of storage in transit at government expense, if applicable.

(5) A copy of the claimant's contract with the warehouse and a copy of any rider prepared when storage converts from government-paid storage to storage at owner's expense.

(6) DD Form 619-1, from the TO, when temporary storage is needed or when a reweigh is required.

(7) Recovery files forwarded for centralized recovery to USARCS must include a demand packet. If the claim was created on the old database, the paper file must be held until the forwarding entries (for example, transaction codes FR and FM) on that claim have been uploaded to the USARCS database. If the claim is created in Personnel Claims Management System (PCMS), the paper file can be mailed within seven days of verification of payment to the claimant. Recovery files forwarded to an overseas command claims service (that is, transaction code FE) or to another claims office (that is, transaction code FA) must include a demand packet and should be transferred within seven days of verification of the payment to the claimant. If the record was created on the old database, a transfer disk must accompany the paper file. Claims created on PCMS do not require a transfer disk.

b. Claims personnel must ensure that DD Form 1840R is properly completed and sent to the liable third party or parties within 75 days of delivery of the property. See paragraph 11-21g, above, for detailed instructions on completing and dispatching DD Form 1840R. In addition, a copy of the 1840R must also be sent to the destination transportation office for use in the carrier's evaluation as required by Part C, Appendix O, Defense Transportation Regulation, Part IV, (DOD 4500.9-R).

c. Claims personnel must inform claimants that the carrier has the right to inspect damaged goods within 45 days of delivery, or within 45 days of dispatch of the last DD Form 1840R, whichever is later, and that the claimant must retain damaged items for carrier inspection during that period. Essential items such as washing machines, dryers, or televisions may be repaired before that time, if necessary (see also paras 11-21f(6) and 11-21f(8)). Claimants should not dispose of items until authorized by the field claims office.

d. Claims personnel must ensure that repair estimates describe the specific location of damage claimed and that the same damage is claimed on DD Form 1844. For additional information regarding proper repair estimates, see paragraphs 11-14d, 11-14e, and 11-14h(1)(e), above. Claims personnel must ensure that the DD Form 1844 is properly and completely filled out. The claimant must fully describe the nature and extent of the loss or damage to each item and must enter the correct inventory numbers and year purchased. On claims against a Schedule II DPM carrier, where liability is only \$.60 times the weight of the item, claims personnel must enter the correct item weights from the Joint Military-Industry Table of Weights, insurance payments must be noted, and heading data must be entered in each block of the form. The Joint Military-Industry Table of Weights is posted on the USARCS Web site at "Claims Resources," III, no. 43.

e. Claims personnel must prepare written demands against appropriate third parties, using the DD Form 1843 with a

copy of the Federal Debt Collection Act Notice attached. No demand will be made where it conclusively appears that the loss or damage was caused solely by government employees or where a demand would otherwise be clearly improper under the circumstances. If it is determined that a demand is not required because recovery action cannot, or will not, be pursued, include a brief written statement setting forth the basis for this decision on the chronology sheet. Pursuant to the Joint Military-Industry Agreement (posted on the USARCS Web site at "Claims Resources," III, no. 39), claims of \$25 or less are not pursued because administrative costs outweigh recovery proceeds.

f. Claims personnel must immediately inform the Commander USARCS, ATTN: JACS-PCR, upon receiving information that any responsible third party is or may be involved in bankruptcy proceedings. USARCS will comply with the notice requirements for bankruptcy cases set out in DOD 7000.14-R, Volume 10, Chapter 18. Upon request by USARCS, claims against the government arising out of shipments transported by bankrupt BOL/GBL carriers should be promptly adjudicated, paid if appropriate, and immediately forwarded to USARCS for recovery action. Such files should be marked "BANKRUPT" in red on the upper left corner of the folder and should be mailed separately from other files sent to USARCS. Do not forward as "CLOSED."

g. Claims personnel must prepare and dispatch unearned freight packets in appropriate cases. See paragraph 11-36 below.

h. Claims personnel must coordinate with the local transportation office to ensure proper counseling on potential claim procedures. The installation transportation office (ITO) or Personal Property Shipping Office's (PPSO) outbound shipping counselor plays an important role in the claims process. This is the first person an owner (and a potential claimant) usually visits when preparing to ship personal property. Unfortunately, counselors sometimes do not provide owners with sufficient information or owners fail to realize its importance. To facilitate this process, a DD Form 1797, Personal Property Counseling Checklist, (sample posted on the USARCS Web site at "Claims Resources," III, no. 11), is provided to assist field claims offices in coordinating with their respective ITO outbound shipping counselors. Give a copy of this checklist to the ITO outbound shipping counselors to use each time they counsel an outbound owner. The checklist should be attached to the owner's copy of DD Form 1797, Personal Property Counseling Checklist, as an Addendum to Part VII (Liability, Claims, Protection), to help owners better understand the claims process in case they need to file a claim for personal property lost or damaged in shipment.

i. If an AAFES employee's claim is determined to be meritorious by the approval or settlement authority, transmit the entire file to the proper NAF disbursing office for payment in accordance with AR 27-20, paragraph 12-7. Thereafter, AAFES will pursue appropriate recovery on the claim.

11-25. Determination of liability

a. *Military-Industry Agreement on Loss and Damage Rules.* The Military-Industry Agreement on Loss and Damage Rules, took effect in January 1992. The purpose of the agreement is to define responsibilities and administrative rules for various aspects of the claims process. Claims personnel should study and understand this document to make recovery of claims funds as successful and expedient as possible. Questions may be directed to:

U.S. Army Claims Service
Recovery Branch (JACS-PCR)
4411 Llewellyn Ave.
Ft. Meade, Maryland 20755-5360

(1) *Examination of a bill of lading.* Domestic shipments are now transported under a standard bill of lading that resembles the GBL, but is no longer a government form. International shipments still move under a GBL (SF 1203). The GBL or bill of lading is the key document for determining which carrier will be liable for recovery of the owner's loss and damage.

(2) *Obtaining copies of bills of lading.* The claimant is normally given a copy of the GBL or BOL and should submit it with his or her claim. If the claimant does not have a copy of the bill of lading then claims offices may be able to obtain one from the destination TO, or the origin TO. An alternative, and sometimes easier way, is to access an electronic copy of the GBL from the Department of Defense Electronic Document Access (DOD EDA) Web site at <http://eda.ogden.disa.mil/>. Documents are maintained on this site are for accounting purposes only and, therefore, blocks describing the actual weight shipped and delivery information are not displayed. Permission to access electronic documents is usually coordinated between automation personnel at the post level and the DOD EDA administrators. This will allow the claims offices to view the information on household shipments that move on freight bills of lading as well as local move contracts. When requesting access, ask for permissions that will allow views of automated as well as non-automated GBLs for both freight and personal property, and contracts. Refer to the Claims forum on JAGCNet to find postings describing how to get these permissions. If TO cannot provide a copy, refer to the DD Form 1840. The SCAC code of the responsible carrier should be in block 11. The local delivery agent's name and address will be in block 15c. Usually it will be easier to contact the local agent for a copy, but if that fails, then contact the carrier whose SCAC is in block 11 for a copy. Carrier addresses and telephone numbers can be obtained from the list of approved carriers on the SDDC Web site at www.sddc.army.mil. When claims offices cannot obtain bill of lading from the claimant, the destination TO, the origin TO, or the carrier, then dispatch the recovery demand to the carrier whose SCAC is listed in block 11 of the DD Form 1840.

b. Examining an inventory. An inventory is the property owner's receipt for the goods tendered to the third party carrier or contractor. It describes in detail that property's condition at pickup. Explanations of HHG Inventory Form entries are posted to the USARCS Web site at "Claims Resources," III, no. 30.

(1) *Overflow/split shipment/partial delivery.* Occasionally, an inventory states the word "overflow" or "partial delivery" or "split shipment" somewhere on the first page. Such notations indicate that the entire shipment could not be loaded on the same truck and that a portion of goods may arrive at destination after a prior delivery of part of the shipment. This may be your first clue to look for a previous claim or to "flag" the initial claim so that the same claim number can be used should an additional delivery result in a claim.

(2) *When carriers fail to list carton size on the inventory.* Household goods carriers are required by the Tender of Service (para JJ3, Appendix B, DTR, Part IV) to list the cubic size of cartons on the inventory they prepare. Often, carriers violate that provision and fail to note any carton size on the inventory. Carton size is vital in assessing liability in claims against contractors whose liability is based on the weight of the lost or damaged item, where the Joint Military-Industry Table of Weights (posted on the USARCS Web site at "Claims Resources," III, no. 43) is still used to determine the agreed weight of specific size cartons. Some carriers insist on assigning a weight of only 25 pounds to cartons whose size is not noted on the inventory. This is the smallest size carton with the lowest liability and is not always correct. When the carrier fails to list a carton size, claims personnel should assign a size to that carton based on the type of property it contained. For example, linens are often packed in a 4.5 cubic foot carton. An unmarked carton containing linens may be assigned a size of 4.5 cubic feet with a weight of 35 pounds.

c. Problems relating to proof of tender to the carrier.

(1) *Carton capacity of compact disks.* Carriers will not list individual compact disks (CDs) on an inventory. How many CDs a carton holds will become an issue if a large number are claimed as missing or damaged. Tests by USARCS have demonstrated that 200 compact discs fit into a 1.5 cubic foot carton if they are in their original plastic containers. Many more can be in a 1.5 cubic foot carton if they are in a "photo album" container.

(2) *Proof of tender when damaged items are not listed on the inventory.* The primary means of proving an item was tendered to a carrier is a listing of the item on the inventory prepared by the carrier at origin. Small items are usually not listed individually on an inventory. However, if a large item that would reasonably be listed on an inventory is not listed, then the presumption is that the item was not tendered to and shipped by the carrier. However, we can prove tender of an item that was not listed on an inventory if we can provide a personal statement from the owner concerning the packing of the item and proof of ownership.

(a) First, the claims office must check the inventory to determine if the claimed item was listed and if so to verify not only that the correct inventory number was assigned but also that it actually described the same item claimed.

(b) If the item is not listed on the inventory, ask the claimant:

1. What makes you sure that the carrier took custody of this item?
2. What were the circumstances at the time the carrier took custody? Describe the details in writing in your own words.
3. Why did you sign the inventory if the item was not listed?
4. What evidence can you provide to prove that you owned this type and quality of item? Do you have paid receipts, cancelled checks, credit card statements or photographs?
5. Do you have personal records showing the purchase date, price, and condition of the item?
6. Can anyone else verify you owned the item(s)?
7. Do you have or can you obtain statements from these people?
8. Why did you not notice the damage at delivery?
9. What were the circumstances at the time of delivery? Describe the details in writing in your own words.
10. Did you take photographs of the damaged item at delivery or shortly thereafter? For instance, did you take movies or photographs during delivery, or during packing and placing of goods?
11. Was there any evidence of carton tampering, such as torn tape, ripped cardboard, or crushed edges or corners?
12. Did you speak to the carrier about the item?
13. Was the item placed or kept in a particular room?
14. Did you see the carrier pack the missing item?
15. What particular memories do you have that the carrier shipped the item?

(c) Obtain as much evidence as the claimant reasonably can provide to establish ownership and tender to the carrier.

(d) If possible, obtain a detailed and personalized written statement from the claimant while the claimant is still located in the area. Field claims offices are in the best position to obtain these statements and any other information that helps establish that the item was tendered but not delivered. Make it a standing office procedure (SOP) to ask claimants to prepare such a statement. These written statements greatly strengthen the Army's position in negotiating settlements with carriers or when offset becomes necessary. Explain to the claimant that this information is needed so that the claims office can recover from the responsible third party for the loss.

(3) *Standard of proof for tender of high value items not listed.* Proof of tender is needed to recover against the carrier for missing high value items such as expensive jewelry. The best proof of tender is a description of each item

on the inventory. There should also be receipts establishing purchase, an explanation of how the owner acquired the property, or photos showing it in use before shipment.

(a) Items with higher value have a higher evidentiary standard for proof of tender. Recovery on missing high value items such as jewelry is rare.

(b) At the time of the owner's counseling at the TO, the owner should be informed that jewelry and other small expensive items should be hand-carried to avoid this problem. If fine jewelry or other expensive items are to be included in the shipment, however, the owner must ensure that each item is individually recorded on the inventory. If the carrier declines to do this, the owner should add this information to the "Remarks/Exception" section found at the bottom of each inventory page. An owner who tenders a jewelry box should indicate the inventory number for it and specifically describe each expensive item within the jewelry box in the Remarks/Exception section. Occasionally, some carriers prepare, in addition to the normal household goods inventory, a high value inventory to reflect tender of expensive items. The owner should make sure that all the expensive items are listed and well described on this separate inventory. Merely listing a jewelry box is no longer sufficient to establish loss for expensive items missing from it. The inventory should list the individual items in the jewelry box. The owner should also verify that these items were received before signing the inventory at delivery.

(4) *Internal damage to electronic items.* Carriers will dispute any claim that an electronic item or appliance was damaged in shipment when there is no external damage to the item or the carton in which it was packed. They often object by stating that there is no evidence that the item was working properly when tendered.

(a) For an electronic item or appliance, proof that an item was "tendered to the carrier in good condition" means showing that it actually worked when it was given to the carrier. Unlike many other household goods items, such as furniture, the inventory prepared by the carrier will be of little use in resolving this issue. Carriers are not required to know or to note the working condition of electronic items or appliances before shipment. The Tender of Service and many decisions of the Comptroller General preclude the government from arguing that the absence of inventory notations establishes a presumption that the item was in good working condition before shipment. These decisions recognize that for both practical and safety reasons, carriers cannot be expected to plug in electronic items to see if they work. For many items, this would be especially difficult, if not impossible.

(b) To prevail on these claims, repair estimates must indicate that the internal damage was of the type that could be caused by rough handling. In addition, field claims offices must obtain proof of tender in good condition from the owner and specifically document this information in the claim file. Usually, only claimants or their families will know whether an electric item worked immediately before shipment. Ask the claimant to provide a specific statement on the item's condition at the time the carrier arrived to pack the shipment. For example, was the stereo, VCR, or computer used shortly before the move? Was the item relatively new? Had it recently been repaired? Can visitors or neighbors state the working condition before shipment? Note that such statements must not be made on mere "fill-in-the blank" type forms. The statement should be in the claimant's own words and must specifically refer to the item in question, its damage, and any surrounding conditions.

(c) Ask the owner for a detailed statement that explains the condition of the item at the time of tender. "Fill-in-the-blank" or boilerplate language and general statements that the item worked before shipment are insufficient. The claimant must describe in detail the item's condition before shipment and, more importantly, demonstrate personal knowledge that the item was in good working order before the shipment. Each claimant's statement will be unique. Although this may require more initial effort from the field claims office, it will ease not only the claims process but also the recovery process, and it will eliminate USARCS' need to seek out the claimant months, sometimes years, after delivery to obtain this information. The following is a nonexclusive list of questions that an adjudicator should resolve before deciding to pay for damage to electronic items when no clear evidence of external damage to the item exists:

1. Does a statement from a qualified repair firm specifically identify the nature and cause of the damage (beyond a statement that the item was "damaged in shipment")? Did you speak with the repair firm and, most importantly, was this recorded in the claim file?

2. Is the internal damage of the type that is likely to have been caused by rough handling (such as a cracked circuit board, loose solder points, internal parts rattling around)? Alternatively, is the damage of the type that the claimant easily could have caused (such as a burned out power supply on an item that was subjected to dual voltage, or electrical connections that have corroded during long-term storage)?

3. Is there evidence of rough handling or improper packing in the rest of the shipment (such as large furniture items broken, numerous boxes crushed, and a great deal of broken glass)?

4. Is the item relatively new in terms of its expected life? Is it covered by a warranty? Has the claimant inquired about the warranty?

5. Can the claimant provide specific circumstances to help explain the damage? How was the item packed? Who packed it? What shows that the item worked before the move?

d. *Carrier exception sheets or "riders" and non-temporary storage.* The government often issues a bill of lading authorizing a carrier to pick up household goods from an NTS warehouse in which these goods have been stored pursuant to the basic ordering agreement (BOA) found at Appendix J, DTR, Part IV (DOD 4500.9-R). The bill of lading carrier is liable for loss or damage as the "last handler" of the shipment, unless it can show that the claimed

items were lost or damaged before the carrier accepted the shipment from the NTS warehouse. To prove that loss or damage occurred before pickup, the carrier's agent(s) must provide a valid exception sheet, or rider, (see para JJ. 13, page IV-B-20, app B, DTR, Part IV).

(1) While an exception sheet signed by the carrier's agent and an NTS warehouse agent may shift liability to the warehouse, riders between two of the carrier's agents will not relieve the carrier of liability.

(2) Normally, a carrier will hire a number of different agents to perform services on a shipment. On a pickup from NTS, it may hire the NTS warehouse firm as an agent. When a carrier picks up a NTS shipment, the carrier's "primary hauling agent," or "hauler," takes items from the loading dock on which the NTS warehouse has placed them and loads them onto the truck. In some instances, a hauler will repack and re-inventory a shipment. If the hauler notices loss or damage that is not reflected as PED on the inventory, it should prepare an exception sheet and should ensure that an employee of the NTS warehouse signs and dates it. Normally, the hauler will then deliver the shipment or will place it in the carrier's storage-in-transit (SIT) warehouse closest to the shipment's destination. In the latter instance, a "delivery" or "destination" agent takes the shipment from the SIT warehouse to the Soldier's residence.

(3) The carrier's "booking agent," whose name is usually listed in parentheses under the primary carrier's name in block 1 of the BOL/GBL, SF, acts as the carrier's point of contact on the shipment. An "origin agent" normally packs up shipments at residences. Because shipments in NTS are already packed, a BOL/GBL carrier picking up a shipment from an NTS warehouse often will list its booking agent as the "origin agent" on its internal documents, even though this company may not actually handle the shipment.

(4) One carrier agent may pick up goods from another carrier agent, which temporarily stored the goods in transit. The pickup agent will probably prepare a rider to note the condition of the goods. This protects the pickup agent from being charged back by the BOL /GBL carrier for loss or damage that occurred before it took custody of the goods. In such cases, riders executed between agents of a carrier are referred to as "SIT riders." The carrier, of course, remains liable to the Army for any loss or damage that is presumed to have occurred while the shipment was in the custody of any of the carrier's agents. Claims personnel should not mistake a "SIT rider" for an NTS rider.

(5) A bill of lading carrier is relieved of liability only for loss or damage listed specifically on the exception sheet that its agent prepares when it picks up the shipment from NTS. For example, a carrier that listed only "table leg broken" on the rider would be liable for unlisted damage to the table top. Sample replies to carriers that deny liability on the basis of damage noted on a rider are posted on the USARCS Web site at "Claims Resources," III, no. 46.

(6) An exception sheet/rider is invalid unless it is signed by an employee of the NTS warehouse firm and dated. (If any sheet/rider is not signed, claims personnel should ask both the carrier and NTS warehouse why not). If both parties confirm that the exception sheets are valid, they may be accepted as proper. If the bill of lading carrier (or its agent) did not sign an exception sheet, the sheet is still valid if the carrier can produce it and the NTS warehouse does not dispute its validity.

(7) If NTS warehouse employees initial an exception sheet, instead of signing it in the space provided, the rider is invalid unless the NTS warehouse acknowledges this mark as its agent's signature. If the employee abbreviates the warehouse firm's name so it cannot be read or lists only its carrier's agent number, the exception sheet may be valid, but claims personnel will need to ensure that this is the actual rider the carrier's agent prepared when the agent picked up the shipment from NTS.

11-26. Exclusions from liability

After claims personnel have identified the responsible carrier and determined there is sufficient evidence of tender, damage in transit and the amount of damage, they may make a demand against the carrier for any items for which the liability has not shifted to an NTS warehouse or another contractor pursuant to a valid rider. However, the carrier may respond by raising a defense or exclusion that will bar holding the carrier liable. Samples of carrier defenses and corresponding issues are posted on the USARCS Web site at "Claims Resources," III, no. 46. The burden is on the carrier to prove by credible evidence that the alleged exclusion applies. Nevertheless, claims personnel should screen their files for evidence of these exclusions before asserting a demand, and modify the demand to the extent an exclusion is valid.

a. Legal exclusions. Under common law rule (see *Missouri Pacific R.R. Co. v. Elmore & Stahl*, 377 U.S. 134 (1964)) and the Carmack Amendment to the former Interstate Commerce Act (49 U.S.C. § 14706), a carrier may not be liable for transit loss or damage if it can prove that the loss was due to an act of God, an act of a public enemy, an act of the shipper, an act of a public authority, or the inherent nature of the property and can prove that there was no negligence by its employees, agents, or subcontractors that contributed to the loss.

(1) Acts of God include such events as extraordinary floods, unusually heavy rains, electrical storms, extraordinarily hot or cold weather, hurricanes, windstorms, and earthquakes. Fire is not an act of God unless it was caused by a lightning strike or occurs in the aftermath of some other event, such as an earthquake. Freezing is not generally considered an act of God for purposes of this exclusion when it occurs at seasons of the year and in parts of the country where freezing is normally expected. The same is true of hot, humid weather in tropical regions. The event must be both unusual and unexpected. For example, a flash flood that damages goods in temporary storage may be an act of God that excludes liability. But a flood that was predicted because of heavy rains may not be a valid exclusion if

the carrier had sufficient notice to move the goods before the flooding of the warehouse. The key to this exclusion is to remember that the carrier must also prove that no act of negligence by its personnel contributed to the loss.

(2) Public enemies are only military forces of a nation involved in an armed conflict. Thieves, hijackers, and rioters are not public enemies in the legal sense of this exclusion.

(3) Act of the shipper is usually raised when an item is alleged to have been packed by the owner. However, para Y1, page IV-B-13, of the Tender of Service (Appendix B, DTR, Part IV, says the carrier is responsible for all packing and must inspect all prepackaged goods. The carrier is also responsible for determining if the items must be repacked to be safe and secure. Failure to do so may be considered negligence by the carrier and, therefore, the exclusion will not apply.

(4) Acts of public authority may include such things as prolonged detention in customs or quarantines due to insect infestation, during which containers leak or are broken into. Here again, the facts must be reviewed to see if any act of negligence by the carrier contributed to the loss, such as failure to properly pack an item or failure to have the proper clearance documents.

(5) Inherent nature of the items is most often raised in commercial shipments of agricultural goods that are subject to spoilage. It rarely occurs in household goods shipments. It may arise if metal items arrive rusted. But here again, the carrier should only be excused liability if the facts establish that the carrier was not negligent in protecting the items.

b. Negotiated exclusions. The contract with the carrier and several joint military-industry agreements may also exclude all or part of the carrier's liability.

(1) *Claims for \$25 or less.* In order to save administrative costs, an agreement was made with the carrier industry that claims against carriers for \$25 or less will not be asserted and carriers will not seek refunds for less than \$25. See the Joint Military Industry Agreement on Claims of \$25.00 or Less, posted on the USARCS Web site at "Claims Resources," III, no. 39. However, as a matter of policy, the Army will not assert recovery demands for \$50 or less. See paragraph 11-35c(1), below.

(2) *No timely notice.* Under the provisions of the 1992 Joint Military-Industry Memorandum of Understanding on Loss and Damage Rules (posted on the USARCS Web site at "Claims Resources," III, no. 41) loss or damage reported to a claims office more than 75 days after delivery is presumed not to have occurred while the goods were in the possession of the carrier, unless good cause for the delay in notice can be shown. As a practical matter, the carrier usually will not be liable for any loss or damage listed on a DD Form 1840R which has no dispatch date or a dispatch date more than 75 calendar days after delivery. The carrier may be liable if the evidence shows that the owner was unable to give notice in time because of illness, official absence, or other good cause. In addition, if the evidence shows the carrier had actual notice of the loss, it may be held liable even though the DD Form 1840R was not dispatched within 75 days. Actual notice may occur when the carrier sends an inspector to the house in response to the damage noted on a DD Form 1840 and the owner shows the inspector the additional damage noted on the DD Form 1840R.

(a) Because part of the transportation on these codes of service is by the government, initial demands on carriers will be for only 50 percent of the total liability, unless the evidence clearly shows the loss occurred while the goods were in the possession of the carrier. However, if the carrier refuses to accept the 50-percent compromise offer, the full amount will be sought in subsequent collection actions by offset or against the carrier's insurer. For recovery on these types of shipments, prepare DD Form 1844 as usual. Liability is calculated in the same way as on Code 1 or 2 domestic household goods shipments. Two different sums should be shown as carrier liability at the bottom of DD Form 1844 by listing the amount of liability due under the 50-percent compromise and then listing the full amount to be offset if the carrier fails to pay. For example, "\$100 code T/\$200 Offset". This same computation should be shown in the "amount of government claim" box on DD Form 1843. If a carrier refuses to make a satisfactory settlement or fails to timely reply to the demand, forward the claim to USARCS as an impasse. The carrier's full liability will be pursued. See the Joint Military-Industry Agreement on Code 5, Code J and Code T Shipments with associated guidance (posted on the USARCS Web site at "Claims Resources," III, no. 40).

(b) Code J shipments are unaccompanied baggage shipments. Because they are relatively small shipments, the value of the items in a Code J shipment often exceeds the carrier's maximum liability of \$1.25 times the net weight of the shipment. When computing the 50 percent demand in these cases, the rule is that you will demand 50 percent of the loss, not to exceed the carrier's maximum liability. For example, on an 800-pound shipment, the carrier's maximum liability under the current GBL program would be \$1,000. If the total amount of all loss and damage was \$1,500, then the demand on the carrier would be for \$750. But if the total loss was \$2,500, then the demand on the carrier would be only the maximum contractual liability of \$1000, even though 50 percent of \$2,500 would be \$1,250. New carriers may try to argue that the demand on a Code J recovery claim cannot be more than 50 percent only of their maximum liability, because the Agreement says that the demand will be for 50 percent of the amount the Army determines to be due, and we cannot determine that more than the maximum liability is due. However, the understanding between the parties to the agreement, based on their past practice, is that the "50 percent amount" that is demanded will be 50 percent of the total loss, not to exceed the carrier's maximum liability.

11-27. Contractual limits on maximum liability of third parties

a. General. The liability of third parties for loss of or damage to personal property shipped by the Department of

Defense is usually limited under the terms of the contract. These limits may be found in the Tender of Service, the rate solicitations, the carrier's tariffs, and joint military-industry agreements. These limits may be expressed as limits on the amount payable for each item, a limit on the total amount payable on the entire claim, or both. The amount per item may be expressed as a flat rate (such as \$50 per line item for a shipment booked into NTS before 1 January 1997) or as a specific monetary amount per pound of the item or per pound of the shipment. In addition, for items shipped under an agreement that makes the carrier liable only for the depreciated replacement cost of an item, the claims services and carrier industry have developed the Joint Military Industry Depreciation Guide, posted on the USARCS Web site at "Claims Resources," III, no. 2.

b. Weight of shipment. The net weight of the shipment is normally listed in block 3 or 4 of DD Form 1840, depending on the date printed. If the net weight is missing, obtain it from the TO.

c. Types of shipment. Most carrier shipments of personal property or household goods are performed under authority of a BOL or GBL. Each BOL or GBL is a separate contract that incorporates the terms of the Tender of Service and the rate solicitation. It stipulates the method by which the shipment moves (mode of shipment). Each mode of shipment is identified by a code composed of one or two characters, either letters or numbers, in block 3 of the GBL. GBL service codes are defined in the DTR, Part IV and are posted on the USARCS Web site at "Claims Resources," III, no. 26. The carrier's maximum liability on all bill of lading and GBL shipment is \$1.25 times the net weight of the shipment. On domestic shipments, this liability may be increased if the owner elects to pay for higher liability under Option 1 or Option 2 (Full Replacement Value protection). Other shipments may be transported under the terms of a contract, such as the DPM contract or the NTS contract, that is subject to the Federal Acquisition Regulation (FAR). These contracts are usually indefinite delivery, indefinite quantity contracts (IDIQs) under which the contractor agrees to provide services as they are needed and ordered by the government. When goods are moved pursuant to one of these contracts, an order for the movement is issued on a DD Form 1164 (posted on the USARCS Web site at "Claims Resources," III, no. 9). The carrier's liability on these shipments is stated in the contract.

d. Increased release value (IRV) liability. Also referred to as "basic coverage," this is the most common carrier liability limit. The term is derived from the fact that at one time, almost all government shipments were "released" to the carrier with a presumed value, and hence a carrier maximum liability of only \$.60 per pound times the weight of the item. Although this level of liability is now found only on DPM contracts for Schedule I (origin) and Schedule II (destination) services, the term IRV is still used by some transportation offices and carriers. The carrier's maximum liability for these shipments is for the depreciated replacement or repair cost, which ever is less, not to exceed a total of \$1.25 times the net weight of the shipment. This liability is fully paid by the government, not the owner, and is no longer reflected on the BOL or GBL by any special language. If, for example, the owner of a 10,000-pound code 1 BOL/GBL shipment makes no request for extra liability coverage (no language printed on the BOL/GBL refers to a higher released valuation), the maximum amount for which the carrier could be held liable is \$12,500 (\$1.25 times 10,000 pounds net weight).

e. Increased Declared Value, Option 1. Option 1 coverage is a higher level of liability, expressed as either a lump sum or a liability per pound higher than \$1.25, where the owner pays the cost in excess of what the government pays for basic coverage. This level of coverage is usually purchased by an owner who wants protection for items with a value that exceeds a category maximum allowance or for a shipment whose value exceeds the released valuation and/or statutory maximum. Option 1 must appear on the original BOL/GBL in block 25 or block 27; a correction to the BOL or GBL correction notice is not acceptable.

f. Full Replacement Value Protection, Option 2. Option 2 is the highest level of IRV and involves a no-depreciation liability settlement feature. This type of coverage is also called full replacement cost (FRC) protection or Full Replacement Value (FRV) protection and may be purchased under the same circumstances as Option 1, or merely because the claimant does not wish to have the replacement cost of destroyed or missing items depreciated to their fair market value.

(1) Option 2 must appear on the original GBL in block 25 or block 27; a GBL correction notice is not acceptable. Option 2 may be shown as a lump sum (example: "Option 2: \$50,000") or as a multiple (example: "Option 2: \$3.50 times the net weight"). Under Option 2, the carrier's maximum liability for a single item is the item's repair cost or undepreciated replacement cost. The minimum coverage available under Option 2 is \$21,000, or \$3.50 times the net weight of the shipment, whichever is greater.

(2) An owner who chooses Option 2 coverage must initially file a claim with the carrier; allowing the carrier the right to repair or replace items (see also paragraph 11-21b (3)). The government will accept a claim only if the carrier denies it, if delay in settlement with the carrier would cause hardship, or if the carrier fails to settle the claim satisfactorily within 30 days. If a claim is submitted to the government, normal depreciation and the rules on maximum allowances are applied to our payment to the claimant.

(3) On our recovery claim, we will assert a demand for the full, undepreciated replacement cost for any item that was lost or destroyed (that is, the repair cost exceeded replacement cost). However, in this type of claim, special care must be used in computing the carrier's liability. In general, the guidance in the following paragraph should be followed. But remember that when the Army computes the replacement cost, we use depreciated replacement cost to determine if an item can be economically repaired. On claims from Option 2 shipments, the carrier is liable for the undepreciated replacement cost. Consider, for example, a damaged television set that has a depreciated replacement

cost of \$100, an undepreciated (i.e., new item) cost of \$300, and repair cost of \$250. The Army would consider the item "destroyed" because the repair exceeded the depreciated replacement cost and we would only pay \$100 to the claimant. But the carrier under Option 2 would not consider this item destroyed because it can be repaired for less than the cost of a new item. Therefore, for an item such as this, the demand on carrier would not be for the \$300 replacement cost, but for the \$250 repair cost.

g. Computing carrier liability. In completing the "Carrier Liability" column of DD Form 1844 (See sample completed DD Form 1844, posted on the USARCS Web site at "Claims Resources," III, no. 18) ignore item weights and enter the amount adjudicated on each item for which the carrier is liable. Refer to the Joint Military-Industry Depreciation Guide or the NTS Depreciation Guide (both on the USARCS Web site) to apply the carrier rate of depreciation on lost or destroyed items, as this rate may differ from the rate used in determining the payment to the claimant. Where the government payment was limited by application of a maximum allowance (or by depreciation), enter the item's full, substantiated value. (Note, however, that the head of the ACO may waive the maximum allowance in Option 2 claims if it is clear that the Army will be able to recover the full amount of the loss from the carrier). Total the amounts for which the carrier is liable in the "Carrier Liability" column. If the total exceeds the maximum carrier liability for the entire claim, enter the maximum carrier liability on DD Form 1843 as the amount demanded. Do not change the total of the amounts for which the carrier is liable on the DD Form 1844 however.

(1) The claimant should be informed that any uncompensated loss may be reimbursed after recovery action against the carrier is completed. Mark Option 2 files forwarded for centralized recovery should be marked "OPTION 2: FRC" in red on the upper left corner of the manila folder. Option 1 files forwarded for centralized recovery should be marked "OPTION 1." If you think the claimant may be due additional recovery money, the words "CLAIMANT DUE CARRIER RECOVERY" must be added.

(2) The Army's recovery demand may exceed the amount the Army has paid the claimant because a payment was limited by a maximum allowable limit, or the loss included items held for resale or used in connection with a private business. The claimant is due any money recovered from the carrier that is in excess of the amount paid to the claimant by the Army and by private insurance. On those claims, forward the file to USARCS for centralized recovery and mark the outside front cover of the claim file with the words "CLAIMANT DUE CARRIER RECOVERY" See para 11-29, below.

h. Non-temporary storage (NTS) contractors. There are two types of NTS shipments: a direct delivery from NTS by the company that stored the property and a delivery by a bill of lading carrier from a NTS warehouse. Direct deliveries of household goods from NTS are often misinterpreted as local moves. It may be difficult to tell the difference between the two, since a shipment delivered from NTS by the warehouseman is usually also a short-distance (local) move. The type of contract involved determines whether the shipment is a local move, a direct delivery from NTS, or a carrier delivery picked up from NTS.

(1) *Direct delivery by non-temporary storage warehouse.* NTS of household goods requires completion of a DD Form 1164 to accomplish the "handling-in" portion of the shipment under the provisions of the Basic Ordering Agreement (that is, contract). The goods are usually stored for a period of usually six months to four years, although shipments can remain in storage longer than four years if an owner's overseas tour is extended or if the owner is given another overseas assignment. The "handling-out" and post-storage services are accomplished by a supplemental service order. These are usually short-distance moves processed under the authority of at least two documents: the initial service order and the supplemental service order. The BOA for shipments booked into storage prior to 1 January 1997 states that the contractor shall be liable "in an amount not exceeding fifty dollars (\$50) per article or package listed on the warehouse receipt or inventory form" (that is, \$50 per inventory line item). A schrank is an exception to this rule; maximum liability for a schrank is \$50, no matter how many lines are used on the inventory. On all shipments booked into storage on or after 1 January 1997, warehouse liability is \$1.25 times the net weight. Claims arising from loss or damage caused by a single contractor that was responsible for the pickup, NTS, and delivery of the shipment will be handled entirely by the field claims office. (However, under a current test program, the Southeast Regional Storage Management Office (RSMO) will handle the complete recovery process against warehouses under its jurisdiction.) This includes pursuing offset action through the appropriate RSMO. Contact addresses and geographical areas of responsibility are posted on the USARCS Web site at "Claims Resources," III, no. 52. NTS contractors are required to maintain insurance coverage; therefore, if an NTS contractor is no longer in business or is bankrupt, forward the claim file to USARCS for collection from the insurer.

(2) *Bill of lading carrier delivery from NTS.* DD Form 1164 is also used for "handling-in" of the goods into the warehouse. When storage ends, if the "handling-out" and post-storage services are accomplished by issuance of a bill of lading, it may be issued to a different company or, in some cases, to the same company that stored the goods. These may be local or long-distance moves processed under the authority of two documents: the initial service order and the bill of lading. Liability is assessed entirely against the delivering carrier at the appropriate rate for the code of service involved, unless the carrier prepares an exception sheet (rider) noting damage or loss at the time the goods are picked up from the warehouse. A warehouse representative must date and sign the exception sheet. An exception sheet should be prepared by the bill of lading carrier that picks up the goods from NTS even if that carrier is the same company that stored the goods. This is necessary to relieve the carrier from liability at the carrier rate and revert to liability at the warehouse storage rate. If a valid exception sheet exists, liability for items noted on it is assessed against the NTS

warehouse at the appropriate rate depending on when the shipment was booked into storage. (See para 11–27h (1), above.)

(3) *DPM contractor delivery from NTS.* Goods may be delivered from an NTS storage facility using the DPM process. In most cases, these will be shipments picked up and delivered locally or within the region under Schedule III of the contract. On such local moves, the carrier's liability will be \$1.25 time the weight of the shipment. However, it is possible that the goods will be ordered out under Schedule II of the contract. In that case, the delivery carrier will be liable only for \$.60 times the weight of the lost or damaged item, unless the loss is due to negligence.

11–28. Settlement procedures in recovery actions

The goal of the recovery program is to recoup the carrier's full liability, subject to the maximum limits on carrier liability discussed above. The most efficient way to achieve this goal is a direct settlement with the carrier that is acceptable to both parties.

a. Demand packets. A demand is a monetary claim against a carrier, contractor, or insurer to compensate for loss of or damage to personal property during shipment or storage. DD Form 1843 is used as a demand letter against a third party and must be accurately and completely filled out (a sample completed DD Form 1843 is posted on the USARCS Web site at "Claims Resources," III, no. 18). The demand packet is a group of documents stapled together and sent to the liable third party. Do not use original documents. Mail demand packets in official DA envelopes. Prepare an individual demand packet for each party who is liable. Do not prepare a demand packet when a claim file has been closed or when potential recovery is \$25 or less (see para 11–26b(1), above) or less. In this case, note the reason for closing on the chronology sheet, enter the closure code in the recovery screen, mark the outside of file folder "CLOSED," and forward the file to USARCS. Affix the demand packet to the left inside cover on top of the file copies of these documents (opposite the side bearing claimant's complete name and file number). A demand packet will consist of the following documents in descending order:

(1) Original DD Form 1843, with the Federal Debt Collection Act notice attached and referenced in block 9, Remarks.

(2) The GBL or bill of lading and any related correction forms.

(3) Copy of DD Form 1840/1840R, or other SDDC-approved forms for notice of loss or damage at deliver or notice of loss or damage after delivery.

(4) Copy of DD Form 1164, if applicable.

(5) Copy of DD Form 1844.

(6) Copy of DD Form 1841, if prepared.

(7) Copies of all repair or replacement estimates.

(8) Copies of all other supporting documents necessary to establish how the items were lost or damaged and the amount of the owner's loss.

b. Dispatch of demand packets. Unless there is a specific reason to expect a request for reconsideration on a claim, area claims offices in the United States and Puerto Rico will send demand packets on the following claims directly to the third party not more than seven days after settlement.

(1) Claims arising out of domestic or international bill of lading shipments where the amount of the demand is \$500 or less. Claims offices that believe they have the staff to handle all recovery demands on bill or lading and GBL claims, regardless of the amount of the claim, may request authority to assert and settle all bill of lading/GBL recovery claims from the Commander USARCS by submitting a written request with justification through the Chief, Personnel Claims and Recovery Division, USARCS.

(2) Direct deliveries from NTS by the NTS contractor, regardless of the amount of the demand.

(3) The DPM shipments when the claim is against either the outbound (Schedule I) or inbound (Schedule II) services contractor, regardless of the amount of the demand.

(4) The DPM shipments when claim is against intra-city, intra-regional, or local move contractor under Schedule III, regardless of the amount of the demand.

c. Carrier response to Army demand. The claims and liability sections of all DOD transportation and storage contracts contain a provision on the time that a contractor has to pay, deny, or make a final written offer in response to a claim. Bill of lading/GBL carriers, DPM contractors, and NTS contractors have 120 days from receipt of our demands to settle claims. The Global POV Contract (GPC) contractor has 60 days, and future programs being developed by SDDC may reduce the time to settle from 120 to 60 days. USARCS will publish information on time limits for new contracts or changes in time limits on existing contracts. But field offices must update their recovery SOPs to reflect any new or changed time limits for carrier responses. PLEASE NOTE: Under the provisions of Part IV, Joint Military-Industry Memorandum of Understanding on Loss and Damage Rules (posted on the USARCS Web site at "Claims Resources," III, no. 41), if a DPM, NTS, BOL, or GBL contractor submits a counteroffer within 90 days of receipt of the government demand, the claims office must make a written reply to the offer, if it is not accepted, before an offset can be initiated. As a practical matter, claims offices should reply to all counteroffers and denials, as the government response to the carrier's offer or denial may convince the carrier of its mistake and lead to a settlement.

Normally, one rebuttal to a third party's denial or counteroffer is sufficient unless new arguments are raised or new evidence introduced.

d. Acceptance of checks. Immediately deposit checks received for the exact amount demanded from third parties. If a carrier or contractor forwards a check for less than the amount demanded, review the carrier's arguments against liability to determine whether they are acceptable. If they are valid in the light of all evidence, make appropriate corrections in the claim file and the unearned freight packet, deposit the check, record the deposit in the claim record in the PCMS database, and dispatch the unearned freight letter, if applicable. Follow guidance in paragraph 11-28m for disposition of records respective of the database used to create and store the electronic file.

e. Counteroffers. If a third party offers to settle the claim for less than the initial demand, review the arguments for reducing liability to determine whether they are acceptable. If they are valid in the light of all evidence, make appropriate corrections in the claim file and the unearned freight packet and accept the offer. Inform the carrier that offset action will commence if it does not submit a check for that amount within 45 days or the end of the contractual time period for settlement, whichever is later. If a release was included, sign, date, and return it. Suspend the file for 45 days or the end of the contractual settlement period, whichever is later. If the carrier submits a check in an acceptable amount, deposit it, record the deposit in the claim record in the PCMS database, and send the unearned freight letter, if applicable. Then enter an FF transaction into the database, mark the front upper left corner of the file as "CLOSED." If the carrier does not submit a check in the proper amount within the specified period, forward the file to USARCS (or to the appropriate contracting officer) for offset action. Mark such files forwarded to USARCS as "IMPASSE" in the front upper left corner, record an FI transaction in the database, and change the Group. Follow guidance in paragraph 11-28m for disposition of records respective of the database used to create and store the electronic file.

f. Unacceptable checks and offers, BOL/GBL claims. If a third party's basis for denying liability is not valid for any or all items, return any unacceptable checks, explaining why the check or offer is rejected, and request the correct amount. If a release was included, amend it to the revised amount and sign, date, and return it. If the contractual period for settling the claim (for example, 120 days from receipt of the demand) has not yet expired, warn the third party that the claim will be forwarded for offset action if a check for the amount requested is not received within the end of the contractual settlement period. If you believe that there is insufficient time for the carrier to respond before the end of the contractual settlement period, you may as an alternative give the carrier 45 days to reply. Suspend the file for the appropriate period. If a check in the proper amount is received, deposit it, record the deposit in the computer, and dispatch the unearned freight letter, if applicable. Then enter an FF transaction into the database, mark the front upper left corner of the file as "closed." Follow guidance in paragraph 11-28m for disposition of records respective of the database used to create and store the electronic file. If a check in the correct amount is not received within the suspense period, and the claim is against a BOL/GBL carrier, forward the file to USARCS (or to the appropriate contracting officer) for offset action. Mark such files forwarded to USARCS as "IMPASSE" on the front upper left corner and record a FI transaction on the database. Follow guidance in paragraph 11-28m for disposition of records respective of the database used to create and store the electronic file. (In PCMS the upload is instantaneous and the file should be forwarded as soon as the forwarding code has been entered and the DFAS comeback voucher is received.)

g. Unacceptable checks and offers, non-bill of lading/GBL claims. If the claims is against a DPM, NTS or other contractor whose contract is subject to the Federal Acquisition Regulations and the Contract Disputes Act, prepare a Claims Memorandum for the appropriate contract officer, explaining the factual and legal basis for the contractor's liability, attach supporting documents as exhibits and forward the memorandum, exhibits and the claim file to the contracting officer with a request that the contracting officer collect the amount due by administrative offset. Be sure to include the Army recovery claims line of accounting number in the memorandum. Prior to sending the request, find out from the contracting officer if you can retain the original file and only send a copy of the file or if the contracting officer will insist on receiving the original file. If the contracting officer requests the original file, you should retain a copy until final action is complete.

h. No response from carrier. If a carrier fails to respond to a demand within the contractual time period, area claims offices should not send a reminder to BOL/GBL carriers whose claims will be sent to USARCS for offset. The front folder of the claim should be marked "IMPASSE - NO RESPONSE." Enter the FI code in the appropriate database and follow procedures outlined in paragraph 11-28m for disposition of records respective of the database that was used to create and store the electronic file. On receipt at USARCS, the Recovery Branch USARCS sends the carrier the standard letter to a carrier which has not responded to an area claims office's demands. The letter advises the carrier that a claim has been forwarded as an "Impasse - No response," and that its failure to pay, deny or make a final written offer is a breach of an important contract provision. It then asks it to promptly notify USARCS if the failure was due to some administrative error. By centralizing this notification process, USARCS is able to track those carriers that routinely fail to respond to demands, and can differentiate such carriers from those who may have an occasional administrative problem. It then permits USARCS to assemble complete files that will support action by SDDC to suspend or terminate habitually unresponsive carriers from the program.

i. Stale-dated checks. Some carrier checks are valid only if cashed by a certain date, usually 60 or 90 days after issuance. To avoid complications caused by checks becoming "stale dated," the following rules apply:

- (1) Return insufficient checks to the sender before forwarding files to USARCS for offset.
- (2) DO NOT include checks in files forwarded to USARCS.

- (3) DO NOT accept partial checks and then send the file to USARCS for offset of the balance.
- (4) Affix the demand packet to the left inside cover on top of the file copies of these documents (opposite the side bearing the claimant's complete name and file number).
- (5) DO NOT request files be returned from USARCS for deposit of checks received after the file leaves the claims office.
- (6) If a check is received after dispatch of the file to USARCS, telephone the Recovery Branch, (301) 677-7009, ext 421 (CONUS) or ext 457 (OCONUS) and determine if offset has been initiated. If it has, return the check to the carrier. If it has not, you may be instructed to send the check to USARCS. However, if the check is about to become stale, you may be directed to return it to the carrier, with a request that it be reissued and sent directly to USARCS.
- (7) Either deposit or return all checks within 30 days of receipt and ensure office procedures require that all checks are handled as 30-day suspense items.

j. Denials. Review the third party's basis for denying liability in light of all the evidence. If claims personnel agree with the third party's denial and decide to terminate recovery action, the reasons for this determination must be noted on the chronology sheet or a Memorandum for Record in the file. Inform the third party in writing that denial was accepted. Mark the front upper left corner of such file "CLOSED." If the claim was processed in the old personnel claims database, access the GBL Recovery screen and select the appropriate closure code from the Closure Code menu. Access the Transactions screen and enter the FF code that will retire the file. Hold the file for 30 days or until the next upload is completed before forwarding to USARCS. If the claim is processed on the PCMS, enter an FF code in the Status field. Save the file, access the Closure Code from the Claim Details screen, and select the appropriate code for closure. Do not hold the file but forward the file for retirement in the normal course of business.

k. Depreciation on recovery demands. In determining payments to claimants, apply the depreciation rates from the ALDG, posted on the USARCS Web site at "Claims Resources," III, no. 1. In determining the amount of recovery from third parties, however, apply the rates from the Joint Military Industry Depreciation Guide (posted at "Claims Resources," III, no. 2). If Non-Temporary Storage (NTS) was involved, it may be appropriate to apply depreciation during the period of storage using the rates contained in the Non-Temporary Storage Depreciation Guide (posted at "Claims Resources," III, no. 3).

l. Highlights of the Salvage Memorandum of Understanding. In April 1989, the military services entered into a Memorandum of Understanding (MOU) on salvage with the carrier industry. This MOU, hereafter be called the Salvage MOU, is posted on the USARCS Web site at "Claims Resources," III, no. 42. All PC and recovery personnel must read it and be familiar with all of its rules. On shipments delivered in the United States, if carriers have paid or agree to pay the depreciated replacement cost or full replacement cost (new-for-old), then carriers have a right to pick up destroyed items. The carrier will pick up these items directly from the claimant. If the claimant refuses or cannot furnish a salvageable item to the carrier, the carrier may deduct 25 percent from the depreciated replacement cost that it owes the government. This is a standard rate agreed to in the MOU and does not depend on the actual salvage value of the item.

(1) The carrier must pick up items at the claimant's residence, or other location acceptable to the claimant and the carrier, not later than 30 days after receipt of the government's claim against the carrier. The carrier forfeits its salvage rights if it does not vigorously attempt to collect the items within this period.

(2) As a convenience to claimants, carriers may be permitted to pick up salvageable items before the recovery claim has been settled. Recall that carriers usually have 120 days to settle recovery claims, but only 30 days from receipt of the demand to pick up salvage items. If a carrier has picked up an item for salvage but then later is found not to be liable for the item, the office asserting the recovery demand will make appropriate arrangements to resolve the situation, keeping in mind the true value of the damaged item and the cost to the government to regain the item. If a claimant wishes to retain a destroyed item, a reasonable salvage value will be deducted from the amount otherwise payable at the time the claim is adjudicated. The carrier has no right to pick up items for which salvage value has been deducted.

(3) Destroyed items involving application of a maximum allowance are handled on a case-by-case basis. Even if the government has not fully compensated the claimant for the full value of an item to which a maximum allowance has been applied, the carrier has salvage rights in the item if the carrier will pay the full-depreciated replacement cost for the item. However, exercising that right depends on the carrier paying the full amount of the loss.

(4) If the carrier informs the installation claims office in a timely manner that the claimant has refused to allow pickup of a salvageable item, the claims office will contact the claimant and explain the carrier's rights. If the claimant continues to refuse to allow the carrier to pick up the item or discards the item without authorization to do so and, as a result, the carrier's liability for the item is reduced by 25 percent, then the item's salvage value may be collected from the claimant. The CJA or claims attorney has authority to waive collection action or to assess a lesser salvage value when circumstances warrant but will fully explain any such action on the chronology sheet.

(5) If the carrier informs the claims office in a timely manner that it has been denied the right to pick up a salvageable item (hazardous items are not salvageable and may be disposed as prescribed in paragraph 11-14j (2), above), the carrier will be liable only for 75 percent of the item's value rather than 100 percent, except as provided in para c of the Salvage MOU.

(6) Recovery demands are sometimes asserted for amounts in excess of the carrier's maximum liability in claims in which the carrier would be entitled to salvage. If such a claim involves both lost and damaged items, as well as items that are destroyed (that is, delivered, but the cost to repair damage exceeds the depreciated replacement value of the item), then the carrier's liability will be applied first to the lost items, and then to items for which the repair cost has been paid. Only when the carrier has paid for all of those items will any amount paid by the carrier be considered payment for items that were destroyed.

(7) When a field claims office settles a claim in which goods were delivered in the United States, the claimant was paid the full value (that is, depreciated replacement cost) for an item, and the carrier is liable at the rate of \$1.25 or more, the carrier may have the right to claim salvage. In those cases, field claims offices will include a notice in the claims settlement letter that is sent to the claimant, warning the claimant to retain items for which they were paid the full value (that is, depreciated replacement value) for at least 90 days to allow the carrier to claim its salvage rights. The claimant should be advised to contact the claims office if he or she has not heard from the carrier within that time. The claimant should not be told to dispose of the item after 90 days.

m. Property recovered after the claim is paid. See paragraph 11–16, above.

n. Disposition of forwarded files. On 15 August 15 2005, USARCS deployed the new Personnel Claims Management System (PCMS). Claims filed on or after that date should have been logged into PCMS. Prior to that date claims were logged into and managed on the personnel claims database. Each field office had a stand-alone version of the personnel claims database. The personnel claims database fed data via monthly uploads to the corporate database, known as HQDB, maintained by USARCS. For technical reasons, related strictly to the programming requirements of the two databases, paper files could not be received by USARCS until the monthly upload took place. For the same reason, transferred paper files could not be received without a floppy diskette that contained a copy of the electronic file. Because there are still active files on the old personnel claims database, these requirements remain in place for that system until the remaining files on it are retired or USARCS terminates the requirement. The current PCMS replaced both the field office databases and the Headquarters Database, which means claims office personnel at every level are using the same system. This "merger" eliminated the need for monthly uploads of data to USARCS and transfer disks. Therefore, the files may be forwarded to USARCS as soon as the field claims office receives verification that the claimant has been paid.

(1) Changes made to files in the old personnel claims database. Any changes to files created in the old personnel claims database must be held until the office's PC and recovery claims data for that month is uploaded to USARCS' HQDB.

(a) All transactions to a file and markings on file folders should be completed according to their status in accordance with paragraphs 11–28a through k, above. Once the upload is complete and any upload errors are corrected by the field office, forward the files to higher headquarters as appropriate.

(b) The FE, FA, and TA transaction codes entered in the old personnel claims database prompt the user to create an electronic copy of the claim record onto a floppy diskette. The diskette must accompany the paper file to the receiving office so that the electronic file can be copied into its database. Otherwise, the receiving office will be unable to perform data entry to the electronic record.

(c) The FI, FR, FF, and FM transaction codes are held for 30 days or after the upload is complete, whichever is first, and marked according to guidelines set forth in this chapter.

(2) Changes made to files in PCMS. Prior to forwarding, insure the paper file folder has been marked and the electronic record contains accurate data entry as directed in paragraphs 11–28a through k by changing the Status code, Group, and Owner and any other fields identified in the User Guide. Once these changes are made, the files should be mailed to the higher headquarters without delay. There is no requirement to create a floppy diskette in PCMS.

11–29. Reimbursements to claimants and insurers from money received from third parties

a. Claimant's application of a maximum allowance. The prohibition against paying for items purchased or used for a private business, and the requirement to apply depreciation on Option 2 and other claims on which the carrier is liable for the Full Replacement Value of lost items, sometimes limits the amount of compensation we can pay a claimant, leaving the claimant with an uncompensated loss. However, claims personnel will assert claims against third parties for the full amount of the claimant's loss, up to the limit of the third parties' maximum liability. If the amount recovered on the claim exceeds what the Army paid the claimant, the claimant or the claimant's insurer may be due reimbursement.

b. Claims without private insurance. On claims without private insurance payment, any amount recovered for an item in excess of what the government paid the claimant will be reimbursed to the claimant. Such files should be marked "CLAIMANT DUE CARRIER RECOVERY" in red. DO NOT promise the claimant that an additional payment is due; rather, inform the claimant that recovery from the carrier depends on the amount and quality of the evidence the claimant provides and that the actual recovery may be less than anticipated. The claimant should further be told that considerable time will elapse before recovery is effected and before any possible reimbursement can be made. The claimant should be told to notify USARCS of any change of address or phone number so any reimbursement due can be made expeditiously after recovery is completed. Such claims should be processed for recovery action as quickly as possible. If private insurance has paid part of a claim, the claimant is only entitled to disbursement of

funds recovered for an item if the amount recovered exceeds the combined payments by the Army and private insurance to the claimant for that item. Remember that all claims involving a payment by private insurance must be forwarded to USARCS for centralized recovery, except DPM claims, which must be forwarded to USARCS after recovery so that USARCS can process the reimbursement (see para 11–31a(3), below). On other claims, if the claimant is due part of the amount recovered from the carrier, forward the claim to USARCS for centralized recovery.

c. Private insurance. When a claimant has purchased a private insurance policy covering the shipment or storage of property and the insurance company pays all or any portion of the value of items lost or damaged, the insurance company is entitled, to the extent of its payment, to reimbursement of a pro rata share of the amount recovered on such items. Field claims offices will compute the third party's liability based on the highest amount paid to the claimant by the government and/or the claimant's insurer on a line-by-line basis for each item involved. Remember, however, that carrier liability is based on the depreciated replacement cost or the repair cost, whichever is less, except on shipments with FRV liability under Option 2. Therefore, if private insurance paid more than the depreciated amount that the government would have paid (or has a hold back amount that will be paid once the item is replaced), the amount of the demand against the carrier must be limited to the depreciated replacement cost under the depreciation rates in the Depreciation Table, posted on the USARCS Web site at "Claims Resources," III, no. 2. Once the carrier liability is computed, forward the file to USARCS for recovery and USARCS will compute and reimburse the insurer's pro rata share after USARCS has completed recovery.

11–30. Privately-owned vehicle recovery

All recovery claims against the Global POV Contract (GPC) prime contractor or against an ocean carrier for loss or damage to POVs during shipment or storage at government expense will be forwarded to the appropriate overseas command claims service, to USARCS, or to a CONUS office designated by USARCS to handle recovery claims from claims offices in a specific region. Area claims offices and overseas command claims services may pursue recovery claims for damage to a POV by other contractors (for example, paint overspray, objects thrown by lawn mowers); against local contractors who store a POV during an operational deployment under a local contract; or against third parties who are responsible for damage to a POV while it is being driven by the claimant to or from a VPC in conjunction with a PCS move.

a. Overseas command claims services and CONUS offices designated by USARCS will assert claims against the primary contractor under the Global POV Contract (GPC). If the contractor provides evidence that all or part of the damage occurred while the POV was in the possession of the ocean carrier, the claim will be forwarded to USARCS for assertion of a claim against the ocean carrier after the GPC contractor has settled any claim for loss that is its responsibility. All impasse claims will be forwarded to USARCS for consideration of collection by administrative offset.

b. The USARCS has designated a small number of claims offices to process POV recovery. Refer to USARCS delegation of authority published in the Claims Forum on the JAGCNet and on the USARCS Web site for these locations. Transfer files in accordance with paragraph 11–31d using the FA forwarding code. Because only a few offices process POV recovery claims, USARCS will provide specific guidance on the recovery process by disseminating and occasionally updating a model POV recovery SOP.

c. Claims for reimbursement of rental car expenses because a POV was not delivered by the Required Delivery Date (RDD) are not payable under this chapter. However, under the provisions of Joint Federal Travel Regulation (JFTR), paragraph 5410D, Soldiers are entitled to payment of not more than \$30 a day for not more than seven days as compensation for rental car expenses if their POV is not delivered on the RDD. This payment can be obtained through DFAS. There is no similar provision in the Joint Travel Regulations (JTR) for civilian employees. However, civilian employees who are entitled to travel by POV for the convenience of the government from the VPC to their duty station and who are delayed at the VPC location for a short while to await late delivery may be entitled to per diem during the waiting period under the provisions of JTR, paragraph C5228.

11–31. Centralized recovery program procedures

a. Centralized recovery actions, United States. Under the Centralized Carrier Recovery Program, claims offices in the United States and Puerto Rico will forward the following types of claims to USARCS for dispatch of demand packets:

- (1) Any recovery claims against a BOL/GBL carrier for more than \$1,000.
- (2) Claims from BOL/GBL shipments involving liability of more than one-third party. This category includes claims involving both a BOL /GBL carrier and an NTS warehouse. It also includes GBL shipment claims involving more than one carrier, for example, when a GBL shipment in SIT converts to storage at the owner's expense and is later delivered out under a service order. In both of these cases, the delivery carrier may note missing items or new damage on a rider to the inventory and this rider, if properly executed, will shift liability back to the warehouse. However, this category of claims should only be forwarded to USARCS when the ACO is aware of a rider before the recovery claim is asserted. If the rider does not become known until the carrier responds to the recovery demand, and the claim is otherwise one that the ACO would assert, the ACO should complete recovery against the carrier and then assert and process a recovery demand against the warehouse.

(3) All claims, except DPM claims, on which the claimant's private insurance company has paid part of the claimant's loss. DPM recovery claims asserted against the origin or delivery contractor that include payment by a private insurance company will be processed to completion by the appropriate field office. Once recovery has been completed and the funds deposited, the file will be forwarded to USARCS for processing the pro rata distribution of the recovery funds to the private insurer.

(4) Claims for mobile home shipments, which are identified by "code S" in Block 2 of the GBL.

(5) Claims involving a bankrupt or uncollectible GBL carrier. USARCS will send a message to all claims offices and post a notice on the claims forum of the JAGCNet, or in other electronic media, as soon as USARCS receives notice that a carrier, warehouse, or freight forwarder has filed a petition in U.S. Bankruptcy Court under either chapter 7 or chapter 11 of the Bankruptcy Code. Under the provisions of the Bankruptcy Code, an automatic stay against all collection actions is imposed as soon as a company files a bankruptcy petition. Any entity that attempts to collect on a debt after the effective date of the stay is subject to criminal and civil penalties. So as soon as an ACO receives notice that a carrier has filed a petition in bankruptcy court, that office should immediately return all checks from that carrier that have not yet been deposited, recall all recovery demands, and should not dispatch any further demands. If notice did not come from USARCS, the office should notify USARCS. Area claims offices will be directed by USARCS to forward all claims from BOL/GBL carriers to Recovery Branch, USARCS. Recovery from local contractors that have filed for bankruptcy must be pursued through local contracting offices.

(6) Claims involving single incidents that result in damage to more than one shipment (such as defaults, warehouse fires, floods, and break-ins).

(7) Claims for accompanied (checked) baggage against commercial air, train or bus companies or against AMC chartered air carriers.

(8) All claims against airlines for loss or damage to checked or carried on luggage.

(9) All recovery claims against mobile home transporters.

b. Centralized recovery actions, overseas offices.

(1) *European offices.* All offices within the operational control of the USACSEUR will forward recovery claims arising out of DPM shipments, POV shipments or storage, unaccompanied baggage shipments (SDDC codes of Service 7, 8, and J), and accompanied (checked) baggage to the Recovery Branch, USACSEUR, to the address shown below following procedures specified by the Chief, USACSEUR. Once payment to the claimant is confirmed, enter the FE code in the database for files sent to USACSEUR. For claims created in the old personnel claims database (system used prior to August 15, 2005), include a transfer diskette with the claims data in the file. For all household goods shipments (SDDC codes of shipment 3, 4, 5, 6, and T) recovery files, enter the FR code and forward to USARCS after 30 days or the next completed upload, whichever comes first. Claims processed in the PCMS do not require any holding period or transfer diskettes.

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(2) *Korea and Japan.* Claims offices in Korea will forward all recovery files to the Office of the Judge Advocate, U.S. Forces Korea (Claims) (FKJA-CL) under procedures specified by that office. In addition, FKJA-CL receives all checked baggage recovery claims, and recovery claims on coded shipments except local and DPM shipments from U.S. Army Japan (Camp Zama) and 10th Area Support Group Claims Processing Office (Okinawa). Enter the "FE" code in the database for files sent to FKJA-CL. Refer to guidance in paragraphs 11-28m and 11-31d(1)(b) for disposition of files.

c. File format.

(1) A diagram showing how files should be assembled is posted to the USARCS Web site at "Claims Resources," III, no. 44. When forwarding a file to USARCS or a command claims service for recovery, affix the following documents to the left inside cover (opposite the side bearing the claimant's complete name and file number) in descending order:

(a) The demand packet, consisting of the original DD Form 1843 (sample completed form posted on the USARCS Web site "Claims Resources," III, no. 17) with dispatcher data blocks (signature, telephone number, and "dispatch date") empty; copies of DD Forms 1840 and 1840R; copy of DD Form 1844, any statements by member, copies of any estimates; copies of the BOL/GBL or DD Form 1164, DD Form 1841; (completed samples of all posted on the USARCS Web site at "Claims Resources," section III) and any other documents appropriate to support the claim against the third party, such as personal statements.

(b) If applicable, an unearned freight packet consisting of the original letter requesting deduction of unearned freight charges with a copy of the GBL, DD Form 1843, DD Form 1844, and supporting documents (estimates) attached thereto. Completed samples are posted on the USARCS Web site at "Claims Resources," section III.

(c) Locally approved or adopted chronology sheets will be the last documents attached to the left inside cover of the file.

(2) The following documents will be affixed to the right inside cover in descending order:

(a) The paper screen recording entry of all actions taken at the field office on USARCS' Claims Legal Automation Information Management System.

(b) Certified copy of the voucher from the servicing DFAS showing the amount paid the claimant and the exact appropriation and fiscal year from which payment was deducted.

(c) DD Form 1842. Completed sample posted on the USARCS Web site at "Claims Resources," III, no. 16.

(d) Private insurance settlement documents, if applicable.

(e) All inventories.

(f) All other documents, such as request for exception sheets or riders, orders, turn-in slips, witness statements, and correspondence

(g) Copies of transportation documents, such as PCS orders, requests for shipment of property, counseling forms, BOL/GBL, service orders, and DD Form 619-1. A completed sample of DD Form 619-1 is posted on the USARCS Web site at "Claims Resources," III, no. 7.

d. Actions prior to forwarding.

(1) *Ensure database input is correct.* USARCS uses the information contained in the database to provide statistics to several agencies, including the GAO and the SDDC. There are plans to use this data in scoring carriers under a program designed to eventually improve the quality of service to Soldiers and employees. Therefore, ensuring timely and accurate data input into the database is critical. For example, an incorrect SCAC code entry may cause USARCS to provide misinformation about a carrier, or to offset the wrong carrier. Failure to record recovery deposits properly in the database may distort carrier recovery performance analysis, as well as the field office recovery program analysis.

(a) Forwarding to USARCS using the old personnel claims database. Once a forwarding code of "FF," "FR," or "FI" has been entered the claims office must wait until the next monthly upload of data to mail paper files. When these paper files have been forwarded, no further data entry should be done to the electronic record. Contact USARCS to retrieve the file and wait for receipt of the paper file prior to making further data entry in the electronic record.

(b) For claims created on the old personnel claims database, using a forwarding code of "FE" or "FA," requires the user to copy the electronic record to a floppy diskette by creating a transfer diskette. The diskette should be labeled so it can be associated with the paper file. It is a mandatory for the diskette to accompany the paper file to the so the electronic record can also be received into the destination claims office application.

(c) Forwarding files using PCMS. The requirements for transfer disks and monthly uploads are obsolete with the use of PCMS. Therefore, all claims files should be forwarded for retirement or recovery within 7 days of the claim settlement date. When a request for reconsideration is anticipated, a file may be held in the adjudicating claims office for up to 60 days.

(2) *Files forwarded for recovery.* DO NOT stuff the demand packet into an envelope or staple it to the claim. Dispatch dates and signatures will NOT be entered on the DD Form 1843. When appropriate, include an unearned freight packet in the file. (See para 11-36 of this publication for instructions on preparing Unearned Freight Letters). Always enter the BOL/GBL number and the SCAC from Block 2 of the BOL/GBL (see sample completed Bills of Lading posted on the USARCS Web site at "Claims Resources" III), but do not enter "demand sent" data into the computer on files forwarded to USARCS for recovery. Enter the "FR" transfer code on the computer. For files created and processed in the old personnel claims database, hold the file until the day after the next monthly upload of data to USARCS is complete. Insure all errors, if any, are corrected. In order for USARCS personnel to receipt the file from the personnel claims database into the corporate database, the most recent version of the electronic record must be present and contain the logical sequence of transaction codes. If this is not so, USARCS is unable to receipt the file electronically and, therefore, cannot change the electronic record. Because USARCS personnel cannot change or track changes to the record, no action can be taken on the paper file. Forward claims created and processed on the current PCMS within seven days of verification of payment to the claimant or within seven days of denial of a claim. Ensure the group is changed to reflect USARCS Recovery/Retirement Branch and select an owner from the USARCS employee list. There is no need to delay forwarding the files pending uploads.

(3) *Files forwarded for retirement.* Enter "FF" the day after you settle the claim or complete local recovery action. Then hold the file until the day after your office's next data transmission to USARCS before you forward it to USARCS for retirement (For example, if "PF" is entered on 14 December 2003; then "FF" should be entered on 15 December 2003; and the file should be mailed on 6 January 2004, the day after your office's upload to USARCS on Monday 5 January. If you enter "FF" on the same day that you settle the claim, the two entries may be reversed during upload into the USARCS database. The database cannot distinguish multiple entries on the same date.

(a) *Files created in Personnel Claims Management System and forwarded for retirement.* For local recovery, enter the "FF" code as soon as the recovery is complete on HHG claims. Enter the "FF" code as soon as the adjudication of the claimant's settlement is complete on other than HHG claims. Once the "FF" code is entered, there is no waiting period prior to mailing the file to USARCS and it may be sent immediately after payment to the claimant is confirmed.

(b) *Files created on the old personnel claims database.* Because of the old personnel claims database's design, and the interface between it and the HQDB during the upload, errors occur in reading certain sequences of transaction codes that are entered on the same date. Therefore, certain codes must be entered on separate dates to insure an error-

free upload. One such sequence involves the "FF" code. Enter "FF" the day after you settle with the claimant or complete local recovery action (post a deposit). Hold the file until the day after your office's next data upload to USARCS before you mail the paper file to USARCS for retirement. For example, if "PF" is entered on 14 December 2003, enter the "FF" code on 15 December 2003 and mail the paper file on the first duty day after the upload takes place and errors, if any, are corrected. Alternatively, if the carrier submits a check which satisfies the government's demand, post the deposit but wait one day before posting the "FF" code to the record.

e. Return of files from the United States Army Claims Service. Normally, claims sent to USARCS will be returned to a field claims office only for reconsideration action.

(1) Please inform claimants that, although they have up to 60 days to request reconsideration, they should inform your office as early as possible that they intend to do so, so that you can retain the file. Do not forward those files on which you know you will receive a request for reconsideration until you have received and acted upon the request. However, do not retain files unless it is clear that a claimant seeks reconsideration. Holding files too long will clog the field claims office and delay carrier recovery.

(2) Do not send disks with files forwarded to USARCS for recovery, offset, or retirement (transaction codes FR, FI, FF).

f. The old personnel claims database automatically generates error reports after each upload to USARCS. This report either states, "There were no errors," or lists the errors by claim numbers and specifies the error field. "Errors" are records that contain incorrect or inconsistent data that could not be uploaded into the system. If your office receives an error report, it is vital to correct the errors in each record and then retransmit the corrected data to USARCS. Make new paper screens for the claims files, and forward those files after the upload is complete. Because the current PCMS is an Internet and real-time system, there is no need to transmit data to USARCS. However, because there are always new users on the system and due to the complexity of the system, data entry errors still occur. To allow for corrections, users can generate their own error reports, which check for blank fields and other inconsistencies. Instructions for these reports will be posted to the PCMS User Manual as they are developed.

g. European centralized recovery processing. USAREUR field claims offices will separate files with recovery potential into CONUS and European recovery. If required by USARCS or USACSEUR, the field office will prepare demand packets, stapled together, in each paper claims folder. Documents must be legible. Do not use original document. Forward the entire file to the responsible claims service in accordance with guidance provided by the appropriate office. Enter the "FE" code in the database and forward to USACSEUR within seven days of confirming payment to the claimant or within seven days of denial. For claims created and processed in the personnel claims database, entering the "FE" code will prompt the user to create a transfer diskette that must accompany the paper file to USACSEUR. Claims created and processed on the personnel claims database and forwarded to USARCS cannot have the "FR" code and "PF" code entered on the same date. In order to assure a smooth transmission of data during the monthly upload, enter the "FR" code at least one day after the "PF" code is entered and forward the file to USARCS the day after the office's next monthly data upload. Data entry on claim records created on the current PCMS is not subject to the same requirements. The "FE" transaction code does not require the creation of a diskette and the transactions may be entered on the same date without any restrictions. However, in order to preserve an audit of all actions in a file the user should save the record after each entry before entering the next change. Demand packets prepared by field claims personnel will generally not include copies of DD Forms 1299, Application for Shipment and/or Storage of Property (sample completed DD form 1299 posted on the USARCS Web site at "Claims Resources," III, no. 10); carrier's inventory (except on DPM claims); the Personal Property Counseling Checklist, or DD Form 1842, (Claim for Loss or Damage to Personal Property Incident to Service); PCS orders; or payment vouchers. If required by the recovery claims service, arrange the demand packet in the following sequence, top to bottom:

(1) DD Form 1843. The "send your reply to" block will read: "Chief, U.S. Army Claims Service, Europe, Postfach 41 03 40, 68277 Mannheim, Germany."

(2) DD Form 1844.

(3) DD Form 1841 (if available).

(4) Inventory (for DPM shipments only).

(5) DD Form 619-1 or any other transportation documents.

(6) Copies of repair estimates or paid bills.

(7) All other appropriate supporting documents.

11-32. Direct Procurement Method recovery

a. General. Sometimes the government manages a shipment from origin to destination by issuing separate contracts to commercial firms for services that are required at each segment of the move, such as packing, containerization, local drayage, and storage. When the installation transportation office (ITO) or Personal Property Shipping Office (PPSO) contracts directly for transportation services, rather than by using a carrier under the SDDC's centrally procured BOL/GBL programs, it is said to "directly procure" these services. Therefore, this type of shipment is referred to as a Direct Procurement Method or DPM shipment. These contracts are sometimes referred to as "packing and drayage" contracts. Most large Army installations will have a DPM contract for transportation services for their installation and the local

area supported by their PPSO. However, in areas where there is a Joint Personal Property Shipping Office (JPPSO) a single contract for all the DOD shipments in the area may be managed by the procurement office at an Air Force or Navy base. For example, the DPM contract for the Colorado Springs area is managed by the procurement office at Peterson AFB. Because the SDDC may designate an office that will manage the DPM contract for a region, an ACO's area of responsibility may be served by more than one DPM contract. For example, DPM deliveries in the Fort Lewis area are under a contract managed by the JPPSO at McChord AFB, but for pickups and deliveries in locations north of King County, Washington the applicable DPM contract is managed by the Fleet Industrial Supply Center (FISC) at Bremerton Naval Base. While the contracts are solicited, awarded and administered by a procurement office, with a designated contracting officer (CO) responsible for all final decisions on claims, a contracting officer's representative (COR) will be appointed for each transportation office to administer certain aspects of the contract for services provided to that office. Claims attorneys and CJAs should know which offices procure and manage the DPM contracts for their areas of responsibility and the names of the CORs for their installation.

b. Direct Procurement Method contract structure. The DPM contracts, like most government contracts, have a "Schedule of Supplies or Services" that lists the services being procured. In most DPM contracts, there are three services listed: Schedule I services are Outbound Services, Schedule II services are Inbound Services, and Schedule III services are local moves. Under Schedule I, the carrier will inventory and pack an owner's goods, place the goods in crates, and haul the crates to a motor freight, ocean freight, or airfreight terminal. At the freight terminal, the Schedule I contractor will turn over custody of the goods to a freight company that will transport the goods to another terminal near the final destination. The freight portion of a DPM shipment is usually done under a government freight bill of lading rather than a personal property BOL/GBL, and the goods move under an SDDC centrally procured contract as miscellaneous freight, not as household goods. At the destination freight terminal, the Schedule II contractor under the DPM contract for that area will pick up the crates, haul them to the owner's new address, unpack and place the items, and haul away the packing materials. Under schedule III, the contractor will pack the goods, transport them from origin to destination, and unpack the goods. Most of these local moves are between on-post and off-post housing. Although they are sometimes characterized as intra-city or intra-regional moves, in some areas they can be interstate moves. For example, a Soldier who is transferred from Fort Meade, Maryland to Fort Belvoir, Virginia, may have his or her goods transported either under a bill of lading or by the Schedule III contractor under a DPM contract.

c. Direct Procurement Method contractor liability. In almost all DPM claims that do not arise out of a local move, the recovery demand will be asserted against the Schedule II delivery contractor, under the so-called "last carrier" or "last bailee" rule. A claims office will not pursue recovery against a freight carrier or the Schedule I carrier at origin unless there is evidence that all or part of the damage occurred before the goods came into the possession of the Schedule II contractor. Under the provisions of the Defense Federal Acquisition Regulation Supplement (DFARS) (48 C.F.R. § 247.271-4(k)) the claims and liability paragraph at 48 C.F.R. § 252.247-7016 must be used in DPM contracts.

(1) The notice period for Schedule III contractors is the standard 75 day rule. Notice of loss or damage is required within one year of delivery to Schedule I and Schedule II contractors. However, the claims office should try to give notice to the Schedule II delivery contractor within 75 days if possible, in order to avoid disputes over the notice period, as the delivery contractors generally believe that the 75-day notice period applies to them as well.

(2) Contractor liability for non-negligent damage is limited to \$.60 per pound per article. An "article" is defined in the International Personal Property Rate Solicitation as any shipping piece or package and its contents. The Joint Military-Industry Table of Weights (posted on the USARCS Web site at "Claims Resources," III, no. 43) will be used to determine the weight of an item. This level of liability would apply when the goods arrive at destination with loss or damage and there is no evidence to determine when or how the loss or damage occurred. Where it is established that the loss or damage is a result of contractor negligence, the contractor is liable for the full repair or current (depreciated) replacement cost. There may be evidence (for example, photographs, and statements by inspectors or the owner) that the origin contractor failed to properly pack an item. For example, a table that is placed in the shipping crate without padding and then has an unwrapped bike placed on top of it may arrive damaged. Or boots may be packed in the same carton as hats, which are found on delivery to be crushed to the point that they cannot be reshaped. In those cases, the notice of loss or damage to those items should be sent back to origin and a demand for the full value or repair cost should be asserted, without regard to the \$.60 per pound limit. Another example might be a Schedule II inbound carrier whose truck is wrecked in an accident en route to the owner's residence after picking up a shipment at a freight terminal. If evidence proves the driver's negligence was the cause of the accident, the contractor would be liable for the full value of the goods, not for only \$.60 per pound of each item. However, negligence cannot be assumed merely from the fact that there was a loss or damage. There must be evidence to prove that a specific negligent act or omission caused the loss or damage.

(3) Schedule III contractors, like BOL/GBL carriers, are liable for the depreciated replacement or repair cost, whichever is less, up to a maximum of \$1.25 times the net weight of the shipment in pounds. This liability applies whether or not there is actual proof of negligence.

(4) The DFARS provision cited above says only that the contractor will "make prompt payment" to the claimant. In the past USARCS has interpreted this to mean that the DPM contractor has only 30 days and not 120 days to respond to government recovery demands. However, many offices did not realize that DPM contractors had only 30 days to

respond and allowed them to take 120 days to settle claims. To avoid the necessity of maintaining two different suspense files, claims offices may give DPM contractors 120 days to pay, deny, or make final written offer on our recovery claims. The Federal Debt Collection Act says that normally debts to the United States should be paid within 30 days of receipt of a government demand, unless a longer period is specified in the appropriate contract or agreement. No time is specified in the DPM contract. But as 120 days is deemed a prompt response under most federal and commercial transportation contracts, it can be considered prompt in this context.

d. Bills of lading in Direct Procurement Method shipments. When a transportation office elects to use the DPM method, the transportation of a Soldier's goods between an origin freight terminal and the destination freight terminal is the only part of the movement that is governed by a BOL/GBL contract. Usually, the motor freight carrier picks up the goods from one company named in block 18 of the GBL and delivers them to another company named in block 19 of the GBL. Block 3 of the GBL will contain a two-letter service code to identify the shipment as a DPM move. See brief descriptions of these code on the USARCS Web site at "Claims Resources," III, no. 25, or refer to the DTR, Part IV. Block 27 of the GBL should contain a brief description of the shipment and it usually includes the released valuation, which applies only to the motor freight company named in block 1 of the GBL. The origin and destination contractors' liability is set forth in each local contract and normally is computed based on the net weight of the article, as indicated in the Joint Military-Industry Table of Weights, also posted at USARCS Web site at "Claims Resources," III, no. 43. If it is determined the freight GBL carrier is responsible for the loss or damage to property, prepare the file and the demand packet in accordance with paragraph 11-31c of this publication and forward to USARCS for recovery. The determination of liability must be supported by documents in the file such as a rider between the DPM contractor and carrier or other conclusive evidence. Do not forward DPM recovery actions to USARCS for centralized recovery unless an impasse is reached against the motor freight carrier. If forwarding the claim to USARCS as an impasse with a DPM motor freight carrier, include an unearned freight memorandum, if applicable.

e. Responsibility for recovery. Claims that result from loss or damage caused by a local contractor responsible for the pickup, local transit, and delivery of the shipment are handled entirely by the field claims offices. Field claims offices and command claims services will complete DPM recovery regardless of monetary limits. This duty includes pursuing offset action through the local contracting officer, if necessary (after reaching an impasse against the origin or destination contractor). Claims attorneys and CJAs will forward DPM files to the contracting officer for offset under cover of a memorandum that identifies the applicable contract and fully explains the factual and legal basis for our claim.

f. Cargo liability insurance. Although it is usually not required by the standard DPM contract, some local contractors do maintain cargo liability insurance coverage. If the local contractor is no longer in business or is bankrupt, the file may be closed and retired after verifying with the contracting office that no insurance coverage exists. Note on the chronology sheet the reason for closing a claim without pursuing or completing recovery action. Do not forward local or DPM recovery actions to USARCS for recovery unless an impasse is reached against a motor freight carrier (motor, air, or ocean). If forwarding the claim to USARCS as an impasse with a motor freight carrier, include an unearned freight memorandum, if applicable. If private insurance paid for part of the loss, forward the file to USARCS after recovery so that USARCS can process a pro rata refund of the recovered proceeds to the insurer. Treat these impasses as GBL recoveries and use the "FR" code in the database to record the transfer. For claims created in the old personnel claims database, you must wait until after the next upload to USARCS is complete to forward the paper folder to USARCS. For those claims created in the current PCMS, enter the "FR" transaction (status) code, change the group to HQ USARCS Recovery/Retirement, select an "owner" from the list and forward immediately. There is no requirement to hold the paper files when using PCMS.

g. Intra-theater shipments. The DPM shipments within both Europe and South Korea will be processed as directed by the respective chiefs of those claims services. Overseas command claims services will dispatch demands directly on overseas DPM and intra-theater shipments and all overseas demands against rail, motor, and airline contractors. In addition, USACSEUR will dispatch demands on all unaccompanied baggage shipments to Europe.

(1) *United States Army Europe intra-theater shipments.* For U.S. Army Europe (USAREUR) shipments, it is critical to identify the shipment modes throughout the management of household goods claims. Notice procedures are jeopardized if claims personnel do not understand which carrier or contractor bears liability under a particular shipment mode. Additionally, different shipment modes may have different notice periods, and proper claims adjudication requires a determination whether the claimant provided timely notice. Also, because some intra-theater modes allow a short time in which to assert a demand for recovery, claims personnel must identify and hasten such actions. Normally, DD Form 1840 indicates the shipment mode in the "code of service" block. USACSEUR will periodically review European transportation contracts and advise European offices of notice and liability provisions of those contracts.

(2) *Korean intra-theater shipments.* The Office of the Judge Advocate, U.S. Forces Korea (Claims) will monitor contracts for transportation of household goods within that theater of operations and keep field claims offices informed of any notice and liability provisions that are unique to those contracts.

11-33. Special recovery actions

a. Commercial airline shipments. Sometimes a commercial airline may also operate under authority of a GBL for the air transportation segment (the "middle" portion) of a DPM shipment. The GBL should state the liability rate. If it

does not reflect the released valuation of the shipment, contact the origin ITO for the appropriate liability statement. For flights that do not both begin and end in the United States, the United States is subject to the terms of the Warsaw Convention, and any contract or agreement to the contrary may be null and void. However, claims personnel must ascertain the specific contractual liability limitations as they may exceed those set forth in the Warsaw Convention. Additionally, the Warsaw Convention's terms may adversely affect the military recovery program because a shorter notice period applies to commercial airlines carrying international shipments. Article 26 of the Warsaw Convention provides that "in case of damage, the person entitled to delivery must notify the carrier forthwith after the discovery of the damage, and at the latest, within three days from the date of receipt in the case of baggage and seven days from the date of receipt in the case of goods. In case of delay, the complaint must be made at the latest within 14 days from the date on which the baggage or goods should have been placed at the passenger's or owner's disposal." This requirement places a heavier burden on both claimants and claims personnel, and the latter should make sure that both ITOs and claimants know about the time limitations for notice of damage or loss arising from international commercial air shipments. The Warsaw Convention also carries a two-year statute of limitations in which to file claims. Claims must be filed against the airline (demands must be dispatched) within two years of the incident or from the date on which the goods ought to have arrived, or from the date on which the transportation stopped. Air waybills are not prepared until goods arrive at the airport, so any signature on that form acknowledges receipt of goods at destination delivery and establishes timely notice. Airlines do not deliver goods, so the claimant, the ITO, or a carrier must pick up the shipment at the airport. If the owner or owner's agent fails to note exceptions on the delivery receipt when picking up the shipment, then timely notice is not established and will normally preclude recovery from the airline.

b. Storage in transit converted to storage at owner's expense. The ITO may authorize Storage in Transit (SIT) for up to 180 days on a GBL shipment. Extensions of SIT usually are granted in 90-day increments. The bill of lading/GBL carrier's liability under the original bill of lading continues as long as the extension of SIT is authorized.

(1) If goods remain in SIT beyond the authorized time limit, the shipment converts to storage at the owner's expense, but the owner is usually still entitled to a delivery out of storage at government expense. There are three ways to arrange for delivery of goods from storage after it has converted to storage at the member's expense. If the warehouse being used for SIT is also an NTS warehouse, the ITO may issue a service order (DD Form 1164) under the NTS contract to deliver the goods. The ITO may issue a service order to the DPM contractor for schedule II services or the ITO may issue a new bill of lading listing the warehouse as the "From" address in block 19.

(2) If the owner's claim against the government is payable, the claims office will pursue liability based on the applicable contract against the delivering contractor as the last handler of the goods, unless the contractor can prove that the loss or damage did not occur while the goods were in its custody. To disclaim liability the contractor must provide a valid exception sheet or rider or other evidence that the loss or damage occurred before the goods came into the contractor's possession.

(3) The field claims office must ensure that timely notice of loss or damage is provided to the delivery contractor. However, regardless of how the goods are ordered out of the warehouse, the delivery carrier often does not prepare a new DD Form 1840/1840R, but gives the claimant a DD Form 1840 that was prepared by the original bill of lading carrier. In that event, the delivery carrier would be deemed to waive timely notice by providing the claimant a form with incorrect information. Therefore, while claims offices should always dispatch the DD Form 1840R submitted by the claimant to the address listed in block 9 of the DD Form 1840, claims personnel should also analyze the transportation documents when the claim is finally received to ensure the recovery claim is directed to the proper party.

(4) If a government contractor picks up goods stored at the owner's expense and liability is established against the warehouse by exceptions noted on a valid exception sheet or rider, claims personnel must request a copy of the contract between the owner and the warehouse, if the claim has been paid, because the claimant will have assigned his or her rights against the warehouse to the Army on the DD Form 1842. This contract will state the commercial rate of warehouse liability, which may differ from the usual government rate. If the warehouse's liability is known before the Army pays the claim under the PCA, the Army claims office should deny that part of the claim because a loss during storage at the claimant's expense is not a loss incident to shipment. In such a case, the property owner must pursue warehouse liability directly against the warehouse. If the warehouse liability does not become known until after the claim is paid, but before the recovery demand is asserted, forward recovery actions involving more than one contractor to USARCS for centralized carrier recovery. If, however, the warehouse liability is not discovered until after the demand is asserted by the ACO against the delivery carrier, the ACO should complete both recovery actions.

c. Mobile homes. Mobile home claims represent a small percentage of the total claims field claims personnel handle; therefore, claims personnel are often unfamiliar with the requirements for processing these claims. There are three forms relevant to shipments of mobile homes: DD Form 1412, Inventory of Items Shipped in a House Trailer; DD Form 1800, Mobile Home Inspection Report; and DD Form 1863, Accessorial Services-Mobile. Because mobile home shipments are infrequent, completed sample of these forms are not posted to the USARCS Web site. To obtain blank copies of these forms go to <http://www.dtic.mil/whs/directives/infomgt/forms/formsprogram.htm>. After following procedures set forth in subparagraphs (1) through (7), below, forward all mobile home claims to USARCS for centralized recovery action.

(1) *Agents.* If the primary carrier hires another mobile home carrier to transport the mobile home, the first carrier will continue to be shown on the GBL and is responsible for the mobile home from pickup to delivery. The GBL

carrier is also responsible for damage caused by third parties it engages to perform services such as auxiliary towing and wrecking.

(2) *Storage in transit.* The SIT is available on mobile home shipments. The extension of SIT beyond 180 days applies only to household goods and hold baggage shipments, not to the shipment of mobile homes. If a mobile home remains in SIT beyond 180 days, storage is at the owner's expense.

(3) *Notice.* Claims personnel will dispatch DD Form 1840R in accordance with paragraph 11-21g, above.

(4) *Liability.* In computing the carrier's liability on the DD Form 1844, claims offices must consider the following information.

(a) *For damage to the mobile home.* Generally, carrier liability for damage to a mobile home includes the full cost of repairs for damage incurred during transit. In addition to the exclusions listed in paragraph 11-26, above, a mobile home carrier is excused from liability when it can offer substantial proof that a latent structural defect (one not detectable during the carrier's preliminary inspection) caused the loss or damage.

(b) *For damage to contents.* The carrier's liability for loss or damage to household or personal effects inside the mobile home (such as clothing and furniture or furnishings that were not part of the mobile home when it was manufactured) is limited to \$250, unless a greater value is declared in writing on the GBL. The carrier must prepare a legible inventory of all contents on DD Form 1412 in coordination with the owner.

(c) *For water damage.* Water damage to a doublewide or expansion-type mobile home usually is caused by the carrier's failure to protect it sufficiently against an unexpected rainstorm. Carriers often try to avoid liability by asserting that this damage is due to an "act of God." It is, however, the carrier's responsibility to ensure safe transit of the mobile home from origin to destination. Not only should a carrier be aware of the risk of flash floods and storms in certain locales during certain seasons, but it should also provide protective covering over mobile home parts exposed to the elements. Carrier recovery should be pursued for water to mobile homes damaged in these circumstances.

(5) *Waivers.* The carrier may try to escape liability by having the owner sign a waiver of liability. Such waivers are not binding on the United States.

(6) *Demands.* The carrier is liable for the full amount of substantiated damage to the mobile home itself (less estimate fees), plus up to \$250 for loss or damage to contents (or more, if the claimant purchased IRV on the contents). Prepare a demand for the total amount and forward the file along with the demand packet to USARCS for centralized recovery. The demand packet should include, in addition to DD Forms 1843 and 1844, the following documents which are described in the Guidance on Mobile Home Processing and posted as sample completed forms on the USARCS Web site at "Claims Resources," III:

(a) DD Form 1800 (Mobile Home Inspection Report).

(b) DD Form 1863 (Accessorial Services - Mobile Home).

(c) DD Form 1840/1840R.

(d) DD Form 1841 (Government Inspection Report).

(e) DD Form 1412 (Inventory of Items Shipped in House Trailer).

(f) Owner Statement.

(7) *Driver statement references.* The DTR, Chapter 407, Part IV (DOD 4500.9-R) pertains to mobile home shipments and contains valuable information. It can be accessed at www.transcom.mil/j5/pt/dtr.html. To access the mobile home/boat contract solicitation issued by SDDC, go to www.sddc.army.mil, select Personal Property/POV from the menu in the upper right corner of the home page. At the next page, under "Domestic" click on "more" and then scroll down to Mobile home/Boat Solicitation. Another guide is DA Pamphlet 740-2, which discusses the owner's responsibilities before shipment. It is usually provided to the owner during transportation counseling. Also useful is the Mobile Homes Counseling Checklist, which is given to mobile home owners at some installations. Copies of this checklist should be available from the local ITO.

d. Claims for accompanied baggage.

(1) *Commercial passenger carriers.* Military travelers who travel on TDY or during a PCS move on a commercial airline, train or bus on a regular commercial ticket may purchase their tickets using unit funds or purchase their own tickets and receive reimbursement from the government. Although the travel is funded by the government, the tickets are issued in the name of the traveler. Even though the rate may be negotiated by SDDC or GSA with the carrier, there is no direct contractual relationship between the government and the carrier for a particular ticket.

(a) Military travelers who lose their checked luggage, or sustain a loss from or damage to checked luggage, should immediately notify the airline, train, or bus company's baggage department and file a claim directly with the carrier. This will permit the carrier to initiate a tracing action and ensure that the carrier gets timely notice of the loss.

(b) If the claimant has filed with the carrier and either not received a settlement or had the claim denied, the claimant may submit a claim to the Army for payment under the PCA. If the Army pays the claim, it may then bring a subrogation claim against the carrier. However, because this is a subrogation claim, the government is bound by the claims and liability terms that apply to the commercial ticket. The reverse side of the ticket or baggage claim check should state liability terms and may state the time that travelers have to file claims. If they do not, contact the carrier to obtain its liability terms.

(c) After assembling all the necessary liability information, area claims offices in the United States and Puerto Rico

should forward all such recovery claims to USARCS. Overseas claims offices should forward them to the appropriate overseas command claims service.

(2) *Air Mobility Command chartered flights.*

(a) Claimants who are traveling on flights chartered by AMC should also alert the chartered carrier to the loss and file a claim directly with the carrier, if their loss is from individually checked baggage. However, if the claim is not settled and the claimant then files with the Army, the recovery claims is not a subrogation claim but a contract claim under the AMC charter contract.

(b) The AMC baggage irregularity report is the delivery document upon which transportation personnel record loss or damage. Study this document to determine whether timely notice exists. Unless loss and damage are recorded on this document, no potential carrier recovery exists and the file may be closed.

(c) The flight number prefix that appears in the "mission and date" block of the appropriate form identifies the air carrier. The boarding pass, flight ticket, or baggage receipt may be used to identify the air carrier by referring to the flight number prefix shown on the front and matching the first letter to the same letter shown in the border of the reverse side.

(d) After assembling all the necessary liability information, area claims offices in the United States and Puerto Rico should forward all such recovery claims to USARCS. Overseas claims offices should forward them to the appropriate overseas command claims service.

(e) There is no GBL on this type of shipment. Conditions generating liability are set forth in the airline's contract with Air Mobility Command (AMC). To obtain the contract pertaining to the claim being adjudicated, contact:

Headquarters, Air Mobility Command
ATTN: DOKAS (for domestic flights) or
ATTN: DOKAI (for international flights)
Scott Air Force Base, Illinois 62225-5305

11-34. Offset actions

a. *General.* Most carriers have 120 days from receipt of demand to pay, deny or make a final written offer on a claim. Field claims offices may extend this period no more than 45 days to complete negotiations or to allow time for receipt of payment. If a carrier fails to respond within 130 days of the date on a recovery demand (allow five days mail time for the demand to reach the carrier and five days for the carrier's reply to reach the government), and no extension has been given, the file should be sent as an impasse for potential recovery by administrative offset. An impasse occurs when a carrier either fails to respond to a demand or when efforts to negotiate a settlement have reached a standstill and the carrier has no valid basis for its total or partial denial. Before forwarding files for offset claims personnel must ensure that timely notice has been given, the file includes all necessary documents, and the demand and any correspondence were mailed to the proper carrier or contractor at the correct address.

b. *Claim files forwarded to USARCS.* All claims involving offset against BOL/GBL carriers are forwarded to USARCS for action. The file should be marked "IMPASSE" in the upper left-hand corner. If a carrier does not respond to the demand, mark the file "IMPASSE-NO RESPONSE." USARCS will review the file and, if appropriate, begin offset action. On DPM moves, claim files are forwarded to USARCS for offset action only when a BOL/GBL freight carrier is found to be liable. Files should be forwarded to:

Commander USARCS
ATTN: JACS-PCR
4411 Llewellyn Ave.
Fort Meade, Maryland 20755-5360

c. *Claim files forwarded to Direct Procurement Method contracting offices.* Most non-bill of lading/non-GBL transportation and storage contracts are subject to the FAR/DFARS, and disputes under these contracts must be resolved in accordance with the Contract Disputes Act. Under this process if an impasse is reached, only a warranted contracting officer with specific authority to resolve disputes under the contract may make a unilateral determination that the contractor owes money to the government for a claim, and that the claim payment is delinquent. This final decision by the contracting officer triggers our right to collect by offset. Claims forwarded to local contracting offices for offset action include claims arising from DPM shipments, both local moves, and DPM shipments in which the origin or destination contractor is found liable. Claims arising from NTS should be sent to the appropriate RSMO for a contracting officer's decision.

(1) When the contractor fails to reply to a demand within 130 days of dispatch or fails to make an acceptable offer, the file should be marked "IMPASSE" in the front upper left-hand corner and forwarded to the appropriate contracting office with a request for offset action. Claims attorneys and CJAs will forward DPM files to the contracting officer for offset under cover of a claim memorandum that identifies the applicable contract, and that fully explains the factual and legal basis for the government's claim. The memorandum should also include the fund cite (other wise known as accounting classification) for deposit of Army recovery funds. Prior coordination with the contract officer should

include an agreement on whether the original claims file will be forwarded with the offset memorandum, or whether a copy will be acceptable. If the original file is forwarded, the claims office should keep a copy file that includes at least the DD Forms 1842, 1844, 1843, and chronology sheet. Claims attorneys and CJAs should if possible request that their office's contract attorney review the memorandum and file before it goes to the contracting officer.

(2) If the contracting officer agrees and recovers payment through offset, the funds should be placed in the claims deposit account into which all other recovery money is deposited. The contract officer should not be permitted to return the file without action solely because the carrier no longer has the contract and all payments under the contract have been disbursed. If the contracting officer makes a final decision that a claim is delinquent, it can be collected from any government disbursement to that contractor, including tax refunds. If the contractor does not pay in response to a demand from the contracting officer, penalty, interest, and collection charges begin to accrue. So long as the contractor is still in business, DFAS will pursue collection. See chapter 18, volume 10, DOD Finance and Accounting Manual at www.defenselink.mil/comptroller/fmr/10/10_18.pdf.

(3) Each field claims office should maintain a log of the files it forwards to its contracting office for offsets, place the retained copy of the file in a suspense filing system, and monitor progress on each file until offset is completed. Deposits into the claims account also should be monitored closely and reconciled regularly.

d. Non-temporary storage offset actions.

(1) Forward impasse claims against NTS warehouses to the Regional Storage Management Office (RSMO) responsible for administering the BOA for storage in that geographic area. See the USARCS Web site at "Claims Resources," III, no. 52 for a list of the addresses and telephone numbers for the four RSMOs with a list of the states for which each office is responsible.

(2) The guidance above on requesting final decisions and offsets from DPM contracting officers also applies to requests forwarded to the RSMO contracting officers.

e. Files with no carrier liability or recovery potential. Files with no carrier liability or recovery potential should not be treated as impasses. They should be marked "CLOSED" in the upper left-hand corner and forwarded to USARCS for retirement. Enter "no carrier liability" in the note field of the database, and explain the basis for the determination on the chronology sheet or in a file memorandum.

f. Refunding carrier offset money. Carriers often request refunds of money that has been collected by offset to pay prior government claims. All such requests should be sent to the Recovery Branch, USARCS. Local contracting offices cannot direct defense finance offices to pay refunds from the claims deposit account using money deposited through offset of DPM contractors. Such refunds are unauthorized. Field claims offices should monitor offset actions to ensure that this does not occur.

(1) Only the Commander USARCS or the Commander's designee may refund money from the claims deposit account. Granting unauthorized refunds frustrates the Commander's efforts to determine the account balance available for reissue.

(2) The DPM contractors may contest offset, either by requesting the contracting officer to reconsider the decision or by appealing the decision to the Armed Services Board of Contract Appeals (ASBCA). Either the ASBCA or the contracting officer may decide that an offset was improper. Neither may refund money from the claims deposit account, however. Instead, the contracting office must return the claims file, with the refund decision, to the claims office, which then must forward the file to the Personnel Claims and Recovery Division, USARCS, for action. Every effort should be made to notify USARCS of these actions within 10 days of notice of the ASBCA's or contracting officer's decision, as the United States has only 30 days to refund the money before interest begins to accrue.

(3) If a contracting office is refunding offsets from the claims deposit account, the CJA or claims attorney should persuade the contracting officer to stop this practice. Also, the CJA or claims attorney should notify the Commander USARCS.

11-35. Compromise or termination of recovery actions

a. General. The authority to assert a claim includes the authority to reach a compromise settlement and, in appropriate circumstances, to terminate efforts to collect on the claim. A third party may deny liability on all or part of a claim. Claims personnel must evaluate any denial to determine whether the evidence supports the denial. The determination to compromise or terminate recovery is a matter of judgment and it must take into consideration all the facts, including:

(1) The legal merits of the government's claim, including whether there is evidence to substantiate every element of the claim.

(2) Whether the cost of pursuing the claim will exceed the amount recovered.

(3) The debtor's ability to pay.

(4) The impact that compromise or termination will have on other claims with the same debtor or on similar claims with other debtors.

b. Limits on authority. The Federal Claims Collection Act, 31 U.S.C. §§ 3711, 3716-3719, and the Federal Claims Collection Standards promulgated pursuant to that Act govern the compromise or termination of recovery claims. See 31 C.F.R. Parts 903 and 904. These standards authorize the heads of executive agencies to compromise or terminate

collection efforts on claims that do not exceed \$100,000, exclusive of interest and penalties. For claims in excess of \$100,000, the DOJ must approve the action. The Commander USARCS, will make most decisions on GBL recovery claims in excess of \$1,000 as installation claims offices do not possess the monetary authority to assert such claims. However, on DPM recovery actions, Recovery Judge Advocates (RJAs) must ensure that their office procedures alert them to any recovery claim in excess of \$15,000, as compromise may exceed their authority.

c. Termination before demand.

(1) The Army will not assert recovery claims when the third party's liability is less than \$50. Remember, however, that the \$50 limit is based not on what the Army has paid on the claim, but on the third party's total liability. Private insurance may have paid \$100 on a lost item, leaving the Army to pay only \$10 on a damaged item. But the claim against the carrier would be for \$110 and should be asserted. As noted in paragraph 11-26b, above, we have a contractual agreement with carriers not to assert demands for less than \$25. This was based on an analysis of the overhead costs of collecting and processing a payment. However, these costs continue to increase. In FY03, the Army collected payments on 996 claims for amounts between \$25 and \$50. The average recovery on the claims that were settled was only \$29.26. Therefore, while the agreement with industry is still set at \$25, as a matter of internal policy, the minimum amount has been raised to \$50.

(2) On POV recovery actions, no demand will be asserted under the present program unless the potential recovery is more than \$50.

(3) Do not terminate recovery claims against a carrier or warehouse that is no longer in business or has filed an action in bankruptcy. Alert the Recovery Branch, USARCS to the situation at (301) 677-7009, extension 401 or 404. Normally, the Commander USARCS will pursue recovery action on GBL carriers in this situation and will direct field claims offices to forward all claims against the carrier or warehouse to USARCS for further action. For claims against DPM contractors that are no longer in business, the contracting officer should be contacted for possible collection by offset against payments still due the contractor or for recovery against performance bonds or cargo insurance.

(4) If upon reviewing a file before dispatching a demand it appears that the recovery claim is not supported by sufficient evidence, the claim may be terminated. Fully explain the basis for the determination in the chronology sheet or a memorandum for record in the file.

d. Compromise or termination after issuing a demand.

(1) In those cases where a carrier bases its denial on the government's failure to prove tender, damage in transit, or the cost of the loss or damage, claims personnel must determine whether additional evidence is needed and if it can be obtained. In some cases, the cost of obtaining the additional evidence may exceed the amount to be recovered. In that event, it may be possible to negotiate a compromise with the carrier. If not, claims personnel may have to accept the denial, but must fully document the basis for the final action in the file.

(2) Whenever possible, claims should be settled by direct payment with a carrier, and claims personnel should be willing to compromise on all or part of a claim if the evidence is in doubt. The cost of pursuing collection by administrative offset may not always be recoverable but claims should not be compromised merely because a carrier makes a counteroffer that is less than the amount demanded. If the carrier does not provide a basis for its failure to pay the full amount of the claim, and the evidence supports the government's demand, the claim should be forwarded as an impasse for potential collection by offset.

(3) The USARCS may agree to compromise or terminate collection on any impasse file forwarded for collection by administrative offset. If a field claims office feels strongly that a claim sent to USARCS for offset should not be compromised, it should set forth the reasons in a memorandum in the file.

(4) If DFAS-IN returns a claim as uncollectible, the Recovery Branch will pursue recovery against the carrier's cargo liability insurance. Although several claims may be consolidated into a single demand letter to the insurance company, each claim will be treated as a separate action for purposes of the compromise and termination authority granted in the Federal Claims Collection Act. The Chief, Recovery Branch, will determine whether any claims against insurance policies will be compromised or terminated. If the total amount of the compromise exceeds \$15,000, however, the Chief, Recovery Branch, will make a recommendation for final action to the Chief, Personnel Claims and Recovery Division.

11-36. Unearned freight claims

a. When the loss or destruction of an item in shipment is attributable to a BOL/GBL carrier, that carrier is not entitled to receive transportation charges for that item. When a recovery claim has been settled with a carrier and the settlement includes payment for items that were lost or destroyed, claims personnel who settled the claim must prepare a letter to DFAS-IN requesting collection of the appropriate shipping charges by administrative offset. A sample letter is posted on the USARCS Web site at "Claims Resources," III, no. 49. The letter will identify the BOL/GBL number of the shipment and the items that were lost or destroyed. The Claim and Adjudication Section, DFAS-IN will compute the amount the carrier must refund and attempt to collect from the carrier. An unearned freight packet is required when a mobile home is lost or completely destroyed. Generally, an item is deemed to be "destroyed" if it cannot be repaired or if the repair costs more than replacement. If items can be repaired, but even after repair are "useless for the purposes for which they were intended" or "no longer exist in the form in which they were tendered to

the carrier," then they will be deemed to be destroyed. But mere LOV does not automatically qualify as destruction. See Aalmode Transportation Corporation, B-231357, January 15, 1991; and B-231357.2, September 9, 1992.

b. Before mailing unearned freight packets to DFAS-IN, be sure to complete local recovery and make appropriate corrections to the DD Form 1844 for claims in which compromise was reached on certain items. For files marked 'IMPASSE,' do not mail the unearned freight packet to DFAS-IN; leave it in the file forwarded to USARCS, USACSEUR, or FKJA-CL.

c. Keep in mind that unearned freight packets are not required on every claim. Unearned freight packets should not be prepared on claims involving NTS or DPM contractors. Because there is a cost to the government in processing the collection, DFAS-IN will not process an unearned freight claim on an international shipment unless the weight of the items is more than 42 pounds, and they will not process one for a domestic shipment unless the weight is at least 100 pounds. DO NOT PREPARE unearned freight letters unless the estimated weight of the items is more than these limits. The Joint Military Industry Table of Weights does not apply to calculating the weight of items for determining freight charges, so you should make your best estimate of the weight of any lost or destroyed items.

d. The unearned freight letter to DFAS-IN (sample posted on the USARCS Web site at "Claims Resources," III, no. 49) will include copies of DD Forms 1843 and 1844 and one copy of the GBL and will identify the line items on the DD Form 1844 for which unearned freight charges should be deducted. Further, copies of repair estimates will be added to the unearned freight packet if the items are not repairable. Each estimate should clearly state that the item in question is either beyond repair, no longer exists in its original form, or is useless for its intended purpose. Estimates written in a foreign language must be translated into English. A copy of the inspection report will also be included in the unearned freight packet. If substantiation is lacking (for example, there is no estimate of repair or equivalent statement or no inspection could be made), note this information in the chronology sheet and do not assert an unearned freight charge for the item in question. Claims examiners should identify items that qualify for unearned freight charges at the same time they adjudicate the claim and calculate carrier recovery. Place an asterisk beside the line item, or circle the line number of the corresponding item on the DD Form 1844 in red ink. Do not highlight it because some photocopy machines will darken the highlighted area.

e. The DD Form 1844 is extremely important because DFAS-IN reviews this document to determine if the item is destroyed or missing. Make sure claimants provide sufficient descriptive information in block 7 to determine whether the item is destroyed. Stating that the item is "destroyed" without further descriptive language hinders DFAS-IN in determining if the item is actually destroyed. Additionally, claims examiners must make sure that the adjudication codes used in block 26 are consistent with a destroyed item. "Replacement Cost" ("RC") is consistent with settlement for a destroyed item, and on rare occasions, "fair and reasonable" ("F & R") may be used if the claimant is unable to establish the value for the destroyed item. The chronology sheet should state why "F & R" was used. "Loss of value" ("LOV") and "agreed cost of repair" ("AGC") are inconsistent with a destroyed item. Such notations on a destroyed item would require further explanation on the chronology sheet. "Amount claimed" ("AC") is ambiguous and needs further explanation as well.

11-37. Recovery action against a claimant

AR 27-20, paragraph 11-14g, authorizes claims personnel to recalculate the amount allowed on any personnel claim and recoup overpayments due to adjudication errors or because a claimant misrepresented, fraudulently or otherwise, the facts necessary for correct adjudication. Claims offices at any level should seek a refund of an overpayment from a claimant when a claimant is paid by both the government and an insurer or other third party, or when the overpayment results from a fraudulent misrepresentation by the claimant. In other cases, claims attorneys and CJAs will use their discretion in seeking a refund. In most cases, claimants should not be required to make refunds when the overpayment was due to an error in adjudication, unless the error was so egregious that the claimant should have realize that an error had been made. For example, if a claimant files a claim for \$500 and receives a payment for \$5,000, the claimant should be required to refund \$4,500.

a. *Request for repayment.* Upon determining that a claimant has been overcompensated, the field claims office should notify the claimant, in writing, of the overpayment and request voluntary repayment to the government. The letter advising the claimant that he or she is indebted to the United States and demanding payment must comply with the provisions of the Federal Claims Collection Act, 31 U.S.C. §§ 3701-3722A and the Federal Claims Collection Standards, 31 C.F.R. Parts 900-904. In general, the notice must advise the claimant of the basis for the debt, the claimant's right to dispute the debt, and the consequences of failing to pay within 30 days. All letters demanding repayment from claimants will be sent by certified mail, return receipt requested. A sample demand letter to a claimant with a selection of paragraphs is posted on the USARCS Web site at "Claims Resources," III, no. 47 and no. 48 is an Election of Options form letter, to be included with the demand letter, that the claimant should use for his or her reply (enter your address before sending). The claimant can use this reply letter to indicate what action her or she intends to take on the debt.

b. *Voluntary repayment.* Voluntary repayment is the preferred method of collecting excess payments. If the claimant agrees to repay the government, the field claims office may consider any reasonable offer to make full restitution. Claims personnel must use sound discretion in arriving at a repayment schedule. Factors to consider in devising a repayment schedule include, but are not limited to, the length of time the claimant will remain on active duty, the

Soldier's rank, other debts, credit history and family obligations. If, after receiving written notification of the proposed action, the claimant refuses to return all or part of the overpayment, the field claims office must forward the file along with a claims memorandum recommending either further collection action or termination of the collection efforts to USARCS, ATTN: JACS-PC, 4411 Llewellyn Avenue, Fort Meade, MD 20755-5360. Overseas claims offices will forward these recoupment actions through their respective command claims services.

c. Involuntary collection by pay deduction. Debts may be deducted from a Soldier's pay as an administrative offset under 37 U.S.C. § 1007. The salary of a DA civilian employee may be offset under 5 U.S.C. § 5514. If the claimant is a retired civil service employee, 31 U.S.C. § 3716 authorizes an administrative offset of a civilian retiree's civil service retirement pay. Moreover, all claimants who receive funds from the government, regardless of employment status, are subject to involuntary collection. By signing the DD Form 1842, each claimant expressly authorizes the government to withhold pay for any overcompensation received because of subrogated payments by insurers, carriers or any other persons, or because of any information that the claimant has provided to the government later discovered to be incorrect or untrue. However, while an Area Claims Office may assert a demand for repayment and accept voluntary repayments, all requests for involuntary collections must be forwarded to the Personnel Claims Branch, USARCS. Only USARCS will transmit requests to DFAS or another government agency for involuntary collection of a debt from a claimant's government pay or pension.

d. Involuntary collection. If debt collection by the above-listed methods is not possible because the claimant does not receive regular federal income or salary from which the debt may be offset, the debt can be transferred to the DFAS Out-of-Service Debt Management Office, and potentially the Treasury Offset Program for further collection. All requests for involuntary collection will be sent to USARCS for review and approval.

Chapter 12 Nonappropriated Fund Claims

Section I Claims against Nonappropriated Fund Employees

12-1. General

Army Regulation (AR) 215-1, gives the Army claims system administered by the U.S. Army Claims Service (USARCS), authority to process claims arising from the two categories listed below. AR 608-10, addresses processing of claims arising from family child care providers. These publications may be obtained at the Army Publishing Directorate Web site.

a. Categories. Claims involving nonappropriated fund activities fall into two broad categories:

(1) *Claims arising from the negligent or wrongful acts or omissions of employees of a NAFI while within the scope of employment.* These claims are processed under the appropriate chapter of AR 27-20 in the same way as any other tort claim against the Army except that the claim is paid with nonappropriated funds rather than appropriated funds. Accordingly, if a nonappropriated fund (NAFI) employee caused injury, death, or property damage while operating a NAFI vehicle within the United States, claims arising from the incident would be paid under AR 27-20, chapters 4 or 5. However, if the incident occurred outside the United States, claims arising would be paid under chapters 3, 5, 7, or 10 depending upon whether the claimant was a family member of a U.S. force or its civilian component or a foreign inhabitant.

(2) *Claims that NAFIs pay as a matter of policy.* Sometimes NAFIs pay claims as a matter of policy to encourage the use of their sports activities as well as the quarters-based family child care program established under AR 608-10. No statute imposes liability on the United States for this category of claim as the tortfeasor either is not a United States employee or, if a United States employee, is not acting within the scope of employment. Claims arising out of sports activities are cognizable when an authorized user of sports property uses the property in an authorized manner. Family child care claims are cognizable if the injury or death of a child is caused by the negligent or wrongful act or omission of a child care provider.

b. Payment from multiple sources.

(1) In certain instances, proportionate payment of the same claim out of both nonappropriated funds and appropriated funds may be necessary, when it is determined that both NAFI and appropriated fund employees are liable. In such instances, the amount payable must be pro-rated according to the degree of liability attributable to each category of employee. The claims file must show whether each involved tortfeasor is paid from appropriated funds (APF) or NAF funds.

(2) Many Army installations maintain golf courses surrounded or intersected by roads that carry the general public. Often, claims are filed after a golf ball strikes a car that someone is driving on such a road. While not cognizable under AR 27-20, chapter 11, these claims may be payable in tort if there is negligence on the part of the United States. It may be negligent to construct a golf course next to a road, or to construct a road through or around a golf course, without taking reasonable measures to prevent golf balls from leaving the course. For example, if a green is next to a

road, some measures (such as a fence) may be necessary to prevent golf drives to the green from striking a car. Similarly, if a tee and fairway are situated next to a main road, the activity should take some measures (such as a screen of trees) to prevent golf balls from striking vehicles on the road. If such reasonable measures are not taken, there may be a duty to warn. Determine whether local law recognizes liability on the part of the golfer. In this connection, be sure to examine whether the golfer was negligent or merely unlucky. The negligent golfer should be required to pay for the damage or share liability with the United States. If the golfer cannot be identified, as is often the case, no assumption can be made about the golfer's negligence in the absence of the testimony of others. However, when the course's design or layout presents issues of negligence, a compromise settlement for out-of-pocket expenses may be negotiated. Payment should be made from appropriated funds unless responsibility for the negligent act is that of the NAFI. It is not appropriate to deny liability simply because future claims may result. Claims personnel and NAF personnel should work together to identify the risks of future liability and institute measures to reduce it.

(3) Where either an authorized user or a family child care provider is insured by a personal liability policy, the insured is considered primarily liable and the Army is secondarily liable. When the NAFI activity, such as a flying or parachute club, is insured, that insurance is the primary source of recovery. Additionally, in certain foreign countries, NAFI vehicles are covered by liability insurance.

c. Working relationship/who should settle.

(1) A close working relationship with the NAFI and Army and Air Force (AAFES) management at the installation will help claims personnel identify and process tort claims under chapter 12 and AR 215-1. At some installations, NAFI or AAFES personnel settle small claims themselves without referring them to the field claims office since they use their local accounts to pay small claims. Avoid this practice.

(2) Both AR 27-20 and AR 215-1 require the claims judge advocate (CJA) or claims attorney to settle tort claims. NAFI or AAFES managers have authority to adjust many customer complaints in regard to property purchased or services obtained at the facility. For example, a customer complains that an AAFES service station failed to perform proper service on a vehicle or that a product purchased at the Post Exchange (PX) or NAFI resale store is defective. Refer a customer who tries to file a claim about such matters to the exchange manager for AAFES complaints or to the supervisor of the NAFI activity for resolution. Before referring the customer back to the activity, the CJA or claims attorney should discuss the referral with the exchange manager or NAFI supervisor with the goal of helping the claimant resolve the complaint.

d. Specific types of complaints. Procedures for specific types of complaints—

(1) For complaints and claims arising from exchange activities including concessionaires, see Exchange Operating Procedures (EOP) 57-2 (Property, Casualty, and Contractor Insurance Claims).

(2) For claims arising from other NAFIs, see AR 215-1, chapter 3.

(3) For claims arising from APF laundry and dry cleaning operations, see AR 210-130, chapter 2.

(4) For claims for refunds of sales proceeds see EOP 40-5, Exchange Operating Procedures. Use and exhaust these procedures before considering the claim under AR 27-20.

e. Analysis of responsible party. NAFI or AAFES claims are identified by the status of the person responsible for the act or omission that gives rise to liability. These claims may involve loss or injury due to defectively maintained property. Investigate the issue of responsibility carefully to determine who owns the property or is responsible for its maintenance. If a claim concerns a structure or plant, determine whether the building was built or modified with nonappropriated funds. Even if it was built or modified with appropriated funds, the NAFI or AAFES is likely to be responsible for its maintenance, which it pays for with nonappropriated funds. If that is the case, the claim will be paid with nonappropriated funds. If the NAFI is responsible but the identity of the negligent person cannot be determined, the claim is still paid with nonappropriated funds. For cases in which the NAFI manager was aware of a hazard but failed to take adequate steps to safeguard the public (such as marking broken steps), a claim for injury caused by that defect is payable with nonappropriated funds. In contrast, if the NAFI manager placed work orders with the local engineers (part of an appropriated fund activity) for repair of a facility constructed with appropriated funds and these orders were not completed through no fault of the NAFI, the claim is payable with appropriated funds. Claims in which there is a basis for payment from either fund are prorated from each fund source.

f. Guidelines for identifying NAFI or AFEES claims. Identify NAFI or AAFES claims according to these guidelines:

(1) NAFI claims must be distinguished from those arising from the activities of a private association. The NAFIs are established under command authority and must meet the federal agency test, that is, they must be essential for the performance of governmental functions and an integral part of the Department of the Army (DA), see 28 U.S.C. § 2671 and AR 215-1. AAFES exchanges are always NAFIs. Officers and noncommissioned officer (NCO) clubs are usually NAFIs unless formed as a private association. The same is true of post stables or golf courses. Thrift shops and spouses' clubs are usually not NAFIs despite the use of DA facilities. The Army is not responsible for private association claims except to the extent of its participation in the activity. See the Federal Tort Claims Handbook (FTCH), § II, B2i. As a matter of good practice, private associations and activities that are required to maintain liability insurance coverage should include the United States as a named insured to preclude the insurer's claim for indemnity or contribution.

(2) The AAFES claims arising on an Army post are the Army's responsibility and those that arise on an Air Force

base are the Air Force's responsibility. Off post or off base claims arising from the shipment of AAFES merchandise or supplies in an AAFES vehicle usually involve shipments originating from a Department of Defense (DOD) depot; for this reason, the Army usually assumes responsibility for the claim. When the Air Force assumes responsibility, the area claims office (ACO) or claims processing office (CPO) should fully cooperate with its sister service.

12-2. Claims by employees for losses incident to employment

Adjudicate these claims in accordance with chapter 11. Pay approved claims pursuant to paragraph 2-80h.

12-3. Claims generated by acts or omissions of employees

Investigate claims generated by acts or omissions of employees as tort claims in accordance with the procedures set forth in chapter 2.

12-4. Persons generating liability

See AR 27-20, paragraph 12-4.

12-5. Claims payable from appropriated funds

See AR 27-20, paragraph 12-5. Also note that NAFI claims may involve losses due to defectively maintained property. Investigate carefully to determine who owns the property or is responsible for its maintenance.

12-6. Settlement authority

See AR 27-20, paragraph 12-6.

12-7. Payment

See AR 27-20, paragraph 12-7.

Section II

Claims involving persons other than Nonappropriated Fund Employees

12-8. Claims arising from activities of Nonappropriated Fund contractors

See AR 27-20, paragraph 12-8.

12-9. Nonappropriated Fund Instrumentalities Risk Management Program claims

See also AR 27-20, paragraph 12-9.

a. Under certain conditions, third-party claims caused by authorized users of NAFI property are deemed payable pursuant to the Army's policy of encouraging the use of NAFI sports activities. These claims may be filed against NAFIs when an authorized user of NAFI property has caused property damage or injury to a third person (who may also be an authorized user). These claims are investigated as fully as Federal Tort Claims Act (FTCA) or MCA claims. Accordingly, the authorized user must be found to have acted negligently in causing the damage or injury that is the subject of the claim: strict liability is not a basis for compensation. Soldiers or other authorized NAFI users are not considered employees or agents of the United States.

b. Claims against participants in NAFI sports activities who use NAFI personal property in the manner authorized and cause personal injury, death or property loss or damage to others may be payable as non NAFI risk management program (RIMP) claims. While the participant may be a U.S. Soldier or employee, there is no scope of employment requirement. Thus, a Soldier who takes flying lessons during leisure time is not acting within scope of employment and, of course, a flight instructor who is an independent contractor is not considered within scope. Similarly, claims based upon the operation of a golf cart, water equipment, or other sports equipment by a participant are non NAFI RIMP claims. See FTCH § II, B2k and B3.

c. The following elements are necessary for a finding of liability:

(1) The property involved must be NAFI property as defined in the glossary to AR 215-1: "property procured by, transferred, or donated to a NAFI and carried on NAF property records." Real property is not included.

(2) The activity involved must be a NAFI. Certain types of activities, such as parachute clubs or flying clubs, may be organized as NAFIs or as private organizations. If the organization involved is not a NAFI, the claim is not payable as an authorized user claim with nonappropriated funds.

(3) The activity involved must be a NAFI whose specific purpose is the performance of sports activities. Specifically excluded from this category are theaters, exchanges and snack bars.

(4) The claim must arise from the use of authorized users which includes guests who meet the requirements for extension of guest privileges. For example, if the NAFI requires a guest to sign in, check the sign-in sheet to be certain that the person was a proper guest.

d. A claim is excluded from coverage if it would not be payable under the FTCA (aside from scope of employment issues or because the tortfeasor is not a U.S. employee). Among the more common types of excluded incidents are claims barred by the Feres doctrine. For example, two active duty Soldiers are golfing together at a NAFI golf course.

One player negligently operates the golf cart, striking the other player. The claim is Feres barred. A similar exclusion may arise under the Federal Employees Compensation Act (FECA), which covers certain sports injuries.

e. Always check for alternative bases of liability. For example, the NAFI property may be negligently maintained or NAFI employees may have failed to properly supervise the activity causing the harm. Where alternative bases for liability exist, the claim will be paid as an "authorized user" claim if the tortfeasor's authorized user status is one of the bases of liability.

f. Other frequently encountered claims are those involving family child care providers. See FTCH § II, Bk.

(1) *General.* AR 608–10, chapter 6, section III, and AR 215–1 describe the quarters-based family child care program. Care provided by child care centers or chaplain cooperative nurseries is not covered. It is important to recognize that family child care providers are not U.S. employees but private persons whose activities are regulated by the installation commander.

(a) To encourage their participation in the program, the Army has adopted the policy of paying for personal injury or wrongful death claims arising from certain negligent acts or omissions committed by these child care providers. The claim or action must be based on a negligent act or omission, however. Family child care providers are not covered under RIMP for injury or death occurring to their own child, stepchild, or foster child, to any other child who resides in the provider's household on a permanent basis (more than 60 days), or to any child not eligible for child care at a Child Development Services center. Also excluded are any claims or actions for property that may have been lost or damaged during the course of providing child care. Finally, claims for injuries or other losses caused by the operation of a motor vehicle are not payable regardless of any negligence on the part of the family child care provider.

(b) Settlements are limited to \$500,000 per claims incident. Coverage overseas is limited to children and providers who are authorized for logistical support and protection under a status of forces agreement (SOFA).

(c) Personnel who review family child care programs should carefully scrutinize local procedures to ensure that Child Development Services maintains adequate supervision over family child care providers. A memorandum of understanding should be executed between the ACO or CPO and the Child Development Services coordinator on processing family child care provider claims, setting forth both the legal support provided to the family child care program and the requirements for investigating potential claims incidents that occur in a family child care home. The memorandum of understanding should state that the family child care provider director must report immediately to the ACO or CPO any event creating potential liability; it should also outline procedures for the ACO or CPO to investigate all such incidents with the help of Child Development Services personnel. In addition, it should require legal review of the local family child care program, including any changes made.

(2) *The role of the Area Claims Office or Claims Processing Office.*

(a) *Investigation.*

1. Investigate potential claims arising in family child care homes the same way any other incident is investigated. An individual's designation as a family child care provider requires that person to execute an agreement allowing claims personnel to investigate all potential claims. This agreement grants the provider's consent to inspect quarters and is specifically intended to facilitate claims investigation, the nature of which is set forth at paragraph 2–53. At some installations the administrative law section of the Office of the Staff Judge Advocate, rather than the claims office, provides formal legal review and advice to the family child care program. The administrative law section and the claims office should cooperate in reviewing actions taken and advice provided to the family child care program. Any training conducted for family child care providers should be coordinated with the CJA.

2. Investigation should include whether the family child care director complied with AR 608–10, chapter 6. For example, in a sexual abuse case, were all family members cleared? In a case where the injured child was burned by hot water, were the quarters inspected to determine whether the water temperature was set at the required 110 degrees? Negligent acts or omissions by U.S. employees could result in payment, in whole or in part, from appropriated funds.

(b) *Suits against family child care providers individually.*

1. Occasionally, a party will file a lawsuit against a family child care provider individually without filing a claim and without naming the United States as a defendant. Approach this situation with caution. Remember that the family child care provider is not an employee of the United States. An action against the family child care provider individually is not governed by the FTCA or the MCA; accordingly, state law controls the action. State civil procedure applies, as does state substantive tort law. Certain situations are excluded, such as willful torts and automobile accidents while the family child care provider is engaged in transporting children. In addition, payments are limited to \$500,000.

2. Representation by a private attorney increases the cost to the provider and complicates the claim's resolution. However, the family child care provider must not be subjected to a default judgment, which may result when there is delay in resolving questions of representation. Accordingly, when a family child care provider seeks advice from the claims office, give the matter prompt attention and contact an area action officer (AAO) immediately. Close coordination with the Army Litigation Center is also necessary.

3. The AAO will seek to have the court dismiss the legal action against the family child care provider and to have the plaintiff file an administrative claim. The plaintiff's attorney must be contacted immediately and informed that the family child care provider is not a federal employee and that an administrative claim should be filed and the suit

dismissed. In most states, a voluntary dismissal without prejudice does not prevent a suit from being filed later if the claim cannot be resolved. Most states toll the statute of limitations for the plaintiff's minority.

12-10. Claims payable

See AR 27-20, paragraph 12-10.

12-11. Procedures

See chapter 2, sections I, IV and X, Claims Investigative Responsibility, Investigative Methods and Techniques and, Payment Procedures, respectively. Also see AR 27-20, paragraph 12-11.

12-12. Settlement authority

See chapter 2, section IX, Settlement Procedures, and AR 27-20, paragraph 12-12.

Chapter 13

Claims Office Administration

13-1. Automated claims databases

a. Purpose. The U.S. Army Claims Service (USARCS) claims databases provide staff judge advocates (SJAs), supervising attorneys, field claims officers, and the Commander USARCS with timely and accurate data, claims management reports, and budget information for better claims office management.

b. Software requirements. The USARCS provides three claims management programs: the Tort and Special Claims Application (TCSA) database for tort claims, the Personnel Claims Management System (PCMS) database for personnel claims, and the Affirmative Claims Management Program (ACMP) database for affirmative claims. USARCS continually refines and improves the software based on user suggestions that are approved through its chain of command. Each new version is cumulative, containing the refinements present in all previous versions. Additionally, each new version will accept the claims data already in the system. Thus, there is no need to reenter claims data as new versions are brought on-line.

c. User manuals. The three claims management databases include downloadable user manuals written to help and instruct claims personnel. Each manual describes its database in detail and explains how to use it.

d. Assignment of claim numbers. The current affirmative and torts programs and the old personnel claims program assign a unique 9-character number to every claim or PCE entered into them. The current PCMS program is centralized and assigns numbers sequentially. Since many claims offices may create different personnel claims simultaneously, PCMS numbers will not be consecutive within each office. In all programs the claim number does not change; it remains the same even if the claim or PCE is transferred to USARCS or another claims office. The only exceptions to this rule occur when a PCE is converted into a claim or when a claim is opened as a tort claim and claims office personnel later decide to pay it as a personnel claim or vice versa. However, if the claim is only payable as a tort claim, it will be closed in the PCMS database and be entered as a tort claim in the TCSA database. The 9-character tort and affirmative claim numbers consist of the last 2 digits of the fiscal year, the 3-digit office code, and a 4-character claim sequence number. Tort and special claims are identified with a "T" and a 3-digit claims sequence number. Affirmative claims are identified with an "A" and a 3-digit claims sequence number. The 9-character PCE number consists of the letter "P," the 3-digit office code, and a 5-digit PCE sequence number. In the old personnel claims database personnel claims are numbered from the start of the fiscal year with a 4-digit claims sequence number. All claims sequence numbers other than those for PCEs and in the PCMS begin with "0001" at the beginning of the fiscal year. The databases' software automatically assigns the next consecutive claim number to each new claim or PCE entered in them. For example, "P-281-0012" identifies the 12th PCE at Fort Gordon, Georgia; "97-344-0029" identifies the 29th personnel claim filed using the old personnel claims database at Walter Reed Army Medical Center, Washington, DC, in FY 97; "05-011-A055" identifies the 55th affirmative claim opened at Fort Lewis, Washington, in FY 05; "06-451-T002" identifies the second tort claim filed at Fort Buchanan, Puerto Rico in FY 06. The new PCMS does not incorporate an office code and fiscal year in the claim number-claim numbers issue in numerical sequence-but USARCS requires them on the paper file. Therefore, the field claims office should write the last two digits of the fiscal year, the office code, and the system-generated claim number on the right side of the folder tab along with the claimant's name and claim type.

e. Determination of statute. Prior to entering a claim into one of the databases a determination must be made as to whether it is an affirmative claim (chap 14), tort or special claim (chaps 3 through 10) or personnel claim (chap 11). A claim that is filed as a personnel claim will be entered into the database as such and any final action will include both the PCA and the MCA, if the claim also constitutes a tort. However, if the claim is only payable as a tort claim, it will be closed in the PCMS database and be entered as a tort claim in the TCSA database. When claimants or their attorneys contact a claims office to file a claim, the claims office personnel should obtain sufficient information from the claimant to determine whether the claimant wishes to file a tort claim, a personnel claim, or both. When a claims

office receives a claim, regardless of the form used, the claims judge advocate (CJA) should review the allegations to see if they comprise a tort claim, a personnel claim, or both. If the claim alleges a personnel claim, the claim must first be considered under the PCA. See AR 27–20, paragraph 11–3c. All claims must be reviewed under all applicable statutes. See paragraphs 2–15 of both AR 27–20 and this publication for more information on determining the correct statute.

f. Review of claims data. The claims officer, CJA, recovery judge advocate (RJA) or claims attorney must personally review the database entries to ensure that they are accurate and complete and that the category codes are appropriate. Unless these codes are carefully selected, the system will be unable to provide accurate data for trend analysis.

g. Claims of other Services.

(1) *Tort claims.*

(a) Entry into database. All tort claims filed with a claims office should be logged into the TSCA database, even if they appear to be against another service and not against the Army. In many countries outside the United States, the Army has been assigned responsibility to adjudicate tort claims against other services. In those cases where the Army has not been assigned such responsibility, the claims office should still log the claim into the database and then transfer it to the other service's claims office. This ensures accountability of the claim file and documents the date of receipt which starts the applicable statute of limitations.

(b) Single-service responsibility claims. Department of Defense Instruction (DODI) 5515.08 has assigned the Army single-service responsibility for tort claims arising from the activities of all Department of Defense (DOD) components in certain foreign countries. This publication in paragraph 1–19 also discusses single-service claims responsibility. A list of single-service assignments is posted on the USARCS Web site at "Claims Resources," VI, h. Claims arising in those countries alleging negligence by any DOD employee are logged in and processed as if they allege negligence against the Army. However, any allegation by a member or employee of another service that constitutes a personnel claim should be forwarded to the appropriate service for adjudication of the personnel claim. Claims payable under the Personnel Claims Act (PCA) may not be paid as a tort claim; thus, claims offices should ensure they coordinate with the other service prior to settling a claim under the Military Claims Act (MCA) or the Federal Tort Claims Act (FTCA), AR 27–20, paragraph 11–3c. If the claim is determined to be without merit under both the PCA and either the MCA or the FTCA, the claims office must deny the claim under the MCA/FTCA and should ensure that the other service coordinates its denial of the claim under the PCA with the Army claims office's denial.

(c) Establishing the lead agency. Some claims may allege negligence by employees of both the Army and one or more services or government agencies, such as a claim of medical malpractice in an Army medical treatment facility, an Air Force or Navy medical treatment facility, and a Department of Veterans Affairs hospital. In such instances, the claims office that receives the claim should contact the other service(s)/agencies involved and try to establish a lead agency. See AR 27–20, paragraph 2–13 and this publication for guidance on selecting a lead agency and maintaining the claim file.

(d) Nonappropriated and mixed fund claims. Nonappropriated fund (NAF) claims brought under AR 27–20, chapter 12 are processed in the same manner as other tort claims. However, the claims investigation may reveal that the damage resulted from the negligence of employees of both appropriated fund (AF) and nonappropriated fund instrumentalities (NAFI). For example, a claim alleging injury at a child development center may result from the negligence of the center director, paid from AF, and a caretaker, paid from NAF. If both AF and NAF paid employees are responsible for the damages, once the claim is adjudicated the CJA will apportion the amount of damages between the AF and NAF tortfeasors. The amount that the NAF instrumentality (NAFI) was directed to pay will be entered into the claims record along with any amount to be paid from the claims expenditure allowance (CEA). The TSCA database is designed not to subtract the approved NAF amount from the claims office's CEA if the correct transaction code ("PN" - nonappropriated fund) is used. A copy of the claim file is then forwarded to the NAFI for payment. A settled NAF claim will be transferred for retirement like other tort claims.

(e) Foreign claims commissions. Each FCC has a separate office code and is considered a separate "office" for purposes of data entry and claims reporting. Each FCC must have a separate code from that of its command claims service or field claims office.

(2) *Personnel claims.* Claims from personnel of other services should be entered into the PCMS using the claimant type code "S." Forward the paper file to the appropriate entity and enter the "TS" transaction code in the database to record the transfer and the date of the transfer.

h. Field carrier recovery entries (personnel claims). USARCS requires certain carrier recovery information be completed in the "GBL Recovery" and "Non-GBL Recovery" block(s) of the computer claim record. See the PCMS on-line user manual for exact procedures.

i. Recording refunds from claimants (personnel claims). When a claimant refunds money on a personnel claim that the claims office has already paid, use the screen called "Non-GBL Recovery."

j. Potentially compensable event files. PCE files will be merged into a claim file when a claim is filed or asserted. PCE files not otherwise merged into a claim file will be retained until transferred to another Army claims office or

until the time for filing a claim has expired. Ensure that calculations of the time to file a claim consider tolling under the Servicemembers Civil Relief Act. 50 U.S.C. app. §§ 501–596.

13–2. Transferring of claims responsibility and/or files

a. Tort claims. See policies and instructions set forth in AR 27–20, paragraph 13–2 and paragraph 2–13 of this publication.

b. Affirmative claims. See AR 27–20, paragraph 13–2 and paragraph 14–6c of this publication.

c. Personnel claims. Observe the following rules when forwarding claim files to USARCS or a command claims service.

(1) An office forwarding claims created and processed in the old personnel claims database to another office for settlement or reconsideration action must include a diskette containing the record of the claim. This includes claims forwarded to the Personnel Claims Division (C03) at USARCS for initial payment, reconsideration or for additional payment above \$40,000.

(2) For personnel claim files forwarded to USARCS for recovery, for offset, or retirement, do not send a diskette. Follow the procedures for holding and forwarding files described in paragraph 11–31d. USARCS will receive the computer records on these claims when the monthly data upload is forwarded.

(3) When forwarding claims files for offset action see instructions in paragraph 11–34.

(4) For all personnel claim files forwarded to USARCS, mark the file folder on the outside in the manner described in paragraphs 11–24f, 11–27g, 11–28a, and 11–28h, depending on the corresponding type of action. The automation of files has not changed this long-standing requirement.

(5) The outside Continental United States (OCONUS) claims offices will follow the instructions of their supervising command claims services when sending records to them. Claims created and processed in the old personnel claims database must always include a diskette containing the record of the claim whenever a claim is forwarded to an overseas command claims service for any reason. This is not a requirement on the new PCMS but the losing field claims office should enter the appropriate status code, receiving group, and owner in the appropriate fields.

(6) Claims offices will ensure that the last transaction recorded in the electronic claim record specifies the reason for forwarding the claim. See the appropriate PCMS on-line user manual for the correct transaction code.

13–3. Claim files organization and maintenance

General guidance pertinent to all claims is found in AR 27–20, paragraph 13–3.

a. Personnel claims. For a detailed discussion of the arrangement of these claim files see paragraph 11–31c of this publication.

b. Tort and affirmative claims. For a detailed discussion of arrangement of these claim files see paragraph 2–11 of this publication.

c. Potentially compensable events. Claims offices will maintain separate investigative files of potentially compensable events (PCEs) for every incident they (or a unit claims officer) have investigated. An investigative file will be prepared when the claims office receives a copy of a report of incident or report of investigation from a unit claims officer or any other source. Similar files will be maintained for incidents investigated by a claims office or other Army official that might give rise to an affirmative claim in favor of the Army or of another service where the Army has single-service responsibility.

13–4. Closing abandoned or withdrawn files

For instructions on retention and disposal (retirement) of claim files see AR 27–20, paragraph 13–4.

a. Tort claims.

(1) *Generally.* Each file will contain evidence of the claimant’s intention to withdraw or abandon the claim, such as a letter or a memorandum for record of a telephone conversation with the claimant. Before apparently abandoned claims are forwarded to USARCS, a certified letter will be sent to the claimant requesting a statement of intentions be provided within a specified period, usually 30 days. For further discussion, see paragraphs 2–75a and 13–5 of this publication.

(2) *Tort claims arising under chapter 4.* The certified letter will include a paragraph stating that failure to respond will result in the presumption that the claim is abandoned; furthermore, it will state that if the claimant is dissatisfied with the action taken, the claimant may file suit in an appropriate U.S. District Court no later than six months from the date of mailing the letter or be forever barred from remedy.

(3) *Tort claims arising under chapter 3 or 6.* The letter’s last paragraph will advise the claimant that failure to respond will result in the presumption that the claim is abandoned. This paragraph will also state that a claimant who is dissatisfied with the action taken has a right to appeal the action for a review and final decision. The paragraph will clearly state that the claimant has 60 days in which to submit an appeal.

(4) *Tort claims arising under chapter 10.* The registered letter’s last paragraph will advise the claimant that failure to respond will result in the presumption that the claim is abandoned. This paragraph will also state that claimants who

are dissatisfied with the proposed final action on their claims have the right to request the FCC reconsider the final action. The paragraph will clearly state that the claimant has 30 days in which to submit a request for reconsideration.

b. Personnel claims. Personnel claims arising under chapter 11 will be administratively closed in the situations listed below. However, when claimants have neither affirmatively abandoned nor fully substantiated a claim cognizable under chapter 11, they will be directed by certified mail to provide the required substantiation within a specified period, usually ten days. If the correspondence is returned as undeliverable and the claimant is an active duty Soldier or government employee who qualifies as a proper party claimant in accordance with paragraph 11-4, the claimant will be contacted through the unit or organization. If the claimant still fails to respond, the claim will be paid (through the claimant's DFAS military or civilian pay account) to the extent that it is meritorious and can be substantiated, and closed. If the claimant is not an active duty Soldier or government employee, the file will be closed.

(1) The claimant cannot be located.

(2) The claimant affirmatively withdraws or abandons the claim prior to adjudication. The file will contain evidence of the claimant's intention to abandon, such as a letter from the claimant or a memorandum of a telephone conversation with the claimant.

(3) Other reasons which preclude settlement of the claim.

13-5. Certified and registered mail

a. With the exception of final actions on personnel claims, use certified or registered mail with return receipt requested, or send correspondence by private carriers (such as Federal Express), when those carriers provide item tracking service, for all:

(1) Acknowledgement letters for claims alleging personal injury which are accompanied by Health Insurance portability and Accountability Act (HIPAA) related documents requiring claimant's signature. (Sample HIPAA documents are posted on the USARCS Web site at "Claims Resources," II, c, nos. 13-16.

(2) 30 and 60-day letters.

(3) Notices of final actions.

(4) Proposed final actions under chapter 10, including final offers and denials.

(5) Courtesy letters informing claimants of action taken by the Deputy Judge Advocate General or the Secretary of the Army's designee in MCA/FCA cases.

(6) Abandonment notices.

b. Often, the return receipt from the U.S. or a foreign postal system is not returned. Additionally, private carriers provide electronic, rather than paper receipts. Accordingly, the file copy of the correspondence should be annotated with the mail service's tracking number. The claims office should visit the U.S. Post Service or private carrier's Web site two weeks after mailing to view and print the tracking information regarding the correspondence as proof of date and time of mailing and delivery. Retain a printout of this information in the claim file.

Chapter 14 Affirmative Claims

14-1. Statutory authority

Depending on the type of claim and the facts of the case, federal agencies must choose between several theories of recovery to assert and collect the government's claim for damaged property or for costs of Soldiers' medical care and/or wages (basic pay, incentive and special pay) when they are injured by the negligent actions of another.

a. Federal Claims Collection Act.

(1) *General.* The Federal Claims Collection Act (FCCA), 31 U.S.C. §§ 3711-3720E, as amended by the Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1749 (25 October 1982) and Pub. L. No. 101-552, 104 Stat. 2736 (15 November 1990), provides a basis for agencies to recover for damage to or loss of government property. Its implementing regulations are published at 31 C.F.R. Parts 900-904; those for the Army specifically are in AR 27-20, chapter 14.

(2) *Historical background.*

(a) Before the Civil War, the Supreme Court decided that the United States had the same right as any other legal entity to assert a cause of action for tortious damage to its property interests (*Cotton v. United States*, 52 U.S. (11 How.) 229 (1850)). However, recognition of a federal right as a property owner, important as that is, is but a threshold issue in the area of claims in favor of the United States. The allocation of powers and responsibilities within the government to enforce such a right is another critical determination. The Constitution empowers Congress to dispose of property belonging to the United States and a cause of action is a property interest. Thus, the basic source of power to assert, settle or compromise property damage claims in favor of the United States is found in federal legislation.

(b) Departments and agencies of the government using or having custody of United States property have a duty to protect it. Title III of the Budget and Accounting Act of 1921 (42 Stat. 24, repealed by Pub. L. No. 89-554, § 8(a), 80

Stat. 63F) created the General Accounting Office, one of whose duties was to supervise the recovery of all debts it certified to be due the United States (42 Stat. 24, 31 U.S.C. § 3702). The Comptroller General had the general statutory duty of settling and adjusting all claims and demands both by and against the United States by means other than litigation (E.O. 6166, reprinted at 5 U.S.C. § 901). When the executive agencies were reorganized in 1933, the responsibility for prosecuting claims and demands in favor of the United States by way of litigation was vested in the Department of Justice (DOJ) (21 Comp. Gen. 59 (1941); see also 26 Comp. Gen. 618 (1947)). Once any federal agency refers a claim to the Department of Justice (DOJ), DOJ has full authority to dispose of the claim, as it deems appropriate. This authority and control by the DOJ does not affect the function of any other agency with respect to cases prior to referral for litigation.

(c) For many years, the Comptroller General recognized that some claims actions could be completed by other federal agencies without referring them to the General Accounting Office or the DOJ. Actions that could be taken by other federal agencies on property damage claims were limited, in general, to settlement by recovery in full. A Comptroller General decision is illustrative: "Where the remittance (from the tortfeasor's insurer) is in the full amount of the damages as found by the administrative office, as appears to be the case here, there would be no legal basis for this office to raise any objection if the administrative officer receiving the remittance, or any other officer of the establishment concerned, should execute a proper document releasing further liability in the matter," 21 Comp. Gen. 59.

(d) The narrow scope of federal agency recovery action reflected a longstanding and well-established principle that without specific statutory authority, federal agency heads and their delegees had no authority to compromise claims in favor of or against the United States. S. Rep. No. 1331, 89th Cong. 2d Sess., reprinted in 1966 U.S. Code Cong. & Admin. News 2532, 2533-34. As used here, "compromise" meant to dispose of the claim without conceding liability by considering factors such as the cost of recovery and the defendant's ability to satisfy the claim. As to claims in favor of the United States, the reason for this rigid rule concerning compromise was that a final settlement for less than the actual amount of the claim necessarily entailed a disposition of at least a portion of the government's cause of action, and only Congress had the power to dispose of any property of the United States (80 Stat. 308, 31 U.S.C. §§ 3701, 3711, 3717, 3718).

(e) The inflexibility of federal claims recovery practice led to the enactment of the FCCA of 1966, effective 15 January 1967. The purpose of this Act is to afford more flexibility in disposing of claims in favor of the United States. The FCCA permits heads of agencies and their designees to compromise claims in favor of the United States that do not exceed \$100,000 or to terminate recovery action on such claims. These new powers to dispose of claims are to be exercised in accordance with standards issued jointly by the Attorney General and the Comptroller General. These standards are published at 31 C.F.R. Parts 900-904. A very important application of the FCCA is to claims for damage to, or loss of, Army property.

b. Federal Medical Care Recovery Act.

(1) *General.* The Federal Medical Care Recovery Act (FMCRA) 42 U.S.C. §§ 2651- 2653, and 10 U.S.C. § 1095 provide primary authority for agencies to recover the reasonable value of medical care and pay furnished by the United States in certain circumstances. The FMCRA permits recovery for medical expenses or in cases where an individual is injured in circumstances creating tort liability upon some third person. In such cases, agencies may recover costs from tortfeasors or their insurance carriers. The FMCRA is the primary authority used to recover the costs of medical care paid for by TRICARE.

(2) *Historical background.*

(a) During World War II, the War Department asserted claims in favor of the United States that were analogous to the common law cause of action of a master for injury tortiously inflicted upon his servant. The claims were asserted against any person who tortiously injured a member of the Army, leaving that Soldier incapable of performing duty. The sum of damages sought was the cost of medical treatment provided and the amount of salary paid during the period of incapacitation.

(b) In February 1944 an enlisted Soldier was struck in a pedestrian crosswalk by a Standard Oil of California truck. The Army routinely asserted a claim against Standard Oil for the cost of medical treatment (\$123.25) and the Soldier's pay (\$69.31) during his period of hospitalization. Despite the modest amount of damages, Standard Oil declined to pay and the case went to trial. In an extensive opinion by Judge Yankwich (United States v. Standard Oil Co. of Cal., 60 F. Supp. 807 (S.D. Cal. 1945)), the claim was upheld and Standard Oil was held liable for damages. The company appealed this decision and prevailed in the U.S. Court of Appeals (153 F.2d 958 (9th Cir. 1946)), which held that the injured Soldier was not a "servant" nor was the United States a "master" under the pertinent California statute. The United States appealed, and the Supreme Court affirmed the decision but upon a different theory (United States v. Standard Oil Co. of Cal., 332 U.S. 301 (1947)). The Supreme Court held that even though the government's right at issue derived from tort rather than from contract, federal law controlled its existence. But looking into existing federal law, it found that no such right existed. The Supreme Court determined that Congress and not the Court was the proper forum to create the right if it was to be created at all.

(c) In a 1960 report entitled "Review of the Government's Right and Practices Concerning Recovery of the Cost of Hospital and Medical Services in Negligent Third-Party Cases" (Manuscript Decision Comptroller General (MS DCG) B-133226, 6 May 1960), the Comptroller General estimated that without the type of enabling legislation the Supreme

Court contemplated in the Standard Oil Company case, the government was prevented from recovering several million dollars each year for hospital and medical care furnished to Soldiers. The report concluded by recommending such legislation. Several standing committees in both Houses of Congress studied the problem extensively, and the result was the Act of 25 September 1962, codified at 42 U.S.C. §§ 2651 through 2653 and known as the FMCRA.

c. 10 U.S.C. § 1095.

(1) *General.* 10 U.S.C. § 1095 permits recovery from certain third-party payers, namely health benefits insurers and automobile liability insurance carriers. Claims personnel may use this statute to recover costs for medical care provided by or through a medical treatment facility (MTF).

(2) *Historical background.*

(a) 10 U.S.C. § 1095 as originally passed in 1986 was limited to recovering health care costs from health benefits insurers for care furnished to eligible beneficiaries treated in MTFs. Such collections are solely against the insurer; collections against the insured for the deductible portion are not permitted.

(b) The Act was expanded to include collections from other sources such as automobile liability that was already permitted under the FMCRA based on tort liability, 42 U.S.C. § 2651(a). However, recovery under 10 U.S.C. § 1095a(1) is not limited to tort liability but includes any insurance, medical service or health plan of a third-party payer, that is, any entity that is obligated to pay health costs on behalf of a MTF patient, such as workers compensation and no fault carriers.

14–2. Recovery rights under the Federal Medical Care Recovery Act and 10 U.S.C. § 1095

a. The FMCRA creates a claim in favor of the United States, offers a means of enforcement, and provides methods to satisfy (or extinguish) claims. At its heart is the creation of the claim itself. Liability may be pursued in any case in which the United States is authorized or required by law to furnish or pay for care and treatment to a person who is injured or suffers a disease under circumstances creating a tort liability upon some third person. The United States has the right to recover from that third person the reasonable value of the care, as well as the total amount of the pay accrued and owing to a Soldier who is unable to perform his duties as a result of the injury or disease. See § 2651(a).

b. The government's right is independent of the rights of the person receiving medical care. The government's right arises directly from the statute; the statutory reference to subrogation pertains only to one mode of enforcement. In creating an independent right in the government, the Act prevents a release given by the injured person to a third-party from affecting the government's claim. See *United States v. Winter*, 275 F. Supp. 895 (E.D. Pa. 1967); *United States v. Greene*, 266 F. Supp. 213 (N.D. Ill. 1967); *United States v. Bartholomew*, 266 F. Supp. 976 (W.D. Okla. 1967); *United States v. Jones*, 264 F.Supp 11 (E.D. Va. 1967) and *United States v. Guinn*, 259 F. Supp. 771 (D.N.J. 1966). See also, *Validity and Construction of Medical Care Recovery Act Dealing with Third-Party Liability for Hospital and Medical Care Furnished by United States*, 7 A.L.R. Fed. 289.

c. The head of the federal agency furnishing the care may require the injured party to assign his or her cause of action against the tortfeasor to the extent of the government's right of recovery. The United States is specifically allowed to intervene or join in any action at law brought by or through the injured party against the liable third person. Alternatively, if the injured party does not begin an action, the United States may bring an original suit in its own name, or in the name of the injured party. The primary method is to try to recover through the injured party.

d. The government's claim may be satisfied in various ways. According to regulations issued under the statute, the head of an agency, usually through delegees, may accept payment of a claim for the full cost of the medical care. Once the payment is received, a release may be executed. Such delegees may also compromise any claim in part, waive any claim in whole, or terminate recovery efforts.

e. The FMCRA also provides that no action taken by the United States in connection with its rights thereunder shall operate to deny to the injured party recovery for that portion of damages not covered by the FMCRA. This safeguard precludes a defendant from using an agency's administrative determination of non-liability or agreed percentage-of-damages compromise against the injured party. When the defendant's assets and insurance are insufficient to satisfy all claims, the government has statutory authority to compromise or waive its claim on grounds of undue hardship to the injured party.

f. Where no tort is involved, it is necessary to look beyond the FMCRA to satisfy a claim. Under 10 U.S.C. § 1095, eligible beneficiaries may have received medical care for an injury incurred while working for civilian employers. In such instances, for care provided through TRICARE the existence of a remedy may hinge upon the particular wording of a state workers' compensation statute. Here, the United States stands in the position of a lienholder for services rendered. Some courts have denied recovery on the lienor theory, finding no statutory basis for the government's claim, *Nat'l Mut. Casualty Co. v. Barnett*, 445 F.2d 573 (5th Cir. 1971); *Texas Employees Ins. Assn v. United States*, 390 F. Supp. 142 (N.D. Tex.1975); *United States v. Commercial Union Ins. Group*, 294 F. Supp. 768 (S.D.N.Y. 1969). However, in addition to recovery from worker's compensation funds under 10 U.S.C. § 1095, recovery under a state workers' compensation statute is also a viable theory of recovery in many states, and the recovery judge advocate (RJA) or recovery attorney should aggressively assert workers' compensation claims. To recover under a state's workers' compensation statute, claims personnel must comply with the state's procedural requirements. Office policy

and precedent files, including the most current authorities under applicable law, are especially important if claims personnel are to keep abreast of developments concerning this additional source of recovery.

g. The government may also seek recovery as a third-party beneficiary under the terms of a specific insurance policy. The government has been very successful in pursuing claims under this theory. See for example, *United States v. Gov't Employees Ins. Corp.*, 440 F.2d 1338 (5th Cir. 1971); *Gov't Employees Ins. Co. v. United States*, 376 F.2d 836 (4th Cir. 1967); *United States v. Leonard*, 448 F. Supp. 99 (W.D. N.Y. 1978) and *United States v. United Services Auto Ass'n*, 312 F. Supp. 1314 (D. Conn. 1970). *United States v. Commercial Union Ins. Group*, 294 F. Supp. 768 (S.D.N.Y. 1969).

h. With the enactment of 10 U.S.C. § 1095, the importance of this theory of recovery has diminished. However, there may be cases where this theory provides the only source of recovery, such as cases where the injured party was at fault and TRICARE paid for the medical care. Since there is no legally recognized tortfeasor, the FMCRA will not apply, and 10 U.S.C. § 1095 will not apply because the care is not provided by, or through, an MTF. The government must comply with state procedural law when asserting a claim as a third-party beneficiary, *United States v. Hartford Accident & Indem. Co.*, 460 F.2d 17 (9th Cir. 1972), cert. denied 409 U.S. 979 (1972). Since the government's right to recovery hinges on the particular wording of an insurance contract, insurance companies may successfully thwart government recovery by specifically excluding the United States from the terms of the contract: *Gov't Employees Ins. Co. v. United States*, 400 F. 2d 172 (10th Cir. 1968). *United States v. Allstate Ins. Co.*, 606 F. Supp. 588 (D. Haw. 1985). *United States v. Allstate Ins. Co.*, 306 F. Supp. 1214 (N.D. Fla. 1969).

i. The government has often been successful in voiding such exclusionary amendments to insurance policies. See, for example, *United States v. Nationwide Mut. Ins. Co.*, 499 F.2d 1355 (9th Cir. 1974); *United States v. Gov't Employees Ins. Co.*, 461 F.2d 58 (4th Cir. 1972); *Southern Farm Bureau Casualty Ins. Co. v. United States*, 395 F. 2d 176 (8th Cir. 1968); *United States v. Nat'l Ins. Underwriters*, 266 F. Supp. 636 (D. Minn. 1967); *Engle v. United States*, 261 F. Supp. 93 (W.D. Ark. 1966). Historically, in states that have adopted no-fault automobile insurance laws, the government has often succeeded in recovering as a third-party beneficiary under the terms of either the insurance contract or the state no-fault statute itself. See, for example, *Gov't Employees Ins. Co. v. Rozmyslowicz*, 449 F. Supp. 68 (E.D. N.Y. 1978), aff'd sub. nom. *United States v. Gov't Employees Ins. Co.*, 605 F.2d 669 (2d Cir. 1979); *Gov't Employees Ins. Co. v. United States*, 376 F.2d 836 (4th Cir. 1967); *United States v. Leonard*, 448 F. Supp. 99 (W.D. N.Y. 1978); *United States v. United Services Auto. Assn.*, supra; *United States v. Commercial Union Ins. Group*, 294 F. Supp. 768 (S.D. N.Y. 1969); *United States v. Criterion Ins. Co.*, 596 P.2d 1203 (Colo. 1979); *United Services Auto Assn. v. Holland*, 283 So.2d 381 (Fla. Dist. Ct. App. 1973); *Transnational Ins. Co. v. Simmons*, 507 P.2d 693 (Ariz. Ct. App. 1973).

j. RJAs and recovery attorneys should become familiar with the automobile insurance laws of the states within their areas of responsibility so they can more effectively assert claims for medical care provided by the United States. Within jurisdictions that have established state-administered funds to satisfy uninsured liability claims, RJAs and recovery attorneys should make every effort to recover from these funds when circumstances warrant. This will depend on the nature of the funds and on relevant state statutes.

14-3. Claims collectible

a. *General.* This chapter provides guidance to claims personnel on identifying, asserting, pursuing, and settling claims in favor of the United States for damage to and loss or destruction of government property and for the recovery of the costs of medical care and Soldiers' wages furnished, or to be furnished, at the government's expense. The Affirmative Claims Management Program (ACMP) includes all Army claims offices and their jurisdictional responsibilities. The Department of the Army (DA) has single-service responsibility for processing and settling all claims arising under the FCCA and the FMCRA in Belgium and Germany, among other countries. U.S. Army Claim Service Europe (USACSEUR) and claims offices in Mons, Belgium and in Hoensbroek, the Netherlands process affirmative claims arising in these countries. Similarly, the Office of the Judge Advocate, U.S. Forces Korea (Claims) (FKJA-CL) has single-service responsibility for affirmative claims arising in the Republic of Korea (ROK).

b. *The MTF third-party recovery program.*

(1) 10 U.S.C. § 1095 allows federal agencies to recover certain medical care costs from health benefits insurers and from automobile insurance carriers. In 1992, the Judge Advocate General (TJAG) and the Surgeon General signed a Memorandum of Agreement setting forth the responsibilities of the installation claims offices and the MTFs in pursuing claims against these third-party payers.

(2) The MTFs, through their third-party recovery program, pursue claims against health benefits insurers and Medicare supplemental insurance policies. Installation claims offices pursue claims against automobile insurance carriers as well as all claims arising under the FMCRA, state workers' compensation statutes, contractual third-party-beneficiary theory, or hospital lien laws.

(3) Some cases may involve collecting from both a health benefits insurer and an automobile insurance carrier. Consequently, the local MTF's third-party collection program personnel must closely coordinate with the installation claims office. Simultaneous efforts should be made to collect from both sources. Where the collection effort results both in recovery of health benefits and collection from a tortfeasor's insurer, the government is entitled to the proceeds of both as a tortfeasor is not entitled to reap the benefits of the injured party's health benefits. However, if recovery is

from a source not involving a tortfeasor, then the government should return any double collection to its source. Keep in mind that the greater recovery should be retained, depending on the amount of deductible from either source.

c. Nonappropriated fund instrumentality property. Nonappropriated fund instrumentality (NAFI) property, including that of the Department of Defense (DOD), is covered by the risk management program (RIMP) under Army Regulation (AR) 215-1, chapter 19, § VII. In most instances, the fund manager can seek reimbursement from RIMP. Where the damage is caused by a third-party, the fund manager should report the loss to the RJA for collection action.

14-4. Claims not collectible

Special rules pertain not only to the type of activity from which an affirmative claim arises but also to the category of prospective tortfeasors or defendants.

a. Military personnel and civilian employees.

(1) Property damage caused by military personnel or civilian employees may be the subject of an enforceable liability to the United States, but the liability is usually not determined, satisfied, or settled under the provisions of AR 27-20. Instead, the report of survey is used, and recovery is made by offset against the current or final pay of the responsible employee (AR 735-5, chapter 13). In the exceptional case when resort is made to the claims system, the report of survey system provides the standard of liability unless private insurance covers the prospective defendant's liability. If insurance is available, state law determines liability and the claim for damage should be asserted under the provisions of AR 27-20.

(2) The FMCRA provides for recovery against a third person "other than, or in addition to, the United States," but it does not specify or define the particular classes of federal "third persons" whose negligent acts will not give rise to claims under that statute. This language has generally been interpreted to mean that Congress intended to exclude claims arising out of the acts or omissions within the scope of employment or line of duty of employees of any federal agency, members of the armed services, and persons acting on behalf of a federal agency in an official capacity. Accordingly, RJAs or recovery attorneys will not assert claims against such individuals acting within the scope of government employment. Further, the Federal Drivers Act (28 U.S.C. § 2679(b)) precludes claims action against government drivers.

b. Soldiers, family members, retirees, and civilian employees. Recovery should not be attempted when the injured party is receiving medical care at government expense and a Soldier, family member, retiree, or civilian employee is the uninsured third-party tortfeasor. A claim in these cases is payable from the uninsured tortfeasor's personal funds. This approach is consistent with the rule that the government does not seek indemnity from negligent government employees for the payment of claims to third parties (*United States v. Gilman*, 347 U.S. 507 (1954)). Exceptions to this general policy will be made when the incident involves gross negligence, such as in assault cases. However, if the tortfeasor maintains liability or medical pay insurance coverage, a claim should be asserted and recovery pursued to the extent of the policy coverage.

c. Other federal agencies. An office or organization of the United States is specifically excluded from the definition of those who may be prospective defendants.

d. Foreign prospective defendants. Waiver provisions of international agreements may require different treatment for certain foreign prospective defendants acting in an official capacity. Investigation will proceed normally unless an agreement or regulation provides otherwise. See chapter 7.

14-5. Applicable law

a. Researching state law. The RJA or recovery attorney must determine the prospective defendant's liability in accordance with the law of the place in which the damage or injury occurred with respect to local rules of the road, elements of tort, and possible defenses. In some instances, there may be no prospective defendant, as in cases where the injured party is the one who caused the accident. This information will determine which theory or theories claims personnel will use to assert the government's claim.

b. Computing statute of limitations. Failure to take appropriate action before the statute of limitations runs can result in inability to bring suit in an otherwise collectable assertion. Claims personnel must monitor the statute of limitations closely in every case. To preclude running of the statute of limitations claims personnel should suspense files based on the date of accrual, not the date they become aware of the government's claim. An effective suspense system will guarantee that appropriate action is taken on cases before the statute of limitations expires. This is especially important where the civilian attorney or insurance company does not cooperate with the claims office.

14-6. Identification of recovery incidents

a. Establishing points of contact. The amount of collections is directly dependent on the RJA's ability to develop contacts on post and throughout the area of geographic responsibility. It is essential to establish a point of contact in each unit or activity and foster a relationship with the point of contact with a view to receiving reports of incidents.

(1) *Incidents involving property damage.* Damage to or loss of government property should be a matter of particular concern. Establish points of contact in Reserve, National Guard, and ROTC units, recruiting battalions, and Army and DOD depots.

(2) *Incidents involving medical care.*

(a) *TRICARE fiscal intermediaries.* TRICARE fiscal intermediaries deal primarily with field recovery offices. They are required to notify the appropriate recovery office of a potential incident through DD Form 2527, Personal Injury Questionnaire (a sample completed form is posted on the USARCS Web site at “Claims Resources,” IV, f). Recovery offices should discuss with their intermediary any failures to notify or delays in doing so, and should document them. If problems persist they should contact the TRICARE Assistant General Counsel at:

TRICARE Management Activity
16401 East Centretch Parkway
Aurora, Colorado 80011-9043
Voice Commercial: 303-676-3561

(b) *Support agreements with medical treatment facilities.* To facilitate early notification and prompt collection of medical expenses, heads of ACOs and claims processing offices (CPOs) should enter into support agreements with the commanders of their respective MTFs in accordance with the memorandum of agreement between TJAG and the Surgeon General. A sample support agreement is posted on the USARCS Web site at “Claims Resources,” IV, g. By using funds from third-party collections, ACOs or CPOs can hire enough staff to permit increased collections, which will benefit patient care when deposited in the operating budget of their MTFs. Such staffing will also lead to a closer relationship and permit development of a system for identifying potential recovery incidents by reviewing, for example, emergency room logs, Composite Health Care System (CHCS) reports, and ambulance run log sheets.

(c) *Relations with injured party.*

1. *Advice to injured party.* After receiving the initial notification of the incident, RJAs or recovery attorneys will advise injured parties of the government’s and the injured party’s rights and obligations. Many injured parties will not be aware that the government’s claim exists, so the logical first step is to explain the law underlying the United States’ interest. The injured party should be advised to seek legal assistance for clarification of the rights and obligations imposed by law. The injured party should also be informed of his or her duty to cooperate in the assertion of the government’s claim, to furnish a complete factual statement regarding the injury or disease, and to furnish information concerning any legal action brought. Further, the injured party should be cautioned not to execute a release or settlement for any claim without first notifying the RJA or recovery attorney. The RJA or recovery attorney will obtain a statement from the injured party acknowledging receipt of the advice and the need for a factual statement and information concerning any individual legal action pending or contemplated. See 32 C.F.R. §§ 537.23 and 220.9.

2. *Ethical considerations.* AR 27-26 and state ethics rules prohibit RJAs and recovery attorneys from communicating with a party represented by an attorney without the attorney’s consent. Nor can RJAs and recovery attorneys direct nonlawyer claims personnel to contact a represented party; these rules apply to all claims personnel when obtaining information from an injured party. Usually claims personnel do not know if an individual is represented by an attorney until the injured party completes and returns the report of injury questionnaire. When they learn an injured party has retained an attorney, they must direct all further communication to the attorney. These rules do not prohibit claims personnel from dealing directly with an insurance company in appropriate cases.

b. *Maritime claims.* Maritime claims in favor of the United States are processed not as affirmative claims in accordance with AR 27-20, chapter 14, but as maritime claims in accordance with AR 27-20, chapter 8.

c. *Using affirmative claims database.* The first ACO or CPO that learns of a potential recovery incident will promptly enter it into the ACMP database. Any other ACOs or CPOs that attempt to enter the same information will be put on notice that another office is involved. This will lead to a decision as to which office should take recovery action. The office in whose area of geographic responsibility the incident occurred will normally make the entry. If that office has the largest financial interest in the recovery, that office will be the responsible office unless the injured party received most of the medical treatment in a military medical center. In this event, the medical center should be the responsible office. However, a hard and fast rule should not be established as other factors may govern. In any event, the ACOs or CPOs involved should determine the responsible office.

14-7. Notice to U.S. Army Claims Service

All too often, serious injuries occur and investigation indicates that there is a limited amount of available liability insurance, and the government’s care expense will predictably be a large sum. Every effort should be made to develop other sources of recovery such as negligence in the design and maintenance of a road or highway or the vehicles involved, or malpractice in treating the injuries. Relying on the injured party’s attorney to develop such resources is frequently unproductive as the cost may be great and the injured party has no ability to finance it. So that potentially large recovery incidents may benefit from a timely and immediate investigation, reporting and coordination with USARCS affirmative claims personnel is essential on all claims over \$50,000, thereby permitting access to the expert witnesses who will develop the claim. A mirror file must be created for all affirmative claims over \$50,000 in the manner set forth in paragraph 2-12.

14-8. Investigation

a. Claims in favor of the United States are investigated in essentially the same manner as other tort claims. Claims personnel should apply general instructions for tort claims investigations. However, additional information is needed relating to the prospective defendant, such as the defendant's identity, ability to pay, insurance coverage, information about any collateral legal proceedings arising from the same incident, and documented recommendations as to liability. When indicated another ACO or CPO will assist in the interview of witnesses or treating personnel.

b. The amount of investigation depends on the value of the government's claim. When the amount is \$5,000 or less, only basic information is needed. This can consist of information obtainable by phone or facsimile. Reports and information developed by other investigative officials concerning the incident giving rise to the claim will be obtained, for example, Criminal Investigation Division reports (CID), line of duty investigations, AR 15-6 investigations, aircraft collateral investigations, or reports of survey. In higher value cases, these should provide a starting point to furnish to USARCS as part of the mirror file. If a unit claims officer assists the RJA or recovery attorney, a DA 1208, Report of Claims Officer will be completed. The RJA or recovery attorney will review all the evidence, including the unit claims officer's report of investigation. After ensuring that the file is complete, the RJA or recovery attorney will make a written determination as to the merits of asserting a claim. If the RJA or recovery attorney decides that no one is liable in tort, it is still possible that a claim may be asserted under 10 U.S.C. § 1095, state workers' compensation laws, third-party-beneficiary of a contract, or state hospital lien laws. In determining whether to investigate, the RJA or recovery attorney must take into account not just the elements of the tort at issue, but also defenses such as contributory negligence or assumption of risk, the last clear chance doctrine, the family purpose doctrine, guest statutes, and all other doctrines that could affect the outcome of litigation.

14-9. Assertion

a. *Claims involving property.*

(1) *General principles.* The United States owns vast fee interests in real property and improvements, leaseholds, and innumerable items of personal property. As a property owner, the Army is often the victim of a tort. This section describes the principles and procedures by which the United States asserts and recovers claims for damage to, or loss of, its property. Property that can be the subject of a claim includes much more than property purchased with Army appropriations and used and controlled by the Army, as well as DOD property. In general, United States property under Army control is Army property. The same is true for property of a foreign government for which the United States is responsible and over which the Army exercises control. Indeed, where the Army has been assigned single-service claims responsibility by the DOD, property of other military departments may be Army property for purposes of the Army claims system.

(2) *Property claims in Germany.*

(a) *General.* In Germany, the North Atlantic Treaty Association Status of Forces Agreement (NATO SOFA) and supplementary agreements provide a special method of recovery for property damage claims. Normally, such claims are asserted directly against a prospective defendant's insurance company. However, when a foreign national tortfeasor has also suffered damage and has filed a claim against the United States at a German Defense Costs Office (DCO), the United States asserts its claim with the DCO as a counterclaim. The DCO applies German law in adjudicating the claim and sets off the U.S. government's property damage claim against that of the foreign national claimant. The DCO then pays, with partial reimbursement by the United States, any balance remaining after the setoff to the claimant. Any excess owed to the United States from the claimant is recovered directly from the claimant or the appropriate insurer by USACSEUR.

(b) *Army and Air Force Exchange Service, Europe property.* Property belonging to AAFES, Europe is also subject to the provisions contained in the North Atlantic Treaty Association Status of Forces Agreement (NATO SOFA) and supplementary agreements. Pursuant to a 9 October 1975 agreement between USACSEUR and AAFES, Europe, property damage claims resulting from motor vehicle accidents in Germany that involve AAFES, Europe vehicles are processed by USACSEUR. Monies recovered are paid to the appropriate AAFES, Europe account.

(3) *Property claims in the Republic of Korea.*

(a) *Damage caused by Republic of Korea forces members/employees.* Generally, claims for damage to U.S. government property used by its armed forces and damaged by members and employees of the armed forces of the ROK in performance of their official duties are waived under the provisions of the United States/ROK SOFA agreement. However, if a report of survey reveals that a Korean augmentee to the U.S. Army is responsible for damage to or loss of U.S. military property, the claim will be forwarded to FKJA-CL for recovery in an amount that does not exceed the Soldier's monthly wage.

(b) *Damage caused by others.* In the ROK, when damage to U.S. government property is caused by third parties other than those assigned to jointly operated military installations and activities, military commands should forward copies of reports of survey, police reports, photographs of the damaged government property, and evidence of estimated or actual costs of damages to the OJA, FKJA-CL, APO AP 96205-0084.

(c) *Concurrent District Compensation Committee claim.* Where an ROK national has also filed a claim with the

District Compensation Committee, claims personnel may still seek recovery against the tortfeasor or insurer. The RJA or recovery attorney will coordinate with the foreign claims attorney to ensure a consistent result.

(d) *Army and Air Force Exchange Service claims.* FKJA-CL does not process AAFES claims.

(4) *Property claims in Japan.* In Japan, Army claims offices can only recover and deposit affirmative claims that can be recovered in the full amount asserted. The U.S. Air Force has withheld from the Army authority to compromise or terminate recovery efforts on any claim in favor of the United States.

(5) *Repayment in kind.* With certain exceptions, monies received for personal property damage claims in favor of the government are paid into the United States Treasury and are therefore not available for replacing or repairing the destroyed or damaged personal property. Alternatively, the RJA or recovery attorney who asserts the claim may accept, in lieu of money, the replacement of the property or the property's restoration to its prior condition. Before a release based on a repair or replacement in kind may be executed, the technical staff officer responsible for the type of property in question must certify that this procedure is acceptable and that the repair or replacement in kind was satisfactorily accomplished. This procedure may also be used in cases involving damaged real property.

b. *Claims involving medical care.*

(1) *Determining which service should assert claim.* The service that has the greatest financial interest should assert the claim. If most of the care was furnished in an Army MTF or the Army has single service responsibility, the Army should assert the claim regardless of the service identity of the injured party. If an Army MTF furnished a smaller portion of the care, the claim should be transferred to the service that furnished most of the care. Similarly, within the Army, the claim should be asserted by the area claims office (ACO) that has jurisdiction over the MTF that furnished most of the care. Claims for care furnished by TRICARE should be asserted by the service according to the service identity of the injured party. If the smaller part of the care was furnished by an Army MTF, and the injured party has identity within another service, that service should assert the claim. Files should be transferred as soon as there is sufficient information.

(2) *Notification of liable parties.* After determining that the Army will exercise the government's right to recover, the RJA or recovery attorney should assert a demand to all potentially liable parties with an informational copy to all other parties having an interest in the claim. The other parties may include the tortfeasors' insurers, all injured parties or their attorneys, and each injured party's insurer. If the tortfeasor is an employee of a company owned by a parent corporation, claims personnel should also provide notice to the parent corporation. In other words, let every interested individual and business know that the government has a claim. This should be done even if the injured party's attorney has signed a representation agreement. Claims personnel should advise the injured party's attorney and the liable insurance company of the notification made. This notification will increase the chances that the government will be named on the settlement draft. If it is not named, the insurer settles at its own risk. Many insured prospective defendants fail to notify their insurance companies of incidents. This failure may be a breach of the cooperation clause in the policy and may be grounds for the insurer to refuse to defend the insured or be responsible for any liability. The United States, as a claimant, may prevent this by giving the requisite notification itself. The purpose of the insurance clause is satisfied if the insurer receives actual notice of the incident, regardless of the informant. Assertion letters are used for initial contact with insurance companies. Two sample assertion letters are posted on the USARCS Web site at "Claims Resources," IV, i and j. One is for a medical assertion for a Soldier (that includes wages). The other is for a medical assertion for a civilian (that does not include wages).

(3) *Amount of demand.* The demand should be made in a definite amount at the earliest possible date. Before making this demand, the RJA or recovery attorney should confirm that the total amount is legally due. If medical treatment will be protracted or if the facts concerning the total cost are not readily available, the RJA or recovery attorney may make a demand in an indefinite amount and advise the proper parties that further billing information will be forthcoming.

(a) *Costs of medical care.* For MTF care, use a form acceptable in local insurance practice; for TRICARE, use billings obtained from the TRICARE regional office. The prescribed rates for medical care published by the Office of Management and Budget and DOD are the starting point for analysis. As a general rule, the defendant may not litigate their reasonableness.

(b) *Burial expenses.* Burial expenses, if incurred in jurisdictions where they are allowable as part of medical expenses, will be obtained on DD Form 2063.

(c) *Lost pay.* Claims personnel will also need to obtain information about the injured party's pay.

1. To calculate the "costs of pay" furnished to a Soldier tortiously injured by another, claims personnel must determine how long the Soldier was unable to perform assigned duties because of his or her injuries. This information can be obtained from the unit commander or supervisor. Verify the total number of days the Soldier was unable to perform military duties.

2. Claims personnel must then determine the amount of the injured party's basic pay and whether he or she receives any special or incentive pay. A current pay chart will provide the amount of basic pay the Soldier was receiving at the time of the incapacitation; if there was additional pay, obtain a copy of his or her leave and earnings statement.

3. Once the necessary information has been gathered, calculating the amount attributable to the time the Soldier was unable to perform any military duties becomes a simple mathematical calculation. For example, based upon the 2005

pay chart, if an E-4 with four years of service is unable to perform military duties for two weeks, the amount of these lost wages is \$867.30 (\$1877.70 monthly basic pay divided by the 4.33 weeks in one month then multiplied by two). Claims personnel should calculate the amount of a Soldier's lost wages when they calculate medical expenses. When they assert the government's claim against the insurance company or tortfeasor, claims personnel should include the total amount of medical care costs as well as the lost wages.

(4) *Medical care claims in Germany.*

(a) *General.* The absence of attorney representation agreements is unique to processing medical care recovery claims in Germany. The German Federal Code of Lawyer's Fees establishes minimum fees that German attorneys must charge. Because 5 U.S.C. § 3106 requires that an injured party's attorney representing the United States do so on a no-fee basis only, German attorneys representing injured parties may not assert claims on behalf of the United States in Germany. Thus, USACSEUR asserts the government's claims directly against the insurance companies of third-party tortfeasors.

(b) *The Haftpflicht-, Unfall- und Kraftverkehrsversicherer Agreement.* Medical care claims resulting from motor vehicle accidents occurring in Germany are asserted in accordance with a 1971 agreement between the United States and the Association of Liability, Accident and Traffic Insurers, Hamburg. It limits government claims for medical care costs to 62.5 percent of the Office of Management and Budget rate for care rendered in MTFs located in Germany. In exchange, the German insurance industry agreed not to challenge either the standing of the United States to assert such claims or the reasonableness of the Office of Management and Budget rates.

(5) *Medical care claims in the Republic of Korea.* FKJA-CL has single-service responsibility for all medical care recoveries within ROK. Attorney representations are not permitted in the ROK. FKJA-CL may proceed on an independent right to directly assert against insurance companies of third-party tortfeasors. Insurance companies in the ROK are required by law to provide unlimited policy benefits on behalf of their insureds, eliminating all deductibles and maximum payments.

(6) *Medical care claims in Japan.* In Japan, Army claims offices can only recover and deposit affirmative claims that can be recovered in the full amount asserted. The Air Force has withheld from the Army the authority to waive, compromise, or terminate recovery efforts on any claim in favor of the United States.

14-10. Recovery procedures

a. United States policy authorizes the attorney retained by an injured party to assert the claim of the United States as an item of special damages in the injured party's claim. A model Attorney Agreement is posted on the USARCS Web site at "Claims Resources," IV, e. The right of the injured party to assert the Army's claim finds support in the general rule permitting subrogation or partial assignment of the claim to the injured party to sue for the entire amount. Distribution of amounts recovered is a matter solely between the subrogor and the subrogee or assignor and assignee. The attorney may rely on the cases of *Conley v. Maatala*, 303 F. Supp. 484 (D.N.H. 1969), and *Palmer v. Sterling Drugs, Inc.*, 343 F. Supp. 692 (E.D. Pa. 1972), as authority to protect the government's interests in any judicial proceeding against third parties.

b. Ethical considerations play an important role during this representation. An ethical conflict can arise, however, when a settlement is reached and there are insufficient insurance proceeds to satisfy both the Army's claim and the injured party's claim. In such cases, the RJA or recovery attorney needs to take direct action with the injured party's attorney and all insurers involved, withdrawing any representation agreement if indicated.

c. A private attorney is not entitled to attorney fees and costs for representing the government's interests along with those of his or her own client, 5 U.S.C. § 3106. The RJA or recovery attorney must provide written authorization for the injured party's attorney to include the government's claim in the client's suit. The attorney must then acknowledge that the government will not pay for the representation.

d. Requests for assistance involving potentially improper or unethical conduct by civilian attorneys representing the government's interests should be referred to the staff judge advocate (SJA).

14-11. Settlement authority

a. *Assertions over \$50,000.* When an assertion is over \$50,000 and there is a request for compromise or waiver, a memorandum outlining the details of the assertion must be submitted to USARCS for consideration of who will negotiate the settlement. Sample memorandums, for property and medical assertions, are posted on the USARCS Web site at "Claims Resources," IV, i-k.

b. *Distinguishing between waiver and compromise.* For purposes of this chapter, to waive is to forfeit entirely the government's right to recovery in a particular case. For example, to waive a \$5,000 medical care claim would leave the government without any recovery. To compromise is to accept some lesser amount than the amount of the government's claim. For example, the RJA or recovery attorney may be authorized to compromise the \$5,000 assertion to \$3,500 or even to \$1.

(1) Command claim services, ACOs and CPOs must exercise waiver and compromise authority so that the rights of the government are protected and claims satisfied as fully as possible. The RJA or recovery attorney must be not only well rounded in the facts and the law but also skilled in the art of negotiating. Skill in evaluating claims is essential to

success. The evaluation by injured party's attorney should be discussed with others skilled in evaluation and not accepted on its face.

(2) Should there be several prospective defendants who are jointly liable, the RJA or recovery attorney negotiating the compromise should be careful not to inadvertently release claims against the remaining debtors by making a compromise agreement with one. A compromise with one tortfeasor carries no obligation to reach a similar compromise with other tortfeasors.

(3) Should there be multiple injured parties, any compromise should include the interests of all rather than considering one to the exclusion of others, whether or not all parties are represented.

c. Terminating recovery efforts. In small claims CCSes, ACOs, or CPOs are authorized to terminate recovery efforts for the convenience of the government if the tortfeasor cannot be located, is found to be judgment-proof, or has refused to respond to repeated correspondence concerning legal liability. Termination of recovery efforts is also warranted if the claim is legally without merit, the claim cannot be substantiated by evidence, or the recovery costs will exceed the amount of the recovery. A termination for the convenience of the government is made after it is determined that the case does not warrant litigation or that it is not cost-effective to pursue further recovery efforts. This is little more than an abandonment of recovery efforts, so no release would be executed. Since this is without consideration, a decision to terminate recovery efforts for the convenience of the government would not preclude subsequent recovery efforts should a defendant be found or assets become available.

d. Waiver requests based on undue hardship. Determine whether a request for waiver based on undue hardship should be compromised as an alternative to waiver. Determine whether the total assets of the prospective defendant and other resources such as insurance coverage are insufficient to discharge both the government's and the injured party's claim. Usually, the RJA or recovery attorney estimates the reasonable value of the general damages aspect of the injured party's claim by reference to other similar cases in the same jurisdiction. The request must include detailed information concerning the reasonable value of the claim as to both general and special damage elements, pension rights, and other benefits. The injured party must also present evidence of other assets and income so that a realistic assessment of possible hardship may be made. Only if the request for waiver for undue hardship cannot be appropriately treated as a compromise should the RJA or recovery attorney consider waiving the claim in its entirety.

e. Releases. The RJA or recovery attorney who receives either payment of a claim in full or full satisfaction of an approved compromise settlement may provide a receipt and execute a release. An indemnity agreement cannot be included in the release, and the RJA or recovery attorney must ensure that the terms of the release do not prejudice the government's right on any additional claim that arises out of the same incident. Language proposing to release any claim that the injured party holds against the tortfeasor must be avoided. A sample release, that contains language for both medical care and property damage, is posted on the USARCS Web site at "Claims Resources," IV, h.

14-12. Enforcement of assertion

a. Installment payments.

(1) Where the assertion is limited in amount (for example, \$5,000 or less), prospects for recovery and future employment are good, and the debtor is financially unable to pay the debt in one lump sum, the RJA or recovery attorney may accept payment in regular installments. Installment payments will be required on a monthly basis, and their size must bear a reasonable relation to the size of the debt and the debtor's ability to pay. The installment agreement should specify payments of sufficient size and frequency to liquidate the government's claim in no more than three years. Installment payments of less than \$50 per month should be accepted only if justifiable on the grounds of financial hardship or for some other reasonable cause.

(2) When the RJA or recovery attorney has agreed to accept payment in regular installments, an executed confession-judgment note should be obtained from the debtor when the total amount of the deferred installments exceeds \$750. The note should specify all the terms of the installment arrangement. The debtor should receive a written explanation of the consequences of signing the note, and the RJA or recovery attorney should document that the note was signed knowingly and voluntarily. The RJA or recovery attorney will not accept security from the debtor for the deferred payment. The installment agreement should contain a provision accelerating the debt should the debtor default. Before executing an installment agreement, the RJA or recovery attorney should get a financial statement from the debtor who asserts an inability to satisfy the government's claim in a lump-sum payment. Sample installment agreements for both medical and property assertions are posted on the USARCS Web site at "Claims Resources," IV, c and d.

b. Working with insurance companies.

(1) Often, despite timely proper notice from claims personnel, an insurance company settles with the injured party without satisfying the government's claim. State insurance laws often require insurers to negotiate with all claimants before disbursing insurance proceeds. Consequently, claims personnel should continue to pursue the government's claim with the insurance company. The RJA or recovery attorney should also research state law to determine if any other recourse against the insurance company exists.

(2) To avoid paying the government's claim, an insurance company may argue that the injured party already has signed a release. However, case law has clearly established that a release from the injured party does not prevent the government from pursuing its claim. Claims personnel need to advise the insurance company of this and continue to

aggressively pursue the government's claim. If the insurance company still refuses to negotiate with the RJA or recovery attorney, he or she may file a complaint with the state insurance commissioner. In appropriate cases, the RJA or recovery attorney may refer the case for litigation.

c. Where tortfeasor is charged with a crime. Where the tortfeasor is charged with a crime, work with the prosecutor to impose restitution as part of any sentence. Where the respondent fails to provide restitution, first advise the respondent that continued failure to pay could result in the complete sentence being imposed. If the respondent still does not pay, report the matter to the court for action.

Appendix A References

Section I

Required Publications

Army Regulations are available from the Army Publishing Directorate at www.apd.army.mil The Code of Federal Regulations is at <http://www.aces.gpo.gov/cfr/index.html> DOD publications are at <http://www.dtic.mil/hwhs/directives/>. Field Manuals are at <http://www.adtdl.army.mil/> (Reimer Digital Library). The United States Code is available at <http://www.gpoaccess/uscode/index.html>.

AR 27–20

Claims. (Cited throughout the publication.) (Cited in para throughout the whole publication..)

AR 215–1

Military Morale, Welfare and Recreation Activities and Nonappropriated Fund Instrumentalities. (Cited in paras 2–17, 2–33, 2–45, 2–80, 12–1, 12–9, and 14–3..)

AR 608–10

Child Development Services. (Cited in paras 2–31a, 2–45d(6), 12–1, 12–9f, and B-1.)

28 C.F.R. Pt. 14

Federal Tort Claims Act Implementation (USARCS). (Cited in paras 2–5, 2–15l(2), 2–65a, 2–78a, 4–2e, 5–2, and B-1.)

31 C.F.R. Pts 901–904

Department of the Treasury, Federal Claims Collection Standards. (Cited in paras 11–35b, 11–37a.)

FTCH

Federal Tort Claims Handbook.

(Cited throughout). (Available at USARCS Web site on JAGCNet at “Claims Resources,” II, a, no. 33.)

10 U.S.C. § 831

Compulsory self-incrimination prohibited. (Cited in para 11–6g(2)(f).)

10 U.S.C. § 939

Uniform Code of Military Justice, Article 139. (Cited in paras 2–17d, 2–25a(8), 5–1, Chapter 9 passim, 11–3, 11–5, 11–21e(3).)

10 U.S.C. § 1054

Certain Suits Arising out of Legal Malpractice. (Cited in paras 2–62f(3), B-1.)

10 U.S.C. § 1089

Gonzales Act. (Cited in paras 2–34h, 2–36a, 2–39h(1), 2–45c(1)(a), 2–62f, 3–8c, and B-1.)

10 U.S.C. § 1095

Third party claims for health care services costs. (Cited in paras 14–1, 14–2, 14–3b(1), 14–8b, and B-2.)

10 U.S.C. § 2731

Defines settlement. (Cited in paras 2–69a, B-1.)

10 U.S.C. § 2733

Military Claims Act. (Cited in paras 2–15b, 2–37, 2–38, 2–45, 2–46a, 2–51b, 3–1, 3–3, and B-1.)

10 U.S.C. § 2734

Foreign Claims Act (Cited in paras 2–46b, 9–8e, 10–1, and B-1.)

10 U.S.C. § 2734a

International Agreements Claims Act. (Cited in paras 2–51e, 3–3c(2), 7–1a, 8–1c), and B-1.)

10 U.S.C. § 2734b

International Agreements Claims Act. (Cited in paras 2–51e, 2–80d, 3–3c(2), 7–1a, 8–1c, 10–2a(1)(b)(3), and B-1.)

10 U.S.C. § 2735

Finality of settlements under Title 10. (Cited in paras 2–82, B–1.)

10 U.S.C. § 2737

Non-Scope Claims Act. (Cited in paras 2–46b, 5–1, and B-1.)

10 U.S.C. §§ 4801, 4802, 4806

Army Maritime Claims Settlement Act. (Cited in paras 2–39e, 2–51d, 8–1a, 10–2d(2), and B-1.)

10 U.S.C. §§ 4803, 4804

Third party maritime claims. (Cited in paras 2–39e, 2–61e, 8–1a(4), and B-1.)

28 U.S.C. § 1291

Federal Tort Claims Act. (Cited in para B–1.)

28 U.S.C. § 1346

Tucker Act. (Cited in paras 2–15a(4), 2–17c(2)(c), 2–17h(1), 2–36b, 2–39d, 2–46a, 2–51a, 3–3d(2)(a), and B-3.)

28 U.S.C. § 1402

Federal Tort Claims Act. (Cited in para B–1.)

28 U.S.C. § 1491

Certain claims considered by the Court of Federal Claims. (Cited in paras 2–15a(4), 2–29c(4)(b), 2–39d, and B-3.)

28 U.S.C. §§ 2401–2402

Federal Tort Claims Act. (Cited in paras 2–36b(2), 2–44d(4), 4–2c, and B-1.)

28 U.S.C. §§ 2411–2412

Federal Tort Claims Act. (Cited in paras 2–51f(3), B-1.)

28 U.S.C. § 2415

Federal Tort Claims Act. (Cited in paras 2–62a(2), 11–7b(6).)

28 U.S.C. §§ 2671–2680

Federal Tort Claims Act. (Cited in paras 2–8b, 2–15, 2–17c(1)(c), , 2–17h(1), 2–25a(6), 2–27c, 2–36a, 2–39, 2–44, 2–45, 2–46, 2–51f, 2–55b, 2–62f(2), 2–67a, 2–70a, 2–82, 3–3d(2)(a), 3–8c, 3–9a, 4–1, 4–2, 6–1b, 8–2a(1), 12–1f, 14–4a(2)), and B-1.)

31 U.S.C. § 3711

Federal Claims Collection Act. (Cited in paras 11–35b, 14–1a, and B-1.)

31 U.S.C. § 3721

Personnel Claims Act. (Cited in paras 9–8e, 11–6, 11–10, 11–14, and B–1.)

32 U.S.C. § 715

National Guard Claims Act. (Cited in paras 6–1, B–1.)

39 U.S.C. § 411

Postal Agency Agreements. (Cited in paras 2–39, B–1.)

41 U.S.C. §§ 601–613

Contract Disputes Act. (Cited in paras 11–23a, 11–28, and 11–34c.)

42 U.S.C. §§ 2651–2653

Federal Medical Care Recovery Act. (Cited in paras 14–1, B–1.)

Section II

Related Publications

A related publication is a source of additional information. The user does not have to read it to understand the publication. Most of the documents listed in this section are available from the Web sites listed in Section I. DOD publications are available at www.dtic.army.mil. United States Code (USC) is available at www.gpoaccess.gov.uscode.

Public laws are available on <http://thomas.loc.gov/bss>. Code of Federal Regulations are available at [http:// www.gpoaccess.gov/cfr/html](http://www.gpoaccess.gov/cfr/html). Some of the treaties and international claims agreement are available on the USARCS Web site on JAGCNet; at the entry screen click on the “USARCS” link.

AFI 13-201

Air Force Airspace Management

AR 1-75

Administrative and Logistical Support of Overseas Security Assistance Organizations (SAOs)

AR 15-6

Procedures for Investigating Officers and Boards of Officers

AR 15-180

Army Discharge Review Board

AR 15-185

Army Board for Correction of Military Records Rules

AR 25-400-2

The Army Records Information Management System

AR 27-26

Rules of Professional Conduct for Lawyers

AR 27-40

Litigation

AR 27-50

Status of Forces Policies, Procedures and Information

AR 37-104-4

Military Pay and Allowances Policy

AR 40-3

Medical, Dental, and Veterinary Care

AR 40-66

Medical Record Administration and Health Care Documentation

AR 40-68

Clinical Quality Management

AR 40-400

Patient Administration

AR 55-80

DOD Transportation Engineering Program

AR 58-1

Management, Acquisition and Use of Motor Vehicles

AR 60-20

Army and Air Force Exchange Service Operating Procedures

AR 190-9

Absentee Deserter Apprehension Program and Surrender of Military Personnel to Civilian Law Enforcement Agencies

AR 190-47

The Army Corrections System

AR 195-5

Evidence Procedures

AR 210-47

State and Local Taxation of Lessee's Interest in Wherry Act Housing

AR 210-130

Laundry and Dry Cleaning Operations

AR 340-21

The Army Privacy Act

AR 405-15

Real Estate Claims Founded Upon Contract

AR 600-4

Remission or Cancellation of Indebtedness for Enlisted Members

AR 600-8-3

Unit Postal Operations

AR 600-15

Indebtedness of Military Personnel

AR 608-99

Family Support, Child Custody, and Paternity

AR 638-2

Care and Disposition of Remains and Disposition of Personal Effects

AR 700-84

Issue and Sale of Personal Clothing

AR 735-5

Policies and Procedures for Property Accountability

10 C.F.R. § 8.2

Interpretation of the Price-Anderson Act (§ 170 of the Atomic Energy Act of 1954)

14 C.F.R. § 91.119

Minimum Safe Altitudes

14 C.F.R. pt. 1261

Processing of Monetary Claims

22 C.F.R. §§ 3.1-3.12

Gifts and Decorations from Foreign Governments

28 C.F.R. §§ 15.1-15.4

Certification and Decertification in Connection with Certain Suits

31 C.F.R. §§ 235.1-235.6

Issuance of settlement checks for forged checks drawn on designated depositories

31 C.F.R. pts. 900-904

Federal Claims Collection Standards

32 C.F.R. pt. 220

Collection from Third-Party Payers of Reasonable Charges for Healthcare Services

32 C.F.R. pt. 537

Claims on behalf of the United States

32 C.F.R. pt. 1659

Selective Service System, Extraordinary expenses of registrants

38 C.F.R. §§ 4.1–4.150

Department of Veterans Affairs, Schedule for Rating Disabilities

48 C.F.R. pts. 1–99

Federal Acquisition Regulation

48 C.F.R. pts. 200–299

Federal Acquisition Regulations System, Department of Defense

DA Pam 600–8

Management and Administrative Procedures

DA Pam 740–2

Moving Your Mobile Home Management and Administrative Procedure

DFAS–IN 37–1

Finance and Accounting Policy Implementation (Available at <http://www.access.gpo.gov/nara/cfr/cfr-table-search.html>.)

DOD 4160.21–M

Defense Materiel Disposition Manual

DOD 4500.9–R, Part IV, Personal Property

Defense Transportation Regulation

DOD 4500.36–R

Management, Acquisition and Use of Motor Vehicles

DOD 4525.6–M

Department of Defense Postal Manual

DOD 6025.18–R

Health Information Privacy Information

DOD 7000.14–R

Financial Management Regulation

DODD 5515.6

Processing Tort, Contract and Compensation Claims Arising out of Operations of Nonappropriated Fund Activities

DODD 5515.9

Settlement of Tort Claims

DODD 5515.10

Settlement and Payment of Claims under the Military Personnel and Civilian Employees Claims Act of 1964

DODD 6000.12

Health Services Operations and Readiness

DODI 1100.21

Voluntary Services in the Department of Defense

DODI 5515.08

Assignment of Claims Responsibility

FM 3-01.80

Visual Aircraft Recognition

FM 4-30.5

Explosive Ordnance Disposal Service and Unit Operations. (Available at <http://www.train.army.mil/> for authorized users.)

EOP 40-5

Customer Services.

EOP 57-2

Property, casualty, and contractor insurance programs.

International Claims Agreement

Compact of Free Association between the U.S. and the Marshall Islands and Micronesia.

International Claims Agreement

German Supplemental Agreement to the NATO SOFA (Reciprocal).

International Claims Agreement

Memorandum of Understanding, U.S./Australia (Reciprocal).

International Claims Agreement

Partnership for Peace Agreement (Reciprocal).

International Claims Agreement

Status of Forces Agreement, U.S./Japan (Available at <http://www.usfj.mil/>.)

International Claims Agreement

Status of Forces Agreement, U.S./Korea (Reciprocal).

International Claims Agreement

Status of Forces Agreement, U.S. Kuwait (contact Chief JA CENTCOM)

International Claims Agreement

Status of Forces Agreement, North Atlantic Treaty Association (Reciprocal)

International Claims Agreement

Status of Forces Agreement, U.S./Romania

International Claims Agreement

Status of Forces Agreement, U.S./Singapore (Reciprocal)

International Rate Solicitation

International Personal Property Rate Solicitation

JFTR

Joint Federal Travel Regulations (Available at <https://secureapp2.hqda.pentagon.mil/perdiem/trvlregs.html>.)

JTR

Joint Travel Regulations (Available at <https://secureapp2.hqda.pentagon.mil/perdiem/trvlregs.html>.)

Medem Network Web site

(Available at <http://www.medem.com/>.)

MedicineNet Web site

(Available at <http://www.medicinenet.com>.)

Medline Plus Web site

(Available at <http://medlineplus.gov/>.)

Memorandum of Agreement, June 1984

Torts, between OTJAG and the Surgeon General. (Available at the USARCS Web site at "Claims Resources," I, f, no.1.)

Memorandum of Agreement, June 1993

Torts, between OTJAG and the Surgeon General. (Available at the USARCS Web site at "Claims Resources," I, f, no. 2.)

Memorandum of Agreement for the Third Party Collection Program, April 10, 1992

Affirmative Claims. (Available at the USARCS Web site at "Claims Resources," I, f, no. 3.)

Memorandum of Understanding, June 1, 1992

Defense Commissary Agency Claims. (Available at the USARCS Web site at "Claims Resources," I, e, no. 3.)

National Cancer Institute Web site

National Cancer Institute information. (Available at <http://www.nci.nih.gov/>.)

Texas A & M Forestry Extension Service Web Site

Evaluation of Texas Shade Trees. (Available at <http://extensionforestry.tamu.edu/publications/shadetree1.htm>.)

Treasury Financial Manual (TFM)

Treasury Financial Manual. (Available at <http://www.fms.treas.gov/tfm/index.html>.)

5 U.S.C. chapter 87

Life insurance

5 U.S.C. chapter 89

Life insurance

5 U.S.C. § 552

Freedom of Information Act

5 U.S.C. § 552a

Privacy Act

5 U.S.C. § 901

Executive Reorganization, Purpose

5 U.S.C. § 2301

Merit System Principles

5 U.S.C. § 3106

Employment of Attorneys, Restrictions

5 U.S.C. § 5351

Student Employees, Definitions

5 U.S.C. § 5514

Installment deduction for indebtedness to the United States

5 U.S.C. § 5724

Travel and Transportation Expenses; New Appointees, Student Trainees, and Transferred Employees, definitions

5 U.S.C. § 7901

Services to Employees, Health Service Programs

5 U.S.C. §§ 8101–8193

Federal Employees Compensation Act

5 U.S.C. § 8116

Federal Employees Compensation Act

5 U.S.C. § 8140

Federal Employees Compensation Act

5 U.S.C. §§ 8701–8716

Servicemen's Life Insurance

10 U.S.C. § 1037

Counsel before foreign judicial tribunals and administrative agencies; court costs and bail

10 U.S.C. § 1053

Financial institution charges incurred because of Government error in direct deposit of pay: reimbursement.

10 U.S.C. § 1091

Personal services contracts

10 U.S.C. § 1094

Licensure requirement for health-care professionals

10 U.S.C. § 1102

Confidentiality of medical records

10 U.S.C. §§ 1201–1221

Retirement or separation for physical disability

10 U.S.C. § 1552

Correction of military records: claims incident thereto

10 U.S.C. § 1588

Authority to accept certain voluntary services

10 U.S.C. § 1594

Reimbursement for financial institution charges incurred because of Government error in direct deposit of pay

10 U.S.C. § 2012

Support and services for eligible organizations and activities outside the Department of Defense

10 U.S.C. § 2558

National military associations: assistance at national conventions

10 U.S.C. § 2575

Disposition of unclaimed property

10 U.S.C. § 2733

Property loss; personal injury or death: incident to noncombat activities of Department of Army, Navy, or Air Force

10 U.S.C. § 2736

Property loss; personal injury or death: advance payment

10 U.S.C. § 4712

Disposition of effects of deceased persons by summary court-martial

10 U.S.C. § 4837

Settlement of accounts: remission or cancellation of indebtedness of enlisted members

10 U.S.C. § 7363

Settlement of Claims

10 U.S.C. §§ 7621–7623

Claims

10 U.S.C. §§ 9801–9804, 9806

Military Claims

12 U.S.C. §§ 3401–3422

Right to financial privacy

15 U.S.C. § 2210

Reimbursement for costs of firefighting on Federal property

16 U.S.C. § 17f

Property of employee lost, damaged, or destroyed while in use on official business; reimbursement of employee

16 U.S.C. § 574

Damages caused private property in protection, administration, and improvement of national forests; reimbursement

16 U.S.C. §§ 831–831ee

Tennessee Valley Authority

18 U.S.C. § 4126

Prison Industries Fund; use and settlement of accounts

22 U.S.C. § 277e

Disposal of lands; issuance of licenses for use of lands; compensation for injured property

22 U.S.C. § 1474

Additional authority of Secretary of State or other Government agency authorized to administer provisions

22 U.S.C. §§ 1621

Settlement of international claims: definitions

22 U.S.C. §§ 1641–1642

Settlement of International Claims

22 U.S.C. § 2509(b)

Presidential powers and authorities; claim settlements

22 U.S.C. §§ 2669, 2669–1

Secretary of State, Payment of tort claims arising in connection with overseas operations

22 U.S.C. §§ 3601–3873

Panama Canal

22 U.S.C. §§ 3761–3779

Panama Canal Commission, claims for injuries to persons or property

22 U.S.C. § 3970

Compensation for imprisoned foreign national employees

23 U.S.C. § 210

Defense access roads

25 U.S.C. § 388

Claims for damages; settlement by agreement

26 U.S.C. § 104

Compensation for injuries or sickness

26 U.S.C. § 6213

Restrictions applicable to deficiencies; petition to Tax Court

28 U.S.C. § 517

Interests of United States in pending suits

28 U.S.C. §§ 1330, 1332

Actions against foreign states & Diversity of citizenship; amount in controversy; costs

28 U.S.C. § 1350

Alien's action for tort

28 U.S.C. § 1391

Venue generally

28 U.S.C. §§ 1441–1452

District courts; Removal of Cases from State Courts

28 U.S.C. § 1495

Damages for unjust conviction and imprisonment; claim against United States

28 U.S.C. § 1505

Indian claims

28 U.S.C. §§ 1602–1611

Jurisdictional Immunities of Foreign States

28 U.S.C. § 2409a

Real property quiet title actions

28 U.S.C. § 2415

Time for commencing actions brought by the United States

28 U.S.C. § 2501

Time for filing suit

28 U.S.C. § 2513

Unjust conviction and imprisonment

29 U.S.C. §§ 621–634

Age Discrimination Act

29 U.S.C. §§ 701–797b

Vocational Rehabilitation and Other Rehabilitation Services

31 U.S.C. § 1304

Judgments, awards, and compromise settlements

31 U.S.C. § 1342

Limitation on voluntary services

31 U.S.C. § 3343

Check forgery insurance fund

31 U.S.C. § 3529

Requests for decisions of the Comptroller General

31 U.S.C. §§ 3701–3733

Financial Management, Claims

31 U.S.C. § 3702

Meritorious Claims Act, authority to settle claims

31 U.S.C. § 3727

Assignments of claims

32 U.S.C. § 112

Drug interdiction and counter-drug activities

32 U.S.C. § 316

Detail of members of Army National Guard for rifle instruction of civilians

32 U.S.C. §§ 502, 503, 504, 505, 508

National Guard, training

33 U.S.C. §§ 401–426p

Protection of Navigable Waters and of Harbor and River Improvements Generally

33 U.S.C. §§ 401–467n

Protection of navigable waters and of harbor and river improvements generally

33 U.S.C. §§ 408, 412

Rivers and Harbors Act

33 U.S.C. § 701q

Repair and protection of highways, railroads, and utilities damaged by operation of dams or reservoir

33 U.S.C. § 702c

Expenditures for construction work; conditions precedent; liability for damage from flood waters; condemnation proceedings; floodage rights

33 U.S.C. § 709

Regulations for use of storage waters; application to Tennessee Valley Authority

33 U.S.C. § 710

Accountability for property issued to the National Guard

33 U.S.C. § 853

Power to settle claims

33 U.S.C. §§ 901–950

Longshore and Harbor Workers' Compensation Act

36 U.S.C. § 2110

Claims against the American Battle Monuments Commission

37 U.S.C. §§ 204(g), 204(h)

Pay and allowances of the uniformed services, basic pay, entitlement

37 U.S.C. § 1007

Deductions from pay

38 U.S.C. chapter 13

Dependency and indemnity compensation for service-connected deaths

38 U.S.C. chapter 15

Pension for non-service-connected disability or death or for service

38 U.S.C. chapter 17

Hospital, nursing home, domiciliary, and medical care

38 U.S.C. chapter 31

Training and rehabilitation for veterans with service-connected disabilities

38 U.S.C. chapter 35

Survivors' and dependents' educational assistance

38 U.S.C. § 106

Certain service deemed to be active service

38 U.S.C. § 511

Decisions of the Secretary; finality

38 U.S.C. § 515

Administrative settlement of tort claims

38 U.S.C. § 1110

Basic entitlement

38 U.S.C. § 1114

Rates of wartime disability compensation

38 U.S.C. § 1131

Basic entitlement

38 U.S.C. §§ 1301–1323

Dependency and indemnity compensation for Service-connected Deaths

38 U.S.C. §§ 1701–1774

Hospital, Nursing Home, Domiciliary, and Medical Care

38 U.S.C. § 1726

Reimbursement for loss of personal effects by natural disaster

38 U.S.C. § 1151

Benefits for persons disabled by treatment or vocational rehabilitation

38 U.S.C. § 1975

Jurisdiction of District Courts

38 U.S.C. § 1984

Suits on insurance

38 U.S.C. § 2102

Limitations on assistance furnished

39 U.S.C. § 2603

Settlement of claims for damages caused by the Postal Service

40 U.S.C. § 605

Payment of costs

40 U.S.C. § 3131

Bonds on contractors of public buildings or works

42 U.S.C. §§ 254b, 254c

Health Centers

42 U.S.C. §§ 300aa–1–300aa–6

National Vaccine Program

42 U.S.C. §§ 1320d–1320d–8

Health Insurance Portability and Accountability Act

42 U.S.C. §§ 1651–1654

Defense Bases Act, compensation authorized

42 U.S.C. § 1983

Civil action for deprivation of rights

42 U.S.C. § 1997e

Suits by prisoners

42 U.S.C. §§ 2000e–2000e–7

Equal Employment Opportunities

42 U.S.C. §§ 2207, 2210, 2211

Atomic Energy Commission Claims

42 U.S.C. § 2473(c)(13)

Functions of Administration (Claims against NASA)

42 U.S.C. § 3374

Acquisition of property at or near military bases which have been ordered to be closed

42 U.S.C. §§ 3796 – 3796c–1

Public Safety Officers' Death Benefits

42 U.S.C. § 5173

Debris removal

42 U.S.C. §§ 6961–6965

Resource Conservation Recovery Act

42 U.S.C. §§ 9601–9628

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

42 U.S.C. § 9675

Applicability of securities laws

42 U.S.C. §§ 12101–12213

Americans with Disabilities Act

45 U.S.C. § 362(o)

Railroad Unemployment Insurance, duties and powers of the board

46 U.S.C. § 30101 (current text available only on Lexis or Westlaw)

Admiralty Extension Act

46 U.S. C. §§ 30101 – 30106 (current text available only on Lexis or Westlaw)

Jones Act

46 U.S.C. §§ 30301– 30308 (current text available only on Lexis or Westlaw)

Death on the High Seas Act

46 U.S.C. §§ 30501–30512 (current text available only on Lexis or Westlaw)

Limitation of Vessel Owner's Liability

46 U.S.C. §§ 30901–30918 (current text available only on Lexis or Westlaw)

Suits in Admiralty Act

46 U.S.C. §§ 31101–31113 (current text available only on Lexis or Westlaw)

Public Vessels Act

49 U.S.C. § 14706

Interstate Transportation

50 U.S.C. § 1431

National Defense Contracts

50 U.S.C. app. §§ 1–44

Trading with the Enemy Act

50 U.S.C. app. § 461

Military Selective Service Act

50 U.S.C. app. §§ 501–596

Servicemembers Civil Relief Act

50 U.S.C. app. §§ 2001–2016

War claims

P.L. 89–257

An Act to authorize certain members of the Armed Forces to accept and wear decorations of certain foreign nations

P.L. 92–415

An Act to amend title 28, United States Code, section 1491, to authorize the Court of Claims to implement its judgments for compensation

P.L. 97–365

An Act to increase the efficiency of Government-wide efforts to collect debts owed the United States and to provide additional procedures for the collection of debts owed the United States

P.L. 98–194

An Act to authorize appropriations for fiscal year 1984 for the Armed Forces for procurement, for research, development, test, and evaluation, and for operation and maintenance, to prescribe personnel strengths for such fiscal year for the Armed Forces and for civilian employees of the Department of Defense, to authorize appropriations for such fiscal year for civil defense, and for other purposes

P.L. 100–694

Federal Employees Liability Reform and Tort Compensation Act of 1988

P.L. 101–189

National Defense Authorization Act for FYs 90 & 91

P.L. 101–552

Administrative Dispute Resolution Act

P.L. 103–337

National Defense Authorization Act For FY95

P.L. 105–85

National Defense Authorization Act For FY98

P.L. 108–87

Department of Defense Appropriations Act, 2004

R.C.M. 1107

Action by convening authority. (Available at www.au.af.mil/au/awc/awcgatew/ucmj.htm.)

UCMJ, Art. 31

Compulsory self-incrimination prohibited (Available at www.au.af.mil/au/awc/awcgatew/ucmj.htm.)

UCMJ, Art. 139

Redress of injuries to property (Available at www.au.af.mil/au/awc/awcgatew/ucmj.htm.)

Section III

Prescribed Forms

DA Forms listed in this section may be obtained at <http://www.apd.army.mil/>. Blank copies of DD forms may be obtained at <http://www.dtic.mil/whs/directives/informgt/forms/formsprogram.htm>. Blank copies of SF forms may be obtained at <http://www.gsa.gov/Portal/gsa/ep/formslibrary.do?formType=SF>.

DA Form 348

Equipment Operators Qualification Record (except Aircraft). (Prescribed in para 2–25.)

DA Form 1208

Report of Claims Officer. (Prescribed in paras 2–3c, 2–19a(4), 14–8b.)

DA Form 1574

Report of Proceedings by Investigating Officer/Board of Officers. (Prescribed in para 9–8f(5).)

DA Form 1666

Claims Settlement Agreement. (Cited in paras 2–73, 2–81e(3), 2–81e(4)(c), 2–81f(1)(b).)

DA Form 1668

Small Claim Certificate. (Prescribed in paras 2–14b, 2–72, 2–81b(4).)

DA Form 3161

Request for Issue or Turn-In. (Prescribed in para 11–16c.)

DA Form 3265

Explosive Ordnance Incident Report. (Prescribed in para 2–28e.)

DA Form 3881

Rights Warning Procedure/Waiver Certificate. (Prescribed in para 9–8f(2).)

DA Form 4106

Incident Report. (Prescribed in paras 2–2b(7), 2–3e, 2–34k.)

DA Form 7500

Tort Claims Payment Report. (Prescribed in paras 2–73, 2–81b.)

DA Form 7501

Personnel Claims Payment Report. (Prescribed in para 11–10b(3)(b).)

DD Form 139

Pay Adjustment Authorization. (Prescribed in para 11–10j.)

DD Form 619–1

Statement of Accessorial Services Performed. (Prescribed in paras 11–24a, 11–31c(2)(g), 11–31h(2).)

DD Form 788

Private Vehicle Shipping Document for Automobile. (Prescribed in para 11–5h(2)(b).)

DD Form 1164

Service Order for Personal Property. (Prescribed in paras 11–24a, 11–27, 11–31, 11–33.)

DD Form 1299

Application for Shipment and/or Storage (Prescribed in para 11–31.)

DD Form 1840 & 1840R

Notice of Loss or Damage. (Prescribed in paras 11-7a, 11-9, 11-10i, 11-14, 11-20g, 11-21.)

DD Form 1842

Claim for Loss of or Damage to Personal Property Incident to Service. (Cited in para 11-7a.)

DD Form 1843

Demand on Carrier/Contractor. (Cited in para 11-24e.)

DD Form 1844

List of Property and Claims Analysis Chart. (Cited in para 11-14p(4).)

DD Form 2527

Personal Injury Questionnaire. (Cited in para 14-6e.)

SF 95

Claim for Damage, Injury or Death. (Prescribed in paras 2-4, 2-5, 2-7, 2-9a, 2-12a(1), 2-79e, 2-81a(3).)

Section IV**Referenced Forms**

Except where otherwise indicated below, the following forms are available on the APD Web site www.apd.army.mil. FMS forms are available at <http://fms.treas.gov/forms.html>.

DD Form 1348-1A

Issue Release/Receipt Document

DD Form 1351-2

Travel Voucher

DD Form 1412

Inventory of Items Shipped in House Trailer

DD Form 1797

Personal Property Counseling Checklist

DD Form 1800

Mobile Home Inspection Report

DD Form 1841

Government Inspection Report

DD Form 2063

Record of Preparation & Disposal of Remains

FMS Form 194

Judgment Fund Transmittal

FMS Form 196

Judgment Fund Award Data Sheet

FMS Form 197

Voucher for Payment

SF 91

Motor Vehicle Accident Report

SF 1034

Public Voucher for Purchases and Services Other Than Personal

Appendix B

Reference and Resource Materials for Administrative Claims Processing

Note: Sections B-1 through B-3 list among other items the principal statutes and regulations used in claims processing. These texts may be obtained at www.gpoaccess.gov. However, you are advised to get them on Lexis or Westlaw, as the official government Web site does not always have the most current version. The Army regulations listed may be obtained at www.apd.army.mil, and the DODD and DODIs at www.dtic.mil/whs.directives. Some of the other documents in these sections are posted on the "Claims Resources" page of the USARCS Web site on JAGCNet. All the documents listed in sections B-4 through B-8 are posted on the "Claims Resources" page of the USARCS Web site on JAGCNet.

B-1. Authorities for all types of claims

- a. Tort Claims Authorities.*
- (1) Military Claims Act (MCA), 10 U.S.C. § 2733.
 - (2) Federal Tort Claims Act (FTCA).
 - (a) 28 U.S.C. §§ 1291.
 - (b) 28 U.S.C. §1402.
 - (c) 28 U.S.C. §§ 2401–2402.
 - (d) 28 U.S.C. §§ 2411–2412.
 - (e) 28 U.S.C. §§ 2671–2680. (The "Westfall Act," 28 U.S.C. § 2679, an integral part of the FTCA, provides qualified immunity from individual suit for employees of the United States acting within the scope of their employment.)
 - (3) Ancillary Materials to the FTCA.
 - (a) Legislative history of the FTCA.
 - (b) Federal Regulations of the Attorney General (AG) implementing the FTCA, 28 C.F.R. Part 14.
 - (c) Appendix to the AG Regulations (Sets forth delegations for settlements to various Federal Departments including the Secretary of Veterans Affairs and the Secretary of Defense.)
 - (4) Gonzales Act, 10 U.S.C. § 1089.
 - (5) Certain suits arising out of legal malpractice, 10 U.S.C. § 1054.
 - (6) Non-Scope Claims Act (NSCA), 10 U.S.C. § 2737.
 - (7) National Guard Claims Act (NGCA), 32 U.S.C. § 715.
 - (8) International Claims.
 - (a) International Agreements Claims Act (IACA), 10 U.S.C. §§ 2734a and 2734b.
 - (b) Article VIII of the NATO Status of Forces Agreement (SOFA) (Reciprocal).
 - (c) Article XXIII of the US–Korean SOFA (Reciprocal).
 - (d) US–Singaporean SOFA (Reciprocal).
 - (e) Memorandum of Understanding (MOU) Between the Government of the United States and the Government of Australia Concerning the Exchange of Service Personnel Between the United States Marine Corps and the Australian Army and the General Conditions which apply to the Exchange of Such Personnel (Reciprocal), T.I.A.S. 11550, 1987 UST LEXIS 61.
 - (f) Compact of Free Association between U.S. and the Governments of the Marshall Islands and the Federated States of Micronesia SOFA.
 - (g) German Supplemental Agreement to the NATO SOFA (Reciprocal).
 - (h) Partnership for Peace Agreement (Reciprocal) (This item not posted to USARCS Web site. Posted at <http://www.nato.int/>.)
 - (i) Status of Forces Agreement, U.S./Japan. (This item not posted to USARCS Web site. Posted at <http://usfj.mil/references/sofa.html>.)
 - (j) Status of Forces Agreement, U.S./Kuwait. (No copy posted. Readers wanting more information about this Agreement should contact Chief JA CENTCOM.)
 - (k) List of know international claims agreements in force.
 - (l) List of Partnership for Peace SOFA participating countries.
- (9) Foreign Claims Act (FCA), 10 U.S.C. § 2734
 - (10) Army Maritime Claims Settlement Act (AMCSA), 10 U.S.C. §§ 4801, 4802, and 4806.
 - (11) Admiralty Extension Act, 46 U.S.C. §30101.
 - (12) Claims against nonappropriated fund (NAF) activities and the risk management program (RIMP).
 - (a) AR 215–1.
 - (b) AR 608–10.
 - (c) Department of Defense Instruction (DODI) 1100.21.

(13) Claims by the U.S. Postal Service for losses or shortages in postal accounts caused by unbonded Army personnel.

(14) Postal Agreement With the Department of Defense (February 1980).

(a) 39 U.S.C. § 411.

(b) DOD Directive 4525.6.

(c) DOD 4525.6-M.

b. Personnel Claims Authorities.

(1) Personnel Claims Act, 31 U.S.C. § 3721.

(2) Redress of injuries to personal property, Uniform Code of Military Justice, Article 139 (10 U.S.C. § 939).

(3) The Federal Claims Collection Act, 31 U.S.C. §§ 3711-3720E.

(4) Federal Claims Collection Standards 31 C.F.R. Parts 900-904.

c. Fund Source Authorities (for settlements).

(1) For claims paid under Title 10 statutes, 10 U.S.C. § 2736.

(2) For claims paid by Financial Management Service, 31 U.S.C. § 1304.

(3) For payment of substantiated claims from NAFI activities, Department of Defense Directive (DODD) 5515.6.

d. Affirmative Claims Authorities (see also Memorandum of Agreement at subpara. f(3)).

(1) Tort Affirmative Claims

(a) The Federal Claims Collection Act, 31 U.S.C. §§ 3711-3720E.

(b) The Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651-2653.

(c) Collection from Third-Party Payers of Reasonable Health Care Services, 10 U.S.C. § 1095 (tortfeasor not required under this authority).

(2) Maritime Affirmative Claims, 10 U.S.C. §§ 4803 and 4804.

e. Single Servicing Authorities.

(1) Department of Defense Instruction (DODI) 5515.08 (Single-Service Responsibility).

(2) Department of Defense Directive (DODD) 5515.9 (Tort Claims Settlement).

(3) Defense Commissary Agency Claims, Memorandum of Understanding, June 1, 1992.

f. Memoranda of Agreement between OTJAG and the Surgeon General.

(1) Memorandum of Agreement, June 1984 (Torts).

(2) Memorandum of Agreement, June 1993 (Torts).

(3) Memorandum of Agreement for the Third Party Collection Program, April 10, 1992 (Affirmative Claims).

g. Additional Authorities pertinent to claims processing under Title 10 statutes.

(1) 10 U.S.C. § 2735, establishes that settlements (or "actions") under the Title 10 claims processing statutes are final and conclusive.

(2) 10 U.S.C. § 2731, provides a definition of the word settle.

(3) 10 U.S.C. § 1102, confidentiality of medical records.

B-2. Other statutes related to claims processing by USARCS

a. Flood exclusion to U.S. liability, 33 U.S.C. § 702c.

b. Disaster relief indemnity by local governments, 42 U.S.C. § 5173.

B-3. Most commonly used statutory authorities for remedies related to but distinct from USARCS administrative claims processing

a. Tucker Act, 28 U.S.C. § 1346, provides exclusive jurisdiction in the Court of Federal Claims over causes of actions alleging property loss caused by a Fifth Amendment "taking."

(1) Maritime authority statutes.

(2) Public Vessels Act (PVA), 46 U.S.C. §§ 31101-31113.

(3) Suits in Admiralty Act (SIAA), 46 U.S.C. §§ 30901-30918.

(4) Rivers and Harbors Act, 33 U.S.C. §§ 408 and 412.

b. Federal Employees Compensation Act (FECA), two excerpts:

(1) 5 U.S.C. § 8116.

(2) 5 U.S.C. § 8140, providing guidance on personal injury and death claims by civilian employees arising within the scope of their employment and information on certain claims by ROTC cadets, respectively.

c. Longshore and Harbor Workers Compensation Act, 33 U.S.C. §§ 901-950.

d. Claims for consequential property damage by civilian employees may only be considered in the Court of Federal Claims pursuant to 28 U.S.C. § 1491, an extract of the FTCA.

e. Defense Bases Act, 42 U.S.C. §§ 1651-1654.

f. Meritorious Claims Act, 31 U.S.C. § 3702.

g. American Battle Monuments Commission, 36 U.S.C. § 2110.

B-4. Tort claims resources (posted on the USARCS Web site on JAGCNet at “Claims Resources,” Section II, Tort Claims Resources)

a. General Resources.

- (1) Claims Assistance Visits Checklist.
- (2) Disaster Readiness Materials and Supplies.
- (3) Procedures to Ensure Timely Payment of Claims in the Event of a Natural Disaster or other Emergency.
- (4) Format for “Appointment of Paying Agent” Memorandum for Disaster Readiness Kit.
- (5) Claimant Interview Checklist.
- (6) Government Driver Interview Checklist.
- (7) Police Officer Interview Checklist.
- (8) Scope of Employment Checklist.
- (9) Slip and Fall Accident Checklist.
- (10) Questionnaire to Determine if a Claim falls under the Foreign Claims Act (FCA) or the Military Claims Act (MCA).
- (11) U.S. Government Car Rental Agreement.
- (12) Authority to File on Behalf Memo.
- (13) List of State Recreational Use Statutes.
- (14) List of Discretionary Function Cases Organized by Branch or Agency, Derived from Dept. of Justice (DOJ) Monograph.
- (15) List of State Laws on Indemnity and Contribution, Alphabetical.
- (16) List of Cases Discussing Loss of Enjoyment of Life as Damages Element, Organized by Approach and State.
- (17) List of cases discussing traditional and loss of chance causation in medical malpractice claims, organized by approach and state.
- (18) Sources of Medical Records Table.
- (19) Sample Letter Setting Up an Independent Medical Examination.
- (20) Lost Future Earnings, Tools for Calculation of (for Damage Calculations).
- (21) List of Regional Offices for Federal Worker’s Compensation Programs.
- (22) Scope of Employment Statement, Sample Format and Language.
- (23) Delegation of Approval Authority, Sample Format and Language.
- (24) Potentially Compensable Events and Serious Incidents, Sample Format and Language.
- (25) Memorandum seeking approval (also known as an “action”) by the Chief of the USARCS Tort Claims Division of an FTCA settlement for \$150,000.
- (26) Memorandum seeking approval (also known as an “action”) by the DOJ of an FTCA settlement for \$200,000.
- (27) Authority to Compromise Health Care Finance Administration Lien, Letter.
- (28) Sample completed SF 95. (See app A for links to where blank forms may be obtained.)
- (29) Sample completed DA Form 1668, Small Claims Certificate.
- (30) Military Allowance List Depreciation Table.
- (31) List of Single Service Jurisdiction by Region/Command and Armed Services Branches.
- (32) Republic of Korea District Compensation Committees.
- (33) Federal Tort Claims Handbook.

b. Payment Resources.

- (1) Transmittal Memo, to obtain payment from Army Central Insurance Fund.
- (2) Transmittal Memo, to obtain payment from Army and Air Force Exchange Service.
- (3) Transmittal Letter, to obtain payment from Corps of Engineers.
- (4) Advance Payment Acceptance Agreement for cash settlements.
- (5) Advance Payment Acceptance Agreement for trust estate settlements.
- (6) Settlement Agreement, claimant is represented by an attorney.
- (7) Settlement Agreement, claimant is a minor or incompetent.
- (8) Settlement Agreement, where lienholders have a known interest.
- (9) Settlement Agreement, where Medicare is a lienholder.
- (10) Settlement Agreement, where a joint tortfeasor is participating in the settlement.
- (11) Settlement Agreement, where there is a joint tortfeasor not participating in the settlement including hold harmless language.
- (12) Settlement Agreement where the claim is for wrongful death.

(13) Sample completed FMS Form 194, Judgment Fund Transmittal (See app A for links to where blank forms may be obtained.)

(14) Sample completed FMS Form 196, Judgment Fund Award Data Sheet

(15) Sample completed FMS Form 197, serves as settlement agreement in some claims

(16) Sample completed DA Form 1666, Settlement Agreement

(17) Sample completed DA Form 7500, Tort Claim Payment Report

c. Form letters, HIPPA releases, and transmittal memos

(1) Acknowledgment Letter, FTCA

(2) Acknowledgment Letter, MCA (or FCA)

(3) Acknowledgment Letter, Defective Claim

(4) Acknowledgment Letter, Amended Claim

(5) Acknowledgment Letter, Request for Reconsideration, FTCA

(6) Acknowledgment Letter, Maritime Claim, SOL

(7) Final Offer Letter, FTCA

(8) Final Offer Letter, MCA

(9) Denial Letter, FTCA

(10) Denial Letter, MCA

(11) Denial Letter, Combined FTCA and MCA

(12) Rescission of Denial Notice, Claim filed with more than one Armed Services Agency

(13) Release for Use of Medical Records under HIPAA

(14) Explanation of Privacy Rights under HIPAA

(15) HIPAA Assurance Agreement for a Medical Consultant

(16) HIPAA Assurance Agreement for an Independent Medical Examination

(17) Transmittal cover memo for payment documents forwarded to a claimant's Attorney for execution

(18) Transmittal cover memo for payment documents forwarded to a pro se claimant for execution

B-5. Personnel claims resources (Unless otherwise noted, the documents on this list are posted on the USARCS Web site on JAGCNet at "Claims Resources," Section III, Personnel Claims Resources

a. Allowance List-Depreciation Guide

b. Joint Military Industry Depreciation Guide

c. Non-Temporary Storage Depreciation Guide

d. Adjusted Dollar Value Guide

e. Sample DA Form 7501, Personnel Claims Payment Report

f. Sample DD Form 619-1, Statement of Accessorial Services (Delivery and Reweigh)

g. Sample DD Form 788, Private Vehicle Information Shipping Document

h. Sample DD Form 1164, Service Order for Personal Property

i. Sample DD Form 1299, Application of Shipment or Storage of Property

j. Sample DD Form 1797, Personal Property Counseling Checklist

k. Attachment to DD Form 1797 (Pre-Shipment Claims Advice Letter)

l. Sample DD Form 1840, Joint Statement of Loss or Damage at Delivery

m. Sample DD Form 1840R, Notice of Loss or Damage

n. Sample DD Form 1841, Inspection Report, Government

o. Sample DD Form 1842, Claims for Loss or Damage to Personal Property Incident to Service

p. Sample DD Form 1843, Demand on Carrier or Contractor

q. Sample DD Form 1844, List of Property and Claims Analysis Chart - Maximum Allowable

r. Explanation of DD1844 Entries - Maximum Allowable

s. Sample DD Form 1844, List of Property and Claims Analysis Chart - DPM/NTS

t. Explanation of DD1844 Entries - DPM/NTS

u. Sample DD Form 1844, List of Property and Claims Analysis Chart - Insurance

v. Explanation of DD1844 Entries - Insurance

w. Sample SF 1203, Government Bill of Lading (GBL) (rescinded, but still encountered in older claims)

x. Explanation of GBL Entries

y. GBL Service Codes

z. Direct Procurement Method (DPM) Service Codes

aa. Sample Standard Format SDDC Commercial Bill of Lading

ab. Sample HHG Inventory Form (commercial)

ac. Explanation of HHG Inventory Entries

- ad.* Delegation of Recovery Authority
- ae.* Sample of Exception Sheet (aka "Rider")(commercial)
- af.* Guidance on Claims Involving Insurance
- ag.* Six Year Statute of Limitations Guidance on Claimants Rights Against the Carrier
- ah.* Guidance on Mobile Home Processing
- ai.* DD Form 1412, Inventory of Items Shipped in House Trailer (Not posted. Copies may be obtained at <http://www.dtic.mil/whs/directives/infomgt/forms/formsprogram.htm>)
- aj.* DD Form 1800, Mobile Home Inspection Report (Not posted. Copies may be obtained at <http://www.dtic.mil/whs/directives/infomgt/forms/formsprogram.htm>)
- ak.* DD Form 1863, Accessorial Services - Mobile) (Not posted. Copies may be obtained at <http://www.dtic.mil/whs/directives/infomgt/forms/formsprogram.htm>)
- al.* Joint Military Industry Agreement on Claims of \$25.00 or Less
- am.* Joint Military Industry Memorandum of Understanding on Code 5, Code T, and J Shipments
- an.* Joint Military Industry Memorandum of Understanding on Loss & Damage Rules
- ao.* Joint Military Industry Memorandum of Understanding on Salvage
- ap.* Joint Military Industry Table of Weights
- aq.* Assembly of Records/File Organization Instructions
- ar.* Sample Settlement Letter (with selection of paragraphs)
- as.* Sample Standard Third Party Denials to Demands for Payment
- at.* Sample Demand Letter to Claimant (with selection of paragraphs)
- au.* Sample Debtor's Election of Options Form
- av.* Unearned Freight Letter to DFAS-IN
- aw.* Awaiting Documentation Letter
- ax.* Federal Debt Collection Notice (An attachment to a Carrier Recovery Demand)
- ay.* List of Regional Management Storage Offices (RMSOs)

B-6. Affirmative claims resources (posted on the USARCS Web site on JAGCNet at "Claims Resources," Section IV, Affirmative Claims Resources)

- a.* Recovery approval request-medical
- b.* Recovery approval request-property
- c.* Installment agreement-medical
- d.* Installment agreement-property
- e.* Attorney representation agreement
- f.* Sample Completed DD Form 2527, Personal Injury Questionnaire
- g.* Model support agreement (for MTFs to hire a contractual employee to help process affirmative claims)
- h.* Release (including language for medical care recovery and property damage assertions)
- i.* Model assertion letter for medical care recovery for a Soldier (includes wages)
- j.* Model assertion letter for medical care recovery for a civilian (does not include wages)
- k.* Model assertion for property damage recovery

B-7. Article 139 (Uniform code of Military Justice) claims resources (posted on the USARCS Web site on JAGCNet at "Claims Resources," Section V, Article 139 Claims Resources)

- a.* Sample written claim for personal property wrongfully taken or willfully damaged by a member of the armed forces
- b.* Sample memorandum to disbursing officer
- c.* Sample notification letter of commencement of an investigation
- d.* Sample appointment of an investigating officer memorandum
- e.* Sample notification letter to claimant of results of investigation
- f.* Sample notification letter to an individual wrongdoer of the results of an investigation
- g.* Sample legal review findings memorandum

B-8. Tables listing claims offices worldwide (posted on the USARCS Web site on JAGCNet at "Claims Resources," Section VI, Tables Listing Claims Offices Worldwide)

- a.* Continental U.S. Claims Offices
- b.* Central and South American Claims Offices

- c.* U.S. Army Corps of Engineers Offices
- d.* European Claims Offices
- e.* Korean Claims Offices
- f.* Receiving State Offices in Germany and Korea
- g.* State-by-State List of National Guard Active Duty Liaison Offices and Claims Offices
- h.* List of Single Service Jurisdiction by Region/Command and Armed Service Branch

Glossary

Section I Abbreviations

AAFES

Army and Air Force Exchange Service

AAO

area action officer

ACMP

Affirmative claims management program (database)

ACO

area claims office

ADA

Americans with Disabilities Act

AEA

Admiralty Extension Act

ALDG

Allowance List—Depreciation Guide

AMC

Air Mobility Command

AMCSA

Army Maritime Claims Settlement Act

APF

appropriated funds

AR

Army Regulation

ARNG

Army National Guard

ASBCA

Armed Services Board of Contract Appeals

AWOL

absent without leave

BL

Bill of Lading

BOA

basic ordering agreement

CAV

claims assistance visits

CEA

claims expenditure allowance

CENTCOM

U.S. Central Command

CERCLA

Comprehensive Environmental Response, Compensation, and Liability Act

C.F.R.

Code of Federal Regulations

CHCS

Composite Health Care System

CID

Criminal Investigation Division

CJA

claims judge advocate

CMMS

Centers for Medicare and Medicaid Management

COE

Corps of Engineers

CONUS

continental United States

COR

Contracting Office Representative

CPO

claims processing office

CR

carrier recovery

CRNA

certified registered nurse anesthetist

DA

Department of the Army

DAO

Defense Accounting Office

DCO

Defense Cost Office

DECA

Defense Commissary Agency

DERA

Defense Environmental Restoration Account

DFAS

Defense Finance and Accounting Service

DFAS-IN

Defense Finance and Accounting Service—Indianapolis Center

DJAG

The Deputy Judge Advocate General

DOD

Department of Defense

DODD

Department of Defense Directive

DOHA

Defense Office of Hearings and Appeals

DOJ

Department of Justice

DPM

Direct Procurement Method

DPW

Directorate of Public Works

DRMO

Defense Reutilization and Marketing Office

DTR

Defense Transportation Regulation

DVA

Department of Veterans Affairs

EOP

Exchange Operating Procedures

EPA

Environmental Protection Agency

ETS

expiration term of service

FAR

Federal Acquisition Regulation

FBI

Federal Bureau of Investigation

FCA

Foreign Claims Act

FCC

foreign claims commission

FCCA

Federal Claims Collection Act

FECA

Federal Employees Compensation Act

FELRTCA

Federal Employees Liability Reform and Tort Compensation Act of 1988

FEMA

Federal Emergency Management Agency

FKJA-CL

Office of the Judge Advocate, U.S. Forces Korea (Claims)

FMCRA

Federal Medical Care Recovery Act

FMS

Financial Management Service

FOIA

Freedom of Information Act

FRCP

Federal Rule of Civil Procedure

FRG

Federal Republic of Germany

FTCA

Federal Tort Claims Act

FTCH

Federal Tort Claims Handbook

FTNGDT

Full Time National Guard Duty Training

GAO

Government Accountability Office

GBL

Government Bill of Lading

GCMCA

General Court-Martial Convening Authority

GOV

Government owned vehicle

GPC

Global POV Contract

GSA

General Services Administration

HCFA

Health Care Financing Administration

HCP

health care provider

HIPAA

Health Insurance Portability and Accountability Act

IACA

International Agreements Claims Act

IDT

incident-to-duty training (National Guard)

IG

Inspector General

IO

Investigating Officer

IRV

Increased Released Value

JA

Judge Advocate

JAGC

Judge Advocate General Corps

JAGCNet

Judge Advocate General Corps Network

JFTR

Joint Federal Travel Regulation

JTR

Joint Travel Regulations

LSHWCA

Longshore and Harbor Workers Compensation Act

MA

maximum allowance

MAAG

Military Assistance Advisory Group

MACOM

major Army command

MCA

Military Claims Act

MEDCOM

Medical Command

MFR

memorandum for record

MOA

memorandum of agreement

MOU

memorandum of understanding

MP

Military Police

MSC

Military Sealift Command

MTF

medical treatment facility

MWR

Morale, Welfare, and Recreation

NAF

nonappropriated funds

NAFI

Non-Appropriated Fund Instrumentalities

NASA

National Aeronautics and Space Administration

NATO

North Atlantic Treaty Organization

NCO

Non-Commissioned Officer

NGCA

National Guard Claims Act

NOE

nap-of-the-earth

NSCA

Non-Scope Claims Act

NTS

Non-Temporary Storage

O & M

Operation and Maintenance

OMB

Office of Management and Budget

OSJA

Office of the Staff Judge Advocate

OTJAG

Office of The Judge Advocate General

Pam

Pamphlet

PCA

Personnel Claims Act

PCE

potentially compensable event

PCMS

Personnel Claims Management System (database)

PCS

permanent change of station

PFPP

Partnership for Peace

PL

Public Law

POV

privately owned vehicle

PPSO

Personal Property Shipping Office

PVA

Public Vessels Act

PX

Post Exchange

QA

quality assurance

RCM

Rule for Courts-Martial

RIMP

risk management program (for AAFES)

RJA

recovery judge advocate

RM

risk management

ROK

Republic of Korea

ROTC

Reserve Officers' Training Corps

RSMO

Regional Storage Management Office

RSO

receiving State office

SA

Secretary of the Army

SCAC

Standard Carrier Alpha Code

SDDC

Surface Distribution and Deployment Command

SIA

Suits in Admiralty Act

SIR

supplemental inflatable restraint system

SIT

Storage In Transit

SJA

Staff Judge Advocate

SOFA

Status of Forces Agreement

SOP

Standing Operating Procedure

SPCMCA

Special Court-Martial Convening Authority

SSN

social security number

STANFINS

Standard Financial System

STANFINS SRD1

Standard Financial System Redesign

TDRL

temporary disability retirement list

TDY

temporary duty

TGBL

through government bill of lading

T.I.A.S.

Treaties and Other International Acts Series

TJAG

The Judge Advocate General

TO

transportation officer

TSCA

Tort and special claims application (database)

UCMJ

Uniform Code of Military Justice

UPPA

Uniform Periodic Payment Act

UPS

United Parcel Service

U.S.

United States

USACHPPM

U.S. Army Center for Health Promotion and Preventive Medicine

USACSEUR

U.S. Army Claims Service Europe

USAR

U.S. Army Reserve

USARCS

U.S. Army Claims Service

USAREUR

U.S. Army, Europe

U.S.C.

United States Code

USSOC

U.S. Special Operations Command

VCR

video cassette recorder

VPC

Vehicle Processing Center

Section II**Terms**

This section contains no entries.

Section III**Special Abbreviations and Terms**

This section contains no entries.

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