

## **1999 USARCS CLAIMS TRAINING COURSE**

### **FTCA Exclusions**

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I. INTRODUCTION. Exceptions to liability under the Federal Tort Claims Act may be statutory or judicially created. In addition, an exclusive alternative remedy may bar recovery.

#### II. REFERENCES.

A. Federal Tort Claims Act (FTCA) 28 U.S.C. §§ 2671-2680.

B. Army Regulation (AR) 27-20, Claims.

C. Department of the Army Pamphlet 27-162.

D. United States Army Claims Service, Federal Tort Claims Act Handbook (October 1997).

#### III. STATUTORY EXCEPTIONS

The Federal Tort Claims Act (FTCA) confers exclusive jurisdiction upon district courts over civil actions for money damages caused by the negligent or wrongful acts or omissions of any employee of the Government acting within the scope of his or her employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b).

The exceptions set forth in 28 U.S.C. § 2680(a)-(h) define the limits of the United States' waiver of sovereign immunity and define the boundaries of the district court's jurisdiction to hear tort claims against the United States. The statutory exceptions commonly encountered in handling claims against the Army

include those of discretionary function, intentional torts (assault and battery, false arrest, false imprisonment, malicious prosecution) misrepresentation, deceit and interference with contract rights.

A. Due Care Exception. 28 U.S.C. § 2680(a). Reference D, para II B4 b.

Excludes claims 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).

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.

Application of the due care exception has been relatively limited. See Lively v. United States, 870 F.2d 296 (5th Cir. 1989); Doe v. Stephens, 851 F.2d 1457 (D.C. Cir. 1988); Hydrogen Technology Corp. v. United States, 831 F.2d 1155 (1st Cir. 1987); Peltzman v. Smith, 404 F.2d 335 (2d Cir. 1968); Dupree v. United States, 247 F.2d 819 (3d Cir. 1957).

B. Discretionary Function Exception. 28 U.S.C. § 2680(a). Reference B, para II B4c(2). Excludes claims arising out of the exercise or performance of, or failure to exercise or perform, discretionary function, whether or not discretion is abused.

1. The exception affords protection against tort liability for Governmental actions and decisions based on considerations of public policy. United States v. Gaubert, 499 U.S. 315 (1991). (Federal Home Loan Bank Board undertook to advise and oversee certain aspects of the operation of Independent American Savings Association (IASA). When IASA was placed in receivership, its chairman (Gaubert) alleged that FHLBB had negligently carried out its supervisory activities, which he characterized as operational actions. The Court held that there is nothing in the description of a discretionary act that refers only to policymaking or planning functions. Day-to-day management of banking affairs, like the management of other businesses regularly require[s] judgment as to which of a range of permissible courses is the wisest. Discretionary conduct is not confined to the policy or planning level.)

2. Focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by the statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.

3. If an agency fails to act in accord with a specific mandatory directive, the discretionary function exception does not apply. Berkovitz v. United States,

486 U.S. 531 (1988). (Exception is inapplicable to tort claims based upon an agency's failure to comply with statutory and regulatory provisions mandating that it receive all data a manufacturer is required to submit, examine the product, and determine that the product complies with all regulatory standards, before licensing the product. In addition, the exception might not bar tort claims based upon an agency's release of vaccine lots without testing, if there is a policy which requires all lots be tested prior to authorizing release.) However, the presence of a few, isolated provisions cast in mandatory language does not transform an otherwise suggestive set of guidelines into binding agency regulations. Sabow v. United States, 93 F.3d 1445 (9th Cir. 1996), reprinted as amended, Sabow v. United States, 1996 U.S. App. Lexis 27829 (9th Cir. Cal. Oct 28, 1996). (Discretionary function exception to the FTCA barred negligent infliction of emotional distress claims arising from actions of investigations of the Naval Investigative Service and the Office of The Judge Advocate General during course of their investigation of shooting death of Marine Corps officer. Investigators were not required to follow specific investigative regulations and directives detailed in investigative manual, and thus they were performing discretionary acts. Moreover, discretionary judgements by investigators involved social, economic or political considerations.)

4. Negligence is irrelevant to the discretionary function analysis. Barnson v. United States, 816 F.2d 549 (10th Cir. 1987), cert. denied, 484 U.S. 896 (1987).

5. The claims attorney must undertake a two-tier analysis to identify protected discretionary functions.

a. Does the Governmental action involve 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. Is the choice or judgment one based on, or susceptible to, public policy considerations (social, economic, political and military considerations)?

6. Claims investigation.

a. Identify and review any statutes, regulations, guidelines, directives or policy statements that may affect the activity forming the basis of the claim.

b. 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.

c. Be prepared to state what policy considerations an Army representative will articulate in terms of social, political, economic or military factors influencing the discretionary activity.

d. Failure to warn allegations are common to many FTCA claims. If the failure to warn is unconnected to the policy decision that created the damage, the discretionary function exception may not be applicable. In such cases, the claims officer should interview the decision maker to determine what economics (i.e., budgeting impact) or other factors (i.e., protection of federal property, safety, agency mission, scenic preservation) were involved in a decision not to warn.

C. Section 2680(h) Exceptions. Reference D, para II B4 i. Incidents that arise out of assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process (committed by one other than a law enforcement officer), libel, slander, misrepresentation, deceit or interference with contract rights.

1. Artful pleading to avoid excluded torts is not permitted. United States v. Shearer, 473 U.S. 52 (1985). The phrase "arising out of assault or battery" is broad enough to encompass claims sounding in negligence. Id. at 55-56. But see: Benavidez v. U.S., 177 F.3d 927 (10th Cir. 1999). Plaintiff alleged he had been the victim of sexual abuse during counseling he received from an Indian Health Service psychologist. District Court granted U.S.' motion to dismiss, finding the psychologist had been acting within the scope of his employment when he performed the alleged acts, and that the psychologist had engaged in intentional tortious conduct, which was excluded from the FTCA's sovereign immunity waiver. The 10th Circuit reversed, finding the therapist's behavior did not fall under the FTCA's intentional tort exception, but that the mishandling of "transference" by the psychologist was professional negligence or malpractice.

2. In order to avoid the bar of a Section 2680(h) exclusion, a plaintiff must demonstrate that the Government employee was acting outside the scope of employment and that the claim is based upon an independent duty not derivative of the employment relationship.

3. A claim based upon an alleged assault by a person who is not acting within the scope of federal employment is barred because such a claim does not fall within the FTCA's general waiver of sovereign immunity for acts and omissions of federal employees who are within the scope of employment.

4. Sheridan v. United States, 487 U.S. 392 (1988). Section 2680(h) is not a bar if the federal employee commits an assault or battery outside the scope of employment as a result of the antecedent negligence of other federal employees. In Sheridan the claim was based on a Navy directive requiring all personnel to prevent the possession or use of private firearms on base. On remand the U.S. was held not liable as Maryland has no Good Samaritan law.

However, the majority in Sheridan expressly declined to reach the issue of whether negligent hiring, negligent supervision or negligent training (cases where duty is based upon the employment relationship) may ever provide the

basis for liability under the FTCA for a foreseeable assault or battery by a Government employee.

5. The provisions of section 2680(h) shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations). 10 U.S.C. § 1089(e). The exception also applies to personal services contractors. 10 U.S.C. § 1089(a).

6. Cannot avoid the false imprisonment, false arrest, malicious prosecution and abuse of process exclusion by couching a claim in constitutional terms.

7. The assault, battery, false imprisonment, false arrest, malicious prosecution and abuse of process exceptions do not apply to federal law enforcement officers. The definition of a federal law enforcement officer includes any officer of the United States who is empowered by law to execute searches, to seize evidence or to make arrests for violation of federal law. Such employees are considered to include military police, but not post exchange detectives. In a claim involving such allegations, the investigation should address the nature, amount, and justification for the use of force. Whether or not a federal law enforcement officer is involved, defenses of probable cause, reasonableness, and good faith are available, provided the arrest is otherwise lawful under state law.

Despite the FTCA provision that the liability of the United States shall be "to the same extent as a private individual under like circumstances" under state law, the courts sometimes look to state law as it pertains to law enforcement activities rather than the conduct of private individuals. See Dirienzo v. United States, 690 F. Supp. 1149 (D. Conn. 1988) (applying New York law) (valid warrant defeated claims for false arrest and false imprisonment); Friedman v. United States, 927 F.2d 259 (6th Cir. 1991) (applying Ohio law) (where probable cause existed and indictment and conviction were not void, no claim for false arrest, false imprisonment, or malicious prosecution); Waybenais v. United States, 769 F. Supp. 306 (D. Minn. 1991) (applying Minnesota law) (Bureau of Indian Affairs use of force in shooting armed man was reasonable; not assault and battery); but see Van Schaick v. United States, 586 F. Supp. 1023 (D.S.C. 1983) (applying South Carolina law) (false imprisonment for failure to take arrest before magistrate within reasonable time.)

8. Whether phrased as an unwarranted invasion of privacy or damage to reputation, the communication of defamatory information by a Government employee acting within the scope of employment falls within the libel and slander exception. The defamation may be intentional or negligently inflicted. The tort of defamation, as recognized by most states, requires some act of communication or publication. Thus, an allegation of mere negligent record keeping may not be a tort under state law but may have a remedy under the Privacy Act. The alleged defamatory material may be communicated verbally or contained in an investigation report, a medical report, or a personnel action. The exception has

been held applicable to suits for furnishing defamatory information to a prospective employer and those stated as invasion of privacy and false light.

9. The misrepresentation and deceit exception deprives courts of jurisdiction over tort claims against the United States based on plaintiff's reliance on Governmental misinformation or failure to communicate correct information. United States v. Neustadt, 366 U.S. 696 (1961). The exception encompasses negligent as well as deliberate misrepresentation. It applies equally to affirmative or implied misstatements and negligent omissions. Preston v. United States, 596 F.2d 232 (7<sup>th</sup> Cir. 1979), cert. denied, 444 U.S. 915(1979). The exception has been broadly construed by the courts in such diverse situations as negligent inspections, failure to warn of the criminal propensities of a federal witness, wrongful induction into military service, and salary and benefits misinformation conveyed by a recruiter. The exception does not apply to medical malpractice claims. Thus, claims based on allegations of lack of informed consent, negligent diagnosis, or untimely diagnosis are not barred by the exception. In cases in which the exception may be applicable, the claims attorney should investigate the nature of the Government acts or omissions, as well as the information upon which the claimant may have relied to his or her detriment.

10. The interference with contract rights exception should be considered whenever it appears that the claimant is claiming that an economic interest has been harmed by a federal agency or employee. It is applicable to prospective rights or economic advantage, as well as existing rights. Small v. United States, 333 F.2d 702 (3d Cir. 1964). Although the invasion of interests of a financial or commercial character has been the main application of the interference with contract rights exception, it has been applied in a number of cases involving property damage or personal injury.

#### D. Additional Statutory Exclusions Under Section 2680.

1. Arises out of transmission of postal matter. 28 U.S.C. § 2680(b). Reference D, para II B4 d. This exclusion applies to the loss, miscarriage or negligent transmission of letters or postal matter.

2. Arising out of collection of taxes, duties or detention of goods. 28 U.S.C. § 2680(c). Reference D, para II B4 e. The circuits are split on whether the exclusion applies to seizure of goods by Government agencies and the care and disposal of such property when the agency is one other than the Customs Service. See Kurinsky v. United States, 35 F.3d 594 (6th Cir. 1994) (exclusion applies only to detained goods in connection with customs and taxes); United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481 (10th Cir. 1984), cert. denied sub nom. Jarboe - Lackey Feedlots, Inc. v. United States, 469 U.S. 825 (1984) (2680 (c) bars claim arising out of USDA seizure of adulterated meat).

The detention of goods exclusion may apply to seizures in connection with an arrest. Cheny v. United States, 972 F.2d 247 (8th Cir. 1992) (exclusion applies to damage claims resulting from negligent handling of a car title certificate by an agent of the federal Army task force).

3. Cognizable under the Suits in Admiralty Act (46 U.S.C. §§ 741-752) or Public Vessels Act (46 U.S.C. §§ 781-790). 28 U.S.C. § 2680(d). Reference D, para II B4 f. 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.

4. Arises from the administration of Trading with the Enemy Act. 28 U.S.C. § 2680(f). Reference D, para II B4 g. This Act provides the sole remedy for any person claiming money or other property held by an alien property custodian.

5. Damages result from the imposition or establishment of a quarantine. 28 U.S.C. § 2680(f). Reference D, para II B4 h.

6. Arises from the combatant activities of the Armed Forces or Coast Guard in time of war. 28 U.S.C. § 2680(j). Reference D, para II B4 k. Declaration of war by Congress is not necessary.

7. Arises from fiscal operations of the Treasury Department or regulation of the Monetary System. 28 U.S.C. § 2680(i). Reference D, para II B4 j. 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 contract. Forward these claims either to DFAS or through contract channels to the contracting officer for consideration.

8. Claim arises in a foreign country. 28 U.S.C. § 2680(k). Reference D, para II B4 l. Despite the apparent clarity of this exception, there have been repeated attempts to narrow the meaning. Nevertheless, the courts have held that U.S. embassies, leased military bases, territory occupied by the military services, Antarctica, trusteeships under the mandate of the United Nations, and the high seas fall within the "foreign country" category. 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. Orlikow v. United States, 682 F. Supp. 77 (D.D.C. 1988) (CIA human experimentation in Canada did not arise in foreign country since supervised and funded in Washington, D.C.).

9. Arises from the activities of the Tennessee Valley Authority. 28 U.S.C. § 2680(l). Reference D, para II B4 m.

10. Arises from activities of the Panama Canal Commission. 28 U.S.C. § 2680(m) and 22 U.S.C. § 3761. Reference D, para II B4 m.

11. Arises from activities of a Federal land bank, intermediate credit bank or bank for cooperatives. 28 U.S.C. § 2680(n). Reference D, para II B4 m.

IV. FLOOD AND FLOODWATERS EXCLUSION, 33 U.S.C. § 702(c).  
Reference D, para II B4 o.

A. Bars claims based upon Government negligence in the construction, operation, maintenance, and management of federal flood control projects, as well as man made floods.

B. Claims investigation.

1. Determine which Act of Congress authorized the project for flood control.

2. Determine the degree to which the project is currently used for flood control.

3. Determine whether or not the local beneficiary agreed to assume liability for claims and, if so, obtain a copy of the local agreement.

4. Determine the specific method of operation on the dates in question and whether or not they complied with established regulations or standard operating procedures.

5. Obtain the water levels for a relevant period of time both before and after the date in question.

6. Determine whether any underwater objects are involved in causing the claimed injury.

V. JUDICIALLY CREATED EXCLUSIONS.

A. Feres v. United States, 340 U.S. 135 (1950). Reference D, para I E10.  
Bars suits by service personnel for injuries that arise out of or in the course of their military service.

B. To assist in determining whether the injuries occurred incident to service, courts consider the totality of the circumstances including:



1. Duty status. Johnson v. United States, 704 F.2d 1431 (9<sup>th</sup> Cir. 1983) - the duty status distinction cannot be mechanically applied to answer the incident to service question. Kohn v. United States, 680 F.2d 922 (2d Cir. 1982) - an injury to a service member on base or off base, but while the service member is engaged in a military duty, is incident to service.

2. Location of the incident. Millang v. United States, 817 F.2d 533 (9<sup>th</sup> Cir. 1987), cert. denied, 485 U.S. 987 (1988) - off duty marine run over by an on duty MP on military installation was Feres barred. Pierce v. United States, 813 F.2d 349 (11<sup>th</sup> Cir. 1987) - off base motorcyclist involved in accident with government vehicle while on personal business not Feres barred.

3. The activity of the plaintiff at the time of the incident. Parker v. United States, 611 F.2d 1007 (5<sup>th</sup> Cir. 1980) - soldier was on leave for four days killed off post while driving home was not Feres barred. Fleming v. U.S. Postal Service, 993 F. Supp. 582 (W.D. Ky. 1998), rev'd, 186 F.3d 697 (6th Cir. 1999). Service member injured in off-base automobile accident with postal service employee while driving from his off-base home to a restaurant for breakfast prior to reporting for duty was not acting incident to service.

C. Feres Rationales. When the totality of the circumstances show that the Feres doctrine bars suit, the Court may dismiss the suit without considering the underlying Feres doctrine rationales. On the other extreme, even when the three-factor totality of the circumstances test strongly indicates that the Feres doctrine does not bar suit, the Court must look to the Feres doctrine rationales before permitting suit. Richards v. United States, 1998 WL 154725 (D. Virgin Islands) aff'd 1999 WL 294715 (3rd Cir. (Virgin Islands)). (Active duty service member injured in a motor vehicle accident on a public road running on an easement across a military reservation. The application of the three-factor totality of the circumstances test strongly indicated that the Feres doctrine barred suit. However, because the two circuits that have considered factually similar case (9th and 11th) are split, the court found the three-factor analysis inconclusive and considered the Feres doctrine rationales in finding the suit barred.)

1. The federal relationship between serviceperson and Government. Active duty status in the armed forces and the fact that the incident occurred while the servicemember was on the way home from work on base suggest this federal relationship. Richards, 1998 WL 154725 at 5.

2. Benefits accruing to the plaintiff as a result of military service. Bon v. United States, 802 F.2d 1092 (9<sup>th</sup> Cir. 1986) - off duty sailor injured while using Navy recreational facilities is Feres barred.

3. The effect on military discipline. United States v. Shearer, 473 U.S. 52 (1985) - off base, off duty murder of one soldier by another would cause court to second-guess military decisions.

Note: 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. The aforementioned factors are not triggers for or against immunity - this exception does not operate automatically under any circumstances.

Variations in case law require a detailed factual investigation.

D. Post Service Injury. Feres applies to actions in which the plaintiff is injured incident to service and alleges a post service injury, such as failure to warn or provide follow-up care. Laswell v. Brown, 683 F.2d 261 (8<sup>th</sup> Cir. 1982), cert. denied, 459 U.S. 1210 (1982). However, if an independent negligent act occurred after the soldier retired, then the "incident to service" doctrine will not bar the claim.

E. Army Reserve, National Guard members, and ROTC cadets. Suits brought by National Guard personnel under the FTCA are generally barred by Feres doctrine. Selbe v. United States, 130 F.3d. 1265 (7<sup>th</sup> Cir. 1997). Feres bars suit by ROTC cadets for injuries sustained during ROTC activities. Morse v. West, 1999 U.S. App. LEXIS 446.

F. Genesis Claims. Feres bars suit by dependents of service members where the claim has its "genesis" in a service-related injury to a service member. In re, "Agent Orange" Prod. Liab. Litig., 818 F.2d 201 (2<sup>d</sup> Cir. 1987); L.J.B., Wife of/and D.R.B., on Behalf of Their Minor Grandchild, R.W.H., v. United States, 1997 WL 162076 (E.D. La).

G. Derivative Claims. Feres bars suit for an injury to a service member, even if suit is brought by a spouse or dependent on claims recognized under state law as belonging to the spouse or family member. Harten v. Coons, 502 F.2d 1363 (10<sup>th</sup> Cir. 1974), cert. denied, 420 U.S. 963 (1975). Feres does not bar suit by a service member for injuries to a spouse or family member, so long as those injuries were not incurred incident to service. Hicks v. United States, 368 F.2d 626 (4<sup>th</sup> Cir. 1966).

H. Temporary Disability Retirement List (TDRL). As presently implemented, service members on TDRL are considered retired. Circuits that have addressed the issue of whether Feres bars claims for torts occurring after

placement on the TDRL are divided. Kendrick v. United States, 877 F.2d 1201 (4<sup>th</sup> Cir. 1989), cert. dismissed, 493 U.S. 1065 (1990); Ricks v. United States, 842 F.2d 300 (11<sup>th</sup> Cir. 1988), cert. denied, 490 U.S. 1031 (1989) - the TDRL does not extinguish the relationship between the service member and the armed forces nor does it relieve a service member from his or her duties. Harvey v. United States, 884 F.2d 857 (5<sup>th</sup> Cir. 1989); Cortez v. United States, 854 F.2d 723 (5<sup>th</sup> Cir. 1988) - service members on the TDRL are not prevented by the Feres Doctrine from bringing actions under the FTCA for injuries incurred while on TDRL. Bradley v. U.S., 161 F.3d 777 (4th Cir. 1998). In distinguishing Kendricks, the court held that Feres doctrine did not bar claims arising from the death of a servicemember who, while on TDRL and pursuing follow-up treatment for injuries resulting from a service-related infection, sought emergency treatment at military facility for condition purportedly unrelated to prior infection and arising after she was placed on TDRL status. See, Perlstein, TDRL and the Feres Doctrine, 43 A.F.L. Rev. 259 (1997) for a comprehensive review of this topic.

I. Injury to or death of a fetus or infant. Romero v. United States, 954 F.2d 223 (4<sup>th</sup> Cir. 1992) on remand, 806 F. Supp. 569 (E.D. Va. 1992) aff'd without op., 2 F.3d 1149 (4th Cir. 1993)-treatment of a pregnant soldier which results in injury to a fetus or an infant is not Feres barred. Feres does bar a claim by the soldier mother for her own injury. Atkinson v. United States, 825 F.2d 262, (9th Cir. 1987) cert. denied, 485 U.S. 987 (1988).

## VI. ALTERNATIVE REMEDY BARS SUIT.

### A. Federal Employees Compensation Act (FECA). Reference D, para I E9.

1. FECA is the exclusive remedy against the United States for Federal employees injured in the course of their employment. 5 U.S.C. § 8116(c). Saltsman v. United States, 104 F.3d 787 (6<sup>th</sup> Cir. 1997)
2. The determination by the Office of Worker's Compensation binds the court.
3. Any injury which presents substantial questions of FECA coverage should be submitted as a FECA claim before action is taken on any FTCA claim. If the civilian employee or legal representative did not file a claim under FECA before filing a FTCA claim, advise the claimant immediately to file a FECA claim. Stanfill v. United States, 1999 WL 183766 (M.D. Ala.)
4. FECA applies only to injuries and death, but not to property losses.
5. The FECA bar extends to derivative claims. Underwood v. United States, 207 F.2d 862 (10<sup>th</sup> Cir. 1953)

6. FECA bar extends to subsequent malpractice during treatment of FECA injury. Balancio v. United States, 267 F.2d 135 (2d Cir. 1959) cert. denied, 361 U.S. 875 (1959). In addition, the FECA bar applies when the employer furnishes emergency medical treatment to an employee for a nonwork-related condition while the employee is at work (the human instincts doctrine).

7. 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. Lucas, 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 remedies.

8. ROTC cadets. A cadet is eligible for FECA benefits if he or she is a member of, or an applicant for membership in, the ROTC of the Army, Navy or Air Force. 5 U.S.C. § 8140.

B. Longshoremen's' and Harbor Workers' Compensation Act. 33 U.S.C. § 905(a). Reference D, para I E9 e FECA type bar extends to employees not covered by FECA, e.g., nonappropriated fund employees.

C. CERCLA. Comprehensive Environmental Response, Compensation and Liability Act. 42 U.S.C. §§ 9601-75. An environmental restoration program administered by the Environmental Protection Agency (EPA). The statute expressly permits a private individual to sue, not for damages, but to ensure compliance with the CERCLA mandate. The Department of Defense, by agreement with the EPA, administers the Defense Environmental Restoration Account program which is designed to carry out CERCLA objectives and remedies (to include recovery for the costs of necessary clean up response).

D. Tucker Act. 28 U.S.C. §§ 1346a, 1491. Reference D, para II B4e(6), II B4i(4)(c), II B5c. Claims filed under the Tucker Act include those founded upon the United States Constitution, 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. 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. 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 property.

E. National Vaccine Injury Compensation Program. 42 U.S.C. §§ 300aa -10 through 23. Reference D, para II B5p. Claims for injury and death caused by the administration of vaccines may be payable under this act. A claimant dissatisfied with the Court of Federal Claims' judgment may bring suit for damages in state or federal court provided the prerequisites of the statute have been met.

VI. RECREATIONAL USE STATUTES. Reference D, para II B4c(2)(m) (i)-(iii).

A. These define and limit the duties of a recreational landowner in relation to persons using his premises for recreational purposes.

B. Although the primary rationale underlying recreational use statutes - encouraging landowners to open their land to the public - is arguably inapplicable to the Government, the courts have consistently held that the Government receive the benefits of such statutes.

C. Recreational use statutes, by their terms, usually do not bar liability when a fee is charged, an economic benefit is received or where the conduct is willful or wanton. Under these circumstances, the standard of care becomes one of reasonable care. Active or constructive knowledge of a dangerous condition may place a duty to warn or guard against that hazard.

1. Recreational Activity. Cagle v. United States, 937 F.2d 1073 (6<sup>th</sup> Cir. 1991). The court rejected the argument that the Tennessee Recreational Use Statute does not apply to public lands, such as that owned by the United States. The court also found that the plaintiff, who was injured when riding a battlefield canon like a seesaw, was engaged in sightseeing within the scope of the statute.

2. Gross Negligence. Sumner v. United States, 794 F. Supp. 1358 (M.D. Tenn. 1992). The United States was not protected from liability by the Tennessee Recreational Use Statute for its failure to post adequate warning signs around an impact area containing unexploded shells, since its failure to do so constituted gross negligence.

3. Fee. Ducey v. United States, 713 F.2d 504 (9<sup>th</sup> Cir. 1983), later proceedings, 830 F.2d 1071 (9<sup>th</sup> Cir. 1987). The court held that the Government may be held liable for deaths in a flash flood at the Lake Mead National Recreational Area for the failure to warn visitors of flood hazards. Under the Nevada Recreational Use Statute, immunity was provided to the landowner, except where use of the land was granted for consideration. Although the United States did not charge a fee for entrance, decedents paid consideration to a concessionaire for moorage and trailer rentals and made purchases from its store.

Since the concessionaire paid a percentage of its gross receipts to the United States, this was an economic benefit to the United States resulting in the application of the Nevada statute's exception to the limitation of liability. But see Wilson v. United States, 999 F.2d 953 (8th Cir. 1993); Howards v. United States, 181 F.3d 1064 (9th Cir. 1999) and other cases cited in Reference D, para II B4c(2)(m)(ii).

4. Actual Notice. George v. United States, 735 F. Supp. 1524 (M.D. Ala. 1990). The court found that liability under Alabama's Recreational Use Statute does not require a finding that the Government's activity was willful or malicious. Since the Government had actual knowledge of a dangerous condition, of which the plaintiff was unaware (alligator in a lake), yet failed to guard or warn against the danger, liability was imposed.

D. Interaction with Discretionary Function Exception. Allegations of negligence regarding the design, maintenance and construction of recreational and other Governmental 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. Rosenbush v. United States, 119 F.3d. 438 (6th Cir. 1997).

E. Claims Investigation. 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 "protected" activities in the applicable statute.

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. What use is made of the fee and whether there is a commercial benefit.

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.

1999 USARCS CLAIMS TRAINING COURSE

FTCA - Exclusions

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