

§ 536.77

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(b) Claims arising from private or domestic obligations rather than from government transactions.

(c) Claims based solely on compassionate grounds.

(d) A claim for any item, the acquisition, possession, or transportation of which was in violation of DA directives, such as illegal war trophies.

(e) Claims for rent, damage, or other payments involving the acquisition, use, possession or disposition of real property or interests therein by and for the Department of the Army (DA) or Department of Defense (DOD). See § 536.34(m) and paragraph 2–15m of DA Pam 27–162.

(f) Claims not in the best interests of the United States, contrary to public policy, or otherwise contrary to the basic intent of the governing statute (10 U.S.C. 2733); for example, claims for property damage or loss or personal injury or death of inhabitants of unfriendly foreign countries or individuals considered to be unfriendly to the United States. When a claim is considered not payable for the reasons stated in this section, it will be forwarded for appropriate action to the Commander USARCS, with the recommendations of the responsible claims office.

(g) Claims presented by a national, or a corporation controlled by a national, of a country at war or engaged in armed conflict with the United States, or any country allied with such enemy country unless the appropriate settlement authority determines that the claimant is, and at the time of the incident was, friendly to the United States. A prisoner of war or an interned enemy alien is not excluded from bringing an otherwise payable claim for damage, loss, or destruction of personal property in the custody of the government.

(h) A claim for damages or injury, which a receiving State should adjudicate and pay under an international agreement, unless a consistent and widespread alternative process of adjudicating and paying such claims has been established within the receiving State. See DA Pam 27–162, paragraph 3–4a, for further discussion of the conditions of waiver.

(i) Claims listed in §§ 536.42, 536.43, 536.44, 536.45, and 536.46 of this part, except for the exclusion listed in

§ 536.45(k). Additionally, the exclusions in § 536.45(a), (b), (e) and (k) do not apply to a claim arising incident to noncombat activities.

(j) Claims based on strict or absolute liability and similar theories.

(k) Claims payable under subparts D or J of this part, or under AR 27–20, chapter 11.

(l) Claims involving DA vehicles covered by insurance in accordance with requirements of a foreign country unless coverage is exceeded or the insurer is bankrupt. When an award is otherwise payable and an insurance settlement is not reasonably available, a field claims office should request permission from the Commander USARCS to pay the award, provided that an assignment of benefits is obtained.

§ 536.77 Applicable law for claims under the Military Claims Act.

(a) *General principles*—(1) *Tort claims excluding claims arising out of noncombat activities.* (i) In determining liability, such claims will be evaluated under general principles of law applicable to a private individual in the majority of American jurisdictions, except where the doctrine of contributory negligence applies. The MCA requires that contributory negligence be interpreted and applied according to the law of the place of the occurrence, including foreign (local) law for claims arising in foreign countries (see 10 U.S.C. 2733(b)(4)).

(ii) Claims are cognizable when based on those acts or omissions recognized as tortious by a majority of jurisdictions that require proof of duty, negligence, and proximate cause resulting in compensable injury or loss subject to the exclusions set forth at § 536.76. Strict or absolute liability and similar theories are not grounds for liability under this subpart.

(2) *Tort claims arising out of noncombat activities.* Claims arising out of noncombat activities under §§ 536.75(a)(2) and (b) are not tort claims and require only proof of causation. However, the doctrine of contributory negligence will apply, to the extent set forth in 10 U.S.C. 2733(b)(4) and paragraph (a)(1)(i) of this section.

(3) *Principles applicable to all subpart C claims.* (i) Interpretation of meanings

and construction of questions of law under the MCA will be determined in accordance with federal law. The formulation of binding interpretations is delegated to the Commander USARCS, provided that the statutory provisions of the MCA are followed.

(ii) Scope of employment will be determined in accordance with federal law. Follow guidance from reported FTCA cases. The formulation of a binding interpretation is delegated to the Commander USARCS, provided the statutory provisions of the MCA are followed.

(iii) The collateral source doctrine is not applicable.

(iv) The United States will only be liable for the portion of loss or damage attributable to the fault of the United States or its employees. Joint and several liability is inapplicable.

(v) No allowance will be made for court costs, bail, interest, inconvenience or expenses incurred in connection with the preparation and presentation of the claim.

(vi) Punitive or exemplary damages are not payable.

(vii) Claims for negligent infliction of emotional distress may only be entertained when the claimant suffered physical injury arising from the same incident as the claim for emotional distress, or the claimant is the immediate family member of an injured party/decendent, was in the zone of danger and manifests physical injury for the emotional distress. Claims for intentional infliction of emotional distress will be evaluated under general principles of American law as set forth in paragraph (a)(1)(i) of this section and will be considered as an element of damages under paragraph (b)(3)(ii) of this section. Claims for either negligent or intentional infliction of emotional distress are excluded when they arise out of assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, libel, or slander, as defined in § 536.45(h).

(viii) In a claim for personal injury or wrongful death, the total award for non-economic damages to any direct victim and all persons, including those derivative to the claim, who claim injury by or through that victim will not exceed \$500,000. However, separate

claims for emotional distress considered under paragraph (b)(1) of this section are not subject to the \$500,000 cap for the wrongful death claim as they are not included in the wrongful death claim; rather, each is a separate claim with its own \$500,000 cap under paragraph (b)(3)(ii) of this section. Continuous or repeated exposure to substantially the same or similar harmful activity or conditions is treated as one incident for the purposes of determining the extent of liability. If the claim accrued prior to September 1, 1995, these limitations do not apply. Any such limitation in the law of the place of occurrence will apply.

(b) *Personal injury claims*—(1) *Eligible claimants*. Only the following may claim:

(i) Persons who suffer physical injuries or intentional emotional distress, but not subrogees (when claiming property loss or damage, medical expenses or lost earnings); see paragraph (a)(3)(iii) of this section.

(ii) Spouses for loss of consortium, but not parent-child or child-parent loss of consortium;

(iii) Members of the immediate family who were in the zone of danger of the injured person as defined in paragraph (a)(3)(vii) of this section.

(2) *Economic damages*. Elements of economic damage are limited to the following:

(i) Past expenses, including medical, hospital and related expenses actually incurred. Nursing and similar services furnished gratuitously by a family member are compensable. Itemized bills or other suitable proof must be furnished. Expenses paid by, or recoverable from, insurance or other sources are not recoverable.

(ii) Future medical, hospital, and related expenses. When requested, a medical examination is required.

(iii) Past lost earnings as substantiated by documentation from both the employer and a physician.

(iv) Loss of earning capacity and ability to perform services, as substantiated by acceptable medical proof. When requested, past federal income tax forms must be submitted for the previous five years and the injured person must undergo an independent medical examination (IME). Estimates of

future losses must be discounted to present value at a discount rate of one to three percent after deducting for income taxes. When a medical trust providing for all future care is established, personal consumption may be deducted from future losses.

(v) Compensation paid to a person for essential household services that the injured person can no longer provide for himself or herself. These costs are recoverable only to the extent that they neither have been paid by, nor are recoverable from, insurance.

(3) *Non-economic damages.* Elements of non-economic damages are limited to the following:

(i) *Past and future conscious pain and suffering.* This element is defined as physical discomfort and distress as well as mental and emotional trauma. Loss of enjoyment of life, whether or not it is discernible by the injured party, is compensable. The inability to perform daily activities that one performed prior to injury, such as recreational activities, is included in this element. Supportive medical records and statements by health care personnel and acquaintances are required. When requested, the claimant must submit to an interview.

(ii) *Emotional distress.* Emotional distress under the conditions set forth in paragraph (a)(3)(vii) of this section.

(iii) *Physical disfigurement.* This element is defined as impairment resulting from an injury to a person that causes diminishment of beauty or symmetry of appearance rendering the person unsightly, misshapen, imperfect, or deformed. A medical statement and photographs, documenting claimant's condition, may be required.

(iv) *Loss of consortium.* This element is defined as conjugal fellowship of husband and wife and the right of each to the company, society, cooperation, and affection of the other in every conjugal relation.

(c) *Wrongful death claims.* The law of the place of the incident giving rise to the claim will apply to claims arising in the United States, its commonwealths, territories or possessions.

(1) *Claimant.* (i) Only one claim may be presented for a wrongful death. It shall be presented by the decedent's personal representative on behalf of all

parties in interest. The personal representative must be appointed by a court of competent jurisdiction prior to any settlement and must agree to make distribution to the parties in interest under court jurisdiction, if required.

(ii) Parties in interest are the surviving spouse, children, or dependent parents to the exclusion of all other parties. If there is no surviving spouse, children, or dependent parents, the next of kin will be considered a party or parties in interest. A dependent parent is one who meets the criteria set forth by the Internal Revenue Service to establish eligibility for a DOD identification card.

(2) *Economic loss.* Elements of economic damages are limited to the following:

(i) Loss of monetary support of a family member from the date of injury causing death until expiration of decedent's worklife expectancy. When requested, the previous five years federal income tax forms must be submitted. Estimates must be discounted to present value at one to three percent after deducting for taxes and personal consumption. Loss of retirement benefits is compensable and similarly discounted after deductions.

(ii) Loss of ascertainable contributions, such as money or gifts to other than family member claimants as substantiated by documentation or statements from those concerned.

(iii) Loss of services from date of injury to end of life expectancy of the decedent or the person reasonably expected to receive such services, whichever is shorter.

(iv) Expenses as set forth in paragraph (b)(2)(i) of this section. In addition, burial expenses are allowable. Expenses paid by, or recoverable from, insurance or other sources are not recoverable.

(3) *Non-economic loss.* Elements of damages are limited to the following:

(i) Pre-death conscious pain and suffering.

(ii) 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.

(iii) 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 becomes 18 years old.

(iv) Claims for the survivors' emotional distress, mental anguish, grief, bereavement, and anxiety are not payable, in particular claims for intentional or negligent infliction of emotional distress to survivors arising out of the circumstances of a wrongful death are personal injury claims falling under § 536.77(b)(3).

(d) *Property damage claims.* The following provisions apply to all claims arising in the United States, its commonwealths, territories and possessions.

(1) Such claims are limited to damage to, or loss of, tangible property and costs directly related thereto. Consequential damages are not included. (See § 536.50(e) and DA Pam 27-162, paragraph 2-56a.)

(2) Proper claimants are described in § 536.27. Claims for subrogation are excluded. (See § 536.27(e)). However, there is no requirement that the claimant use personal casualty insurance to mitigate the loss.

(3) Allowable elements of damages and measure of proof (additions to these elements are permissible with concurrence of the Commander USARCS). These elements are discussed in detail in DA Pam 27-162, paragraph 2-54.

(i) Damages to real property.

(ii) Damage to or loss of personal property, or personal property that is not economically repairable.

(iii) Loss of use.

(iv) Towing and storage charges.

(v) Loss of business or profits.

(vi) Overhead.

§ 536.78 Settlement authority for claims under the Military Claims Act.

(a) *Authority of the Secretary of the Army.* The Secretary of the Army, the Army General Counsel, as the Secretary's designee, or another designee of the Secretary of the Army may approve settlements in excess of \$100,000.

(b) *Delegations of Authority.* (1) Denials and final offers made under the delegations set forth herein are subject to

appeal to the authorities specified in paragraph (d) of this section.

(2) The Judge Advocate General (TJAG) and the Assistant Judge Advocate General (TAJAG) are delegated authority to pay up to \$100,000 in settlement of a claim and to disapprove a claim regardless of the amount claimed.

(3) The Commander USARCS is delegated authority to pay up to \$25,000 in settlement of a claim and to disapprove or make a final offer in a claim regardless of the amount claimed.

(4) The Judge Advocate (JA) or Staff Judge Advocate (SJA), subject to limitations that USARCS may impose, and chiefs of a command claims service are delegated authority to pay up to \$25,000 in settlement, regardless of the amount claimed, and to disapprove or make a final offer in a claim presented in an amount not exceeding \$25,000.

(5) A head of an area claims office (ACO) is delegated authority to pay up to \$25,000 in settlement of a claim, regardless of the amount claimed, and to disapprove or make a final offer in a claim presented in an amount not exceeding \$25,000. A head of a claims processing office (CPO) with approval authority is delegated authority to approve, in full or in part, claims presented for \$5,000 or less, and to pay claims regardless of the amount claimed, provided an award of \$5,000 or less is accepted in full satisfaction of the claim.

(6) Authority to further delegate payment authority is set forth in § 536.3(g)(1) of this part. For further discussions also related to approval, settlement and payment authority see also paragraph 2-69 of DA Pam 27-162.

(c) *Settlement of multiple claims arising from a single incident.* (1) Where a single act or incident gives rise to multiple claims cognizable under this subpart, and where one or more of these claims apparently cannot be settled within the monetary jurisdiction of the authority initially acting on them, no final offer will be made. All claims will be forwarded, along with a recommended disposition, to the authority who has monetary jurisdiction over the largest claim for a determination