MAKING UNCLE SAM RESPONSIBLE TO YOUR CLIENT

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I. Actions Speak Louder Than Words

A. How the government litigates shows what you must do to win for your client.

B. "That's the difference between governments and individuals. Governments don't care, individuals do."

Mark Twain in *A Tramp Abroad*, 1880, Vol. 2, Ch. 10.

1. Except this limited waiver of sovereign immunity.

2. Verdicts higher than you might think.

$44.7 Million – Dickerson v. United States, (SA-99-CA-1-H6) W.D. Tex. San Antonio Div. (2000)
$32.6 Million- Lebron v. United Services, (A-99-CA-316-JN) W.D. Tex. Austin Div. (2000)
$12.3 Million – Gess v. United States, 884 F.2d 1280 (9th Cir. 1989)

II. Scope of Liability

A. 28 U.S.C. § 1346(b) imposes liability for personal injury or wrongful death caused by "...the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

1. Exclusive Remedy - 28 U.S.C. § 2679(b)(1) as amended 1988; U.S. v. Smith, 499 U.S. 160, 111 S.Ct. 1180 (1991) exclusive even when FTLA exception precludes recovery- Gonzalez Act.

a. Gonzales Act, 10 U.S.C. § 1089- Makes FTCA the exclusive remedy for claims against government medical personnel- does not create a remedy were action is precluded by exceptions in FTCA.

Jones v. Newton, 775 F.2d 1316 (5th cir. 1985) Member of USAF brought medical negligence action against military doctor. §1089 makes FTCA exclusive remedy, however, plaintiff precluded from bring action under FTCA pursuant to Feres doctrine. "[T]he plaintiff has reached the end of the line."

b. Cato v. U.S., 70 F.3d 1103 (9th Cir. 1995); Hercules, Inc. v. U.S., No. 94-818, 64 L.W. 4117 (3-4-96).

2. For general discussion, see, "Government Tort Liability," 111 *Harv. L. Rev*. 2009 (1998); "The Liability of the United States Government under the Federal Tort Claims Act," *Denver University Law Review*, Vol. 66:4 (1989).

B. Employee must be acting within course and scope of federal office or employment. 28 U.S.C. § 1346(b).

1. "Employee of the government" is defined at 28 U.S.C. § 2671 and 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 § 115, 316, 502, 503, 504 or 505 of Title 32," and, "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." See, Mendrala v. Crown Mortgage Co., 955 F.2d 1132 (7th Cir. 1992)(concluding that FHLMC is not a federal agency where it is structured to function independently of the federal government and receives no appropriations from congress); Meyer v. Fidelity Savings, 944 F.2d 562 (9th Cir. 1991)(federal agencies are immune from Bivens actions alleging a violation of constitutional rights.)

a. Independent contractors not "employees" unless government had authority to control "detailed physical performance of contractor and exercised substantial supervision over contractor's day to day activities." Vallier v. Jet Propulsion Laboratory, 120 F. Supp. 887 (C.D. Calif. 2000); Harper v. Lockheed Martin Energy Systems, Inc., 73 F. Supp. 2d 917 (E.D. Tenn. 1999); Laurence v. Department of Navy, 59 F.3d 112 (9th Cir. 1995); Tisdale v. U.S., 62 F.3d 1367 (11th Cir. 1995), hurt on HUD managed property; Hines v. U.S., 60 F.3d 1442 (9th Cir. 1995), independent bulk mail handlers.

b. CHAMPUS Partnership and Independent Contract Physicians

(1) Leone v. U.S., 910 F.2d 46 (2d Cir. 1991), cert denied, 111 S.Ct. 1103 (Aviation Medical Examiners (AME) are not government employees) Richie v. U.S., 732 F.Supp. 1125 (W.D. Okla. 1990).

(2) Ezekiel v. Michel, 66 F.3d 894 (7th Cir. 1995), resident at VA hospital, which did not pay him, held to be federal employee; Starnes v. U.S., 139 F.3d 540 (5th Cir. 1998), (USAF resident was "borrowed servant" at private hospital).

(3) Linkous v. United States, 142 F.3d 271 (5th Cir. 1998) (Physician providing serves for CHAMPUS was an independent contractor.)

2. "Federal employee" status is a question of federal law. Loque v. U.S., 412 U.S. 521, 528 (1973); Quilco v. Kaplan, 749 F.2d 480, 483 (7th Cir. 1984).

3. Individual employees are immune if in scope of employment. Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2672 and § 2679(b)(1); U.S. v. Smith, 499 U.S. 160, 111 S. Ct. 1180 (1991).

a. Attorney General's certification that employee acting in the scope is not conclusive, but is subject to judicial review. Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 115 S.Ct. 2227, 132 L. Ed.2d 375 (1995).

b. Burden of proof on plaintiff, Williams v. U.S., 71 F.3d 502 (5th Cir. 1995).

c. Split on remand to state court, [Coleman v. United States, 91 F.3d 820 (6th Cir. 1996); Nascuti v. Scannell, 906 F.2d 802 (1st Cir. 1990)] or retain in district court [Garcia v. United States, 88 F.3d 318 (5th Cir. 1996); Jamison v. Wiley, 14 F.3d 222 (4th Cir. 1994); Aliota v. Graham, 984 F.2d 1350 (3d Cir. 1993), cert denied] .

d. District court must hold evidentiary hearing before refusing to substitute U.S. Singelton v. United States, 2002 U.S. App. LEXIS 842 (6th Cir. 2002); Heutron v. Anderson, 75 F.3d 357 (8th Cir. 1995).

C. State Substantive Law Applies

1. Injury must be caused by negligence of government employee. Actions against government based upon strict or absolute tort liability are not contemplated by the statute. Laird v. Nelms, 406 U.S. 797 (1972); Chancellor v. United States, 1 F.3d 438 (6th Cir. 1993); Roditis v. United States, 122 F.3d 108 (2d Cir. 1997).

2. U.S. may be held liable under circumstances where a private person would be held liable in accordance with the law of the place where the tort occurred. 28 U.S.C. § 1346(b).

a. The applicable law is the whole law, including choice of law rules, of the place were the negligent act occurred, not where it had its operative effect. Richards v. United States, 369 U.S. 1 (1962).

b. All types of torts, e.g., auto accidents, medical malpractice, legal malpractice, wrongful death, negligent infliction of emotional distress, toxic torts, damage to property, false arrest, dram shop, social host liquor liability, injury or death to fetus, slip and fall.

(1) e.g., Schwander v. U.S., 974 F.2d 1118 (9th Cir. 1992), upholding right of children under California law to bring wrongful death claims after pre-death settlement with parents.

(2) Appley v. U.S., 164 F.3d 1164 (8th Cir. 1999), (duty pursuant to state law "Good Samaritan" doctrine, Restatement (2d) of Torts § 324A); Gould v. U.S., 160 F.3d 1194 (8th Cir. 1998), (Army Corps of Engineers appreciated risks in sledding accident, thus, "open and obvious" rule under Missouri law did not preclude recovery).

(3) Central Airlines v. U.S., 1999 U.S. App. LEXIS 4338 (8th Cir.), (claim for negligent enforcement of regulations by FAA not recognized under state law).

a. Even if federal government would be immune under state law, Kee v. U.S. 1999 U.S. App. LEXIS 1382 (9th Cir.), (release of third party motorist tortfeasor does not bar claim).

b. Plaintiff can sue U.S. for activity not commonly undertaken by a private individual so long as neutral principles of tort would impose liability upon a private person undertaking the same activity. Raymer v. United States, 660 F.2d 1136 (6th Cir. 1981); Indian Towing Company v. U.S., 350 U.S. 61 (1955). But see Moody v. U.S., 774 F.2d 150 (6th Cir. 1985), cert denied, 107 S.Ct. 65 (1986) (agency regulations held not to create an undertaking where focus was to protect agency interests and regulations disclaim an intention to assist others).

3. Neither federal statutes nor the U.S. Constitution create a cause of action under the Federal Tort Claims Act. Jaffee v. U.S., 592 F.2d 712 (3rd Cir.), cert denied, 441 U.S. 961 (1979); Lombard v. U.S., 690 F.2d 215 (D.C. Cir., 1982), cert denied, 462 U.S. 1118 (1983).

4. Other Cases

a. Red Elk on Behalf of Red Elk v. U.S., 62 F.3d 1102 (8th Cir. 1995), rape by Indian Reservation Police Officer; Hines, supra.

b. Florida Auto Auction of Orlando, Inc. v. U.S., 74 F.3d 498 (4th Cir. 1996); Young v. U.S., 71 F.3d 1238 (6th Cir. 1995); Stratmeyer v. U.S., 67 F.3d 1340 (7th Cir. 1995); Russ v. U.S., 62 F.3d 201 (7th Cir. 1995); Keller v. U.S., 58 F.3d 1194 (7th Cir. 1995); Doggett v. U.S., 875 F.2d 684 (9th Cir. 1989); Borgren v. U.S., 716 F.Supp. 1378 (D. Kan. 1989)

III. Administrative Claim

A. Filing of Administrative Claim

1. 28 U.S.C. § 2675 requires filing with the agency or agencies employing the individual whose conduct is involved. 28 C.F.R. 14.2(b).

a. If a derivative claim is viable under state law, a separate, signed claim form must be submitted. Manko v. U.S., 830 F.2d 831 (8th Cir., 1987); Rucker v. U.S. Department of Labor, 798 F.2d 891 (6th Cir., 1986).

b. Wrongful death: Selvidge v. U.S., 1994 U.S. Dist. LEXIS 18919 (Dist. Kansas 1994) (The state wrongful death statute states that the heir that brings the action does so for the benefit, and on behalf of, all remaining qualified heirs. Notice requirements met were the SF-95 includes a signed statement of representation, the claimants are both listed as witnesses, and the damages are stated in a sum certain. The court held that "[t]he enactment of the FTCA was intended to accord injured parties an opportunity for recovery . . . and not intended to "Put up a barrier of technicalities to defeat their claim.") But see, Frantz v. U.S., 791 F. Supp. 445 (D.Del. 1992) (Del. Code defines wrongful death as a derivative claim and an action maintained for the benefit of specified individuals for damages sustained as a result of the decedent's death . The court held that the "standard claim for is simple, short . . . and repeatedly uses the singular form of the terms claim and Claimant. . . . [T]he standard claim form gives every indication that the claim form is tailored for a single claimant.); Muth v. U.S., 1 F. 3d 246 (4th Cir. 1993)(Were multiple claimants exist, each claimant must "individually satisfy the jurisdictional prerequisites of filing a proper claim, unless another is legally entitled to assert such a claim on their behalf.)

c. Exception where claim is asserted by third-party practice, counterclaim or cross-claim under Federal Rules of Civil Procedure where the action is pending in federal court. 28 U.S.C. § 2675(a); U.S. v. Green, 33 F. Supp. 203 (W.D. N.Yl. 1998); (this administrative claim exception applies only to counterclaims which are compulsory); Federal Trade Commission v. Commonwealth Marketing Group, Inc., 72 F. Supp. 530 (W.D. Pa. 1999); Spawr v. U.S., 796 F.2d 279 (9th Cir. 1986); West v. U.S., 592 F.2d 487 (8th Cir. 1979).

b. Must give "sufficient information" or dismissal. Burchfield v. U.S., 1999 U.S. App. LEXIS 3190 (11th Cir.), (every theory of liability need not be identified); Romulus v. U.S., 160 F.3d 131 (2d Cir. 1998) (SF 95 must identify enough to permit government to investigate); Orlando Helicopter Airways v. U.S., 75 F.3d 622 (11th Cir. 1996).

B. Federal Regulations

1. The Attorney General is responsible for handling all claims. Basic Regulations at 28 C.F.R. 14.1 – 14.4.

a. 28 C.F.R. 14.4 details certain information to be submitted for wrongful death claims and certain other claims.

2. Each federal agency is permitted and has promulgated its own regulations, see, e.g., DOD, 32 C.F.R. Part 536; VA 38 C.F.R. Part 14; Army Regulation 27-20; VA District Council Manual, Chapter 18; Navy, Manual of the Judge Advocate General, 32 C.F.R. §§ 750.30 -750.40. Navarro v. U.S., 586 F. Supp. 799 (1984).

C. Monetary Demand on SF 95

1. 28 C.F.R. 14.2(a) requires a sum certain amount of damages [clearly stated in writing, see Zuber v. U.S., 2000 U.S. App. LEXIS 22653 (6th Cir. 2000); Bradley v. U.S., 951 F.2d 268 (10th Cir. 1991)] sought and enough information to provide a basis for agency investigation. Cook v. U.S., 578 F.2d 164 (5th Cir. 1992); Wardsworth v. U.S., 721 F.2d 503 (5th Cir. 1983), cert denied, 469 U.S. 818 (1984); Adams v. U.S., 615 F.2d 284 (5th Cir.), clarified, 622 F.2d 197 (1980); Tidd v. U.S., 786 F.2d 1565 (11th Cir. 1986).

2. A valid claim may be amended anytime prior to final agency action. Maxson v. U.S. Postal Service, 586 F. Supp. 80 (W.D. Mich. 1984); Provencial v. U.S., 454 F.2d 72 (8th Cir. 1972); 28 C.F.R. 14.2(c).

3. Ad damum in subsequent complaint may not exceed the amount requested in the administrative claim except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time the claim was presented, or intervening facts must have occurred. 28 U.S.C. § 2675(b); Sullivan v. U.S., 173 F. Supp.2d 691 (E.D. Mich. 2001); Lowry v. U.S., 958 F. Supp. 704 (Dist. Mich. 1997); Low v. U.S., 795 F. 2d 466 (5th Cir. 1986);); Spivey v. U.S., 912 F.2d 80 (4th Cir. 1990; O'Rourke v. Eastern Airlines, 730 F.2d 842 (2d Cir. 1984); Kielwein v. U.S., 540 F.2d 676 (4th Cir.), cert denied, 429 U.S. 979 (1976). Del Valle Rivera v. U.S., 626 F.Supp. 347 (D.R.R. 1986)

D. Discovery Before Litigation

1. Freedom of Information Act, 5 U.S.C. § 552

2. Privacy Act, 5 U.S.C. § 552(a)

3. Subpoena by U.S., 5 U.S.C. § 304

4. Quality Assurance Records Not Discoverable, 38 U.S.C. § 5705; 10 U.S.C. § 1102; confidentiality of medical quality assurance records.

E. Claimant must receive a denial of administrative claim or wait for six months after filing claim before bringing suit. 28 U.S.C. § 2679(d). Must file within six months of denial. Anderson v. U.S. 803 F.2d 1520 (9th Cir. 1986).

1. There is an unresolved conflict between the circuits on how to calculate the last day of the six month period. Compare Vernell v. U.S. Postal Service, 819 F.2d 108 (5th Cir. 1987)(The limitations period runs from the day after the denial of the administrative claim is mailed through the day before the same calendar date six months later.) with Tribue v. U.S., 826 F.2d 633 (7th Cir. 1987) (applied the same computation used in Vernell, however discussed the issues raised when the denial of the administrative claim is mailed on the last day of the month. The court found that the period is 6 calendar months and therefore some claimants will have fewer days to filed their claims than others.) Cf: Maahs v. U.S., 840 F.2d 863 (11th Cir. 1988).

2. McCallister v. U.S., 925 F.2d 841 (5th Cir. 1991)(there is no time limit for filing of an FTCA action when an administrative claim is deemed denied by virtue of the agency's failure to finally dispose of the calm within six months. See also, Stancomb v. U.S., 121 F. Supp. 1019 (E.D. Tex., 2000).

2. Motion for reconsideration can extend. Gonzales v. U.S., 1998 U.S. App. LEXIS 1343 (10th Cir.), (must prove government timely received motion).

IV. Litigation

A. Pleadings Practice

1. Notice pleading, but adequate allegation of jurisdiction is advisable.

2. Venue (where plaintiff resides or where cause of action arose). 28 U.S.C. § 1402(b). Gould Electronics, Inc. v. U.S., 220 F.3d 169 (3rd Cir. 2000) (State where the "acts or omissions" occurred, not where the injury occurred.)

3. Allege exhaustion of administrative remedies and denial. 28 U.S.C. § 2675. Williams v. U.S., 866 F. Supp. 1320 (Dist. Kansas 1994).

4. No jury. 28 U.S.C. § 2402.

5. Pendent parties permitted. Now "supplemental jurisdiction," which is not retroactive [Yanez v. U.S., 1993 U.S. App. LEXIS 6173 (9th Cir. 3/29/93)]. Judicial Improvements Act of 1990, § 310 (28 U.S.C. § 1367) effectively overrules Finley v. U.S., 490 U.S. 545, 109 S.Ct. 2003, 104 L. Ed. 593 (1989).

B. Typical Defenses

1. "Jurisdictional"

a. Must sue "United States."

(1) FRCP 15(c) misnomer will not work. Digman v. U.S., 1993 U.S. App. LEXIS 4716 (9th Cir. 3/5/93) (allows amendments to relate back to the date of the original complaint **only** where the U.S. Attorney or Attorney General has notice of the suit **before** the Statute of limitations has run.); Greene v. David Grant U.S. Air Force Medical Center (9th Cir. 4/23/91, unpublished), cert denied, 112 S.Ct. 869.

b. Statute of Limitations

(1) Must file administrative claim within two years. 28 U.S.C. § 2401(b), or remedy coverts to legal malpractice suit. Ward v. U.S., 2001 U.S. App. LEXIS 458 (7th Cir. 2001); Stewart v. U.S. Postal Service, 655 F.2d 741 (7th Cir. 1981).

(a) Recent cases include McGraw v. U.S., 2002 U.S. App. LEXIS 2867 (9th Cir. 2002) (In a medical malpractice failure to diagnose or treat a preexisting condition the cause of action accrues when the

patient "becomes aware, or through the exercise of reasonable diligence should have become aware of the development of a preexisting condition into a more serious condition."); Brown v. U.S., 2002 U.S. App. LEXIS 329 (4th Cir. 2002)(medical malpractice claim accrues when the plaintiff knew or should have known of the injury and its cause.); Herrington v. U.S., 2001 U.S. App. LEXIS 26551 (9th Cir. 2001) (where claimant alleges that the government has engaged in fraudulent concealment the claimant "must plead with particularity the circumstance surrounding the concealment and state facts showing due diligence in trying to uncover facts"); Edwards v. U.S., 1999 U.S. App. LEXIS 2688 (4th Cir.), (due diligence test in medical malpractice case, patient knew of "critical injury"); Flory v. U.S., 138 F.3d 157 (5th Cir. 1998), (requires denial by certified mail; if not, actual notice does not satisfy the statute); Green v. U.S., 1998 U.S. App. LEXIS 31014 (9th Cir.), (accrual is "due diligence" test; date of death controls in air crash); Wartell v. U.S., 1997 U.S. App. LEXIS 26544 (9th Cir.), (mental competency only a factor under "due diligence" test in determining accrual).

(b) Disagreement on whether two years extended if expires over a weekend. Miller v. U.S., 1993 U.S. App. LEXIS 4993 (6th Cir. 3/9/93), holding weekends included; McDuffee v. U.S., 769 F.2d 492 (8th Cir. 1985), weekends excluded.

(c) Barred unless both presented to the agency within two years of accrual of the action and filed in court within six months of denial or no action by the agency. Dyniewicz v. U.S., 742 F.2d 484, 485 (9th Cir., 1984); Schuler v. U.S., 628 F.2d 199, 201 (D.C. Cir., 1980).

(d) 28 C.F.R. 14(b)(4) re: multiple agency cases separate denials.

(2) Accrual of action is generally time when the injury occurred.

(a) Accrual when plaintiff aware of injury; two years to file even though plaintiff did not know tortfeasor was a federal employee. Gould v. U.S., 905 F.2d 738

(4th Cir. 6/8/90, unpublished), cert denied, 111 S.Ct. 673.

(b) In medical malpractice actions, accrual may be deferred until plaintiff is aware or should be aware of existence of the injury and its cause. Accrual is not delayed pending plaintiff's discovery that the injury was negligently induced. Diaz v. U.S., 165 F.3d 1337 (11th Cir.), (due diligence rule applied in wrongful death of prisoner, who had received allegedly substandard medical care); Santiago v. Lykes Bros. Steamship Co., 1993 U.S. App. LEXIS 4806 (11th Cir. 3/17/93);Price v. U.S., 775 F.2d 1491 (11th Cir. 1985); U.S. v. Kubrick, 444 U.S. 111 (1979).

i) Statute of limitations is two years, Tirey v. U.S., 1993 U.S. App. LEXIS 4125 (9th Cir. 2/22/93); Mossow v. U.S., 1993 U.S. App. LEXIS 4556 (8th Cir. 3/15/93), discovery rule applied to legal malpractice case.

(c) Continuous treatment doctrine. Accrual may be delayed when a course of continuous treatment is provided for the same injury or illness over a period of time, until the treatment is completed. See, Deter v. U.S., 1997 U.S. Dist. LEXIS 15842 (NDNY 1997); Espinoza v. U.S., 1996 U.S. App. LEXIS 11205 (10 th Cir. 1996); Ulrich v. U.S., 853 F.2d 1078 (2d Cir. 1988); Otto v. N.I.H., 815 F.2d 985 (4th Cir. 1987); Wehrman v. U.S., 830 F.2d 1480 (8th Cir. 1987); Reilly v. U.S., 513 F.2d 147 (8th Cir. 1975); Kossick v. U.S., 330 F.2d 933 (2d Cir. 1964).

(d) Infancy or incompetency. Generally will not toll, however, where the government causes the incompetency, one court held that in the case of an emancipated adult, accrual would not occur until a guardian was appointed so as to preclude the government from profiting from its own wrongdoing. See, Clifford by Clifford v. U.S., 738 F.2d 977 (8th Cir. 1984); Explained in, Barnhart v. U.S., 884 F.2d 295(7th Cir. 1989) But see Barren v. U.S., 839 F.2d 987 (3rd Cir. 1988) where a court refused to delay accrual despite conduct by a VA physician which

directly affected plaintiff's ability to understand that he had been injured.

(e) Assurances by treating physician. Plaintiffs have avoided the statute of limitations bar by claiming that their doctor's assurances that the injury was temporary or a normal side effect prevented them from discovering their cause of action. See, Burgess v. U.S., 744 F.2d 771 (11th Cir., 1984); Rosales v. U.S., 824 F.2d 799 (9th Cir., 1987); Chamness v. U.S., 835 F.2d 1350 (11th Cir., 1988); McDOnald v. U.S., 843 F.2d 247 (6th Cir. 1988)("blameless ignorance").

(f) Fraudulent concealment: Lawrence v. Int'l Bhd. Of Teamsters, 2001 U.S. Dist. LEXIS 3113 (2001) (Fraudulent concealment or misrepresentation of critical facts that would lead one to know that he can sue.) Diminnic v. U.S., 728 F.2d 301 (6th Cir. 1984).

(g) Undetermined damages: Bridgford v. U.S., 950 F.2d 978 (4th Cir. 1972); Disapproved by, U.S. v. Kubrick, 444 U.S. 111 (1979).

(h) No administrative claim file: Davis v. Marsh, 876 F.2d 1446 (9th Cir. 1989) (No recovery under FTCA when claim not presented to appropriate federal agent with in 2 years.)

(3) "Equitable tolling" applies to suits against the government. Perez v. U.S., 1999 U.S. App. LEXIS 2103 (5th Cir.), citing United States v. Brockamp, 519 U.S. 347, 136 L.Ed.2d 818, 117 S. Ct. 849 (1997) and Irvin v. Veterans Administration, 111 S. Ct. 453 (1990); Schmidt v. U.S., 933 F.2d 639 (8th Cir. 1991); Glarner v. U.S., 30 F.3d 694 (6th Cir. 1994).

(a) Schmidt v. U.S., 933 F.2d 639 (8th Cir. 1991), applying Irwin, held statute of limitations is not jurisdictional, just affirmative defense.

(b) Revising Equitable Tolling and The FTCA: Putting the Legislative History in Proper Perspective, 31 Seton Hall L. Rev. 174 (2000).

c. Feres Doctrine

(1) Suits by military officers arising out of actions incident to service are barred. Feres v. U.S., 340 U.S. 135 (1950); U.S. v. Johnson, 107 S. Ct. 2063 (1987); U.S. v. Stanley, 107 S.Ct. 3054 (1984). Indirect or third-party claims are similarly barred. Stencil Aero Engineering Corp. v. U.S., 431 U.S. 666 (1977).

(2) Feres challenged:

(a) Taber v. Maine, 67 F.3d 1029 (2d Cir. 1995) supersedes 45 F.3d 588; Judge Calabresi's excellent analysis of why respondeat superior holds the U.S. vicariously liable for and why Feres should not bar a claim for injuries to one serviceman on liberty caused by another drunk serviceman on liberty, whose cars crashed on a public road off base.

(b) Elliott v. U.S., 13 F.3d 1555 (11th Cir. 1994), rehearing en banc granted, 28 F.3d 1076, held at 37 F.3d 617 that "The judges of the en banc court are equally divided on the proper disposition of this case," ruling that Feres did not bar claim of active duty serviceman (on "ordinary leave") overcome by carbon monoxide gas from faulty venting system in Fort Benning apartment, suffered serious, permanent and debilitating injuries. Case settled. See also, Hall v. U.S., 130 F. Supp. 2d 825 (S.D. Miss. 2000) (Defendants motion for summary judgment denied where active duty man dies of carbon monoxide poisoning while asleep in his on-base house while off- duty.)

(c) Bradley v. U.S., 161 F.3d 777 (4th Cir. 1998) (patient on TDRL status, so not "incident to service).

(3) With respect to certain medical malpractice claims, see Atkinson v. U.S., 804 F.2d 561 (9th Cir. 1986), modified, 813 F.2d 1006 (9th Cir. 1987), holding that medical malpractice claims are not necessarily barred even when the malpractice occurs incident to service. Atkinson, 825 F.2d 202 (9th Cir. 1987), cert denied, 108 S. Ct. 1288 (1988) Romero v. U.S., 954 F. 2d 223 (1992)(Feres doctrine not applicable where medical treatment was rendered to ensure health of a civilian (fetus), consequential damages to parents allowed.)

(4) Recent cases include: Galligan v. City of Philadelphia, 156 F. Supp. 2d 437(2001)(Cadet's injuries sustained at Army-Navy football game dismissed-game incident to military service.); Cummings v. Dept. of Navy,116 F. Supp.2d 76 (D.C. 2000); Backman v. U.S., 1998 U.S. App. LEXIS 16911 (10th Cir.), (Lt. in Public Health Service ("PHS") sought care for congenital condition at Shiprock Indian Hospital, claim barred); Corey v. U.S., 1997 U.S. App. LEXIS 22258 (10th Cir.), (claims for sexual harassment by active duty airman at detachment's recreational party barred); George v. U.S., 1997 U.S. App. LEXIS 15062 (9th Cir.), (close to retiring active duty member on permissive temporary duty, barred); Jackson v. U.S., 110 F.3d 1484 (9th Cir.), (reservist on weekend drill alleged failure to refer to surgery by hospital at Camp Pendleton, barred); Jimenez v. U.S., 158 F.3d 1228 (11th Cir. 1998) (seaman in jail, admitted to hospital on "appellate leave" for hip fusion, barred); Jones v. U.S., 112 F.3d 299 (7th Cir. 1997) (active duty sergeant assigned to base so he could participate in U.S. Military Olympics team, when surgery crippled him, barred); Selbe v. U.S., 130 F.3d 1265 (7th Cir. 1997) (reservist on active duty had care at military hospital subsequent to her original injury treatment at civilian hospital, barred); (Schoemer v. U.S., 59 F.3d 26 (5th Cir. 1995), cert denied, No. 95-528 (11-27-95), 64 L.W. 3378, barring medical malpractice claim in pre-induction physical to National Guardsman; Hayes v. U.S., 45 F.3d 2145 (5th Cir. 1995), where Feres barred wrongful death claim of a serviceman who died due to medical negligence during a purely elective hernia repair surgery by Army doctor, cert denied, No. 94-1957, 10-2-95, 64 L.W. 3240; Johnson v. U.S., 810 F. Supp. 7 (D.D.C. 1993), on HIV blood contamination case; Lewis v. U.S. (CA 4, 9/11/92), 61 USLW 3524, cert denied 2/22/93, USS Iowa explosion; Gremlich v. U.S. (3d Cir. 6/6/91, unpublished), 60 U.S.L.W. 3565, cert denied, 1992 U.S. LEXIS 989; Estate of McAllister v. U.S. (9th Cir. 1992), 942 F.2d 1473, cert denied, 117 L. Ed.2d 411 (1992); Kitowski v. U.S., 931 F.2d 1526 (11th Cir. 1991), cert denied, 112 S. Ct. 371 (1991); McGowen v. Scoggins, 890 F.2d 128 (9th Cir. 1989); Sanchez v. U.S., 878 F.2d 633 (2d Cir. 1989); Kendrick v. U.S., 877 F.2d 1201 (4th Cir. 1989); Appelhans v. U.S., 877 F.2d 309 (4th Cir. 1989); Smith v. U.S., 877 F.2d 40 (11th Cir. 1989); Seals v. U.S., 714 F.Supp. 1194 (S.D. Fla. 1989); see also, Case Note, The John Marshall Law Review, Vol. 22:199.

(a) See, Lutz v. Secretary of Air Force, 944 F.2d 1427 (9th Cir. 1991), a Bivens claim which discusses Feres at length.

(5) Proposed legislation to ameliorate Feres has been frequent in past years, but not successful. Example, in 1992 H.R. 3407 [Rep. Barney Frank (D. Mass.)] was approved by the House Judiciary Committee which would have allowed active duty members of armed forces to sue over medical malpractice at military facilities.

Recently, Judge Cox, chair of a commission sponsored by the National Institute of Military Justice, stated that "the commission believes that a study of the [Feres] doctrine is warranted. An examination of the claims that have been barred . . . and a comparison of service members; right to other citizens, could reform this military doctrine in light of present day realities and modern tort practice." Masciola, The Feres Doctrine Revisited? Vol. 7 No. 1 Federal Torts Liability and Military Advocacy Section, Winter 2002.

d. Statutory Exceptions: 28 U.S.C. § 2680; Kosak v. U.S., 465 U.S. 848 (1984).

(1) Discretionary Function 28 U.S.C. § 2680(a)

(a) Discretionary function exception precludes suit "based upon an act or omission of an employee of the government exercising due care in the execution of the statute or regulation" or "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty."

(b) Designed to prevent judicial second guessing of actions and decisions based on considerations of public policy. U.S. v. Gaubert, 499 U.S. 315, 11 S.Ct. 1267 (1991).

(c) The exception also applied despite allegations of abuse of discretion. Dalehite v. U.S., 346 U.S. 15 (1953), where court focused on policy; U.S. v. Varig Airlines, 467 U.S. 797 (1974); where court focused on "nature of conduct."

(d) Supreme Court in Gaubert explained Berkovitz v. U.S., 108 S. Ct. 1959 (1988) which created a two-prong test: 1) whether the challenged conduct involved an element of judgment or choice and 2) whether the discretion involved was the kind the discretionary function exception was designed to shield.

i) Burden of proof on the U.S. government Autery v. U.S., 992 F.2d 1523 (11th Cir. 1993), see n.6; Prescott v. U.S., 973 F.2d 696 (9th Cir. 1992).

(e) Discretionary acts may include decisions at the operational or management level. U.S. v. Gaubert, 111 S.Ct. 1267 (1991).

(f) Barring Recovery: Kilby v. U.S., 2002 U.S. App. LEXIS 1042 (3d Cir. 2002) (Injured logger brought action against Forest Services alleging negligent failure to warn of high concentration of dead trees in his contract areas.); Garcia v. U.S., 2001 U.S. App. LEXIS 21391 (9th Cir. 2001) (Postal inspector's failure to investigate threat to kill Plaintiff was within the "breadth of investigator's discretion."); Orthopedic Bone Screws Prod. Liab. Litig., 264 F. 3d 344 (2001) Class action against FDA for negligently granting clearance for the marketing of certain bone screws-discretionary function exception protects the FDA's actions.); Irving v. U.S., 162 F.3d 154 (1st Cir. 1998), (majority reluctantly held claims involving OSHA inspection; see well reasoned dissent by Judge Bownes); Fullmer v. U.S., 1999 U.S. App. LEXIS 986 (10th Cir.), (medical claim that staffing inadequate at clinic); Boyle v. United Technologies Corporation, 487 U.S. 500, 108 S. Ct. 2510, 2517 (1988), bar to suit against the military for negligent design of a helicopter escape hatch; Baum v. U.S., 1993 U.S. App. LEXIS 2983 (4th Cir. 2/23/92), barred park service guardrail case; Zumwalt v. U.S., 928 F.2d 951 (10th Cir. 1991), where hiker slipped in national park; Johnson v. U.S., 949 F.2d 332 (10th Cir. 1991), where national park service was not liable for lack of formal mountain climbing regulations; many cases cited in Tomassetti v. U.S., 853 F.2d 927 (6th Cir. 1988)

LEXIS 10809; Moore v. Valder, 65 F.3d 189 (D.C. Cir. 1995), malicious prosecution; Baldassarous v. U.S., 64 F.3d 206 (5th Cir. 1995); Crumpton v. Stone, 59 F.3d 1400 (D.C. Cir. 1995), public release of information of deceased Army member; Domme v. U.S., 61 F.3d 787 (10th Cir. 1995); Roth Rock v. U.S., 62 F.3d 196 (7th Cir. 1995); Julia Saaverda Balmaceda, Inc. v. U.S., No. 94-1722, cert denied 10-2-95, cited below at 46 F.3d 279.

(g) Recovery Not Barred: Alfrey v. United States, 276 F.3d 557 (9th Cir. 2002) (Inmate killed in Federal Prison- negligent performance of a mandatory duty is not exempt under the discretionary function exception.); Marlys v. U.S., 241 F. 3d 1208 (9th Cir. 2001)(Where logging contract required \operator to comply with prescribed safety practices of federal law the failure to was not a policy judgment congress intended to protect by the discretionary function exception.); Appley v. U.S., 164 F.3d 1164 (8th Cir. 1999) (violation of specific duty to inspect grain by DOA); Fang v. U.S., 140 F.3d 1238 (9th Cir. 1998) (medical claim against park service regarding emergency care); In re Glacier Bay, 71 F.3d 1447 (9th Cir. 1995), look to each act to determine if charting of bay subject to discretion; Johnson v. Sawyer, 980 F.2d 1490 (5th Cir. 1992), unauthorized release of information by IRS not barred since tort in Texas; Routh v. U.S., 941 F.2d 853 (9th Cir. 1991), did not bar claim for failure to require falling object protection on backhoe used to clear trees; Andrulonis v. U.S., 952 F.2d 652 (2d Cir. 1991), originally decided at 924 F.2d 1210, cert granted and judgment remanded 112 S.Ct. 39 (post Gaubert), where U.S. held liable under New York law requiring scientist to warn about dangerous virus used in laboratory experiment; Tonelli v. U.S., 60 F.3d 492 (8th Cir. 1995), negligent hiring claim barred, but not negligent retention after notice of illegal acts.

(h) See also, Zillman, "Protecting Discretion: Judicial Interpretation of the Discretionary Function Exception to the FTCA," 47 *Me L. Rev.* 366 (1995); Fishback and Killefer, "The Discretionary Function Exception to the Federal Tort Claims Act: Dalehite to Varig to Berkovitz," *Idaho Law Review*, Vol. 25

(1988-89); Zillman, "Congress, Courts and Government Tort Liability: Reflections on the Discretionary Functioning Exception to the Federal Tort Claims Act," *Utah Law Review* 1989:687.

(2) Intentional Torts: 28 U.S.C. § 2680(h)

(a) Only torts expressly listed are excluded. Plead negligence. Examples, assault and battery, false arrest/imprisonment, malicious, libel/slander, intentional and negligent misrepresentation.

i) Specifically does not apply to negligence claims (negligent or wrongful act or omission in the provision of legal assistance) accruing after November 14, 1986 (regardless of when negligence occurred) pursuant to 10 U.S.C. § 1054(e). See also, Saraw Partnership v. U.S., 67 F.3d 567 (5th Cir. 1995) (misrepresentation exceptions), McAdams v. Reno, 64 F.3d 1137 (8th Cir. 1995) (defamation exception).

(b) Sheridan v. U.S., 487 U.S. 392, 108 S. Ct. 2449 (1988). Seminal case, but specifically did not rule out negligent supervision of employees who then commit intentional tort. Brock v. U.S., 64 F.3d 1421 (9th Cir. 1995), allowing negligent supervision claim as in Hines, supra (failure to screen bulk mail handlers for fitness).

(c) Guthrie, Note, *Duquesne Law Review*, Vol. 27:829

(3) Foreign Country: 28 U.S.C. §2680(k)

(a) Nurse v. U.S., 226 F. 3d 996 (9th Cir. 2000)(exception applies even where tort occurs in a foreign area under U.S. control); Price v. U.S., 69 F.3d 46 (5th Cir. 1995), conversion of Hitler watercolors; Miller v. U.S., 73 F.3d 878 (9th Cir. 1995), "harsh" but not unconstitutional; Smith v. U.S., No. 91-1538, 61 USLW 4215 (1993); U.S. v. Smith, 111 S.Ct. 1180 (1991); U.S. v. Spelar, 338 U.S. 217 (1949); Heller v. U.S., 776 F.2d 92 (3rd Cir. 1985); Burma v. U.S., 240 F.2d 720 (4th Cir. 1957).

(b) Headquarters Negligence

i) In Re Paris Air Crash of March 3, 1974, 399 F.Supp. 732 (C.D. Calif. 1975)
ii) Eaglin v. U.S., 794 F.2d 981 (5th Cir. 1986)
iii) In Re Agent Orange Product Liability Litigation, 580 F.Supp. 1242 (E.D. N.Y. 1984), aff'd 767 F.2d 703 (2d Cir. 1984)
iv) Nurse v. U.S., 226 F. 3d 996 (9th Cir. 2000)
v) Alvarez-Machain v. U.S., 266 F. 3d 1045 (9th Cir, 2001).

(c) See, "Away from Justice and Fairness: The Foreign County Exception to the Federal Tort Claims Act," *Loyola of Los Angeles Law Review*, Vol. 22:603 (Jan. 1989)

(4) Combatant activities during time of war: 28 U.S.C. § 2680(j), barring victims killed when civilian plane mistaken for military. Koohi v. U.S., 976 F.2d 1328 (9th Cir. 1992).

(5) Other exceptions for cases arising in admiralty, under federal banking procedures, Tennessee Valley Authority, Panama Canal Company, customs tax collections, Postal Service errors.

(6) Exceptions are determined by federal law. Ramirez v. U.S., 567 F.2d 854 (9th Cir. 1977).

e. Recovery under Other Statutory Compensation May Bar or Create Offset

(1) e.g., Federal Employees Compensation Act, 5 U.S.C. §8128(b)(FTCA is the exclusive remedy), Lance v. U.S., 70 F3d 1093 (9th Cir. 1995); Longshoremen's and Harbor Workers Compensation Act, 33 U.S.C. § 905(a) Southwest Marine v. Gizoni, 502 U.S. 81 (1991) (LHWCA provides that "any amounts paid to an employee for the same injury, disability, or death pursuant to the Jones Act should be credited against any liability imposed by the LHWCA.); Federal Prison Industries Fund, 18 U.S.C. § 4126 See, Scott v. Reno, 902 F. Supp. 1190 (1995)(Exclusive remedy for injuries received but not for deliberate indifference to a federal prisoners serious medical needs- FTCA and Bivens claims); Public Vessels Act, 46 U.S.C. § 745; VA Benefits; NATO Status of Forces Agreement, 4 U.S.T. 1792.

f. Service under Federal Rule of Civil Procedure 4(d)(4) and (5)

g. Administrative Claim Description Encompass Complaint 28 U.S.C. § 2671ff

2. Recreational Use Statutes Create Immunity.

a. Wilson v. The Boy Scouts, et al., 1993 U.S. App. LEXIS 6165 (8th Cir. 3/29/93); Guttridge v. U.S., 927 F.2d 730 (2d Cir. 1991).

3. Other Defenses Where State Law Does Not Recognize Claim.

a. Wrongful Birth

(1) Campbell v. U.S., 962 F.2d 1579 (11th Cir. 1992), cert denied (2/22/93), since Georgia does not recognize such a claim, FTCA not available.

(2) See also, Phillips v. U.S., 575 F.Supp. 1309 (S. Car. 1983); Robak v. U.S., 658 F.2d 471 (7th Cir. 1981).

b. Lost Chance

(1) "Loss of chance" in medical malpractice case Delaney v. Cade, D.O., 1993 U.S. App. LEXIS 2511 (10th Cir., 2/18/93), also discusses claim against hospital under Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd, the "anti-patient dumping" act.

(2) Hicks v. U.S., 368 F.2d 626 (4th Cir. 1968)

C. Damages

1. District court's assessment of damages is reviewed under "clearly erroneous" rule; wide discretion. Dickerson v. U.S., 280 F.3d 470 (5th Cir. 2002); Reising v. U.S., 60 F.3d 1241 (7th Cir. 1995); Johnson v. Sawyer, 980 F.2d 1490, (5th Cir. 1992).

2. As allowed under state law, including future medical expenses and loss of enjoyment of life or other damages as allowed under the applicable state law. Molzof v. U.S., 502 U.S. 301, 112 S.Ct. 711 (1992), appeal after remand, 6 F.3d 461 (1993); Hull by Hull v. U.S., 971 F.2d 1499 (10th Cir. 1992), future damages are to be reduced to present value.

a. State "caps": Bryant v. U.S., 126 F. Supp.2d 1227 (Dist. Az. 2002) (Finding "that in this case the United States is most reasonably analogous to a private hospital whose own employees allegedly acted negligently. Because the NMMMA caps damages for medical malpractice claims brought against hospitals, the United States' liability in this case is limited to $600,000, except for recovery of medical care and related benefits, which are not capped"); Owen v. U.S., 935 F.2d 734 (5th Cir. 1991), cert denied, 112 S. Ct.870; Sterns v. U.S., 923 F.2d 34 (4th Cir. 1991), cert denied, 112 S.Ct. 54 (1991); Taylor v. U.S., 821 F.2d 1428 (9th Cir. 1987); Shaw v. U.S., 741 F.2d 1202 (9th Cir. 1984); Lucas v. U.S., 7 S.W.2d 687 (Tex. 1988).

c. Maximum recovery rule: Dickerson v. U.S., 280 F.3d 470 (5th Cir. 2002); Lebron v. U.S. 279 F.3d 321(5th Cir. 2002) Applies when an awards is greater that 133% of the highest previous recovery in the states and is applicable only to noneconomic damages. The court examines other awards in factually similar cases in the same state. Review remains under the "clearly erroneous standard".

d. Collateral Source Rule: A personal injury claimant's award is not reduced by the amount of compensation received from other sources. Molzof v. U.S., 6 F.3d 461 (7th Cir. 1993)

   i. Kirkland v. U.S.. 1998 U.S. Dist. LEXIS 19871 (N.D. Ill. 1998) In FTCA claims the source is collateral if the program's funding comes from "a specially funded source distinct from the unsegregated general revenues of the Federal Treasury."

e. Non-Collateral Payments

   (1) Social Security: U.S. v. Hayashi, 282 F.2d 599 (9th Cir. 1960); Smith v. U.S., 587 F.2d 1013 (3d Cir. 1978), but see Steckler v. U.S., 549 F.2d 1372 (10th Cir. 1977).

   (2) Medicare: e.g., Manko v. U.S., 830 F.2d 831 (8th Cir. 1987); Berg v. U.S., 806 F.2d 988 (10th Cir. 1986).

   (3) CHAMPUS, Mays v. U.S., 806 F.2d 976 (10th Cir. 1986)

   (4) Medical Care: Feeley v. U.S., 337 F.2d 924 (3rd Cir. 1969)

3. No punitive (traditional "common law" principles), and no prejudgment interest. 28 U.S.C. § 2674; Molzof v. U.S., 112 S.Ct. 711 (1992); Palmer v. U.S., 146 F.3d 361 (6th Cir. 1998).

4. Post judgment interest: 31 U.S.C. § 1304; not available against an agency (e.g., Veterans Administration) which cannot "sue and be sued." Wilson v. U.S., 756 F.Supp. 213 (1991, D.C. N.J.)

   a. Only when the judgment becomes final after review on appeal by the government and then only from the date of filing of the transcript of the judgment with the Comptroller General. See, Reminga v. U.S., 695 F.2d 1000 cert denied, 103 S.Ct. 1778 (1982) (interest statute held not unconstitutionally vague or confusing); Thompson v. Kennickell, 254 U.S. App. D.C. 348 (Dist. Colum. 1986) Moyer v. U.S., 612 F. Supp. 239 (D.C. Nev., 1985) (constitutes waiver of sovereign immunity and must be strictly construed in manner favorable to government; where plaintiffs fail to file transcript of judgment with Comptroller General but instead sent letter to Assistant U.S. Attorney, failure to satisfy express statutory requirement barred post-judgment interest); Lucas v. U.S., 807 F.2d 414 (5th Cir. 1986) (interest statute applicable to malpractice suit); U.S. v. Thayer-West Hotel Co., 329 U.S. 585 (1947); Saunders v. Clayton, 629 F.2d 596 (9th Cir. 1980).

   b. Plaintiff's duty to provide certified transcript to General Accounting Office. Delucca v. U.S., 670 F.2d 843, 846 (9th Cir. 1982). See also, Volkema, "The "Hook" in a Federal Tort Claims Action: How to Lose Most of Your Fee and Part of Your Client's Award," *Ohio Bar Association Report*, Vol. 58, No. 33, (9/2/85)

5. Kamerschen, "Damage Calibrations Under the Federal Tort Claims Act," *Georgia State Bar Journal*, Vol. 25/No. 2/Nov. 1988

V. Settlement/Negotiation

A. Authority delegated by Attorney General:

Associate/Reporting Attorney General	Unlimited	28 C.F.R. 0.161
Assistant Attorney General, Civil Division *	$2 million	28 C.F.R. 0.172(b) & 0.160
United States Attorney **	$1 million	28 C.F.R. 0.168(d)(2)

* Proposed settlement does not exceed 2 million, and may accept offers in compromise where difference in original claim amount and proposed settlement does not exceed the greater thereof $2 million or 15% or original claim

** Proposed settlement does not exceed 1 million, and may accept offers in compromise where the gross amount of the original claim does not exceed $5 million and the difference between the original claim amount and the settlement amount is not greater than 1,000,000.

B. Structured Settlements

1. U.S. Government's concern re: loss of tax revenue

2. Reversionary interest on behalf of U.S. Government; Deasy v. U.S., 99 F.3d 354 (10th Cir. 1996); Hill v. U.S., 81 F.3d 118 (10th Cir. 1996); Hull v. U.S., 971 F.2d 1499 (10th Cir. 1992).

3. Anti Deficiency Act 31 U.S.C. 1341(a)

4. Massie v. U.S., 166 F.3d 1184 (Fed. Cir. 1999), (where insurer, which then went into conservatorship, could only pay 52-59% of obligation, government required to pay balance under FTCA).

C. Final settlement/judgment, DOJ must submit to General Accounting Office for payment. Checks normally take six to eight weeks.

VI. Attorney Fees

A. Controlled by statute: 28 U.S.C. § 2678

1. 20% pre-suit

a. Paid as part of one check to claimant and attorney by GAO (usually within four to six weeks).

2. 25% post-suit

a. Paid by separate check.

b. Anderson v. U.S., 127 F.3d 1190 (9th Cir. 1997) (no "prevailing party" fees under state law, only contingent fee allowed).

B. If structured settlement (periodic payments), fee based on cost/present value. Wyatt v. U.S., 783 F.2d 45 (6th Cir. 1986).

C. Federal Rule of Civil Procedure 11; Equal Access to Justice Act, 28 U.S.C. § 2412(b), under which torts are excluded; for discussion, see, Ellis v. U.S., 711 U.S. F.2d 1571 (Fed. Cir. 1983) and Sanchez v. Rowe, 870 F.2d 291 (5th Cir. 1989).

D. Can you argue that a private contract greater than the statutorily imposed fee can be enforced as in civil rights litigation under 42 U.S.C. §§ 1983, 1988? See, Venegas v. Mitchell, 110 S. Ct. 1679 (1990).

VII. Ethics Issues

A. Discovery misrepresentations by Assistant U.S. Attorney. Palmer v. U.S., 146 F.3d 361 (6th Cir. 1998).

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