JACS-Z **1 November 1999**

MEMORANDUM FOR CLAIMS JUDGE ADVOCATES/CLAIMS ATTORNEYS

SUBJECT: Federal Tort Claims Act (FTCA) Handbook

1. This edition of the FTCA Handbook is a revision of the material originally published in July 1979 and updated periodically since. The previous edition was last updated in September 1998. This edition contains significant cases through September 1999 pertaining to the filing and processing of administrative claims under the FTCA (Title 28, United States Code, Sections 2671-2680) and related claims statutes.

2. This Handbook provides case citations covering a myriad of issues. The citations are organized in a topical manner, paralleling the steps an attorney should take in analyzing a claim. Older citations have not been removed. Shepardizing is essential.

3. If any errors are noted, including the omission of relevant cases, please use the error sheet at the end of the Handbook to bring this to our attention. Users needing further information or clarification of this material should contact their Area Action Officer or Mr. Joseph H. Rouse, Deputy Chief, Tort Claims Division, DSN: 923-7009, extension 212; or commercial: (301) 677-7009, extension 212.

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T A B L E O F C O N T E N T S

H. What are Payment Procedures?

PROCEDURAL ASPECTS OF FILING AND PROCESSING CLAIMS UNDER FTCA AND SPECIAL PROBLEMS RELATING THERETO

I. REQUIREMENTS FOR ADMINISTRATIVE FILING

A. Why is There a Requirement?

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

2. Administrative Filing Requirement Jurisdictional. Administrative filing requirement is jurisdictional on all claims accruing after 17 January 1967 prior to filing suit (28 U.S.C. § 2672, 2675(a), as amended). Three-M Enterprises Inc. v. U.S., 548 F.2d 293 (10th Cir. 1977); Ferreira v. U.S., 389 F.2d 191 (9th Cir. 1968); Avril v. U.S., 461 F.2d 1090 (9th Cir. 1972); Caton v. U.S., 495 F.2d 635 (9th Cir. 1974); Peterson v. U.S., 428 F.2d 368 (8th Cir. 1970); Meeker v. U.S., 435 F.2d 1219 (8th Cir. 1970); Melo v. U.S., 505 F.2d 1026 (8th Cir. 1974); Best Bearings Co. v. U.S., 463 F.2d 1177 (7th Cir. 1972); Ianni v. U.S., 457 F.2d 804 (6th Cir. 1972); Executive Jet Aviation Inc. v. U.S., 507 F.2d 508 (6th Cir. 1974); Allen v. U.S., 517 F.2d 1328 (6th Cir. 1975); Molinar v. U.S., 515 F.2d 246 (5th Cir. 1975); Bernard v. U.S. Lines, 475 F.2d 1134 (4th Cir. 1973); Kielwien v. U.S., 540 F.2d 676 (4th Cir. 1976); Bialowas v. U.S., 443 F.2d 1047 (3d Cir. 1971) Schwartz v. U.S., 446 F.2d 1380 (3d Cir. 1971); Rosario v. American Export-Isbrantsen Lines, Inc., 531 F.2d 1227 (3d Cir. 1976); Commonwealth of Pennsylvania v. National Association of Flood Insurers, 520 F.2d 11 (3d Cir. 1975); Santiago-Ramirez v. Secretary of Department of Defense, 984 F.2d 16 (1st Cir. 1983), Orlando Helicopter Airways v. U.S., 75 F.3d 622 (11th Cir. 1996); Johnson v. U.S., 788 F.2d 845 (2d Cir.), cert. Denied 479 U.S. 914 (1986); GAF Corp. v. U.S., 818 F.2d 901 (D.C. Cir. 1987).

3. Waiver of Administrative Filing Requirement. Administrative filing requirement not subject to waiver or avoidance. Claremont Aircraft Inc. v. U.S., 420 F.2d 896 (9th Cir. 1970); Childers v. U.S., 442 F.2d 1299 (5th Cir. 1971). See also Roscoe v. U.S., 83 F.3d 433 (table), 1996 WL 200384 (10th Cir. 1996) (administrative filing requirement may not be avoided in trespass action by pleading a Bivens action); Weisgal v. Smith, 774 F.2d 1277 (4th Cir. 1985) (plaintiff may not avoid administrative filing requirement by claiming proposed FTCA count adding U.S as a defendant relates back (*see* F.R.Civ.P. 15)to original suit commenced solely against prison warden); Murphy v. West, 945 F. Supp. 874 (D. Md. 1996) (plaintiff cannot avoid exhaustion of

administrative remedies by pleading it is a futile requirement); McQuady v. Sec'y of Education, Civ. # 5:94-CV-542-2(DF) (M.D. Ga., Aug. 21, 1995) (administrative filing requirement can not be avoided by suing Secretary individually).

4. Purposes of Requirement. Gives agency opportunity to settle. Relieves court congestion. Avoids unnecessary litigation. Speeds up settlements and reduces the number of stale claims. Legislative history of 1966 Amendment.

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

6. Not Necessary for Compulsory Counterclaim. Not necessary to file administrative claim where there is a compulsory counter claim. U.S. v. Amtreco, Inc., 790 F. Supp. 1576 (M.D. Ga. 1992) (CERCLA suit against owner-operator re property damage and conversion). See also U.S. v. Martech USA, Inc., 800 F. Supp. 865 (D. Alaska 1992) (suit against operator under Clean Air Act-claim for indemnification and discriminatory enforcement is not compulsory counter claim). U.S. v. Green, F. Supp. 2d 203 (W.D. NY 1998), counterclaim for EPA tortious actions in CERCLA suit is not compulsory and administrative claim is required--compulsory counter claim requires identity of facts with original claim, matuality of proof and a logical relationship.

7. Not Necessary for Third Party Practice. Joinder of U.S. as third party to obtain contribution or indemnity does not require filing of administrative claim prior to suit. Spawr v. U.S., 796 F.2d 279 (9th Cir. 1986) (no requirement to file administrative claim for true third party claim); Hassan v. Louisiana DOT & Development, 923 F. Supp. 890 (W.D. La. 1996) (citing Thompson v. Wheeler, 898 F.2d 406 (3rd Cir. 1990) and Jackson v. Southeastern Pa. Transportation Authority, 727 F. Supp. 965 (E.D. Pa. 1990)). See also West v. U.S., 592 F.2d 487 (8th Cir. 1979). USA v. Green, Civ. # 1:97-CV-00271 (W.D.N.Y., 18 Dec. 98), third party complaint does not lie in action by United States for clean-up under CERCLA where respondent alleges that EPA caused damage during cleaning as original action is based on occurrences prior to clean-up accordingly third complaint is not compulsory as required.

B. What Must Be Filed?

1. Written Demand for Sum Certain. Written demand for sum certain (28 U.S.C. §§ 2401, 2675(b); 28 C.F.R. § 14.2). See, e.g., Danowski v. U.S., 924 F. Supp. 661 (D.N.J. 1996) (single claim form held sufficient to present father's claim for ERISA

medical bills where both his name and son's name appears on SF 95 form as claimants, the SF 95 was accompanied with the bills, and government was alerted to subrogated nature of father's clain concerning the bills, even though son was the person hit by postal truck); Shoemaker v. U.S., 1997 WL 96543 (S.D.N.Y.) allegations against numerous federal agencies alleging placement of electronic surveillance devices in Plaintiff's home does not constitute a claim because it lacks specificity). Sum certain requirement is jurisdictional. Hamilton v. U.S., 741 F. Supp. 1159 (D.N.J. 1990). Failure to state a sum certain constitutes a fatal defect in the claim. Suarez v. U.S., 2 F.3d 1061 (11th Cir. 1994). See also Coska v. U.S., 114 F.3d 318 (1st Cir. 1997) (failure to state a sum certain despite two requests to do so bars suit); Martinez v. U.S. Post Office, 875 F. Supp. 1067 (D.N.J. 1995) (letter that does not contain a sum certain is not proper claim); Hager by and Through Hager v. Swanson Group, Inc., 916 F. Supp. 447 (E.D. Pa. 1996) (same); Stokes v. U.S., 937 F. Supp. 11 (D.D.C. 1996) (letter to USPS advising of erroneous payroll deduction cannot be amended after SOL has run by adding a sum certain, since letter is not claim); Magdalenski v. U.S. Government, 977 F.Supp. 66 (D. Mass. 1997) (letter to DVA for § 351 benefits is not an FTCA claim since it does not contain a demand for a sum certain); Montoya v. U.S., 841 F.2d 102 (5th Cir. 1988) (failure to state dollar amount for three minors does not meet administrative filing requirement); Adkins v. U.S., 896 F.2d 1324 (11th Cir. 1990) (cannot add sum later when SF 95 says injuries incapacitating); Messerschmidt v. U.S., Civ. # 91-00730 HMF (D. Haw. 1992) (a letter without a sum certain does not toll SOL). State law does not modify FTCA filing requirements. Vega-Velez v. U.S., 800 F.2d 288 (1st Cir. 1986) (under Puerto-Rican law, filing of state suit in tort must be delayed until worker's compensation claim is adjudicated--FTCA filing requirements not tolled); Poindexter v. United States, 647 F.2d 34 (9th Cir. 1981) (FTCA limitation periods govern over local law limitation period). However, FTCA's jurisdictional requirements cannot be added to by Attorney General's regulations, i.e., documentation of claim. Cizek v. U.S., 953 F.2d 1232 (10th Cir. 1992); GAF Corp. v. U.S., 818 F.2d 901 (D.C. Cir. 1987); Warren v. Department of the Interior, Bureau of Land Management, 724 F.2d 776 (9th Cir. 1984) (en banc); Douglas v. U.S., 658 F.2d 445 (6th Cir. 1981); Adams v. U.S., 615 F.2d 284 (5th Cir. 1980). Contra Kanar v. U.S., 118 F.3d 527 (7th Cir. 1997); Pa. v. Nat'l Ass'n of Flood Insurers, 520 F.2d 11 (3d Cir. 1975); Lunsford v. U.S., 570 F.2d 221 (8th Cir. 1977). Hayden v. U.S., Civ. # 98-C-0367-S (N.D. Ala., 24 July 1998) Failure to state a sum certain allegedly or advise of unnamed U.S. employee is nevertheless a fatal defedt -- U.S. not estopped from raising issue. Video Vend, Inc. v. Morale, Welfare and Recreation Dep't, Civ. # 97-01613ACK (D. Haw., 14 Oct. 98), letter to NAFI contractor alleging $50,000 loss due to contract termination despite verbal

promise to continue contract is FTCA claim; Lang v. U.S., Civ. # C-1-97-713 (S.D. Ohio, 14 Apr. 98), allegation of U.S. officials conspired to intercept claimant's thoughts, dreams, and emotions by electric surveillance is not a claim as it does not tell who conspired and what harm it caused. Jama v. U.S. INS, 22 F. Supp. 2d 353 (D.C.N.J. 1998), group of claims dismissed under FTCA for failure to state sum certain-except for claims containing sum for property damage. Dolan v. U.S. Army, 1999 WL 199012 (S.D. NY), letter asking DOD to contact plaintiff re his injury but without sum certain mailed one day short of two years and on same day suit filed is not a cognizable claim.

2. Examples of Written Demand.

a. Complaints to Individuals. Complaint to individual U.S. employee not a claim, including treating physician, facility commander or administrator, or Inspector General. Winston Brothers v. U.S., 371 F. Supp. 130 (D. Minn. 1973); Sullivan v. U.S., 428 F. Supp. 79 (E.D. Wis. 1977). Contra Blue v. U.S., 567 F. Supp. 394 (D. Conn. 1983) (sum certain not named, but claim allowed). See also Roper Hosp. Inc. v. U.S., 869 F. Supp. 362 (D.S.C. 1994) (letter to OPM by civilian hospital requesting review of denial of mail handler's benefits does not constitute a claim); Pennington Enterprises Inc. v. U.S., Civ. #90-1067 (D.D.C. 1992) (meeting with Dept. of Agriculture officials concerning whether shipment of grass seed violated law not a claim); Logan v. U.S., 792 F. Supp. 663 (E.D. Mo. 1992) (letter to DA which in turn writes DVA--not a claim); Hartford Accident Indemnity v. U.S., 720 F. Supp. 259 (E.D.N.Y. 1989) (letter to USPS stating payments made to insured does not constitute proper claim); Stokes v. U.S. Postal Service, 937 F. Supp. 11 (D.D.C. 1996) (letter to USPS employee complaining about IRS tax levy not a claim); Athanaus v. U.S., 1996 WL 745404 (N.D. Ill.) (letter stating that a claim is being filed is not a claim, since it contains no sum certain); Bishop v. Dep't of the Army, 1996 WL 191716 (E.D. La.) (filing suit in federal court does not constitute an administrative claim); Decker v. U.S., 603 F. Supp. 40 (S.D. Ohio 1984) (application to U.S. Army for life insurance benefits is not an FTCA claim); Orlando Helicopter Airways v. U.S., 75 F.3d 622 (11th Cir. 1996) (contract readjustment claim arising from unfounded whistleblower complaints seeking “final decision” under Contract Disputes Act is not an FTCA claim, since it fails to specify which federal official engaged in misconduct); Bellecourt v. U.S., 788 F. Supp. 623 (D. Minn. 1992) (complaint about medical care to prison officials is not an administrative claim); Pipkin v. USPS, 951 F.2d 272 (10th Cir. 1991) (civil service grievance not an FTCA claim); Verner v. U.S Govt., 804 F. Supp. 381 (D.D.C. 1992)

(veteran's request for benefits cannot be construed to be an FTCA claim). Letters or demands specifying a sum certain can serve as an administrative claim. Farmers State Savings Bank v. FmHA, 866 F.2d 276 (8th Cir. 1989). See also Santiago-Ramirez v. Secretary of Dept. of Defense, 984 F.2d 16 (1st Cir. 1993) (letter to Director of Administration, AAFES, complaining of dismissal and harassment and demanding $50,000 constitutes proper FTCA claim); Corte-Real v. U.S., 945 F.2d 475 (1st Cir. 1991) ($100,000 plus continuing treatment and still at work is sufficient to meet requirement); FGS Construction v. Carlow, 823 F. Supp. 1508(D.S.D. 1993) (submission of claim for final decision under the Contract Disputes Act constitutes an FTCA claim); 55 Motor Ave. Co. v. Liberty Indus. Finishing Corp., 885 F. Supp. 410 (E.D.N.Y. 1994) (letter to DOJ filing demand under CERCLA and threatening suit within 2 weeks constitutes a claim under FTCA). But see Research Environmental & Industrial Consultants, Inc. v. U.S., Civ. # 5:96-0771 (S.D. W.Va., 11 February 1997) (letter demanding sum higher than that offered during negotiations with COE over condemned land does not constitute an FTCA claim). However, while documentation is not part of the § 2672 presentment requirement, documentation must be presented prior to filing of suit. Romulus v. U.S., 983 F. Supp. 336 (E.D.N.Y. 1997) (n accord with McNeil v. U.S., 506 U.S. 106, 113 (S.Ct. 1980)). Millares v. U.S., 137 F.3d 715, 1998 WL 88875 (2d Cir. N.Y.) (presentation of memory aid with verbal demand for $38,000 for expenses on DEA mission in Chile does not constitute a claim for $1.5 million for emotional distress. Bacani v. U.S. and DVA, 1998 WL 177967 (N.D. Tex.). Request to DVA and MSPB to recalculate his accrued annual leave does not constitute an FTCA claim nor does DVA response demanding repayment of $8, 366.97 constitute a final action. Williams v. U.S., 1998 WL 886993 (E.D. La.), letter to VA stating that claimant was entitled to increased benefits because the VA let him fall out of bed is not an FTCA claim. Bernard v. Calejo, 17 F. Supp. 2d 1310 (S.D. Fla. 1998), letter detailing extent of injuries caused by INS employee in beating of detainee is considered sufficient notice of sum certain despite no sum being mentioned-duty of U.S. to ask for sum.

b. Continuing Injury. Existence of continuing injury does not eliminate requirement for sum certain on SF 95. Legrand v. Lincoln, 818 F. Supp. 112 (E.D. Pa. 1993) (existence of continuing injury does not eliminate requirement for sum certain on SF 95); College v. U.S., 411 F. Supp. 738 (D. Md. 1976).

c. Incapacitating Injury. Administrative filing requirement not negated by fact that claimant's condition renders him unable to present claim. Kokaras v. U.S., 980 F.2d 20 (1st Cir. 1992); Dreakward v. Chestnut Hill Hospital, 427 F. Supp. 977 (E.D. Pa. 1977); Mayo v. U.S., 407 F. Supp. 1352 (E.D. Va. 1976).

d. State Court Suit Not a Claim. Filing suit in state court does not constitute a claim. Kozel v. Dunne, 678 F. Supp. 450 (D.N.J. 1988) (filing suit in state court within two years does not preempt administrative filing requirement). See also Fuller v. Daniel, 438 F. Supp. 928 (N.D. Ala. 1977); Goodman v. Daniel, 438 F. Supp. 928 (N.D. Ala. 1977); Goodman v. U.S., 324 F. Supp. 167 (M.D. Fla. 1971); Miller v. U.S., 418 F. Supp. 373 (D. Minn. 1976); Smith v. U.S., 328 F. Supp. 1224 (W.D. Tenn. 1971); Meeker v. U.S., 435 F.2d 1219 (8th Cir. 1970). Contra Kelley v. U.S., 568 F.2d 259 (2d Cir. 1978) (plaintiff alleged that U.S. driver concealed fact that he was U.S. employee--Kelley not required to file administrative claim). Cf. Harris v. Burris Chemical Inc., 490 F. Supp. 968 (N.D. Ga. 1980) (plaintiff did not know driver was U.S. employee, therefore, statute tolled by state court filing; Kelley not followed). The following cases have not followed Kelley. Dunaville v. Carnago, 485 F. Supp. 545 (S.D. Ohio 1980) (rejects Kelley and follows Driggers v. U.S., 309 F. Supp. 1377 (D.S.C. 1970)); Lien v. Beehner, 453 F. Supp. 604 (N.D.N.Y. 1978) (plaintiff argued that PHS doctor was thought to be private physician); Gould v. U.S. Dept. of HHS, 905 F.2d 738 (4th Cir. 1990) (same notion, but involving PHS physician working in private clinic); Flicking v. U.S., 523 F. Supp. 1372 (W.D. Pa. 1981) (Kelley not followed even though no awareness wrongdoer worked for United States, however, state suit filed after two years had elapsed); Wilkinson v. Gray, 523 F. Supp. 372 (E.D. Va. 1981) (Kelley not followed--plaintiff aware wrongdoer was U.S. employee); Rogers v. U.S., 675 F.2d 123 (6th Cir. 1982) (Kelley not followed--one postman collides with another--knowledge of scope doubtful); Wilkinson v. U.S., 677 F.2d 998 (4th Cir. 1982) (EM on TDY in leased vehicle--Kelley not followed--plaintiff aware that EM employed by Navy); Gonzales v. U.S., 543 F. Supp. 838 (N.D. Cal. 1982) (Kelley not followed--Postal Service carrier truck); Van Lieu v. U.S., 542 F. Supp. 862 (N.D.N.Y. 1982) (Kelley not followed--officer on TDY in rental vehicle connection with Army not known). Henderson v. U.S., 785 F.2d 121 (4th Cir. 1986) (Kelley not followed--limitations period begins to run when accident occurred, not when plaintiff learned driver was U.S. employee); Wollman v. Gross, 637 F.2d 544 (8th Cir. 1980) (plaintiff did not know that federal employee was within scope of employment and waited more than two years to file in

state court--claim barred). Accord Houston v. USPS, 823 F.2d 896 (5th Cir. 1987) (distinguishing Kelley and Staple v. U.S., 740 F.2d 766 (9th Cir. 1984)); Bradley v. U.S., 856 F.2d 575 (3d Cir. 1988) (distinguishing Kelley). The Westfall Act may have changed the above-cited case law. See Jackson v. U.S., 789 F. Supp 1109 (D. Colo. 1992) (where U.S. substituted as party after removal of state suit, claimant has 60 days to file administrative claim); Filaski v. U.S., 776 F. Supp. 115 (E.D.N.Y. 1991) (same, citing 28 U.S.C. § 2679(d)(5)); Logan v. U.S., 851 F. Supp. 704 (D. Md. 1994) (lack of knowledge of Federal status of defendant-driver does not permit addition of party in state court--case subject to removal and substitution). Berlin v. U.S., 9 F.2d 648 (S.D. W. Va., 1997), SF 95 which contained no sum certain is not remedied by filing suit within 2-year SOL.

e. Money Figure in Writing. Money figure must be clearly stated in writing, not verbally. Johnson v. U.S., 404 F.2d 22 (5th Cir. 1968); Grant v. U.S., 162 F. Supp. 689 (E.D.N.Y. 1958); Bialowas v. U.S., 443 F.2d 1047 (3d Cir. 1971); Allen v. U.S., 517 F.2d 1328 (6th Cir. 1975); Melo v. U.S., 505 F.2d 1026 (8th Cir. 1974); Ianni v. U.S., 457 F.2d 804 (6th Cir. 1972); Caton v. U.S., 495 F.2d 635 (9th Cir. 1974); Robinson v. U.S., 563 F. Supp. 312 (W.D. Pa. 1983); Rogers v. U.S., 568 F. Supp. 894 (E.D.N.Y. 1983). But see Collins v. U.S. Dept. of Army, 626 F. Supp. 536 (W.D. Pa. 1985) (no sum certain required when plaintiff requested documents to ascertain extent of injuries); Robinson v. U.S., 408 F. Supp. 132 (N.D. Ill. 1976) (PI claim allowed to proceed despite ”N/A” in SF 95 PI box and PD claim settlement). Wilds v. U.S. Postmaster General, 989 F. Supp. 178 (D. Conn. 1997)(where Title VII complaint makes $300,000 damage demand, among other requests, FTCA filing requirement met.

f. Approximate or Present Amount. Where approximate or present amount of claim stated on SF 95 claim may be limited to that amount. Adams by Adams v. U.S. Dept. of Housing & Urban Dev., 807 F.2d 318 (2d Cir. 1986) (administrative claim stating "in excess of $1,000" is limited to $1,000); Fallon v. U.S., 405 F. Supp. 1320 (D. Mont. 1976) ("Approximately $1,500.00" held sum certain, but limited to that amount); Erxleben v. U.S., 668 F.2d 268 (7th Cir. 1981) ("$149.42 presently" meets sum certain requirement). But see Bradley v. U.S. by Veterans Admin., 951 F.2d 268 (10th Cir. 1991) (SF 95 stating sum “in excess of $100,000” does not meet requirement). Presentation of bills or receipts may meet requirement where SF 95 amount left blank, but recovery may be limited to this amount. Molinar v. U.S., 515 F.2d 246 (5th Cir. 1975); Mack v. USPS, 414 F. Supp. 504 (E.D. Mich. 1976); Erxleben v. U.S., 668 F.2d 268 (7th Cir. 1981). See

also Williams v. U.S., 693 F.2d 555 (5th Cir. 1982) (includes itemization presented to state court where SF 95 amount left blank). Contra Schaefer v. Hills, 416 F. Supp. 428 (S.D. Ohio 1976). However, presentation of medical bills not subject of claim does not meet sum certain requirement. Farr v. U.S., 580 F. Supp. 1194 (E.D. Pa. 1984). Poynter v. U.S., __ F. Supp. 2d __, 1999wl515838 (W.D. La.), SF 95 which states "$500,000+ is proper claim. Plus (+) mark is surplus.

g. Agency Permission. Agency permission to permit sum to be named later invalid. Jordan v. U.S., 333 F. Supp. 987 (E.D. Pa. 1971), aff'd mem., 474 F.2d 1340 (3rd Cir. 1973). But see Apollo v. U.S., 451 F. Supp. 137 (M.D. Pa. 1978) for doctrine of "relation back."

h. Class Actions Administrative Filings. Class actions must name claimants and state sum certain for each. Lunsford v. U.S., 570 F.2d 221 (8th Cir. 1977); Caidin v. U.S., 564 F.2d 284 (9th Cir. 1977); Petition of Gabel v. U.S., 350 F. Supp. 624 (C.D. Cal. 1972); Commonwealth of Pa. v. National Assn. of Flood Insurers, 520 F.2d 11 (3d Cir. 1975); Founding Church of Scientology of Washington, DC v. Director FBI, 459 F. Supp. 748 (D.D.C. 1978); Kipperman v. McCone, 422 F. Supp. 860 (N.D. Cal. 1976); Blain v. U.S., 552 F.2d 289 (9th Cir. 1977); Kantor v. Kahn, 463 F. Supp. 1160 (S.D.N.Y. 1979); House v. Mine Safety Appliances Co., 573 F.2d 609 (9th Cir. 1978); Ryan v. Cleland, 531 F. Supp. 724 (E.D.N.Y. 1982); Keene Corp. v. U.S., 700 F.2d 836 (2d Cir. 1983). But see Lundgren v. U.S., 810 F. Supp. 256 (D. Minn. 1992) (claim form which names all claimants and contains a single lump sum for all is a proper FTCA claim).

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

j. Specifity of Pleading in Class Action. Class actions require specific basis for each claim re details of allegations as to why the U.S. is involved, e.g., dates, times, places, and how U.S. negligence is connected. GAF Corp. v. U.S., 593 F. Supp. 703 (D.D.C. 1984) (asbestos); Keene Corp. v. U.S., 591 F. Supp. 1340 (D.D.C. 1984) (same).

k. Tolling by Insurer's Claim. Filing by insurer for subrogated loss does not toll insured's PI claim. Shelton v. U.S. 615 F.2d 713 (6th Cir. 1980). See also Ahmed v. U.S., 20 F.3d 514 (4th Cir. 1994) (Where claim filed by insurer only mentions potential PI claim and no sum for PI is named, no PI claim has been filed); Cizek v. U.S., 953 F.2d 1232 (10th Cir. 1992) (amount stated by insurer does not substitute for insured's demand, since they were not identical).

l. Spouse's Name on SF95 Not Sufficient. Identifying claimant's spouse as such on SF 95 not sufficient to present written demand for spouse. Rucker v. U.S. Dept. of Labor, 798 F.2d 891 (6th Cir. 1986). See also Nazarenus v. U.S., 1996 WL 156408 (E.D. Pa.) (same); Davis v. U.S., 834 F. Supp. 517 (D. Mass. 1993) (same); Richardson v. U.S., 831 F. Supp. 657 (N.D. Ind. 1993) (spouse must file separate claim for loss of consortium--cites McNeil v. U.S., 508 U.S. 106, 113 S.Ct. 1980 (1993)); Pappa v. Pro-Source Distribution, Inc., Civ. # CV 97-H-1554-E (N.D. Ala., 10 Oct. 1997) (husband must file claim and can not use wife's claim for basis for suit); Accord Wozniak v. U.S., 701 F. Supp. 259 (D. Mass. 1988). Contra Casey v. U.S., 635 F. Supp. 221 (D. Mass. 1986); Ottem by Ottem v. U.S., 594 F. Supp. 283 (D. Minn. 1984). Mentioning wife's loss of consortium on husband's SF 95 also does not constitute a claim by the wife. Dondero v. U.S., 775 F. Supp. 144 (D. Del. 1991). Dupont v. U.S., 980 F. Supp. 192 (S.D. W. Va. 1997) (failure to submit spouse's loss of consortium claim is fatal as loss of consortium is separate cause of action in West Virginia.

m. Failure to Provide Specific Facts. Shoemaker v. U.S., 1997 WL 96543 (S.D.N.Y.) (claim that does not state place and date is not a claim since it is so attenuated and insubstantial under Hogans v. Lavine, 415 U.S. 528 (1974)).

3. Documenting A Claim.

a. Appropriate Documentation. Accompanied by appropriate evidence and information (28 C.F.R. § 14.4). A proper claim has sufficient documentation to permit investigation. Cook v. U.S. on behalf of U.S. Dept. of Labor, 978 F.2d 164 (5th Cir. 1992); Tidd v. U.S., 786 F.2d 1565 (11th Cir. 1986). Failure to document administrative claim results in dismissal of suit. Cotto v. U.S., 993 F.2d 274 (1st Cir. 1993). Romulus v. United States, 160 F.3d 131 (2nd Cir. 1998); Sorge v. U.S., 1997 WL 603451 (S.D.N.Y.) (failure of claimant to furnish medical evidence of injury in VA accident results in dismissal for lack of subject matter jurisdiction). See also

Swift v. U.S., 614 F.2d 812 (1st Cir. 1980); Founding Church of Scientology v. Director FBI, 459 F. Supp. 748 (D.D.C. 1978); Kornbluth v. Savannah, 398 F. Supp. 1266 (E.D.N.Y. 1975); Rothman v. U.S., 434 F. Supp. 13 (C.D. Cal. 1977); State Farm v. U.S., 446 F. Supp. 191 (C.D. Cal. 1978); Robinson v. U.S. Navy, 342 F. Supp. 381 (E.D. Pa. 1972); Cummings v. U.S., 449 F. Supp. 40 (D. Mont. 1978); Melo v. U.S., 505 F.2d 1026 (8th Cir. 1974); Mudlo v. U.S., 423 F. Supp. 1373 (W.D. Pa. 1976); Manis v. U.S., 467 F. Supp. 828 (E.D. Tenn. 1979); Emch v. U.S., 474 F. Supp. 99 (E.D. Wis. 1979); Keene Corp. v. U.S., 700 F.2d 836 (2d Cir.), cert. denied, 464 U.S. 864 (1983). Contra Muldez v. U.S., 326 F. Supp. 692 (E.D. Va. 1971); Adams v. U.S., 615 F.2d 284 (5th Cir.), clarified, 622 F.2d 197 (5th Cir. 1980); Douglas v. U.S., 658 F.2d 445 (6th Cir. 1981); Jastremski v. U.S., Civ. #79-98-C (S.D. Ind. 1981), aff'd without discussing relevant point, 737 F. 2d 666 (7th Cir. 1984); Koziol v. U.S., 507 F. Supp. 87 (N.D. Ill. 1981); Hoaglan v. U.S., 510 F. Supp. 1058 (N.D. Iowa 1981); Reynoso v. U.S., 537 F. Supp. 978 (N.D. Cal. 1982); Tucker v. USPS, 676 F.2d 954 (3d Cir. 1982); Avery v. U.S., 680 F.2d 608 (9th Cir. 1982); Surratt v. U.S., 582 F. Supp. 692 (N.D. Ill. 1984); Charlton v. U.S., 743 F.2d 557 (7th Cir. 1984); Warren v. U.S. Dept. of Interior, 724 F.2d 776 (9th Cir. 1984); Bush v. U.S., 703 F.2d 491 (11th Cir. 1983); GAF Corp. v. U.S., 818 F.2d 901 (D.C. Cir. 1987). Pagel v. U.S., 986 F. Supp. 1315 (N.D. Cal. 1997) (where claimant supplies medical records and bills but not disability report, claim is adequately documented.

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

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

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

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

4. Authority to Sign for Claimant. Proof of authority should accompany signature of legal representative or agent, e.g., attorney, administrator, executor, guardian (28 C.F.R. § 14.3). Pringle v. U.S., 419 F. Supp. 289 (D.S.C. 1976). A plaintiff's failure to prove signing authority may be fatal. Kanar v. U.S., 118 F.3d 527 (7th Cir. 1997) (failure to show proof of authority to sign claim means that no claim has been filed--states 3rd and 8th Circuits in support, but that 5th, 6th, 9th and 10th hold otherwise); Moody v. U.S., 585 F. Supp. 286 (E.D. Tenn. 1984) (no power of attorney--no claim filed); Triplett v. U.S., 501 F. Supp. 118 (D. Nev. 1980) (affidavits presented at trial does not cure failure to present power of attorney with administrative claims). See also Gunstream v. U.S., 307 F. Supp. 366 (C.D. Cal. 1969); House v. Mine Safety Appliances Co., 573 F.2d 609 (9th Cir. 1978); Lunsford v. U.S., 570 F.2d 221 (8th Cir. 1977); Caidin v. U.S., 564 F.2d 284 (9th Cir. 1977); Estate of Santos v. U.S., 525 F. Supp. 982 (D.P.R. 1981); Del Valle v. VA, 571 F. Supp. 676 (S.D.N.Y. 1983). However, since the Attorney General's regulation (28 C.F.R. § 14.2) is not jurisdictional, a plaintiff's failure to present power of appointment is not invariably fatal. See Knapp v. U.S., 844 F.2d 376 (6th Cir. 1988) (administrative claim by personal representative of estate who qualified after filing claim, but before filing suit, is valid). See also Conn v. U.S., 867 F.2d 916 (6th Cir. 1989); Leaty v. U.S., 748 F. Supp. 268 (D.N.J. 1990); Byrne v. U.S., 804 F. Supp. 577 (S.D.N.Y. 1992); Endsley v. U.S., 818 F. Supp. 252 (S.D. Ind. 1992). But see Martiney v. U.S., 743 F. Supp. 298 (D.N.J. 1990) (requirement to furnish power of attorney authorizing signature is a jurisdictional prerequisite). Where plaintiff is quadriplegic or incompetent, courts have accepted signature of others without requiring proof of authority. Graves v. U.S. Coast Guard, 692 F.2d 71 (9th Cir. 1982) (signature of attorney-plaintiff a quadriplegic); Avila v. INS, 731 F.2d 616 (9th Cir. 1984) (father signed for incompetent adult son). Sometimes loss of consortium claims are recognized, although only one spouse signs form); Hardiman v. U.S., 752 F. Supp. 52 (D.N.H. 1990) (only husband signed SF 95 and only one sum named, although wife mentioned on SF 95 as claimant--sufficient to constitute proper claim); Boyce v. U.S., 942 F. Supp. 1220 (E.D. Mo. 1996) (demand for $ 3,000,000 includes wife's loss of consortium based on letter from attorney, even though only husband signed claim); Emery v. U.S., 920 F. Supp. 788 (W.D. Mich. 1996) (single claim form signed only by husband demanding $2 million constitutes claim for wife's loss of consortium based on statement to that effect in Block 11, SF 95). Jama v. U.S. INS, 22 F. Supp. 2d 353

(D.C.N.J. 1998), failure to provide evidence of authority of attorney to file administrative claim is not jurisdictional.

a. Authority and State Law. Authority should be in accordance with state law, since it determines who may bring claims and when they may do so. Schwarder v. U.S., 974 F.2d 1118 (9th Cir. 1992) (adult children can file WD claim under Cal. law, even though deceased and his widow-to-be settled PI claim indicates that state law prevails over final and conclusive language of 28 U.S.C. § 2672); Jackson v. U.S., 730 F.2d 808 (D.C. Cir. 1984) (daughter may not sign death claim in D.C. where there is a widow, since death occurred in Pa. and forum law applies); Transco Leasing Corp. v. U.S., 896 F.2d 1435 (5th Cir. 1990) (claim by estate sufficient to permit suit by widow and child); Frantz v. U.S., 791 F. Supp. 445 (D. Del. 1992) (estate claim does not include WD claim by survivors under Delaware law); Wozniak v. U.S., 701 F. Supp. 259 (D. Mass. 1988) (Massachusetts law says widow is beneficiary--administrative claim signed by her is valid, even though appointed as administratrix later--this conforms to 28 C.F.R. § 14.3); Zywicki v. U.S., Civ. #88-1501-T (D. Kan. 1991) (same as Wozniak, but under Kansas law--states 28 C.F.R. § 14.3(a) is not jurisdictional and that this is the majority rule); Dykes v. U.S., 794 F. Supp. 334 (D.S.D. 1992) (wrongful death (WD) claim filed by mother of deceased in her individual capacity sufficient to toll SOL for WD estate claim); Marricone v. U.S., 697 F. Supp. 874 (E.D. Pa. 1988) (claim by estate under Kentucky law includes illegitimate kids); Free v. U.S., 885 F.2d 840 (11th Cir. 1989) (no requirement to be appointed executor to file wrongful death claim); Hunter v. U.S., 417 F. Supp. 272 (N.D. Cal. 1976) (all family members not named in death claim--those not named are time barred). Compare Locke v. U.S., 351 F. Supp. 185 (D. Haw. 1972); DeGroot v. U.S., 384 F. Supp. 1178 (N.D. Iowa 1974); Young v. U.S., 372 F. Supp. 736 (S.D. Ga. 1974); Campbell v. U.S., 534 F. Supp. 762 (D. Haw. 1982); Forest v. U.S., 539 F. Supp. 171 (D. Mont. 1982); Warren v. U.S. Dept. of Interior, 724 F.2d 776 (9th Cir. 1984). See also Angelistanti v. U.S., Civ. # CV 195-116 (S.D. Ga., 22 Nov. 1995) (under Ga. Law, widower is only proper claimant--widower did not bring claim, but daughters did, naming widower as involuntary plaintiff--judge refuses to dismiss). Moreover, where State law permits relation back, § 14.3 test is still met. Hiatt v. U.S., 910 F.2d 737 (11th Cir. 1990) (recovery by minor son permitted in wrongful death case, even though no claim filed).

b. Appointment Held in Abeyance. In cases where amount of claim does not justify cost of appointment, requirement may be held in abeyance provided that it is met prior to

settlement, filing of suit or, in any event, prior to two years from accrual of action. Van Fossen v. U.S., 430 F. Supp. 1017 (N.D. Cal. 1977).

5. Notifying Claimant of Improper Claim. Claimant should be put on written notice that failure to file for sum certain in writing by proper person within two years of accrual may result in statute of limitation barring claim. Molinar v. U.S., 515 F.2d 246 (5th Cir. 1975); Kelley v. U.S., 568 F.2d 259 (2d Cir. 1978). See also Danowski v. U.S., 924 F. Supp. 661 (D.N.J. 1996) (failure of USPS to notify claimant of defect leads to court holding that father's claim for son's medical bills paid by him was constructively filed). Since 1983, objective standards apply to Rule 11 sanctions, bad faith need not be shown. Accordingly, early notification should be made to claimants where claim is clearly barred, e.g., SOL, Feres, FECA, foreign country exclusion. See *The Law of Sanction*, Trial, May 1988; Vaccaro v. Stephens, 869 F.2d 866 (9th Cir. 1989) (frivolous claim may result in substantial penalties).

6. Amendments. Administrative claim may be amended at any time prior to final agency action, i.e., denial, final offer of settlement, even after two year SOL has run (28 C.F.R. § 14.2). Provencial v. U.S., 454 F.2d 72 (8th Cir. 1972). Agency action not final until claimant signs settlement agreement in PI case, even though payment is approved in full amount claimed. Odin v. U.S., 656 F.2d 798 (D.C. Cir. 1981). See also Wiseman v. U.S., 976 F.2d 604 (9th Cir. 1992) (issuing a check for full amount stated on SF 95 does not bar amendment when check returned and higher amount claimed). Whether an amendment will be allowed is based on the nature and timing of the amendment. Beheler v. R.T.C., No. # 94-11045 (5th Cir., Aug. 16, 1995) (location of accident on SF 95 different from location named in suit--amendment not permitted); Tilton v. U.S., Civ. #C-86-20448-SW (N.D. Cal. 1990) (addition of pain and suffering claim at trial in wrongful death case not authorized); Barrett v. U.S., 845 F. Supp. 774, (D. Kan. 1994) (addition of survival claim at trial in wrongful death case prohibited); Lopez de Robinson v. U.S., 114 F.3d 1169 (table), 1997 WL 259551 (1st Cir 1997) (claim by widow for her pain and suffering can be converted into claim of estate for decedent's pain and suffering); Doe v. U.S., 58 F.3d 494 (9th Cir. 1995) (amendment to avoid foreign country exclusion by pleading act took place on high seas, rather than in Venezuelan waters).

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

b. Amendment Restarts Administrative Consideration Period. Amending a claim, e.g., by including spouse's loss of

consortium or raising the amount upwards, starts the six months period for delaying suit running over again (28 C.F.R. § 14.2(c)). Kirby v. Marsh, 624 F. Supp. 1100 (M.D. Ala. 1985) (claimed amount increased several days before suit filed—in creased amount accepted by court--new claim issue not raised).

c. Amendments in Court. Attempt to amend in court may result in requiring new and separate administrative claim if it is in fact a new claim. Executive Jet Aviation, Inc. v. U.S., 507 F.2d 508 (6th Cir. 1974). See, e.g., Richardson v. U.S., 860 F.2d 357 (9th Cir. 1988) (where amputation occurred after administrative claim filing, permissibility of amendment depends on whether amputation foreseeable). If a new claim or an increased amount, the court will generally prohibit amendment. Swackhammer v. U.S., 119 F.3d 7 (9th Cir. 1997) (amendment not permitted--SOL bars sexual assualt claim against recruiter as it accrued no later than time plaintiff was informed that recruiter was disciplined); Industrial Indemnity Co. v. U.S., 504 F. Supp. 394 (E.D. Cal. 1980) (amendment to increase amount denied); Reuter v. U.S., 534 F. Supp. 731 (W.D. Pa. 1982); Val-U Const. Co. of South Dakota v. U.S., 905 F. Supp. 728 (D.S.D. 1995) (suit limited to amount stated on SF 95, not to total of bills submitted); Reuter v. U.S., 534 F. Supp. 731 (W.D. Pa. 1982) ($342,240 reduced to $250,000, amount of administrative claim); Wiseman v. U.S., Civ. #C90-12042 (W.D. Wash. 1991) (claim paid in amount of $5,918.23 (medical bills) and $3900 property damage, despite attorney for claimant stating he would amend later, amendment to $250,000 rejected at trial); Tilton v. U.S., Civ. #C-86-20448-SW (N.D. Cal. 1990) (addition of pain and suffering claim at trial in wrongful death case not authorized); McCann v. U.S., Civ. # 3:93-CV-1690-T (N.D. Tex., June 9, 1995) (SF 95 only stated individual claims but not separate claim for survivorship as required by Texas law--adding survivorship claim at trial not permitted); Hoogeveen v. U.S., Civ. # 93-1091-Civ-J-10 (M.D. Fla., Mar. 10, 1995) (adding spouse's loss of consortium claim in court not permitted--cites McNeil v. U.S., 508 U.S. 106, 113 S.Ct. 1980 (1993)); Quiros v. U.S., Civ. #86-0202-06 (D.P.R. 1987) (same). Accord Adames Mendez v. U.S., 652 F. Supp. 356 (D.P.R. 1987); Wozniak v. U.S., 701 F. Supp. 259 (D. Mass 1988). Can be amended upward for injuries later discovered and substantiated at trial. Foskey v. U.S., 490 F. Supp. 1047 (D.R.I. 1979); U.S. v. Alexander, 238 F.2d 314 (5th Cir. 1956); Husovsky v. U.S., 590 F.2d 944 (D.C. Cir. 1978); Joyce v. U.S., 329 F. Supp. 1242 (W.D. Pa. 1971); Campbell v. U.S., 534 F. Supp. 762 (D. Haw. 1982). See also Michels v. U.S., 31 F.3d 686 (8th Cir. 1994) (sustaining trial judge's increase in claimed amount due to increased injury).

d. Presentation of Different Basis for Claim at Trial. The addition of different basis or allegations may be barred at trial. Provancial, 454 F.2d 72 (8th Cir. 1972). See, e.g., Parra Vda. de Mirabal v. U.S., 675 F. Supp. 50 (D.P.R. 1987) (attempt to add count of suicide attempt at trial precluded); Rice v. U.S., 1997 WL 15136 (D.N.M.) (adding count at trial re U.S. attorney disclosing tax information during press conference denied under McNeil); Webb v. U.S., Civ. # SA-95-CA-0186 (W.D. Tex., Oct. 1, 1996) (failure to allege improper psychiatric diagnosis in administrative claim precludes that allegations at trial); Bembenista v. U.S., 866 F.2d 493 (D.D.C. 1988) (attempt to add count of medical negligence at trial for assault of patient precluded); Clemens v. Aluminum Co. of America, 726 F. Supp. 273 (E.D. Cal. 1989) (adding PI count at trial to PD claim not permitted); Logan v. U.S., Civ. #90-00210 (D. Haw. 1992) (adding different cause of action for starting quarters fire barred at trial); Myers v. U.S., 805 F. Supp. 90 (D.N.H. 1992) (upward amendment of amount claimed is not permitted at trial--based on Reilly v. U.S., 863 F.2d 149 (1st Cir. 1988)); Wardsworth v. U.S., 721 F.2d 503 (5th Cir. 1983), cert. denied, 469 U.S. 818 (1984) (required to allege medical malpractice in administrative claim); Wright v. U.S., 816 F. Supp. 415 (E.D. Va. 1993) (changing date of injury not permitted at trial); Portillo v. U.S., Civ. # 93-8275 (5th Cir., June 30, 1994) (adding count of negligent administration of anesthesia at trial barred in suit for urinary tract infection based on failure to catherize). Jones v. U.S., Civ. #1:95-CV-2352-JTC (N.D. Ga., 20 May 1996) (allegation of assault by sexual harassment does not include allegation of negligent supervision); Domingos v. U.S., 883 F. Supp. 16 (E.D.N.C. 1993) (adding hepatitis count at trial not permitted in AIDS claim case). Moreover, a claim which does not state theory of recovery, e.g., negligent failure to diagnose or subsequent malpractice, precludes both from being raised at trial. Rooney v. U.S., 634 F.2d 1238 (9th Cir. 1980). But see Williams v. U.S., 922 F. Supp. 357 (D.D.C. 1996) (broad allegation of medical malpractice sufficient to meet filing requirement); Rutherford v. U.S., Civ. # 81-0039-H (S.D. Ala. 1982) (plaintiff permitted to add theory of case at trial); Rise v. U.S., 630 F.2d 1068 (5th Cir. 1980) (same). However, some courts have held that a broad variety of allegations may be added. Avila v. INS, 731 F.2d 616 (9th Cir. 1984); Broudy v. U.S., 722 F.2d 566 (9th Cir. 1983). See also Lopez v. U.S., 758 F.2d 806 (1st Cir. 1985) (allowed to add psychiatric injury allegation at trial, even though not spelled out on SF 95, but ad damnum reduced); Geibel v. U.S., 667 F. Supp. 215 (W.D. Pa. 1987) (permits addition of emotional trauma count at trial, then dismissed as no prior case law and no injury).

Amendment will be allowed where new claim is sufficiently embraced in original claim and agency has enough notice to investigate. Johnson v. U.S., 788 F.2d 845 (2d Cir. 1986) (administrative claim provided Postal Service sufficient notice of negligent supervision allegation); Brewer v. U.S., 864 F. Supp. 741 (N.D. Ill. 1994) (addition of count of willful and wanton permitted as count was reasonably embraced in original claim for death by asphyxiation). For example, adding informed consent count in medical malpractice trial does not constitute a new claim. Mellor v. U.S., 484 F. Supp. 641 (D. Utah 1978). See also Franz v. U.S., 29 F.3d 222 (5th Cir. 1994) (adding informed consent count at trial permitted as DVA has sufficient notice to investigate all aspects of care during administrative phase). However, the standard is not so broad as to encompass all claims. Bush v. U.S., 703 F.2d 491 (11th Cir. 1983) (plaintiff allowed to add poor post-op care, but not informed consent, as basis for suit at trial). If the Government fails to object at trial to evidence concerning allegation not made on administrative claim, it may not object to amendment. Boyce v. U.S., 942 F. Supp. 1220 (E.D. Mo. 1996). Butler v. U.S., 1998 WL 314317 (10th Cir. (Okla.)) Count of lack of informed consent cannot be raised in suit for negligent surgery as not on SF 95. Dynamic Image Technologies, Inc. v. U.S., 18 F. Supp. 2d 146 (D.P.R. 1998), permits addition of counts of infliction of emotional distress and negligent supervision at trial even though not stated in SF 95 - cites Santiago-Ramirez v. Sec'y of Dep't of Defense, 984 F.2d 16 (1st Cir. 1993) as authority. Munsell v. U.S., 14 F. Supp. 2d 214 (D.R.I. 1998), where USPS is alleged to have a snow removal plan, cannot add count at trial that hole was alongside paved surface at entrance. Alvarez v. U.S., 1999 U.S. Dist. LEXIS 11092 (S.D.N.Y.). Claimant's administrative claim of medical malpractice is not limited to certain dates and, therefore, not expanded at trial. Birchfield v. U.S., 168 F.3d 1252 (11th Cir. 1999), claim alleging osteoporosis caused by overadministration of prednisone does not preclude raising failure to timely diagnose osteoporosis for first time in court.

e. Ad Damnum Amendments at Trial. Ad damnum may be raised in amount at trial only if there is newly discovered evidence not reasonably available previously or on proof of intervening facts (28 U.S.C.§ 2675(b)). See Del Valle Rivera v. U.S., 626 F. Supp. 347 (D.P.R. 1986) (ad damnum of $500,000 reduced to $200,000--amount of administrative claim); Robinson v. U.S., 746 F. Supp. 1059 (D. Kan. 1990) (held to amount on SF 95, even though discovered later surgery may be needed); Colon v. U.S., 877 F. Supp. 57 (D.P.R. 1995) (court values injuries at $125,000, but limits

award to $50,000 amount claimed); Hogan v. U.S., 86 F.3d 1162 (table), 1996 WL 280061 (9th Cir. 1996) (damages limited to $50,000 claimed administratively and not amount raised at trial, since plaintiff did not seek additional treatment until 5 years after accident); McFarlane v. U.S., 684 F. Supp. 780 (E.D.N.Y. 1988) (cannot raise ad damnum where increase based on medical diagnosis made prior to original claim). But see Lane v. U.S., 1996 WL 426312 (S.D.N.Y.) (amendment of ad damnum from $1 million to $5 million permitted as results of future surgery unknown even if claimant knew he needed surgery at time of filing administrative claim). Amendment is allowed when evidence not reasonably available. Spivey v. U.S., 912 F.2d 80 (4th Cir. 1990) (claimant's tardive dyskensia could not have been discovered prior to filing--upward amendment permitted).

(1) Offers by Claimant's During Negotiation. Claimant offers made in administrative negotiations in an amount lesser than that stated on the claim form are not considered to be amendments downward limiting the amount of any subsequent suit.

(2) SF95 Demand Not Realistic. Since amendments upward at trial are sometimes difficult to obtain, the original administrative demand cannot and should not be a realistic appraisal. Kielwien v. U.S., 540 F.2d 676 (4th Cir. 1976), cert. denied, 429 U.S. 979 (1976). See, e.g., Lowry v. U.S., 958 F. Supp. 704 (D. Mass. 1997) (in back injury case, denying motion to increase ad damnum at trial–-citing numerous cases and stating trend is for strict interpretation); Sandoval v. U.S., Civ. #C-80-1545 (N.D. Cal. 1981) (increase in ad damnum denied where claimant failed to get ophthalmologist report prior to trial); Ordahl v. U.S., 601 F. Supp. 96 (D. Mont. 1985) (recovery reduced to amount stated in claim); Low v. U.S., 795 F.2d 466 (5th Cir. 1986) (admin. claim filed for $1,275,000, requires judgment of $3,500,000 to be reduced to amount of claim); Martinez v. U.S., 780 F.2d 525 (5th Cir. 1986) (limited at trial to amount on claim form); Schubach v. U.S., 657 F. Supp. 348 (D. Me. 1987) (limited to amount on claim form even though claimant was unaware he could claim for pain and suffering); Vice v. U.S., 861 F. Supp. 38 (S.D. Tex. 1994) (where claimant knew he was injured shortly after the accident, but did not seek treatment for 3 months, ad damnum cannot be increased at trial). Upward amendment of amount permitted when unforeseeable additional impairments or medical treatments occur after filing of claim. Harrison v. U.S., 662 F. Supp. 1175 (W.D. Tenn. 1987) (amendment from $300,000 to $1,000,000 permitted at trial as

additional impairment from swine flu later discovered); Allgeier v. U.S., 909 F.2d 869 (6th Cir. 1990) (upward amendment permitted at trial, since need for second surgery not known when SF 95 filed); Cole v. U.S., 861 F.2d 1261 (11th Cir. 1988) (awarded $200,000 more than claimed as injuries were more serious than originally believed). See also Gallimore v. U.S., 530 F. Supp. 136 (E.D. Pa. 1982) (raising of ad damnum permitted due to unpredictable change in long standing precedent controlling damages); McDonald v. U.S., 555 F. Supp. 935 (M.D. Pa. 1983) (increased at trial from $1 million to $3.97 million). Accord Campbell v. U.S., 534 F. Supp. 762 (D. Haw. 1982); O'Rourke v. Eastern Air Lines Inc., 730 F.2d 842 (2d Cir. 1984); Schwartz v. U.S., 446 F.2d 1380 (3d Cir. 1971). But see Colin v. U.S., 324 F. Supp. 121 (W.D. Mo. 1970).

(3) Derivative Claims. Derivative claims should be filed and stated in amount separately to avoid ad damnum limitation problems at trial, since it lessens amount recoverable by the injured party. Mudlo v. U.S., 423 F. Supp. 1373 (W.D. Pa. 1976); Heaton v. U.S., 383 F. Supp. 589 (S.D.N.Y. 1974); Collazo v. U.S., 372 F. Supp. 61 (D.P.R. 1973); Knoff v. U.S., 74 F.R.D. 555 (W.D. Pa. 1977). See also Davis v. Marsh, 807 F.2d 908 (11th Cir. 1987) (administrative claim named two children of decedent and $100,000, three additional children added at trial, but sum limited to $100,000 total); Dupont v. U.S., 980 F. Supp. 192 (S.D. W. Va. 1997) (husband's claim for loss of consortium is separate and distinctive and can not be raised at trial in absence of filing an administrative claim); Rode v. U.S., 812 F. Supp. 45 (M.D. Pa. 1992) (failure to include spouse in administrative claim precludes addition of spouse on filing of suit); Klimaszewski v. U.S., 1997 WL 177792 (E.D. Pa.) (loss of consortium claim not permitted at trial, even though husband noted on SF 95 that he was married); McDevitt v. U.S. Postal Service, 963 F. Supp. 482 (E.D. Pa. 1997) (loss of consortium claim not permitted at trial as husband was listed on SF95 only as owner of car). But see Estate of Sullivan v. U.S., 777 F. Supp. 695 (N.D. Ind. 1991) (widow fulfilled jurisdictional requirements for loss of consortium by filing wrongful death administrative claim); Willis v. U.S., 1997 WL 11986 (N.D. Ill) (loss of consortium claim not permitted based on wording of SF95, but permitted as part of wrongful death damages).

C. Where Must the Claim be Filed?

1. Appropriate Agency. 28 U.S.C. §§ 2401(b), 2675(c) require that claim be filed with appropriate agency. Hart v. Department of Labor ex rel. U.S., 116 F.3d 1338 (10th Cir. 1997) (claim without sum certain filed with DOJ and forwarded to DOL--refiling claim with sum certain with U.S. Attorney on last day is not properly filed); Farlaino v. U.S., 108 F.3d 1388 (table), 1997 WL 139768 (10th Cir. 1997) (neither DOJ nor U.S. Attorney appropriate agency for filing claim); Garrett v. U.S., 640 F.2d 24 (6th Cir. 1981) (federal court not appropriate agency). Former version of regulation (28 C.F.R. §§ 14.2) allowed plaintiff to file claim with any Federal agency. Stewart v. U.S., 458 F. Supp. 871 (S.D. Ohio 1978); Barnson v. U.S., 531 F. Supp. 614 (D. Utah 1982). Statute of limitations is tolled only upon receipt by appropriate agency, not mailing. Lotriionte v. U.S., 560 F. Supp. 41 (S.D.N.Y. 1983); Crack v. U.S., 694 F. Supp. 1244 (E.D. Va. 1988). See also Johnson v. U.S., 906 F. Supp. 1100 (S.D. W. Va. 1995) (claim received by U.S. Attorney one day before SOL ran--sent to USDA named on SF 95 where received five days later--claim not timely filed). Accord Bailey v. U.S., 642 F.2d 344 (9th Cir. 1981). 28 C.F.R. § 14(b) (2) requires that if inappropriate agency receives claim, it must forward it to appropriate agency, and if "wrong" agency fails to do so, SOL is tolled. Greene v. U.S., 872 F.2d 236 (8th Cir. 1989); Bukala v. U.S., 854 F.2d 201 (7th Cir. 1988), further proceedings, 727 F. Supp. 382 (N.D. Ill. 1989). Oquendo-Ayala v. U.S., 30 F. Supp. 2d 193 (D.P.R. 1998), claim for false arrest by DEA filed with FBI and forwarded to DEA after SOL has run is not timely filed.

a. Legislative and Judicial Branches. "Appropriate agency" includes Legislative and Judicial Branches, but only when latter is performing non-judicial function. McNamara v. U.S., 199 F. Supp. 879 (D.D.C. 1961); 26 Comp. Gen. 891 (1947); McCrary v. U.S., 235 F. Supp. 33 (E.D. Tenn. 1964); U.S. v. LePatourel, 571 F.2d 405 (8th Cir. 1978), on remand, 463 F. Supp. 264 (D. Neb. 1978), aff'd, 593 F.2d 827 (8th Cir. 1978); Cromelin v. U.S., 177 F.2d 275 (5th Cir. 1949), cert. denied, 339 U.S. 944 (1950); Foster v. MacBride, 521 F.2d 1304 (9th Cir. 1975); Tomalewski v. U.S., 493 F. Supp. 673 (W.D. Pa. 1980). The term excludes the Federal Reserve Bank. Lewis v. U.S., 680 F.2d 68 (9th Cir. 1982).

b. Mailbox Not Appropriate Agency. "Appropriate agency" does not include placing claim in U.S. post office facility, i.e., mail box. Steele v. U.S., 390 F. Supp. 1109 (S.D. Cal. 1975); Comm. Underwriters v. Dobbs, Civ. Act #390-19 (E.D. Mich. 1973). See also Bellecourt v. U.S., 994 F.2d 427 (8th Cir. 1993) (claim placed in mail, but not received--not properly filed); Seitu v. Rutherford, 1997 WL 122919 (D.D.C.) (copy of SF95 and unsigned return receipt card produced by

plaintiff is insufficient to prove receipt). Claim improperly filed when delivered to Federal Express, who failed to deliver claim to agency. Flaherty v. U.S., 1996 WL 197508 (N.D. Ill., 19 April 1996). Payne v. U.S., __ F. Supp. __, 1998 WL 384751 (N.D.N.Y.) Proof of mailing is insufficient in face of affidavit of nonreceipt. Payne v. U.S., 10 F. Supp. 2d 203 (N.D.N.Y. 1998), affadavit of nonreceipt by Government employee is sufficient to overcome presumption that claim was mailed and received. Tapia-Ortiz v. U.S., F.3d, 1999 WL 166329 (2nd Civ) delivery of claim against DEA by prisoner to prison officials for mailing to DEA tolls SOL.

c. Counterclaim Excluded. Does not include counterclaim except as to third party suit under Federal Rules (28 U.S.C. § 2675(a)). U.S. v. Chatham, 415 F. Supp. 1214 (N.D. Ga. 1976); U.S. v. Levering, 446 F. Supp. 977 (D. Del. 1978). Where United States dropped as third party, original plaintiff must bring or have brought administrative claim in timely manner. West v. U.S., 592 F.2d 487 (8th Cir. 1979).

2. Multi-Agency Claim. Where more than one Federal agency is involved, each should be notified, plus informing each of the other's role (28 C.F.R. § 14.2).

a. Problems From Failure to Notify. Failure to so notify may result in one agency denying claim while administrative negotiations are proceeding with another.

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

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

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

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

4. Where Within Agency. Need not be agency claims office. Locke v. U.S., 351 F. Supp. 185 (D. Haw. 1972). Timely filing may be obtained by filing with any “appropriate agency” office, e.g., recruiting service, ROTC unit, good Samaritan Federal physician

when he brings patient back to consciousness. See, e.g., Frey v. Woodard, 481 F. Supp. 1152 (E.D. Pa. 1979) (recruiting office), rev'd on other grounds, 748 F.2d 173 (3rd Cir. 1984).

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

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

a. Does Not Include Saturdays or Holidays (F.R.C.P.6(a)). Frey v. Woodard, 748 F.2d 173 (3d Cir. 1984) (fact that recruiting office open on Saturday was irrelevant); Maahs v. U.S., 840 F.2d 863 (11th Cir. 1988) (where claim accrues on 24 January, SOL starts on 25 January and ends on Monday, since two years ends on Saturday). See also Prince v. U.S., 185 F. Supp. 269 (E.D. Wis. 1960); Rodriguez v. U.S., 382 F. Supp. 1 (D.P.R. 1974); Kirby v. U.S., 479 F. Supp. 863 (D.S.C. 1979). Also does not include days when federal offices are closed. In re Swine Flu Immunization Products Liability Litigation, 880 F.2d 1439 (D.C. Cir. 1989) (SOL extended one day when Federal offices closed by snow). Adams v. U.S., 173 F.3d 1339 (11th Cir. 1999), mailbox rule is construed in case of federal prisoner to mean deliver to prison official for mailing tolls SOL.

b. Accrual date Determined by Federal Law. Vega-Velez v. U.S., 800 F.2d 288 (1st Cir. 1986), aff'g, 382 F. Supp.1 (D.P.R. 1986) (local law requires employee to exhaust worker's compensation remedy before filing suit, however, SOL starts running at time of injury). The accrual date must be determined individually, even though large number of cases may be involved. Allen v. U.S., 527 F. Supp. 476 (D. Utah 1981) (1,000 plaintiffs exposed to radiation from nuclear testing). Weissmann v. USPS, 1998 454790 (4th Cir.), in slip-and-fall claim, SOL not tolled while victim seeks and recovers state worker's compensation benefits.

c. Is Limitation Jurisdictional or Includes Equitable Tolling? Formerly, courts agreed that the two year filing requirement from the accrual of the claim was jurisdictional and not subject to waiver. Casias v. U.S., 532 F.2d 1339 (10th Cir. 1976); Caton v. U.S., 495 F.2d 635 (9th Cir. 1974); Mann v. U.S., 399 F.2d 672 (9th Cir. 1968); United Missouri Bank South v. U.S., 423 F. Supp. 571 (W.D. Mo. 1976); Pugh v. FmHA, 846 F. Supp. 60 (M.D. Fla. 1994, aff'd without opinion, 74 F.3d 1251 (11th Cir. 1995) (table); Bailey v. U.S., 642 F.2d 344 (9th Cir. 1981). Since the U.S.

Supreme Court's ruling in Irwin v. Veterans Administration, 498 U.S. 89, 111 S.Ct. 453 (1990) and U.S. v. Brockcamp, ___ U.S. ___, 117 S.Ct. 849 (1997), courts have become divided on whether the requirement is jurisdictional or is not jurisdictional, because if the latter, it is subject to equitable tolling. Cases maintaining the requirement is subject matter jurisdictional. See, e.g., Winters v. U.S., 953 F.2d 1392 (table), 1992 WL 11317 (10th Cir. 1992). See also Willis v. U.S., 879 F. Supp. 889 (C.D. Ill. 1994) (rejects view that FTCA SOL is not jurisdictional and permits factual hearing on accrual date of medical malpractice claims--excellent list of citations on equitable tolling and jurisdictional nature of SOL), aff'd, 65 F.3d 171 (7th Cir. 1995) (table); Burns v. U.S. Dept. of Justice, 864 F. Supp. 80 (N. D. Ill. 1994) (ignores existence of doctrine of equitable tolling and cites old 7th Circuit cases stating that FTCA SOL is jurisdictional). Cf. U.S. v. Brockamp, ___ U.S. ___, 117 S.Ct. 849 (1997) (claim for tax refund under section 6511 of Internal Revenue Code filed late due to drunkenness or senility is not subject to equitable tolling due to number of times Section 6511 references 2 year filing period); Raziano v. U.S., 999 F.2d 1539 (11th Cir. 1993) (equitable tolling under SIAA not permitted where negotiation with Coast Guard ran past 2-year filing limit); Ferreiro v. U.S., 934 F. Supp. 1375(S.D. Fla. 1996) (equitable tolling not permitted in Public Vessels Act case where plaintiff missed the SOL where Government allegedly misled plaintiff by negotiating under FTCA). Other courts have held that equitable tolling applies in FTCA cases. See, e.g., Glanner v. U.S. Dept. of Veterans Affairs, 30 F.3d 696 (6th Cir. 1994) (claimant requested Disabled American Veterans forms to file negligence claim while still a patient--wrong forms are given--SOL is equitably tolled); Schmidt v. U.S., 933 F.2d 639 (8th Cir. 1991) (FTCA two year requirement not jurisdictional under Irwin and thus subject to equitable tolling); Alvarez-Machain v. U. S., 96 F.3d 1246 (9th Cir. 1996) (equitable tolling applies to Mexican kidnapped by DEA hirelings in Mexico and jailed for two years in U.S.--claim filed three years after kidnapping); Bartus v. U.S., 930 F. Supp. 679 (D. Mass. 1996) (claimant files wrong form based on instructions of VA counselor--VA acknowledges receipt, but does not inform claimant that he used wrong form--SOL equitably tolled based on Glanner v. U.S., 30 F.3d 697 (6th Cir. 1994)); Diltz v. U.S., 771 F. Supp. 94 (D. Del. 1991) (equitable tolling allowed--wrongfully placed stitch during eye surgery). See also Beggerly v. U.S., 114 F.3d 484 (5th Cir. 1997) (equitable tolling permitted under Quiet Title Act where Department of the Interior mislead plaintiff re valid title to patent land). The First Circuit's decision in Kelley v. N.L.R.B., 79 F.3d 1238 (1st Cir. 1996) discusses

five relevant factors in assessing equitable tolling claims, which are: (1) lack of actual notice of the filing requirements; (2) lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement. The First Circuit's Kelley decision also notes that the cases in which equitable tolling is most often invoked are where affirmative misconduct by the party against whom it is employed is present, e.g., the U.S. Many courts have held that even if equitable tolling was applicable, the plaintiff failed to show its entitlement to relief from the two year time bar. See, e.g., Hoosier Bancorp of Indiana Inc. v. Rasmussen, 90 F.3d 180 (7th Cir. 1996) (using 6 month paragraph in denying Bivens claim does not extend SOL for constitutional suit and does not constitute equitable tolling); Johnson v. U.S., 78 F.3d 579 (4th Cir.1996) (future potential of U.S. to become involved in suit against W. Va. National Guard is not basis for equitable tolling--National Guard member never requested representation); Lambert v. U.S., 44 F.3d 296 (5th Cir. 1995) (suit dismissed for failure to properly serve--suit refiled same day, but dismissed again for failure to comply with 6-months SOL--doctrine of equitable tolling not applicable as adequate remedy under federal rules); Justice v. U.S., 6 F.3d 1474 (11th Cir. 1993) (equitable tolling not permitted in second VA suit where first suit, though timely filed, was dismissed without prejudice due to lack of due diligence); First Alabama Bank v. U.S., 961 F.2d 1226 (11th Cir. 1993) (no equitable tolling, since claimant did not rely on IRS agent's misrepresentation concerning need to file claim); Sule v. The Warden, MCC New York, 1995 WL 115694 (S.D.N.Y.) (equitable tolling does not apply to suit of prisoner for overcrowded conditions, since SOL runs from date of injury, not from date of discovery of cause of action); McKewin v. U.S., Civ. 91-131-CIV-5-F (E.D.N.C. 1992) (claim for brain damage at 1982 birth filed in 1990--parents know of cause in 1987--no basis for equitable tolling); Muth v. U.S., 1 F.3d 246 (4th Cir. 1993) (no equitable tolling for claim filed in 1991, where claimant wrote COE before 1988 acknowledging contamination of land). Cf. Oropallo v. U.S., 994 F.2d 25 (1st Cir. 1993) (in taxpayer refund suit filed more than 3 years after tax paid, holds that no equitable tolling can be applied to 3 year limit based on belief that Irwin v. Veterans Administration, 498 U.S. 89 (1990) was modified by Lambf, Pleva, Lipkind, Prupis & Pettigrew v. Gilbertson, 501 U.S. 350, 111 S.Ct. 2773 (1991), holding that equitable tolling could not be invoked where claim was barred prior to Irwin); Million v. Frank, 47 F.3d 385 (10th Cir. 1995) (equitable tolling not permitted in Title VII action where plaintiff fails to read

mailed denial notice accepted by spouse). U.S. v. Beggerly, 524 U.S. 38 (1998), no equitable tolling where petitioner finds key document in 1991 in Quiet Title Act suit closed. Jones-Booker v. U.S., 16 F. Supp. 2d 52 (D. Mass. 1998), where federal elmployee is unable to timely file a FECA appeal due to his inability to communicate as his property interest is protected by due process. Perez v. U.S., 167 F.3d 913 (5th Cir. 1999), equitable tolling granted where Texas NG fails to send SF 95 in response to attorney's letter demanding redress for injury and fails to forward letter to Army Claims. Berlin v. U.S., 9 F.2d 648 (S.D. W. Va. 1997), Government claims paralegal tells claimant's attorney he can't file suit until 6 months expires does not provide basis for equitable tolling where SF 95 contains no sum certain; Kieffer v. Vilk, 8 F. Supp. 2d 387 (D.N.Y. 1998), letter to Postal Inspection Service did not contain sum certain. Neither state nor federal suit corrects the deficiency-note state suit filed before two years but improperly removed. Stanfill v. U.S., 43 F. Supp. 2d 1999 WL 183766 (M.D. Ala.), equitable tolling permited where plaintiff takes voluntary dismissal to file FECA claim at urging of US and the FECA proceedings are then held up by CPO. Parker denial issued prior to FECA filing and suit refiled after six months ran; Barr v. U.S., 1999 WL 314634 (10th Cir. (Okla.)), equitable tolling not permitted where suit is refiled more than six months from date of decree). St. John v. U.S., 1999 U.S. Dist. LEXIS 10631 (S.D. Fla. 24 June 99), where plaintiff files claim 12 years after he was told his bladder was injured during colon cancer surgery, equitable tolling cannot be based on fact that his ureter, not his bladder, was injured.

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

3. Disability of Claimant. Disability of claimant does not negate timely filing requirement. Mayo v. U.S., 407 F. Supp. 1352 (E.D. Va. 1976); Dreakward v. Chestnut Hill Hospital, 427 F. Supp. 977 (E.D. Pa. 1977).

a. Infancy. This includes infancy. Pittman v. U.S., 341 F.2d 739 (9th Cir. 1965), cert. denied, 382 U.S. 941 (1965); Zavala v. U.S., 876 F.2d 780 (9th Cir. 1989) (following Pittman); Smith v. U.S., 588 F.2d 1209 (8th Cir. 1978); Simon v. U.S., 244 F.2d 703 (5th Cir. 1957); Childers v. U.S., 316 F. Supp. 539 (S.D. Tex. 1970), aff'd, 442 F.2d 1299 (5th Cir. 1971); Mann v. U.S., 399 F. 2d 672 (9th Cir. 1968); U.S. v. Glenn, 231 F.2d 884 (9th Cir. 1956), cert. denied, 352 U.S.

926 (1956); Muldez v. U.S., 326 F. Supp. 692 (E.D. Va. 1971); Harper v. U.S., 239 F. Supp. 645 (D. Md. 1965); Morton v. U.S., 185 F. Supp. 211 (E.D. Ill. 1960); Morgan v. U.S., 143 F. Supp. 580 (D.N.J. 1956); Whalen v. U.S., 107 F. Supp. 112 (E.D. Pa. 1952); Fleury v. U.S., Civ. #379-47 (D. Vt. 1981). See also Landreth By and Through Ore v. U.S., 850 F.2d 532 (9th Cir. 1988) (custodial mother must timely file for child, even though her negligence contributed to injury). But see Portis v. U.S., 483 F.2d 670 (4th Cir. 1973) (4th circuit declined to follow Pittman). Cf. Reo v. U.S., 98 F.3d 73 (3rd Cir. 1996) (administrative claim settled for $2500 in 1974 by USPS involving 3 year old child is not binding, since not approved by N.J. court under N.J. law--action by child at age 19 is valid, since SOL on six month filing requirement from denial of claim never began to run).

b. Incompetency. This also includes incompetency. Casias v. U.S., 532 F.2d 1339 (10th Cir. 1976); Accardi v. U.S., 435 F.2d 1239 (3rd Cir. 1970); Hoch v. Carter, 242 F. Supp. 863 (S.D.N.Y. 1965); Jackson v. U.S., 234 F. Supp. 586 (D.S.C. 1964). Contra Washington v. U.S., 769 F.2d 1436 (9th Cir. 1985) (14 years in coma tolls SOL where no guardian appointed); Clifford v. U.S., 738 F.2d 977 (8th Cir. 1984) (if injured party in coma, SOL begins to run when guardian appointed); Zeidler v. U.S., 601 F.2d 527 (10th Cir. 1979); Pardy v. U.S., 575 F. Supp. 1078 (S.D. Ill. 1983) (period of care excluded); Dundon v. U.S., 559 F. Supp. 469 (E.D.N.Y. 1983). Cf. U.S. v. Brockamp, ___ U.S. ___, 117 S.Ct. 849 (1997) (same notion, but in tax refund context). Jones-Booker v. U.S., 16 F. Supp. 2d 52 (D. Mass. 1998) extends to inability to communicate and calls it equitable tolling in regard to FECA.

c. Alternative Remedies. Pursuit of alternative remedies. Gould v. U.S. Dept. HHS, 884 F.2d 785 (4th Cir. 1989) (where widow pursues state remedy, SOL is not tolled); Geyen v. Marsh, 587 F. Supp. 539 (W.D. La. 1984) (pursuit of administrative remedies against Federal agency does not toll SOL); Group Health Inc. v. U.S., 662 F. Supp. 753 (S.D.N.Y. 1987) (pursuit of independent admin. remedy does not toll SOL). Accord Winston Bros. Co. v. U.S., 371 F. Supp. 130 (D. Minn. 1973). Cf. Barnhart v. U.S., 884 F.2d 295 (7th Cir. 1989) (SOL not extended by fear of losing VA benefits if claim filed). Bailey v. West, 160 P.3d (Fed. Cir. 1998), where VA employee failed to file veteran's appeal despite agreeing to do so--time for filing is equitably tolled.

4. Medical Malpractice.

a. Discovery Rule. In medical malpractice, accrual occurs when the claimant discovered or by reasonable diligence should have discovered, the injury and its course. Nemmers v. U.S., 795 F.2d 628 (7th Cir. 1986) (where child born three weeks late, with difficult labor requiring C-section, test depends not on individual plaintiff's personal knowledge and reactions, but rather on reactions of objective reasonable man); Wartell v. U.S., 124 F.3d 315 (table), 1997 WL 599960 (9th Cir. 1997) (therapy relationship ended when plaintiff transferred to Arizonia in 1981—sexual relationship started thereafter—claimant sought care in 1986—claim filed in 1986—claim filed in 1993 is time barred); Stewart v. U.S., 713 F. Supp. 833 (E.D. Pa 1989) (claims for malpractice resulting in undescended testicle barred, but claim based on sterility resulting from undescended testicle allowed to continue because plaintiff not informed of this effect of undescended testicle); Thompson v. U.S., 642 F. Supp. 762 (N.D. Ill. 1986) (SOL starts to run in survival action when surviving spouse receives autopsy report explaining cause of death); Wehrman v. U.S., 648 F. Supp. 386 (D. Minn. 1986) (plaintiff treated by VA from 1962-1985, but filed claim in 1985--barred by lack of reasonable diligence in investigating legal remedies). See also Smith v. American Red Cross, 876 F. Supp. 64 (E.D. Pa. 1994) (accrual date is date HIV+ diagnosed, not when developed into AIDS as 95% of HIV patients develop AIDS); Stone-Pigott v. G.D. Searle & Co., 660 F. Supp. 366 (D. Md. 1987) (discovery rule applied in IUD cases). Henrich v. Sweet, 44 F. Supp. 2d 408 (D. Mass 1999). Where patients died in early 1960's following concentrated radiation for brain cancer, claim accrues in 1995 when Congressional report published - cites Drazan v. U.S.; Orlikow v. U.S., 682 F. Supp. 77 (DDC 1988), Glickman v. U.S., 150 F.3d 112 (2d Cir. 1996); Barrett v. U.S., 689 F.2d 324 (2d Cir. 1982)

b. Non-Medical Malpractice Cases. More limited application in other types of cases. Peck v. U.S., 470 F. Supp. 1003 (S.D.N.Y. 1979). Murrell v. U.S., 1998 WL 173191 (M.D. Fla.). VA denail of veteran's claim where denial notice stated "NSC PTE" {Not service connected-prior to enlistment} start SOL running in case where FTCA claim filed in 1996.

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

a. Continuous Treatment. Tyminiski v. U.S., 481 F.2d 257 (3rd Cir. 1973); Ashley v. U.S., 413 F.2d 490 (9th Cir. 1969); Kossick v. U.S., 330 F.2d 933 (2nd Cir. 1964); Rahn v. U.S., 222 F. Supp. 775 (S.D. Ga. 1963). See also Wehrman v. U.S., 830 F.2d 1480 (8th Cir. 1987) (doctrine applied even

though different VA physicians failed to advise of surgical option over 22 year period); Ulrich v. VA, 853 F.2d 1078 (2d Cir. 1988) (veteran who jumped out of hospital window on 7 May 1976--discharged from hospital 22 July 1976--files administrative claim 18 July 1978--not SOL barred); McDonald v. U.S., 843 F.2d 247 (6th Cir. 1988) (surgeon's post-op assurances that healing may take 3-5 years tolls statute); Tolliver v. U.S., 831 F. Supp. 558 (S.D. W.Va. 1993) (continuous treatment doctrine applies where original diagnosis reversed and treatment continued); Santana v. U.S., 693 F. Supp. 1309 (D.P.R. 1988) (SOL tolled until last date of treatment of foot); Detor v. U.S., 1997 WL 627554 (N.D.N.Y.) (diabetic patient of VA suffers retinopathy and eventually becomes blind—claim filed in 1995—court refuses to rule on SOL as not shown when patient knew failure to treat caused injury—continuous treatmnent doctorine applied); Moreno v. U.S., Civ. #86-0555 (D. Haw. 1987) (brain damaged at birth in 1977--claim filed in 1983--child still under Army care--continuing treatment doctrine applied); Todd v. U.S., 570 F. Supp. 670 (D.S.C. 1983) (holds continuous treatment as still good law cites Tyminski). But see Lynch v. U.S., 121 F.3d 708 (table), 1997 WL 436560 (6th Cir. 1997) (suit filed more than two years after pschiatric treatment in VA clinic is time barred even though patient later resumed treatment with VA); Otto v. NIH, 815 F.2d 985 (4th Cir. 1987) (injury occurs after all treatment options offered fail--continuous treatment doctrine does not apply to succeeding Government physicians); Espinoza v. U.S., 715 F. Supp. 207 (N.D. Ill. 1989) (receiving treatment elsewhere and had prior claim--doctrine n/a); Lazarini v. U.S., 898 F. Supp. 40 (D.P.R. 1995) (veterans claim for maltreatment of hand over 40-year period barred by SOL--each incident separate, not continuing tort).

b. Credible Explanation. Sanders v. U.S. Department of the Army Surgeon General, 551 F.2d 458 (D.C. Cir. 1977); Reilly v. U.S., 513 F.2d 147 (8th Cir. 1975); Jordan v. U.S., 503 F.2d 620 (6th Cir. 1974); Brown v. U.S., 353 F.2d 578 (9th Cir. 1965). See also Gabbard v. U.S., 892 F.2d 82 (table), 1989 WL 150592 (9th Cir. 1989) (plaintiff told injury at birth may have been caused by pressure on umbilical cord-plaintiff need not seek another explanation).

c. Undetermined Damages. Bridgeford v. U.S., 550 F.2d 978 (4th Cir. 1977); Portis v. U.S., 483 F.2d 670 (4th Cir. 1973); Toal v. U.S., 438 F.2d 222 (2nd Cir. 1971); Ashley v. U.S., 413 F.2d 490 (9th Cir. 1969).

d. Blameless Ignorance. Based on Urie v. Thompson, 337 U.S. 163 (1949), an FELA case. See also Exnicious v. U.S., 563

F.2d 418 (10th Cir. 1977); Bridgeford v. U.S., 550 F.2d 978 (4th Cir. 1977); Portis v. U.S., 483 F.2d 670 (4th Cir. 1973); Quinton v. U.S., 304 F.2d 234 (5th Cir. 1962); Hammond v. U.S., 388 F. Supp. 938 (E.D.N.Y. 1975). But see Gonzales-Bernal v. U.S., 907 F.2d 246 (1st Cir. 1990) (SOL not revived when Customs' Agents convicted of murder, since victim last seen in their company when he disappeared). Lopez v. U.S., 998 F. Supp. 1239 (D.N.M. 1988) SOL runs when HIS psychologist propositions teenage patients and uses liquor and marijuana with then, not when diagnosed with PTSD.

e. Splitting a Cause of Action. Exnicious v. U.S., 563 F.2d 418 (10th Cir. 1977); Bridgeford v. U.S., 550 F.2d 978 (4th Cir. 1977); Portis v. U.S., 483 F.2d 670 (4th Cir. 1973).

f. Fraudulent Concealment. Fraudulent concealment may toll the statute of limitations. Hohri v. U.S., 782 F.2d 227 (D.C. Cir. 1986) (WWII West Coast evacuation of Japanese American--fraudulent concealment applied); Gess v. U.S., 909 F. Supp. 1426 (M.D. Ala. 1995) (failure to disclose full extent of possible injury from unauthorized injection of lidocaine by unknown person to a number of newborn infants in nursery tolls SOL--cites Burgess v. U.S., 744 F. 2d 771 (11th Cir. 1984)); Cogburn v. U.S., 717 F. Supp. 958 (D. Mass. 1989) (SOL extended where Navy officer's records altered to conceal exposure to asbestos); Orlikow v. U.S., 682 F. Supp. 77 (D.D.C. 1988) (secret psychiatric experiment tolls SOL); Moessmer v. U.S., 569 F. Supp. 782 (E.D. Mo. 1983) (CIA places false info in claimant's records in 1966, which plaintiff did not learn of it until 1981). But see Diminnie v. U.S., 728 F.2d 301 (6th Cir. 1984) (where actual tortfeasor is federal employee concealing his crime--no tolling). Fraudulent concealment requires affirmative representations. Dyniewicz v. U.S., 742 F.2d 484 (9th Cir. 1984) (no duty to reveal negligence); Peeples v. U.S., Civ. #86-2899-4A (W.D. Tenn. 1988) (same as Dyniewicz); Shock v. U.S., 689 F. Supp. 1424 (D. Md. 1988) (failure to inform of Dr. Billings' alleged incompetence does not extend SOL under fraudulent concealment theory). Even if fraudulent concealment occurs, SOL begins to run when plaintiff has sufficient knowledge of the facts, including injury. Pitts v. U.S., 663 F. Supp. 593 (M.D. Ga. 1987) (SOL started to run in 1949 when mother knew soldier was diagnosed as psychotic in 1945, not when records released years later). Many cases have found the doctrine inapplicable. See, e.g., Zeleznik v. U.S., 770 F.2d 20 (3d Cir. 1985) (SOL not tolled where parents learn 12 years after son's death that murderer was illegal alien negligently not deported). Gibson v. U.S., 781 F.2d 1334 (9th Cir. 1986) (doctrine not applicable where claimant aware fire started by unknown person, even though

not aware of role of FBI); Snorgrass v. U.S., 567 F. Supp. 33 (E.D.N.Y. 1983) (ignorance of DEA agents role in customs search not fraudulent concealment); Nahsonhoya v. U.S., Civ. -91-946-PHX-RCB (D. Ariz., 15 Jan. 1993) (SOL bars child abuse claims where school notified parents of possible abuse, even though teacher's subsequent confession not made public). Strang v. U.S., Civ. # 3:95-CV-63 (DF) (M.D. Ga., 23 Mar. 1998) SOL runs when claimant first became aware that her medical records appeared in press, not when she received confirmatory proof. Kronisch v. U.S., 150 F.3d 112, (2d Cir. 1998) Suit for administration of LSD by CIA agent in Paris in 1952 is time-barred as plaintiff was aware of CIA LSD test program in 1977 and did not file until 1981 - destruction of records in 1974 did not effect its ability to investigate.

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

h. Trivial Injury. Goodhand v. U.S., 46 F.3d 209 (7th Cir. 1994) (claim filed 5 years after 4° tear at birth based on lack of knowledge of full extent of injury--barred by SOL).

i. Continuing Tort. Hurt v. U.S., 914 F. Supp. 1346 (S.D. W. Va. 1996) (continuous tort doctrine applies to IRS harassment claim due audits every year since 1973--plaintiff is attorney who represents clients in suits against IRS). But see Cato v. U.S., 70 F.3d 1103 (9th Cir. 1995) (claim of enslavement and continuing disrespect of African Americans does not fall under FTCA, even if continuing violations doctrine avoids 2-year SOL, since there is no jurisdiction over these allegations).

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

a. Kubrick Followed: Dessi v. U.S., 489 F. Supp. 722 (E.D. Va. 1980); Robbins v. U.S., 624 F.2d 971 (10th Cir. 1980); Camire v. U.S., 489 F. Supp. 998 (N.D.N.Y. 1980); DeGirolamo v. U.S., 518 F. Supp. 778 (E.D.N.Y. 1981); Garrett v. U.S., 640 F.2d 24 (6th Cir. 1981); Mortensen v. U.S., 509 F. Supp. 23 (S.D.N.Y. 1980); Davis v. U.S., 642 F.2d 328 (9th Cir. 1981); Pangrazzi v. U.S., 511 F. Supp. 648 (E.D. Pa. 1981); Fernandez v. U.S., 673 F.2d 269 (9th Cir. 1982); Gallick v. U.S., 542 F. Supp. 188 (M.D. Pa. 1982); Roll v. U.S., 548 F. Supp. 97 (E.D. Mo. 1982); Kelly v. U.S., 554 F. Supp. 1001 (E.D.N.Y. 1983); Bishop v. U.S., 574 F. Supp. 66 (D.D.C. 1983); Steele v. U.S., 599 F.2d 823 (7th Cir. 1979); Richman v. U.S., 709 F.2d 122 (1st Cir. 1983) (beating by ex-VA mental patient); Scott v. Casey, 562 F. Supp. 475 (N.D. Ga. 1983) (LSD experiment in Federal prison in 1950s: date report issued starts SOL running); Maulfair v. U.S., 601 F. Supp. 885 (M.D. Pa. 1985); Arvayo v. U.S., 766 F.2d 1416 (10th Cir. 1985) (SOL starts running when parents were told child was severely brain damaged due to meningitis diagnosed in civilian hospital shortly after different diagnosis in USAF hospital); Ignacio v. United States, 110 F.3d 68 (table), 1997 WL 129315 (9th Cir. 1997) (SOL accrued when son died while awaiting airlift for advanced treatment--not when father told airlift may have caused death), aff'g, Ignacio v. U.S., Civ. # CV 92-781 T-JMR (D. Ariz., Dec. 13, 1995) (decedent in IHS hospital for 45 minutes before air ambulance called--died from severe stab wound before evacuation--claim accrues on date of death); Price v. U.S., 775 F.2d 1491 (11th Cir. 1985) (SOL starts running when veteran is informed of injury, not when appeal for increased compensation is denied); Burns v. U.S., 764 F.2d 722 (9th Cir. 1985) (when osteoradionecrosis is side effect of radial therapy about which patient was warned, SOL starts running when patient informed of osteoradionecrosis); Green v. U.S., 765 F.2d 105 (7th Cir. 1985) (even though victim of explosion and fire was unaware of prior OSHA inspection SOL runs from time of incident where action is based on improper OSHA inspection); Radman v. U.S., 758 F.2d 591 (11th Cir. 1985) (SOL begins to run from allegedly tortious termination of benefits, not from date of receipt of last settlement check settling termination of benefits case) Leftridge v. U.S., 612 F. Supp. 631 (W.D. Mo. 1985) (discovery and correction of aberrant coronary artery following heart attack in 16-year-old, long time heart

patient starts SOL running); Schroer v. Chmura, 634 F. Supp. 941 (N.D.N.Y. 1986) (SOL began to run when patient learned anal sphincter torn during childbirth); Hacker v. U.S., Civ. #C84-321T (W.D. Wash. 1985) (16-year-old with diagnosed heart murmur being followed at Army hospital has heart attack--files claim four years later); Sexton v. U.S., 832 F.2d 629 (D.C. Cir. 1987) (nuclear radiation experimental therapy for leukemia in child who died shortly thereafter in 1983--claim filed 1986); Hicks v. Hines Inc., 826 F.2d 1543 (6th Cir. 1987) (barge employee sues under Jones Act for bladder cancer 17 years after eye burns, where both injuries allegedly due to exposure to chemicals); Bass v. U.S., Civ. #C-85-1257 MHP (N.D. Cal. 1987) (baby's brain damaged by delayed C-section filed 10 years after birth); Shostack v. U.S., 679 F. Supp. 459 (M.D. Pa. 1988) (severity of Guillian Barre Syndrome following swine flu dictated inquiry); Gustafson v. U.S.; 650 F.2d 1034 (9th Cir. 1981); Barren v. U.S., 839 F.2d 987 (3d Cir. 1988); Herrera-Diaz v. U.S. Dept. of Navy, 845 F.2d 1534 (9th Cir. 1988) (born 1977, claim filed 1984--no evidence of misrepresentation); Cragin v. U.S., 684 F. Supp. 746 (D. Me. 1988) (meningitis diagnosed in 1969, claim filed 1985--SOL not tolled); Outman v. U.S., 890 F.2d 1051 (9th Cir. 1989) (SOL ran even though claimant died not of excessive dose, but only of tardive dyskinesia); Quarles v. U.S., 731 F. Supp. 428 (D. Kan. 1990) (SOL starts when VA benefits denied, not when veteran confirms there was negligent care); Mazur v. U.S., 957 F. Supp. 1041 (N.D. Ill. 1997) (SOL begins to run when alien was informed that her permanent residency application would be denied, not when it was formally denied); Mendez v. U.S., 732 F. Supp. 414 (S.D.N.Y. 1990) (guardian never read medical records which indicate cause of infant's brain damage at birth--SOL bars claim); Sewell v. U.S., 732 F. Supp. 1103 (D. Colo. 1990) (SOL runs even though did not learn that FAA failed to bar pilot prior to crash); Oberlin v. U.S., 727 F. Supp. 946 (E.D. Pa. 1989) (digital third trimester vaginal exam in 1976 brings on PROM--claim filed in 1986-SOL ran); Bolen v. U.S., 727 F. Supp. 1346 (D. Idaho. 1989) (told in 1973 had tardive dyskinesia from long term stelazine--claim filed and denied in 1976--claimant said he did not get notice--SOL ran); Simmons v. U.S., 754 F. Supp. 274 (N.D.N.Y. 1991) (SOL started when status changed from MIA to KIA, not when "new" evidence found years later); Bradley v. U.S. by Veteran's Admin., 951 F.2d 268 (10th Cir. 1992) (insertion and removal of elbow prosthesis more than two years before filing barred by SOL); Schunk v. U.S., 783 F. Supp. 72 (E.D.N.Y. 1992) (failure to diagnose chronic headache and pain over a period of time at two DVA hospitals is time barred); Tirey v. U.S., Civ. # 91-5307B (W.D. Wash, 1 May 1992) (lockjaw resulting from tonsillectomy in April 1988-claim filed Nov. 1990 is time barred); Lumpkin v. U.S.,

791 F. Supp. 747 (N.D. Ill. 1992) (1984 episiotomy repair following 1983 childbirth required 1987 C-section--Kubrick followed); Kelly v. U.S., 4 F.3d 985 (table), 1993 WL 321581 (4th Cir. 1993) (SOL starts to run when patient is informed that a tubal ligation was performed during a C-Section, not when patient finds out that tubal ligation was not medically necessary); Gaudreault v. U.S., 835 F. Supp. 684 (D. Mass. 1993) (SOL bars claim filed in 1991 for failure to treat meningitis--caused brain lesion known to claimant in 1988); Mumford v. U.S., Civ. # 91-44-CIV-4-BO (E.D.N.C., 24 Nov. 1993) (SOL bars claim filed in 1989 where claimant was aware of gynecological problems after insertion of third IUD in 1981); Gualtier v. U.S., 837 F. Supp. 360 (D. Kan. 1993) (death on Aug. 4, 1988--claim filed May 16, 1992--received medical records on April 5, 1990--expert opinion received in October 1990--SOL barred); McMillan v. U.S., 46 F.3d 377 (5th Cir. 1995) (claim filed July 2, 1991, for injury at birth on November 1979--claim accrued at latest when school psychiatrist diagnosed anoxic injury in February 1985); Espinoza v. U.S., 85 F.3d 640 (table), 1996 WL 249488 (10th Cir. 1996) (radiation treatments by VA in 1956-request for increased benefits in 1990--FTCA claim filed in 1993 is time barred); Kumpf v. Secretary of Army, 1996 WL 432330 (N.D. Cal.) (soldier commits suicide at Army hospital in 1985--family consults attorney who refuses case, but advises family to file administrative claim within two years--claim filed in 1994--Kubrick applies). Lopez v. U.S., __ F. Supp., 1998 WL 141691 (D.N.M.). Where Indian Health Service therapist used liquor and marijuana with plaintiffs, claim accrued when conduct occurred not when psychologist tole them opf harm; Migliore v. U.S., 132 F.3d 39, 1997 WL 787476 (9th Cir. (Cal.)). SOL starts where mother knew her child was injured at birth and needed treatment by specialist in first year of life. Schock v. U.S., 21 F. Supp.2d 115 (D.R.I. 1998), where decedent's lawyer cleans out decedent's bank account prior to his death, statute is tolled until lawyer is indicted as not reasonable for beneficiary to examine all her father's accounts prior to that. Walker v. U.S., 176 F.3d 1436, 1999 WL 259623 (8th Cir. (Ark.)), claim alleged leg fractured at Army hospital while installing prosthesis in 1993, claim filed in 1996 is time barred. Edwards v. U.S., 1999 WL 96138 (4th Cir. (Va.)), patient need not know exact cause only that wrist operation failed.

b. Kubrick not followed: Lee v. U.S., 485 F. Supp. 883 (E.D.N.Y. 1980); Waits v. U.S., 611 F.2d 550 (5th Cir. 1980); Exnicious v. U.S., Civ. #74-K-1202 (D. Colo. 1980); Foskey v. U.S., 490 F. Supp. 1047 (D.R.I. 1979); Hamilton v. U.S.P.H.S., 502 F. Supp. 732 (D.S.D. 1980); Wadewitz v. U.S., (D. Md. 1980) (24 A.T.L.A. L. Rep., 22 Feb. 1981); Overstreet

v. U.S., 517 F. Supp. 1098 (M.D. Ala. 1981); Jackson v. U.S., 526 F. Supp. 1149 (E.D. Ark. 1981); Snorgrass v. U.S., 567 F. Supp. 33 (E.D.N.Y. 1983) (ignorance of DEA agents role in customs search not fraudulent concealment); Lhotka v. U.S., 114 F.3d 751 (8th Cir. 1997) (SOL accrued when landowner knew of abnormal flooding after rainy season, not when rainy season flooded the area); Liuzzo v. U.S., 485 F. Supp. 1274 (E.D. Mich. 1980) (KKK killing involving FBI); Stoleson v. U.S., 629 F.2d 1265 (7th Cir. 1980) (heart attack from nitroglycerin in dynamite production worker); Schnurman v. U.S., 490 F. Supp. 429 (E.D. Va. 1980) (mustard gas test in WWII); Ware v. U.S., 626 F.2d 1278 (5th Cir. 1980) (negligent diagnosis of cattle--overruled test of Mendiola v. U.S., 401 F.2d 695 (5th Cir. 1968)); Allen v. U.S., 588 F. Supp. 247 (D. Utah 1984) (Nevada atomic tests 1951-1962--when injured party knew atomic radiation causes injuries, SOL began to run); Bergman v. U.S., 551 F. Supp. 407 (W.D. Mich. 1982) (KKK beatings involving FBI); Peterson v. U.S., 694 F.2d 943 (3d Cir. 1982) (SOL judgment for U.S. reversed as U.S. could not produce hospital discharge summary allegedly giving notice of injury); Targett v. U.S., 551 F. Supp. 1231 (N.D. Cal. 1982) (letter from NRC concerning exposure to nuclear radiation not enough since radiation exposure could be by other causes); Augustine v. U.S., 704 F.2d 1074 (9th Cir. 1983) (fact that claimant knew he had bump on palate does not toll statute until he knew bump could be pre-cancerous lesion); Barrett v. U.S., 689 F.2d 324 (2d Cir. 1982) (LSD experiment); Harrison v. U.S., 708 F.2d 1023 (5th Cir. 1983) (SOL tolled during time critical medical records purposely kept from claimant); Snyder v. U.S., 717 F.2d 1193 (8th Cir. 1983) (whether claimant knew or should have known pain caused by endorectomy question of fact not subject to summary judgment); Moessmer v. U.S., 569 F. Supp. 782 (E.D. Mo. 1983) (CIA places false info in claimant's records in 1966--plaintiff did not learn of it until 1981); Rispoli v. U.S., 576 F. Supp. 1398 (E.D.N.Y. 1983) (inpatient in VA hospital treated for five years for broken leg-statute not tolled because of assurances by doctor); Page v. U.S., 729 F.2d 818 (D.C. Cir. 1984) (continuous misuse of drug therapy from 1972 to 1980); Burgess v. U.S., 744 F.2d 771 (11th Cir. 1984) (knowledge of breaking of collar bone to deliver shoulder dystocia newborn does not start SOL--subsequent knowledge of Erb's palsy does); Jastremski v. U.S., 737 F.2d 666 (7th Cir. 1984) (fact that father was a physician and helped deliver plaintiff-son, who was negligently delivered, does not start SOL); Drazan v. U.S., 762 F.2d 56 (7th Cir. 1985); Brazzell v. U.S., 788 F.2d 1352 (8th Cir. 1986) (swine flu shot in Nov. 1976--filed admin. claim in Feb. 1980 for myalgia--SOL did not run, since not warned of such risk); Simmons v. U.S., 805 F.2d 1363 (9th Cir. 1986) (SOL does not begin to run when

sexual relationship with counselor first occurs, but when claimant advised by psychiatrist that the relationship caused her emotional injury); Nicolazzo v. U.S., 786 F.2d 454 (1st Cir. 1986) (veteran had ear problem from helicopter crash--SOL starts running when skull fracture diagnosed nine years later); Moreno v. U.S., Civ. # 86-0555 (D. Haw. 1987) (brain damaged at birth in 1977--claims filed 1983); Dearing v. U.S., 835 F.2d 226 (9th Cir. 1987) (baby brain damaged at birth by failure to promptly resuscitate, files three years after birth); Nemmers v. U.S., 870 F.2d 426 (7th Cir. 1989) (parents did not have knowledge of negligence until reading similar case in newspaper--uses objective test); McDonald v. U.S., 843 F.2d 247 (6th Cir. 1988) (surgeon's post-op assurances that healing may take 3-5 years tolls SOL); Colleen v. U.S., 843 F.2d 329 (9th Cir. 1987) (SOL tolled until brain damage in newborn discovered almost one year after birth); Gould v. U.S., 684 F. Supp. 508 (N.D. Ill. 1988) (born 1970, claim filed 1984--not mother's subjective belief, but her acquisition of medical records, started SOL); Weaver v. U.S., Civ. # SA-87-CA-562 (W.D. Tex. 1990) (SOL tolled until learned of HIV positive, even though negligence was in failure to diagnose timely and creating need for colon surgery); Osborn v. U.S., 918 F.2d 724 (8th Cir. 1990) (claim accrued when physician told mother seizures related to DPT shots, not when another physician earlier told mother to stop pertussis shots); Miller v. U.S., 932 F.2d 301 (4th Cir. 1991) (where decedent knew of alleged delay in diagnosing breast cancer in 1984, SOL started in 1984 under Va. law and wrongful death claim filed in 1988 within two years of death was time barred); Hance v. U.S., 773 F. Supp. 551 (W.D.N.Y. 1991) (brain damaged at birth on April 23, 1982--SOL tolled until saw attorney in Sept. 1987); Muensterman v. U.S., 787 F. Supp 499 (D. Md. 1992) (parents informed injury due to improperly conducted blood test, but not of failure to perform timely C-section--SOL starts when damage due to intrauterine stroke diagnosed, not when told of improper blood test); Willis v. Ortho Pharmaceutical, Inc., Civ. # 84-CV-742, 3 & 85-CV-542 (N.D.N.Y. 1992) (knowledge of general risks of IUD does not toll SOL until told that ongoing PID is associated with IUD); Sloaten v. U.S., 990 F.2d 1038 (8th Cir. 1993) (SOL starts when board decided that oil and mineral rights had not been converted by U.S.); Rice by and Through Rice v. U.S., 889 F. Supp. 1466 (N.D. Okla. 1995) (mothers knowledge that daughter delivered at 43 weeks when taken to civilian hospital for breathing problems due to swallowing meconium and spend first 40 days of life there does not start SOL running); Sanborn v. U.S., 764 F.2d 637 (9th Cir. 1985) (in action alleging swine flu death where coroner did not conduct autopsy and said no Guillain-Barre Syndrome, SOL starts when survivor discovers cause of death);

Sanborn v. U.S., 660 F. Supp. 1129 (D. Idaho 1987) (wife died one month following swine flu shot in 1976--claim filed 1980--SOL tolled); Pleasant v. U.S., 915 F. Supp. 826 (W.D. La. 1996) (claim filed 37 months after death is not time barred, since widower's request for medical records not filed until 13 months after death). Diaz v. U.S., 165 F.3d 1337 (11th Cir. 1999), med malpractie suit time where widow waited 1 1/2 years to find out that husband-inmate was undergoing pyschiatric care at time of suicide.

7. Effect of Death. Wrongful death claim accrues at death as a matter of federal law: state law on accrual is not applicable. Johnston v. U.S., 85 F.3d 217 (5th Cir. 1996). See also Kington v. U.S., 396 F.2d 9 (6th Cir. 1968); Pringle v. U.S., 419 F. Supp. 289 (D.S.C. 1976); Foote v. Public Housing Commissioner of U.S., 107 F. Supp. 270 (D. Mich. 1952); Wolfenbarger v. U.S., 470 F. Supp. 943 (E.D. Tenn. 1979); Fisk v. U.S., 657 F.2d 167 (7th Cir. 1981). See also Attallah v. U.S., 758 F. Supp. 81 (D.P.R. 1991) (SOL on WD claim starts when murder discovered, not when victim disappeared). Accord Ciccarelli v. Carey Canadian Mines Ltd, 757 F.2d 548 (3d Cir. 1985) (SOL not extended under either discovery rule or for fraudulent concealment, since Pennsylvania WD Statute says from date of death). However, a cause of action must exist under state law for death claim to be filed. Rosenberg v. Celotex Corp., 767 F.2d 197 (5th Cir. 1985) (SOL bars suit as New York law requires personal injury claim to exist at time of death); Quattlebaum v. Carey Canada Inc., 685 F. Supp. 939 (D.S.C. 1988) (action under wrongful death can only be maintained if decedent could sue for PI). Thus, where claim must be filed under state law within two years of original injury and no claim is filed until death three years after original injury, FTCA claim is barred. See, e.g., Winn v. U.S., 593 F.2d 855 (9th Cir. 1979); Crownover v. Gleichman, 574 P.2d 497 (Colo. 1978). Accord Weedin v. U.S., 509 F. Supp. 1052 (D. Colo. 1981). However, there is no need to file a wrongful death claim where personal injury claim already filed as both are based on the same injury. Brown v. U.S., 838 F.2d 1157 (11th Cir. 1988); Nelson v. U.S., 541 F. Supp. 816 (M.D.N.C. 1982). Green v. U.S., 1998 U.S. App. Lexis 31014 (9th Cir., Calif.), failure to file wrongful death claim within two years of air crash is not excused by fact that NTSB report not available until eight months after crash.

8. Soldiers' and Sailors' Civil Relief Act (SSCRA). Soldiers' and Sailors' Civil Relief Act extends SOL. Conroy v. Aniskoff, 507 U.S. 511, 113 S.Ct. 1562 (1993) (soldier need not show that his military service prejudiced his ability to redeem property in order for SSCRA to toll Maine SOL). See also Lester v. U.S., 487 F. Supp. 1033 (N.D. Tex. 1980); Stephan v. U.S., 490 F. Supp. 323 (W.D. Mich. 1980); Detweiler v. Pena, 38 F.3d 591 (D.C. Cir. 1994) (BCMR'S 3-year SOL extended by SSCRA during active duty);

U.S. v. Bomar, 8 F.3d 226 (5th Cir. 1993) (garageman convicted of violation of SSCRA for selling soldier's car while he was in Saudi Arabia); Hamner v. BMY Combat Systems, 869 F. Supp. 800 (D. Kan. 1994) (in suit against tank manufacturer, SSCRA tolls SOL during active duty, but under Kansas SOL, suit filed 1 day too late); Oberlin v. U.S., 727 F. Supp. 946 (E.D. Pa. 1989) (SSCRA applicable even though airman had ability to file). SSCRA applies to servicemembers claim, even where claim is derivative and principal claim is time barred. Kersetter v. U.S., 57 F.3d 362 (4th Cir. 1995) (service member's claim for increased costs of raising child survives SOL bar of brain damaged daughter's claim--SSCRA applies); Miller v. U.S., 803 F. Supp. 1120 (E.D. Va. 1992) (SSCRA applied to father-service member in brain damaged baby case, even though child and mother are barred by SOL); Beck v. U.S., 1987 WL 17154 (N.D. Ill. 1987). But see Romero by Romero v. U.S., 806 F. Supp. 569 (E.D. Va. 1992) (where claim of child for brain damage at birth is barred by SOL, parents claim for mental anguish is also barred).

9. Damage to Land and Property. SOL on damage to property begins when damage is first noticeable. Blue Dolphin, Inc. v. U.S., 666 F. Supp. 1538 (S.D. Fla. 1987) (SOL on damage to boat began to run when boat returned to owner's possession, even though it was still constructively seized by U.S.). The same rule applies to land damage, such as erosion. Heezen v. Aurora County, 157 N.W.2d 26 (S.D. 1968); Cravens v. U.S., 163 F. Supp. 309 (W.D. Ark. 1958); Rygg v. U.S., 334 F. Supp. 219 (D.N.D. 1971); Konecny v. U.S., 388 F.2d 59 (8th Cir. 1967). See also Bayou des Familles Development Corp., 130 F.3d 1034 (Fed. Cir. 1997) (SOL starts to run when COE denies wetlands permit to develop marshes, not when court remedies exhausted); Miller v. United States, Civ. # C/A 5:93-1673-6 (D.S.C., Sept. 26, 1996), aff'd, 125 F.3d 848 (table), 1997 WL 592854 (4th Cir. 1997) (where plaintiff knew of erosion damage to her land caused by adjacent U.S. Air Force Base as early as 1973, claim is time barred though erosion continues). Often land damage claims are plead as nuisance claims, and the type of nuisance created by the wrongful government conduct has an effect upon the statute of limitation. If a permanent nuisance, the damage is permanent when inflicted and the SOL begins to run when the damage is first noticed, but if a temporary nuisance, the harm is deemed to be continuing, so the SOL never runs. Prescott v. United States, 105 F.3d 666(table), 1996 WL 747922 (9th Cir. 1996) (U.S. removal of diversion dam in 1976 started SOL running, since removal created permanent nuisance); Bartleson v. U.S., 96 F.3d 1270 (9th Cir. 1996) (even though property had been shelled from adjacent Camp Roberts for years, shelling had been intensified in the last two years prior to filing of claim for permanent nuisance-–claim timely filed); Huffman v. U.S., 82 F.3d 703 (6th Cir. 1996) (addition to inn built next to loading dock-whether 2 years SOL

had run turns on whether noise nuisance was permanent, that is, structure was properly constructed and/or operated, meaning that such noise was normal, thereby barring claim or temporary, that is, post office was improperly constructed and/or operated, meaning noise occurred only occasionally, making the violation continuous, thereby not barring the claim); Rapf v. Suffolk County of New York, 755 F.2d 282 (2d Cir. 1985) (SOL continues to run, since groin causing beach to wash away is considered continuing public nuisance under New York law). Inverse condemnation (taking) under Tucker Act SOL accrues when damage is complete. U.S. v. Dickinson, 331 U.S. 745, 67 S.Ct. 1382 (1947). Donavan v. Gober, 5 F. Supp. 2d 142 (W.D.N.Y. 1998) SOL starts when Federal salary is guaranteed the first time as to claim for infliction of emotional distress. Dzrura v. U.S., 168 F.3d 581 (1st Cir. 1999), claim for seizure of painting by IRS for unpaid taxes is filed more than two years from failure to sell at auction - SOL barred as not a continuing violation.

10. Toxic Torts. Toxic torts create difficult interpretations of SOL. Kelly v. Johns-Manville Corp., 590 F. Supp. 1089 (E.D. Pa. 1984) (asbestos); Miller v. Cudahy Co., 592 F. Supp. 976 (D. Kan. 1984) (salt pollution of freshwater aquifer), later proceedings, 858 F.2d 1449 (10th Cir. 1988) (tolling of SOL turns on whether damage to aquifer is temporary or permanent); Peterson v. Instapak Corp., 690 F. Supp. 697 (N.D. Ill. 1988) (SOL runs from when chemical pneumonia diagnosed, but not for disease later manifested); Montana Pole & Treating Plant v. L.F. Laucks & Co., 993 F.2d 676 (9th Cir. 1993) (SOL begins to run when contamination is abated, not when EPA seizes property). FTCA cases include Arcade Water District v. U.S., 940 F.2d 1265 (9th Cir. 1991) (leaching of USAF laundry contaminants into well discovered in 1981, claim filed 1984, not barred since continuing tort under California law); Muth v. U.S., 1 F.3d 246 (4th Cir. 1993) (statute starts to run when owner had knowledge of contamination and that it caused injury to property in case of TNT contamination from Army ordnance plant); W.C. & A.N. Miller Companies v. United States, 963 F. Supp 1231 (D.D.C. 1997) (fact that chemical munitions were buried in early 1920's before FTCA passage does not bar claim, since claimant did not learn of contamination until 1993, citing Carnes v. U.S., 186 F.2d 648 (6th Cir. 1951) and In Re Silver Bridge Disaster Litigation, 381 F. Supp. 931 (S.D. W.Va. 1974)); Warminster Township Municipal Authority v. U.S., 903 F. Supp. 846 (E.D. Pa. 1995) (Township's knowledge of pollution of water system in 1979 is date of accrual--not a continuing tort since injury was permanent); Punnett v. U.S., 602 F. Supp. 530 (E.D. Pa. 1984) (public notice to potential claimants as a result of Jaffee (Jaffee v. U.S., 488 F. Supp. 632 (D.N.J. 1979), aff'd, 663 F.2d 1226 (3rd Cir. 1981) (en banc), cert. denied, 456 U.S. 972 (1982)) concerning exposure to radiation from nuclear tests insufficient to start SOL

running). Of course, CERCLA can be applied to pollution occurring before passage and U.S. can sue without giving prior notice. U.S. v. Dickerson, 640 F. Supp. 448 (D. Md. 1986).

11. False Arrest. False arrest or imprisonment when original arrest occurs. Hitchmon v. U.S., 585 F. Supp. 256 (S.D. Fla. 1984). Trueman v. Lekberg, 1998 WL 181816 (E.D. Pa.). False arrest claim accrues on date of arrest.

12. Mistaken Filing Under FTCA. Bovell v. U.S., DOJ, 735 F.2d 755 (3d Cir. 1984) (mistaken filing under FTCA does not toll SOL under SIAA). Whittlesey v. Cole, 142 F.3d 340 1998 WL 177351 (6th Cir. (Tenn.)). Where plaintiff sues Navy contract physician after Tenn. One year SOL has run, SOL not tolled by his failure to discover physician was contractor.

13. Bailment. Magruder v. Smithsonian Institute, 758 F.2d 591 (11th Cir. 1985) (where gift made to Smithsonian without owner's consent, SOL runs from date when owner knew of gift); MacAvoy v. The Smithsonian Inst., 757 F. Supp 60 (D.D.C. 1991) (conversion of art objects occurred where person claiming ownership demanded possession). Price v. U.S., 707 F. Supp. 1465 (S.D. Tex. 1989), rev'd on other grounds, 69 F.3d 46 (5th Cir. 1995) (bailment continues until conversion, that is, unmistakable act by bailee in derogation of his possession here from 1945 to 1983--cites Mucha v. King, 792 F.2d 602 (7th Cir. 1986)). Bachea v. U.S., __ F.3d __, 1998 WL 598548 (9th Cir. Alaska), daughter of deceased is not proper claimant as she was adopted at birth by her grand-parents.

14. Indemnity or Contribution. Sea-Land Service v. U.S., 874 F.2d 169 (3d Cir. 1989) (SOL starts under SIAA when vessel owner paid settlement); General Electric Co. v. U.S., 620 F. Supp. 160 ((D. Minn. 1985) (same--notwithstanding change in case law by U.S. Supreme Court which allowed indemnification of manufacturer by U.S. in FECA covered case, SOL did not start on date of Supreme Court decision, but when judgment giving rise to indemnification claim paid).

15. Lack of Knowledge of U.S. Involvement. A plaintiff's lack of knowledge of federal government involvement normally does not toll the SOL. See Gould v. U.S. Dept. of HHS, 905 F.2d 738 (4th Cir. 1990), cert. denied, 498 U.S. 1025 (1991) (plaintiff did not learn physicians in private clinic were PHS employees-SOL not tolled); Zeleznik v. U.S., 770 F.2d 20 (1985), cert. denied, 475 U.S. 1108 (1986) (SOL not tolled even though plaintiff made diligent inquiry and did not learn of U.S. involvement); Dyniewiez v. U.S., 743 F.2d 484 (9th Cir. 1984) (parents drown in flood, but did not learn MPs controlled road--SOL not tolled); Steele v. U.S., 599 F.2d 823 (7th Cir. 1979) (injured while

installing runway lights, but did not learn of FAA involvement--SOL not tolled). See also paragraph ID2d, supra, for additional cases. Whittlesey v. Cole, 142 F.3d 340 1998 WL 177351 (6th Cir. (Tenn.)). Where plaintiff was not notified that Navy doctor was a contractor until over one year after death (Tenn. Has one year SOL in medical malpractice cases), claim against U.S. not timely filed as SOL ran from date of death.

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

17. Westfall Act. Filaski v. U.S., 776 F. Supp. 115 (E.D.N.Y. 1991) (where state suit is removed under Westfall Act and dismissed for failure to file administrative claim, the plaintiff has an additional 60 days to file claim-plaintiff not aware other driver was U.S. employee--based on 28 U.S.C. § 2679(d)(5)). See also Jackson v. U.S., 789 F. Supp. 11109 (D. Colo. 1992); Egan by Egan v. U.S., 732 F. Supp. 1248 (E.D.N.Y. 1990); Algorri v. U.S., Civ. # 86-4757-WDK (C.D. Cal., 8 June 1994) (in suit originally commenced in state court in 1986, plaintiff had 60 days to file administrative claim after U.S. was substituted as party).

18. Subrogated Claims. Severtson v. U.S., 806 F. Supp. 97 (E.D. La. 1992) (subrogated claim may be included in timely filed P.I. claim--also holds that SOL does not start to run until insurer learns of accident).

E. Who May File?

1. Injury Claim. In injury cases, the injured party or agent or legal representative (28 C.F.R. § 14.3(a)). Separate claims must be filed separately. Lee v. U.S., 980 F.2d 1337 (10th Cir. 1992) (parents claim filed beyond SOL is separate and cannot relate back to timely filed claim for child's injuries). A person may be considered injured when their injury is cognizable at state law, such as when there is a reasonable medical probability that cigarette smoking asbestos worker will develop cancer and die from it is sufficient to establish cause of action. Gideon v. Johns-Manville Sales Corp., 761 F.2d 1120 (5th Cir. 1985). Accord Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir. 1986); Gonzalez v. U.S., 600 F. Supp. 1390 (W.D. Tex. 1985). A person may not file a claim for speculative future health hazards, such as those resulting from land pollution. Good Fund Ltd.-1972 v. Church, 540 F. Supp. 519 (D. Colo. 1982); Laswell v. Brown, 683 F.2d 261 (8th Cir. 1982).

2. Death Claim. In death cases, the person authorized by state law (28 C.F.R. § 14.3(c)). Thus, a claim by the estate or the

survivors or both may be filed depending on state law in the state where the negligence occurred (28 U.S.C. § 2672). Van Fossen v. U.S., 430 F. Supp. 1017 (N.D. Cal. 1977). But see Keener v. Morgan, 647 F.2d 691 (6th Cir. 1981) (negligence of one parent may be imputed to other parent, and thus bar recovery by either for death of child). Some states' WD statute make a viable fetus a person for legal purposes. Espadero v. Feld, 649 F. Supp. 1480 (D. Colo. 1986) (interprets state death statute as including viable fetus as a person); Volk v. Baldazo, 651 P.2d 11 (Idaho 1982) (citing a number of cases re viable fetus as a person); Wade v. U.S., 745 F. Supp 1573 (D. Haw. 1990) (can sue in Hawaii for death of viable fetus, even though fetus stillborn). However, many states will not permit a wrongful death claim for a non-viable fetus. In Re Air Crash Disaster at Detroit Metropolitan Airport, 737 F. Supp. 427 (E.D. Mich. 1989), aff'd, 917 F.2d 24 (table), 1990 WL 163940 (6th Cir. 1990) (Michigan law). See also Reese v. U.S., 930 F. Supp. 1537 (S.D. Ga. 1995) (mother of deceased motorist has standing to bring wrongful death action on behalf of deceased's unborn fetus); Aki v. Listwa, 741 F. Supp. 555 (E.D. Pa. 1990) (only three jurisdictions which permit claim for death of non-viable fetus, that is, Georgia, Missouri and Rhode Island). Becker v. U.S., __F.3d __, 1998WL598548 (9th Cir. (AK)) daughter of deceased is not proper claimant as she was adopted at birth by her grandmother.

3. Indemnity and Contribution Claim. Indemnity and contribution claims are valid if permitted by state law, since U.S. is liable as private person (28 U.S.C. §§ 46(b), 2674). U.S. v. Yellow Cab Co., 340 U.S. 543 (1951); Rayonier Inc. v. U.S., 352 U.S. 315 (1957); Travelers Insurance Co. v. U.S., 283 F. Supp. 14 (S.D. Tex. 1968); Williams v. U.S., 352 F.2d 477 (5th Cir. 1965); Elliott v. U.S., 329 F. Supp. 621 (D. Me. 1971). The plaintiff on a contribution or indemnity claim must have final judgment entered against it before it may file an administrative claim. Johns-Manville Sales Corp. v. U.S., 690 F.2d 721 (9th Cir. 1982). Accord GAF Corp. v. U.S., 593 F. Supp. 703 (D.D.C. 1984). See also Robinson v Alaska Properties and Inv. Inc., 878 F. Supp. 1318 (D. Alaska 1995) (FDIC cannot be joined as third party defendant under Alaska's equitable apportionment act, since defendant did not state claim under the FTCA).

4. Assignees Barred. Assignees are barred by Anti-Assignment Act (formerly 31 U.S.C. § 203 until 1982, now 31 U.S.C. § 3727). See Cadwalder v. U.S., 45 F.3d 297 (9th Cir. 1995) (purchaser of fire damaged ranch is not proper claimant, since he was assigned claim by former owner); Hornbeck Offshore Operators v. Ocean Line, 849 F. Supp. 434 (E.D. Va. 1994) (31 U.S.C. § 3727 precludes assignment of in rem claim on subfreight's owed by U.S); Bernert Towboat Co. v. USS Chandler (DDG 996), 666 F. Supp.

1454 (D. Or. 1987) (act bars claimant who voluntarily paid for lost cargo from asserting cargo owner's claim). 31 U.S.C. § 3727 not applicable where claim assigned by operation of law. U.S. v. Shannon, 342 U.S. 288 (1952); U.S. v. Aetna Casualty & Surety Co., 338 U.S. 366 (1949); Goulding v. U.S., 488 F. Supp. 755 (D. Ariz. 1980).

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

6. Derivative Claim. Derivative claims are separate and should be filed as such. Lee v. U.S., 980 F.2d 1337 (10th Cir. 1992) (parents claim filed beyond SOL is separate and cannot relate back to timely filed claim for child's injuries); Franklin Savings Corp. v. U.S., 970 F.Supp 855 (D. Kan. 1997) (building and loan association as 94% shareholder in liquidated S&L association could bring derivative FTCA claim, but individual shareholders could not). Santos v. U.S., 525 F. Supp. 982 (D.P.R. 1981) (holding adult children must file administrative claim); Green v. U.S., 385 F. Supp. 641 (S.D. Cal. 1974); Collazo v. U.S., 372 F. Supp. 61 (D.P.R. 1973); Hunter v. U.S., 417 F. Supp. 272 (N.D. Cal. 1976); Knouff v. U.S., 74 F.R.D. 555 (W.D. Pa. 1977); Fol v. U.S., 548 F. Supp. 1257 (S.D.N.Y. 1982) (wife's loss of services not included in husband's injury claim); Lester v. U.S., 487 F. Supp. 1033 (N.D. Tex. 1980) (husband may not bring claim for wife's personal injury in community property state); Sandoval v. U.S., Civ. #C80-1545 (N.D. Cal. 1981) (PI claim for minor does not include parents unless expressly listed. Claim by parents does not toll SOL for widow's claim in wrongful death case. Jackson v. U.S., 558 F. Supp. 14 (D.D.C. 1982); First Commercial Bank N.A. Little Rock, Arkansas v. U.S., 727 F. Supp. 1300 (W.D. Ark. 1990) (survivor claim in wrongful death action barred, since not on SF 95); Hilburn v. U.S., 789 F. Supp 338 (D. Haw. 1992). Contra Swizdor v. U.S., 581 F. Supp. 10 (S.D. Iowa 1983) (claim by husband for his injuries does toll SOL for wife's claim for loss of consortium); Locke v. U.S., 351 F. Supp. 185 (D. Haw. 1972); Young v. U.S., 372 F. Supp. 736 (S.D. Ga. 1974); DeGroot v. U.S., 384 F. Supp. 1178 (N.D. Iowa 1974) (includes common law wife); Forest v. U.S., 539 F. Supp. 171 (D. Mont. 1982); Champagne v. U.S., 573 F. Supp. 488 (E.D. La. 1983); Bulloch v. U.S., 487 F. Supp. 1078 (D.N.J. 1980) (child not named on SF 95 could be added as party at suit, but all plaintiffs limited to amount on SF 95); Reese v. U.S., 930 F. Supp. 1537 (S.D. Ga. 1995) (mother of deceased motorist has standing to bring wrongful death action on behalf of deceased's unborn fetus).

7. Subrogated Claim. Subrogated claims are separate and should be filed, processed and paid as such. Robinson v. U.S., 408 F.

Supp. 132 (N.D. Ill. 1976). See also Nicholson Air Service Inc. v. U.S., 686 F. Supp. 538 (D. Md. 1988) (insurer filed administrative claim, insured filed suit--insurer substituted at trial, since real party in interest). But see Sky Harbor Air Service Inc. v. U.S., 348 F. Supp. 594 (D. Neb. 1972) (holding that filling out of insurance information on back of SF 95 constitutes joint claim).

8. Intergovernmental Claim.

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

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

9. FECA Bar. U.S. employees are not proper claimants when covered by the Federal Employees Compensation Act (FECA) (5 U.S.C. §§ 8101-8150). Saltsman v. U.S., 104 F.3d 787 (6th Cir. 1997) (FECA is exclusive remedy for employees shot and injured/killed by fellow employee while on job at Fort Knox); Brown v. U.S., Civ. # 93-CV-75147-DT (E.D. Mich, Apr. 20, 1994) (claim based on negligent hiring and retention for wrongful death of ATF agent who was shot by his supervisor falls under FECA--cites Bruni v. U.S., 964 F.2d 76 (1st Cir. 1992)). FECA applies to new employees not yet formally entered. TerKeurst v. U.S., 549 F. Supp. 455 (W.D. Mich. 1982). Also includes D.C. employees. Carter v. U.S., Civ. # 86-2389 (D.D.C. 1987) (citing Mason v. D.C., 395 A.2d 399 (D.C. 1978)), DC employees who are entitled to workmen compensation under DC law are not entitled in FECA as 5 U.S.C. 8101(1)(D) and 8139 are superseded, see D.C. Code 1-633.2(a)(7)(18)(10). FECA applies to injuries and death, but not to property losses. See 31 U.S.C. §§ 240-43; Holcombe v. U.S., 176 F. Supp. 297 (E.D. Va. 1959).

a. FECA Exclusive Remedy. FECA is an exclusive remedy (5 U.S.C. § 8116(c)); Johansen v. U.S., 343 U.S. 427 (1952); Smith v. Rivest, 96 F. Supp. 379 (E.D. Wis. 1975). But see Daly v. U.S., 946 F.2d 1467 (9th Cir. 1991) (VA can be held liable for failure of VA physician to inform VA employee of results of PE--FECA exclusivity not discussed). Neither the Westfall Act (nor its predecessor, the Driver's Act), 28 U.S.C. § 2679(b), change the exclusivity of FECA. Vantrease

v. U.S., 400 F.2d 853 (6th Cir. 1968); Tazelaar v. U.S., 558 F. Supp. 1369 (N.D. Ill. 1983), nor does Health Care Immunity Act (10 U.S.C. § 1089). Baker v. Barber, Civ. #C-80-0015-L(b). Nor do other remedial schemes, which may not be as monetarily beneficial as recovery under the FTCA, undermine FECA's exclusivity. Benton v. U.S., 960 F.2d 19 (5th Cir. 1992) (failure to receive FECA award for pain, suffering and future lost wages does not preclude application of exclusivity); Gallo v. Foreign Service Grievance Board, 776 F. Supp 1478 (D. Colo. 1991) (claim for improper medical treatment not a grievance, but FECA exclusive remedy against U.S.). Claim first must be submitted under FECA if substantial question exists. Figueroa v. U.S., 7 F.3d 1405 (9th Cir. 1995) (U.S. employee ordered to clean up toxic waste from exploded transformer in U.S. Navy power plant creates substantial question of FECA coverage); Doe v. U.S., Civ. #95-CV-0549C (W.D.N.Y., Feb. 9, 1996) (college student training in phlebotomy at VA hospital pricks herself with HIV+ tainted needle--case held in abeyance until DOL rules as incident occurred prior to her signing employment contract and VA filed FECA claim for her); Reep v. U.S., 557 F.2d 204 (9th Cir. 1977); Joyce v. U.S., 474 F.2d 215 (3d Cir. 1973); Somma v. U.S., 283 F.2d 149 (3d Cir. 1960); Gill v. U.S., 641 F.2d 195 (5th Cir. 1981). But see Martin v. U.S., 566 F.2d 895 (4th Cir. 1977); Wright v. U.S., 717 F.2d 254 (6th Cir. 1983) (secretary at VA hospital treated for ruptured tubal pregnancy for which she was not entitled to treatment--held no substantial question of Federal jurisdiction lies). A plaintiff must pursue the FECA remedy prior to filing FTCA suit. DiPippa v. U.S., 687 F.2d 14 (3d Cir. 1982); Avasthi v. U.S., 608 F.2d 1059 (5th Cir. 1979); Concordia v. USPS, 581 F.2d 439 (5th Cir. 1978); Williams v. U.S., 565 F. Supp. 59 (N.D. Miss. 1983). Elman v. U.S., 1998 WL 88340 (E.D. Pa.) (federal employee trips on sidewalk maintained by National Park Service on way to Federal Health Fair-FECA applies. Meester v. Runyon, 140 F.3d 855 (8th Cir. (ND) 1998) - FECA beneficiary is required to return to work under 5 U.S.C. 815(b) to job she says she cannot perform and, therefore, violates Rehabilitation Act, 29 U.S.C. 794(a)-held FECA is exclusive rememdy. Martin v. Runyon, 14 F. Supp. 174 (D.P.R. 1998), Postal Reorganization Act rather than FECA bars on-the-job injury claims under FTCA for postal worker. Griffen v. U.S. Civ #1P-98-0437 - C-D/F (S.D. Ind. 4 May 99) custodial employee pushes his supervisor out of a window during argument over his responsibilities-FECA barred but state suit against employee permitted.

b. Definition of Employee. "Employee" is defined very broadly and may include volunteers, e.g., in hospital summer employees, interns, ROTC cadets and Civil Air Patrol (CAP).

Waters v. U.S., 458 F.2d 20 (8th Cir. 1972) (summer employee); U.S. v. Alexander, 234 F.2d 861 (4th Cir. 1956) (5 U.S.C. § 803) (CAP); Kelley v. U.S., 792 F. Supp. 793 (M.D. Fla. 1992) (CAP); Hudiburgh v. U.S., 626 F.2d 813 (10th Cir. 1980) (ROTC); Wake v. U.S., Civ. # 2:94-CV7 (D. Vt., Mar. 13, 1995) (ROTC); Levine v. U.S., 478 F. Supp. 1389 (D. Mass. 1979). FECA applies to joint employees. See Heilman v. U.S., 731 F.2d 1104 (3rd Cir. 1984) (both Feres and FECA applies to employee of Defense Nuclear Agency (DNA) who claimed overradiation while on active duty as DNA employee). However, FECA does not include prospective employee, James v. U.S., 483 F. Supp. 581 (N.D. Cal. 1980), or a bystander asked to fight a fire, Messig v. U.S., 129 F. Supp. 571 (D. Minn. 1955), or a railroad inspector. Shippey v. U.S., 321 F. Supp. 350 (S.D. Fla. 1970). Pourier v. U.S., __ F.3d __, 1998 WL 136201 (8th Cir. (S.D.)). Contract ambulance driver for Indian Tribe is federal employee - claim for wrongful death of HIS nurse in crash falls under FECA.

c. Federal Employment Governed by Federal Law. Federal employment question of Federal law. Pattno v. U.S., 311 F.2d 604 (10th Cir. 1962). Premises test not exclusive test. Avasthi v. U.S., 608 F.2d 1059 (5th Cir. 1979); Bailey v. U.S., 451 F.2d 963 (5th Cir. 1971). Some of the federal scope of employment decisions include: Woodruff v. U.S. Department of Labor, 954 F.2d 634 (11th Cir. 1992) (employee in on-post collision is covered while going off post to buy sweater during lunch break); Schmid v. U.S., 826 F.2d 227 (3rd Cir. 1987) (coverage for employee playing softball after duty hours); Grijalva v. U.S., 781 F.2d 472 (5th Cir. 1986) (coverage for on-post accident while on way home); Concordia v. U.S. Postal Service, 581 F.2d 439 (5th Cir. 1973) (coverage for off-post collision while on way home from work where collision due to medication taken while on job); Holst v. U.S., 755 F. Supp. 260 (E.D. Mo. 1991) (USPS employee injured while picking up paycheck on day off is not under FECA).

d. Derivative Claims. FECA bar extends to derivative claims. Posegate v. U.S., 288 F.2d 11 (9th Cir. 1961); Thol v. U.S., 218 F.2d 12 (9th Cir. 1954); Underwood v. U.S., 207 F.2d 862 (10th Cir. 1953); Grijalva v. U.S., 781 F.2d 472 (5th Cir. 1986); Metz v. U.S., 723 F. Supp. 1133 (D. Md. 1989) (wife's claim for emotional distress).

e. Bar Extends to LHWCA Covered Employees. FECA type bar extends to employees covered by Longshoremen and Harbor Workers' Compensation Act, e.g., nonappropriated fund employees (33 U.S.C. § 901-950; 5 U.S.C. § 8171). U.S. v. Forfari, 268 F.2d 29 (9th Cir. 1959), cert. denied, 361 U.S.

902 (1959); Employees Welfare Committee v. Daws, 599 F.2d 1375 (5th Cir. 1979); Dolin v. U.S., 371 F.2d 813 (6th Cir. 1967). No indemnity. White v. Texas Eastern Transmission Corp. v. Charles Wheatley Co., 512 F.2d 486 (5th Cir. 1975), cert. denied, 423 U.S. 1049 (1976).

f. DOL Decision on FECA Determinative. The Secretary of Labor has final say on applicability of FECA. See Swafford v. U.S., 998 F.2d 837 (10th Cir. 1993) (Secretary of Labor has final say on FECA benefits in sexual harassment case); Doe v. U.S., Civ. #95-CV-0549C (W.D.N.Y., Feb. 9, 1996) (college student training in phlebotomy at VA hospital pricks herself with HIV+ tainted needle-case held in abeyance until DOL rules as incident occurred prior to her signing employment contract and VA filed FECA claim for her); Eure v. USPS, 711 F. Supp. 1365 (S.D. Miss. 1989) (Secretary of Labor must decide whether timely filed under FECA prior to FTCA dismissal. FECA determination final and employee bound by provision of benefits. Czerkies v. U.S. Dept. of Labor, 73 F.3d 1435 (7th Cir. 1996) (Department of Labor decision in FECA is final and conclusive--not subject to review provided due process standard has been met); Gill v. U.S., 641 F.2d 195 (5th Cir. 1981) (determination by FECA on coverage bars court applying FTCA); William v. U.S., Civ. # 91-3844 (S.D. NY 1991) (denial of benefits by DOL is final and binding in court re: FTCA). See also Cobia v. U.S., 384 F.2d 711 (10th Cir. 1967), cert. denied, 390 U.S. 986 (1968); Soderman v. U.S. Civil Service Commission, 313 F.2d 694 (9th Cir. 1963). Contra Martin v. U.S., 566 F.2d 895 (4th Cir. 1977); U.S. v. Udy, 381 F.2d 455 (10th Cir. 1967). White v. U.S., 143 F.3d 232 (5th Cir. 1998) DAC injured in accident on-post while going home must apply for FECA--reverses Bailey v. U.S., 451 F.2d 963 (5th Cir. 1971).

g. Subsequent Malpractice. FECA bar extends to subsequent malpractice during treatment of FECA injury. Balancio v. U.S., 267 F.2d 135 (2d Cir. 1959); Byrd v. Warden, Fed. Detention Hq., 376 F. Supp. 37 (S.D.N.Y. 1974); Mohr v. U.S., 184 F. Supp. 80 (N.D. Cal. 1960); Alexander v. U.S., 500 F.2d 1 (8th Cir. 1974); Sanders v. U.S., 387 F.2d 142 (5th Cir. 1967). See also FECA Program Memo 186, 14 Oct. 1980; FECA Program Memo 42, 3 March 1966; Scheppan v. U.S., 810 F.2d 461 (4th Cir. 1987) (PHS officials claim for negligent medical treatment barred); Lance v. U.S., 70 F.3d 1093 (9th Cir. 1995) (volunteer worker who was treated at VA for injury not on the job is FECA barred); Votteler v. U.S., 904 F.2d 128 (2d Cir. 1990) (coverage for medical malpractice for PHS employee, even though treatment was for non-job related injury); McCall v. U.S., 901 F.2d 548 (6th Cir. 1990) (FECA coverage for medical malpractice for on-the-job injury of

Federal employee, even though surgery was furnished on basis employee was military dependent); Somma v. U.S., 283 F.2d 149 (3rd Cir. 1960) (failure to properly read x-rays on required physical results in delayed diagnosis of non-job related TB falls under FECA); Wilder v. U.S., 873 F.2d 285 (11th Cir. 1989) (FECA coverage for medical malpractice on NAFI employee injured on job, even though treatment furnished as military dependent). But see Daly v. U.S., 916 F.2d 1467 (9th Cir. 1991) (U.S. held liable under FTCA for failure to inform employee of abnormal test results--FECA not raised); Wright v. U.S., 717 F.2d 254 (6th Cir. 1983) (no coverage for medical malpractice for VA hospital employee re rupture of tubal pregnancy).

h. Third Party Claims. Formerly, FECA bar extended to third party claims for indemnity or compensation. Smith v. Rivest, 396 F. Supp. 379 (E.D. Wis. 1975); Wilson v. Knoxville Community Dev. Corp. v. U.S. Post Office Dept., 451 F. Supp. 1168 (E.D. Tenn. 1978). Newport Air Park Inc. v. U.S., 419 F.2d 342 (1st Cir. 1969); Galimi v. Jetco, Inc. v. Hodges, 514 F.2d 949 (2d Cir. 1975); Travelers Insurance Co. v. U.S., 493 F.2d 881 (3d Cir. 1974); Kudelka v. American Hoist & Derrick Co. v. U.S., 541 F.2d 651 (7th Cir. 1976); Wien Alaska Airlines Inc. v. U.S., 375 F.2d 736 (9th Cir. 1967), cert. denied, 389 U.S. 940 (1967) (citing United Air Lines Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964), cert. dism'd sub nom., United Air Lines v. U.S., 379 U.S. 951 (1964)); Murray v. U.S., 405 F.2d 1361 (D.C. Cir. 1968); Intra-Fix v. U.S., Civ. #SA-80-CA-8 (W.D. Tex. 1981). Contra Wallenius Bremen GmBH v. U.S., 409 F.2d 994 (4th Cir. 1969), cert. denied, 398 U.S. 598 (1970). In Lockheed Aircraft Corp. v. U.S., 460 U.S. 190, 103 S.Ct. 1033 (1983) the Supreme Court overrules the foregoing cases and holds that FECA's exclusive remedy provision does not bar third party indemnity claims against U.S. See also Campuzano v. U.S., 751 F. Supp. 36 (E.D.N.Y. 1990) (3rd party action by driver of POV permitted where U.S. employee in GOV recovered FECA benefits). Cf. Fairchild Republic Co. v. U.S., 712 F. Supp. 711 (S.D. Ill. 1988) (no contribution where Federal employee sues asbestos manufacturer, since safeguarding workplace by U.S. is discretionary). Nonetheless, the U.S. still possesses the immunity it would have as a private person under state workers' compensation laws. Bell Helicopter v. U.S., 833 F.2d 1375 (9th Cir. 1987). See also General Electric Co. v. U.S., 813 F.2d 1273 (4th Cir. 1987) (Maryland law); GAF Corp. v. U.S., 1996 WL 422491 (D.D.C.) (GAF's claiim for indemnity barred by California's dual capacity doctrine); Rivera-Lopez v. U.S., 914 F. Supp. 17 (D.P.R. 1996) (Puerto Rican law); Nicholson v. United Technologies Corp., 697 F. Supp. 598 (D. Conn. 1988) (Connecticut law). However, there is some

disagreement over whether the U.S. would be protected under LHWCA's exclusivity provisions. See Johns-Manville Sales Corp. v. U.S., 622 F. Supp. 443 (N.D. Cal. 1985) (LHWCA case following Lockheed). Contra Bush v. Eagle-Picher Industries Inc., 927 F.2d 445 (9th Cir. 1991) (LHWCA dual capacity doctrine not permitted under Lockheed to obtain contribution in suit of asbestos manufacturer); In re All Maine Asbestos Litigation (PNS Cases), 772 F.2d 1023 (1st Cir. 1985). See also Lopez v. A.C. & S. Inc. v. U.S., 858 F.2d 712 (Fed. Cir. 1988) (civil service shipyard worker not under LHWCA as no maritime jurisdiction). Farley v. U.S., __ F.3d __, 1998WL849749 (10th Cir., Okla.), sexual harassment causing emotional injuries could be determined to be under FECA-cites Swafford v. U.S., 998 F.2d 837 (10th Cir. 1993); McDaniel v. U.S., 970 F.2d 194 (6th Cir. 1992); Jones v. TVA, 948 F.2d 258 (6th Cir. 1991); contra DeFord v. Sec'y of Labor, 700 F.2d 281 (6th Cir. 1983).

i. Non-Enumerated Injuries. FECA bar extends to a great number of injuries, even if not specifically enumerated or compensable. The FECA bar extends to injuries for which there is no scheduled compensation, e.g., ability to reproduce. Posegate v. U.S., 288 F.2d 11 (1961); Thol v. U.S., 218 F.2d 12 (9th Cir. 1954); Mack v. U.S., 213 F.2d 543 (10th Cir. 1954); Underwood v. U.S., 207 F.2d 862 (10th Cir. 1953). See also Fenelon v. Duplessis, # 92-3200 (5th Cir., 29 June 1993) (no suit permitted for emotional distress by USPS employee--rejects Sheehan, infra, and cites U.S. v. Smith, 499 U.S. 160, 111 S.Ct. 1181 (1991) and states that FECA applies even though no scheduled benefit). Cf. Parayno v. U.S., Civ. # 95-3733R (AJB) (S.D. Cal., 1 May 1996) (exchange employee is beaten and sexually assaulted by Navy driver who is taking her to work--claim for pain and suffering is excluded by LHWCA). The FECA bar also extends to verbal abuse from supervisors or other employees. Guidry v. Durkin, 834 F.2d 1465 (9th Cir. 1987) (defamation action barred by FECA exclusivity); Andrejko v. Sanders, 638 F. Supp. 449 (M.D. Pa. 1986) (mere verbal abuse of Federal employee by supervisor does not constitute actionable behavior). Accord Araujo v. Welch, 742 F.2d 802 (3d Cir. 1984). FECA normally bars emotional distress FTCA suits. Fenelon, supra; Castro v. U.S., 757 F. Supp. 1149 (W.D. Wash. 1991) (emotional distress claim brought by USPS employee who alleges she was forcibly detained and questioned is barred by FECA--court distinguishes Sheehan, infra); Jones v. Resolution Trust Corp., Civ. # 94-133 (S.D. Tex., 29 June 1994) (suit of emotional distress by Federal employee arising from constructive dismissal--court rejects Sheehan, infra, and applies FECA bar--citing McDaniel v. U.S., 970 F.2d 194 (6th Cir. 1992)); Greathouse v. U.S., 961 F. Supp. 173 (W.D.

Ky. 1997) (employee's emotional distress claim for being threatened by co-employee must be filed under FECA because of Saltsman v. U.S., 104 F.3d 787 (6th Cir. 1997)). However, some courts have held that emotional distress claims are not barred by FECA. See Sheehan v. U.S., 896 F.2d 1168 (9th Cir. 1990) (FECA does not bar intentional infliction of emotional distress for sexual assault by supervisor--also not barred by assault exclusion); Underwood v. U.S. Postal Service, 742 F. Supp. 968 (M.D. Tenn. 1990) (FECA does not bar FTCA claim for emotional distress caused by mishandling of personnel action--cites Sheehan and Newman v. Legal Services Corp., 628 F. Supp. 535 (D.D.C. 1986)); Freedman v. Turnage, 646 F. Supp. 1460 (W.D.N.Y. 1986) (Bivens type action against superiors permitted as administrative remedies either exhausted or not available); Lawrence v. I.C.C., 631 F. Supp. 631 (E.D. Pa. 1982) (FECA does not bar suit as no scheduled compensation for mental suffering, humiliation, embarrassment or loss of employment-suit permitted under Administrative Procedures Act (5 U.S.C. § 703) and Mandamus Act (28 U.S.C. § 1361)). Even if claim arguably not FECA barred, the plaintiff may have to resort to statutory scheme other then FTCA to get relief. Bush v. Lucas, 462 U.S. 367 (1983) (sexual/racial discrimination claims barred under FTCA-plaintiff required to use other remedies, e.g., administrative or Title VII, 42 U.S.C. §2000e); Brown v. General Services Administration, 425 U.S. 820, 96 S.Ct. 1961 (1976) (same). Jense v. Runyon, 990 F. Supp. 1320 (D. Utah, 1998). FECA does not cover harm to postal worker caused by on-the-job sexual harassment as it is a non-covered injury - cites in support Nichols v. Frank, 42 F.3d 503 (9th Cir. 1994) and permits negligent supervision suit under FTCA. Vargo-Adams v. U.S. Postal Service, 992 F. Supp. 939 (N.D. Ohio 1998). Postal worker, allegedly wrongfully discharged, claim for intentional infliction of emotional distress is exclusively under FECA. Farley v. U.S., __ F.3d __, 1998 WL 849749 (10th Cir. Okla.), sexual harrassment causing emotional injuries; could be determined to be under FECA-cites Swaford v. U.S., 998 F.2d 837 (10th Cir. 1993); McDaniel v. U.S., 970 F.2d 194 (6th Cir. 1992); Jones v. TVA, 948 F.2d 259 (6th Cir. 1991); DeFord v. Sec'y of Labor, 700 F.2d 281 (6th Cir. 1983). Brown v. U.S., 1999 U.S. Dist. LEXIS 10437 (N.D. Tex. 2 July 99) substantial question as to whether FECA applies to emotional distress claim where IRS employee claims tampering with evidence during her embezzlement trial and continuing harrassment after acquittal; Burke v. U.S., 641 F. Supp. 566 (E.D. La 1986); Eura v. U.S. Postal Service, 711 F. Supp. 1365 (S.D. Miss. 1989); Williams v. U.S., 565 F. Supp. 59 (M.D. Miss. 1983); contra Deford v. Sec'y of Labor, 700 F.2d 281 (6th Cir. 1983); Cergick v. Austin, 764 F. Supp. 580 (W.D. Mo. 1991).

j. Prison Industry Injuries. Prison industries compensation system also bars claims for on-the-job injuries of prisoners. Demko v. U.S., 385 U.S. 149 (1966); Shepard v. Stidham, 502 F. Supp. 1275 (M.D. Ala. 1980) (citing Aston v. U.S., 625 F.2d 1210 (5th Cir. 1980)). But see Bagola v. Kindt, 131 F.3d 632 (7th Cir. 1997) (exclusivity of ptrison industries remedy does not preclude Bivens claim by injured prisoner against prison officials); Scott v. Reno, 902 F. Supp. 1190 (C.D. Cal. 1995) (claim for deliberate indifference in treatment of industrial injury under 8th Amendment is not barred by Prison Industries Act, 18 U.S.C. § 4126). Kamaka v. U.S., Civ. #96-00623SPK (D. Haw., 22 Oct. 1997) (U.S. prisoner fell from roof while tearing down building -- claim fell under Act. Guttknecht v. U.S., 1998 WL 205700 (E.D. Pa.). Federal prisoner slips on ice while on work release at Naval installation - exclusive remedy is Prison Industries Act.

k. Criminal Complaint. Signing criminal complaint for threats against her life by supervisor cannot be subject of suit by subordinate employee. Currie v. Guthrie, 749 F.2d 185 (5th Cir. 1984).

l. Constitutional Claims. Constitutional claims against Federal employees, i.e., Bivens remedy not allowed unless special factors exist, e.g., no comprehensive Congressionally mandated remedy available. Bush v. Lucas, 462 U.S. 367 (1983). See also Schweiker v. Chilicky, 488 U.S. 412, 108 S.Ct. 2460 (1988) (Social Security applicants must use Social Security remedy); Spagnola v. Mathis, 859 F.2d 223 (D.C. Cir. 1988) (no Bivens remedy for employee denied promotion or prospective employee denied employment).

m. State Tort Liability of Federal Employees. Westfall v. Erwin, 484 U.S. 292 (1988) (FECA bar applied only when other federal employee's conduct was within scope and discretionary). This decision has been modified by the Westfall Act, 28 U.S.C. § 2679. See Haas v. Barto, 829 F. Supp. 729 (M.D. Pa. 1993) (scope certification of Attorney General upheld where one federal employee pulled out steps from under another employee causing fall).

n. State and Local Law Enforcement Officers. Falls under FECA when engaged in apprehension or attempted apprehension of person engaged in Federal crime or material witness thereof (5 U.S.C. § 8191). See Buehler v. U.S., 1996 WL 511645 (N.D. Cal.) (FECA applies to claim for injuries by California narcotics agent injured while riding with DEA agent); Aponte v. U.S., 940 F. Supp. 898 (E.D. Cal. 1996)

(FECA applies to deputy sheriff who is shot while assisting in Federal drug enforcement); Aurello v. U.S., Civ. # 87-0778-VAC (D. Haw. 1988). Fleming v. U.S.P.S., __ F. Supp. __, 1998 Wl 81634 (W.D. Ky.) (soldier on way to work collides with USPS vehicle off post--
Feres barred.

. Barron v. Martin-Marietta Corp., 868 F. Supp. 1203 (N.D. Calif. 1994) (in suit against manufacturer, availability of government contractor defense turns on whether U.S. employee is injured by toxic fumes from missile canister); Stone v. FWD Corp., 822 F. Supp. 1211 (D. Md. 1993) (government contractor defense bars claim by Navy civilian employee fireman who slipped on step of fire engine). In Re Asbestos Litigation, 986 F. Supp. 761 (S.D.N.Y. 1997) (Raymark supplying protective asbestos blankets to Naval shipyard workers results in liability on design defect not subject to Government contractor defense as Raymark did not warn U.S. of danger in using blankets.

10. Feres Bar. U.S. service members are not proper claimants for personal injury or death arising incident to service. Feres v. U.S., 340 U.S. 135 (1950); McAllister v. U.S., 942 F.2d 1473 (9th Cir. 1991) (Feres applies where soldier mental patient on hospital pass stabs and kills active duty Army officer who is shopping at PX). Compare Brooks v. U.S., 337 U.S. 49 (1949).

a. Feres Includes Reservists and National Guardsmen. Bowen v. Oistead, 125 F.3d 800 (9th Cir. 1997) (officer's suit because of involuntary dismissal is Feres barred); Layne v. U.S., 295 F.2d 433 (7th Cir. 1961), cert. denied, 368 U.S. 990 (1962); Coletta v. U.S., 300 F. Supp. 19 (D.R.I. 1969); Mattos v. U.S., 274 F. Supp. 38 (E.D. Cal. 1967), aff'd, 412 F.2d 793 (9th Cir. 1969); Cusanelli v. Klaver, 698 F.2d 82 (2d Cir. 1983); Peluso v. U.S., 474 F.2d 605 (3d Cir. 1973); Spain v. U.S., 452 F. Supp. 585 (D. Mont. 1978); Misko v. U.S., 453 F. Supp. 513 (D.D.C. 1978); U.S. v. Carroll, 369 F.2d 618 (8th Cir. 1966); Herreman v. U.S., 476 F.2d 234 (7th Cir. 1973); Sadowinski v. U.S., Civ. 79-3077 (9th Cir. 1980). Bednasowicz v. U.S., 1997 WL 665792 (N.D. Ill.) (Feres bars action by reservist for wrongful discharge, which is heartland Feres by its nature). Feres applies to AD reservists or those ordered to AD. Uhl v. Swanstrom, 876 F. Supp. 1545 (N.D. Iowa 1995), aff'd, 79 F.3d 751 (8th Cir. 1996) (Feres bars claim by National Guard technician who received medical discharge in error,even though BCMR ordered him reinstated--accord Wood v. U.S., 968 F.2d 738 (8th Cir. 1992)); Loughney v. U.S., 839 F.2d 186 (3d Cir. 1988) (Feres applies to National Guardsman's two week training duty); Maw

v. U.S., 733 F.2d 174 (1st Cir. 1984) (Feres bars suit from non AD reservist who did not report for six months AD, since JAG reservist told him he was mistakenly ordered to AD); Eisenhart v. U.S., Civ. 81-73051 (9th Cir. 1980) (Feres bar includes auxiliary Coast Guardsman on reserve duty on another reservist's privately owned boat); Tobin v. Pryce, 963 F. Supp. 880 (D. Neb. 1997) (derogatory treatment of Jewish NG officer during 2 week ADT in Germany falls under Feres); Barry v. Stevenson, 965 F. Supp. 1220 (E.D. Wis. 1997) (national guardsman on two weeks training injured passenger in vehicle accident--suit against driver barred under Westfall Act, since driver was in scope of employment); Velez v. U.S. ex rel. Dept. of Army, 891 F. Supp. 61 (D.P.R. 1995) (member of Puerto Rico NG performing official duties without orders is arrested at Fort Buchanan--Feres bars false arrest claim); Hassenfratz v. Garner, 911 F. Supp. 235 (S.D. Miss. 1995) (civilian technician with Miss. ARNG filed suit for being terminated for cause--Feres applies); Townsend v. Seuver, 791 F. Supp. 227 (D. Minn. 1992) (member Minn. NG barred from suing state civilian employees for racial harassment); Patterson v. U.S., Civ. 1P 83-900C (S.D. Ind. 1983) (reservist voluntarily riding in jeep at summer camp barred under Feres). Feres also applies to AD reservist involved in off-post accidents. Green v. Hall, 881 F. Supp. 451 (D. Or. 1995) (reservist on weekend training, killed in off-post accident with civilian truck while going to breakfast--Feres bars claim for negligent supervision of driver who was ill); Bielema v. Biester, 880 F. Supp. 555 (N.D. Ill. 1995) (Feres bars claim by two week reservist involved in off post, off duty accident--Parker distinguished). Feres also applies when injury incurred on AD, but negligent treatment not rendered while plaintiff on AD. Jackson v. U.S., 110 F.3d 1484 (9th Cir. 1997); Quintana v. U.S., 997 F.2d 711 (10th Cir. 1993) (medical treatment at USAF MTF for ADT injury after return to civilian status--Feres barred); Bloss v. U.S., 545 F. Supp. 102 (N.D.N.Y. 1982) (full-time recruiter for N.Y. Navy Reserve--claim for medical malpractice falls under Feres, even though he was not in pay status at time of treatment); Lied v. U.S., Civ. 82-0322 (M.D. Pa. 1982). A § 709 employee's suit may not be barred. See Neal v. Alabama National Guard, 1997 WL 1114910 (M.D. Ala.) (709 employee's suit against fellow 709 employee for racial harassment is not necessarily barred by Feres, even though harassment occurred in a duty status--cites many cases on hybrid status of 709 employees). Hupp v. U.S. Dept. of the Army, 144 F.3d 1144 (8th Cir. 1998) Title VII applies to Iowa NG sergeant's application for AGR position but Feres bars claim. Gregory v. Widnall, 153 F.3d 1071 (9th Cir. 1998) Title VIII applies to National Guard Technicians except when they challenge personnel actions integrally related to

military's unique structure, therefore, Feres bar not applicable to hostile work environment claims; Grant v. Shubuck, 81 F. Supp. 2d 250 (W.D.N.Y. 1998), barring Guardman access to Armory, stripping his security clearance among other actions is not a 42 U.S.C. 1983 action and is Feres barred; Walker v. U.S., 1998 WL 637360 (E.D. La.), Army reserve officer's suit is Feres barred re common law tort portion for involuntary release-also time-barred. Rowe v. U.S., 37 F. Supp. 3d 425 (D. Md. 1999), medical malpractice alleged for improper repair of knee after 2 weeks active duty is Feres barred. Brown v. U.S., 151 F.3d 800 (8th cir. 1998), ROTC cadet-reservist injured in PT training, alleges negligent treatment at Army hospital - cites Wake v. U.S., 89 F.3d at 58.

b. Feres Extends to Derivative Claims. Mattos v. U.S., 274 F. Supp. 38 (E.D. Cal. 1967); Van Sickel v. U.S., 285 F.2d 87 (9th Cir. 1960); De Font v. U.S., 453 F.2d 1239 (1st Cir. 1972); U.S. v. Lee, 400 F.2d 558 (9th Cir. 1968); Harrison v. U.S., 479 F. Supp. 529 (D. Conn. 1979). See also Broshinsky v. U.S., 947 F.2d 417 (9th Cir. 1991) (wife's claim for failed vasectomy is derivative and Feres barred); Scales v. U.S., 685 F.2d 970 (5th Cir. 1982) (injury to child at birth not compensable due to negligent treatment of service member mother during pregnancy, i.e., rubella warning not given); Clark v. U.S., 974 F. Supp 895 (E.D. Tex. 1997) (birth defects alleged due to father's chemical exposure during Desert Storm is Feres barred); Minns v. U.S., 155 F.3d 445, 4th Cir. 1998)(same facts and result as Clark). Williams v. U.S. Army, 709 F. Supp. 668 (E.D.N.C. 1989) (Feres bars claim of dependent husband for soldier wife's miscarriage); Contra Monaco v. U.S., 661 F.2d 129 (9th Cir. 1981), cert. denied, 456 U.S. 989 (1982) (genetic damage to daughter from atomic radiation); Hinkie v. U.S. et al., 715 F.2d 96 (3d Cir. 1983); Mondelli v. U.S., 711 F.2d 567 (3d Cir. 1983); In re Agent Orange Product Liability Litigation, 580 F. Supp. 1242 (E.D.N.Y. 1984); Lombard v. U.S., 690 F.2d 215 (D.C. Cir. 1982), cert. denied, 462 U.S. 118 (1983); Fountain v. U.S., 533 F. Supp. 698 (W.D. Ark. 1981); Bibby v. U.S., Civ. #80-0230-6 (D.S.C. 1981) (failed vasectomy--wrongful birth).

c. Goverment Contractor Defense. Feres may extend to third party claims for indemnity and to claims against U.S. contractor by service member particularly where “government contractor” defense is viable under State law. See, generally, Brown v. Caterpillar Tractor, 696 F.2d 246 (3rd Cir. 1982), appeal after remand, 741 F.2d 646 (3rd Cir. 1984); Ramsey v. Henry, 577 F.2d 1163 (4th Cir. 1978); Donham v. U.S., 536 F.2d 765 (8th Cir. 1976); Carter v. City of Cheyenne, 649 F.2d 827 (10th Cir. 1981); Laswell v. Brown,

683 F.2d 261 (8th Cir. 1982); In re Agent Orange Product Liability Litigation, 534 F. Supp. 1046 (E.D.N.Y. 1982); McKay v. Rockwell International Corp., 704 F.2d 444 (9th Cir. 1983); Hillier v. Southern Towing Co. v. U.S., 714 F.2d 714 (7th Cir. 1983) (member of U.S. Coast Guard dies from inhalation of ammonia fumes while acting as inspector). See also Askin v. Brown & Root Services Corp., 1997 WL 598597 (S.D.N.Y.) (Brown & Root entitled to government contractor defense in suit for rental of compound used by U.S. Army and U.N. in Somalia). Cases where Feres or the government contractor defense barred third party indemnity claims. Stencel Aero Engineering Corp. v. U.S., 97 S.Ct. 2054 (1977); Hefley v. Textron Inc., 713 F.2d 1487 (10th Cir. 1983) (suit for helicopter crash involving Kansas National Guard--Feres may extend to third party claims for indemnity); Wm. T. Thompson Co. v. U.S., 26 Cl. Ct.17 (1992), aff'd sub nom., Hercules Inc v. U.S., 24 F.3d 188 (Fed. Cir. 1994), aff'd, 516 U.S. 417, 116 S.Ct. 981 (1996) (manufacturer's indemnity claim arising from Agent Orange settlement is barred because contractor's would not have been liable because of government contractor defense); McVan v. Bolco Athletic Co., 600 F. Supp. 375 (E.D. Pa. 1984) (manufacturer cannot third party U.S. in action for injury of Army officer by defective base during informal on-post softball game). The Supreme Court has also allowed manufacturers to assert a government contractor defense, where product manufactured to government approved specifications. Boyle v. United Technologies Corp., 487 U.S. 500, 108 S.Ct. 2510 (1988) (Supreme Court reinvents Government contractor defense--based on Federal common law); Yearsley v. W.A. Ross Construction Co., 309 U.S. 18, 60 S.Ct. 413 (1940) (same); Perez v. Lockheed Corp., 81 F.3d 510 (5th Cir. 1996), modified on other grounds, 88 F.3d 340 (5th Cir. 1996) (Government contractor defense applies to crash of C5A at Ramstein where USAF actively participated in design and revision); Tozer v. LTV Corp., 792 F.2d 402 (4th Cir. 1986) (canopy on fighter jet-government contractor defense); Bynum v. FMC Corp., 770 F.2d 556 (5th Cir. 1985) (where Mississippi National Guardsman is injured by poorly designed M-548 cargo carrier while on annual training in Georgia--court permits government contractor defense under Federal common law); In re Air Crash Disaster at Mannheim Germany on 11 Sept. 1982, 769 F.2d 115 (3d Cir. 1985) (Government contractor defense applies despite contractor's primary role in design, since U.S. had final say); Koutsoubos v. Boeing Vertol, 755 F.2d 352 (3d Cir. 1985), cert. denied, 474 U.S. 821 (1985); Tate v. Boeing Industries, 921 F. Supp. 1562 (W.D. Ky. 1996) (government contractor applies to sling hang-up where U.S. approved operational manual); Wisner v. Unisys Corp., 917 F. Supp. 1501 (D. Kan. 1996) (Government contractor defense applies to postal equipment--not limited to military

contracts); Ramey v. Martin-Baker Aircraft Co., 656 F. Supp. 984 (D. Md. 1987) (government contractor defense bars injury claim by civilian mechanic on Navy base--good collection of cites); Crossan v. Electron Tube Division, 693 F. Supp. 528 (E.D. Mich. 1986) (government contractor defense applies). However, the government contractor defense does not apply in all circumstances where products are made according to government plans, especially where plaintiff's claims involve something other than a design defect. Chapman V. Westinghouse Electric Corporation., 914 F.2d 267 (9th Cir. 1990) (no Government contractor defense when Navy member slips on contractor maintained loading dock at U.S. installation); Mitchell v. Lone Star Ammunitions, Inc., 913 F.2d 242 (5th Cir. 1990) (government contractor defense does not apply when contractor knows of defect in mortar shells, but U.S. does not); Trevino v. General Dynamics Corp., 865 F.2d 1474 (5th Cir. 1989) (Varig does not require application of Government contractor defense where contractor has final say); Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985) (crash into ocean after launch from flight deck--no government contractor defense); Gray v. Lockheed Aeronautical Systems Co., 125 F.3d 1371 (11th Cir. 1997), aff'g, 880 F. Supp. 1559 (W.D. Ga. 1995) (crash of aircraft seconds after launching from carrier--Government contractor defense denied as ailerions were defectively manufactured).

d. AD Military Personnel. Feres bars suits involving AD military personnel incident to service. See U.S. v. Johnson, 481 U.S. 681, 107 S.Ct. 2063 (1987) (Coast Guard pilot killed because of FAA controllers' negligence while the pilot was conducting search operation at sea--Feres barred); Belton v. Dow Chemical Co., 103 F.3d 137 (table), 1996 WL 674150 (9th Cir. 1996) (claim for injury from Agent Orange is Feres barred); Stephenson v. Stone, 21 F.3d 159 (7th Cir 1994) (accused soldier shot another soldier who was going to testify against him--Feres barred); Jackson v. Reigle, 17 F.3d 280 (9th Cir. 1994) (claim based on USAF investigation into homosexual lifestyle of USAF officer who was assigned to Ballistic Missile office is Feres barred--differentiates Lutz, infra); Blakey v. U.S.S. Iowa, 991 F.2d 148 (4th Cir. 1993) (Feres applies to death of sailor due to explosion on high seas); Washington v. U.S., 12 F.3d 1111 (table), 1993 WL 471790 (9th Cir. 1993) (acquisition of AIDS based on Navy's failure to issue "no sex" order to sailor--Feres barred); Kitowski v. U.S., 931 F.2d 1526 (11th Cir. 1991) (Feres applies to deliberate drowning of Navy trainee by instructors during training); Smith v. U.S., 877 F.2d 40 (11th Cir. 1989) (Feres applies to death of Challenger astronaut); Dozler v. U.S., 869 F.2d 1165 (8th Cir. 1989) (failure to warn of plot to murder-Feres applies); LeCrone v. U.S. Navy, 958 F. Supp.

169 (S.D. Cal. 1997) (claim for emotional distress allegedly due to failure to discipline sailors who beat and kicked LeCrone is Feres barred); Ordahl v. U.S., 646 F. Supp. 4 (D. Mont. 1985) (blowgun known to be in barracks used to attack fellow airman--Feres barred); Bolton v. U.S., 604 F. Supp. 1219 (S.D. Miss. 1985) (failure to furnish mental health treatment to AD soldier who killed son is Feres barred); McCaleb v. U.S., 572 F. Supp. 1260 (M.D. Tenn. 1983) (one Navy member stabs another aboard ship--both incident to service). The Feres bar may include sexual harassment claims incident to service. Becker v. Pena, 103 F.3rd 137 (table), 1997 WL 90570 (9th Cir 1997) (Coast Guard member's claim for sexual harassment is Feres barred as is her constitutional claim); Bois v. Marsh, 801 F.2d 462 (D.C. Cir. 1986) (superior officer admittedly discriminates against female officer--suit barred by Feres-no suit under 42 U.S.C. § 1983(3) against superior); Stubbs v. U.S., 744 F.2d 58 (8th Cir. 1984) (Feres bars action for suicide of service member who was sexually harassed by drill sergeant); Colon v. U.S., Civ. #C-93-3320 WHO (N.D. Cal., Feb. 22, 1994) (suicide of soldier allegedly due to wrongful order and sexual harassment is Feres barred); Lunsford v. U.S., Civ. # 83-H-701-S (M.D. Ala. 1984) (sexual harassment of service woman by military supervisor--suit barred). But see Lutz v. Secretary of the Air Force, 944 F.2d 1477 (9th Cir. 1991) (USAF major injured by spreading her private correspondence obtained surreptitiously is not Feres barred). Swiantek v. U.S., 1995 WL 120208 (E.D. Pa. 1995) (soldier-driver dies when he overturns tank allegedly due to improper training--Feres applies. Jimenez v. U.S., 158 F.3d 1228 (11th Cir. 1998), sailor still on active duty at time of alleged malpractice as court martial not affirmed and discharge not executed. Berry v. U.S., 52 F. Supp. 2d 841 (E.D. N.C. 1997) Feres bars injury claims by paratroopers even though FAA comptrollers allegedly caused midair collision.

e. Adjustments of Military Status. Feres bar includes adjustments of military status of plaintiff. Jernigan v. U.S., 86 F.3d 1162 (table), 1996 WL 258602 (9th Cir. 1996) (claim for improper court-martial is Feres barred, but court must rule on FOIA claim independently); Wood v. U.S., 968 F.2d 738 (8th Cir. 1992) (suit for loss of pay due to improper assignments is Feres barred); Duffy v. U.S., 966 F.2d 307 (7th Cir. 1992) (unlawful call to AD barred--must exhaust BCMR remedies); Fathman v. U.S. Navy, 723 F. Supp. 1243 (S.D. Ohio 1989) (Feres applied to undesirable discharge modified by NBCMR); Aviles v. U.S., 696 F. Supp. 217 (E.D. La. 1988) (member of Coast Guard involuntarily retired for disability--Feres applies); Ayala v. U.S., 624 F. Supp. 259 (S.D.N.Y. 1985) (allegation that transfer from active duty to

reserves was racially motivated is barred under Feres--proper forum is Board for Correction of Military Records); Geyen v. Marsh, 587 F. Supp. 539 (W.D. La. 1984) (ABCMR decision on character of discharge for service in 1969-1972 does not effect Feres or revive FTCA--here decision by ABCMR was adverse); Hopkins v. U.S., 567 F. Supp. 491 (E.D.N.Y. 1983) (service member commits suicide at home while awaiting orders placing him on TDRL for psychiatric reasons--held Feres applies). But see Adams v. U.S., 728 F.2d 736 (5th Cir. 1984) (service member who remained at home while awaiting appeal of BCD not under Feres for care obtained at PHS facility). Jiminez v. U.S., 158 F.3d 1228 (11th Cir. 1998), medical malpractice alleged on sailor who had received BCD which had not been affirmed - Feres applies.

f. Medical Malpractice on Service Members. The Feres bar includes medical malpractice on service members. Jones v. U.S., 112 F.3d 299 (7th Cir. 1997) (soldier's claim for improper surgery at Letterman AMC while he was at Olympic tryout is Feres barred); Catshell v. U.S., 75 F.3d 426 (8th Cir. 1996) (reverses district court holding that Feres not applicable to sailors claim for delayed diagnoses of lymphoma); Schoemer v. U.S., 59 F.3d 26 (5th Cir. 1995) (Feres bars claim for failure to diagnose acromegaly during MEPS exam upon entry into NG from RA); Hayes v. U.S. on Behalf of Dept. of Army, 44 F.3d 377 (5th Cir. 1995) (Feres applies to hernia operation, even though hernia not caused by military service); Major v. U.S., 835 F.2d 641 (6th Cir. 1987); Persons v. U.S., 925 F.2d 292 (9th Cir. 1991) (Feres applies to suicide of sailor who previously attempted suicide, but was not admitted); Irvin v. U.S., 845 F.2d 126 (6th Cir. 1988) (Feres bars claim for negligent prenatal care to female soldier--follows Atkinson v. U.S., 825 F.2d 202 (9th Cir. 1987), cert. denied, 485 U.S. 987 (1988)); Madsen v. U.S., 841 F.2d 1011 (10th Cir. 1987) (medical malpractice in military hospital while on terminal leave--Feres applies); Del Rio v. U.S., 833 F.2d 282 (11th Cir. 1987) (negligent prenatal care to service woman, personal injury claim by mother barred, but not to child); Rayner v. U.S., 760 F.2d 1217 (11th Cir. 1985) (fact that service member "volunteered" to undergo myelogram does not remove Feres bar); West v. U.S., 744 F.2d 1317 (7th Cir. 1984) (Feres bars recovery for birth defects allegedly resulting from Army mistyping father's blood); Scales v. U.S., 685 F.2d 970 (5th Cir. 1982) (Feres includes injuries to service member mother caused by negligent delivery and extends to child's injuries, e.g., wrongful birth and wrongful life); Hawe v. U.S., 670 F.2d 652 (6th Cir. 1982); Davis v. U.S., 667 F.2d 822 (9th Cir. 1982) (negligent medical care bar under Feres not affected by 10 U.S.C. § 1089); L.J.B. v. U.S., 1997 WL 162076 (E. D. La.)

(claims of AIDS deaths of Navy member and wife are Feres barred); Cox v. Arnold, Civ. # C-3-94-538 (S.D. Ohio, 26 Jan. 1996) (Feres bar applied even though treatment by USAF physician was in a non-clinical setting); Faktor v. U.S., Civ. # 3-95-0694 (M.D. Tenn., 2 May 1996) (improper treatment of injury to military physician who slipped in shower in hotel is Feres barred); Johnson v. U.S., Civ. No. 89-2633 (D.D.C., Sept. 26, 1994), aff'd, 1995 WL 418651 (D.C. Cir. 1995) (Feres applies to failure to inform soldier that blood she donated was HIV positive); Lewis v. U.S., 865 F. Supp. 295 (D.S.C. 1994)(Feres bars claim by sailor exposed to mustard gas and not warned of health risk--claim also barred by discretionary function exclusion); Antoine v. U.S., 791 F. Supp. 304 (D.D.C. 1992) (service member's use of military MTF is always Feres barred); Forgette v. U.S., Civ. # 93-1925-A (W.D. Okla, Feb. 15, 1992), aff'd, 35 F.3d 574 (table), 1994 wL 461290 (10th Cir. 1994) (attack on Feres doctrine on basis that is merely a court created doctrine fails in medical malpractice case); Grosinsky v. U.S., 741 F. Supp. 805 (D. Ariz. 1990) (Feres bars claim by husband and wife for failed vasectomy); Martin v. U.S., 1989 WL 161540 (D. Md. 1989) (Feres applies to claim of service woman delivering child for her injury); Ocello v. U.S., 685 F. Supp. 100 (D.N.J. 1988) (Feres applies, even though no VA benefits granted due to EPTS); Rousell v. U.S., 745 F. Supp 1278 (S.D. Ohio 1988) (Feres bars claim for injuries caused by malfunctioning respirator during medical transport); Heath v. U.S., 633 F. Supp. 1340 (E.D. Cal. 1986) (mother's treatment with drug Benedectin causes severe birth defects--claim of mother and child barred since mother was active duty); Briggs v. U.S., 617 F. Supp. 1399 (D.R.I. 1985) (serviceman dies in quarters following provisional diagnosis of "Reiter's Syndrome" at military hospital held Feres barred); Davis v. Dept. of Army, 602 F. Supp. 355 (D. Md. 1985) (wrongful disposal of fetus born to service woman barred by Feres); Benvenuti v. DOD, 587 F. Supp. 348 (D.D.C. 1984) (Feres bars suit from military physician for adverse OER's and psychiatric exam). See also Thigpen v. U.S., 800 F.2d 393 (4th Cir. 1986) (majority opinion bars sexual assault by hospital corpsman on patient under A&B (28 U.S.C. § 2680(h)--dissent bars it under Feres). But see C.R.S. v. U.S., 761 F. Supp. 665 (D. Minn. 1991) (Feres does not bar claim by soldier, his wife and child for AIDS contaminated blood administered during abdominal surgery while on training duty in 1983); Johnson v. U.S., 810 F. Supp. 7 (D.D.C. 1992), earlier opinion, 735 F. Supp. 1 (D.D.C. 1992) (donation of blood by soldier stationed at WRAMC to WRAMC blood bank is not incident to service); Graham v. U.S., 753 F. Supp. 994 (D. Me. 1990) (soldier's child injured during birth--not Feres barred). Feres bar includes medical malpractice on service member injured on leave.

Veillette v. U.S., 615 F.2d 505 (9th Cir. 1980); Buer v. U.S., 241 F.2d 3 (7th Cir. 1956), cert. denied, 353 U.S. 974 (1957); Lampitt v. U.S., 753 F.2d 702 (8th Cir. 1985) (while on convalescent leave operated on by Navy doctors); Jones v. U.S., 655 F. Supp. 1032 (D.P.R. 1987) (soldier injured in bar-negligent treatment in VA hospital--Feres barred); Briggs v. U.S., 617 F. Supp. 1399 (D.R.I. 1985); Shults v. U.S., 421 F.2d 170 (5th Cir. 1969); Jones v. U.S., 729 F.2d 326 (5th Cir. 1984); Stansberry v. Middendorf, 567 F.2d 617 (4th Cir. 1978). See also Skees v. U.S. by and Through Department of the Army, 109 F.3d 421 (6th Cir. 1997) ("off duty" suicide falls under Feres where soldier was treated at military hospital); Borden v. Veterans Admin, 41 F.3d 763 (1st Cir. 1994) (Feres bars claim for medical malpractice by active duty soldier treated in VA facility for off duty injuries); Sidley v. U.S., 861 F.2d 988 (6th Cir. 1988) (negligent treatment for non-LOD motorcycle accident--Feres barred). Feres upheld even where treatment is by PHS or VA for service member on leave). Bankston v. U.S., 480 F.2d 495 (5th Cir. 1973); Lindeman v. U.S., (9th Cir. 1975) (unreported); Eisenhart v. U.S., Civ. #81-73851 (E.D. Mich. 1982). Feres also extends to elective surgery. Harten v. Coons, 502 F.2d 1363 (10th Cir. 1974); Hall v. U.S., 451 F.2d 353 (1st Cir. 1971); Lowe v. U.S., 440 F.2d 452 (5th Cir. 1971), cert. denied, 404 U.S. 833 (1971); Luce v. U.S., 538 F. Supp. 637 (E.D. Wis. 1982). Feres also bars suit by National Guard members injured while on active duty for medical malpractice committed by VA hospital. Selbe v. U.S., 130 F.3d 1265 (7th Cir. 1997) (Feres barred suit by Indiana National Guard member injured on active duty for medical malpractice committed by VA hospital where she was sent for treatment of hand injury). Of course, where the injury is to the child of a service member, the claim will stand on a different ground. Romero v. U.S., 954 F.2d 222 (4th Cir. 1992) (claim by damaged child is not Feres barred for premature birth resulting from alleged failure to place cerclage). Carter v. U.S., Civ. C-96-2543 WHO (N.D. Calif., 30 Oct. 1998). Sailor suicide in Oakland Naval Hospital - Feres applies. Pettus v. U.S., 1998 WL 536964 (9th Cir. Colo.), failure to diagnose skin condition is Feres barred. Carter v. U.S., Civ 1999 U.S. App LEXIS 9118 (9th Cir. 18 May 99), sailor commits suicide in psychiatric ward-Feres applies. Mills v. U.S., 1999 WL211943 (4th Cir. (S.C.)) fact that soldier was allegedly on medical leave during surgery at Moncrief ACH does not affect Feres bar.

g. Off-Duty, On-Base Conduct. Feres applies to off duty, but on-base activity. Hale v. U.S., 452 F.2d 668 (6th Cir. 1971); Flowers v. U.S., 764 F.2d 759 (11th Cir. 1985) (airman on-post returning to quarters from an off-post personal

errand, collision with U.S. vehicle on state highway running through base); Bon v. U.S., 802 F.2d 1092 (9th Cir. 1986) (Feres bars claim arising from collision of two boats operated by off-duty sailors); Shaw v. U.S., 854 F.2d 360 (10th Cir. 1988) (Feres applies to on-post on way to work POV accident); Rainey v. U.S., Civ. # 91-2656-4/5 (W.D. Tenn., 30 Nov. 1992) (off-duty sailor placed under detention and taken to confinement is injured in jeep caused by officer-of-the-day--Feres barred); Estate of McAllister v. U.S., 942 F.2d 1473 (9th Cir. 1991) (off-duty Army officer is stabbed to death by enlisted mental patient near Post Exchange is Feres barred); Millang v. U.S., 817 F.2d 533 (9th Cir. 1987) (off-duty Marine at on-post picnic run over by on-duty MP--Feres barred); Kelly v. Major, 835 F.2d 641 (6th Cir. 1987) (Feres bars soldiers claim for injuries resulting from motorcycle v. car collision on post in which NCO got drunk at unit party and caused accident); Frazier v. U.S., 372 F. Supp. 208 (M.D. Fla. 1973) (in PX). But see Elliott v. U.S., 13 F.3d 1555 (11th Cir. 1994) (soldier totally disabled by carbon monoxide gas in his on-post quarters while on annual leave is not Feres barred), vacated 2.8 F.3d 1076 (11th Cir. 1995) see also 37 F.3d 6-7 (11th Cir. 1994) affirmed by operation of law due to 4-4 vote enbanc; Kelly v. Panama Canal Com'n, 26 F.3d 597 (5th Cir. 1994) (Feres does not bar claim for wrongful death of soldier caused by striking low-hanging wires while sailing in a NAFI catamaran); Stephan v. U.S., 490 F. Supp. 323 (W.D. Mich. 1980). Feres does not include injuries on another post while attending off-duty picnic. Ritzman v. Trent, 125 F. Supp. 664 (E.D.N.C. 1954). Day v. Massachusetts Air National Guard, 167 F.3d 679 (1st Cir. 1999). Claims for off-duty vicious hazing attack on airman is Feres barred; however, individual suit against one attacker is permitted. Hansen v. U.S., Civ. # C98-5241RJB (W.D. Wash., 29 Oct. 1998), soldier struck by food cart in McChord Air Force Base commissary while shopping is Feres barred. Schmidt v. U.S. Civ #98-00183 SOM (D. Mass 6 May 99), sailor jogging on lunch break atPearl Harbor is hit by postal truck-Feres applies. Pringle v. U.S., 44 F. Supp. 2d 1168, (D. Kan. 1999), Feres bars action by soldier who is ejected from enlisted club and beaten in parking lot by civilian gang. Wendle v. U.S., Civ-97-1523-M (W.D. Okla. 31 Mar 99) soldier driving POV on post is struck by Gov't bulldozer driven by drunken civilian employee-Feres applies. Shiver v. U.S., 34 F. Supp. 2d 321, (D. Md. 1999) rape of female soldier by drill sergeant while on post is Feres barred.

h. NCO Club. Feres applies to military working in NCO Club. Mariano v. U.S., 444 F. Supp. 316 (E.D. Va. 1977). But see Roush v. U.S., 752 F.2d 1460 (9th Cir. 1985) (NCO Club

bouncer not in charge, i.e., on military duty--distinguishes Mariano); Johnson v. U.S., 704 F.2d 1431 (9th Cir. 1983); Howell v. U.S., 489 F. Supp. 147 (W.D. Tenn. 1980) (NCO bartender injured off-base by another NCO bartender driving POV after closing party at club--not Feres barred).

i. Soldiers Employed by Contractors. Feres bars applies to soldiers working for private contractor off-duty, but on-post. Miller v. U.S., 643 F.2d 481 (8th Cir. 1980); Seals v. U.S., 714 F. Supp. 1194 (S.D. Fla. 1989).

j. Base Recreational Areas. Feres applies to on base recreational areas and activities. Chambers v. U.S. 357 F.2d 224 (8th Cir. 1966); Knight v. U.S., 361 F. Supp. 708 (W.D. Tenn. 1972), aff'd, 480 F.2d 927 (6th Cir. 1973); Watkins v. U.S., 462 F. Supp. 980 (S.D. Ga. 1977); Camassar v. U.S., 531 F.2d 1149 (2d Cir. 1976); Richardson v. U.S., 226 F. Supp. 49 (E.D. Va. 1964); Parker v. U.S., 611 F.2d 1007 (5th Cir. 1980); Hand v. U.S., 260 F. Supp. 38 (M.D. Ga. 1966). This includes military flying clubs. Walls v. U.S., 832 F.2d 93 (7th Cir. 1987) (active duty soldier who was passenger was injured in crash of flying club plane piloted by active duty Warrant Officer--Feres applied); Woodside v. U.S., 606 F.2d 134 (6th Cir. 1979); Eckles v. U.S., 471 F. Supp. 108 (M.D. Pa. 1979); Hass v. U.S., 518 F.2d 1138 (4th Cir. 1975). But see Dreier v. U.S., 106 F.3d 844 (9th Cir. 1996) (soldier on afternoon off on recreational outing with other soldiers drowns in downhill channel at Fort Lewis water treatment facility--Feres not applicable). Denham v. U.S., 646 F. Supp. 1021 (W.D. Tex. 1986); Klepper v. U.S., Civ. # 80-1728 (D. Kan. 1984) (Feres does not bar claim for soldier injured while swimming at COE reservoir designated as Army recreational area); Brown v. U.S., 99 F. Supp. 685 (S.D. W.Va. 1951).

k. Proceeding Off-Base. Feres also applies to persons proceeding off-base. Stewart v. U.S., 90 F.3d 102 (4th Cir. 1996) (Feres applies to on post collision where soldier is on way home); Bisel v. U.S., Civ. # 94-197 (W.D. Mich., 12 Sept. 1994), aff'd, 121 F.3d 707 (table), 1997 WL 415316 (6th Cir. 1996) (Feres barred negligent supervision claim for injuries to two sailors who are involved in one car crash off-post following unit party); Stewart v. U.S., 90 F.3d 102 (4th Cir. 1996); Thomason v. Sanchez, 398 F. Supp. 500 (D.N.J. 1975), aff'd, 539 F.2d 955 (3d Cir. 1976); Coffey v. U.S., 324 F. Supp. 1087 (S.D. Cal. 1971); Gursley v. U.S., 232 F. Supp. 614 (D. Colo. 1964); Mason v. U.S., 568 F.2d 1135 (5th Cir. 1978). But see Parker v. U.S., 611 F.2d 1007 (5th Cir. 1980) (Warner v. U.S., 720 F.2d 837 (5th Cir. 1983) limits Parker to "furloughs" such as in Brooks v. U.S., 337 U.S. 49 (1949)

and upholds Zoula & Sterling v. U.S., 217 F.2d 81 (5th Cir. 1954) as law of circuit); Downes v. U.S., 249 F. Supp. 626 (E.D.N.C. 1965).

l. In Military Vehicle on Leave. Feres applies while plaintiff is using, or in, a military vehicle on leave. Uptegrove v. U.S., 600 F.2d 1248 (9th Cir. 1979) (military aircraft); U.S. v. Lee, 400 F.2d 558 (9th Cir. 1968 (same); Morgan v. U.S., 366 F. Supp. 938 (N.D. Fla. 1973); Gadwell v. U.S., Civ. #79-285 (M.D. Pa. 1982) (in recreational pass truck).

m. Off-Base, Off-Duty Activity. Feres may bar recovery for off base, off duty actions. U.S. v. Shearer, 473 U.S. 52, 105 S.Ct. 3039 (1985) (murder by one member of another off-duty and off-post barred by assault and battery exclusion, even with negligent supervision allegation); Satterfield v. U.S., 788 F.2d 395 (6th Cir. 1986) (follows Shearer--soldier beaten to death off-post by off-duty soldiers); Sanchez v. U.S., 878 F.2d 633 (2d Cir. 1989), aff'g, 701 F.Supp. 374 (E.D.N.Y. 1988)(AD Marine passenger PI claim barred by Feres when Marine driver overturns off-post after recent repair by PX); Bon v. U.S., 802 F.2d 1092 (9th Cir. 1986) (Feres bars claim arising from collision of two boats operated by off-duty sailors); Lauer v. U.S., 968 F.2d 1428 (1st Cir. 1992) (sailor struck by GOV while walking on off-base access road maintained and patrolled by Navy is barred). But see Sanchez v. U.S., 813 F.2d 593 (2d Cir. 1987) (Marine injured while passenger in POV off-post which crashed due to faulty brake repair by AAFES service station--not Feres barred); Lauer v. U.S., 773 F. Supp. 527 (D.P.R. 1991) (off duty sailor struck by POV while walking on perimeter road off base not Feres barred--U.S. provided no lighting); Taber v. Maine, 67 F.3d 1029 (2nd Cir. 1995) (Feres does not bar claim by sailor for injuries received in Guam in off post accident). Richards v. U.S., 1 F. Supp. 2d 498 (D.V.I. 1998) aff'd 176 F.3d 652 WL 294715 (3d Cir. (V.I.)) Soldier left off early to tend to pregnant wife--accident on major highway going through post--Feres applies. Dall v. U.S., 42 F. Supp. 2d 1275 (M.D. Fla. 1998), Navy officer flying club member, while on pass, crashes his own plane (maintained by flying club) while practicing off base under control of Navy Flying Club instructor under Feres.

n. Returning to Duty. Feres applies to persons returning to duty. Morey v. U.S., 903 F.2d 880 (1st Cir. 1990) (sailor falls off pier as he is boarding ship on return from pass); Pierce v. U.S., 813 F.2d 349 (11th Cir. 1987) (Feres not applied to accident just off-post to soldier who had been home for several minutes and was returning to duty); Shoen v.

U.S., 885 F. Supp. 827 (E.D.N.C. 1995) (Marine injured in on-post collision while on way to work--Feres applies); Daly v. U.S., Civ. # 76-2381-Z (D. Mass., 27 March 1980) (Feres barred suit by estate of "on liberty" petty officer killed by vehicle driven by another service member on public way while proceeding back to his ship from service club). But see Milleville v. U.S., 751 F. Supp. 976 (N.D. Fla. 1990) (sailor recruiter injured off-base after leaving on-base quarters to go to office off-base in POV--not Feres barred). Fleming v. U.S. Postal Service, 993 F. Supp. 582 (W.D. Ky. 1998). Soldier on way to work collides with USPS vehicle off-post - Feres applies.

o. Treatment of Veterans. Feres bar does not include veterans treated for prior incident to service injuries or being on a military base. U.S. v. Brown, 348 U.S. 110 (1954). See also McGowan v. Scoggins, 890 F.2d 128 (9th Cir. 1989) (Feres not applicable to assault on retired officer seeking new ID card). However, Brown not applicable where malpractice occurred in service. Anderson v. U.S., Civ. # 80-4050 (N.D. Iowa 1982). See also Katta v. U.S., 774 F. Supp. 1135 (N.D. Ill. 1991) (1985 suicide of veteran discharged in 1971--barred by Feres and lack of proximate cause).

p. Continuing Torts. Feres bars continuing torts based on continuing duty to inform, e.g., x-ray which shows cancer, increased risk of harm or disease. Hamilton v. U.S., 564 F. Supp. 1146 (D. Mass. 1983); Jefferson v. U.S., 340 F.2d 193 (9th Cir. 1965); Wisniewski v. U.S., 416 F. Supp. 599 (E.D. Wis. 1976); Henning v. U.S., 446 F.2d 774 (3d Cir. 1971); Henninger v. U.S., 473 F.2d 814 (9th Cir. 1973); Franz v. U.S., 414 F. Supp. 57 (D. Ariz. 1976); Nagy v. U.S., 471 F. Supp. 383 (D.D.C. 1979); Vallance v. U.S., 574 F.2d 1282 (5th Cir. 1978); Bishop v. U.S., 574 F. Supp. 66 (D.D.C. 1983); Schwartz v. U.S., 230 F. Supp. 536 (E.D. Pa. 1964); Broudy v. U.S., 661 F.2d 125 (9th Cir. 1981); Seveney v. U.S. Govt., 550 F. Supp. 653 (D.R.I. 1982); Targett v. U.S., 551 F. Supp. 1231 (N.D. Cal. 1982). See also Maddick v. U.S, 978 F.2d 614 (10th Cir. 1992) (while only tort is continuing failure to warn of increased risk of disease due to diving duty while on active duty--Feres applies); In re Agent Orange Product Liability Litigation, 603 F. Supp. 239 (E.D.N.Y. 1985) (no factual basis for claims including wife's claim--infant may sue later if injury occurs); Hopkins v. U.S., 567 F. Supp. 491 (E.D.N.Y. 1983) (discharge of paranoid schizophrenic who commits suicide). Claims involving the failure to warn about the effects of exposure to chemical weapons are Feres barred. Schnurman v. U.S., 490 F. Supp. 429 (E.D. Va. 1980) (WW II mustard gas test); In re Agent Orange Product Liability

Litigation, 506 F. Supp. 762 (E.D.N.Y. 1980) (Agent Orange cases against U.S. barred under Feres. There has been much litigation over whether Feres bars a continuing duty to warn claim in cases involving service members exposure to nuclear testing. Hampton v. U.S., 575 F. Supp. 1180 (W.D. Ark. 1983) (nuclear radiation injury-barred by Feres); Jaffee v. U.S., 592 F.2d 712 (3d Cir. 1979), cert. denied, 441 U.S. 961 (1978) (Nevada atomic tests-Feres barred--accord Monaco v. U.S., 661 F.2d 129 (9th Cir. 1981) (includes radiation claims of offspring)); Cole v. U.S., 635 F. Supp. 1185 (N.D. Ala. 1986) (discretionary function exclusion (28 U.S.C. § 2680(a)) applied to decision not to warn veterans of continuing danger to radiation exposure while in service). But see Cole v. U.S., 755 F.2d 873 (11th Cir. 1985) (in nuclear radiation case, continuing duty to warn barred by Feres, but new duty to warn is not--accord Shipek v. U.S., 752 F.2d 1352 (9th Cir. 1985)); Molsbergen v. U.S., 757 F.2d 1016 (9th Cir. 1985); Allen v. U.S., 588 F. Supp. 247 (D. Utah 1984) (explains continuing duty in civilian nuclear tests); Kelly v. U.S., 512 F. Supp. 356 (E.D. Pa. 1981) (nuclear test in South Pacific); Everett v. U.S., 492 F. Supp. 318 (S.D. Ohio 1980) (Nevada atomic tests); Reynolds v. Dept. of Navy, #C2-75-427 (S.D. Ohio 1976) (nuclear tests); Laswell v. Brown, 683 F.2d 261 (8th Cir. 1982), cert. denied, 459 U.S. 1210 (1983); Lombard v. U.S., 690 F.2d 215 (D.C. Cir. 1982), cert. denied, 462 U.S. 118 (1983); Fountain v. U.S., 533 F. Supp. 698 (W.D. Ark. 1981); Gaspard v. U.S., 713 F.2d 1097 (5th Cir. 1983). See also Maas v. U.S., 897 F. Supp. 1098 (N.D. Ill. 1995) (failure to warn claim by ex-USAF members who cleaned up nuclear aircraft crash while in NG is not Feres barred, but discretionary function exclusion does apply). LSD experiments on service members is barred by Feres. Stanley v. U.S., 483 U.S. 669 (1987). Contra Sweet v. U.S., 687 F.2d 246 (8th Cir. 1982) (court rules no causation in LSD "flashback" case and avoids ruling on Feres); Thornwell v. U.S., 471 F. Supp. 344 (D.D.C. 1979). Feres does not bar a failure to warn discharged soldier of continuing effects of LSD administered by Army. See M.M.H. v. U.S., 966 F.2d 285 (7th Cir. 1992) (failure to inform discharged soldier of negative result of HIV test performed on final physical forms basis of proper emotional distress claim under Wisconsin law); Johnson v. U.S., 735 F. Supp. 1 (D.D.C. 1990) (service woman misinformed she had AIDS when she donated blood to Army, not barred as giving blood not incident to service).

q. Void Enlistments. Feres includes void enlistments, i.e., failure to discover service disqualification on induction physicals where applicant is nevertheless enlisted or inducted. Healy v. U.S., 192 F. Supp. 325 (S.D.N.Y. 1961); Knoch v. U.S., 316 F.2d 532 (9th Cir. 1963); Southard v.

U.S., 397 F. Supp. 409 (E.D. Pa. 1975); Glorioso v. U.S., 331 F. Supp. 1 (N.D. Miss. 1971); Redmond v. U.S., 331 F. Supp. 1222 (N.D. Ill. 1971); Joseph v. U.S., 505 F.2d 525 (7th Cir. 1974); Kilduff v. U.S., 248 F. Supp. 310 (E.D. Va. 1961); Thompson v. U.S. ex rel. Brown (Sec. of Defense), 493 F. Supp. 28 (W.D. Okla. 1980); Calhoun v. U.S., 475 F. Supp. 1 (S.D. Cal. 1977), aff'd, 604 F.2d 647 (9th Cir. 1979); Silke v. U.S., Civ. #80-760-S (D. Mass. 1982); Morrow v. U.S., Civ. #82-C-2479 (N.D. Ill. 1983). See also Bowers v. U.S. 904 F.2d 450 (8th Cir. 1990) (failure to diagnose cancer at pre-induction physical--Feres barred); Appelhans v. U.S., 877 F.2d 309 (4th Cir. 1989) (Feres bars medical malpractice claim while on excess leave awaiting CM results-discharged when cancer discovered--Feres barred).

r. Non-Induction. If applicant is not inducted, Feres does not apply. Betesh v. U.S., 400 F. Supp. 238 (D.D.C. 1974).

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

t. Military Prisoners. Feres does apply to military prisoners who have not been discharged. Walden v. Bartlett, 840 F.2d 771 (10th Cir. 1988) (bars constitutional claim of discharged prisoner for pre-discharge illegal segregation); Dexheimer v. U.S., 608 F.2d 765 (9th Cir. 1979); Shaw v. U.S., 448 F.2d 1240 (4th Cir. 1971); Sargent v. U.S., 897 F. Supp. 524 (D. Kan. 1995) (military prisoner who injures finger while working in prison shoe shop is Feres barred). Feres does not extend to military prisoners who have been discharged. Milliken v. U.S., 439 F. Supp. 290 (D. Kan. 1976). Evans v. U.S., Civ #98-2446-JWL (D. Kan. 11 Mar 99), undischarged prisoner injured by off-set press in Disciplinary Barracks and alleges medical care was negligent is Feres barred.

u. Swine Flu Act. Feres does not bar claim by service members under Swine Flu Act. Brown v. U.S., 715 F.2d 463

(9th Cir. 1983); Hunt v. U.S., 636 F.2d 580 (D.C. Cir. 1980). Richardson v. U.S., Civ. # 97-1962 (CKK) (D.D.C., 13 Mar 1998) (Airman's claim for swine flu vaccination injury is not Feres barred but double dose given to servicemembers is discretionary.

v. Service Academy Cadet. Feres bars service academy cadets. Miller v. U.S., 42 F.3d 297 (5th Cir. 1995) (Feres bars claim of Naval Academy midshipman for medical malpractice during treatment of injuries received in sailing accident--Feres also applies to SIAA and PVA claims); Collins v. U.S., 642 F.2d 217 (7th Cir. 1981); Archer v. U.S., 217 F.2d 548 (9th Cir. 1954), cert. denied, 348 U.S. 953 (1955); Thoming v. U.S., Civ. #79-849 (D. Or. 1980); Fischer v. U.S., 451 F. Supp. 918 (E.D.N.Y. 1978), reversed by same judge on reconsideration.

w. AD Military Under Duress. Feres bar includes service members on active duty only under duress, e.g., not discharged after expiration of service. Garrett v. U.S., 625 F.2d 712 (5th Cir. 1980).; Small v. U.S., 219 F. Supp. 659 (D. Del. 1963). Feres also applies to improperly characterized discharges. Anderson v. U.S., 724 F.2d 608 (8th Cir. 1983) (discharge from state National Guard does not release member from Reserve, therefore, arrest for failure to report to active duty is under Feres); Torres v. U.S., 621 F.2d 30 (1st Cir. 1980). Feres bars claims arising from their leaving service without the proper documents. Rogers v. U.S., 902 F.2d 1268 (7th Cir. 1990) (went home at end of enlistment without discharge papers, arrested years later for desertion--Feres applies); Desjardins v. U.S., 815 F. Supp. 96 (E.D.N.Y. 1993) (Feres bars claims of sailor arrested for desertion, even though charges dropped due to SOL). Person improperly ordered to active duty is not subject to Feres. Valn v. U.S., 708 F.2d 116 (3d Cir. 1983).

x. TDRL. Feres applies to soldier on TDRL. Ricks v. U.S., 842 F.2d 300 (11th Cir. 1988); Whitman v. U.S, 765 F. Supp 674 (D. Kan. 1991) (Feres applies to suicide of TDRL service member being treated by VA); Lampitt v. U.S., 585 F. Supp. 151 (E.D. Mo. 1984) (placing service member on convalescent leave does not effect Feres bar); Hopkins v. U.S., 567 F. Supp. 491 (E.D.N.Y. 1983); Anderson v. U.S., 575 F. Supp. 470 (E.D. Mo. 1983). See also Madsen v. U.S. ex rel. U.S. Army COE, 841 F.2d 1011 (10th Cir. 1987) (Feres applies to TDRL soldier treated for cycle accident); Guariglia v. U.S., Civ. # JFM-92-917 (D. Md. 1992) (sailor on TDRL treated for ice hockey injury at a Navy hospital is Feres barred); Hartline v. U.S., Civ. # Y-92-1252 (D. Md., 4 Nov. 1992), aff'd, 19

F.3d 11 (table), 1994 WL 62288 (4th Cir. 1994) (failure to diagnose and treat cystic brain tumor in AD officer allegedly caused death--Feres applies even though on TDRL last 9 days of life). Accord Ricks v. U.S., 842 F.2d 300 (11th Cir. 1988). Contra Kendrick v. U.S., 877 F.2d 1201 (4th Cir. 1989) (jumps out of window in Army hospital). Accord Cortez v. U.S., 854 F.2d 723 (5th Cir. 1988) (Feres does not apply to soldier on TDRL); Harvey v. U.S., 884 F.2d 857 (5th Cir. 1989) (injured while on medical hold--not under Feres); Everette v. U.S., Civ. # 94-1857-CIV-T-21A (M.D. Fla., 25 July 1995) (Feres does not bar claim for medical malpractice on active duty soldier who is comatose and in a VA hospital, since he is no longer active); Berry v. U.S., 772 F. Supp. 563 (D. Kan. 1991); Rinelli v. U.S., 706 F. Supp. 190 (E.D.N.Y. 1988). Bradley v. U.S., 161 F.3d 777 (4th Cir. 1998) negligent treatment of staph infection of TDRL Navy member is not Feres barred as infection occurred after being placed on TDRL - distinguishes Kendrick supra.

y. Constitutional and Intentional Torts. Feres bars constitutional and intentional torts against the U.S. Jaffee v. U.S., 592 F.2d 712 (3d Cir. 1979) (Jaffee I); Nagy v. U.S., 471 F. Supp. 383 (D.D.C. 1979); Everett v. U.S., 492 F. Supp. 318 (S.D. Ohio 1980); Kelly v. U.S., 512 F. Supp. 356 (E.D. Pa. 1981); Lewis v. U.S., 663 F.2d 889 (9th Cir. 1981). The bar includes suits by service members, including derivative suits against fellow service members and civilian employees. Chappell v. Wallace, 462 U.S. 296 (1983); Grant v. Pitchford, 565 F. Supp. 430 (S.D. Cal. 1983); Bishop v. U.S., 574 F. Supp. 66 (D.D.C. 1983); Jaffee v. U.S., 663 F.2d 1226 (3d Cir. 1981); Bailey v. Van Buskirk, 345 F.2d 948 (9th Cir. 1965); Martinez v. Schrock, 537 F.2d 765 (3d Cir. 1976), cert. denied, 430 U.S. 920 (1977); Howard v. Lyons, 360 U.S. 593 (1959); Birdwell v. Schlesinger, 403 F. Supp. 710 (D. Colo. 1975); Mandel v. Nouse, 509 F.2d 1031 (6th Cir. 1975); Bailey v. DeQuevedo, 375 F.2d 72 (3d Cir. 1967), cert. denied, 389 U.S. 948 (1967); Penagaricano v. Llenza, 571 F. Supp. 888 (D.P.R. 1983). See also Mollnow v. Carlton, 716 F.2d 627 (9th Cir. 1983) (former USAF officer alleges conspiracy of superiors); Hefley v. Textron Inc., 713 F.2d 1487 (10th Cir. 1983) (suit against U.S. and Adjutant General of Kansas arising from helicopter crash); Lunsford v. U.S., Civ. # 83-H-701-S (M.D. Ala. 1984) (service woman cannot sue military supervisor for sexual harassment on the job); Brown v. U.S., 739 F.2d 362 (8th Cir. 1984) (Feres bars, e.g., suit against U.S. for racially motivated “mock lynching” on-post by fellow service members, but not suit against fellow service members); Park v. Zatchuk, 605 F. Supp. 207 (D.D.C. 1985) (individual suit not permitted for physician “kicked out” of residency by military superiors--decided under Barr

v. Mateo, 360 U.S. 564 (1959)); Chatman v. Commodore D.E. Hernandez, USN, 805 F.2d 453 (1st Cir. 1986) (sailor cannot sue CO for court-martialing him nor can he bring action under 42 U.S.C. § 1983); Stauber v. Cline, 837 F.2d 395 (9th Cir. 1988) (NG technician barred from suing fellow employees for libel and intentional infliction of emotional distress); Tobin v. Pryce, 983 F. Supp. 880 (D. Neb. 1997) (Feres barred Bivens action by Nebraska National Guardsman who on active duty training in Germany was subjected to derogatory statements and acts by superiors during privately arranged and financed visit to former Nazi concentration camp, where Army director of operations and training authorized visit for professional development purposes and Army took disciplinary action against persons who made derogatory statements or performed defamatory acts); Norris v. Lehman, 845 F.2d 283 (11th Cir. 1988) (no Bivens action for decertifying Junior ROTC instructor); Udell v. Adjutant General's Dept. of State of Texas, 878 F. Supp. 991 (S.D. Tex. 1995) (Feres bars claim for wrongful termination under Texas Whistleblowers Act--cites Chappell v. Wallace, 462 U.S. 296 (1983)). Mackey v. Milan, 154 F.3d 648 (6th Cir. 1998), sexual harrassment of female officer by male superior officer is Feres barred.

z. Property Losses. Feres bars property losses as well, since such losses are covered by 31 U.S.C. § 240 or 10 U.S.C. § 2733. See Verma v. U.S., 10 F.3d 646 (D.C. Cir. 1994) (Army's retention of vials allegedly belonging to military medical researcher is Feres barred); Orken v. U.S., 239 F.2d 850 (6th Cir. 1956) (AF plane crashed into on-post quarters); U.S. v. USAA, 238 F.2d 364 (8th Cir. 1956) (POV hit by Navy plane on-post); Preferred Insurance v. U.S., 222 F.2d 942 (9th Cir. 1955), cert. denied, 350 U.S. 837 (1955) (AF plane hits on-post trailers); Fidelity-Phoenix Fire Insurance v. U.S., 111 F. Supp. 899 (N.D. Cal. 1953), aff'd sub nom., Preferred Insurance Co. v. U.S., 222 F.2d 942 (9th Cir. 1955), cert. denied, 350 U.S. 837 (1955) (same, but quarters); Brown v. U.S., 927 F. Supp. 1176 (E.D. Ark. 1996) (Feres bars claim for misdelivery of former service member's property, even though error occurred after discharge); Nelson v. U.S., Civ. 4:94cv123 (E.D. Va., Apr. 7, 1995) (Feres bars claim for proceeds of SGLI insurance based on Navy permitting sailor to change beneficiary without counseling); Monarch Ins. Co. of Ohio v. U.S., 511 F. Supp. 201 (E.D. Va. 1981) (privately owned aircraft at weekend drill--fact that wife is part owner does not bar Feres application); Rivera-Grau v. U.S., 324 F. Supp. 394 (D. N.Mex. 1971) (pallets blown into on-post POVs), USAA v. U.S., 285 F. Supp. 854 (S.D.N.Y. 1968) (off-post accident on way to Army hospital); Gursley v. U.S., 232 F. Supp. 614 (D. Colo. 1964) (on-post quarters blown up); Wallis v. U.S., 126 F. Supp. 673 (E.D.N.C. 1954) (furniture

damaged in shipment); Lund v. U.S., 104 F. Supp. 756 (D. Mass. 1952) (sand blown into on-post POV) (follows Brooks rule).

aa. Fellow Service Member. Feres bars suits against fellow service member or civilian employee. U.S. v. Stanley, 483 U.S. 669, 107 S.Ct. 3054 (1987) (secret LSD drug tests on service personnel); Bailey v. DeQuevedo, 375 F.2d 72 (3d Cir. 1967); Martinez v. Schrock, 537 F.2d 765 (3d Cir. 1976); Stordahl v. Harrison, 542 F. Supp. 721 (E.D. Va. 1982). See also Ribas v. Macher, 687 F. Supp. 684 (D.D.C. 1988) (Feres bars slander action against superior); Cross v. Fiscus, 830 F.2d 755 (7th Cir. 1987) (U.S. Marine NCOs absolutely immune from defamation action by former CO who was relieved following their complaints). But see Durant v. Neneman, 884 F.2d 1350 (10th Cir. 1989) (Feres doesn't bar suit against officer who struck troops while he was on way to work); Kenneally v. Bayer, 760 F. Supp. 503 (D. Md. 1990) (Army officer alleged defamatory statement concerning senior officer to Office of Presidential Personnel not entitled to Feres immunity). O'Neil v. U.S., Civ. 97-7030 (3rd Cir. 1 May 1998). Feres bars suit for death of Naval officer murdered by another Naval officer while victim is watching television movie in her quarters.

bb. Injury to or Death of Fetus. Treatment of pregnant soldier which results in injury to fetus is not Feres barred, where treatment is to both mother and fetus. Romero v. U.S., 954 F.2d 222 (4th Cir. 1992). Accord Del Rio v. U.S., 833 F.2d 282 (11th Cir. 1987); Atkinson v. U.S., 825 F.2d 202 (9th Cir. 1987), cert. denied, 485 U.S. 987 (1988) (fetus died, wrongful death claim paid--mother's injury is Feres barred); Graham v. U.S., 753 F. Supp. 994 (D. Me. 1990) (fetus damaged during delivery of pregnant USAF member). Contra Minns v. U.S., 974 F. Supp. 500 (D. Md. 1997) (Feres bars claims of minors afflicted with birth defects allegedly due to service member’s exposure in Desert Storm); Irvin v. U.S., 845 F.2d 126 (6th Cir. 1988), cert. denied, 488 U.S. 975 (1988) (mother received rubella shot during basic training--distinguishing Scales v. U.S., 685 F.2d 970 (5th Cir. 1982), cert. denied, 460 U.S. 1082 (1983), where damage to fetus allegedly caused by rubella shot to pregnant USAF member); Heath v. U.S., 633 F. Supp. 1340 (E.D. Cal. 1986) (fetus allegedly damaged by drug Benedectin given to pregnant USAF member). France v. U.S., Civ. #98-74453 (E.D. Mich. 6 May 99), active duty mother receives shots, later delivers damaged child after separation-Feres barred.

cc. Delayed Entry Program. Feres bars action by person enrolled in delayed entry program for failure to report.

Bauer v. U.S., Civ. #C-78-1049 WHO (N.D. Cal., 7 August 1979)(Feres barred action for false arrest and imprisonment of AWOL person who enlised under delayed entry program under alleged condition she would be automatically discharged if her husband did not receive change of specialty).

dd. ROTC Cadets. See also Morse v. West, 1989 U.S. App. Lexis 446 (19th Cir. (Colo.)), aff'd 1999WL11287 (10th Cir., Colo.), (sexual harassment by another ROTC cadet held Feres barred); Wake v. U.S., 89 F.3d 53 (2nd Cir. 1996) (inactive reservist who is member of senior Naval ROTC is injured while traveling in a van driven by a U.S. Marine on trip back to college after undergoing pre-commissioning physical--Feres applies); Brown v. U.S., 151 F.3d 800 (8th Cir. 1998), ROTC Cadet-reservist inuured in PT training alleges negligent treatment at Army hospitl-Feres barred-cites Wake v. U.S., 89 F.3d at 58-62.

II. PROCESSING OF AN ADMINISTRATIVE CLAIM

A. When Must Suit be filed?

1. Suit Optional After Six Months. Suit permissible at option of claimant any time after six months has expired from date of filing proper claim (28 U.S.C. § 2675(a)). McKenith v. U.S., 771 F. Supp. 670 (D.N.J. 1991) (filing of suit after expiration of six months from date of filing admin. claim constitutes final action and precludes refiling admin. claim). See also Arigo v. U.S., 980 F.2d 1159 (8th Cir. 1992) (suit filed 8 months after claimant wrote DVA that he was withdrawing claim and filing suit is time barred, since his letter constituted a "final denial"). But see Hyatt v. U.S., 546 F. Supp. 96 (E.D.N.Y. 1997) (where plaintiff first files suit, then files administrative claim which is denied, but does not refile suit, but dies not refile suit, equitable tolling of six months is granted since U.S. entered into discovery with plaintiff without raising issue).

2. Negotiations. Negotiations may continue indefinitely with claimant provided claim is not finally denied by agency. McAllister v. U.S. by U.S. Dept. of Agriculture, 925 F.2d 841 (5th Cir. 1991) (no time limit for filing suit if no final agency action); Taumby v. U.S., 902 F.2d 1362 (8th Cir. 1990), vacated and remanded, 919 F.2d 69 (8th Cir. 1990) (failure to file suit within 20 months after filing admin. claim--bars suit on theory of laches). Agency failure to act on claim does not constitute denial and start six months running. Stahl v. U.S., 732 F. Supp. 86 (D. Kan. 1990). However, constructive denial permitted in Panama due to effective date of treaty. De Berro v. U.S., 495 F. Supp. 179 (D. Canal Zone 1980).

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

4. Written Notice of Final Denial. Written notice of final denial required (28 C.F.R. § 14.9). Boyd v. U.S., 482 F. Supp. 1126 (W.D. Pa. 1980). The written notice itself does not create a cause of action nor must it state explicitly that suit must be filed within six months. See Pitts v. U.S., 109 F.3d 822 (1st Cir. 1997) (failing to file within six months ground for dismissal despite fact that six months paragraph does not say "need to file suit");Gromo v. U.S. Army Finance Center, Civ. # 92-4767 (6EB) (D.N.J. 1993) (use of six months paragraph in FTCA denial letter does not create FTCA cause of action through implication by its use). Denial notice must be sent to claimant's attorney. Graham v. U.S., 96 F.3d 446 (9th Cir. 1996) (suit filed after 6 month period had run is proper, since denial notice was sent to claimant, not her attorney). The cases are split on whether the denial can be sent by regular mail so as to start the six months running. See Royer v. U.S., Civ. # 94-2454 RMU (D.D.C., Aug. 21, 1995) (regular mail okay--citing Pipken v. U.S. Postal Service, 951 F.2d 272 (10th Cir. 1991)); McMahon v. Aquilera, Civ. # 94-2454 RMU (D.D.C., Aug. 21, 1995) (same as Royer); Johnson v. U.S. v. Airport Baggage Carriers Inc., 652 F. Supp. 407 (E.D. Va. 1987) (regular mail insufficient even though letter received). Request for reconsideration must be received by agency which denied claim be received, not mailed, within six months. Gervais by and through Bremner v. U.S., 667 F. Supp. 710 (D. Mont. 1987); Anderberg v. U.S., 718 F.2d 976 (10th Cir. 1983). See also Moya v. U.S., 35 F.3d 501 (10th Cir. 1994) (fact that reconsideration request was sent by certified mail does not create presumption that request was received); Solomon v. U.S., 566 F. Supp. 1033 (E.D.N.Y. 1983) (request for explanation of denial did not rise to level of request for reconsideration which would toll 6 month SOL); Polk v. U.S., 709 F. Supp. 1473 (N.D. Iowa 1989) (no proof for reconsideration ever received--suit barred); Stewart v. U.S. VA, 722 F. Supp. 406 (W.D. Tenn. 1989) (reconsideration request must be received not later than six months from denial). Gonzales v. U.S., Civ. # 96-2167 (10th Cir., 30 Jan 1998) (mailing of reconsideration request does not toll 6-month SOL as receipt is not presumed. Flory v. U.S., 138

F.3d 157 (5th Cir. 1998). Final action by USPS sent by regular mail is insufficient to toll 6-months filing period due to requirement of 28 USC 2401(b) to send notice by certified or registered mail - so held even though claimant actually received notice. Zumazama v. U.S., 1998 WL 560757 (9th Cir., Calif.), applies equitable tolling where Navy unintentionally leads new attorney to believe final denial not previously denied when it had been and attorney missing filing date. Winter v. U.S., Civ. # 97-1484 PHX-PGR (D. Ariz., 18 Mar. 1999), denial notice informed claimant that request for reconsideration must be sent to VA General Counsel, but was received by District Counsel-suit not timely filed despite fact VA General Counsel acted on reconsideration request.

5. Suit Within Six Months. Suit must be commenced within six months after denial (28 U.S.C. § 2401(b)). See, e.g., Schmidt v. U.S., 901 F.2d 680 (8th Cir. 1990) (where U.S. has no retained receipt, regularity of mail pickup is presumed and suit filed too late); Anderson v. U.S., 803 F.2d 1520 (9th Cir. 1986) (suit filed within two years of incident, but after six months from denial is not timely, where exclusive Federal jurisdiction exists--16 U.S.C. § 457 assimilates State law--but see Bilderback v. U.S., 558 F. Supp. 903 (D. Or. 1982) (using Federal grazing regulations to preempt state open range law); McDuffee v. U.S., 769 F.2d 492 (8th Cir. 1985) (filed one day too late); Kollios v. U.S., 512 F.2d 1316 (1st Cir. 1975); (suit filed one day too late); Woirhaye v. U.S., 609 F.2d 1303 (9th Cir. 1979) (two days too late in state court); Pappa v. Pro-Source Distribution, Inc., Civ. # CV97-H-1554-E (N.D. Ala., 10 Oct. 1997) (suit filed in state court filed in state court solely against private defendants within six months of administrative denial, then withdrawn and filed in federal court with addition of U.S. after six months of denial—SOL bars suit); Knox v. U.S., 874 F. Supp. 1282 (M.D. Ala. 1995) (failure to file within 6 months from notice of denial--barred by § 2401(b); Sparrow v. U.S.P.S., 825 F. Supp. 252 (E.D. Cal. 1993) (filing amended complaint does not satisfy 6-month filing requirement); Chandler v. U.S., 840 F. Supp. 51 (M.D. Ala. 1994) (Rule adding 3 days for service of complaint does not extend 6-month period for filing); Casanave v. U.S., 797 F. Supp. 86 (D.P.R. 1992) (upholds six month filing requirement as jurisdictional); Chambly v. Lindy, 601 F. Supp. 959 (N.D. Ind. 1985) (where both state court suit and administrative claim filed and state court suit removed and dismissed under Federal Drivers Act, claimant can reinstitute FTCA suit after exhaustion of administrative remedies); Smith v. U.S., 585 F. Supp. 624 (E.D. Mich. 1984) (plaintiff cannot extend six months by refiling admin. claim for additional injuries); Tuttle v. USPS, 585 F. Supp. 55 (M.D. Pa. 1983) (requirement does not violate U.S. Constitution); Myszkowski v. U.S. Govt., 553 F. Supp. 66 (N.D. Ill. 1982) (suit filed within two years, but more

than six months after denial--held suit is time barred);Sinkfield v. Pope, 578 F. Supp. 1500 (E.D. Mo. 1983); McGowan v. Williams, 481 F. Supp. 681 (N.D. Ill. 1979). Date of mailing denial notice starts six months running. Carr v. VA, 522 F.2d 1355 (5th Cir. 1975). The six month limitation period is normally not tolled. DeCasaneve v. U.S., 991 F.2d 11 (1st Cir. 1993) (no equitable tolling of six months where suit dismissed because of counsel's failure to comply with discovery orders); Goff v. U.S., 659 F.2d 560 (5th Cir. 1981) (prior filing does not toll six months where voluntary dismissal taken); Whitaker v. U.S., 815 F. Supp. 764 (D. Vt. 1993) (no equitable tolling where suit not filed within six months where first suit was dismissed for naming wrong defendant); Pascarella v. U.S., 582 F. Supp. 790 (D. Conn. 1984) (six months not tolled by attorney's failure to tell client that administrative claim denied). But see Moore v. U.S. Bureau of Prisons, Civ. #89-3121-RDR (D. Kan. 1993) (equitable tolling re 6 months filing requirement granted where penal institution failed to mail). However, where reconsideration has been timely requested, a suit filed within six months of the request for reconsideration is premature. Clark v. U.S., 974 F. Supp. 895 (E.D. Tex. 1997) Gibbs v. U.S., 34 F. Supp. 2d 405 (S.D.W. Va. 1999) suit barred by failure to file within 6 months of denial, a jurisdictional bar. Stanfill v. U.S., F. Supp. 2d, 1999 WL 183766 (M.D. Ala) equitable tolling permitted after 6 months ran due to actions of U.S.-not garden variety neglect by plaintiff.

6. Computation of Six Month Time Period. Scott v. U.S. VA, 929 F.2d 146 (5th Cir. 1991) (six months runs on April 2 where denial notice mailed on October 2--suit filed on April 3 is untimely); Vernell v. USPS, 819 F.2d 108 (5th Cir. 1987) (six months period for filing suit runs from day after mailing until same date six months later, not including Saturdays, Sundays and holidays). Accord McDuffee v. U.S., 769 F.2d 492 (8th Cir. 1985); Kollios v. U.S., 512 F.2d 1316 (1st Cir. 1975); Murray v. U.S., 569 F. Supp. 794 (N.D.N.Y. 1983); Yedwab v. U.S., 489 F. Supp. 717 (D.N.J. 1980). But see Tirbue v. U.S., 826 F.2d 633 (7th Cir. 1981) (last day of month); Bledsoe v. HUD, 398 F. Supp. 315 (E.D. Pa. 1975) (six months does not run until through same date six months later); Rodriguez v. U.S., 382 F. Supp. 1 (D.P.R. 1974) (same) . See also Hughes v. U.S., 701 F.2d 56 (7th Cir. 1982) (time period does not exclude date of mailing). The six month period ends when the suit is received by the agency. Gervais v. U.S., 865 F.2d 196 (9th Cir. 1988) (receipt by agency mailroom, not claims office tolls statute).

7. Filing of Suit Constitutes Final Action. Some cases hold that a claimant’s filing of a suit after six months has expired constitutes final action on a claim. Arigo v. U.S., 980 F.2d 1159 (8th Cir. 1992) (suit filed 8 months after claimant wrote DVA that he was withdrawing claim and filing suit is time barred

as his letter constituted a "final denial"); McKenith v. U.S., 771 F. Supp. 670 (D.N.J. 1991) (filing of suit after expiration of six months from date of filing admin. claim constitutes final action and precludes refiling admin. claim). See also Benge v. U.S., 17 F.3d 1286 (10th Cir. 1994) (court refuses to apply doctrine of relation back to the refiling of a previously dismissed suit after original 6 months has run); Rainey v. U.S., Civ. # 91-2656-415 (W.D. Tenn. 1993) (premature filing of suit is mooted by administrative denial of claim simultaneously filed). However, some courts allow a claimant to refile their suit, when dismissed without predjudice initally, if the agency has never formally denied the claim. Pascale v. U.S., 998 F.2d 186 (3rd Cir. 1993) (suit can be refiled if suit dismissed without prejudice, even though filed after six months, when agency has not finally denied claim); Parker v. U.S., 935 F.2d 176 (9th Cir. 1991) (administrative claim can be refiled if suit is dismissed without prejudice if no final action has been taken by agency); Hannon v. USPS, 701 F. Supp. 386 (E.D.N.Y. 1988). See also Gilles v. U.S., 906 F.2d 1386 (10th Cir. 1990) (even though first complaint dismissed and second complaint did not refer to first complaint, second complaint considered timely filed under doctrine of relation back).

8. Suit Must be Against U.S. Suit must be against U.S., not the Federal Agency in question. Weisgal v. Smith, 774 F.2d 1277 (4th Cir. 1985); Willis v. U.S., 719 F.2d 608 (2d Cir. 1983); Hughes v. U.S., 701 F.2d 56 (7th Cir. 1982); Scheimer v. National Capital Region, NPS., 737 F. Supp. 3 (D.D.C. 1990) (cites Sprecher v. Graier., 716 F.2d 968 (2d Cir. 1983)); Hagebush v. U.S., 657 F. Supp. 675 (D. Neb. 1986); Childress v. Northrop Corp., 618 F. Supp. 44 (D.D.C. 1985); McBernett v. Biscord., 550 F. Supp. 106 (D.P.R. 1982); Stewart v. U.S., 503 F. Supp. 59 (N.D. Ill 1980), aff'd, 655 F.2d 741, (7th Cir. 1981); Hughes v. U.S., 534 F. Supp. 352 (N.D. Ill. 1982). Accord Cummings v. U.S., 704 F.2d 437 (9th Cir. 1983). See also Atencio-Diaz v. Bureau of Prisons, 105 F.3d 664 (table), 1996 WL 742362 (9th Cir. (1996) (cannot amend complaint to name U.S. after six months has passed). Filing against U.S. employee in Federal or state court does not toll six month period. Childers v. U.S., 316 F. Supp. 539 (S.D. Tex. 1970); Claremont Aircraft v. U.S., 420 F.2d 896 (9th Cir. 1970); Stewart v. U.S., 655 F.2d 741 (7th Cir. 1981); Heimila v. U.S., 548 F. Supp. 350 (E.D.N.Y. 1982). But see Staple v. U.S., 740 F.2d 766 (9th Cir. 1984) (Federal suit dismissed, since U.S. not named--plaintiff's state suit then removed and U.S. substituted under Federal Drivers Act--plaintiff not required to re-exhaust admin. remedies); Ezenwa v. Gallen, 906 F. Supp. 978 (M.D. Pa. 1995) (doctrine of relation back applies to six months filing requirement where customs agent sued individually within six months and U.S. substitutes several months after expiration of six months). The relation back

doctrine (see F.R.Civ.P. 15) is not applicable. Benge v. U.S., 17 F.3d 1286 (10th Cir. 1994) (court refuses to apply doctrine of relation back to the refiling of a previously dismissed suit after original 6 months has run); Allen v. VA, 749 F.2d 1386 (9th Cir. 1984) (where agency sued rather than U.S., complaint must be amended not later than six months after denial of administrative claims): Stewart v. U.S., 620 F.2d 740 (9th Cir. 1980) (same); Calderan v. U.S. Dept. of Agriculture, 756 F. Supp. 181 (D.N.J. 1990) (28 days past six months--must sue United States if suing Federal agency--doctrine of relation back not applicable); Nelson v. USPS, 650 F. Supp. 411 (W.D. Mich. 1986) (same, but involving USPS as wrong party). But see McGuckin v. U.S., 918 F.2d 811 (9th Cir. 1990) (applies relation back to naming U.S. as party); Jenssen v. USPS, 763 F. Supp. 976 (N.D. Ill. 1991) (suing postal employee and USPS does not constitute suit against U.S.--can add new party provided conditions of Rule 15(c) are met). King v. U.S., Civ #TH-98-128-C-M/F (S.D. Ind. 16 Mar 99) complaint naming Bureau of Prisons as defendant is dismissed, complaint named U.S. is filed one month after 6 months runs-court had no jurisdiction. Roman v. Townsend, F. Supp. 2d, 1999 WL 2(5574(D.P.R.) suit filed against individuals not U.S.more than 6 months from date of denial is dismissed as time barred and .

9. Pleading Final Denial. Complaint must allege administrative claim filed and finally denied. Altman v. Connally, 456 F.2d 1114 (2d Cir. 1972); McCloskey v. USPS, 534 F. Supp. 667 (E.D. Pa. 1982); (FRCP 8(a) (1)).

10. Proper Service is Required. Suit must be served on both U.S. Attorney and Attorney General or no jurisdiction. Peters v. U.S., 9 F.3d 344 (5th Cir. 1993) (failure to complete proper service is basis for dismissal even though SOL has run); McGregor v. U.S., 933 F.2d 156 (2nd Cir. 1991) (failure to serve Attorney General within six months bars suit, and filing second suit to remedy error is not permitted--distinguishing Zankel v. U.S., 921 F.2d 432 (2nd Cir. 1990)); Watts v. Pinckney, 752 F.2d 406 (9th Cir. 1985); Allgeier v. U.S., 909 F.2d 871 (6th Cir. 1990) (relation back not permitted where U.S. Atty. served four days after six months had run); Williams v. U.S., 558 F. Supp. 66 (E.D.N.C. 1983) (same). See also Lambert v. U.S., 44 F.3d 296 (5th Cir. 1995) (suit dismissed for failure to properly serve-suit refiled same day, but dismissed again for failure to comply with 6 months SOL); Hunt v. Dept. of Air Force, a Div. of the U.S.A., 29 F.3d 583 (11th Cir. 1994) (naming USAF rather than U.S. as defendant is not fatal, but failure to serve U.S. within 120 days is fatal).

11. Premature Filing. A suit filed before the six month limit is premature. See McNeil v. U.S., 508 U.S. 106, 113 S.Ct. 1980 (1993) (filing suit before filing of administrative claim does

not start running of 6 months--suit must be refiled after 6 months of filing claims or after final denial); Watkins v. Arlington County, 1997 WL 40878 (D.C. Cir.) (suit filed several months before claim is denied is dismissed); Farlaino v. U.S., 108 F.3d 1388 (table), 1997 WL 139768 (10th Cir. 1997) (suit filed prior to expiration of six month administrative consideration period is a nullity and must be refiled after administrative denial); Plyler v. U.S., 900 F.2d 41 (4th Cir. 1990) (suit filed before six months must be dismissed, since court has no jurisdiction, even though six months has run by time of dismissal); Allen v. USPS, 1997 WL 30203 (E.D. La.) (suit filed May 17, 1996—-administrative claim filed May 20, 1996 and denied August 7, 1996—-no suit filed after denial of administrative claim—court has no jurisdiction over May 17, 1996 action); Bueno-Watson v. U.S., Civ. # S-92-961 DFL PAN (E.D. Cal., 2 July 1992) (requirement in 28 C.F.R. § 14.9 stating that request for reconsideration precludes filing suit for 6 months is valid under McNeil v U.S., 508 U.S. 106, 113 S.Ct. 1980 (1993), which holds that 28 U.S.C. § 2675 must be strictly construed); Dye v. U.S., Civ. # SA-96-CA-0285 (W.D. Tex., 21 Feb. 1997) (suit filed two days prior to running of six month period for processing administrative claim is premature); McMahon v. Aquilera, Civ. # W-95-CA-087 (W.D. Tex., Nov. 2, 1995) (exhaustion of administrative remedies after premature filing does not mean that original filing is not subject to dismissal for failure to meet requirements in 28 U.S.C. § 2675(a)'s requirements); Hagy v. U.S., Civ. # C95-1719D (W.D. Wash., 30 Apr. 1996) (suit dismissed since filed less than 1 month after filing administrative claim); Brennan v. Ranerly, Civ. # 96-0651 (E.D. La. 13 May 1996) (suit against U.S. employee acting within scope filed same day as administrative claim filed is dismissed); Barsi v. U.S., 1996 WL 207761 (N.D. Cal.) (suit filed on 17 July is dismissed, since claims filed on 29 or 30 January and 6 months had not run); Moore v. U.S. Coast Guard, 1996 WL 137 640 (E.D. La.) (administrative claim filed after suit instituted, suit dismissed as premature). See also Walley v. U.S., 366 F. Supp. 268 (E.D. Pa. 1973); Schaefer v. Hills, 416 F. Supp. 428 (S.D. Ohio 1976); Mack v. U.S. Postal Service (USPS), 414 F. Supp. 504 (E.D. Mich. 1976); Cooper v. U.S., 498 F. Supp. 116 (W.D.N.Y. 1980). But see Celestine v. VA Hospital, 746 F.2d 1360 (8th Cir. 1984) (suit filed prematurely improperly dismissed where administrative claim filed and denied while suit pending and District Court not notified); Bond v. U.S., 934 F. Supp. 351 (C.D. Cal. 1996) (permits filing of suit prior to expiration of six month regulatory period imposed when reconsideration is requested--McNeil distinguished--cites Warren v. U.S. Dept. of the Interior, BLM, 724 F.2d 776 (9th Cir. 1984)). If premature suit dismissed, complaint must be refiled within six months of date of denial of administrative claim. Reynolds v. U.S., 748 F.2d 291 (5th Cir. 1984); Larogue v. U.S., 750 F. Supp. 181 (E.

D. N.C. 1990); Vavrick v. U.S., Civ. # CV 89-5056 JGD (C.D. Cal., 28 Feb. 1990) (original suit dismissed for failure to file administrative claim—second suit dismissed since filed 9 months after denial of administrative claim). But see Abernathy v. U.S., 732 F. Supp. 98 (D. Kan. 1990) (suit filed three weeks early not dismissed, but complaint amended). Premature filing of suit is mooted by administrative denial of claim simultaneously filed. Rainey v. U.S., Civ. # 91-2656-415 (W.D. Tenn. 1993). Oversby v. Postmaster, U.S. Postal Service, Civ. # 97-2357 (JR) (D.D.C., 17 Feb. 98) (failure to file within six months cannot be condoned as first prematurely filed suit is still pending). Zaidi v. U.S., Civ. # 97-02270 (CKK) (D.C., 23 Jan 98), suit filed at same time or shortly after administrative claims filed must be dismissed under McNeil supra; Lehman v. U.S., 154 F.2d 1010 (9th Cir. 1998); USPS denied claim, plaintiff dismissed suit based on informal agreement to settle, then filed second suit after no settlement but more than six months after denials--second suit was time barred.

B. What is Proper Basis for a Claim?

1. Definition of Tort.

a. State Law Tort. Tort as defined by law of state where tort occurred (28 U.S.C. § 2674). See, e.g., Executive Jet Aviation, Inc. v. City of Cleveland, Ohio, 409 U.S. 249, 93 S.Ct. 493 (1972); Richards v. U.S., 369 U.S. 1 (1962); Mundt v. U.S., 611 F.2d 1257 (9th Cir. 1980); Bowen v. U.S., 570 F.2d 1311 (7th Cir. 1978); Tyminski v. U.S., 481 F.2d 257 (3d Cir. 1973); Cox v. McDonnell-Douglas Corp., 503 F. Supp. 202 (W.D. Tex. 1980). See also Cecile Industries Inc. v. U.S., 793 F.2d 97 (3d Cir. 1986) (*de facto* debarment not a tort under Pa. law, hence no cause of action lies--cites Art Metal-USA Inc. v. U.S., 753 F.2d 1151 (D.C.Cir. 1985) and distinguishes Myers & Myers Inc. v. USPS, 527 F.2d 1252 (2d Cir. 1975)); Chen v. U.S., 854 F.2d 622 (2d Cir. 1988) (no tort under New York law regarding *de facto* debarment); State of New York v. Shore Realty Corp., 648 F. Supp. 255 (E.D.N.Y. 1986) (New York law includes tort when U.S. fails to select competent contractor to clean up hazardous waste); Darkov v. Dept. of Agriculture & Farmer's Home Administration, 646 F. Supp. 223 (D. Mont. 1986) (FmHA failure to approve lease for farm mortgaged by FmHA is not a State tort and not actionable under FTCA); 1st Nat'l Bank in Brookings v. U.S., 829 F.2d 697 (8th Cir. 1987) (failure of Federal probation officer to deliver or record deed of trust given to him to secure restitution is not a State tort); Laude v. U.S., Civ. # 95-1581 (EGS) (D.D.C., 29 Feb. 1996) (claim for damage to credit rating due to DFAS sending file to collection agency to recoup overpayment does not constitute a state tort); Carlson

v. U.S., Civ. # C 95-5418 RJB (W.D. Wash., 20 Oct. 1996) (SOP to prohibit entry of female guests into barracks after certain hours does not create a state tort--violation of same SOP by CO did not cause alleged rape of 17 years old); Weber v. U.S., 105 F.3d 163 (table), 1997 WL 1591 (8th Cir. 1997) (allegations that FBI investigation created files containing false information and government's failure to release these files under FOIA does not state a claim--abuse of process claim is excluded by 28 U.S.C. § 2680(h)); Bishop v. Veterans Administration Hospital through the U.S., 1996 WL 741859 (E.D. La.) (Failure of DVA to follow statutory authority re transfer to nursing home does not state a claim); Nat'l Bank of Fairhaven v. U.S., 660 F. Supp. 125 (D. Mass. 1987) (reclaiming of funds by U.S. from bank which paid forged social security check is not a state tort); Akutowicz v. U.S., 859 F. Supp. 1122 (2d Cir. 1988) (loss of U.S. citizenship not a state tort); Leibowitz v. U.S. DOJ, 729 F. Supp. 556 (E.D. Mich. 1989) (no state tort for segregation and moving Federal prisoner who challenged conviction); Weaver v. U.S., 760 F. Supp. 106 (S.D. Miss. 1989) (failure to inform subcontractor that prime contractor had been removed from surety list is not a state tort). Klett v. Pim, 965 F.2d 587 (8th Cir. 1992) (refusal by FmHA to grant farmer an operating loan is not a state tort); Castro v. U.S., 34 F.3d 106 (2d Cir. 1994) (allegations that DEA entered wrong house constitutes a state tort under N.Y. law, even though N.Y. law grants police qualified immunity); Johnson v. Sawyer, 4 F.3d 369 (5th Cir. 1993), rev'd by court en banc on other grounds, 43 F.3d 716 (5th Cir 1995) (en banc) (fact that federal statute provides remedy for unauthorized release of confidential tax information does not preempt state tort under FTCA); Mooney v. Clerk of Courts, District of New Hampshire, 831 F. Supp. 7 (D.N.H. 1993) (alleged improper transfer of suit to another District Court is not a state tort); Haney v. Castle Meadows, Inc., 868 F. Supp. 1233 (D. Colo. 1994) (RTC's failure to furnish reports concerning deficiencies in real property to prospective purchasers is a contract, not a tort claim). FTCA does not extend to breach of contract claims--cites Davis v. U.S., 961 F.2d 53 (5th Cir. 1991)); Woodbury v. U.S., 313 F.2d 291 (9th Cir. 1963); Scallorn v. U.S., 1996 WL 478973 (N.D. Cal.) (failure to require contractor to conduct mandatory safety investigation in 1990 did not cause injury from same source in 1993--held mandatory regulation violation is not a state tort); Coffey v. U.S., 930 F. Supp 185 (E.D.N.Y. 1996) (no state tort for pursuit of happiness). Law of another state cannot be stipulated by parties. Cole v. U.S., 249 F. Supp. 7 (N.D. Ga. 1965).

b. FTCA Does Not Include Constitutional Torts. FTCA does not include Federal constitutional torts, but FTCA and constitutional tort counts may be plead in the alternative, however, there will be only one recovery. Federal Deposit Insurance Corp. v. Meyer, 510 U.S. 471 (1994); Carlson v. Green, 446 U.S. 14, 100 S.Ct. 1468 (1980). See also Ting v. U.S., 927 F.2d 1504 (9th Cir. 1991) (claimant shot by Federal law enforcement officer can bring both Bivens' and Federal Tort Claims Act action, but cannot collect under both); Rivera v. U.S., 928 F.2d 592 (2nd Cir. 1991) (claim for excessive force in search can be brought as 4th amendment tort against individual law officer or as common law tort under Federal Tort Claims Act); McIntire v. U.S., 884 F. Supp. 1529 (M.D. Ala. 1995) (after settling AAFES false arrest claim under FTCA, claimant sues AAFES detective under 42 U.S.C. § 1983--barred by SOL and inclusion in FTCA settlement) Gallegos v. Haggerty, 689 F. Supp. 93 (N.D.N.Y. 1988) (INS agent's 90-minute search and detention action permitted under both 4th amendment and FTCA). However, the alleged violation of the Federal Constitution must be actionable at state law to support an FTCA claim. Van Schaick v. U.S., 586 F. Supp. 1023 (D.S.C. 1983) (unless there is state tort for violation of Federal Constitution there is no Federal Tort Claims Act action).

(1) Only Individual Defendants Liable for Constitutional Torts. In a Bivens constitutional tort action, only the individual defendants, and not the United States, may be held liable. Federal Deposit Insurance Corp. v. Meyer, 510 U.S. 471 (1994); Doe v. U.S., 483 F. Supp. 539 (S.D.N.Y. 1980); Birnbaum v. U.S., 588 F.2d 319 (2d Cir. 1978); Treho v. U.S., 464 F. Supp. 113 (D. Nev. 1978); Jaffee v. U.S., 592 F.2d 712 (3d Cir. 1979); Mayo v. U.S., 425 F. Supp. 119 (E.D. Ill. 1977); Socialist Workers Party v. U.S. Attorney General, 463 F. Supp. 515 (S.D.N.Y. 1978); Wilcox v. U.S., 509 F. Supp. 381 (D.D.C. 1981); Cline v. U.S. Dept. of Justice, 525 F. Supp. 825 (D.S.D. 1981); Diminnie v. U.S., 522 F. Supp. 1192 (E.D. Mich. 1981). See also Bagola v. Kindt, 131 F.3d 632 (7th Cir. 1997) (exclusivity under Prison Industries Act does not preclude Bivens action by injured prisoner agains prison officials); In re Cincinnati Radiation Litigation, 874 F. Supp. 796 (S.D. Ohio 1995) (Navy physician supervising federally funded human nuclear radiation experiment conducted in civilian hospital can be sued for violation of constitutional rights).

(2) Negligence Not a Constitutional Tort. A negligence claim under the FTCA may not be plead as a Bivens constitutional tort claim, if no constitutional rights

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

(3) Existence of Adequate Remedy. A Bivens' action can exist only where there the plaintiff lacks an adequate remedy. McCarthy v. Madigan, 503 U.S. 140, 112 S.Ct. 1081 (1992) (Bivens action for money damages does not require exhaustion of grievance procedure, since there is no grievance procedure for money damages); Weiss v. Lehman, 676 F.2d 1320 (9th Cir. 1982); Doe v. U.S., 483 F. Supp. 539 (S.D.N.Y. 1980). Lee v. Hughes, 145 F.3d 1272 (11th Cir. 1998) (loss of EEO action does give fired U.S. employee a Section 1981 action against his federal employee.

(4) Employee Relation Remedial Schemes. Constitutional tort claims by a federal employee against other federal employees may be barred by statutory schemes concerning employee relations. Federal constitutional tort claims concerning racial discrimination are barred by Title VII. Brown v. General Service Admin., 425 U.S. 820, 96 S.Ct. 1961 (1976); Kizas v. Webster, 707 F.2d 524 (D.C. Cir. 1983). Federal constitutional tort suits are barred in regard to retaliatory personnel practices, since Civil Service procedures are exclusive remedy for retaliatory personnel practices. Bush v. Lucas, 462 U.S. 367 (1983). See also Rivera v. U.S., 924 F.2d 948 (9th Cir. 1991) (Bush v. Lucas applied to whistle blower); Bryant v. Cheney, 924 F.2d 525 (4th Cir. 1991) (Bush v. Lucas applies to Bivens action by Federal civil service worker); American Postal Workers Union v. USPS, 940 F.2d 704 (D.C. Cir. 1991) (class action for retaliatory dismissal does not lie under Federal Tort Claims Act--civil service remedy exclusive); Kotarski v. Cooper, 866 F.2d 311 (9th Cir. 1989) (fact that probationary civil servant has only limited benefits does not avoid Bush v. Lucas); Brothers v. Custis, 886 F.2d 1282 (10th Cir. 1989) (Bush v. Lucas extends to probationary employee, e.g., part-time contract surgeon even though remedy is limited); Maxey v. Kadrovach, 890 F.2d 73 (8th Cir. 1989)

(same); Boretos v. The U.S. Naval Observatory, Civ. # 92-1073-LFO (D.D.C., 6 Jan. 1993), aff'd, 1993 WL 267491 (D.C. Cir. 1993) (Federal employee's emotional distress due to being pressured by supervisor is barred by Bush v. Lucas); Castella v. Long, 701 F. Supp. 578 (N.D. Tex. 1988) (AAFES employee subject to benefit scheme-—no suit allowed under Bush v. Lucas); Liles v. U.S., 638 F. Supp. 963 (D.D.C. 1986) (dismissal following arrest for indecent acts--must exhaust administrative remedies under MSPB appeal procedure); Francisco v. Schmidt, 575 F. Supp. 1200 (E.D. Wis. 1983) (civil service probationary employee cannot file Bivens tort action, even in absence of Civil Service procedural remedy). The Civil Service Reform Act (CSRA) has also been held to bar federal constitutional tort suits. Spagnola v. Mathis, 859 F.2d 223 (D.C. Cir. 1988) (Federal employees statutory civil rights claim against superiors foreclosed by Civil Service Reform Act); Neverez v. U.S., 957 F. Supp. 884 (W.D. Tex. 1997) (suit for defamation dismissed under Westfall Act--no remedy under CSRA); Saul v. U.S., 928 F.2d 829 (9th Cir. 1991) (CSRA preempts both constitutional tort against Federal employee's superior and common law claims against United States arising from personnel action the definition of which is broadly construed to include search); Mittleman v. U.S. Treasury, 773 F. Supp. 442 (D.D.C. 1991) (former United States employee's claim for inaccuracies in her medical records falls exclusively under CSRA); Morales v. Department of Army, 947 F.2d 766 (5th Cir. 1991) (alleged mistreatment of assistant fire chief falls under CSRA); Gergick v. Austin, 997 F.2d 1237 (8th Cir. 1993) (successful Whistleblower Protection Act claimant has no claim under FTCA, since he is limited by Civil Service Reform Act); Grisham v. U.S., 103 F.3d 24 (5th Cir. 1997) (termination under Whistleblower Protection Act (WPA) falls under CSRA and is not a basis for FTCA claim); Steele v. U.S., 19 F.3d 531 (10th Cir. 1994) (CSRA is exclusive remedy for claim for dismissal of USAF civil servant); Blaney v. U.S., 34 F.3d 508 (7th Cir. 1994) (failure of USAF to abide by terms of agreement settling employment dispute is excluded from FTCA by CSRA); Roth v. U.S., 952.F.2d 611 (1st Cir. 1991) (CSRA preempts FTCA even where no remedy for slander); Rishel v. Hibner, 859 F. Supp. 1046 (E.D. Mich. 1994) (Army employee's claim based on improper actions of supervisors, including claim for emotional distress is barred by CSRA); Caylor v. U.S., Civ. # CV-94-H-1061-NE (N.D. Ala., 29 Aug. 1994) (alleged forced resignation of Army employee is barred by CSRA and FECA, since they are the exclusive remedies); Greenlaw v. Garrett, 43 F.3d 462 (9th Cir. 1994) (appeal to court of

performance rating is excluded by CSRA); Ross v. Runyon, 858 F. Supp. 630 (S.D. Tex. 1994) (claim by Federal employee for violation of collective bargaining agreement excluded by CSRA and FECA). But see Brock v. U.S., 64 F.3d 1421 (9th Cir. 1995) (CSRA does not bar claim for rape by supervisor--FECA not discussed); Kent v. Howard, 801 F. Supp. 329 (S.D. Cal. 1992) (state law claim for sexual harassment against supervisor by Navy employee not preempted by CSRA, since outside scope). Leistiko v. Stone, 134 F.3d 817 (6th Cir. 1998) (NG aviator removed from his Title 32 civilian position as he could no longer maintain flight status--CSRA is exclusive remedy--cites U.S. v. Fausto, 489 U.S. 439 (1988). McVey v. U.S., 1997 WL 764499 (6th Cir., Ky.) (Virginia policeman dismissed for sexual harassment, then reinstated; claim for emotional distress falls only under FECA. Cintron-Ortiz v. U.S., 986 F. Supp. 714 (D.P.R. 1997) (CSRA is sold remedy for federal employee's demotion); Warren v. U.S., 1998 WL93976 (7th Cir., Ill.) (federal employee fired for leaving work without permission --CSRA is sole remedy). Kennedy v. U.S. Postal Service, __F.3d__, 1998 WL 270076 (9th Cir. (Or.). Postal worker allegedly wrongfully discharged, exclusive remedies are Postal Reorganization Act and CSRA. Guzman v. U.S., Civ. # CV96-7055 LGB (CWX) (C.B., Calif., 19 Aug. 1998), warantless invasion of employee's home by federal investigation not under CSRA. Golt v. U.S., Civ #98-35318 (9th Cir. 15 July 99) CSRA preempts state remedy for improper firing even though AAFES employee not given written notice of right to union representation. Rosenthal v. U.S., 1999 WL253512 (5th Cir. Ct. 11)) employee who alleged his Swiss Army knife illegally seized as dangerous weapon is limited to personnel action remedy.

(5) FECA. FECA has barred recovery for constitutional tort. Johnson v. U.S., 101 F. 3d 702 (table), 1996 WL 73470 (6th Cir. 1996) (claim for emotional distress caused by personnel actions relative to USPS employee fall under FECA); Ross v. Runyon, 858 F. Supp. 630 (S.D. Tex. 1994) (claim by Federal employee for violation of collective bargaining agreement excluded by CSRA and FECA); Caylor v. U.S., Civ. # 94-181-H-1061-NE (N.D. Ala., 29 Aug. 1994) (alleged forced resignation of Army employee is excluded by CSRA and FECA).

(6) Veterans Benefits. Veterans benefits scheme bars recovery for constitutional tort. Deloria v. Veterans Admin., 927 F.2d 1009 (9th Cir. 1991) (must exhaust administrative remedies for Veteran Affairs claim for benefits); El Amin v. U.S. Veterans Administration, 760

F. Supp. 747 (N.D. Ind. 1991) (cannot cast demand for review of denial of veterans benefits in guise of constitutional tort); Morozsan v. U.S., 849 F. Supp. 617 (N.D. Ind. 1994) (VA procedures for processing disability benefits meet standards and are not unconstitutional). Donovan v. Gover, 5 F. Supp. 2d 142 (W.D.N.Y. 1998) (garnishment of federal salary to repay VA home loan falls under due process and is not a state law claim.

(7) Social Security. Social Security review scheme bars Bivens action. Madsen v. U.S., 663 F. Supp. 31 (D. Idaho 1987) (claim for Social Security benefits not reviewable under FTCA due to limited language in Social Security Act).

(8) Military Records. Military records review system bars recovery for constitutional tort. Moore v. Secretary of the Army, 627 F. Supp. 1538 (D. Conn. 1986) (no cause of action based on allegation that ABCMR decision is in error).

(9) Violation of Federal Statute. A mere violation of federal statute is insufficient to constitute a constitutional tort. Lamont v. Haig, 539 F. Supp. 552 (D.S.D. 1982) (violation of Posse Commitatus Act causing illegal confinement does not create cause of action); Hohri v. U.S., 586 F. Supp. 769 (D.D.C. 1984) (WW II West Coast evacuation of Japanese-Americans); Founding Church of Scientology v. Director FBI, 459 F. Supp. 748 (D.D.C. 1978).

(10) Constitutional Tort. Cases defining what is required for a constitutional tort. Friedman v. Young, 702 F. Supp. 433 (S.D.N.Y. 1988) (pat down search must shock conscience to be Constitutional tort); Morales v. Ramirez, 906 F.2d 784 (1st Cir. 1990) (defines constitutional tort arising out of malicious prosecution-does include slanted investigation). Constitutional tort found to be stated. Engle v. Mecke, 24 F.3d 133 (10th Cir. 1994) (Federal employee recovers judgment from Federal policeman who was arrested him); Stadt v. Univ. of Rochester, 921 F. Supp. 1023 (W.D.N.Y. 1996) (injection of plutonium in 1946 as part of U.S. nuclear program into civilian scleroderma patient constitutes U.S. Constitutional tort in violation of 5th Amendment--cites In re Cincinnati Radiation Litigation, 874 F. Supp. 796 (S.D. Ohio 1995)); In re Cincinnati Radiation Litigation, 874 F. Supp. 796 (S.D. Ohio 1995) (Navy physician supervising federally funded human nuclear radiation experiment conducted in civilian hospital can

be sued for violation of constitutional rights). Ubeh v. Reno, 141 F.3d 1000 (11th Cir. 1998). False affidavit by DEA agent constitutes 4th Amendment tort which accrues on date court dismisses drug charges. Petrazzoulo v. U.S. Marshal's Service, __F. Supp.__, 1998 WL 136493 (W.D.N.Y.). Failure to replace teeth pulled after accident is not a state tort but violation of 8th Amendment. Robertson v. U.S., 1998 WL 223159 (10th Cir. (Okla.)). USAF chaplain files 1st Amendment claim for his removal from USAF due to his opposition to Gulf War and removal from pulpit. Case reversible under Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971), but not sustainable on merits.

(11) Constitutional Tort--Federal Employees. Constitutional tort not stated against other federal employees. Richburg v. U.S., Civ. #86-4194 (D. Kan. 1987) (search of off-post home by MPs--no cause of action against U.S. under 14th amendment and 42 U.S.C. §§ 1983, 1985); Jefferson v. Ashley, 643 F. Supp. 227 (D. Or. 1986) (remarks to prospective employer concerning excess sick leave and inability to get along with former employees are not actionable); Daly-Murphy v. Winston, 820 F.2d 1470 (9th Cir. 1987) (no cause of action for VA anesthesiologist for suspension of privileges); Hill v. Dept. of Air Force, 884 F.2d 1318 (10th Cir. 1989) (listening to subordinates phone conversation is not a Constitutional tort); Padro v. Department of Navy, 790 F. Supp. 958 (D.P.R. 1991) (no property interest in Base Exchange job); Pereira v. U.S. Postal Service, 964 F.2d 873 (9th Cir. 1992) (postal worker allegedly harassed by supervisor has no Bivens action and cannot bring constitutional tort action against United States under the Federal Tort Claims Act); Alasevich v. U.S. Air Force Reserve, 1997 WL 152816 (E.D. Pa.) (Air Force reservist was relieved from flight status after reporting fraudulent activity--suit for constitutional violations is discussed). Rosenthal v. U.S., 1998 WL 312118 (N.D. Ill.) (seizure of employee's pocket knife alleging of a blade length which violvated 18 USC 930 is not a 4th or 5th Amendment cause of action.

(12) Feres. Feres may bar a constitutional tort action. Chappell v. Wallace, 462 U.S. 296 (1983) (Feres bars a Bivens action). See also U.S. v. Stanley, 483 U.S. 681 (1987) (Chappell approach applies to all activities performed incident to “service” and not merely to activities performed within the officer/subordinat relationship); Bowen v. Oistead, 125 F.3d 800 (9th Cir. 1997)(Feres bars constitutional tort suit against

individual military members and Alaska NG). Cf. Coffman v. U.S., 120 F.3d 57 (6th Cir. 1997) (reasoning of Chappell prohibits application of American with Disabilities Act and related state and federal handicap discrimination laws).

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

(1) Invasion of Privacy. See, Generally, Birnbaum v. U.S., 588 F.2d 319 (2d Cir. 1978); Black v. Sheraton Corp. of America & U.S., 564 F.2d 531 (D.C. Cir. 1977); Avery v. U.S., 434 F. Supp. 937 (D. Conn. 1977); Cruikshank v. U.S., 431 F. Supp. 1355 (D. Haw. 1977). See also Douglass v. Hustler Magazine Inc., 769 F.2d 1128 (7th Cir. 1985) (cites numerous awards in "false light" cases). A plaintiff must state plead and prove an invasion of privacy cause of action under state law. Doe v. DiGenova, 642 F. Supp. 624 (D.D.C. 1986) (release of VA medical records under grand jury subpoena not unreasonable intrusive and intrusion not serious--therefore, no tort under DC law); Mack v. U.S., 814 F.2d 120 (2d Cir. 1987) (FBI agent's refusal of urinalysis--no tort for invasion of privacy under New York law--overrules Birnbaum); Hurwitz v. U.S., 884 F.2d 684 (2d Cir. 1989) (no claim under New York law for CIA opening mail); Johnson v. Sawyer, 47 F.3d 716 (5th Cir. 1995) (en banc) (IRS press release of income tax information including criminal record is not a state tort); Reed v. U.S., Civ. # 82-1658-D (D.S.C. 1984) (reprimand of Federal civil servant--not invasion of privacy); O'Donnell v. U.S., 891 F.2d 1079 (3rd Cir. 1989) (release of VA psychiatric record inadvertently to employer is not invasion of privacy since not intentional, but Privacy Act, 5 U.S.C. § 552a, violated). An invasion of privacy cause of action may not be used to assert a cause of action otherwise barred by the FTCA. Thomas-Lazear v. FBI, 851 F.2d 1202 (9th Cir. 1988) (slander claim excluded, even though stated as invasion of privacy). Even if a tort is stated, it may still be barred by the discretionary function exclusion. Doe v. Stephens, 851 F.2d 1457 (D.C. Cir. 1988) (release of medical records to D.C. grand jury violated Veteran's Records and Privacy Act, but no cause of action, since discretionary). However, an action may be permitted under some other statute depending on type of disclosure. O'Donnell; Williams v. McCausland, 791 F. Supp. 992 (S.D.N.Y. 1992) (individual federal employees are not federal agencies for purpose of suit under FOIA and Privacy Act); Sterling

v. U.S., 798 F. Supp. 47 (D. Colo. 1992) (violation of Privacy Act not a state tort, but suit against U.S. permitted). Sanders v. American Broadcasting Companies, Inc., 99 CD65 5020 Civ #5059692 (Sup Ct Calif 24 June 99) suspicious recording of private conversation in open bay of office and using it in broadcast constitutes invasion of privacy-cite numerous cases nationally

(2) *Prima Facie* Tort. Social Workers Party v. U.S. Attorney General, 463 F. Supp. 515 (S.D.N.Y. 1978). Cases where *prima facie* tort successfully asserted. Hurst v. U.S., 739 F. Supp. 1377 (D.S.D. 1990) (unexcused violation of regulatory requirement for Corps of Engineers District Engineer to issue prohibitory order constitutes tort of negligence *per se* under S.D. Law). But see Johnson v. Sawyer, 47 F.3d 716 (1995) (en banc) (5th Cir. 1995) (violation of Internal Revenue Service statute prohibiting public dissemination of tax information does not constitute a tort under Texas law); Prebble v. U.S., 838 F. Supp. 36 (N.D.N.Y. 1993) (manner in which FECA claims are handled does not constitute a *prima facie* tort under N.Y. law).

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

(4) Emotional Distress. See, generally, Cummings v. Walsh Construction Co., 561 F. Supp. 872 (S.D. Ga. 1983); Russo, *Malicious, Intentional and Negligent Infliction of Mental Distress in Florida*, 11 Florida State University Law Review 339 (19__); King v. Burris, 588 F. Supp. 1152 (D. Colo. 1984); Crain v. Krehbiel, 443 F. Supp. 202 (N.D. Cal. 1977); Harmon v. Grande Tire Co. Inc. et al., 821 F.2d 252 (5th Cir. 1987); Ferriter v. Daniel O'Connell's Sons Inc., 413 N.E.2d 690 (Mass. 1980). See also Frame v. Kothari, 515 A.2d 810 (N.J. Super. 1985) (physician sent 10-month-old child home after examining him following fall--parents watched child deteriorate and die); Pierson v. News Group Publications Inc., 549 F. Supp. 635 (S.D. Ga. 1982) (includes publishing degrading photos in newspaper); Azzolino v. Dingfelder, 337 S.E.2d 528 (N.C. 1985) (permits recovery by parents of Down's Syndrome child for their emotional injury--North Carolina

refuses to recognize wrongful life claim); Vu v. Meese, 755 F. Supp. 1374 (E.D. La. 1991) (§ 2680(h) does not bar claim for emotional distress on basis that it is part of claim for extended detention of vessels). But see Hart v. U.S., 894 F.2d 1539 (11th Cir. 1990) (letter notifying widow as to determination of deceased airman's status not basis for emotional distress cause of action under Florida law); Johnson v. U.S., 816 F. Supp. 1519 (N.D. Ala. 1993) (no cause of action for prisoner being forced to live in cell with prisoner who has AIDS, since Alabama does not recognize emotional distress claim).

(a) Intentional Infliction of Emotional Distress. Cause of action defined. Rheuport v. Ferguson v. Woods, 819 F.2d 1459 (8th Cir. 1987) (Iowa law--cites Quade v. Heiderscheit, 391 N.W.2d 261 (Iowa App. 1986)). Cases recognizing a cause of action for intentional infliction of emotional distress. Corkery v. Super X Drugs Corp., 602 F. Supp. 42 (M.D. Fla. 1985) (District Court predicts Florida will permit tort of intentional infliction of emotional harm); Garvey v. Dickinson College, 761 F. Supp. 1175 (M.D. Pa. 1991) (Pa. would recognize intentional infliction); Morgan v. American Family Life Assurance Co. of Columbus, 559 F. Supp. 477 (W.D. Va. 1983) (failure to pay off on insurance policy--intentional infliction of emotional harm cause of action lies either in tort or contract); Blackwell v. Oser, 436 So.2d 1293 (La. App. 1983) (mother can recover for her mental anguish when physician causes birth defects in child, since physician has obligation to treat her so as to avoid injury to child--however, father cannot recover); Gross v. U.S., 723 F.2d 609 (8th Cir. 1983) (repeated demands for refund by Federal agency creates tort of intentional infliction of emotional distress under South Dakota law); Kassel v. U.S. VA, 682 F. Supp. 646 (D.N.H. 1988) (unauthorized release of confidential information from personnel file constitutes tort of intentional infliction of emotional distress). Cases not recognizing a cause of action for intentional infliction of emotional distress. Clark v. U.S., 120 F.3d 268 (table), 1997 WL 409568 (9th Cir. 1997) (loss of Federal prisoners New Balance shoes does not constitute intentional infliction of emotional distress or outrageous conduct under California law); Grubb v. U.S., 887 F.2d 1230 (4th Cir. 1989) (Navy Medical Center CO telling widow that Commander Billing was negligent not intentional infliction of emotional distress); D'Ambra v. U.S., 481 F.2d 14 (1st Cir. 1973) (no Florida tort for intentional infliction of

emotional distress); Kaiser v. U.S., 761 F. Supp. 150 (D.D.C. 1991) (Capital policeman shoots claimant's dog--not intentional infliction of emotional distress--cites Abourezk v. New York Airlines, Inc., 895 F.2d 1456 (D.C. Cir. 1990)). However, a plaintiff pleading intentional infliction of emotional distress may well plead themselves out of court because of the FTCA's intentional tort exclusion. U.S. v. Burke, 548 F. Supp. 724 (D.S.D. 1982). Popovic v. U.S., 997 F. Supp. 672 (D. Md. 1998) No intentional infliction of emotional distress claim lies for investigating NIH scientist for allegedly stealing AIDS research. Stato v. Flershman, 164 F.3d 820 (2nd Cir. 1999) negligent handling of evidence in FECA case resulting in temporary cessation of benefits does not constitute intentional infliction of emotional distress.

(b) Negligent Infliction of Emotional Distress. Elements of negligent infliction of emotional distress. Ramirez v. Armstrong, 673 P.2d 822 (N.Mex. 1983) states that negligent infliction of emotional distress requires (1) a close relative; (2) severe shock from contemporaneous perception; (3) physical manifestation to plaintiff; and (4) physical injury to victim. Cases recognizing cause of action for negligent infliction of emotional distress. Culbert v. Sampson Supermarkets, 444 A.2d 433 (Me. 1982) (Maine adopts negligent infliction of emotional distress--choking on baby food witnessed by mother). The states of Hawaii, California, Texas, Massachusetts, Illinois, Iowa, Louisiana, Ohio, New York recognize negligent infliction of serious mental distress in absence of impact or physical injury. See, e.g., Erlich v. Menzes, 71 Cal. Rptr.2d 137 (Cal. Ct. App., 2nd Dist. 1998) (emotional distress claim allowed for negligent home construction); Rodrigues v. State, 472 P.2d 509 (Haw. 1970); Schultz v. Barberton Glass Co., 447 N.E.2d 109 (Ohio 1983) (windshield shattered without physical injury to driver); Bovsun v. Sanperi, 461 N.E.2d 843 (N.Y. 1984) (negligent infliction of emotional distress-zone of danger rule eliminated mere perception sufficient); Leong v. Takasaki, 520 P.2d 758 (Haw. 1974); Kelley v. Kokua Sales & Supply Ltd., 532 P.2d 673 (Haw. 1975); Campbell v. Animal Quarantine Station, 632 P.2d 1066 (Haw. 1981) (for killing dog); Lui Ciro, Inc. v. Ciro Inc., 895 F. Supp. 1365 (D. Haw. 1995) (recovery for negligent infliction of emotional distress based on damage to property is limited by statute to instances where there is physical injury or suffering from mental illness--Haw. Rev. Stat. § 663-

89). But see Holler v. U.S., 724 F.2d 104 (10th Cir. 1984) (improper psychiatric diagnosis on veteran did not create cause of action under New Mexico law for negligent infliction of emotional distress without accompanying physical injury); Ross v. U.S., 641 F. Supp. 368 (D.D.C. 1986) (negligent transfer of Federal prisoner to Marion does not create cause of action for negligent infliction of emotional distress).

(c) Emotional Distress From Birth of Child. Cases allowing recovery in such circumstances. Haught v. Maceluch, 681 F.2d 291 (5th Cir. 1982) (Texas case recognizing emotional distress of mother from birth of child). See also Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983); St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649 (Tex. 1987)(contra Boyle v. Kerr, 855 SW.2d 593 (Tex. 1993) which overrules Garrard except on bystander liability cases); Ingraham v. Bonds, 808 F.2d 1075 (5th Cir. 1987) ($500,000 to mother for experiencing negligent delivery which resulted in brain damaged child); Sesma v. Cueto, 181 Cal. Rptr. 12 (Cal. App. 1982) (mother's emotional injury at stillbirth based on Dillon v. Legg, 441 P.2d 912 (Cal. 1968)); Molien v. Kaiser Foundation Hospitals, 616 P.2d 813 (Cal. 1980), (father's emotional injury at stillbirth); Blackwell v. Oser, 436 So.2d 1293 (La. App. 1983) (mother can recover for her mental anguish when physician causes birth defects in child, since physician has obligation to treat her so as to avoid injury to child--however, father cannot recover); Shaw v. U.S., 741 F.2d 1202 (9th Cir. 1984) ($2,000,000 award for parent's emotional injury for child brain damaged at birth under Washington law (RCWA § 2.24.010)--reduced to $50,000 on appeal); Phillips v. U.S., 575 F. Supp. 1309 (D.S.C. 1983) ($500,000 for parent's emotional injury for birth of child damaged by rubella despite absence of South Carolina law--cites Naccash v. Burger, 290 S.E.2d 825 (Va. 1982) and Berman v. Allan, 404 A.2d 8 (N.J. 1979)); Boyd v. Bulala, 877 F.2d 1191 (4th Cir. 1989) (permits father to recover for witnessing birth of brain damaged infant); Shelton v. Anthony's Med. Center, 781 SW.2d 48 (Mo. 1989) (mother's emotional distress allowed for viewing birth of armless baby); Wade v. U.S., Civ. #89-00226 HMF (D. Haw., 2 May 1991) (mother awarded $500,000 for emotional distress over loss of stillborn twins for whom recovery not permitted under Wrongful Death Act); Phillips v. Cooper Ob/Gyn Assoc., 811 F. Supp. 1018 (D.N.J. 1993) (viewing by both parents of shoulder dystocia delivery can provide basis for emotional distress claim). But see Schmeck

v. City of Shawnee, Kansas, 647 P.2d 1263 (Kan. 1982) (holds the opposite of Haught).

(d) Bystanders. Requirements for bystander recovery. In re Air Crash at Dallas/Ft. Worth Airport on 2 August 1985, 856 F.2d 28 (5th Cir. 1988) (reviews bystander requirements). See also Gross v. U.S., 676 F.2d 295 (8th Cir. 1982). Cases allowing recovery by bystanders for emotional distress. Sesma v. Cueto, 181 Cal. Rptr. 12 (Cal. App. 1982) (mother's emotional injury at stillbirth based on Dillon v. Legg, 441 P.2d 912 (Cal. 1968)); Thing v. La Chusa, 257 Cal. Rptr. 865, 771 P.2d 814 (Cal. 1989) (adds requirement of awareness to that of presence); Marlene F. v. Psychiatric Medical Clinic Inc., 770 P.2d 278 (Calif. 1989)(mother allowed to recover for emotional injuries from finding out daughter had been sexually molested by therapist); In re Air Crash Disaster Near Cerritas, Cal, 967 F.2d 1421 (9th Cir. 1992), further proceedings, 973 F.2d 1490 (9th Cir. 1992) (witnessing husband and two children trapped in burning home after plane crashed into it is basis for emotional distress claim as placed in fear for own safety); Walker v. Clark Equipment Co., 320 N.W.2d 561 (Iowa 1982) (product liability psychic injury case); Woodill v. Parke Davis and Co., 402 N.E.2d 194 (Ill. 1980) (same as Walker); Marzolf v. Hoover, 596 F. Supp. 596 (D. Mont. 1984) (bystander case--close relative witnesses injury to child); Ochoa v. Superior Court of Santa Clara County, 703 P.2d 1 (Cal. 1985); Hahn v. Sterling Drug Inc., 805 F.2d 1480 (11th Cir. 1986) (Georgia follows impact rule in absence of willful act); Lejeune v. Rayne Branch Hospital., 556 So.2d 559 (La. 1990) (wife's emotional distress for viewing rat bites on husband who is patient in hospital--cause of action permitted). But see In re Air Crash Disaster Near New Orleans, Louisiana on 9 July 1982, 764 F.2d 1082 (5th Cir. 1985) (homeowner in area of air crash who suffered no physical injury or property damage not entitled to damages for mental injury); Harper v. Illinois Central Gulf RR, 808 F.2d 1139 (5th Cir. 1987) (train wreck causes spread of hazardous fumes--no emotional injury unless in zone of danger or for property damage unless witnessed same); Wilder v. City of Keene., 557 A.2d. 636 (N.H. 1989) (no recovery for parents who saw son one hour after accident); Burris v. Grange Mutual Cos., 545 N.E.2d. 83 (Ohio 1989) (no recovery for mother who later learned of son's death in auto accident); Nesom v. Tri Hawk Intern, 985 F.2d 208 (5th Cir. 1993) (discusses abandonment of "zone of danger" rule by La.

Sup. Court, but states that fear of developing disease in future does not create action for emotional distress); Martin by and through Martin v. U.S., 984 F.2d 1033 (9th Cir. 1993) (neither older sister of 6-year-old or mother have emotional distress action); Doe v. U.S., 976 F.2d 1071 (7th Cir. 1992) (no cause of action for seduction, i.e., emotional distress permitted for parents of child sexually abused at USAF day care center); Mortise v. U.S., 102 F.3d 697 (2nd Cir. 1997) (wife who witnessed assault upon husband by National Guard on training exercise does not have claim for negligent infliction of emotional distress, since he did not suffer serious bodily injury); Garber v. U.S., 578 F.2d 414 (D.C. Cir. 1978)(no recovery for emotional distress without impact); Soldinger v. U.S., 247 F. Supp. 559 (E.D. Va. 1965) (same). MR (Vega Alta) v. Caribe General Elec. Products, 31 F. Supp. 2d 226 (D.PR 1998) failure of EPA to follow federal regulations during CERCLA clean up is not at FTCA tort.

(e) Cancer Phobia. Wetherill v. University of Chicago, 565 F. Supp. 1553 (N.D. Ill. 1983) (cancer phobia from experimental administration of Diethystilbestrol actionable); Ayers v. Township of Jackson, 461 A.2d 184 (N.J. Super. 1983) (cancer phobia from groundwater pollution actionable), rev'd on this point, 106 N.J. 157, 525 A.2d 287 (1987). Contra Plummer v. Abbott Labs, 568 F. Supp. 920 (D.R.I. 1983).

(5) Outrage. Tort of outrage defined. Price v. Federal Express Corp., 660 F. Supp. 1388 (D. Colo. 1987) (defines tort of outrage in Colorado--sister witnessed kidnapping and saw 6-year-old brought to police station--cause of action not stated). Cause of action not stated. Crow v. U.S., 659 F. Supp. 557 (D. Kan. 1987) (no tort of outrage under Kansas law in absence of extreme distress); Cole v. U.S., 874 F. Supp. 1011 (D. Neb. 1995) (FBI search of telephone company manager's home, based on strange noises thought to be wiretapping, is not tort of outrage).

(6) Negligent Maintenance of Records. See, generally, Ferguson v. U.S. Army, 938 F.2d 55 (6th Cir. 1991) (U.S. failed to correct records after being informed someone else had enlisted using plaintiff's identity); Quinones v. U.S., 492 F.2d 1269 (3d Cir. 1974); Ina Aviation Corp. v. U.S., 468 F. Supp. 695 (E.D.N.Y. 1979); Doe v. U.S., 520 F. Supp. 1200 (S.D.N.Y. 1981); Moessmer v. U.S., 569 F. Supp. 782 (E.D. Mo. 1983). Negligence action must still be pled under state law. Misany v. U.S., 873 F.2d 160 (7th Cir. 1989) (negligent maintenance of records,

e.g., temporary loss, not a tort under Wisconsin law). Libel and slander action may not be plead as negligent maintenance of records case. Moessmer v. U.S., 579 F. Supp. 1030 (E.D. Mo. 1984) (negligent maintenance of records tort barred by libel and slander exclusion).

(7) Trespass. A trespass action is a cognizable cause of action under the FTCA. See, generally, Hatahley v. U.S., 351 U.S. 173 (1956); Epling v. U.S., 453 F.2d 327 (9th Cir. 1971); Best v. U.S., 505 F. Supp. 48 (E.D.N.C. 1980). See also Lhotka v. U.S., 114 F.3d 751 (8th Cir. 1997) (even though U.S. Fish and Wildlife Service has easement to maintain wetlands, trespass and nuisance can occur due to invasion of property and personal rights). However, it may not be plead as a Bivens action to avoid the FTCA's filing requirement's. Roscoe v. U.S., 83 F.3d 433 (table), 1996 WL 200384 (10th Cir. 1996). As always, the state law tort of trespass must be pled and proven. Lee v. Glickman, 107 F.3d 877 (table), 1997 WL 15597 (9th Cir. 1997) (no intentional trespass where Forest service is accused of planting aliens on Lee's property--actually it was a reforestation crew crossing her property); Krutchen v. U.S., 914 F.2d 1106 (8th Cir. 1990) (no trespass when river waters washed away man-made embankment and caused flooding of abutting land); Good Fund Ltd.-1972 v. Church, 540 F. Supp. 519 (D. Colo. 1982) (radiation produces no physical changes and danger to health--matters of speculation not sufficient to constitute invasion). A trespass suit may be pursued under either the FTCA or the Tucker Act, but not both. Reid v. U.S., 715 F.2d 1148 (7th Cir. 1983) (invasion of claimant's land must be alleged as Tucker Act taking, not a trespass); Drury v. U.S. Dept. of Army, 902 F. Supp. 107 (E.D. La. 1995) (suit for trespass and conversion precludes simultaneous suit under Tucker Act). See also Loesch v. U.S., 645 F.2d 905 (Ct. Cl. 1981). But see Drury v. U.S. Dept. of Army, 902 F. Supp. 107 (E.D. La. 1995) (suit for trespass and conversion does not preclude simultaneous suit under Tucker Act).

(8) Bailment. See, generally, England v. U.S., 405 F.2d 862 (5th Cir. 1969); H.E. Jaeger v. U.S., 394 F.2d 944 (D.C. Cir. 1968); Porter v. U.S., 473 F.2d 1329 (5th Cir. 1973) (under P.L. 89-318); Oates v. U.S., 348 F. Supp. 841 (M.D. Ala. 1972); Cincotta v. U.S., 362 F. Supp. 386 (D. Md. 1973). The plaintiff must show that the bailment standard of care was not met. Richter v. U.S., Civ. No. 2:92-cv-022-WCO (M.D. Ga., 4 June 1993) (duty on plaintiff to show property altered while in bailee's possession); Melvin v. U.S., 963 F. Supp 1052 (D. Kan.

1997) (when prison officer locked cell, he had duty of reasonableness to account for prisoner's property); Short v. U.S. Postal Service, 907 F. Supp. 83 (S.D.N.Y. 1995) (assuming postal employee's car parked at work is bailed, no proof USPS did not exercise ordinary and reasonable care); Williamson v. U.S., Civ. # TH 94-50-C T/H (S.D. Ind., Feb. 28,1995) (U.S. is only responsible for property inventoried following a shakedown in a U.S. prison--constructive delivery of property of prisoner not present). Bailment continues until property's return is demanded. Price v. U.S., 707 F. Supp. 1465 (S.D. Tex. 1989), rev'd on other grounds, 69 F.3d 46 (5th Cir. 1995) (Hitler water colors seized in 1945--continuing bailment until return demanded in 1983—5th Circuit questions application of law to facts without deciding point). Burgess v. U.S. Post Office, Civ #98-CIV-4390 (W6B)(D. NJ 6 July 99) postal employee's car stolen while parked in Post Office lot while she was working - no bailment as she locked car and kept keys.

(9) Contract Grounded Claims. May include contract grounded claims. See, generally, Aleutco Corp. v. U.S., 244 F.2d 674 (3d Cir. 1957); Woodbury v. U.S., 313 F.2d 291 (9th Cir. 1963) (PI claim permitted for negligent performance of contract); Martin v. U.S., 649 F.2d 701 (9th Cir. 1981) (general contractor for low income housing project sues HUD on numerous theories, both tort and contract); Johnson v. HUD, 544 F. Supp. 925 (E.D. La. 1981); Salter v. U.S., 880 F. Supp. 1524 (M.D. Ala. 1995) (personal injury claims based on spraying in Federal-State boll weevil control program is not contract claim, since it is based on properly training and furnishing safety equipment). But see Bonnett Enterprises Inc. v. U.S., 889 F. Supp. 208 (W.D. Pa. 1995) (suit for misrepresentation in tax sale due to IRS' failure to include in bid that land not deeded to IRS falls under jurisdiction of Court of Federal Claims).

(10) Conversion. See, generally, MacAvoy v. The Smithsonian Inst., 757 F. Supp 60 (D.D.C. 1991) (contested ownership of art objects lies in tort of conversion, not contract, and arises out of demand for possession); Acherley v. U.S., 741 F. Supp. 1519 (D. Wyo. 1990) (FDIC as receiver withholding claimant's bank account held to be conversion); Nottingham Ltd. v. U.S., 741 F. Supp. 1147 (C.D. Cal. 1990) (permits FTCA suit for conversion, even though Calif. law does not require wrongful conduct or intent); Aleutco Corp. v. U.S., 244 F.2d 674 (3d Cir. 1957); Social Workers Party v. U.S. Attorney General, 463 F. Supp. 515 (S.D.N.Y. 1978).

Seizure of property without notice constitutes conversion. Love v. U.S., 871 F.2d 1488 (9th Cir. 1989) (selling collateral without notice constitutes a conversion, as well as breach of contract); Arcoren v. Peters, 811 F.2d 392 (8th Cir. 1987) (seizure and sale of cattle of FmHA without notice or hearing violates due process and constitutes conversion). But see Love v. U.S., 844 F. Supp. 616 (D. Mont. 1994) (FmHA's disposition of debtor farmers' collateral without required notice is not a conversion under Montana law). However, a law or regulation is considered sufficient notice. Burton-Bey v. U.S., 100 F.3d 967 (table), 1996 WL 654457 (10th Cir. 1996) (seizures of inmate's properly purchased Dallas Cowboys cap under newly published prison regulation is not conversion). For a conversion to occur the plaintiff must have a ownership interest in the thing being converted. Koppie v. U.S., 1 F.3d 651 (7th Cir. 1993) (alleged improper registration of aircraft does not constitute a conversion, since it does not determine ownership); CHoPP Computer Corp. v. U.S., 5 F.3d 1344 (9th Cir. 1993) (U.S. levies on a stock account on which an injunction has been placed--no conversion--injunction holder had no property interest in the account). Bazuaye v. U.S., F. Supp. 2d, 1999 WL 166996 (D.D.C.) No conversion as plaintiff did not own release bond at time it was seized by USPS under a forfeiture statute.

(11) Wrongful Birth and Wrongful Life. See, generally, Phillips v. U.S., 508 F. Supp. 544, (D.S.C. 1981), further proceedings, 566 F. Supp. 1 (D.S.C. 1981); White v. U.S., 510 F. Supp. 146 (D. Kan. 1981) (Georgia law); Robak v. U.S., 658 F.2d 471 (7th Cir. 1981) (Alabama law); McNeal v. U.S., 689 F.2d 1200 (4th Cir. 1982) (Virginia law). Cases recognizing wrongful birth/wrongful life claims. Harbeson v. Parke-Davis, 656 P.2d 483 (Wash. 1983) (first state high court to permit wrongful life action, but limits it to damaged infant's compensatory damages) (California (Turpin v. Sortini, 643 P.2d 954 (Cal. 1982) and New Jersey Procanik v. Cillo, 478 A.2d 755 (N.J. 1984), also permits claim for wrongful life, but does not permit general damages for infant); Haymon v. Wilkerson, 535 A.2d 880 (D.C. App. 1987) (recognizes wrongful life claim); Fulton-DeKalb Hospital Authority v. Graves, 314 S.E.2d 653 (Ga. 1984) (recognizes wrongful pregnancy); Atlanta Obstetrics & Gynecology Group v. Abelson, 392 S.E.2d 916 (Ga. App. 1990) (permits wrongful birth claim); Keel v. Banach, 624 So.2d 1022 (Ala. 1993) (wrongful birth recognized as cause of action); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975) (same); Dumer v. St. Michael's Hospital, 233 N.W.2d

372 (Wis. 1975) (same). Accord Siemieniec v. Lutheran General Hospital, 480 N.E.2d 1227, aff'd in part, denied in part, 512 N.E.2d 691 (Ill. 1987); Smith v. Cote, 513 A.2d 341 (N.H. 1986); Schroeder v. Perkel, 432 A.2d 834 (N.J. 1981); James G. v. Caserta, 332 S.E.2d 872 (W.Va. 1985); Blake v. Cruz, 698 P.2d 315 (Idaho 1984); Bani-Esraili v. Lerman, 505 N.E.2d 947 (N.Y. 1987); Bowman v. Davis, 356 N.E.2d 496 (Ohio 1976); Ochs v. Borrelli, 445 A.2d 883 (Conn. 1982); Speck v. Finegold, 439 A.2d 110 (Pa. 1981); Fassoulas v. Ramey, 450 So.2d 822 (Fla. 1984). See also Monusko v. Postle, 437 N.W.2d 367 (Mich. App. 1989) (permits preconception tort for failure to test for rubella). Cases refusing to recognize wrongful birth/wrongful life claims. Azzolino v. Dingfelder, 337 S.E.2d 528 (N.C. 1985) (North Carolina refuses to recognize wrongful life claim); Moores v. Lucas, 405 So.2d 1022 (Fla. 1981); Naccash v. Burger, 290 S.E.2d 825 (Va. 1982) (reject wrongful life). Eisbrenner v. Stanley, 308 N.W.2d 209 (Mich. App. 1981); Proffitt v. Bartolo, 412 N.W.2d 232 (Mich. App. 1987). Accord Morris v. Sanchez v. U.S., 746 P.2d 184 (Okla. 1987); Johnston v. Elkins, 736 P.2d 935 (Kan. 1987); Szekeres v. Robinson, 715 P.2d 1076 (Nev. 1986). But see Gallagher v. Duke University, 852 F.2d 773 (4th Cir. 1988) (distinguishes Azzolino and permits claim for parents emotional distress in genetic counseling case); Kush v. Lloyd, 616 So.2d 415 (Fla. 1992) (permits parents claim for wrongful birth in genetic counseling case, but no wrongful life claim).

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

(13) Interference with Visitation. Interference of parent's visitation and communication rights is a tort akin to interference with custodial rights. Ruffalo v. U.S., 590 F. Supp. 706 (W.D. Mo. 1984).

(14) Wrongful Handling of Corpse. Damages can arise from right to possession and injury to the feelings of those with such rights. See, e.g., Kohn v. U.S., 591 F. Supp. 568 (E.D.N.Y. 1984); Davis v. U.S. Dept. of Army, 602 F. Supp. 355 (D. Md. 1985). See also Lyon v. U.S., 843 F. Supp. 531 (D. Minn. 1994) (new medical resident mistakenly has survivors sign autopsy form with eye donor authorization--VA granted immunity under Uniform Anatomical Gift Act due to good faith). Plaintiff must demonstrate wrongful handling of corpse actionable at state law. Mackey v. U.S., 8 F.3d 826 (D.C. Cir. 1993)

(next-of-kin has right of possession of body under D.C. law); Davis v. U.S. Dept. of Army, 602 F. Supp. 355 (D. Md. 1985) (wrongful disposal of fetus not actionable under D.C. law). Even if tort stated, may still be barred by discretionary function exclusion. Sabow v. U.S., 93 F.3d 1444 (9th Cir. 1996) (inadequate investigation of death and mishandling of corpse of active duty member falls under discretionary function exclusion). Some states allow tort for mishandling corpse to proceed either as a distinct tort or plead as an emotional distress claim or both. Lacy v. Cooper Hospital University Medical Center, 745 F. Supp. 1029 (D.N.J. 1990) (re separate tort for mishandling corpse--permitted as emotional distress claim under N.J. law where it is alleged that intern performed pericardio-centesis on corpse); Perry v. Saint Francis Hosp. & Medical Center, Inc., 865 F. Supp. 724 (D. Kan. 1994) (long bones of corpse removed to obtain marrow for organ transplant patient--widow has cause of action for conversion and claim for emotional distress if more than ordinary negligence can be shown). Shults v. U.S., 995 F. Supp. 1270 (D. Kan. 1998). Retention of organs at autopsy without permission of family does constitute intentional infliction of emotional distress - in any event no property interest in dead body under Miss. law. Riley v. St. Louis County of Missouri, 153 F.3d 627 (8th Cir. 1998), suit against county and funeral home for photographing body of young suicide victim and displaying photo in public.

(15) “Headquarters” Tort. "Headquarters" claim exists where negligent acts in U.S. proximately cause harm in foreign country. Couzado v. U.S., 105 F.3d 1389 (11th Cir. 1997) (U.S. Customs and DEA in Miami initiated sting in Belize, but failed to alert U.S. Embassy and police in Honduras who arrested crew and passengers, which resulted in imprisonment and torture--FTCA applies--cites In Re Agent Orange Product Liability, 580 F. Supp. 1242 (E.D.N.Y. 1984)); Giraldo v. U.S., Civ. # CIV-91-0133 (E.D.N.Y., July 7, 1995) (Federal air controller failed to give aircraft coming from Columbia landing priority requested resulting in crash caused by lack of fuel--judgment of $2.12 million to aspiring violinist, including $1.2 past pain and suffering); Bowles v. U.S., 950 F.2d 154 (4th Cir. 1991) (one car accident involving blowout of tire on State Department vehicle invokes State Secrets Act); Beattie v. U.S., 756 F.2d 91 (D.C. Cir. 1984) (air traffic controllers in Antarctica negligently trained and supervised in U.S.); Sami v. U.S., 617 F.2d 755 (D.C. Cir. 1979) (acts by officials in U.S. caused

wrongful detention on Germany); Leaf v. U.S., 588 F.2d 733 (9th Cir. 1978) (officials in U.S. negligently planned and executed drug investigation in Mexico); Donahue v. U.S. Dept. of Justice, 751 F. Supp. 45 (S.D.N.Y. 1990) (DEA ordered claimant to Lebanon with his family where they were kidnapped and tortured--Headquarters tort action permitted); Bryson v. U.S., 463 F. Supp. 908 (E.D. Pa. 1978) (Army doctors in Germany negligently selected and trained in U.S.). But see Gutierrez v. Lamagno, 23 F.3d 402 (4th Cir. 1994) (DEA agent was in an accident in Republic of Columbia--failure to properly select and train is not a Headquarters tort); Tarpeh Doe v. U.S., 28 F.3d 120 (D.C. Cir. 1994) (failure of State Dept. to remove inept Embassy doctor did not cause spinal meningitis in civilian hospital in Liberia); Eaglin v. U.S. Dept. of Army, 794 F.2d 981 (5th Cir. 1986) (U.S. officials failed to warn claimant of black ice hazards in Germany—-not actionable); Cominotto v. U.S., 802 F.2d 1127 (9th Cir. 1986) (impact of Secret Service activities in U.S. on Thailand operation too attenuated to support Headquarters claim); MacCaskill v. U.S., 834 F. Supp. 14 (D.D.C. 1993) (Headquarters tort cannot be based on high-level discussions concerning suicide of Marine security guard in El Salvador). Even if Headquarters tort action properly alleged, suit still subject to discretionary function exclusion. Knisley v. U.S., 817 F. Supp. 680 (S.D. Ohio 1993) (Headquarters tort based on selection and training of Army JAGC officer as legal assistance officer fails because of discretionary function exclusion).

(16) Legal Malpractice. Valid legal malpractice claim must be plead and proven. Knisley v. U.S., 817 F. Supp. 680 (S.D. Ohio 1993) (examines in detail what entails legal malpractice by Army legal assistance officer in domestic separation case and concludes no legal malpractice). See also Massow by Massow v. U.S., 987 F.2d 1365 (8th Cir. 1993) (base legal assistance informing airman that brain damaged baby claim is Feres barred constitutes legal malpractice--genesis test applied); Walker v. U.S., 663 F. Supp. 258 (E.D. Okla. 1987) (Dept. of Interior attorney fails to properly represent Indian client re oil and gas lease). But see Parris v. U.S., 45 F.3d 383 (10th Cir. 1995) (FTCA is not vehicle to challenge public defender's inept defense); Brooks v. U.S., Civ. # 94-181-M Civil (D.N.M., Mar. 15, 1995) (information provided to employer of ex-service member by defense counsel in court martial does not constitute a state tort, even if it constitutes a violation of confidentiality); Chesky v. U.S., Civ. # 85-

0478-D (D. Me. 1988) (legal assistance discloses sexual misconduct of client's husband based on her agreement that he could tell husband's company-held no written consent required). Some states would allow a legal malpractice claim to proceed as an emotional distress claim. Pinkham v. Burgess, 933 F.2d 1066 (1st Cir. 1991) (gross mishandling of civil law suit can give rise to tort of negligent infliction of emotional distress, even though lawsuit could not have been successfully pursued).

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

(18) Anti-Dumping Statute, (COBRA), 42 U.S.C. §§ 1395dd(b)(1)(A) & (B). Dickey v. Baptist Memorial Hospital of North Miss., 1996 WL 408879 (N.D. Miss.) (COBRA does not create course of action under FTCA); Burrows v. Turner Memorial Hosp., Inc., 762 F. Supp. 840 (W.D. Ark. 1991) (COBRA is not applicable under the FTCA, since state tort is separate). COBRA applicability generally. Abercrombie v. Osteopathic Hosp. Founders Ass'n, 950 F.2d 676 (10th Cir. 1991) (COBRA is a strict liability statute); Johnson v. Univ. of Chicago Hosp., 982 F.2d 230 (7th Cir. 1992) (COBRA is applicable to hospital's telemetric referral of patient); Lee by Wetzel v. Alleghany Regional Hosp. Comp. 778 F. Supp 900 (WD Va. 1991) (COBRA required that patient be stabilized prior to transfer); McIntyre v. Schick, 795 F. Supp. 777 (E.D. Va. 1992) (failure to return to ER after premature discharge while in labor falls under COBRA). But see Hutchinson v. Greater SE Community Hospital, 793 F. Supp. 6 (D.D.C. 1992) (discharge due to negligent diagnosis does not constitute failure to treat and is not under COBRA). Chervomiah v. U.S., 1999 U.S. Dist. LEXIS 10197 (D. N. Mex 29 June 99) EMTLA is not applicable to Indian Health Service Hospital.

(19) Covenant of Good Faith. Winchell v. U.S. Dept. of Agriculture, 961 F.2d 1443 (9th Cir. 1992) (farmer went bankrupt allegedly due to Soil Conservation Service admin. delay--no claim under Montana tort for breach of covenant of good faith).

(20) Spoliation of Evidence. Party has duty to preserve and protect material evidence and records. See 32 ATLA L. Rep. 230-33 (Aug. 1989) (citing Wilson v. Beloit

Corp., 869 F.2d 1162 (8th Cir. 1989) and other cases). Some states recognize spoilation as a tort. Smith v. Superior Court., 151 Cal. App.3d. 491, 198 Cal. Rptr. 829 (1984) (recognizes spoliation as tort). Accord Donaio v. U.S., 1997 WL 598146 (N.D. Ill.) (loss of medical records in cataract surgery csse is basis for claim of negligent spoliation, but can not be used as evidentiary presumption); Foster v. Lawrence Memorial Hosp., 809 F. Supp. 831 (D. Kan. 1992) (Kansas would recognize tort of spoilation--good historical background); Hagen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986); Bondu v. Carvich, 473 So.2d. 1307 (Fla. 6th Dist. Ct. App. 1984). Contra Kaplin v. Roselwell Perforators, Inc., 734 P. 2d. 1177 (Kan. 1987). Some states permit the inference of negligence from a party's loss/ destruction of evidence. May v. Moore., 424 So.2d 586 (Ala. 1982) (inference of negligence from suppression of medical records); Public Health Trust v. Valcon, 507 So.2d 596 (Fla. 1987). Accord Carr v. St. Paul Fire & Marine, 384 F. Supp 821 (W.D. Ark. 1974) (destruction of evidence can bring inference of neglect). Cedars-Sinai Medical Center v. The Superior Court of Los Angeles County, __Cal. Rptr. 2d__, 1998 WL 234060 (Cal.). California refuses to recognize spoliation of fetal heart tapes as an independent tort. Temple Community Hospital v. Superior Court of Los Angeles County, 99 CDOS 3993, Civ #5049103 (Sup. Ct. Calif. June 99) California refuses to recognize separate tort of spoliation when third party loses evidence.

(21) Violation of Contempt Statute (18 U.S.C. § 401). Coleman v. Espy, 986 F.2d 1184 (8th Cir. 1993) (failure of FmHA officials to inform farmers as ordered by a court constitutes a tort under FTCA).

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

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

d. FTCA Liability for Violating Federal Regulations. FTCA claim cannot arise from violation or failure to follow Federal rule or regulation unless State law recognizes private cause of action. Cases where no cause of action for

violation of government rule or regulation, because not actionable under state law. See U.S. v. Varig Airlines, 467 U.S. 797, 104 S.Ct. 2755 (1984); Johnson v. Sawyer, 47 F.3d 716 (5th Cir. 1995) (en banc)(violation of IRS statute prohibiting public dissemination of tax information does not constitute a tort under Texas law); Myers v. U.S., 17 F.3d 890 (6th Cir. 1994) (miner's death based on failure of Mine Health and Safety Administration's failure to enforce its regulations does not constitute a tort under Tennessee law); Hardaway v. U.S. Army Corps of Engineers, 980 F.2d 1415 (11th Cir. 1992) (failure to investigate financial worth of contract and require posting of Miller Act bond in violation of COE regulation is not a state tort); Sheridan v. U.S., 969 F.2d 72 (4th Cir. 1992) (Navy regulation on firearms is not basis for claim arising from shooting by off-duty drunken sailor); Westbay Steel Inc. v. U.S., 970 F.2d 648 (9th Cir. 1992) (contracting officer's failure to require surety to post bond as required by Miller Act is not a tort under the FTCA); Kugel v. U.S., 947 F.2d 1504 (D.C. Cir. 1991) (violation of internal FBI procedure does not constitute a state tort or create a public duty); Fazi v. U.S., 935 F.2d 535 (2d Cir. 1991) (USPS regulation concerning security guard to accompany contract mail carrier does not create a state tort under N.Y. law); Freedman v. U.S., 694 F.2d 1202 (9th Cir. 1985) (violation of U.S. Air Force Base regulation controlling temperature on hot water heater in quarters does not create cause of action, but Washington statute governing warranty of habitability does); Santiago-Ramirez v Secretary of Defense, 62 F.3d 445 (1st Cir. 1995) (questioning AAFES employee for removing packages through customer entrance in violation of regulation and then firing her does not create cause of action for intentional infliction of emotional distress); Employers Insurance of Wausau v. U.S., 1993 WL 337524 (N.D. Ill.) (recovery of EPA ordered cleanup costs based on EPA's misinterpretation of governing statute is not a state tort); Sheridan v. U.S., 969 F.2d 72 (4th Cir. 1992), aff'g, 773 F. Supp. 786 (D. Md. 1991) (violation of Navy firearms regulation not a tort under Md. Law); Gist v. U.S., 1991 WL 270289 (D. Kansas) (hiring of bulk mail contractor in violation of USPS procurement manual does not give bulk subcontractor cause of action for violation of statute); Love v. U.S. Dept. of Agriculture, 647 F. Supp. 141 (D. Mont. 1986) (suit cannot be based on failure of FmHA to enforce its regulation to protect Government's security interest). See also U.S. Gold and Silver Investments Inc. v. U.S. ex rel. Director U.S. Mint, 885 F.2d 620 (9th Cir. 1989) (suit for appropriation of trade cannot be brought under Lanham Act, since not a state tort); Art Metal-USA Inc. v. U.S., 753 F.2d 1151 (D.C. Cir. 1985); Love v. U.S., 656 F. Supp. 847 (D. Mont. 1987); Consolidated Aluminum Corp. v. C.F. Bean Corp.,

639 F. Supp. 1173 (W.D. La. 1986) (U.S. not liable for rupture of gas line by dredging company dredging channel for U.S., even though Corps reserved rights concerning safety); Totten v. U.S., 618 F. Supp. 951 (E.D. Tenn. 1985) (failure of USAF to approve independent contractor plan in accordance with USAF regulations not actionable); Moody v. U.S., 774 F.2d 150 (6th Cir. 1985) (FmHA inspection on home); Collins v. U.S., 621 F.2d 832 (6th Cir. 1980); Zabala Clemente v. U.S., 567 F.2d 1140 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978) (aircraft inspection); United Scottish Ins. Co. v. U.S., 614 F.2d 188 (9th Cir. 1979) (same); Gelley v. Astra Pharmaceutical Products Inc., 610 F.2d 558 (8th Cir. 1979) (medical drug inspection); Bernitsky v. U.S., 620 F.2d 948 (3d Cir. 1980) (mine inspection); In re Franklin National Bank Securities Litigation, 478 F. Supp. 210 (E.D.N.Y. 1979) (bank inspection); Carroll v. U.S., 488 F. Supp. 757 (D. Idaho 1980) (mine inspection); Loge v. U.S., 662 F.2d 1268 (8th Cir. 1981) (drug licensing); Market Ins. Co. v. U.S., 415 F.2d 459 (5th Cir. 1969) (safety inspection); Fisher v. U.S., 441 F.2d 1288 (3d Cir. 1971); Roberson v. U.S. v. Merritt-Chapman & Scott Corp., 382 F.2d 714 (9th Cir. 1967); Davis v. U.S., 443 F. Supp. 589 (W.D. Tex. 1977) (meat packing inspection); LeSuer v. U.S., 617 F.2d 1197 (5th Cir. 1980) (safety inspection); Taylor v. U.S., 521 F. Supp. 185 (W.D. Ky. 1981) (mine inspection); Continental Casualty v. U.S., Civ. # CV-80-2101 (C.D. Cal. 1981) (disposal of surplus engine); Schell v. National Flood Insurers Assn., 520 F. Supp. 150 (D. Colo. 1981) (notice to public re availability of flood insurance); Key v. U.S., 513 F. Supp. 756 (N.D. Ala. 1981) (mining practice); Raymer v. U.S., 660 F.2d 1136 (6th Cir. 1981) (mine inspection); Vanderberg v. Carter, 523 F. Supp. 279 (N.D. Ga. 1981) (denial of CHAMPUS benefits); Gunnells v. U.S., 514 F. Supp. 754 (S.D. W.Va. 1981) (mining safety regulations); Baer v. U.S., 511 F. Supp. 94 (N.D. Ohio 1980) (Federal regulations on herbicide); Jennings v. U.S., 530 F. Supp. 40 (D.D.C. 1981) (U.S. safety provision on construction projects); Tuepker v. FmHA, 538 F. Supp. 375 (W.D. Mo. 1982) (disapproval of FmHA emergency loan); Petty v. U.S., 679 F.2d 719 (8th Cir. 1982) (state law, not Swine Flu Act, establishes standard for informed consent); Watson v. Marsh, 689 F.2d 604 (5th Cir. 1982) (defective machine in GOCO plant); Sellfors v. U.S., 697 F.2d 1362 (11th Cir. 1983) (federally financed project at municipal airport to rid birds not sufficient to hold U.S. when plane ingested birds); Jayvee Brand Inc. v. U.S., 721 F.2d 385 (D.C. Cir. 1983) (regulating flame retardant garments); Gary Sheet & Tin Employees Federal Credit Union v. U.S., 605 F. Supp. 916 (N.D. Ind. 1985) (audit of Credit Union does not create duty to regulate and control credit unions). But see Routh v. U.S., 941 F.2d 853 (9th Cir. 1991) (safety provisions of road

clearing contract have force of law--state tort issue not raised); Bilderback v. U.S., 558 F. Supp. 903 (D. Or. 1982) (applied Federal regulation, not State open grazing law, in National Forest Case). Violation of federal rule or regulation held actionable under state law. Hines v. U.S., 60 F.3d 1442 (9th Cir. 1995) (USPS failure to screen contract driver in accordance with USPS manual is basis for liability); Haynes v. U.S., 899 F.2d 438 (5th Cir. 1990) (FAA regulation imposed duty under Texas Law on FAA inspector to act to prevent crash of plane during flight test of qualified pilot); Sorenson v. U.S., Civ. #89 -137-BLG-JDS (D. Mont. 1991) (violation by U.S. Forest Service of its own inspection and safety regulation constitutes tort under Montana law); Griffin v. U.S., 500 F.2d 1059 (3d Cir. 1974) (medical drug licensing); Blessing v. U.S., 447 F. Supp. 1160 (E.D. Pa. 1978) (OSHA inspection); Toole v. U.S., 588 F.2d 403 (3d Cir. 1978) (safety inspection); Doe v. U.S., 520 F. Supp. 1200 (S.D.N.Y. 1981) (failure to comply with Federal probation regulations re youth offenders). See also Huggins v. U.S., 302 F. Supp. 114 (W.D. Mo. 1969); American Exchange Bank of Madison, Wisconsin v. U.S., 257 F.2d 938 (7th Cir. 1958); Kropp v. Douglas Aircraft Co., 329 F. Supp. 447 (E.D.N.Y. 1971); Emelwon Inc. v. U.S., 391 F.2d 9 (5th Cir. 1968); Orr v. U.S., 486 F.2d 270 (5th Cir. 1973); Teich v. U.S. Govt., 500 F. Supp. 891 (N.D. Ill. 1980) (private aid to navigation); Allen v. U.S., 588 F. Supp. 247 (D. Utah 1984) (authorizing Congressional Act required AEC to protect public in atomic tests). The U.S can also held liable where duty to employee of independent or general contractor is owed under State law by virtue of U.S. contract required safety program. U.S. v. Babbs, 483 F.2d 308 (9th Cir. 1973) (munitions contract); Thorne v. U.S., 479 F.2d 804 (9th Cir. 1973) (construction contract); McGarry v. U.S., 549 F.2d 587 (9th Cir. 1976); Rooney v. U.S., 634 F.2d 1238 (9th Cir. 1980); Barron v. U.S., 654 F.2d 644 (9th Cir. 1981); Madison v. U.S., 679 F.2d 736 (8th Cir. 1982) (munitions contract). Compare Jeffries v. U.S., 477 F.2d 52 (9th Cir. 1973). But see Tracer IMBA Inc. v. U.S., 933 F.2d 663 (8th Cir. 1991) (GOCO contractor cannot recover for workmen's compensation benefits paid to its employees, since Government QA inspectors were performing discretionary, not mandatory, safety inspections--distinguishes McMichael v. U.S., 896 F.2d 1026 (8th Cir. 1988) where QA inspector had mandatory duty to close GOCO plant during thunderstorm-the distinction is based on U.S. v. Gaubert, 499 U.S. 315, 111 S.Ct. 1267 (1991), which states that neither Indian Towing nor Berkovitz supports the position that there is a dichotomy between discretionary functions and operational activities). Central Airlines Inc. v. U.S., 169 F.3d 1174 (8th Cir. 1999) no state

tort where FAA imposed civil penalties because FAA admittedly misinterpreted its own regulations.

e. Governmental Function Liability. Can arise out of performance of purely governmental functions. Indian Towing Co. v. U.S., 350 U.S. 61 (1955) (operating channel light); Rayonier Corp. v. U.S., 352 U.S. 315 (1957) (fire fighting); U.S. v. Muniz, 374 U.S. 150 (1963); Neal v. Bergland, 646 F.2d 1178 (6th Cir. 1981).

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

a. Legislative and Judicial Branch Members. "U.S. employee" includes members of legislature and judicial branch when latter is in non-judicial status. Operation Rescue National v. U.S., 975 F. Supp. 92 (D. Mass. 1997) (Senator Kennedy is considered protected by the Westfall Act in making allegedly defamatory remarks against antiabortion group) .See also IIC2a. For review of cases on immunity of judges and prosecutors. See, e.g., Martinez v. Winner, 548 F. Supp. 278 (D. Colo. 1982); McNamara v. U.S., 199 F. Supp. 879 (D.D.C. 1961) (Congressional Branch officers); U.S. v. LePatourel, 571 F.2d 405 (8th Cir. 1978) (Federal judge going to work). Operation Rescue Nat. v. U.S., 147 F.3d 68 (1st Cir. 1998) (Senator Kennedy is considered U.S. employee for FTCA purposes concerning remarks as a rally).

b. Federal Witness Protection Program and Informants. "U.S. employee" does not include person in Federal Witness Protection Program. Bergmann v. U.S., 689 F.2d 789 (8th Cir. 1982) (excludes witness under Federal Witness Protection Program); Boda v. U.S., 698 F.2d 1174 (11th Cir. 1983) (accord with Bergmann). Nor does it include a drug informant. Slagle v. U.S., 612 F.2d 1157 (9th Cir. 1980). But see Leaf v. U.S., 661 F.2d 740 (9th Cir. 1981).

c. Contract Physicians. The term "U.S. employee" excludes "contract physician." Wood v. Standard Products Co., 671 F.2d 825 (4th Cir. 1982); Walker v. U.S., 549 F. Supp. 973 (W.D. Okla. 1982) (even where service is performed in USAF hospital); Lurch v. U.S., Civ. # 79-034-C (D.N.M. 1980) (excludes "scarce medical specialist" hired under 32 U.S.C. §

4117). See also Kramer v. U.S., 843 F. Supp. 1066 (E.D. Va. 1994) (failure of CHAMPUS partners at Langley AFB clinic to diagnose condition which led to leg amputation is not under FTCA, since they were not U.S. employees); Sorahan v. U.S., 1997 WL 573403 (N.D. Ill.) (Dr. Peterson dismissed from FTCA suit since he was independent contractor whose sponge was not removed from patient during hystorectomy); Hanna v. Naegle, Civ. # 93-1421M (D.N.M., 30 Aug. 1996) (CHAMPUS partner held to be independent contractor); Bunevitch v. U.S., Civ. # C-91-0728-L(J) (W.D. Ky., July 19, 1994) (contract radiologist is held to be an independent contractor in suit for misinterpretation of mammogram); Rodriguez v. Sarabyn, 129 F.3d 760 (5th Cir. 1997) (clinical psychologist hired on a purchase order to provide family counseling to ATF victims of Waco raid is an independent contractor); Richerson v. U.S., 104 F.3d 361 (table), 1996 WL 733136 (6th Cir. 1996) (University of Michigan Medical School anesthesiologist is an independent contractor, but immune under state immunity statute); Robb v. U.S., 80 F.3d 884 (4th Cir. 1996) (USAF contracted with contractor to set up a "stand alone" OP clinic, which failed to diagnose lung cancer--both OP physician and contract radiologist were independent contractors); Pickett v. U.S., 724 F. Supp. 390 (D.S.C. 1989) (ER physician not U.S. employee); Eames v. U.S., Civ. # C-92-1822 MHP (N.D. Cal., 29 Dec. 1993) (U.S. not liable for error in reading x-ray by contract radiologist at Naval Hospital); Lilly v. Fieldstone, M.D., 876 F.2d 857 (10th Cir. 1989) (civilian urologist performing surgery in Army hospital an independent contractor, not a civilian employee--soldier not Feres barred); Sneed v. U.S., Civ. #91-0613-FMS (N.D. Cal. 1992) (contract radiologist at Oakland Naval Hospital is independent contractor); Carrillo v. U.S., 5 F.3d 1302 (9th Cir. 1993) (contract pediatrician is not U.S. employee in case where he failed to diagnose child abuse); Leone v. U.S., 910 F.2d 46 (2d Cir. 1990) (private physician is not U.S. employee when conducting FAA pilot licensing exam); Limo v. U.S., 852 F. Supp. (D.D.C. 1994) (contract neuroradiologist at WRAMC is not U.S. employee--distinguishes Spinnard v. U.S., CIV. # 85-0502 (D.D.C., 30 Jan. 1994)); Taylor v. U.S., Civ. #88-H-5396-NE (N.D. Ala. 1989) (contractor in Army hospital ER not a Federal agency); Broussard v. U.S., Civ. # 91-CA-074 (W.D. Tex. 1992) (physician employed by Emergency Medical Services, Inc. to work in ER of Army hospital is independent contractor); McDonald v. U.S., 807 F. Supp. 775 (M.D. Ga. 1992) (physician employed by National Emergency Services and working in ER at Moody AFB is independent contractor--cites similar case involving Eisenhower Army Medical Center); Spritzer v. U.S., 1988 WL 363944 (S.D. Ga. 1988)). However, even where a physician's contract states he/she is an independent contractor, this is not

determinative. Wafford v. U.S., Civ. # C 95-1134 LEW (N.D. Cal., 22 Apr. 1996), appeal dismissed as interlocutory with directions, 116 F.3d 488 (table), 1997 WL 306434 (9th Cir. 1997) (even when MTF contract states that contractor is U.S. employee for FTCA purposes, such language is not determinative, but control test is--cites Bird v. U.S., 949 F.2d 1079 (10th Cir. 1991)); Berman v. U.S., 572 F. Supp. 1486 (N.D. Ga. 1983) (whether senior flight examiner for FAA is federal employee depends on supervision;). Contra B & A Marine v. American Foreign Shopping, 23 F.3d 709 (2d Cir. 1994). Some courts have held the government liable on an apparent agency theory, even though the physician was a contractor. See, e.g., Gamble v. U.S. v. Univ. Anesthesiologists Inc., 648 F. Supp. 438 (N.D. Ohio 1986) (U.S. equitably estopped from denying that contract anesthesiologist was U.S. employee despite nature of contractual arrangement); Utterback v. U.S., 668 F. Supp. 602 (W.D. Ky. 1987) (U.S. liable for actions of contract anesthesiologist at VA Hospital estopped to deny apparent authority--distinguishes Lurch v. U.S., 719 F.2d 333 (10th Cir. 1983) involving scarce services contract between VA and surgeon). See also *Apparent Agency*, Trial Magazine (1988) (19 states have adopted doctrine making a hospital liable for acts of staff doctors who are independent contractors, not employees). Further, the U.S. can be held liable if it breaches some independent duty. Ayers v. U.S., 750 F.2d 449 (5th Cir. 1985) (administration of second spinal anesthetic by supervisory anesthesiologist provided VA Hospital at University Texas Medical School under contract does not release VA whose liable for negligent conduct of fourth year anesthesiology VA resident--held jointly liable). However, sometimes the context renders the physician a federal employee. Tivoli v. U.S., Civ. # 93-Civ. 5817 (CLB)(MDF) (D.D.C. 1993)(Georgetown radiologists hired under non-personal service contract held to be employees of NIH); aff'd Civ. # 98-6012, 6022 (2d Cir., 25 Sep. 98); Perry v. U.S., 936 F. Supp. 867 (S.D. Ala. 1996) (Kessler AFB surgical resident on one month burn training rotation at South Alabama Medical Center is U.S. employee and not borrowed servant or independent contractor--cites Brilliant v. Royal, 582 So.2d 512 (Ala. 1991) in which contract surgeon at Lyster Army Hospital held to be independent contractor); Brown v. Health Services, Inc., 971 F. Supp. 518 (D. Del. 1996) (HHS certification under 42 U.S.C. § 254(c), a Federal grant program, that private physician at HHS is a Federal employee is upheld); Costa v. U.S. Dept. of Veteran's Affairs, 845 F. Supp. 64 (D.R.I. 1994) (civilian resident's temporarily serving at DVA hospital are considered to be employees of U.S. based on DOJ certification); Ritchie v. U.S., Civ. #89-587-A (W.D. Okla. 1991) (CHAMPUS partner hired to staff USAF

hospital OB-Gyn clinic is a U.S. employee); Ezekiel v. Michel, 66 F.3d 894 (7th Cir. 1995) (U. of Chicago resident performing rotation in VA hospital under 38 U.S.C. § 7405 is U.S. employee, even though not compensated by U.S); Quilico v. Kaplan, 749 F.2d 480 (7th Cir. 1984) (VA physician hired under 38 U.S.C. § 4114 is immune from individual suit under 38 U.S.C. § 4116); Bird v. U.S., 949 F.2d 1078 (10th Cir. 1991) (contract CNRA is U.S. employee in IHS Hospital in Oklahoma); Shumaker v. U.S., 714 F. Supp. 154 (M.D. N.C. 1988) (NHSC physician working in civilian clinic is U.S. employee). Also, under state law, a person may have more than one employer. Ward v. Gordon, 999 F.2d 1399 (9th Cir. 1993) (Army physician performing residency at civilian hospital is considered a U.S. employee, since a servant can have two masters); Jones v. Servella, 1996 WL 554513 (D.D.C.) (physician employed by National Health Service Corps assigned to provide student Medical Services at Galludet College is an employee of both U.S. and Galludet); Palmer v. Flaggman, 93 F.3d 196 (5th Cir. 1996) (USAF physician completing residency in private hospital is an employee of both the US and private hospital under Texas law). See also Starnes v. U.S., Civ. # SA-96-CA-529 (S.D. Tex., June 30, 1997) (Army resident in training at civilian hospital is a borrowed servant of that hospital, even though training agreement provides that he is a servant of U.S. under the FTCA). But see Ross v. U.S., Civ. #88-cv-00571 (W.D.N.Y. 1992) (DVA resident in training at Douglas v. U.S., Civ. # 3:94CV-528-S (W.D. Ky., 18 March 1998) (contract gynecologist and radiologist are solely liable for the delay in treating breast cancer at Fort Knox Army hospital. Starnes v. U.S., 139 F.3d 540 (5th Cir. 1998) Military physician in residency training agreement at civilian hospital is not a borrowed servant but a U.S. employee; Linlieus v. U.S., 142 F.3d 271 (5th Cir. 1995) CHAMPUS partner employed at Darnall Army Community Hospital is not U.S. employee. Davis v. U.S., 1998 WL 401640 (E.D. Pa.) (Navy vails to inform claimant of fact that tortfeasors were independent contractors within state SOL period - no fraudulent concelment and no estoppel. Mangual v. U.S., Civ. # 93 CV5683 (E.D.N.Y., 10 Nov. 1998), civilian contractor physician is solely responsible for C-section even though military obstetrician assisted in operation; Lewis v. U.S., 1998WL544969 (N.D. Calif), civilian physician who partially removed tonsils at Oakland Naval Hospital is an independent contractor. Proctor v. U.S., Civ #95-C-1017-E (N.D. Okla 3 Jan 1997) contract radiologist is Federal employee at Indian Helath Services Hospital under 25 USC 1680c(d). Core v. National Emergency Services, Civ #98-257 La App 3d (rev (3 Mar 99)) 1999 La App Lexis 480, Emergency room physician for NES is not a U.S. employee while failing to diagnose a torsion testicle at Fort Polk. Cruz v. U.S., Civ. 97-0094-

CIV-GOLD (S.D. Fla., 6 April 1998) physician not a U.S. employee under FSHCAA, 42 U.S.C. 233(b) but of a trust which supplied physicians to clinic.

d. Contractor or State or Local Employee. "U.S. employee" does not include employee of U.S. contractor or State or local employee funded by U.S. Logue v. U.S., 412 U.S. 521 (1973) (local jail); White v. U.S., 472 F. Supp. 259 (W.D. Pa. 1979) (NASA contract teacher); U.S. v. Orleans, 425 U.S. 807 (1976) (OEO employees); Prater v. U.S., 357 F. Supp. 1044 (N.D. Tex. 1973) (state manpower employee); U.S. v. Becker, 378 F.2d 319 (9th Cir. 1967); Brucker v. U.S., 338 F.2d 427 (9th Cir. 1964); Haugen v. U.S., 492 F. Supp. 398 (E.D.N.Y. 1980); Yates v. U.S., 365 F.2d 663 (4th Cir. 1966); Sowicz v. U.S., 368 F. Supp. 1165 (E.D. Pa. 1973); Brooks v. AR & S Enterprises, 622 F.2d 8 (1st Cir. 1980); Hassen v. Commissioner of IRS, 599 F.2d 305 (9th Cir. 1979) (local swimming pool); Wright v. U.S., 428 F. Supp. 782 (D. Mont. 1977) (local recreation community agency); Vincent v. U.S., 513 F.2d 1296 (8th Cir. 1975) (OEO driver); Harper v. U.S., 515 F.2d 576 (5th Cir. 1975) (local jail); Gere v. U.S., 425 F. Supp. 847 (D.S.D. 1977) (Rosebud Sioux driver under PHS contract); Vincent v. U.S., 383 F. Supp. 471 (E.D. Ark. 1974) (community action agency); Hughes v. U.S., 383 F. Supp. 1071 (S.D. Iowa 1973); Shippey v. U.S., 321 F. Supp. 350 (S.D. Fla. 1970) (Ga. State/Federal Inspection Service); Brown v. U.S., 486 F.2d 284 (8th Cir. 1973) (local jail); U.S. v. Page, 350 F.2d 28 (10th Cir. 1965), cert. denied, 382 U.S. 979 (1966) (GOCO munitions contractor); Alexander v. U.S., 605 F.2d 828 (5th Cir. 1979) (same); Watson v. Marsh, 689 F. Supp. 604 (5th Cir. 1982) (same); Andreotti v. U.S., 469 F.2d 95 (9th Cir. 1972); USF&G v. U.S., 446 F.2d 851 (10th Cir. 1971) (contractor); Eutsler v. U.S., 376 F.2d 634 (10th Cir. 1967); Lipka v. U.S., 369 F.2d 288 (2d Cir. 1966), cert. denied,, 387 U.S. 935 (1967) (contractor); Yates v. U.S., 365 F.2d 663 (4th Cir. 1966); Cannon v. U.S., 328 F.2d 763 (7th Cir. 1964), cert. denied, 379 U.S. 832 (1964); Buchanan v. U.S., 305 F.2d 738 (8th Cir. 1962); Martarano v. Sweeney, 231 F. Supp. 805 (D. Nev. 1964) (state employee); Witt v. U.S., 462 F.2d 1261 (2d Cir. 1972) (driver of cleaning contractor transporting personnel); Coyle v. U.S., Civ. #7 7-2298 (D.N.J. 1980) (contractor called in to locate fault in underground electrical cable); Harris v. Aetna Casualty, Civ. # 1-78-247 (E.D. Tenn.) (GOCO contractor maintained and operated crane belonging to U.S.); Moss v. U.S., Civ. #479-358 (S.D. Ga. 1980) (KP service contract); Hendershot v. U.S., Civ. # CA-2-78-47 (N.D. Tex. 1981) (GOCO nuclear weapons plant). The general test of what constitutes an independent contractor is discussed in Kendrick v. U.S., 854 F. Supp. 453 (E.D. Tex. 1994) (distinguishes day-to-day

control from right to specify conditions and inspect as basis for determining whether there is an independent contractor- also discusses premises liability even though contractor was negligent). The general rule is that the government is not liable for an independent contractor's actions. Roditis v. U.S., 122 F.3d 108 (2nd Cir. 1997) (U.S. not liable for slip and fall on contractor controlled steps adjacent to construction area where neither public or postal employees allowed); Becker v. U.S., 981 F. Supp. 904 (D. Md. 1997) (janitorial cleaning firm is independent contractor and solely liable for fall at PX); Tulkington v. General Electric Co., 967 F. Supp 890 (N.D. W. Va. 1997) (elevator company which contracted to service and maintain elevator in VA hospital is responsible for malfunction as independent contractor. Hagy v. U.S., 976 F. Supp. 1373 (W.D. Wash. 1997) (University of Maryland is an independent contractor for NIH in running human growth hormone treatments); Curry v. U.S., 97 F.3d 412 (10th Cir. 1996) (person hired by forest service to grade road an independent contractor); Wright v. U.S., 537 F. Supp. 568 (N.D. Ill. 1982) (VA ambulance contractor); Maltais v. U.S., 546 F. Supp. 96 (N.D.N.Y. 1982), aff'd mem., 729 F.2d 1442 (2nd Cir. 1983) (general contractor running U.S. Atomic Power Lab); Duncan v. U.S., 562 F. Supp. 96 (E.D. La. 1983) (contract to carry mail); De Blasio v. U.S., 617 F. Supp. 1004 (E.D.N.Y. 1985) (sports concessionaire at National recreation area is independent contractor); Borquez v. U.S., 773 F.2d 1050 (9th Cir. 1985); Maros v. March, Civ. #EP-84-CA-193 (W.D. Tex. 1985)(commissary bagger held not U.S. employee for purposes of bring EEO complaint); Larsen v. Empresas El Yunque Inc., 812 F.2d 14 (1st Cir. 1986) (restaurant-concessionaire in National Forest is not U.S. employee in slip and fall case); Norman v. U.S., 111 F.3d 356 (3rd Cir. 1997) (slip and fall at federal building is responsibility of cleaning contractor, not U.S.); Taylor v. U.S., 668 F. Supp. 1302 (W.D. Mo. 1987) (contract bus driver for Job Corps is not U.S. employee); Letnes v. U.S., 820 F.2d 1517 (9th Cir. 1987) (U.S. Forest Service contract pilot is not U.S. employee); Allen v. City of Kansas City, Kansas, 660 F. Supp. 489 (D. Kan. 1987) (low cost housing employee is not U.S. employee); Bernie v. U.S., 712 F.2d 1271 (8th Cir. 1983) (employees of contractor not supervised by U.S. on day-to-day basis not Federal employees); Creek Nation Indian Housing v. U.S., 677 F. Supp. 1120 (E.D. Okla. 1988) (carrier of aerial bombs not U.S. employee); Aetna Life & Casualty Ins. Co. v. U.S., 508 F. Supp. 298 (N.D. Ill. 1981) (area management broker for HUD not U.S. employee; Cannon v. U.S., 645 F.2d 1128 (D.C. Cir. 1981) (Lorton Reformatory not a Federal agency); Watson v. Alexander, 532 F. Supp. 1004 (E.D. Tex. 1982) (GOCO contractor is independent contractor); Norton v. Murphy, 661

F.2d 882 (10th Cir. 1981) (star route contractor not U.S. employee); Cole v. U.S., 846 F.2d 1290 (11th Cir. 1988) (no duty under Florida law regarding manufacture of cartridges on basis of superior knowledge); Mocklin v. Orleans Levee District, 690 F. Supp. 527 (E.D. La. 1988) (drowning at construction site in Lake Pontchatrain--held independent contractor in control); Charlima Inc. v. U.S., 873 F.2d 1078 (8th Cir. 1989) (FAA designated representative for airworthiness inspector is not Federal employee for FTCA purposes); Brookins v. U.S., 722 F. Supp. 1214 (E.D. Pa. 1989) (independent realty company managing HUD owned housing is not U.S. employee); Thompson v. Dilger, 696 F. Supp. 1071 (E.D. Va. 1988) (weapon developer who is encouraged by OSD to develop U.S. weapon and given free test ammo--not Federal employee); Pershing v. U.S., 736 F. Supp. 132 (W.D. Tex. 1990) (general contractor on construction contract at Fort Hood is responsible for trench cave in); Frazier v. U.S., Civ. #1:89-2805-6 (D.S.C. 1990) (state OSHA inspections do not make state a federal employee); Monroe v. U.S. Marshals, 101 F.3d 706 (table), 1996 WL 665147 (9th Cir. 1996) (medical malpractice by Kent County Jail employees is not U.S. responsibility--right to inspect by U.S. Marshals does not make local jailers U.S. Government employees); Dingle v. Department of the Air Force, Civ. # 3:89-2317-6 (D.S.C. 1990) (cleanup contractor in commissary is not U.S. employee and delegation of duty to safeguard is proper); Borden v. U.S., 949 F.2d 401 (table), 1991 WL 261700 (10th Cir. 1991) (herbicide spraying contractor hired by participant in Department of Agriculture land preservation project--not a U.S. employee or agent); Berkman v. U.S., 957 F.2d 108 (4th Cir. 1992) (operator of mobile lounge at Dulles Airport is not U.S. employee, but independent contractor); Cereceres v. U.S., Civ. #91-759 JC/WWD (D.N.M., 30 Apr. 1993)(maintenance contractor is solely responsible for commissary slip and fall); Acme Delivery Service v. U.S., 817 F. Supp. 889 (D. Colo. 1993) (subcontracting carriers who contracted with prime contractor to carry military goods cannot bring action against U.S., since prime contractor is not U.S. employee); Duff v. U.S., 829 F. Supp. 299 (D.N.D. 1992) (U.S. not responsible for injuries due to contractor generated varnish fumes to occupant of military housing); Hall v. U.S. General Services Admin., 825 F. Supp. 427 (D.N.H. 1993) (elevator maintenance contractor is responsible for fall in federal building elevator due to a misalignment); Brooks v. U.S., Civ. # C 93-20495 JW (N.D. Cal., Jan. 4, 1994) (employee of roofing contractor becomes entangled in exposed wires and falls from roof at Fort Cronkhite--claim barred by independent contractor status); Laurence v. Dept. of Navy, 59 F.3d 112 (9th Cir. 1995) (use of fill soil contaminated with lampblack in 1944 Navy housing project by contractor is not

U.S. responsibility since no knowledge shown); Goewey v. U.S.,886 F. Supp. 1268 (D.S.C. 1995) (maintenance contractor applies roof sealant to soil under leaky wall at base quarters--contractor solely liable); Tisdale v. U.S., 62 F.3d 1367 (11th Cir. 1995) (U.S. not liable for injury to prospective buyer from collapsing stairway at HUD property, since possession and maintenance delegated to broker); Etheridge v. U.S., Civ. # H-94-080 (S.D. Tex., 27 Feb. 1997) (home sales agent who sold VA owned home are not U.S. employees); Williams v. U.S., 50 F.3d 299 (4th Cir. 1995) (slip and fall in building leased by U.S., but maintained by contractor, falls under independent contractor exclusion); Logan v. U.S., Civ. # CV#94-1009-IEG(LSP) (S.D. Cal., Dec. 12, 1995), aff'd, 103 F.3d 139 (table), 1996 WL 717087 (9th Cir. 1996) (contractor who houses federal prisoners is not U.S. employer and U.S. not liable for injuries to paraplegic prisoner in contractor custody); Erbenich v. Social Security Administration, 1996 WL 325057 (E.D. Pa.) (slip and fall on ice outside Social Security building is sole responsibility of maintenance contractor--no day-to-day control and no periodic inspection on a regular basis); Burke v. U.S., 1996 WL 671151 (S.D.N.Y.) (sidewalk repair in Federal Plaza was properly delegated to Ogden, an independent contractor, who is the responsible party); Moreno v. U.S., 965 F. Supp. 521 (S.D.N.Y. 1997) (in slip and fall at building seized by U.S. Marshal Service, management firm hired by USMS is responsible party, since independent contractor). Sometimes the employee or independent contractor issue can not be decided on summary judgment. Cupit v. U.S., 964 F. Supp. 1104 (W.D. La. 1997) (refuses summary judgment regarding whether particular floor waxer at Post Office is independent contractor). In some instances a contractor employee will constitute a "U.S. employee." Ferguson v. U.S., 712 F. Supp. 775 (N.D. Cal. 1989) (private contractor is U.S. employee where delegated housekeeping functions including building secure fence); Delgado v. Akins, 236 F. Supp. 202 (D. Ariz. 1964) (county agricultural service reporter); Thompson v. U.S., 504 F. Supp. 1087 (D.S.D. 1980) (CETA employee as policeman for Sioux Tribe is U.S. employee); Whatley v. U.S., Civ. # 90V-567-N (M.D. Ala. 1991) (commissary bagger is agent of U.S.--U.S. is liable where bagger pushes cart into hole in parking lot and hits customer); B & A Marine v. American Foreign Shipping, 23 F. 3d 709 (2d Cir. 1994) (contractor hired to refit Ready Reserve fleet was agent of U.S. substituted in suit for libel). See also Waters v. U.S., 812 F. Supp. 166 (N.D. Cal. 1993) (contract designation of U.S. as party to be sued makes U.S. sueable under the FTCA, even though contractor is not U.S. employee). Of course, the U.S, may be sued under the FTCA if it breaches some independent duty. Rhoades v. U.S., 950 F. Supp. 623 (D. Del. 1996) (fall over

rolled up carpet behind drop cloth, which was allegedly against clothing rack, in portion of base exchange being renovated by contractor does not warrant dismissal of U.S. on independent contractor defense since U.S. employee clothing racks may have been to close dropcloth); but see, 986 F. Supp. 859, 1997 WL 748738 (D. Del.) which holds contractor completely liable under indemnity clause. Additionally, the U.S. may have a duty under state law to supervise the contractor or have a non-delegable duty under state law. Dickerson, Inc. v. U.S., 875 F.2d 1577 (11th Cir. 1989)(duty to supervise disposition of PCB waste by contractor); Librera v. U.S., 718 F. Supp. 110 (D. Mass. 1989) (where U.S. is aware of icy conditions, U.S. can be held jointly liable, even though clean up delegated to independent contractor). Carter v. U.S., 1998WL744009 (S.D.N.Y.), U.S. not liable where toilet paper holder fell and injured plaintiff in contractor maintained bathroom. Means v. U.S., 176 F.3d 1376 (11th Cir. 1999) Where plaintiff is injured by flash bang devise when county police break into her home so federal agents can search, control test application precludes county agents from being U.S. employees.

e. National Guard. "U.S. employee" includes National Guard while on duty or federally funded training duty for claims arising on or after 29 December 1981 except for non-combat activity cases. See IIB5b below. The D.C. National Guard is a Federal force, not State force. O'Toole v. U.S., 206 F.2d 912 (3d Cir. 1953). The term also includes National Guard Technicians under 32 U.S.C. § 709. Yeary v. U.S., 921 F. Supp. 549 (S.D. Ind. 1996) (32 U.S.C. § 709 employee is U.S. employee by virtue of enabling statute, even though under state control); Holdiness v. State of Louisiana, 572 F. Supp. 763 (W.D. La. 1983). Does not include state hired security guard supervised by 32 U.S.C. § 709 employee. Proprietors Insurance Co. v. U.S., 688 F.2d 687 (9th Cir. 1982); Townsend v. Seurer, 791 F. Supp. 227 (D. Minn. 1992) (state hired security guard in Minnesota NG Air Base not a federal employee).

f. ROTC. "U.S. employee" does not include Junior ROTC instructors unless active duty. Cavazos by and through Cavazos v. U.S., 776 F.2d 1263 (5th Cir. 1985) (Junior ROTC instructors at public high school in Brownsville, Texas, are not U.S. employees); McFeely v. U.S., 700 F. Supp. 414 (S.D. Ind. 1988) (Junior ROTC instructor not U.S. employee); Cobb v. U.S., 81 F. Supp. 9 (W.D. La. 1948); Farrow v. U.S., Civ. #76-L-0656 (S.D. Ala. 1977). However, the term "U.S. employee" does includes Senior ROTC. La Bombard v. U.S., 122 F. Supp. 294 (D. Vt. 1954); Bellview v. U.S., 122 F. Supp. 97 (D. Vt. 1954).

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

h. Civil Air Patrol. Does not include Civil Air Patrol. Pearl v. U.S., 230 F.2d 243 (10th Cir. 1956); Kiker v. Estep, 444 F. Supp. 563 (N.D. Ga. 1978).

i. NAFI Employees. Includes non-appropriated fund employees provided NAFI meets Federal agency test. Dubois v. U.S., Civ. # 93-45-COL (M.D. Ga., June 8, 1994) (Officers Wives Club is sued individually for slip and fall by patron at its furniture barn--jury verdict for Club); Hallett v. U.S., 877 F. Supp 1423 (D. Nev. 1995) (Naval aviators not in scope during raucous social events at Tailhook convention).

(1) Officer Open Mess. H.E. Jaeger v. U.S., 394 F.2d 944 (D.C. Cir. 1968); U.S. v. Holcombe, 277 F.2d 143 (4th Cir. 1960); Short v. U.S., 245 F. Supp. 591 (D. Del. 1965).

(2) Flying Club. Brucker v. U.S., 338 F.2d 427 (9th Cir. 1965), cert. denied, 381 U.S. 937 (1965); U.S. v. Hainline, 315 F.2d 153 (10th Cir. 1963), cert. denied,, 375 U.S. 895 (1963); Woodside v. U.S., 606 F.2d 134 (6th Cir. 1979); Eckles v. U.S., 471 F. Supp. 108 (M.D. Pa. 1979). See also Mignogna v. Sair Aviation, Civ # 92-55 (Sup. Ct. N.Y. 1992) (Hancock AFB flying club is Federal agency). Dall v. U.S., 42 F. Supp. 2d 1275 (M.D. Fla 1998) Navy officer flying club member, while on pass,

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

(3) NCO Mess. Johnson v. U.S., 496 F. Supp. 597 (D. Mont. 1980) (dram shop); Gonzales v. U.S., 589 F.2d 465 (9th Cir. 1979) (dram shop); Vance v. U.S., 355 F. Supp. 756 (D. Alaska 1973) (dram shop); Konsler v. U.S., 288 F. Supp. 895 (N.D. Ill. 1968); Smith v. Pena, 621 F.2d 873 (7th Cir. 1980); Deeds v. U.S., 306 F. Supp. 348 (D. Mont. 1969) (dram shop); Lowe v. U.S., 292 F.2d 501 (5th Cir. 1961).

(4) Central Base Fund. Rizzuto v. U.S., 298 F.2d 748 (10th Cir. 1961).

(5) Navy Cafeteria. U.S. v. Forfari, 268 F.2d 29 (9th Cir. 1959), cert. denied, 361 U.S. 902 (1959).

(6) Ship's Store. Grant v. U.S., 271 F.2d 651 (2d Cir. 1959).

(7) NAFI Swimming Pool. Brewer v. U.S., 108 F. Supp. 889 (M.D. Ga. 1952).

(8) AAFES (PX). Standard Oil Co. of California v. Johnson, 316 U.S. 481 (1942). See also Daniels v. Chanute AFB Exchange, 127 F. Supp. 920 (E.D. Ill. 1955) (PX concessionaire should be excluded as being independent contractor).

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

(10) AD Members at NAFI. Includes AD members on duty at NAFI's and probably at private associations. Roger v. Elrod, 125 F. Supp. 62 (D. Alaska 1954); Mariano v. U.S., 444 F. Supp. 316 (E.D. Va. 1977).

j. Federal Law Enforcement Officers. The definition of "U.S. employee" includes Federal Law Enforcement Officers for certain torts otherwise excluded by 28 U.S.C. § 2680(h). P.L. 93-253, 88 Stat. 50 (16 March 1975) (amending 28 U.S.C. § 2680(h). See Lewis v. Clark, 534 F. Supp. 714 (D. Md. 1982) (DEA acts occurring in 1972 excluded, even though role not discovered until 1978). MPs are federal law enforcement officers who possess power to make arrests for violations of Federal law (para 2-9, IN 210-10; par. 3, IN 600-40). DeLong v. U.S., 600 F. Supp. 331 (D. Alaska 1984); Busdiecker v. U.S., Civ. # 84-99-COL (M.D. Ga. 1984). May also include tribal officers. Peters v. Menominee Tribal Jail, Civ. # 93-C-0011 (E.D. Wis., May 10, 1994) (Menominee tribal officials were acting as agents of U.S. based on contract with Bureau of Indian Affairs when arresting member of tribe); Treho v. U.S., 484 F. Supp. 113 (D. Nev. 1958) (Bureau of Indian Affairs policeman is Federal law enforcement officer). The following are not Federal Law Enforcement Officers. MP out of scope. Daniels v. U.S., 470 F. Supp. 64 (E.D.N.C. 1979). Marine guards. Kennedy v. U.S., 585 F. Supp. 1119 (D.S.C. 1984). VA physician re mental patient. Johnson v. U.S., 547 F.2d 688 (D.C. Cir. 1976). Immigration and Naturalization Agent. Caban v. U.S., 671 F.2d 1230 (2d Cir. 1982). Federal prosecutors. Gray v. Bell, 542 F. Supp. 927 (D.D.C. 1982). Witness under Federal Witness Protection Program. Bergmann v. U.S., 689 F.2d 789 (8th Cir. 1982). See also Park v. U.S., Civ. # CV 93-0857 SVW (CTX) (C.D. Cal., 28 July 1993) (contract security guard at Social Security Building is not a Federal Law Enforcement Officer); Peters v. Heinze, Civ. # 94-913-JE (D. Or., June 20, 1995) (local policeman loaned to ATF for sting operation is not a Federal Law Enforcement Officer); Metz v. U.S., 788 F.2d 1528 (11th Cir. 1986) (claimant's supervisors in Department of Treasury who caused his arrest are not Federal Law Enforcement Officers). The term "Federal Law Enforcement Officer" excludes PX detectives. Solomon v. U.S., 559 F.2d 309 (5th Cir. 1977)(AAFES store detective held not to be a Federal Law Enforcement Officer); Baker v. Army & Air Force Exchange Service-Pacific, Civ. #94-00038DAE (D. Haw., Apr. 11, 1995) (AAFES store detectives are not Federal Law Enforcement Officers--case dismissed even though Air Police took over arrest); Chamblin v. U.S., Civ. #M-76-544 (D. Md. 1977)(same); Knauth v. U.S., Civ. #C78-648A (N.D. Ga. 1980)(same); Velez v. U.S., Civ. #82-2558 (PG) (D.P.R. 1983)(same). See also Sanders v. Nunley, 634 F. Supp. 474 (N.D. Ga. 1985) (PX detective acting reasonably entitled to qualified immunity). Means v. U.S., Civ. #97-RRA-0760-S (N.D. Ala., 17 Mar. 1998) local police entered premises with SWAT team and searched it. FBI agents entered thereafter. Local police are not federal employees.

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

l. Foreign Service Members. Saudi MSG not an employee. Moran v. Kingdom of Saudi Arabia, Civ. #S91-0441(g) (S.D. Miss. 1992) (Saudi MSG driving on USAF base in Mississippi not a U.S. employee).

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

n. Indian Tribes. Shaffer v. U.S., Civ. # S-94-1287 GEB/GGH (E.D. Cal., Mar. 22, 1995) (suit against Indian tribe constitutes suit against U.S. under FTCA). Cheromiah v. U.S., Civ #97-1418 MV/RVP (D.N. Mex. 29 June 99) suit against Indian Health Sevice Hospital falls under FTCA but tribal not New Mexico law applies e.g. N. Mex. Medical malpractice cap is not applicable.

o. Outreach Clinics. Warren v. Joyner, 996 F. Supp. 1997 WL 856187 (S.D. Miss.). Under 42 U.S.C. 233, outreach clinic physicians are considered employees of the Public Health Service.

3. Must Be Within Scope. 28 U.S.C. §§ 1346(b), 2671, 2674, 2679(b). "Line of duty" (LOD) as it appears in 28 U.S.C. § 2671 means scope of employment as determined by law of state in which tort occurred. Williams v. U.S., 350 U.S. 857 (1955); Garcia v. U.S., 799 F. Supp. 674 (W.D. Tex. 1992) (because of wording of Westfall Act, scope is determined under general common law). LOD invokes state respondent superior principles. Bissell v. McElligott, 369 F.2d 115 (8th Cir. 1966), cert. denied, 387 U.S. 917 (1967). LOD merely determines service member's right to benefits, not scope. State of Maryland v. U.S., 221 F. Supp. 740 (E.D. Pa. 1963); Blesy v. U.S., 443 F. Supp. 358 (W.D.N.Y. 1978).

a. Scope Generally. Cases holding within scope. See, e.g., Rodriguez v. Sarabyn, 129 F.3d 760 (5th Cir. 1997) (ATF agents who allegedly detained undercover ATF agent concerning loss of sorprise in Waco raid were in scope of employment); Maron v. U.S., 126 F.3d 317 (4th Cir. 1997) (NIH physician's harassment of fellow NIH physician is within scope even though motivated in part by ill will so long as acts were engendered by their duties); Aviles v. Lutz, 887 F.2d 1046 (10th Cir. 1989) (fellow employees in Indian Health Service dismissed under Westfall Act in defamation action); Harris v. Walker, 89 F.3d 833 (table), 1996 WL 354018 (6th Cir. 1996) (alleged false testimony at Merit System Protection Board within scope under Kentucky Law—cites other cases of criminal conduct being within scope); Andrulonis v. U.S., 724 F. Supp. 1421 (N.D.N.Y. 1989) (CDC employee dismissed under Westfall Act--failure to warn New York State employee of danger); Baggio v. Lombardi, 726 F. Supp. 922 (E.D.N.Y. 1989) (USPS employees dismissed under Westfall Act--defaming fellow employee); Petrousky v. U.S., 728 F. Supp. 890 (N.D.N.Y. 1990) (supervisor dismissed under Westfall Act for libel--judge rejects DOJ scope certification); Mitchell v. U.S., 896 F.2d 128 (5th Cir. 1990) (Army nurse dismissed under Westfall Act for assault); S.J. & W. Ranch Inc. v. Lehtinen, 717 F. Supp. 824 (S.D. Fla. 1989) (Westfall Act shields AUSA from defamation suit); Jordan v. Hudson, 879 F.2d 98 (4th Cir. 1989) (Westfall Act precludes action against whistle blowers); Nadler v. Marm., 731 F. Supp 493 (S.D. Fla 1990); (Westfall Act shields AUSA in defamation action); Deutsch v. Federal Bureau of Prisons., 737 F. Supp. 261 (S.D.N.Y. 1990) (Westfall Act applies to placement of prisoner in cell where another prisoner has AIDS); Forest City Mach. Works v. U.S., 953 F.2d 1086 (8th Cir. 1992) (Dept. of Commerce attorney action in scope when filing 3d party complaint); Dillon v. State of Miss. Military Dept., 827 F. Supp. 1258 (S.D. Miss. 1993) (suit against Miss. Natl. Guardsman as individuals by other Miss. Natl. Guardsman barred under Westfall Act); Riley v. U.S., Civ. # C 93-0320 (N.D. Iowa, 1 Sept. 1994) (Westfall Act bars individual suit against U.S.P.S. driver who was in scope); Craft v. U.S., 542 F.2d 1250 (5th Cir. 1976) (using own mower to cut quarters lawn--held scope); Russell v. U.S., 465 F.2d 1261 (6th Cir. 1972) (nurse drops her own pistol by accident while on duty, shooting patient--held scope); Lyle v. U.S., Civ. # 3C-85-1824SC (N.D. Cal. 1985) (enlisted therapist has intercourse with female patient--held within scope--not assault or battery); Ira S. Bushey & Sons Inc. v. U.S., 276 F. Supp. 518 (E.D.N.Y. 1967) (drunken Coast Guardsman opens valves sinking dry dock containing vessel he was living on--held scope); Blatchford v. Guerra, 548 F. Supp. 406 (S.D. Fla. 1982) (postal supervisor who struck employee while admonishing him--within scope); Lutz v. U.S.,

685 F.2d 1178 (9th Cir. 1982) (service member, pet-owner fails to comply with base regulation requiring restraint of dog--held scope); Simmons v. U.S., 805 F.2d 1363 (9th Cir. 1986) (Indian Health Service counselor within scope when he engaged in sexual intercourse with patient, even where off reservation); Cane v. Burger, 642 F. Supp. 1167 (E.D. Mich. 1986) (Federal Fish and Wildlife officer is within scope while posing as a dentist during official investigation); Worsham v. U.S., 828 F.2d 1525 (11th Cir. 1987) (U.S. drug and alcohol counselor who engaged in sex with patient was within scope and not properly supervised, but no compensable tort, since sex was voluntary); Washington v. U.S., 868 F.2d 332 (9th Cir. 1989) (priming POV carburetor with open spray can--held scope); Vollendorf v. U.S., 951 F.2d 215 (9th Cir. 1991) (active duty service member is in scope when he leaves malaria pills accessible to his grandchild); Haas v. Barto, 829 F. Supp. 729 (M.D. Pa. 1993) (scope certification of Attorney General upheld where one federal employee pulled out steps from under another employee causing fall); Cordoza v. Graham, 848 F. Supp. 5 (D. Mass. 1994) (recording of phone conversation with wife of Fish and Wildlife Service employee about his alleged crimes-tape of conversation used in criminal investigation--FWS agent who made recording is within scope); Alburo v. U.S., Civ. # C95-5061JKA (W.D. Wash., Oct. 20, 1995) (INS examiner who displayed overt sexual behavior during interview with applicant--in scope); Red Elk on Behalf of Red Elk v. U.S., 62 F.3d 1102 (8th Cir. 1995) (police officer arrested 13 year old for violating curfew and raped her in back seat of police car--in scope); Harris v. Walker, 89 F.3d 833 (table), 1996 WL 354018 (6th Cir. 1996) (conduct of surveillance by fellow employees is within scope when ordered by supervisor); Coleman v. U.S., 91 F.3d 820 (6th Cir. 1996) (USPS employee was in scope when she filed criminal complaint against supervisor); Wilson v. Drake, 87 F.3d 1073 (9th Cir. 1996) (supervisor in scope when he allegedly used physical force to preclude subordinate from leaving his office); Cassell v. Norris, 103 F.3d 61 (8th Cir. 1996) (Social Security Administration employees were within scope when they wrote letters to high officials complaining about job related performance of Administrative Law Judge); Pearson v. Friend, 103 F.3d 133 (table), 1996 WL 694398 (7th Cir. 1996) (National Biological Service (NBS) employee was within scope of employment when he made defamatory remarks concerning objectivity of DVM and biologist who were trying to preclude the killing of a sick flock of ducks); Reynolds v. U.S., 927 F. Supp. 91 (W.D.N.Y. 1996) (Fish and Wildlife Service Special Agent was within scope where he entered plaintiff's property and arrested plaintiff's son for hunting ducks without a valid permit--case dismissed, since investigation was permitted by U.S. law); Carpenter v.

Laxton, 96 F.3d 1448 (table), 1996 WL 49099 (6th Cir. 1996) (National Park Service rangers engaging in arrest attempt at request of local sheriff are within scope); McGovern v. Thomas, 1996 WL 478698 (N.D. Cal.) (IRS agent assisting in IRS auction allegedly assaults person who is videotaping IRS agent's POV--held within scope); Wilson v. Drake, 87 F.3d 1072 (9th Cir. 1996) (supervisor allegedly barring subordinates egress from his office and forcibly precluding subordinate from turning on tape recorder is within scope); Cerri v. U.S., 80 F. Supp. 831 (N.D. Cal. 1948) (MP hits innocent bystander--held scope). Contra U.S. v. Jasper, 222 F.2d 632 (4th Cir. 1955). Cases holding outside scope. See, e.g., McNally v. Dewitt, 961 F. Supp. 1041 (W.D. Ky. 1997) (U.S. Marshal not in scope when arresting McNally for state crime); Williams v. Morgan, 723 F. Supp. 1532 (D.D.C. 1989) (DOJ non-scope in "horseplay" case under Westfall Act); Meridian Center Logistics Inc. v. U.S., 939 F.2d 740 (9th Cir. 1991) (Attorney General's certification of scope re FBI agent reversed re contacts with foreign countries); Tilton v. Dougherty, 493 A.2d 442 (N.H. 1985) (official immunity not applicable to NG physician conducting physical exam); Travelers Insurance Co. v. SCM Corp., 600 F. Supp. 493 (D.D.C. 1984) (coffeemaker owned by U.S. employees causing fire in leased building subjects employees to individual suit); Dretar v. Smith, 752 F.2d 1015 (5th Cir. 1985) (permits individual suit in State court against Federal supervisor who shoved Federal employee and struck her with door); Focke v. U.S., 597 F. Supp. 1325 (D. Kan. 1982), aff'd, Civ. #82-1511 (10th Cir. 1985) (social work associate who was not counselor was outside scope in engaging in sexual activity with wife and daughter of a VA mental patient); U.S. v. Campbell, 172 F.2d 500 (5th Cir. 1949), cert. denied, 337 U.S. 957 (1949) (sailor running to catch troop train knocked down bystander--held not scope); Wrynn v. U.S., 200 F. Supp. 457 (E.D.N.Y. 1961) (Posse Comitatus Act--held not scope); Sanchez v. U.S., 177 F.2d 452 (10th Cir. 1949) (U.S. security guard volunteers to help in search of lost girl--held not scope); Guzman v. U.S., Civ. # 75-658 (D.P.R.) (service member brings back grenade from Vietnam after five years causes death and injuries--held not scope); Witt v. U.S., 319 F.2d 704 (9th Cir. 1963); Tilden v. U.S., 365 F.2d 148 (7th Cir. 1966) (driving POV when CO said he was not to do so--held not scope); Bates v. U.S., 701 F.2d 737 (8th Cir. 1983) (Game Warden murders and rapes while on duty--held not scope); Kirby v. U.S., Civ. # 78-1060 (D.S.C. 1979) (off-duty NCO who drives injured civilians to hospital allegedly at request of off-duty officer--not within scope); Piper v. U.S., 887 F.2d 861 (8th Cir. 1989) (airman let dog run loose when base required control--not within scope), Brotko v. U.S., 727 F. Supp. 78 (D.R.I. 1989) (same as Piper);

Chancellor by Chancellor v. U.S., 1 F.3d 438 (6th Cir. 1993) (same as Piper--concurs with Nelson v. U.S., 838 F.2d 1280 (D.C. Cir. 1988) (contra Lutz v. U.S., 685 F.2d 1178 (9th Cir. 1982)); Stanley v. U.S., 894 F. Supp. 636 (W.D.N.Y. 1995) (owner's failure to control Malamute with new puppies to prevent biting child in family housing--not in scope); Marten v. Marable, # 90-1503 (3d Cir. 1990) (VA employee on "official time" as union rep. is not in scope when he removes claimant from union meeting); Johnson v. Carter, Civ. # 90-1419D (W.D. Wash. 1991) (Army resident training in civilian hospital is Federal employee, but not within scope due to Washington's borrowed servant rule); Wood v. U.S., 956 F.2d 7 (1st Cir. 1992), later proceedings, 991 F.2d 915 (1st Cir. 1993) (Army Major not within scope for intentional acts of sexual harassment); Fleichig v. U.S., 991 F.2d 300 (6th Cir. 1993) (correction officer not within scope re sexual assault while taking prisoner to medical appointment); Payne v. U.S., Civ. # 91-1170 PA (D. Or. 1992) (USPS janitor not in scope re sexual harassment of contract employee); Attalah v. U.S., 955 F.2d 776 (1st Cir. 1992) (Customs Agents not within scope where they robbed and killed earlier); Valdiviez v. U.S., 884 F.2d 196 (5th Cir. 1989) (soldier not within scope when donating blood and fails to inform of his homosexuality) (see however, Valdiviez v. U.S., Civ. #SA-86-CA-1595 (W.D. Tex. 1990) (duty to inform of risk of AIDS in pre-1989 transfusion); Doe v. U.S., 618 F. Supp. 503 (D.S.C. 1984), aff'd, 769 F.2d 174 (4th Cir. 1985) (AF major exposes self and suggests sexual acts not in scope); Turner v. U.S., 595 F. Supp. 708 (W.D. La. 1984) (recruiter subjecting female applicants to complete PE not in scope); Hallett v. U.S., 877 F. Supp. 1423 (D. Nev. 1995) (Naval aviators not in scope during raucous social events at Tailhook convention); Arthur v. U.S., Civ. # 92-0433-S-HLR (D. Idaho, Nov. 13, 1995) (VA psychiatrist who engaged in personal relationship with former patient--not in scope); Bennett v. U.S., 102 F.3d 486 (11th Cir. 1996) (soldier who is visiting barracks carrying unregistered and concealed weapon accidentally shoots female guest--not in scope); Haddon v. U.S., 68 F.3d 1420 (D.C. Cir. 1995) (White House electrician threatened to harm White House chef for filing EEO complaint--not in scope); Cooper v. U.S., 897 F. Supp. 325 (W.D. Tex. 1995), aff'd on district court opinion, # 95-50668 (5th Cir., 30 April 1996) (postal carrier who exposed himself while on job--not in scope); Whytosek v. Rademan, 903 F. Supp. 842 (E.D. Pa. 1995) (postal supervisor who verbally confronts and pushes employee--not in scope); Taylor v. U.S., 951 F. Supp. 298 (D.N.H. 1995) (reservists who were officials of Cadet Rangers of America were not in scope while conducting POW training for CRA--claim was for torture and sexual abuse of a CRA member); Gambelli v. U.S., 87 F.3d 1308 (table), 1996 WL 327206 (4th Cir. 1996) (off-

duty Naval police officer who stops at scene of off-post accident and fails to preclude second accident by not securing scene was not in scope and had no duty to do so); Mobley v. Cody, 1996 WL 250655 (D. Md.) (postal employee at request of USPS IG wiretaps her supervisor concerning sexual harassment--employee was not in scope when she utilized wiretap evidence in criminal prosecution); Voytas v. U.S., 256 F.2d 786 (7th Cir. 1958) (soldier steals explosives--held not scope). Accord Gordon v. U.S., 180 F. Supp. 591 (Ct. Cl. 1960). But see Williams v. U.S., 352 F.2d 477 (5th Cir. 1965). Sometime the question of whether person is within scope can not be settled on summary judgment. Nichols v. U.S., 796 F.2d 361 (10th Cir. 1986) (issue of fact as to whether Job Corps enrollee acting within scope when he bit finger of contract security guard who had him in custody). Sometimes apparent authority has been held to be an issue in determining scope of employment. Westfork v. U.S., Civ. S-95-1360 WBS/JFM (E.D. Calif., 8 May 1998). Marine Corps Captain is within scope when storing MRE rations in his on-post quarters garage. His wife gave some to neighboring children who started fire with matches from MRE. See also Westbord v. U.S., Civ. #S-97-1360 WBS/SFM (E.D. Calif., 13 Oct. 98). Tabeas v. Mlynczaf, 149 _F.3d_576, 1998 WL 371983 (7th Cir., Ill.) (libelous complaints against supervisors made outside of channels on DOL stationary on duty time are within scope. Schroder v. Sandoval, Civ. # A97CA896SS (W.D. Tex., 9 Sep. 98), Physicians Assistant who re-examines prisoner after complaint to the warden, is not in scope when he rams in finger and says "[t]his is for complaining." Webb v. U.S., Civ. #97-0283-B (W.D. Va., 3 Nov. 98), FSHCAA Clinic physician not in scope when he allegedly examines patient's body not incident to care sought and offers rendevous in his apartment. Primeau v. U.S., 149 F.3d 897 (8th Cir. 1998), BIA policeman who uses his authority to pick up stranded motorist and later rapes her is within scope; Primeau v. U.S., 181 F.3d 876 (8th Cir. 1999) en banc court held policeman not in-scope and reverses prior 8th Circuit decision. Mackey v. Milan, 154 F.3d 648 (6th Cir. 1998), superior officers' sexual harassment of female officer is within scope under Ohio law by virtue of fact that the alleged harassment occurred because of their being placed in charge of her. Bergeron v. Henderson, 47 F. Supp. 2d 61 (D. Maine 1999) letter carrier files suit against her post master and supervisor for sexual harasment-held to be in rape; Hoffman v. U.S., 1999 WL 417830 (4th Cir (NC)) coworkers were acting in scope of employment when they defended themselves during persona vendetta by plaintiff.

b. Frolic and Detour. Scope is presumed when in official vehicle: must be rebutted to be overcome. Cases holding

scope. Lawrence v. Dunbar, 919 F.2d 1525 (11th Cir. 1990) (DEA agent on way home from Christmas party in a GOV on 24 hour duty dispatch--within scope); Stephenson v. U.S., 771 F.2d 1105 (7th Cir. 1985) (Marine recruiter returning GOV after drinking bout is within scope); Gutierrez De Martinez v. DEA, 111 F.3d 1148 (4th Cir. 1997) (male DEA agent escorting female DEA agent back to hotel dinner is in scope, even though going in wrong direction and partially intoxicated); Parada v. U.S., CIV. # 95-CV-2204 (D.D.C., 4 Feb. 1997) (fact that DEA agent was drinking on duty did not remove him from scope of employment); Nieves-Rios v. U.S., Civ. # 93-1885 ccc (D.P.R., March 13, 1995) (two week reservist drives GOV home on last duty day, changes clothes, washes GOV in private car wash and is returning to post at time of accident--held scope); U.S. v. Baker, 265 F.2d 123 (D.C. Cir. 1959) (getting haircut held in scope); McConville v. U.S., 197 F.2d 680 (2d Cir. 1952) (on return route from bar--held scope); Malicote v. McDowell, 479 F. Supp. 63 (E.D. Tenn. 1979) (intentionally running over two goats--held scope); Atnip v. U.S., 245 F. Supp. 386 (E.D. Tenn. 1965) (rural mail carrier deviates to pick up eggs--held scope); Lowe v. U.S., 83 F. Supp. 128 (W.D. Mo. 1949) (returning to route after deviation-scope). Cases holding not scope. Snodgrass v. Jones, 957 F.2d 482 (7th Cir. 1992) (FBI agent driving home in GOV about 6-7 hours after dinner, followed by 4-5 hours in bar, and 30-90 minute side trip--held not in scope); Dallas v. U.S., 692 F.2d 756 (Table) (5th Cir. 1982) (full time recruiter going to sister's house for change of clothing--not scope); Del Rio v. U.S., Civ. # 88-0414-CIV (S.D. Fla. 1989) (stops at mother's house while en route from MEPS to Homestead AFB--not scope); Western National Mutual Insurance Co. v. U.S., 964 F. Supp. 295 (D. Minn. 1997) (Off-duty U.S. Marshal not in scope when picking up daughter); Snodgrass v. Jones, 755 F. Supp. 826 (C.D. Ill. 1991) (en route to domicile as authorized, but 5 hours expired since duty--held frolic, not detour); Guthrie v. U.S., 392 F.2d 858 (7th Cir. 1968) (recruiter deviates from route--held not scope); King v. U.S., 178 F.2d 320 (5th Cir. 1949) (drunken cadet in training plane without authority--held not scope); W.D. Pruden v. U.S., 399 F. Supp. 22 (E.D.N.C. 1973) (out drinking while on call--held not scope); Pacific Freight Lines v. U.S., 239 F.2d 191 (9th Cir. 1956) (complete deviation--not scope); Blythe v. Tarko, 188 F. Supp. 83 (N.D. W.Va. 1960) (returning from getting mail--not scope); Spradley v. U.S., 119 F. Supp. 292 (D. N.Mex. 1954) (assisting motorist by getting parts--not scope); Rosa v. U.S., 119 F. Supp. 623 (D. Haw. 1954) (returning from bar--not scope). Accord Greenwood v. U.S., 97 F. Supp. 996 (D. Ky. 1951). However, where the trip serves more than one purpose and one of the purposes is within the scope of

employment, it will be deemed to be in scope. Mandelbaum v. U.S., 251 F.2d 748 (2d Cir. 1958); U.S. v. Wibye, 191 F.2d 181 (9th Cir. 1951) (dual purpose--scope); Murphey v. U.S., 179 F.2d 743 (9th Cir. 1950) (dual purpose--scope); Obst v. USPS, 427 F. Supp. 696 (N.D. Cal. 1977) (dual purpose--scope). Permissive use statutes do not apply to FTCA liability. Pacheco v. U.S., 409 F.2d 1234 (3d Cir. 1969); Siciliano v. U.S., 85 F. Supp. 726 (D.N.J. 1949) (allowed another soldier to drive--held scope); O'Toole v. U.S., 284 F.2d 792 (2d Cir. 1960); U.S. v. Hull, 195 F.2d 64 (1st Cir. 1952); Clemens v. U.S., 88 F. Supp. 971 (D. Minn. 1950); Cropper v. U.S., 81 F. Supp. 81 (N.D. Fla. 1948); Murphey v. U.S., 79 F. Supp. 925 (N.D. Cal. 1948); Hubsch v. U.S., 174 F.2d 7 (5th Cir. 1949) (officer uses jeep for pleasure); Long v. U.S., 78 F. Supp. 35 (S.D. Cal. 1948); Williams v. U.S., 105 F. Supp. 208 (N.D. Cal. 1952), rev'd on other grounds, 350 U.S. 857 (1955). Leach v. Walls, 993 F. Supp. 1103 (N.D. Ohio 1997). Mail carrier who drives to his aunt's house to check on his children during his lunch break is not in scope. Hart v. Stafford, Civ. #97-0561 (HHK) (D.D.C., 8 Oct. 98), FBI agent in scope while returning to FBI in GOV from lunch after a visit to DEA. Colon v. U.S., 1999 U.S. Dist. LEXIS 10882 (D.P.R. 2 July 1999) Navy Captain is issued a GOV on arrival in port is not in scope when he is involved in a fatal collision during visits to various bars. See also Colon v. U.S., 1999 U.S. Dist. LEXIS 8535 (D.P.R. 25 May 99) which reopens issue and requires Navy to submit JAG MAU investigation.

c. TDY Travel. Cases holding scope. Flohr v. MacKevjak, 84 F.3d 386 (11th Cir. 1996) (LTC Flohr on TDY returning to hotel from dinner when MacKevjak on TDY with Flohr turns in front of oncoming car--both were within scope); McCluggage v. U.S., 392 F.2d 395 (6th Cir. 1968) (deviated to avoid bad weather--held scope-Ohio law); Combs v. U.S., 768 F. Supp. 584 (E.D. Ky. 1991) (travel to weekend drill is within scope, since POV was authorized by orders); Solow v. U.S., 282 F. Supp. 900 (E.D. Pa. 1968) (delay en route not controlling--held scope); Purcell v. U.S., 130 F. Supp. 882 (N.D. Cal. 1955) (straight TDY--held scope); Kemerer v. U.S., 330 F. Supp. 731 (W.D. Pa. 1971) (goes home from TDY trip on way to mail official letter--held scope); Prince v. Creel, 358 F. Supp. 234 (E.D. Tenn. 1972) (leaves on TDY one day early to visit relative--held scope); Jones v. Polishuk, 252 F. Supp. 752 (E.D. Tenn. 1965) (deviates to find better motel accommodation--held scope); Johnston v. U.S., 310 F. Supp. 1 (N.D. Ga. 1969) (going to restaurant-held scope); Hardy v. U.S., 304 F. Supp. 855 (N.D. Ga. 1969) (going to restaurant--base mess closed--held scope); Whittenberg v. U.S., 148 F. Supp. 353 (S.D. Tex. 1956) (choice of travel--uses POV--held

scope); Satterwhite v. Bocelato, 130 F. Supp. 825 (E.D.N.C. 1955); Marquardt v. U.S., 115 F. Supp. 160 (S.D. Cal. 1953) (leave route same as TDY route--held scope); Wilkinson v. Gray, 523 F. Supp. 372 (E.D. Va. 1981) (work to motel--held scope); Robbins v. U.S., 722 F.2d 387 (8th Cir. 1984) (returning from TDY directly from Scott AFB to Offut AFB--held scope--distinguished Bissell v. McElligott, 369 F.2d 115 (8th Cir. 1966) where TDY return orders permitted leave); Fitzpatrick v. U.S., 726 F. Supp. 975 (D. Del. 1989), further proceedings, 754 F. Supp 1023 (D. Del. 1991) (within scope while driving drunk from Army club to motel). Cases holding not scope. U.S. v. Romitti, 363 F.2d 662 (9th Cir. 1966) (choice of POV was employee's--held not scope); Owen v. U.S., 258 F. Supp. 121 (E.D.N.C. 1966) (leave route same as TDY route--held not scope). Keener v. Dept. of Army, 498 F. Supp. 1309 (M.D. Pa. 1980) (going to NCO Club for meal at midnight--held not scope); Allen v. U.S., 1997 WL 587761 (E.D. La.) (postal inspector drives home from airport in GOV after returning from TDY—accident occurs later that night—no scope); Lee v. U.S., Civ. # 83-5470 (C.D. Cal. 1984) (goes partying on day off-returning to motel--held not scope); Hartzell v. U.S., 786 F.2d 964 (9th Cir. 1986) (Air Force Specialist not in scope while using POV when returning from TDY in leave status); Kirchhoffner v. U.S., 765 F. Supp. 598 (D.N.D. 1991) (50 miles from motel at midnight with .20% Blood alcohol--held not in scope).

d. PCS Travel (POV cases). Cases holding scope. Blesy v. U.S., 443 F. Supp. 358 (W.D.N.Y. 1978) (delay en route completed--held scope--New York law); Berrettoni v. U.S., 436 F.2d 1372 (9th Cir. 1970) (delay en route completed--held scope--Montana law); Hallberg v. Hilburn, 434 F.2d 90 (5th Cir. 1970) (delay en route completed--held scope--Texas law); Platis v. U.S., 409 F.2d 1009 (10th Cir. 1969) (leave route and PCS route identical--held scope--Utah law); Cooner v. U.S., 276 F.2d 220 (4th Cir. 1960) (delay en route completed--held scope--New York law); O'Brien v. U.S., 236 F. Supp. 792 (D. Me. 1964) (starting delay en route--held scope--New York law); Courtright v. Pittman, 264 F. Supp. 114 (D. Colo. 1967) (held scope); Hinson v. U.S., 257 F.2d 178 (5th Cir. 1958) (held scope--California law); U.S. v. Farmer, 400 F.2d 107 (8th Cir. 1968) (completed six months AD--held scope--Iowa law); U.S. v. Culp, 346 F.2d 35 (5th Cir. 1965) held scope-Texas law); U.S. v. Mraz, 255 F.2d 115 (10th Cir. 1958) (held scope-New Mexico law); U.S. v. Kennedy, 230 F.2d 674 (9th Cir. 1956) (held scope--Washington law); Johnson v. Franklin, 312 F. Supp. 310 (S.D. Ga. 1970) (held scope); Ashworth v. U.S., 772 F. Supp. 1268 (S.D. Fla. 1991) (sailor driving U-Haul on DITY move is within scope, even given one day delay en route). Cases holding not scope. Garrett Freightlines

Inc. v. U.S., 529 F.2d 26 (9th Cir. 1976) (held not scope--Idaho law); McSwain v. U.S., 422 F.2d 1086 (3d Cir. 1970) (leave and PCS routes different--held not scope--Colorado law); U.S. v. McRoberts, 409 F.2d 195 (9th Cir. 1969) delay en route--held not scope--California law); Forcht v. Buckley, Civ. #82-292 (going to annual training--held not scope--Indiana law); James v. U.S., 467 F.2d 832 (4th Cir. 1972) (returning from annual training--held not scope--North Carolina law); Stone v. U.S., 408 F.2d 995 (5th Cir. 1969) (POV not authorized, uses anyway--held not scope--Florida law); Bissell v. McElligott, 369 F.2d 115 (8th Cir. 1966) (delay en route beginning--held not scope--Missouri law); Chapin v. U.S., 258 F.2d 465 (9th Cir. 1958) (held not scope--California law); Badger State Mutual Casualty Co. v. U.S., 383 F. Supp. 226 (E.D. Wis. 1974) (starting delay en route--held not scope--Tennessee law); Dettmering v. U.S., 308 F. Supp. 1185 (N.D. Ga. 1969) (starting delay en rout-e-held not scope); Jozwiak v. U.S., 123 F. Supp. 65 (S.D. Ohio 1954); Cobb v. Kumm, 367 F.2d 132 (7th Cir. 1966) (no POV authorized--held not scope--Illinois law); McCall v. U.S., 338 F.2d 589 (9th Cir. 1964) (held not scope--Washington law); U.S. v. Sharpe, 189 F.2d 239 (4th Cir. 1951) (beginning leave--no travel allowance--held not scope--South Carolina law); U.S. v. Eleazer, 177 F.2d 914 (4th Cir. 1949) (beginning delay en route--held not scope--North Carolina law); Calvary v. U.S., 355 F. Supp. 805 (W.D. Tenn. 1973) (starting delay en route--held not scope); North Carolina State Highway Comm. v. U.S., 406 F.2d 1330 (4th Cir. 1969) (delay en route--held not scope--North Carolina law); Provost v. Smith, 308 F. Supp. 1175 (E.D. Tenn. 1969) (finished leave, but not on direct route--held not scope); Kimball v. U.S., 262 F. Supp. 509 (D.N.J. 1967) (en route to post after leave expired--held not scope); McGarrh v. U.S., 294 F. Supp. 669 (N.D. Miss. 1969) (starting delay en route-held not scope--North Carolina law); Gupton v. U.S., 799 F.2d 941 (4th Cir. 1986) (Marine making second trip on self-help PCS move--not within scope); Griffin v. U.S., Civ. #91-878WD (W.D. Wash. 1992) (sailor in rented car on delay en route to home during PCS move not in scope). Chadwick v. Blanton, Civ. # 1:97-CV-1350-ODE (N.D. Ga., 26 Jan. 1998) (reservist driving his POV home from 2-week ADT is within scope.

e. Negligent Entrustment and Authorizing Official Beyond His Authority. See, generally, Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Barron v. U.S. v. Maitland Bros. Co., 473 F. Supp. 1077 (D. Haw. 1979); Haight v. U.S., 538 F.2d 346 (Ct. Cl. 1976). Cases holding scope. Waddell v. U.S., 89 F.3d 831 (table), 1996 WL 342996 (4th Cir. 1996) (Department of Navy civilian moving his gear from one ship to another in his pickup truck is within scope when he backs

into plaintiff); Dornan v. U.S., 460 F.2d 425 (9th Cir. 1972) (ALC driver loaned to contractor during flood emergency--held scope); O'Connell v. U.S., 110 F. Supp. 612 (E.D. Wash. 1953) (driver ordered to drive even though previously grounded--held scope). Cases holding not in scope. Mider v. U.S., 322 F.2d 193 (6th Cir. 1963) (dispatches truck to self for personal use--not scope); Vason v. U.S., 369 F. Supp. 1202 (N.D. Ga. 1973); Rodriguez v. U.S., 455 F.2d 940 (1st Cir. 1972) (used vehicle to look for sailor in bar-not scope); Tucker v. U.S., 385 F. Supp. 717 (D.S.C. 1974) (dispatcher fails to observe driver drinking--held not scope); U.S. v. Schmaltz, 282 F.2d 628 (1st Cir. 1960); LeFevere v. U.S., 362 F.2d 352 (5th Cir. 1966) (dispatches jeep to self for personal use--not scope); Keener v. Jack Cole Trucking Co., 233 F. Supp. 181 (W.D. Ky. 1964) (proper dispatch to take dependents to military hospital--not scope); Concepcion v. U.S., 374 F. Supp. 1391 (D. Guam 1974) (personal errand by regular driver--not scope); Leonard v. U.S., 131 F. Supp. 694 (D. Wyo. 1955) (proper dispatch for service member to take air cadet physical--held not scope). Bettis v. U.S., 635 F.2d 1144 (5th Cir. 1981); Hardow v. U.S., Civ. # C-82-4181 EFL (N.D. Cal. 1984) (regular driver leaves company party where beer is served and drives home, rather than back to motor pool--held not scope); Orbeta v. U.S., Civ. # 89-1682 (AF)) (DP.R. 1991) (soldier takes military vehicle to site of wife's traffic accident--not within scope).

f. Using POV Without Express Authority. Cases holding scope. U.S. v. Hopper, 214 F.2d 129 (6th Cir. 1954) (used POV for TDY when U.S. vehicle available--held scope); Taber v. Maine, 49 F.3d 598 (2d Cir. 1995) (sailor driving POV returning to duty on base after drinking spree is involved in off-base accident--court sets aside Guam law and uses Calif. law to hold in scope). Cases holding not in scope. Walsh v. U.S., 31 F.3d 696 (10th Cir. 1994) (National Guardsman driving POV en route to weekend drill is not in scope); Green v. Hall, 8 F.3d 695 (9th Cir. 1993) (Army reservist went off post in POV for coffee or breakfast-not within scope--MRE rations available); Harris v. U.S., 718 F.2d 654 (4th Cir. 1983) (EM directed to use POV by military officer to take injured to hospital in civilian accident--not scope); Frazier v. U.S., 412 F.2d 22 (6th Cir. 1969) (driving POV to look for home at new duty station--not scope); Paly v. U.S., 221 F.2d 958 (4th Cir. 1955) (used POV on TDY for funeral detail--held not scope); Bisel v. U.S., Civ. # 2:94-CV-44 (W.D. Mich., 12 Feb. 1996), aff'd, 121 F.3d 702 (table), 1997 WL 415316 (6th Cir. 1997) (sailor who leaves service sponsored beer party at Long Beach Naval Station is not in scope when he leaves party and goes off base to purchase beer to consume in quarters and gets in accident returning to on-base quarters--court states

Taber v. Maine misinterpreted California law); Holloway v. U.S., 829 F. Supp. 1330 (N.D. Ga. 1993) (driving POV home from weekend drill not scope, even though mileage was reimbursed--not in scope due to seven rest stops and consumption of beer); Weaver v. U.S. Coast Guard, 857 F. Supp. 539 (S.D. Tex. 1994) (Coast Guardsman driving POV on way back from four-hour pass is not in scope nor is fellow Coast Guardsman who permitted him to drive while drunk); Manderacchi v. U.S., 264 F. Supp. 380 (D. Md. 1967) (editor used own car to get story--held not scope); Ledesma v. U.S., Civ. # A-83-CA-26 (W.D. Tex., 12 Sept. 1984) (soldier returning in borrowed POV to Fort Hood after trip to Austin to pay friend's alimony—-no scope). Vuevas v. Harris, 2 F. Supp. 2d 189 (D.P.R. 1998) (Navy officer drives POV to main base to have lunch. She intends to deliver official files but forgets them. On return, she has accident on public road - no scope).

g. To and From Work. Cases holding scope. Combs v. U.S., 884 F.2d 578 (6th Cir. 1989) (reservist within scope while driving POV home from weekend training where travel reimbursed); Borrego v. U.S., 790 F.2d 5 (1st Cir. 1986) (Federal employee permitted to keep GOV home as he frequently went on field inspections--held scope); Pitt v. Matala, 890 F. Supp. 89 (N.D.N.Y. 1995) (soldier who drove POV to PT, returned home to change and then was involved in accident while going to work is within scope); Simpson v. U.S., 484 F. Supp. 387 (W.D. Pa. 1980) (field recruiter going home--held scope); Daugherty v. U.S., 427 F. Supp. 222 (W.D. Pa. 1977) (recruiter on field duty does not violate home-to-work statute--(5 U.S.C. § 78) (AR 58-1)). See also Konradi v. U.S., 919 F.2d 1207 (7th Cir. 1990) (although commuting to work is unsually not scope, USPS regulation requiring rural mail carriers (RMC) to use own vehicle and alleged local USPS policy requiring RMC to take most direct route to work and to use seatbelt precluded summary judgment). Cases holding not scope. Davies v. U.S., 542 F.2d 1361 (9th Cir. 1976) (officer taking work home--held not scope); Proietti v. Levi, 530 F.2d 836 (9th Cir. 1976)(going home in POV held not scope); Guadagno v. U.S., Civ. # 4:96-CV-60 (W.D. Mich., 26 Sept. 1997) (postal worker not in scope when returning from work even though she received FECA benefits and partial mileage); Coto Orbeta v. U.S., 770 F. Supp 54 (D.P.R. 1991) (soldier takes official vehicle home when wife fails to pick him up when she gets in accident--not scope, but U.S. could be liable for failure to maintain brakes); Smith v. U.S., 762 F. Supp. 1511 (D.D.C. 1991) (authorized use of government vehicle to and from work--not in scope after 5 hour stopover in club for drinks); Bach v. U.S., 92 F. Supp. 715 (S.D.N.Y. 1950) (same); Perez v. U.S., 368 F.2d 320 (1st Cir. 1966)

(same); Rutherford v. U.S., 168 F.2d 70 (6th Cir. 1948) (same); Dubois v. Thorne, Civ. # 85-0775-HB (D.N.M. 1986) (travel between on-post quarters and place of work not within scope). The scope of employment question may raise factual issues which cannot be decided on summary judgment. Short v. U.S., 245 F. Supp. 591 (D. Del. 1965) (going home in POV--scope factual issue).

h. Hitchhiker and Unauthorized Passenger. Cases holding scope. U.S. v. Johnson, 181 F.2d 577 (9th Cir. 1950) (held scope); Pierson v. U.S., 527 F.2d 459 (9th Cir. 1975) (Department of Interior employee in Army plane on tracking mission--held scope despite violation of DOD directive barring passenger); Obst v. USPS, 427 F. Supp. 696 (N.D. Cal. 1977) (held scope). Cases holding not scope. Alexander v. U.S., 98 F. Supp. 453 (D.S.C. 1951) (civilian hitchhiker in jeep--held not scope); U.S. v. Alexander, 234 F.2d 861 (4th Cir. 1956) (not scope); Whittle v. U.S., 328 F. Supp. 1361 (D. Ala. 1971) (not scope); Hottovy v. U.S., 250 F. Supp. 315 (D. Ariz. 1966) (girlfriend in Army helicopter--not scope).

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

4. Private Person Analogy. Under the FTCA, the U.S. is liable as a private person would be liable. See, e.g., Rayonier v. U.S., 352 U.S. 315 (1957); Indian Towing Co. v. U.S., 350 U.S. 61 (1955); Bruns v. National Credit Union Administration, 122 F.3d 1251 (9th Cir. 1997) (Failure to follow Federal Credit Union Act procedures for dismissal of employees does not constitute a state tort); Sea Air Shuttle Corp. v. U.S., 112 F.3d 532 (1st Cir. 1997) (actions of Secretary of Transportation and FAA were not conduct for which private person would be liable); Anderson v. U.S., 55 F.3d 1379 (9th Cir. 1995) (violation of California Fire Code constitutes state tort under FTCA where fire escaped from U.S. controlled burn in National Forest); McMann v. Northern Pueblos Enterprises Inc., 594 F.2d 784 (10th Cir. 1979); Estate of Warner v. U.S., 743 F. Supp. 551 (N.D. Ill. 1990) (standard to be applied to "hot pursuit" chase by Federal officer same as applies to local police); Zeller v. U.S., 467 F. Supp. 487 (E.D.N.Y. 1979). FTCA creates no new torts, but allows only those actionable against private person under State law. Essig v. U.S., 675 F. Supp. 84 (E.D.N.Y. 1987). See also Love v. U.S., 60 F.3d 642 (9th Cir. 1995) (no state tort where FmHA failed to

notify farmers prior to disposal of collateral on their debt). When conflict between local law and express provision of FTCA, FTCA prevails. Westerman v. Sears, Roebuck & Co., 577 F.2d 873 (5th Cir. 1978); Western National Mutual Insurance Co. v. U.S., 964 F. Supp. 295 (D. Minn. 1997) (U.S. not liable under Minnesota's permissive use statute, since strict liability is not FTCA tort under 28 U.S.C. § 2680(b)--citing Rodriguez v. United States, 328 F. Supp. 1389 (D.P.R.), aff'd, 455 F.2d 940 (1st Cir. 1972) and Craive v. United States, 722 F.2d 1523 (11th Cir. 1984)). But see Clemens v. U.S., 88 F. Supp. 971 (D. Minn. 1950). State law on duty of municipal corporations does not apply. Montes v. U.S., 37 F.3d 1347 (9th Cir. 1994) (California "hot pursuit" immunity statute not applicable to Federal officers under Indian Towing Co. v. U.S., 350 U.S. 61 (1955)); Turbe v. Government of Virgin Islands, 938 F.2d 427 (3rd Cir. 1991) (duty to repair street light is a public duty not applicable to cause of accident); Schindler v. U.S., 661 F.2d 552 (6th Cir. 1981); Clem v. U.S., 603 F. Supp. 457 (N.D. Ind. 1985) (Indiana law imposing duty on city to make public parks safe does not impose similar duty on U.S. for federal park, since U.S. is being sued as private person and its liability rests on same basis as a private person). MR (Vega Alta) Inc. v. Caribe General Electric Products Inc., Civ. #97-2294(JAF), (D.P.R., 3 Dec. 98), in CERCLA action, EPA regulatins on clean up do not create a duty in tort. Central Airlines Inc. v. U.S., 169 F.3d 1174 (8th cir. 1999), no state tort where FAA imposes civil penalty because FAA admittedly misinterpreted its own regulation.

a. Basic Requirements. Basic requirements of duty, negligent act or omission, injury and proximate cause between negligence and injury. See, e.g., Epps v. U.S., 862 F. Supp. 1460 (D.S.C. 1994) (no duty of abutting landowner to insure sidewalk is clear); Doty v. U.S., 531 F. Supp. 1024 (N.D. Ill. 1982) (COE has duty to earn of presence of dam and lock on Missippi river under Indian Towing Co. v. U.S., 350 U.S. 61 (1955)—warning signs adequate to meet duty). Injury must be foreseeable. Cella v. U.S., 998 F.2d 418 (7th Cir. 1993) (disability based on polyesitis normally an idiopathic disease--here ruled due to trauma). J.H. Harrison Stone & Title Co. v. U.S., Civ. #97-00473 (CKK) (D.D.C., 5 Feb. 98)(suit against DOT for failure to ensure payment to subcontractor during Union Station redevelopment - no tort for conspiracy violation of federal regulation under state law). U.S. v. Agronics, Inc., 164 F.3d 1343 (10th Cir. 1999), Mine Safety and Health Administration's delegation of its enforcement action to OSHA which redelegates to state agency is not a tort under New Mexico law; Central Airlines, Inc. v. U.S., 169 F.3d 1174 (8th Cir. 1999) FAA's admitted misinterpretation of its own regulations concerning airplane icing equipment is not a tort under Missouri law.

(1) Duty. Duty must exist under private person analogy by virtue of State law. *Restatement(Second)of Torts*, § 281 et seq.; *Prosser on Torts*, 153 (5th ed. 1971). Cases finding a duty. In re Greenwood Air Crash, 873 F. Supp. 1256 (D.S.D. 1995) (FAA controller has common law duty beyond requirements of FAA Manual to warn other aircraft under VFR conditions). Cases finding no duty. Roditis V. U.S., 122 F.3d 108 (2nd Cir. 1997) (No landowner duty under New York nondelegable duty doctrine who slipped on icy step while delivering supplies to contractor at Post Office construction site); Brown v. U.S., 928 F.2d 264 (8th Cir. 1991) (no duty to control off-base traffic after on-base air show where traffic pileup resulted in death); Taylor v. U.S., 951 F. Supp. 298 (D.N.H. 1996) (use of Army equipment by Army reservist in paramilitary training did not create duty to 15 year old tortured by reservist); Burton-Bey v. U.S., 100 F.3d 967 (table), 1996 WL 654457 (10th Cir. 1996) (no duty to permit prisoner to retain Dallas Cowboy's baseball cap contrary to prison regulations); Shankle v. U.S., 796 F.2d 743 (5th Cir. 1986) (discussing fly-by plan with USAF officer does not create duty to ensure safety--U.S. did not create danger as in Indian Towing Co. v. U.S., 350 U.S. 61 (1955)); Gober v. U.S., 778 F.2d 1552 (11th Cir. 1986)(no duty on part of U.S. to employees of lessee for injury from forging press); Patel by Patel v. McIntyre, 667 F. Supp. 1131 (D.S.C. 1987) (failure to arrest drunk driver who shortly thereafter causes fatal collision--not actionable--cites numerous cases); Beattie v. U.S., 690 F. Supp. 1068 (D.D.C. 1988) (no duty to provide service to Air New Zealand in McMurdo Sound); Ayala v. U.S., 846 F. Supp. 1431 (D. Colo. 1993) aff'd, 49 F.3d 607 (10th Cir. 1995) (claim for injury in mine based on alleged improper technical assistance by U.S. fails due to no duty under Colorado law); Biddle v. U.S., Civ. # C92-0132 (S.D. Iowa, May 16, 1994) (USDA test of blood samples of cattle for Brucellosis imposed no duty to protect meat packing company employees from Brucellosis); Shelton v. U.S., Civ. # CIV-95-320-B (E.D. Okla., 27 June 1996) (no duty to warn user of railroad cart re danger of stopping it where U.S. employee stated that the cart had no brakes).

(a) Interpretation of Duty. Common law duty subject to misinterpretation in many cases particularly where it varies from one state to another, e.g., duty to protect public from assaults. Compare Gibson v. U.S., 457 F.2d 1391 (3d Cir. 1977); (one Job Corps Center student assaults another-United States under no duty,

even though there was a knowledge of prior misconduct) with Bryson v. U.S., 463 F. Supp. 908 (E.D. Pa. 1978) (one service member with prior history of misconduct assaults another service member). Another example, is where there is duty to students to protect from injuries, e.g., dependent schools, or youth activities. Compare Bryant v. U.S., 565 F.2d 650 (10th Cir. 1977) (three runaways from Indian School lost parts of legs from frostbite-duty found) (Query: Was U.S. in loco parentis under State law?) and Doe v. Scott, 652 F. Supp. 549 (S.D.N.Y. 1987) (special duty to protect children in West Point day care center) with Sanchez v. U.S., 506 F.2d 702 (10th Cir. 1974) (drunken student causes auto death--no duty).

(b) Good Samaritan Doctrine. Duty can arise under Good Samaritan Doctrine. Sheehan v. U.S., 822 F. Supp. 13 (D.D.C. 1993) (doctrine applies to fall of hand-cuffed arrestee entering police station supervised by officer); Irving v. U.S., 942 F. Supp. 1483 (D.N.H. 1996) (failure to properly inspect by OSHA and note blatant safety violation falls under New Hampshire Good Samaritan doctrine). But see Piechowicz v. U.S., 885 F.2d 1207 (4th Cir. 1989) (no duty under Witness Protection Act where no request for protection made); Guccione v. U.S., 847 F.2d 1031 (2d Cir. 1988) (fact that injured party was under FBI surveillance does not create duty to protect him); Atlantic American Life Insurance Co. v. U.S., Civ. # 1:95-cv-2947-WBH (N.D. Ga., 2 Dec. 1996) (plaintiff's action under Doctrine since its sales rights at Fort Benning were temporarily suspended--Georgia requires physical harm and provision of service by defendant--neither was present). Appley Brothers v. U.S., 163 F.3d 1164 (8th Cir. 1999), USDA assumed duty to inspect grain warehouse and insure adequate quantity of acceptable grain was available to insure contracts were met.

(i) State Statutes. State statute should be checked along with State decisions, particularly in medical malpractice type situations re emergency patients. Cases where the government assumed a duty. Creasy v. U.S., 645 F. Supp. 853 (W.D. Va. 1986) (FmHA failure to inspect defective floor despite promise falls under Good Samaritan Doctrine); Flynn v. U.S., 902 F.2d 1524 (10th Cir. 1990) (National Park Service employees rendering aid outside park protected by Good Samaritan Doctrine); Pierre v. U.S., 741 F. Supp. 306 (D. Mass. 1990) (HUD promise to remove lead paint is an assumed duty

and must be met); Frutin v. Dryvit System Inc., 760 F. Supp. 234 (D. Mass. 1991) (duty under Good Samaritan Doctrine to advise re weather commenced once pilot made contact with FAA controller); Peterson v. U.S., Civ. # H-80-1357 (S.D. Tex. 1982) (duty to wife and child of serviceman based on failure of mental health counselor to adhere to Army standards on authority of Clark v. Otis Engineering, 633 S.W.2d 538 (Tex. Ct. App.-Texarkana 1982)); In re Sabin Oral Polio Vaccine Products L. Lit, 774 F. Supp. 952 (D. Md. 1991) (negligent inspection by U.S. Division of Biologic Standards creates action under Maryland Good Samaritan law); Lemar v. U.S., 580 F. Supp. 37 (W.D. Tenn. 1984) (U.S. health authorities advice to immunize school children does fall under Tennessee Good Samaritan Doctrine); Bergman v. U.S., 551 F. Supp. 407 (W.D. Mich. 1982) (duty to detect and prosecute by FBI KKK "Freedom March" crimes); Miller v. U.S., 561 F. Supp. 1129 (E.D. Pa. 1983) (duty to protect witnesses under Federal Witness Protection Program arises under Pennsylvania Good Samaritan Doctrine). But see Galanti v. U.S., 709 F.2d 706 (11th Cir. 1983); Brown v. U.S., Civ. # CV95-PT-3090-S (N.D. Ala., 30 Jan. 1997) (Army Sgt., AWOL from Germany, shot wife's ex-husband and returned next day to shoot wife and kill her parents--U.S. not liable based on phone call before shooting telling wife to "stay put"). Cases where there is no government duty. Moody v. U.S., 585 F. Supp. 286 (E.D. Tenn. 1984) (right, not duty, to inspect home--cause of action not created); Arvanis v. Noslo Engineering Consultants, Inc., 739 F.2d 1287 (7th Cir. 1984) (requirement of Miller Act that public contractor obtain bonds does not create action under FTCA when Federal agency does not insure bond has been obtained); Howell v. U.S., 932 F.2d 915 (11th Cir. 1991) (Ga. Good Sam. not applicable to plane crash where FAA inspector was aware of plane's grounding two days before crash and did not order investigation); Sheridan v. U.S., 969 F.2d 72 (4th Cir. 1992) (Navy base firearms control regulation does not create Good Sam. duty under Maryland law); Clarken v. U.S., 791 F. Supp. 1029 (D.N.J. 1991) (West Point medics owed no duty to heart attack patient at West Point Thayer Hotel). Ortiz v. U.S. Border Patrol, 39 F. Supp.2d 1321 (D.N.M. 1999), where Border Agents arrest state police in righting overturned vehicle, New Mexico Good Sam applies.

(ii) Rescue. Rescue cases are more frequent, e.g., MAST program. Huber v. U.S., 838 F.2d 398 (9th Cir. 1988) (once Coast Guard participates in rescue must complete proper action); Frank v. U.S., 250 F.2d 178 (3d Cir. 1957), cert. denied, 356 U.S. 962 (1958) (Coast Guard helicopter rescue--liability imposed). See also Korpi v. U.S., 961 F. Supp. 1335 (N.D. Cal. 1997) (Coast Guard's rescue efforts to save boat were not negligent). If a duty is assumed by mounting a rescue, the discretionary function exclusion might still apply. Kiehn v. U.S., 984 F.2d 1100 (10th Cir. 1993) (manner of conducting rescue is discretionary concerning use of backboard for fallen climber in national park). However, the Coast Guard's decision not to mount a search or rescue may well not be actionable. Bunting v. U.S., 884 F.2d 1143 (9th Cir. 1989) (Coast Guard's failure to go to pilot's aid not actionable under State's Good Samaritan statute--also applied to Coast Guard physician emergency care); Daley v. U.S., 499 F. Supp. 1005 (D. Mass. 1980) (no duty for Coast Guard to search); Kurowsky v. U.S., 660 F. Supp. 442 (S.D.N.Y. 1986) (Coast Guard's decision not to engage in risky rescue is not actionable).

(iii) Safety Inspections. Duty can be imposed under Good Samaritan doctrine because of self-imposed safety inspection. Routh v. U.S., 941 F.2d 853 (9th Cir. 1991) (duty created by contract provision re safety concerning roll bar in backhoe); In re Sabin Oral Polio Vaccine Litigation, 774 F. Supp. 952 (D. Md. 1991) (Md. Good Sam. applies to release of vaccine in technical violation of Federal regulations); Barron v. U.S., 473 F. Supp. 1077 (D. Haw. 1979); Blessing v. U.S., 447 F. Supp. 1160 (E.D. Pa. 1978) (OSHA inspection of machine); Irving v. U.S., 532 F. Supp. 840 (D.N.H. 1982) (OSHA inspection of machine); General Public Utilities Corp. v. U.S., 745 F.2d 239 (3d Cir. 1984) (N.R.C. inspection of Three Mile Island Plant); Loge v. U.S., 662 F.2d 1268 (8th Cir. 1981) (HEW regulation on polio vaccine); Phillips v. U.S., 956 F.2d 1071 (11th Cir. 1992) (U.S. responsible for fall from roof under construction under Georgia law based on U.S. v. Aretz, 280 S.E.2d 345 (Ga. 1981)); Schmidt v. Waldco Industries, Inc., 941 F. Supp. 905 (D. Ariz. 1996) (failure to inform contractor of safety violation when the contractor is already aware of it is not discretionary due to contract requirements); Irving v. U.S., 942 F. Supp. 1483 (D.N.H. 1996)

(claimant's hair caught in high speed machining twice cleared by OSHA inspection--N.H. Good Sam. applies). However, this is not usually the case. Raynor v. U.S., 604 F. Supp. 205 (D.N.J. 1984) (HUD pre-mortgage inspection does not impose duty on U.S. to assure proper condition of house); Porter v. U.S., 619 F. Supp. 137 (S.D. Ohio 1985) (failure by FAA to suspend air worthiness certificate does not make U.S. liable); Moody v. U.S., 774 F.2d 150 (6th Cir. 1985) (FHA inspection on home not under Good Samaritan Doctrine); Zabala Clemente v. U.S., 567 F.2d 1140 (1st Cir. 1977)(aircraft inspection); Barnson v. U.S., 531 F. Supp. 614 (D. Utah 1982); Galvin v. OSHA, 860 F.2d 181 (5th Cir. 1988) (OSHA has no duty to employee of private employer to inspect machine); Thompson v. Timpanogos Metals, 762 F. Supp. 927 (D. Nev. 1991) (standard safety clause in COE construction contracts does not impose duty to employee of independent contractor); Oxford v. U.S., 779 F. Supp. 1230 (D. Ariz. 1991) (fall from defective ladder while painting tank--U.S. not responsible, since it did not retain day-to-day control); Bull v. HUD, 15 F.3d 1008 (table), 1994 WL 6653 (9th Cir. 1994) (HUD is not liable for destruction of house by fire because HUD inspected in connection with loan); Scallorn v. U.S., 1996 WL 478973 (N.D. Cal.) (failure to require contractor to conduct mandatory safety investigation in 1990 did not cause injury from same source in 1993--held mandatory regulation violation is not a state tort). Smallwood v. U.S., 988 F. Supp. 1479 (S.D. Ga. 1997) (where ironworker steps in unguarded vat of molten metal - no U.S. liability under Georgia Good Sam as worker did not rely on OSHA inspection). Buck v. U.S., 1998 WL 4729 (9th Cir., Cal.) (failure of Forest Service to conduct safety inspection in violation of Forest Service manual did not increase risk to skier-permittee or create cause of action under California's Good Sam - in accord Thompson v. U.S., 592 f.2d 1104 (9th Cir. 1979); Pyflewski v. U.S., 1998 WL 30474 (N.D. Ill.) Publication of postal manual concerning cleaning natural accumulation of rainwater on post office floor does not create a duty to patron where manual unknown to post office employees. Smith v. U.S. Bureau of Land Management, Civ. # 95-1197-HB/JHG (D. N. Mex., 23 Feb. 1998) (even assuming BLM draft safety manual was in effect concerning safety in cave, there was no duty to spelunkers who were crushed by boulder. Martin v. Miller-Eads, Inc., 47 F. Supp.2d 1081

(S.D., Ind. 1999), VA's reservation of right to conduct safety inspections at construction project does not create duty to electrocuted worker.

(iv) Creation of Danger. Where United States creates danger, it may be liable to rescuers. Richardson v. U.S., 248 F. Supp. 99 (E.D. Okla. 1965). U.S. also liable where it creates public nuisance, i.e., deep trench underwater at public beach. Price v. U.S., 530 F. Supp. 1010 (S.D. Miss. 1981). But see Smallwood v. U.S., Civ. # CV-197-060 (S.D. Ga., 17 Nov. 1997) (employee who stepped in unguarded vat of molten metal brings Good Samaritan action based on OSHA inspection—no cause of action since inspection did not increase danger); Tindall by Tindall v. U.S., 717 F. Supp. 446 (N.D. Miss. 1989) (M-80 and M-100 explosives confiscated by BATF did not create duty to injured minor).

(c) Duty to Independent Contractor Employee's. The general rule is that a person has no duty involving injuries to an independent contractor, since such a duty did not exist at common law. For a review of State law, see King v. Shelby Rural Electric Cooperative Corp., 502 S.W.2d 659 (Ky. 1973). For a general review, see McGarry v. U.S., 370 F. Supp. 525 (D. Nev. 1973) and Kropp v. Douglas Aircraft Co., 329 F. Supp. 447 (E.D.N.Y. 1971). These cases follow the general rule. See, e.g., Lathers v. Penguin Industries Inc, 687 F.2d 69 (5th Cir. 1982) (Texas imposes no duty to employee of independent contractor, even if inherently dangerous); Watson v. Marsh, 689 F.2d 604 (5th Cir. 1982) (same as Lathers and Alexander); Hackman v. U.S., 741 F. Supp. 5 (D.D.C. 1990) (no duty to employee of independent contractor who fell down air shaft at FBI building); Clark v. U.S. Dept. of Army, 805 F. Supp. 84 (D.N.H. 1992) (no duty to subcontractor or employee who fell through roof); Blizzard v. U.S., CV-92-H-2495-E (N.D. Ala., 2 Aug. 1993) (log skidder rolls over and kills operator--no duty on U.S. to inspect for rollover bar and defective brakes); Levrie v. Dept. of Army, 810 F.2d 1311 (5th Cir. 1987) (employees of cleaning contractor at Fort Sam Houston injured by toxic fumes when spilled by them--no cause of action); O'Neill v. U.S., 927 F. Supp. 599 (E.D.N.Y. 1996) (where employee of independent maintenance contractor falls over blown down pipes in boiler room, U.S. has no independent duty to maintain and safeguard pipes); Markes v. U.S., 704 F. Supp. 337 (N.D.N.Y. 1988) (safety clause in construction contract not

enough); Wright v. J.E. Back & Associates, 1996 WL 636439 (D.D.C.) (repair contract employee falls on access stairs during roof repairs--court upholds GSA delegation of safety by contract); Cunningham v. U.S., 827 F. Supp. 415 (W.D. Tex. 1993) (employee of independent contractor twists ankle on wheel chock chained to loading bay at USPS facility--no cause of action); Kandarge v. U.S. Dept. of Navy, 849 F. Supp. 304 (D.N.J. 1994) (Navy contract for evacuation and removal of underground valves requires shoring because of soft ground--Navy not responsible for cave-in of unshored trench); Graham v. U.S., Civ. # CV-S-91-511-LDG(RJJ) (D. Nev., 4 Nov. 1992) (no duty to warn or protect employees of swimming pool contractor from chlorine gas created in course of very job they were hired to do--citing Litttlefield v. U.S., 927 F.2d 1099 (9th Cir. 1991) and Sierra Pacific Power Co. v. Rinehart, 99 Nev. 557, 665 P.2d 270 (1983)). Of course, the test for determining whether someone is an employee or an independent contractor is the control test. Moody v. U.S., 753 F. Supp. 1042 (N.D.N.Y. 1990) (U.S. reservation of rights not sufficient control over day-to-day to hold U.S. liable for employee's negligence). Weimer v. U.S., 1997 WL 774908 (9th Cir., Wash.) (U.S. did not assume control of project by telling contractor to drill holes in dust caps in irrigation system installation contract.

(i) Non-Delegable Duty. Some states impose a non-delegable duty to protect employees of independent contractors. Dickerson, Inc. v. U.S., 875 F.2d 1577 (11th Cir. 1989) (Florida non-delegable duty statute applied to PCB disposal); Gardner v. U.S., 780 F.2d 835 (9th Cir. 1986) (follows Rooney and Thorne below--imposes Califonia's non-delegable duty doctrine to electrical repair contract); Sexton v. U.S., 797 F. Supp. 1292 (E.D.N.C. 1991) (U.S. owed non-delegable duty to warn employee of subcontractor of danger of weak door in metal grate); Hamilton v. U.S., Civ. # 93-150-Civ-J-20 (M.D. Fla., Sept. 2, 1994) (failure to properly instruct contractor's foreman regarding how to properly turn off power on Naval base creates liability for electrical burns to contract painter). Of course, the elements necessary to impose this non-delegable duty must be met. Cole v. U.S., 846 F.2d 1290 (11th Cir. 1988) (no duty to employees of independent contractor under Florida law making smoke cartridges for Army); Schwab v. U.S., 649 F. Supp. 1319 (M.D. Fla. 1986) (U.S. owned, contractor-operated crane tips over--

Florida non-delegable duty not applicable); Moffit v. U.S., 995 F.2d 232 (table), 1993 WL 195386 (9th Cir. 1993)(non-delegable duty doctrine not applicable to employee of telephone repair contractor who is electrocuted on-post); U.S. v. Valentine, 856 F. Supp. 621 (D. Wyo. 1994) (non-delegable duty doctrine is not applicable to contract for removal of wash water from underground tanks--rejects Dickerson, supra, and follows Walker v. U.S., 549 F. Supp. 973 (W.D. Okla. 1982)). See also Littlefield v. U.S., 927 F.2d 1099 (9th Cir. 1991). Ohio imposes such a duty upon a person to employees of independent contractors when electrical dangers are not open or obvious. Angel v. U.S., 775 F.2d 132 (6th Cir. 1985) (Ohio by court decision regards electrical dangers as not open or obvious--holds U.S. liable for death of sandblaster who placed aluminum ladder against wire). Bear Medicare v. U.S., 47 F. Supp. (172 (D. Mont 1999) Tree felled under contract between decedent and Blackfoot Tribe and aproved by BIA. Felling of trees not inherently dangerous, distinguishes McMillan v. U.S., 112 F.3d 1040 (9th Cir. 1997) whice involved felling of snags.

(ii) State Statutes. Duty to independent contractor employees can be imposed by State statute. For example:

(A) Illinois Scaffolding Act. Schmid v. U.S., 273 F.2d 172 (7th Cir. 1959); Fentress v. U.S., 431 F.2d 824 (7th Cir. 1970). However, under this statute the U.S. must be in charge. Cannon v. U.S., 328 F.2d 763 (7th Cir. 1964), cert. denied, 379 U.S. 832 (6th Cir. 1972).

(B) Illinois Structural Work Act. The court in Lulich v. Sherwin Williams Co., 792 F. Supp. 1106 (N.D. Ill. 1992) defined the elements required for owner to be "in charge" and liable under Ill. Structural Work Act. See also Damnjanovic v. U.S., 9 F.3d 1270 (7th Cir. 1993) (where roofer fell due to lack of safety belt, safety provisions and right to stop may place U.S. in control under this statute). The U.S. must be “in charge” for liability under this statute. J.S. Alberici Const. Co. v. U.S., 64 F.3d 430 (8th Cir. 1995) (Illinois Structural Work Act not applicable to claim for injuries of independent contractor employees caused by lifting heavy object, since

U.S. not in control of worksite); Connors v. U.S., 917 F.2d 307 (7th Cir. 1990) (U.S. employee not in charge as required by Ill. Structural Work Act leads to no U.S. liability re foreman's fall from ladder); Savic v. U.S., 918 F.2d 696 (7th Cir. 1990) (same holding as Connors re another fall at construction site); Fulton v. U.S., 772 F. Supp. 1074 (N.D. Ill. 1991) (COE not "in charge" as required by Ill. Structural Work Act).

(C) Safe place to work statutes. Ball v. U.S., 461 F.2d 772 (6th Cir. 1972) (Ohio); O'Neill v. U.S. v. Ambrose-Augusterfer Corp., 450 F.2d 1012 (3d Cir. 1971) (Pennsylvania); Poston v. U.S., 396 F.2d 103 (9th Cir. 1968), cert. denied, 393 U.S.946 (1968) (Hawaii); Huggins v. U.S., 302 F. Supp. 114 (W.D. Mo. 1969) (Kansas); Orr v. U.S., 486 F.2d 270 (5th Cir. 1973) (Florida). Contra Palaidis v. U.S., 564 F. Supp. 1397 (M.D. Fla. 1983) (both Orr and Palaidis involved injuries to employees of electrical contractors at Patrick AFB. Forshaw v. U.S., Civ. # 96-CV-0150 (N.D.N.Y., 14 Sep. 98), contractor employee who falls from scaffold at Fort Drum project is not entitled to recovery under New York Labor Law - cites Doad v. U.S., supra.

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

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

However, if the state statute in question is a strict liability statute, no duty arises, since it is preempted by the FTCA. Roditis v. U.S., 122 F.3d 108 (2nd Cir. 1997) (U.S. is not liable under N.Y. strict liability law imposing non-delegable duty); Maltais v. U.S., 546 F. Supp. 96 (N.D.N.Y. 1982), aff'd mem.,729 F.2d 1442 (2d Cir. 1983) (New York Labor law Section 200 is strict liability statute not applicable to FTCA); Vasquez v. U.S., 1994 WL 268242 (S.D.N.Y.) (N.Y. Labor Law not applicable to fall by employee of subcontractor from shaky ladder during remodeling--no vicarious liability); Moshetto v. United States, 961 F. Supp. 92 (S.D.N.Y. 1997) (U.S. is

not strictly liable under N.Y. labor law to employee of independent contractor); Corey v. U.S. 1996 WL 406842 (N.D.N.Y.) (injury due to contact with electric wire at Griffis AFB--contractor responsible for safety decision to work near energized wires- U.S. not strictly liable under N.Y. labor law). Accord Berghoff v. U.S., 737 F. Supp. 199 (S.D.N.Y. 1989). See also Doad v. U.S., 797 F. Supp. 138 (N.D.N.Y. 1992) (FAR preempts N.Y. labor law re duty to clean up debris). Even if state statute does impose liability, a plaintiff's claim could still be barred under the discretionary function exclusion. Defrees v. U.S. through U.S. Forest Service., 738 F. Supp. 380 (D. Or. 1990) (Oregon statute imposes liability for negligent fire fighting, however use of fire personnel and equipment in fighting numerous fires is discretionary).

(iii) *Restatement Of Torts*. *By Restatement of Torts,* if adopted by State courts. See, e.g., Thorne v. U.S., 479 F.2d 804 (9th Cir. 1973) (California); U.S. v. Babbs, 483 F.2d 308 (9th Cir. 1973) (California); Sowicz v. U.S., 368 F. Supp. 1165 (E.D. Pa. 1973) (Pennsylvania); Toole v. U.S., 588 F.2d 403 (3d Cir. 1978) (Pennsylvania); Toppi v. U.S., 327 F. Supp. 1277 (E.D. Pa. 1971); Jeffries v. U.S., 477 F.2d 52 (9th Cir. 1973) (Washington); U.S. v. DeCamp, 478 F.2d 1188 (9th Cir. 1973). See also Yanez v. U.S., 63 F.3d 870 (9th Cir. 1995) (under Privette v. Superior Court, 854 P.2d 721 (Cal. 1993) U.S. cannot be held liable for failure of independent contractor to take special precautions for inherently dangerous work to prevent lead azide explosion, but can be held liable under *Restatement (Second) of Torts*, § 414 if U.S. inspectors were aware that conductive shoes were not being worn); Camozzi v. Roland/Miller & Hope Consulting Group, 866 F.2d 287 (9th Cir. 1989) (Thorne not effected by Varig and Berkowitz); McMichael v. U.S., 856 F.2d 1026 (8th Cir. 1988) (Arkansas law re duty to employees at GOCO ammo plant is inherently dangerous activity); Rooney v. U.S., 634 F.2d 1238 (9th Cir. 1980) (following Thorne); Vandergrift v. U.S., 500 F. Supp. 229 (E.D. Va. 1978) (roofing contractor fell through roof--U.S. liable); Tatem v. U.S., 499 F. Supp. 1105 (M.D. Ala. 1980) (premises case under Alabama law). But see Busalacchi v. U.S., Civ. # S-91-1720 LKK (E.D. Cal., Feb. 22, 1994), aff'd in relevant part, rev'd in part, 70 F.3d 1277 (9th Cir.

1995) (claim for fall from warehouse roof by employee of independent contractor discussed under § 2680(a)--applicability of *Restatement* not discussed--on appeal, 9th Circuit reinstated claim that government safety inspectors knew of safety violations and failed to correct them based on Yanez v. U.S., 63 F.3d 870 (9th Cir. 1995)); Bloom v. Waste Management Inc., 615 F. Supp. 1002 (E.D. Pa. 1985) (bulldozer operator at COE worksite electrocuted by overhanging wire, no duty to warn, since U.S. has no superior knowledge). One typical imposition of duty upon the U.S. towards the employees of an independent contractor is for inherently dangerous activities. Murdock v. Employers Ins. of Wausau, 917 F.2d 1065 (8th Cir. 1990) (non-delegable duty under Nebraska law re collapse of excavation trench near BLM canal); McCall v. Dept. of Energy, 914 F.2d 191 (9th Cir. 1990) (non-delegable duty under Montana law re electrical workers fall when his safety belt failed); McMillian v. U.S., 112 F.3d 1040 (9th Cir. 1997) (cutting snags in national forest is inherently dangerous--Montana's non-delagability doctrine applies to tree cutting contract where there are snags--U.S. is 45% liable when stood near a snag being cut). But see Phinney v. U.S., 15 F.3d 208 (1st. Cir. 1994) (contract for resurfacing road on Army installation does not involve inherently dangerous activity giving rise to non-delegable duty doctrine under N.H. law); Moffitt v. U. S., 995 F.2d 232 (table), 1993 WL 195386 (9th Cir. 1993) (electrocution of employee of independent contractor in a cherry picker repairing telephone lines at Schofield Barracks not subject to non-delegable duty doctrine, since work not inherently dangerous); Richardson v. U.S., 775 F. Supp. 1372 (W.D. Ark. 1991) (tree being felled by contract employee falls and kills him--U.S. not liable distinguishes McMichael v. U.S., 856 F.2d 1026 (8th Cir. 1988 Ark.) and Aslakson v. U.S., 790 F.2d 688 (8th Cir. 1986)); Allen v. U.S., Civ. #81-101 (W.D. Ark. 1986) (removing pipe at coffer dam site is not inherently dangerous--distinguishes McMichael v. U.S., 751 F.2d 303 (8th Cir. 1985)); Moreschi v. U.S., Civ. No. 93-1370 (W.D. Pa., Nov. 28, 1995), aff'd without opinion, 96 F.3d 1433 (table)(3d Cir. 1996) (construction worker at lock site is impaled upon rebar—-U.S. not liable under peculiar risk doctrine). However, if *Restatement* would impose absolute liability, it is not actionable under FTCA.

Emelwon Inc. v. U.S., 391 F.2d 9 (5th Cir. 1968). Harmon v. U.S., 1998 WL 30708 (N.D. Ill.) operator of refueling track injured by jet blast is owed duty under both Restatement Sections 343 and 414.

(iv) Safety Inspections. Safety inspection can be imposed by self-imposed safety inspection. Dickerson v. Holloway, 685 F. Supp. 1555 (M.D. Fla. 1987), aff'd, 875 F.2d 1577 (11th Cir. 1989) (cradle-to-grave under CERCLA and State regulations regarding PCB waste disposal); Bowman v. U.S., 65 F.3d 856 (10th Cir. 1995), aff'g, 821 F. Supp. (D. Wyoming 1993)(construction contract employee who injured hand on table saw with no safety guard which did not meet contract standards). But see Cazales v. Lecon, Inc., Civ. # H-96-3659(S.D. Tex., 3 Oct. 1997) (subcontractor employee electocuted sues VA over safety supervision—held primary safety responsibility in prime contractor precluded suit); Roscoe v. U.S., Civ. # TH 92-49 C (N.D. Ind., 12 Oct. 1993) (incidental safety briefings and presence on job of U.S. representative does not create a duty under Indiana law). Bean Harison Corp. v. Tennessee Gas Pipeline Co., 1998 WL 113935 (E.D. La.) (COE liable for injuries caused by pipeline explosions from contract dredge as COE imposed mandatory safety controls on contractor). Wallace v. U.S., 991 F. Supp. 1285 (D.N.M. 1996) Contractor employee killed in gas-line explosion--claim based on U.S. failure to inspect, barred by 2680(a). Harmon v. U.S., 8 F. Supp. 2d 757 (N.D. Ill., 1998), where contract fuel driver is waived into area by T-line personnel to refuel plane whose engines are still running, U.S. is liable under Restatement Section 343.

(d) Dram Shop. Dram Shop action was unknown at common law. See, e.g., Corrigan v. U.S., 815 F.2d 954 (4th Cir. 1987) (no statutory or common law dram shop law in Virginia as basis for liability of Army enlisted club); Murray v. U.S., 382 F.2d 284 (9th Cir. 1967) (no California statute at time); Simmons v. U.S., 626 F.2d 985 (3d Cir. 1982) (no North Carolina statute or common law action); Starr v. U.S., 940 F. Supp. 916 (E.D. Va. 1996) (Navy enlisted man gets drunk at Navy mess and drives into accident scene off base--no liability under Virginia law, since no Virginia dram shop). Dram Shop duty arises from statute. Swift v. U.S., 866 F.2d 507 (1st Cir. 1989) (Massachusetts prohibition against serving alcohol to person who has been drunk within last six months applies to NCO Club); Gonzales v. U.S.,

589 F.2d 465 (9th Cir. 1979) (California) (however, no liability, since service member not obviously intoxicated); Hardow v. U.S., Civ. # C-82-4181-25602 (Calif. Business and Professional Code); Raley v. U.S., Civ. # 3:96CV-390-A (W.D. Ky., 28 Jan. 1998) (KRS 413.241 places liability on server of alcohol, not seeller—U.S. not liable where club patron served himself, then crashed into gate causing his death); Vance v. U.S., 355 F. Supp. 756 (D. Alaska 1973); Johnson v. U.S., 496 F. Supp. 597 (D. Mont. 1980) (held negligence *per se*). Cf. Watkins v. U.S., 589 F.2d 214 (5th Cir. 1979) (liability for prescribing Valium to on-leave service member who seriously injured plaintiffs in auto accident after ingesting Valium and vodka). But see Bauer v. U.S., 882 F. Supp. 517 (D.S.C. 1995), aff'd, 86 F.3d 1148 (table), 1996 WL 271445 (4th Cir. 1996) (U.S. is not liable for fatal collision caused by intoxicated Marine driving POV who obtained alcohol by using improperly birth-dated ID); Wells v. U.S., Civ. # W-90-CA-176 (W.D. Tex. 1991) (recently discharged soldier purchased whiskey at Class VI and provided it to underage soldiers who drove while drunk causing death--no U.S. liability). Of course, all requirements of a Dram Shop cause of action must be met, including causation. Skipper v. U.S., 1 F.3d 349 (5th Cir. 1993) (premeditated murder of girlfriend in NCO Club was superseding cause, even though murderer was over-served); Gallea v. U.S., 779 F.2d 1403 (9th Cir. 1986) (California Dram Shop statute not applicable to EM Club, since club not licensed by State). If the Dram Shop statute is a strict liability statute, there is no liability under FTCA. Smith v. U.S., 588 F.2d 1209 (8th Cir. 1978) (Minnesota statute ruled absolute liability--no liability under FTCA); Megge v. U.S., 344 F.2d 31 (6th Cir. 1965) (same holding re Michigan statute). But see Smith v. Pena, 621 F.2d 873 (7th Cir. 1980) (Illinois case)(court adds negligence requirement to absolute liability statute, but does not discuss duty). Additionally, even if all Dram Shop actions requirements are met, plaintiff may well be barred from bringing suit by Feres. Bozeman v. U.S., 780 F.2d 198 (2d Cir. 1985) (service members killed in POV accident after drinking at enlisted club--barred by Feres). McPherson v. U.S., __ F. Supp. __, 1998 WL 400467 (M.D. Ala.) (neither Alabama Dram Shop statute nor USAF regulation create liability in NCO club overserving case from which off-post collision results.

(e) Protection from Intoxicated Persons. Government responsibility to protect other people from intoxicated

persons. Other laws, besides Dram Shop laws, may well impose upon the government a duty to protect the public from intoxicated persons. Doggett v. U.S., 875 F.2d 684 (9th Cir. 1989) (base regulation requiring guards to prevent intoxicated drivers from leaving base creates duty to off-base motorist). But see Beatty v. U.S., 983 F.2d 908 (8th Cir. 1993) (permitting intoxicated airman to drive past gate guards and strike bicyclist on public highway creates no liability); Crider v. U.S., 885 F.2d 294 (5th Cir. 1989) (park rangers under no duty under Texas law to restrain intoxicated driver from driving); Louie v. U.S., 776 F.2d 819 (9th Cir. 1985) (DWI soldier turned over to MPs by civilian police, drives again and kills victim--no duty under Washington law).

(f) Social Host Liability. A recent trend in state court decisions is to impose liability upon social hosts who serve alcohol when a person is later injured because of the serving of alcohol. Gorden v. Alaska Pacific Bancorporation, 753 P.2d 721 (Alaska 1988) (host liability for permitting intoxicated person on premises who assaulted another guest); Mitseff v. Wheeler, 526 N.E.2d 798 (Ohio 1988) (social host served alcohol to a minor); Koback v. Crook, 366 N.W.2d 857 (Wis. 1985)(Wisconsin--service to a minor); Sutter v. Hutchings, 327 S.E.2d 716, (Ga. 1985) (Georgia--service to a minor); Kelly v. Gwinnell, 476 A.2d 1219 (N.J. 1984) (social host liability imposed); Linn v. Rand, 356 A.2d 15 (N.J. App. 1976) (service to a minor); Ashlock v. Norris, 475 N.E.2d 1167 (Ind. App. 1985)(Indiana--service to another bar patron); Clark v. Mincks, 364 N.W.2d 226 (Iowa 1985) (service to a guest whom the host knew would drive); McGuiggan v. New England Tel & Tel Co., 496 N.E.2d 141 (Mass. 1986); Longstreth v. Gensel, 377 N.W.2d 804 (Mich. 1985); Walker v. Key, 686 P.2d 973 (N.Mex. 1984). But see Konsler v. U.S., 288 F. Supp. 895 (N.D. Ill. 1968); Brock v. U.S., Civ. #88-3543-CV-S-4 (W.D. Mo. 1989) (no social host liability applies to Ft. Wood off-post Christmas party); Walker v. Children's Services, 751 SW.2d 717 (Tex. App. 1988) (no host liability to guest who injures himself); Burkhart v. Harrod, 755 P.2d 759 (Wash 1988) (no host liability regardless of whom guest injured); Rone v. H.R. Hospitality, Inc, 759 S.W.2d 548 (Ark 1988) (no "company" party liability); Hallett v. U.S. Dept. of Navy, 850 F. Supp. 874 (D. Nev. 1994) (Nevada has no social host liability--Navy's failure to control drinking at Tailhook Convention is not basis for liability). Holliman v. U.S., 22 F. Supp. 2d 1111

(D. Ariz. 1998), no duty to prevent servicemember from driving where he was noticeably drunk in on-base social setting.

(g) Attractive Nuisance. Duty to frequent trespasser or child trespasser (attractive nuisance). See, e.g., Epling v. U.S., 453 F.2d 327 (9th Cir. 1971) (abandoned road at air base not attractive nuisance). Where attractive nuisance doctrine applicable, research to ensure that it applies to type of nuisance in question. U.S. v. Bernhardt, 244 F.2d 154 (5th Cir. 1957) (Texas--mailbox); Parrott v. U.S., 181 F. Supp. 425 (S.D. Cal. 1960) (California--grenade). Even if there is a duty it may be limited. Landen v. U.S., Civ. #84-0678/9 (W.D. La. 1985) (duty to dud scavengers only to mark impact area). The attractive nuisance doctrine will not apply in many cases. Johnson v. U.S., 270 F.2d 488 (9th Cir. 1959) ,cert. denied, 362 U.S. 924 (1960) (child electrocuted climbing fence--Montana adheres to attractive nuisance doctrine, but U.S. not negligent); Jones v. U.S., 241 F.2d 26 (4th Cir. 1957) (no Maryland doctrine); Blair v. U.S., 433 F. Supp. 217 (D. Nev. 1977) (pool--no Nevada doctrine).

(h) Duty of Landlord to Tenant. A landlord may have duty to provide adequate security or prevent violent acts. Washington v. Resolution Trust Co., 68 F.3d 934 (5th Cir. 1995) (Under Texas law, where landlord maintains control of premises, duty exists to protect tenants from foreseeable violent criminal acts); Choy v. 1st Columbia Management Inc., 676 F. Supp. 28 (D. Mass. 1987) (where tenant assaulted must show entry was through door with faulty lock--duty to provide adequate security). However, a landlord may not have other types of duties to warn depending on the circumstances. See Brooks v. U.S., 712 F. Supp. 667 (N.D. Ill. 1989) (U.S. as landlord did not warn of lead paint hazard, since it had no knowledge of its existence); Parker Land and Cattle Co. Ins. v. U.S., 796 F. Supp. 477 (D. Wyo. 1992) (no duty to warn holder of grazing permit on federal land of danger of brucellosis in wild elk); Duff v. U.S., 829 F. Supp. 299 (D.N.D. 1992) (U.S. not responsible for injuries due to contractor generated varnish fumes to occupant of military housing). Nuridden v. U.S., Civ. #2 96-1203-12 (D.D.C., 16 Apr. 1998) Navy as landlord assumed duty to ensure water heater thermostat set at 120º through inspection, U.S. is liable for burns to 17-month-old child where temperature is at 170º.

(i) Duty to Report Child Abuse. A person may have a duty to report child abuse. Landeros v. Flood, 551 P.2d 389 (Cal. 1976) (duty of physician to report battered child syndrome). Contra Krikorian v. Barry, 242 Cal. Rptr. 312 (Cal. App. 1987); Rubinstein v. Baron, 529 A.2d 1061 (N.J. Super., Law Div. 1987). If there is a duty to report, immunity statute may protect person from suit, including defamation suit. Kempster v. Child Protective Services, 130 A.D.2d 623, 515 N.Y.S.2d 807 (App. Div. 1987); E.S. v. Seitz, 413 N.W.2d 670 (Wis. App. 1987). Caylor v. U.S., 32 F. Supp. 2d 1098 (N.D. Ill., 1999), Navy doctors fail to report child abuse by on-post baby sitter to public authorities, next month Victim B dies from beating -- U.S. liable under Illinois law for negligence as Victim B is beneficiary of state statute to protect human life.

(j) Public Duty Doctrine. Duty to public as a whole, but not to a specific individual. If the duty is a public duty, no cause of action exists. Pezzimenti v. U.S., 114 F.3d 1195 (table), 1997 WL 289400 (9th Cir 1997) (U.S. civilian security has no duty to intervene under public duty dictrine in altercation outside gate at Pearl Harbor Naval Station); Grange Insurance Association v. U.S., Civ. #C86-77E (W.D. Wash. 1989) (Department of Agriculture not liable for failing to warn of brucellosis); Sheridan v. U.S., 773 F. Supp. 786 (D. Md. 1991) (U.S. owed no duty to protect public from harm at the hands of drunk sailor shooting his private firearm); Kazanoff v. U.S., 753 F. Supp. 1056 (E.D.N.Y. 1990) (mail carrier who has key to locked apartment building inadvertently allows murderer to enter--no special relationship or duty); Kugel v. U.S., 947 F.2d 1504 (D.C. Cir. 1991) (leak in violation of FBI internal procedures does not constitute a cause of action based on public duty); Taylor v. Phelen, 799 F. Supp. 1094 (D. Kan. 1992) (failure to timely investigate and arrest criminal who had been previously reported falls under public duty doctrine-cites cases in support); King v. Bureau of Indian Affairs, 108 F.3d 338 (table), 1997 WL 75543 (9th Cir. 1997) (BIA policeman under no duty to arrest Crazy Bull based on his prior record--duty to general public, not to King); Cameron v. Janssen Bros. Nurseries Ltd., 7 F.3d 821 (9th Cir. 1993) (USDA independent contractor fails to check root stock after fumigation in violation of USDA rule--no claim based on public duty doctrine, since no statutory intent or reliance on monitoring); Stratmeyer v. U.S., 67 F.3d 1340 (7th Cir. 1995) (USDA

veterinarian owed duty to public, not individual, where misdiagnosis of brucellosis alleged); Wyler v. Korean Air Line Co. Ltd., 928 F.2d 1167 (D.C. Cir. 1991) (USAF tracking system does not create duty to warn); Shelton v. U.S., Civ. # 97-cv-84 (M.D. La., 17 Dec. 1997) (FBI investigated U.S. Marshal for child molestation, but charges not brought despite airtight case—Marshal resigned but continued molestation—U.S. has no duty to children molested). See also Schweiker v. Hansen, 450 U.S. 785 (1981); Jacobo v. U.S., 853 F.2d 640 (9th Cir. 1988). But see Florida Auto Auction of Orlando, Inc. v. U.S., 74 F.3d 498 (4th Cir. 1996) (statute requiring Customs Service to input vehicle titles prior to export does impose duty to auction house to preclude exportation based on bill of sale). However, if there is a special relationship between the defendant and the plaintiff, the public duty doctrine does not apply, but the discretionary function exclusion may. Merced v. City of New York, 856 F. Supp. 826 (S.D.N.Y. 1994) (failure of N.Y. police acting as DEA agent to furnish protection to assault victim is discretionary, even though special relationship existed). Sellers v. U.S., Civ. # CV 496-68 (S.D. Ga., 21 May 98) (Georgia statute immunizes Army doctor for negligently diagnosing chlamydia in child abuse case).

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

(l) Duty Arising From Leaving Key in Ignition. Many state courts have held that leaving a key in the ignition creates a duty. Richardson v. Carnegie Library Restaurant Inc., 167 N.M. 688, 763 P.2d 1153 (1988) (listing of cases holding such a duty exists in Cal., Conn., Del., D.C., Fla., Ill., Iowa, Md., Mass, Mich., Minn., Mo., N.J., N.Y., N.D., Okla., Ore., Pa., S.C., Tenn.). See also Tyndall v. U.S., 295 F. Supp. 448 (E.D.N.C. 1969).

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

(n) Effect of Exculpatory Release. Whether a person retains a duty after the plaintiff signs an exculpatory release is a question of state law. See, e.g., Columbia Gulf Transmission Co. v. U.S., 966 F. Supp. 1453 (S.D. Miss. 1997) (exculpatory release upheld where building of dikes increases channel flow and exposes natural gas lines); Loeb v. U.S. Dept. of Interior, 793 F. Supp. 131 (E.D.N.Y. 1992) (disclaimer in charter tour contract protects operator of tour in Grand Teton National Park); Schmidt v. U.S., Civ. # CIV-94-0045-T (W.D. Okla., 11 Sept. 1995) (exculpatory release from Fort Sill Riding Stable is not valid under Oklahoma law if claimant can prove fraud, willful injury, gross negligence or violation of law). Matters of Pacific Adventure Inc., 5 F. Supp. 2d 874 (D. Haw. 1998) (exculpatory release in scuba dive contract is invalid under federal law pertaining to transport passengers by vessel, 46 USC, App. 1830). Hinson v. U.S., Civ. # CV396-48 (S.D. Ga., 6 Aug. 1998), Georgia correctional officer signs release to attend training course at Fort McClellan-release not applicable to fall from fire escape at his on-post billets.

(o) High Speed Pursuit. Montez v. U.S., 37 F.3d 1347 (9th Cir. 1994); Mulillo v. U.S., Civ. # SACU 94-0006LM (S.D. Cal., 25 Feb. 1997) (Border Patrol engaged in chase strikes car after running light, killing three in car and injuring a pedestrian--U.S. held 25% liable); Hetzel v. U.S., 43 F.3d 1500 (D.C. Cir. 1995) (D.C. law requiring gross negligence is not applicable--federal police must use due care--cites Briscoe v. Arlington County, 738 F.2d 1352 (D.C. Cir. 1984), cert. denied, 469 U.S. 1159 (1985)); Price v. U.S., Civ. # A4-92-174 (D.N.D., Mar. 1, 1995) (19-year-old intoxicated driver is pursued over 10 miles of empty roads at 105 MPH at 1:00 a.m. while fleeing to avoid arrest--driver misses curve and dies--no liability under North Dakota law, since Bureau of Indian Affairs officer not grossly negligent). Russo v. U.S., __ F. Supp. 2d __, 1999 WL 98597 (E.D. Va.), Little Creek Marine Base desk sergeant tells both military and civilian police pursuing trespasser that "I have officer down" resulting in civilian police shooting trespasser -- U.S. liable because no officer was down.

(p) Duty in Medical Malpractice Cases. The medical defendant must have a duty to the plaintiff for the U.S. to be liable. See, e.g., Howes v. U.S., 887 F.2d 729 (6th Cir. 1989) (no physician patient relationship-no breach of confidentiality where psychiatrist blows

whistle on patient's airman spouse); Koltu v. U.S., 1996 WL 607098 (W.D.N.Y.) (no duty under N.Y. law to others unless psychiatric patient makes particularized threat--suit for murder of wife dismissed, but suit for patient's death continued); Polikoff v. U.S., 776 F. Supp. 1417 (S.D. Cal. 1991) (no duty to test for HIV factor in June 1986 in patient with hepatitis B). Hord v. U.S., 1999 WL 249061 (4th Cir. (S.C.)), doctor-patient relationship created where VA doctor agrees to perform colonoscopy at request of patient's civilian doctor despite patient never arranging appointment.

(2) Negligence. Negligent act or omission is required, which can arise from negligence *per se* or *res ipsa* among other legal causes. Cases finding no negligent act or omission by the defendant. Stuart v. U.S., 23 F.3d 1483 (9th Cir. 1994) (high-speed chase by Border Patrol resulting in death and injuries was not negligent--California statutes immunizing peace officers does not apply); Mendiola v. U.S., 994 F.2d 409 (7th Cir. 1993) (Army recruiter rear ends car which has just been struck by another car from opposing lane--ruled unavoidable accident); Dotson v. U.S., 1995 WL 871178 (E.D. Mich.) (failure to prevent slip on ice at Naval armory by failure to clear previous night's ice storm by 7:45 a.m. is not actionable under Michigan law); Walsh v. U.S., Civ. # CV-N-93-349-PHA (D. Nev., Aug. 14, 1995) (fall in post office reported one week later--photo shows insignificant tear in entrance mat not sufficient to be unreasonably dangerous); Denney v. U.S. Postal Service, 916 F. Supp. 1084 (D. Kan. 1996) (irregularity 1 to 2-inches deep, 8 to 10 inches long, and 3 to 4 inches at its widest point running along seam in sidewalk is a minor defect and not actionable); Vaughn v. U.S., 982 F. Supp. 489 (N.D. Ohio 1997) (U.S. not liable for fall on sidewalk where there is less than a 2 inch deviation); Heller v. U.S., 99 F.3d 1143 (table), 1996 WL 607138 (8th Cir. 1996) (while U.S. was aware of patch of ice at entrance to post office, it was too small to present an unreasonable risk of harm); Wood v. U.S., 106 F.3d 395 (table), 1997 WL 42711 (4th Cir. 1997) (slip and fall on wet pavement in entrance to U.S. Post Office while leaving during heavy rain--U.S. not liable); Nieves v. U.S., 980 F. Supp. 1295 (N.D. Ill. 1997) (U.S. not liable for fall at entrance to post office in water which accumulated from rainfall); Faircloth v. U.S., 837 F. Supp. 123 (E.D.N.C. 1993) (slip and fall on a wet floor on a rainy day in Post Office lobby not compensable, since there was adequate lighting); Walker v. U.S., Civ. # 89-3234-RDR (D. Kan., Sept. 19, 1994), aff'd, 48 F.3d

1233 (table), 1995 WL 87122 (10th Cir. 1995) (no negligence shown in $91 claim for lost or damaged ptoperty seized in a search of Federal prisoner's cell); Jones v. U.S., Civ. # 4:94-CV-140 (JRE) (M.D. Ga., 15 Apr. 1997) (U.S. prevails by using photogramatry expert in fatal crash into pole at Ft. Benning); Freeman v. U.S., 704 F.2d 154 (5th Cir. 1983) (failure to use mats on terrazzo floor on wet day not negligence); Spagnolia v. U.S., 598 F. Supp. 683 (W.D.N.Y. 1984) (same as Freeman); Palmer v. U.S., Civ. # 93-54 (E.D. Ky., 16 Aug. 1996) (release by DVA of violent mental patient to group home when DVA knew he would not remain due to long history--U.S. liable for murder of three family members of ex-wife). Whether an action or inaction is reasonable is judged by the standards prevailing at the time the act took place. Western Greenhouses v. U.S., 878 F. Supp. 916 (N.D. Tex. 1995) (dumping TCE at USAF base in early 70s was not negligent under standards at time).

(a) FTCA Excludes Absolute Liability. FTCA includes only liability for negligent acts and excludes absolute liability. Dalehite v. U.S., 346 U.S. 15 (1953); Free v. Bland, 369 U.S. 663 (1962); Laird v. Nelms, 406 U.S. 797 (1972); Simpson v. U.S., 454 F.2d 691 (6th Cir. 1972); McCutcheon v. U.S., 1996 WL 607083 (W.D.N.Y.) (N.Y. imposing non-delegable duty on landlord to provide proper ingress and egress is strict liability statute and not applicable to HUD housing); Geo. Byers Sons Inc. v. East Europe Import Export Inc., 463 F. Supp. 135 (D. Md. 1979); Moyer v. U.S., 302 F. Supp. 1235 (S.D. Fla. 1969); Coates v. U.S., 181 F.2d 816 (8th Cir. 1950). But see Smith v. Pena, 621 F.2d 873 (7th Cir. 1980) (adds negligence requirement to Dram Shop absolute liability statute and circumvents Dalehite).

(b) Negligence *per se*. Negligence *per se* can arise under State law from statutory violation or extreme wrongdoing. See, e.g., Griffin v. U.S., 500 F.2d 1059 (3d Cir. 1974) (substandard polio vaccine approved and released); Muhammad v. U.S., 366 F.2d 298 (9th Cir. 1966), cert. denied, 386 U.S. 959 (1967) (running stop sign); Stephens v. U.S., 472 F. Supp. 998 (C.D. Ill. 1979) (inadequate warning of submerged tree stumps contrary to regulation is negligence *per se*); Rudelson v. U.S., 431 F. Supp. 1101 (C.D. Cal. 1977) (violation of FAA regulations); Cronenberg v. U.S. et al., 123 F. Supp. 693 (E.D.N.C. 1954) (no warning flares for disabled vehicle at night); Worley v. U.S., 119 F. Supp. 719 (D. Or. 1952) (spring-gun); Cerri v. U.S., 80

F. Supp. 831 (N.D. Cal. 1948) (hitting bystander when shooting at trespasser); U.S. v. Praylou, 208 F.2d 291 (4th Cir. 1953), cert. denied, 347 U.S. 934 (1954) (operation of aircraft); Davenport v. U.S., 241 F. Supp. 792 (D.S.C. 1965) (running stop sign at direction of MP); Peck v. U.S., 470 F. Supp. 1003 (S.D.N.Y. 1979) (failure by FBI to prevent beating in Selma March)(proximate cause ignored); Beesley v. U.S., 364 F.2d 194 (10th Cir. 1966); Michael v. U.S., 338 F.2d 219 (6th Cir. 1964); U.S. v. Wells, 337 F.2d 615 (5th Cir. 1964). But see Coumou v. U.S., 107 F.3d 290 (5th Cir. 1997) (where Coast Guard turned vessel over to Haitian police when contraband was discovered, it was not negligence *per se* for failure to comply with federal extradition law or criminal statute, but claim could be based on failure to notify Haitian police that plaintiff was captain who cooperated in search); Moody v. U.S., 774 F.2d 150 (6th Cir. 1985) (FHA improperly inspected new house not negligence *per se* because of Federal statute requiring inspection); Evans v. U.S., 824 F. Supp. 93 (S.D. Miss. 1993) (postal patron falls through glass window at entrance to Post Office--safety glass requirement not applicable). However, the invocation of negligence *per se* is measured against state law, not local law. Seaberg v. U.S., 448 F.2d 391 (9th Cir. 1971) (city ordnance required full stop for ambulances, state code only required slowing down-not negligence *per se*).

(c) *Res Ipsa Loquitor.* *Res ipsa* is a rule of circumstantial evidence, which is rebuttable and requires exclusive control, incident would not have occurred in absence of negligence and no contributory negligence, if applicable. See, generally, cases cited in Jayson "*Handling Federal Tort Claims*," § 214.02(2). Usually arises in aircraft accidents, (Ashland v. Ling-Temco-Vought Inc., 711 F.2d 1431 (9th Cir. 1983); U.S. v. Johnson, 288 F.2d 40 (5th Cir. 1961)), medical malpractice, (Baker v. U.S., 226 F. Supp. 129 (S.D. Iowa 1964); Reed v. U.S., 579 F. Supp. 279 (E.D. La. 1984)), explosions, (Simpson v. U.S., 454 F.2d 691 (6th Cir. 1972)), defective premises, (Buchanan v. U.S., 305 F.2d 738 (8th Cir. 1962), motor vehicle accidents (Mills v. U.S., 297 F. Supp. 972 (D.D.C. 1969)), wall falls down at Navy installation, (Shell v. U.S., 530 F. Supp. 1271 (E.D.N.Y. 1982)). Cases where *res ipsa* not applicable. Barwick v. U.S., 923 F.2d 885 (D.C. Cir. 1991) (*res ipsa* applied in stalled elevator where no cause established); Creekmore v. U.S., 905 F.2d 1508 (11th Cir. 1990) (*res ipsa* cannot be imposed on

multiple tortfeasors in absence of joint responsibility--elevator drop in NASA Building); Johnston v. U.S., Civ. # SA-94-CA-0110 (W.D. Tex., July 31, 1997) (damage to phrenic nerve during operation at BAMC is not *res ipsa*); Lemke v. U.S., 557 F. Supp. 1205 (D.N.D. 1983) (not applied where vocal cord paralysis results from endarterectomy); Farmer v. U.S., Civ. #90-248-P (W.D. Okla. 1990) (injury to teeth during general anesthesia intubation is not *res ipsa*); Kahn v. U.S., 795 F. Supp. 473 (D.D.C. 1992) (*res ipsa* is not applicable where injured person stepped into elevator stopped 20 inches below floor surface); Shelton v. U.S., 94 F.3d 642 (table), 1996 WL 477262 (4th Cir. 1996) (Salmonella poisoning from prison foods, i.e., eggs and fried chicken, can not be based upon *res ipsa*, even if eggs and fowl are culprit 90% of time); Akiona v. U.S., 938 F.2d 158 (9th Cir. 1991) (*res ipsa* does not apply to grenade thrown in parking lot. Accord Reber v. U.S., 941 F.2d 975 (9th Cir. 1991) (re fishing vessel blown up in Navy bombing area); Padgett v. U.S., Civ. # 80-1966 (D. Kan., 28 Feb. 1985) (plaintiff injured at factory work place by grenade thrown by an unknown person must prove negligence because *res ipsa* not applicable). Johnston v. U.S., Civ. # 97-50686 (5th Cir., 17 Jan 1998) Phrenic nerve injury during three vessel CABG is not res ipsa but requires expert. Hinkle v. U.S., 1999 WL 239701 (S.D.N.Y.), no res ispa where tv set strikes patient being moved by nurses into bed.

(d) Negligence in Premises Cases. In order for a defendant to be negligent in a slip and fall case, the defendant must have actual or constructive knowledge of dangerous condition. See Mas v. U.S., 984 F.2d 527 (1st Cir. 1993) (re slip near checkout counter of commissary--actual or constructive knowledge of dangerous condition is required by U.S); Taylor v. U.S., 121 F.3d 86 (2nd Cir. 1997), aff'g, 946 F. Supp. 314 (S.D.N.Y. 1996) (where door slammed shut on child's finger due to broken door closer, U.S. must be on actual notice for liability to attach); Wood v. U.S., 106 F.3d 395 (table), 1997 WL 42711 (4th Cir. 1997) (fall on wet floor while leaving post office during rainstorm—plaintiff failed to show actual or constructive knowledge of condition). Pytlewski v. U.S., 991 F. Supp. 1043 (N.D. Ill. 1998) No duty to remove water from Post Office entrance on a rainy day due to Illinois national accumulation rule. Bergeron v. U.S., Civ. # 5:97-CV-102-3 (WDO) (M.D. Ga., 16 Oct. 98), 13-year-old who severed ring finger tip by closing

door is negligent as striker plate was not negligently installed. Little v. U.S., 1999 U.S. App. LEXIS 12083 (4th Cir 11 June 99) plaintiff is injured by concrete bench giving way at NRC outdoor cafe-US not laible as (1) Little knew bench at defection or (2) US had no knowledge of defect. Taylor v. U.S., 1999 U.S. LEXIS 10849 (N.D.N.Y., 14 July 1999), proof that U.S. had notice of icy sidewalk outside U.S. Post Office is essential in slip-and-fall case. Halek v. U.S., 178 F. Supp. 481 (7th Cir. 1999), mesh cage partially blocking access to where elevator cables met pulley was not an open and obvious hazard, thereby U.S. is liable on basis of premises liability where mechanic reached inside cage to retrieve bolt. Hinson v. U.S., Civ. # CV396-48 (S.D. Ga., 6 Aug. 1998), U.S. not liable for fall from fire escape in dark under Alabama "step in the dark" rule.

(e) Negligence in Medical Malpractice Cases Including Negligent Referral. The defendant acts or omissions must constitute negligence, i.e., falling below the standard of care, with the standard of care being decided on a local level and by the type of facility. Goodman v. U.S., 2 F.3d 291 (8th Cir. 1993) (local, not national, standard applicable in medical malpractice involving Indian Health Services hospital in South Dakota); Simmons v. U.S., Civ. # 5:96-CV-258-HI (E.D.N.C., 14 Jan. 1998) (false positive diagnosis of Chlamydia leads to testing of parents—held for U.S. as family clinic not required to run more sophisticated test for presence of sexually transmitted diseases). The standard of care is also the standard of care applicable at the time of the negligent act. Wilson v. U.S., Civ. # 89-00737 ACK (D. Haw., 11 June 1992) (in early 1980's, use of sigmoidoscope was not standard of care relative to colon cancer). Cases holding negligence. Pineda v. U.S., 42 F.3d 1401 (table), 1994 WL 684542 (9th Cir. 1994) (circuit reverses District Court holding that nurses promptly responded to cardiac crisis in newborn); MacDonald v. U.S., 853 F. Supp. 1430 (M.D. Ga. 1994) (failure to treat hypercholestrema with timely thrombolytic therapy caused MI--civilian hospital received patient too late); Bischoff v. U.S., Civ. # CIV-94-1456-W (W.D. Okla., Sept. 29, 1995) (examination by physician's assistant with referral to physician does not meet standard of care and is cause of child's death); Warden v. U.S., 861 F. Supp. 400 (E.D.N.C. 1994) (res ipsa loquitor applicable to failure to timely diagnose and treat ruptured disc); Villaflor v. U.S., Civ. # 89-00911 ACK (D. Haw., 20

Apr. 1993) (failure to perform spinal tap on 16 month old child leads to $844,394 judgment in H flu meningitis case); O'Connor v. U.S., Civ. # Cv-91-4009-SMI(Sx) (C.D. Cal., 27 Jan. 1993) (uneven circumcision in 3 year old results in judgment of $15,000 for constriction when child reaches age 16); Doe v. U.S., 805 F. Supp. 1513 (D. Haw. 1992) (21 out of 22 donors tested negative for HIV positive is not basis for dismissal of suit); Garcia v. U.S., 697 F. Supp. 1570 (D. Colo. 1988) (U.S. held liable for nurses failure to place "stat" call for physician notwithstanding plaintiff's extreme condition resulting in plaintiff's serious neurological injuries); Lovejoy v. U.S., Civ. # 89-0039-L(CS) (W.D. Ky., 12 April 1991) ($ 774,597 award after 15% reduction for comparative negligence where Army physician failed to find cancerous mass previously found by 3 other physicians and then relied on contract radiologist's negative reading of suspicious x-ray without viewing film himself); Stevenson v. U.S., Civ. # 84-2021-S (D. Kan. 1985) (court awards $500,000 for complications arising from Prednisone therapy utilized in treating asthmatic where Army utilized less favored therapy without determining whether patient would respond to favored treatment regime and without adequate medical records on which to base decision); Wieder v. U.S., Civ. # 183-76, 184-130 (S.D. Ga., 19 Sept. 1985) (court found Army psychiatrist negligent in giving large prescription of amphetamines to psychiatric patient known to be suicidal and who had attempted suicide in the past); King v. U.S., Civ. # 80-2009 (W.D. La., 3 Aug. 1983) (planned c-section resulted in delivery 4-5 weeks early due to miscalculation of dates). Cases holding no negligence. Cooper v. U.S., 903 F. Supp. 953 (D.S.C. 1995) (Aleveolar nerve damage following tooth extraction is risk of procedure--no written consent required); Simmons v. U.S., 841 F. Supp. 748 (W.D. La. 1993) (abscess which formed at IV site is risk of procedure); Polozie v. U.S., 835 F. Supp. 68 (D. Conn. 1993) (subarachnoid hemorrhage caused by Coumadin was properly monitored); Valencia v. U.S., 819 F. Supp. 1446 (D. Ariz. 1993) (expert testimony fails to establish cause of pneumonia death fell below standard of care); Meehan v. U.S., Civ. # EP-90-CA-112-13 (W.D. Tex. 1991) (phrenic nerve damage possibly related to use of coolant during open heart surgery--surgeon met standard of care); Shaffer v. U.S., 769 F. Supp. 310 (E.D. Mo. 1991) (*res ipsa* not applicable where urine leak occurs several days after kidney transplant); Maddox v. U.S., 770 F. Supp. 320 (W.D. La. 1991)

(complaint of neck pain not sufficient basis for liability for stroke related death where physician made thorough neurological exam, even though not recorded); East v. U.S., Civ. # B-87-3092 (D. Md. 1990) (failure to perform thyroid function test not violative of standards of care); Doe v. Cutter Biological, Civ. # 87-0232 (D. Haw. 1989) (AIDS acquired from transfusion prior to 1984 at TAMC--no liability based on Kozup v. Georgetown University, 663 F. Supp. 1048 (D.D.C. 1987), aff'd in relevant part, 851 F.2d 437 (D.C. Cir. 1988)); Lamping v. U.S., Civ. #85-CV-10423-BC (E.D. Mich. 1987) (failure to diagnose Teflon dressing as source of bleeding--held for U.S); Clay v. U.S., Civ. # H-77-483 (S.D. Tex., 20 Mar. 1979) (Army doctor not negligent in prescribing Predisone therapy for patient suspected of having chronic active hepatitis where evidence supported that diagnosis, even though diagnosis was somewhat uncertain). An interesting decision held that if the claimant could show on remand that there was a negligent referral, the United States could be held liable for the negligence of a civilian hospital and physician. The referral (so called) was under CHAMPUS and did not constitute a referral at all. Rise v. U.S., 630 F.2d 1068 (5th Cir. 1980). Note however, Army hospital commanders can transfer patients to civilian hospitals for care paid for out of their operating budget. Gardner v. U.S. Ireland Army Hospital, Civ. # 3:97 CV-571H (W.D. Ky., 19 April 1999), in failure to diagnose cancer, expert opinion that earlier symptoms could have been related to tumor and may have resulted in a different outcome does not constitute negligence.

(f) Comparative Negligence. Currently, a plaintiff's negligence will not totally bar recovery, especially if it is less than or equal to 50% of the injury's cause, but will reduce it. See, e.g., Soto v. U.S., 11 F.3d 15 (1st Cir. 1993) (U.S. is 10 percent negligent, since U.S. driver failed to brake when plaintiff was running stop sign--recovery was $250,000 for injured plaintiff); Allstate Insurance Co. v. U.S., 973 F. Supp. 759 (M.D. Tenn. 1997) (speeding plaintiff is more than 50% negligent when he strikes left turning USPS vehicle-—no recovery); Estate of Daniel Gonzales v. U.S., 1997 WL 214865 (E.D. Pa.) (14 year old decedent on motorbike comes out of one-way street and turns in front of USPS trailer on 4 lane, 2 way street--U.S. held 60% liable--judgment of $510,000); Cooper v. U.S., 897 F. Supp. 306 (E.D. Tex. 1995) (plaintiff northbound turned left; postal driver southbound turned right--

U.S. 66 2/3% liable as postal driver had yield sign); In re Greenwood Air Crash, 924 F. Supp. 1518 (S.D. Ind. 1995) (mid-air collision of two aircraft--liability proportioned as follows: 70% to plane which violated right-of-way, 25% to U.S. aircraft controller for failure to warn of plane's location); Torres v. U.S., 953 F. Supp. 1019 (N.D. Ill. 1997) (award of $40,000 to postal patron who tripped on nail protruding less than 3/16 inch out of staircase--reduced to $30,000 due to plaintiff's negligence); Gibbs v. U.S., 886 F. Supp. 239 (N.D.N.Y. 1995) (postal truck entering alley without stopping is struck in the right rear by bicyclist on sidewalk--view of both is blocked by parked truck--U.S. is 80% liable); Soto v. U.S., 11 F.3d 15 (1st Cir. 1993) (U.S. is 10 percent negligent as U.S. driver failed to brake as plaintiff was running stop sign--recovery was $250,000 for injured plaintiff); Jackson v. U.S., 933 F. Supp. 273 (D. Mass. 1997) (experienced pilot who flies into icing condition known to him exceeds that of air traffic controller who did relay other icing reports—U.S. not liable under West Virginia law); Baldwin v. U.S., 929 F. Supp. 1270 (E.D. Mo. 1996) (plaintiff stopped suddenly in merge lane and was rear ended by COE vehicle--U.S. 90% liable); Yeary v. U.S., 754 F. Supp. 546 (E.D. Mich. 1991) (pedestrian crossing wide street intersection where there were no crossing lines held 40% negligent when she walked into postal vehicle she did not observe); Richardson v. U.S., 835 F. Supp. 1236 (E.D. Wash. 1993) (drunken driver who had right-of-way collides with second vehicle of 19 to 25 vehicle convoy--awarded 50% of his damages); Locco v. U.S., 1993 WL 97256 (S.D.N.Y.) (fall due to catching heel in expansion joint in West Point Chapel steps--50% recovery); DeVeau v. U.S., 833 F. Supp. 139 (N.D.N.Y. 1993) (constant patron slips on vinyl between two rugs at entrance of post office on rainy day--U.S. 85 percent liable); Loy v. U.S., Civ. # S-93-1178-DFL (E.D. Cal., 2 Sept. 1994) (driver of forklift and purchaser assisting in unloading are equally liable for injury caused by teetering box); Phillips v. U.S., 1996 WL 407237 (N.D. Miss.) (truck driver slips debris while leaving lunchroom--plaintiff's negligence reduces award); Mittiga v. U.S., 945 F. Supp 476 (N.D.N.Y. 1996) (U.S. vehicle collides with pedestrian that is crossing the street in a commercial area in middle of the block--neither driver nor pedestrian are paying attention--U.S. 60% liable and pedestrian 40%). Jackson v. U.S., 156 F.3d 230 (9th Cir. 1998), pilot's negligence flying single engine light plane in area

subject to icing conditions exceeds that of FAA comptroller who failed to warn pilot of specific icing conditions. Duffy v. U.S., 1999 U.S. Dist. LEXIS 7590 (S.D. NY 19 May 99) Postal patron trips over 1.7 inch rise in sidewalk around rounding sharp corner breaks - judgement $125,000 minus 33 percent. Masek v. U.S., 1999 U.S. Dist. LEXIS 10690 (N.D. Ill, 1 July 1999), in intersection collision plaintiff's damages reduced by 20 percent due to his negligence, U.S. recovers nothing as its negligence exceeds 50 percent. Halek v. U.S., __ F.3d __, 1999 WL 312332 (7th Cir., Ill), upholds attribution of 20 percent negligence to plaintiff, an electrician who reaches into a cage designed to preclude catching fingers between pulley and cable while elevator he was repairing was moving. U.S. moved for dismissal on grounds that plaintiff's negligence exceeded that of U.S.

(g) Assumption of Risk. If plaintiff knowingly assumes the risk of a particular danger, his/her recovery will be barred. Boyson v. U.S., 950 F. Supp. 110 (E.D. Pa. 1996) (trip on curb in Philadelphia's National Historic Area caused by pedestrian's failure to watch step); Washington v. U.S. Dept. of HUD, 1997 WL 21389 (W.D. Tex.) (where plaintiff was aware of criminal conditions at HUD housing project and entered assailant's apartment voluntarily, HUD's failure to correct conditions is not the proximate cause of the rape); Colihan v. U.S. Postal Service, 1997 WL 141867 (E.D. Pa.) (fall on sidewalk on which path had been cleared—1/4" slush remaining in other areas--U.S. not liable); Roberson v. U.S., Civ. # 92-00470DAE (D. Haw., Aug. 23, 1993) (claim for slip and fall on wet floor at entrance to Post Office denied despite no mat being present, since area well lighted); Barrett v. U.S., Civ. # 2:94-CV-100-WCO (N.D. Ga., Aug. 28, 1995) (claimant fell going down poorly lit stairs she had ascended several minutes before--no U.S. liability); Seidmon v. U.S., 1996 WL 421905 (E.D. Pa.) (slip and fall while leaving post office even though patron should have seen floor mopping and wet floor sign upon entry--U.S. not liable). But see Verge v. U.S., 965 F. Supp. 112 (D. Mass. 1996) (summary judgment refused even though plaintiff who fell on post office stairs had foreknowledge of BB size gravel always present on stairs). Green v. U.S., 991 F. Supp. 15 (D.D.C. 1998) Plaintiff walking on left side of road sidesteps to right to avoid traffic into path of oncoming motorcycle - assumption of risk applicable as well as contributory negligence bar under D.C. law. Sikes v. U.S., Civ.

#197-196 (S.D. Ga., 14 Jan. 99), plaintiff assumes risk of fall when he fails to inspect sole of rented bowling shoes which were issued with sticky material on bottom.

(3) Proximate Cause Necessary.

(a) Proximate Cause Required. Fact of negligence does not mean there is proximate cause. Cases finding no proximate cause. Magee v. U.S., 121 F.3d 1 (1st Cir. 1997) (plaintiff failed to show how VA's allegedly negligent treatment of mental patient caused mental patient to rear-end plaintiff's autombile); Anderson v. U.S., 82 F.3d 417 (table), 1996 WL 185762 (6th Cir. 1996) (slip on water in post office customer service area near entrance—judgment for U.S.); Essex v. U.S., 123 F.3d 1060 (table), 1997 WL 560014 (4th Cir. 1997) (fall in post office as patron stepped off mat on drizzly day—no causation); Fairchild v. U.S., 1996 WL 197692 (N.D. Ill.) (failure by park rangers to identify heat stroke earlier was not negligent--treatment for heat exhaustion was proper); Cosenza v. U.S., Civ. # CV-930450 (VVP) (E.D.N.Y., July 30, 1997) (no recovery for aggravation of preexisting back and knee injuries allegedly due to rearender by car driven by FBI agent); Remo v. U.S. F.A.A., 852 F. Supp. 356 (E.D. Pa. 1994) (no proximate cause where FAA comptroller failed to control movements of two small aircraft); Budden v. U.S., 15 F.3d 1444 (8th Cir. 1994) (improper weather briefing before take off is remote, not proximate cause, where pilot continues course after encountering difficult weather); Corriveau v. U.S., 832 F. Supp. 19 (D. Mass. 1993) (death following second accident is not related to accident with postal vehicle about 2 months previously); Martin v. U.S., 934 F. Supp. 159 (E.D. Pa. 1996) (residents of village abutting Navy facility fail to prove TCE contamination emanated from Navy facility); McGrath v. U.S., Civ. # 96-78-M (D.N.H., 6 Mar. 1997) (Failure of FAA to require that all jumpers be listed on permit did not cause midair collision between plane and parachutist); Lawson v. U.S., 1996 WL 875077 (N.D. Ohio) (method of operation of flashing light and foghorn on breakwater did not cause collision with breakwater); Ayala v. U.S., 49 F.3d 607 (10th Cir. 1995), aff'g, 846 F. Supp 1431 (D. Colo. 1993) (incorrect technical advice by U.S. does not create liability for mine explosion, since proximate cause was intervening negligence of suppliers and miners); Phillips v. U.S., Civ. # 3:95cv773 (E.D. Va., May 14, 1996) (drunk driver speeding with no headlights hits 2.5-ton GOV with loaded trailer as GOV crosses highway

in front of him--U.S. not liable); Garza v. U.S., 809 F.2d 1170 (5th Cir. 1987) (airman stole dud which injured 13-year-old who found it--not foreseeable or actionable--distinguishes Williams v. U.S., 352 F.2d 477 (5th Cir. 1965) (where soldier was issued ordnance which he neglected to return); Estate of Largent v. U.S., 910 F.2d 497 (8th Cir. 1990) (pilot taking off in fully loaded plane without de-icing equipment on snowy morning caused crash); Castro v. U.S., Civ. # 92-1525 (DRD)(D.P.R., Nov. 29, 1995) (plaintiff crosses two lanes of traffic to enter flow of congested traffic in front of oncoming emergency vehicle--plaintiff is cause of accident); Goodman v. U.S., 916 F. Supp. 362 (S.D.N.Y. 1996) (trip and fall over crowd control barrier at national monument--no proximate cause, since not demonstrated that U.S. was aware of improper placement of barrier); Hunter v. U.S., 1997 WL 163513 (M.D. Fla.) (crash of experimental aircraft caused by adding fuel tanks and entering into wake turbulence after being warned by controller, and not by acts of controller); Dacrepin v. U.S., 964 F. Supp. 659 (E.D.N.Y. 1997) (failure of proof that crack on basketball court was significant enough to cause fall of player); Washington v. U.S. Dept. of HUD, 1997 WL 21389 (W.D. Tex.) (where plaintiff was aware of criminal conditions at HUD housing project and entered assailant’s apartment voluntarily, HUD’s failure to correct conditions is not the proximate cause of the rape); Boyson v. U.S., 950 F. Supp. 110 (E.D. Pa. 1996) (trip on curb in Philadelphia’s National Historic Area caused by pedestrian’s failure to watch step); Beckford v. U.S., 950 F. Supp. 4 (D.D.C. 1977) (stretching 3.5 inch brown unreflectorized wire between two posts caused bicyclist’s fall and not failure to have light on bike); Stuart v. U.S. Government, 797 F. Supp. 800 (C.D. Cal. 1992) (smuggler hotly pursued by Border Patrol collides with third-party--no proximate cause, since Calif. pursuit law was being followed); Gross v. U.S., Civ. # 93-4152 (D.S.D., Oct. 14, 1994) (diabetic prisoner on way to sick call unassisted slips on cleared sidewalk during blizzard--no liability); Pence v. U.S., Civ. # C93-960WD (W.D. Wash., Nov. 3, 1994) (convicted step-mother solely liable for immersion burn on 5 year old where she sets water temperature at 140 degrees in Government quarters); Kelly v. U.S., 805 F. Supp. 14 (E.D. La. 1992) (absence of guardrail and nonskid material did not cause fall on stairs); Worthington v. U.S., 807 F. Supp. 1544 (S.D. Ga. 1992) (air controller's weather report did not cause missed landing approach crash); Burger v. U.S., 748 F. Supp.

1265 (S.D. Ohio 1990) (failure to follow rules in releasing, relative to parole violator, did not cause murder during bank robbery); Fortney v. U.S., 912 F.2d 722 (4th Cir. 1990) (failure to wet down nitrocellulose was cause of explosion in GOCO plant and a contractor responsibility); Craine v. U.S., 722 F.2d 1523 (11th Cir. 1984) (boat rented to service member who then became intoxicated and went over dam was sole proximate cause of drowning); Red Lake Band of Chippewa Indians v. U.S., 936 F.2d 1320 (D.C. Cir. 1991) (U.S. held not liable because injury resulting from riot would have occured even if officers had not been pulled out) Muller v. U.S. Postal Service, 811 F. Supp. 325 (N.D. Ohio. 1992) (overlapping of carpet mat in doorway of U.S. Post Office did not cause fall); Brown v. U.S., 861 F. Supp. 539 (W.D. La. 1994) (no liability for failure to warn or correct danger of exposed tree root in public sidewalk abutting U.S. Post Office); Barta v. U.S., 898 F. Supp. 439 (W.D. Tex. 1995) (nondependent mother is licensee while attending chapel on closed base--no proximate cause as she fell down chapel stairs due to poor eyesight, not inadequate lighting); Sadowski v. U.S., 905 F. Supp. 238 (E.D. Pa. 1995) (no U.S. negligence shown in claim for assault by one VA patient of another during softball game); Handley v. U.S., 889 F. Supp. 1480 (M.D. Ala. 1995) (bingo player falls on shiny unwaxed floor at NCO Club-no foreign substance on floor--judgment for U.S.); Harden v. U.S., Civ. # CV595-03 (S.D. Ga., 8 Aug. 1996) (postal patron who reentered post office after being escorted out and is injured by mail cart caused her own injuries); Rambert v. U.S., 1996 WL 583392 (S.D.N.Y.) (slip and fall in lobby of post office on allegedly wet terrazzo floor--recovery denied due to a lack of credible evidence); Thurston v. U.S., 99 F.3d 1150 (table), 1996 WL 529929 (10th Cir. 1996) (failure of pilot to inform air controller that he was not in VFR conditions before he crashed into mountain--no duty to inform re weather); Harper v. U.S., 949 F. Supp. 130 (E.D.N.Y.1996) (detailed decision finding brain damage occurred ante-partum, not post-partum); Carlston v. U.S., 671 F. Supp. 1324 (D.N.M. 1987) Warren v. U.S., 840 F. Supp. 161 (D.D.C. 1993) (claim denied as injured party told FMT he fell from log. not step stairs, as contended at trial); Friedman v. U.S., 677 F. Supp. 1160 (N.D. Ga. 1987) (failure of FBI to warn of threat was not proximate cause); Dellinger v. U.S., 676 F. Supp. 567 (D. Del. 1987) (failure to salt Post Office parking lot not proximate cause); Hossic v. U.S., 682 F. Supp. 23 (M.D. Pa. 1987) (shower room assault not

proximately caused by improper guard/prisoner ratio); Hoffman v. U.S., 862 F. Supp. 1431 (E.D.N.C. 1994) (no liability for death of child who left incorrect door of bookmobile parked on-post and darted in front of passing POV); Chernock v. U.S., 718 F. Supp. 900 (N.D. Fla. 1989) (exposed to radar while replacing fence near early warning radar site--injuries not proven even though submitted medical proof); Zoppi v. U.S., 396 F. Supp. 416 (N.D. Ohio 1975) (incorrect minimum altitude instructions by controller--no liability for crash); Duncan v. U.S., 328 F. Supp. 521 (D. Neb. 1971) (closet door not installed per manufacturer's instruction--not liable for eye injury to 8-year-old); Swanner v. U.S., 275 F. Supp. 1007 (M.D. Ala. 1967) (failure to protect informer--not liable); Castillo v. U.S., 552 F.2d 1385 (10th Cir. 1977) (fail to watch mental patient who eloped and was run over by train--no liability); Dickens v. U.S., 545 F.2d 886 (5th Cir. 1977) (failure to warn of air turbulence at landing did not cause crash); In re Air Crash Disaster at New Orleans, Louisiana on 20 March 1969, 544 F.2d 270 (6th Cir. 1976) (negligent controller instruction did not cause crash); Quinn v. U.S., 439 F.2d 335 (8th Cir. 1971) (POV with defective brakes injures sleeping camper-U.S. failure to warn of sharp curve--not cause); Tyndall v. U.S., 430 F.2d 1180 (4th Cir. 1970) (leaving keys in vehicle stolen by drunk not cause of accident); Reynolds v. U.S., 805 F. Supp. 336 (W.D.N.C. 1992) (violations of wide load statute by National Guard truck did not cause sideswipe accident); Kirby v. U.S., Civ. # 85-V -1137-S (N.D. Ala, 18 Sept. 1986) (neither side met burden of proof in head-on collision precluding recovery by either side); Latham v. U.S., Civ. # 84-23-CIV-3 (E.D.N.C., 17 Jan. 1986) (civilian policeman in Fort Bragg course fails to prove herniated disc was caused by kick in back); Johnston v. U.S., 597 F. Supp. 374 (D. Kan. 1984) (selling radioactive aircraft dials since U.S. surplus); Tucker v. U.S., 385 F. Supp. 717 (D.S.C. 1974) (negligent dispatching of vehicle not cause of crash); Eastern Brick & Tile Co. v. U.S., 281 F. Supp. 216 (D.S.C. 1968) (trying to beat train caused crash--not failure to ring bell); Insurance Co. of North America v. U.S., 527 F. Supp. 962 (E.D. Ark. 1981) (superseding cause by pilot in air crash); Liuzzo v. U.S., 565 F. Supp. 640 (E.D. Mich. 1983) (FBI permitting informant to accompany KKK not cause of assault resulting in his death). But see Bergman v. U.S., 565 F. Supp. 1353 (W.D. Mich. 1983). Cases finding proximate cause. Watkins, 589 F.2d 214 (5th Cir. 1979) (Valium ingestion causing auto

accident); Pierce v. U.S., 718 F.2d 825 (6th Cir. 1983) (fail to warn of changing weather did cause crash); Hylin v. U.S., 715 F.2d 1206 (7th Cir. 1983) (failure of U.S. inspectors to require handrail which would divert worker from dangerous electrical installation in mine); Lewis v. U.S., 702 F. Supp. 231 (E.D. Mo. 1988) (U.S. caused fall by hosing road in freezing weather after visitor entered premises); Lipnick v. U.S., 717 F. Supp. 902 (D.D.C. 1989) (struck head on poorly maintained door while attempting to open--U.S. liable); Carter v. U.S., Civ. # EP-92-CA-057-B (W.D. Tex. 1992) (fall due to expansion joint in curb outside commissary is basis for liability); Bunch v. U.S., 993 F.2d 881 (table), 1993 WL 164717 (9th Cir. 1993) (U.S. held liable for causing accident when motorist crashed avoiding low flying aircraft--identification of aircraft held sufficient); Cartin v. U.S., 853 F. Supp. 63 (N.D.N.Y. 1994) (liability for failure to properly clear sidewalk of ice and snow on sidewalk abutting U.S. Post Office); Wilson v. U.S., 874 F. Supp. 128 (M.D. La. 1995) (postal truck traveling on wide shoulder struck and killed 7-year-old bicyclist who suddenly appeared from behind dense hedge--U.S. is liable); Colon v. U.S., 887 F. Supp. 57 (D.P.R. 1995) (U.S. liable where VA food handler drops food, but fails to clean it up resulting in patient falling). Sometimes causatiion must be proven through an expert. Vance by and Through Hammons v. U.S., 90 F.3d 1145, (6th Cir. 1996) (while failure to furnish expert medical opinion is sufficient basis for summary judgment, denial of motion to vacate where plaintiff furnished expert opinion was improper). Scott v. U.S., 13 F. Supp. 1226 (M.D. Ala. 1998), overflights of C-130s and helicopters did not cause damage to exotic birds and their eggs. Goldstein v. U.S., __ F. Supp. __, 1998 WL 341023 (E.D.N.Y.)(phantom vehicle causes two Army 5-ton tractor trailers to jackknife -- sudden emergency doctrine discarded by court. Goldstein v. U.S., 9 F. Supp. 2d 175 (S.D.N.Y. 1998), sudden emergency doctrine not applicable where vehicle entering freeway from ramp "cuts off" Army truck as entering from ramp is not a completely unexpected circumstance. Management Activities Inc. v. U.S., __ F. Supp. 2d __, 1998WL658598 (C.D. Calif.), FAA failure to provide wake turbulence is not proximate cause where pilot should have known hazards and procedures to avoid wake turbulence. Elrod v. U.S., 1999 U.S. Dist. LEXIS 7554 (N.D. Cal 19 May 99) USPS liable for failure of brakes on over-the-road cart which struck contract employee. Russo v. U.S., 37 F. Supp. 2d 450 (E.D. Va.

1999), motorist fleeing military police after traffic incident on Navy base is shot by civilian police due to Navy base radio call "I have officer down" establishes proximate cause.

(b) Medical Malpractice Proximate Cause. Medical malpractice cases have given rise to some strained interpretations of proximate cause. For general discussion of this subject, see Loss of Chance in Medical Malpractice Actions, Elliston and Powell; for the Defense, Aug. 1991; Hamil v. Bashline, 364 A.2d 1366 (Pa. 1976) and cases cited therein. See also Hamil v. Bashline, 392 A.2d 1280 (Pa. 1978). See also Nebel v. Avichal Enterprises Inc., 704 F. Supp. 570 (D.N.J. 1989) (New Jersey has substantial factor rule). To determine proximate cause, investigate whether close scrutiny or care by a qualified specialist would have changed result in cases in which death or injury may have resulted in any event, e.g., lung cancer, breast cancer, heart attack, cerebral aneurysm, retrolental fibroplasia in newborn requiring supplemental oxygen. For older cases concerning proximate cause, see McLean v. U.S., 613 F.2d 603 (5th Cir. 1980); Arrendale v. U.S., 469 F. Supp. 883 (N.D. Tex. 1979); Edwards v. U.S., 497 F. Supp. 379 (M.D. Ala. 1980). Moon v. U.S., 512 F. Supp. 140 (D. Nev. 1981) (deceased mental patient); Lima v. U.S., 508 F. Supp. 897 (D. Colo. 1981) (Swine Flu immunization program); Garner v. U.S., CN #78-951-9 (D.S.C. 1980) (birth control pills shorten life expectancy); Speer v. U.S., 512 F. Supp. 670 (N.D. Tex. 1981) (suicide by overdose of psychotic drug). Warner v. U.S., 522 F. Supp. 87 (M.D. Fla. 1981) (swine flu); Tabaczynski v. U.S., 529 F. Supp. 156 (E.D. Mich. 1981) (same); May v. U.S., 572 F. Supp. 725 (W.D. Mo. 1983) (same); Hasler v. U.S., 718 F.2d 202 (6th Cir. 1983) (same); Peterson v. U.S., 569 F. Supp. 676 (D. Idaho 1983)(same); Kress v. U.S., 587 F. Supp. 397 (E.D. Pa. 1984)(same); Carter v. U.S., 593 F. Supp. 505 (W.D. Mich. 1984)(same).

(i) Lost Chance. Some states have adopted the “lost chance” theory of causation. See, e.g., Hicks v. U.S., 368 F.2d 626 (4th Cir. 1966)(applying Virginia law); McBride v. U.S., 462 F.2d 72 (9th Cir. 1972) (Hawaii); Herskovits v. Group Health Cooperative of Puget Sound, 664 P.2d 474 (Wash. 1983) (Washington); Thompson v. Sun City Community Hospital Inc., 688 P.2d 605 (Ariz. 1984)(Arizona); Jeanes v. Milner, 428 F.2d 598 (8th Cir. 1970)(Arkansas); Thomas v. Corso, 288 A.2d 379 (Md. 1972) (Maryland);

Kallenberg v. Beth Israel Hospital, 357 N.Y.S.2d 508 (1974) (New York); Hamil v. Bashline, 364 A.2d 1366 (Pa. 1976), later proceedings, 392 A.2d 1280 (Pa. 1978) (Pennsylvania); Thornton v. CAMC, 305 S.E.2d 316 (W.Va. 1983)(West Virginia). The status of lost chance in Massachusetts is questionable, Glicklich v. Spievack, 452 N.E.2d 287 (Mass. 1983), as is Colorado. Poertner v. Swearingen, 695 F.2d 435 (10th Cir. 1982). The following cases require that the lost chance be over 50 percent: Gonzalez v. U.S., 600 F. Supp. 1390 (W.D. Tex. 1985) (Texas); Gooding v. Univ. Hospital Bldg., 445 So.2d 1015 (Fla. 1984) (Florida); Hanselmann v. McCardle, 267 S.E.2d 531 (S.C. 1980) (South Carolina); Cornfeldt v. Tongen, 295 N.W.2d 638 (Minn. 1980) (Minnesota); Walden v. Jones, 439 S.W.2d 571 (Ky. 1969) (Kentucky); Cooper v. Sisters of Charity of Cincinnati, 272 N.E.2d 97 (Ohio 1971). In other jurisdictions, the rule is not clear concerning the percentage of the lost chance of survival necessary to sustain a claim. Daniels v. Hadley Memorial Hospital, 566 F.2d 749 (D.C. Cir. 1977) (District of Columbia); James v. U.S., 483 F. Supp. 581 (N.D. Cal. 1980) (California). Many courts apply *Restatement (Second) of Torts*, § 323 and rules that loss of chance is jury question. DeBurkarte v. Louvar, 393 N.W.2d 131 (Iowa 1986); Chambers v. Rush-Presbyterian-St. Lukes Medical Center, 508 N.E.2d 426 (Ill. App. 1987). Accord Mays v. U.S., 608 F. Supp. 1476 (D. Colo. 1985); Roberson v. Counselman, 686 P.2d 149 (Kan. 1984). Murray v. U.S., 36 F. Supp.2d 713 (E.D. Va., 1999), estimated 30-60 percent of survival in suptured illiac aneurysm results in $367,282.23 judgment. Crosby v. U.S., 48 F. Supp.2d 924, 1999 WL 257690 (D. Alaska), states that Alaska will not adopt LOC for medical malpractice desite fact that it is the majority rule.

(A) Other Lost Chance Cases. Other cases dealing lost chance of survival include: Kramer v. Lewisville Memorial Hospital, 858 SW.2d 397 (Tex. 1993) (no loss of chance in WD case for cervical cancer); Hurley v. U.S., 923 F.2d 1091 (4th Cir. 1991) (holds Md. law rejects loss of chance re cardiac arrest in long term heart problem patient--states Hicks rule has been misinterpreted and should be preponderance, not substantial possibility); Bell v. U.S., 854 F.2d 881 (6th Cir. 1988) (Michigan has loss of chance, i.e., less

than 50% in failing to diagnose abdominal aneurysm); McBride v. U.S., 462 F.2d 72 (9th Cir. 1972) (42-year-old Navy pilot recently retired while on flight status died in hospital parking lot just after having misread EKG--court held 20 percent chance of survival, enough to establish proximate cause--this in accordance with rule in Hicks v. U.S., 368 F.2d 626 (4th Cir. 1966) wherein the court held that reasonable medical probability of survival was not the test, but used the test of substantial possibility of survival); Boody v. U.S., 706 F. Supp. 1458 (D. Kan. 1989) (permits loss of chance in lung cancer, but applies 5-year past morbid life expectancy to premorbid, i.e., to permit 15 percent recovery); Bowen v. U.S., Civ. #86-0382 (D. Haw. 1987) (lost chance adopted in lung cancer case); Richmond Co. Hospital v. Dickerson, 356 S.E.2d 548 (Ga. 1987) (lost chance adopted in death due to failure to timely perform surgery); McKellips v. St. Francis Hosp., 741 P.2d 467 (Okla. 1987) (lost chance adopted in death by heart attack after premature release from ER); Blackmon v. Langley, 737 S.W.2d 455 (Ark. 1987) (lost chance adopted in failure to timely diagnose lung cancer). But see Dumas v. Cooney, 1 Cal. Rptr.2d 584 (1991) (causation in medical malpractice cannot be based on loss of chance of survival); Weimer v. Hetrick, 525 A.2d 643 (Md. 1987) (lost chance not applicable in death of newborn due to failure to perform C-section); Kroll v. U.S., 694 F. Supp. 1210 (D. Md. 1988) (interprets recent Maryland cases as not adopting loss of chance-held failure to treat impending strokes as actionable); Thomas v. Corso, 265 Md. 84, 288 A.2d 379 (1972) (holds that Hicks is not a lost chance case); McKain v. Bisson, 12 F.3d 692 (7th Cir. 1993) (loss of chance under Indiana law not recognized in heart attack case). But see Mayhue v. Sparkman, 653 N.E.2d 1384 (Ind. 1995). Some recent cases adopting loss of chance. Wellen v. DePaul Health Center, 828 S.W.2d 681 (Mo. 1992); Aasheim v. Hamberger, 690 P.2d 824 (Mont. 1985); Perry v. Las Vegas Medical Center, 805 P.2d 589 (Nev. 1991); Evans v. Dollinger, 471 A.2d 405 (N.J. 1984). The cases do not necessarily reach the same result even on analogous facts. Compare Webb v. U.S., 446 F.2d 760 (5th Cir. 1971), cert. denied, 405 U.S. 1072 (1972) (decedent was summarily ejected from emergency room in Georgia when she showed up

several hours after ingesting 50 tablets of gout medicine in suicide attempt--held no liability, since no treatment available but palliative) with Rewis v. U.S., 503 F.2d 1202 (5th Cir. 1974) (aspirin poisoning of 15-month-old child involving delay before seeking treatment). Wilson v. U.S., 82 F.3d 409 1996 WL 174695 (4th Cir. Va.) In lung cancer claim, interprets Hicks v. U.S., 368 F.2d 626 (4th Cir. 1966) language "substantial probability of survival" to mean more likely than not.

(B) Proportional Damages in Lost Chance Cases. Boody v. U.S., 706 F. Supp. 1458 (D. Kan. 1989) (listing three methods of determining damages in loss of chance cases: 1) award based on assessment of all the evidence; 2) full compensation even though plaintiff had less than even chance of survival or care; and 3) multiply percentage of living or surviving for fixed period of time and award for percent of chance lost); Short v. U.S., 908 F. Supp. 227 (D. Vt. 1995) (loss of chance is 30 percent in delayed diagnosis of prostate cancer--award is total value times 30 percent). Hebert v. U.S. 1998 WL 171668 (E.D. La.) Delay in treatment of Wegener's granulematosis of 8 days, ruling that treatment earlier, e.g., 2 days later, would have had 30 percent chance of saving kidney - awards $5,000 to unemployed male in early 50s. Smith v. U.S., Civ. # 97-CV-73380-DT (E.D. Mich., 18 Dec. 98), delay in diagnosis results in 20 percent loss of chance and award of $376,649 as earlier detection of cervical cancer would have resulted in hysterectomy rahter than radiation.

(ii) Causation in Wrongful Life Cases. Wrongful life gives rise to problem as volunteer abortion is usually the treatment, thus child does not have cause of action. Smith v. U.S., 392 F. Supp. 654 (N.D. Ohio 1975) (applies Texas law from case of Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975) which held no cause of action in rubella syndrome case).

(iii) Cases Finding Causation in Medical Malpractice Cases. See, e.g., Metzen v. U.S., 19 F.3d 795 (2d Cir. 1994) (failure to place hypertensive patient on cholesterol diet is basis for disability in death by heart attack); Newmann v. U.S., 938 F.2d 1258 (11th Cir. 1991) (vestibular damage from gantamycin--probably cause established--

judgment of $1,674,495); Dugger v. U.S., 936 F. Supp. 662 (E.D. Mo. 1996) (delay in treatment results in amputation of leg of disabled veteran leads to $369,000 judgment); Epling v. U.S., 958 F. Supp. 312 (W.D. Ky. 1997) (11 month delay in diagnosing Hodgkin's disease reduces life expectancy from 87% to 78%--award of $201,000); King v. Dept. of Army, Civ. # 95cv241 (E.D. Va., Sept. 23, 1995) (failure to note perforation of duodenum prior to closure of cholestectomy results in death and $350,000 judgment for widower and three minor children); 1st America Bank, Mid-Michigan NA v. U.S., 752 F. Supp 764 (E.D. Mich. 1990) (holds U.S. liable for failure to intubate brain damaged baby following precipitous birth); Kronbach v. U.S., Civ. # 91-820-Civ-J-16 (M.D. Fla., 21 July 1993) (failure to conduct MRI of cerebellum permitted tumor to grow out of dura); Randall v. U.S., 859 F. Supp. 22 (D.D.C. 1994) (failure to perform C-section where mother has observable venereal warts is proximate cause of genital warts in throat of newborn); MacDonald v. U.S., 853 F. Supp. 1430 (M.D. Ga. 1994) (failure to diagnose and treat high cholesterol is proximate cause of heart attack); Griffith v. U.S., Civ. # 86-0117 (W.D. Va., 6 May 1991) (blindness from herpes simplex not caused by VA prednisone overdose); Bais v. U.S., 747 F. Supp. 109 (D. Mass. 1990) (total laryngectomy resulted from failure to timely diagnose cancer); Williams v. U.S., 747 F. Supp. 967 (S.D.N.Y. 1990) (amputation of leg of diabetic federal prisoner due to delay in treatment); Logan v. U.S., 742 F. Supp. 402 (W.D. Ky. 1990) (re failure to treat intractable keratosis in a timely manner); Kennedy v. U.S., 750 F. Supp. 206 (W.D. La. 1990) (5 year delay due to lack of mammography for breast cancer--U.S. liable); Gaffney v. U.S., 1990 WL 57625 (D. Mass 1990) (failure to induce labor earlier leads to transfusion in 1981--U.S. liability for AIDS, although no AIDS test in 1981); Doe v. U.S., 737 F. Supp. 155 (D.R.I. 1990) (1983 tonsillectomy improperly conducted leading to corrective surgery and transfusion--U.S. responsible for AIDS); Goodwin v. U.S., Civ. #3:88-28-23-16 (D.S.C. 1990) (insufficient 1980 testing did cause kidney loss); Jennings v. U.S., Civ. #C88-634T (W.D. Wash 1990) (failure to treat glaucoma causes tunnel vision); Borgren v. U.S., 716 F. Supp. 1378 (D. Kan. 1989) (3-year delay in breast cancer--substantial decrease-rejects lead time bias theory and civilian physicians negligence); Bergman v. U.S., 579 F.

Supp. 911 (W.D. Mich. 1984) (exhaustive decision on connection between beating and brain injuries noted after operation four months later); Szimonisz v. U.S., 537 F. Supp. 147 (D. Or. 1982) (undiagnosed operable brain tumor causes suicide); James v. U.S., 483 F. Supp. 581 (N.D. Cal. 1980) (failure to timely diagnose lung cancer results in $60,000 to widow for reduced life expectancy); Wilson v. U.S., 637 F. Supp. 669 (E.D. Va. 1986) (failure to timely diagnose breast cancer results in award of $179,000 to two adult children for causing death by cancer); Whittle v. U.S., 669 F. Supp. 501 (D.D.C. 1987) (death due to synergistic effect of two psychotropic drugs); Hamilton v. U.S., Civ. # 176-106 (S.D. Ga., 14 Jan. 1980) (Tuttle Army Hospital held liable due to gram negative septicemia due to failure to switch oxygen bottle properly where death occured 6 hours later); Roy v. U.S., Civ. # 79-70825 (E.D. Mich. 1980) (acute myocardial infarction caused by $100 rearender occurring three days earlier). Mitchell v. U.S., __F.3d __, 1998 WL125030 (1st Cir., Mass.) (taking decedent off Coumadin for 11 days to perform colonoscopy causes stroke and death a month later); Zuchowicz v. U.S., __ F.3d __ 1998 WL136193 (2d Cir., Conn.) (overdose of Danocrine causes primary pulmonary hypertension and death 34.5 months later -- U.S. liable. Mitchell v. U.S., 141 F.3d 8 (1st Cir. 1998) Removing patient with atrial fibrillation from coagulent too long in order to perform colonoscopy causes death from CVA. Hankins v. U.S., (IV #F-96-6037 DLB (E.D. Calif. 30 Apr 98),failure to x-ray knee on 1st three to Porterville Family Health Center when plaintifff had commuted, displaced introarticular fracture of tibial plateua of knee in motorcycle accident results in U.S. liability. Gaddis v. U.S., 7 F. Supp. 2d 709 (D.S.C. 1997), death from throat cancer nine months after diagnosis. Only treatment was radiation in month-3 with no follow-up. $1 million plus award to daughter of 69 year old veteran. Jackson v. U.S., Civ. # A-96-CA-491-AA (W.D. Tex., 20 Aug. 98), failure to perform c-section on mother with cephalic disposition and signs of shoulder dystocia result in payable brachial plexis injury. Johns v. U.S., 1998WL151282 (E.D. La.), failure to follow up on mass next to liver and kidney in 1969 after determining it was not a hydatid tumor is cause of death from renal cancer in 1996. Lamarca v. U.S., __ F. Supp. 2d __, 1998WL887164 (E.D.N.Y.), $400,000 award for death due to patient's fall from bed four

months earlier. Colburn v. U.S.. 45 F. Supp. 2d 787 (S.D. Col. 1998) Failure to administer tocolytics to mother bearing 24-week twins is basis for wrongful death claim. Bueno v. U.S., Civ. # SA-97-CA-1383-FB (W.D. Tex., 25 May 1999), $1.1 million verdict for wrongful death by heart attack where 49-year-old decedent visited military hospitals 27 times in less than one year.

(iv) Cases Finding No Causation in Medical Malpractice Cases. See, e.g., Jones v. U.S., 127 F.3d 1154 (9th Cir. 1997), aff'g, 933 F. Supp. 894 (N.D. Cal. 1996) (failure of both Army gynecologist and Army dentist to explain to female Army sergeant that antibiotics would reduce efficacy of birth control pills was not cause of her pregnancy, since start of pregnancy occurred before she started taking the antibiotics--District Court rejected plaintiff's expert testimony based on standard in Daubert v. Merrell Dow Pharmaceuticals Inc. v. U.S., 509 U.S. 579, 116 S.Ct. 189 (1995)); Miner v. U.S., 94 F.3d 1127 (8th Cir. 1996) (mild pervasive development disorder in newborn not caused by foiled midforceps delivery, but by blows to abdomen by husband or car accident during pregnancy); Halley v. United States, 97 F.3d 1456 (table), 1996 WL 499085 (8th Cir. 1996) (no causal connection between injury due to rear end collision and death from congestive heart failure two years later); Kipp v. U.S., 88 F.2d 681 (8th Cir. 1996), aff'g, 880 F. Supp 681 (D Neb. 1995) (in January 1985, prior to effective AIDS test, decedent must prove that she would not have obtained AIDS if proper prescreening of donor had been conducted which she failed to do--negligence *per se* is not basis for liability); Ulczycki v. U.S., 89 F.3d 839 (table), 1996 WL 328782 (7th Cir. 1996) (wrongful death allegedly due to acute mesenteric ischemia not caused by failure to perform angiogram during first hospitalization or delay of surgery over weekend); Henry v. U.S., 89 F.3d 850 (table), 1996 WL 355568 (10th Cir. 1996) (failure to obtain history of headaches in 10-year-old who died from brain tumor does not constitute negligence); Champagne v. U.S., 40 F.3d 946 (8th Cir. 1994) (Indian Health Service failure to treat caused young man's suicide, but parents barred from recovery as father's conduct was a contributing cause); Campbell v. U.S., 907 F.2d 1188 (7th Cir. 1990) (fact that stroke occurred during operation for carotid endarterectomy does not establish negligence); Mann

v. U.S., 904 F.2d 1 (2d Cir. 1990) (VA could allow unlicensed intern to perform surgery under staff supervision--no liability); Lemaire by & through Lemaire v. U.S., 826 F.2d 949 (10th Cir. 1987) (failure to timely diagnose impending stroke--held for U.S.); Waffen v. U.S., 799 F.2d 911 (4th Cir. 1986) (seven months delay in diagnosing moderately differentiated lung cancer--no proximate cause of reduction in life expectancy); Imm v. U.S., 912 F.2d 469 (table), 1990 WL 124496 (9th Cir. 1990) (failure to deliver vaginally not cause, since no indication to do so); Campbell v. U.S., 907 F.2d 1188 (7th Cir. 1990) (fact that stroke occurred during operation for carotid endarterectomy does not establish negligence); Zwicky v. U.S., Civ. # 95-8103 JGD (C.D. Cal. 21 Oct. 1997) (Swine Flu shot in 1976 did not cause plaintiff's myraid of medical symptoms); Luther v. U.S., Civ. # 93-263J (W.D. Pa., 29 July 1996) (detailed opinion finding brain damage occurred ante-partum, not during labor and post-partum); Wilson v. U.S., Civ. # CV194-199 (S.D. Ga., 31 July 1996) (attack on visitor in ladies restroom by schizophrenic mental patient is not compensable, since mental patient was fully aware of his act and not symptomatic); Fairchild v. U.S., 1996 WL 197692 (N.D. Ill.) (failure by park rangers to identify heat stroke earlier was not negligent--treatment for heat exhaustion was proper); McKenna v. U.S., Civ. # 1:88CV4683 (N.D. Ohio, Aug. 9, 1995) (failure to prove that mother received thalidomide during treatment of pregnancy at U.S. Army dispensary in Germany); Bellamy v. U.S., 888 F. Supp. 760 (S.D. W.Va. 1995) (4-5 month delay in diagnosing malignant lymphoma which was 16 cm in size at diagnosis--no liability, since mode of treatment identical); Jordan v. U.S., Civ. # A1-92-231 (D.N.D., Jan. 25, 1995) (no loss of chance of survival where patient not transported from accident scene, since irreversible damage already present); Doe v. U.S., Civ. # 3:94cv882 (E.D. Va., Nov. 17, 1995) (mental patient's allegation of sexual contact with therapist are based on false recollection implanted by others); Negron v. U.S., Civ. # 4:93cv2270-DJS (E.D. Mo., Jan. 4, 1995) (failure to treat HIV+ during kidney transplant in early 1986 had no effect on subsequent death from cardiac arrest secondary to HIV+); Bullock v. U.S., Civ. # C 93-20995 EAI (N.D. Cal., May 22, 1995) (in suit where there is medical opinion in support of medical claim, judge rules he has right to consider allegation despite lack of

proof, but dismisses suit based on Government's expert testimony); Basten by and through Basten v. U.S., 848 F. Supp. 962 (M.D. Ala. 1994) (failure to offer alpha-feta protein test creates liability for spina bifida infant); Bertuat v. U.S., Civ. #91-4215 (E.D. La., Mar. 30, 1994) (failed to prove swine flu shot caused Guillain Barre Syndrome (GBS), since the patient had normal reflexes through numerous hospitalizations and repeated GBS is rare); Portillo v. U.S., 816 F. Supp. 444 (W.D. Tex 1993), aff'd without opinion, 29 F.3d 624 (5th Cir. 1994) (summary judgment for U.S. in suit for urinary tract infection based on failure to timely catherize); Young v. U.S., 574 F. Supp. 571 (D. Del. 1993) (negative wide excession breast biopsy at Tripler AMC, rather then needle localization, did not cause breast deformity); Ward v. U.S., Civ. # 90-0518-L (W.D. Ky., 8 Apr. 1993) (even though there was evidence of medical malpractice at Fort Knox, blindness was congenital and not compensable); Poulos v. U.S., # 92-8287 (5th Cir., 16 Apr. 1993) (neurological injury to newborn was not caused by medical malpractice at Wm. Beaumont AMC); Zywicki v. U.S., 809 F. Supp. 822 (D. Kan. 1992) (2½-year-old child med-evacced within 2 hours of arrival at military hospital--died 3½ hours later at civilian hospital--failure to use nasogastric tube and IV line did not cause death); Shepard v. U.S., 811 F. Supp. 98 (E.D.N.Y. 1993) (showing by plaintiff that lingual nerve damage in tooth removal can be avoided by sufficiently experienced dentist shifts burden to explain why it occurred); Austin v. U.S., Civ. # CIV-92-264-S (E.D. Okla., 23 Dec. 1992) (failure to diagnose pneumonia was due to parents failure to return child for 2 days); Clement v. U.S., 772 F. Supp. 20 (D. Me. 1991) (breach of standard of care by prescription of benzadiazepines and improper inpatient care of mental patient did not cause his suicide); Walton v. U.S., 770 F. Supp. 731 (D. Mass. 1991) (administration of xylocaine to hypertensive dental patient did not cause his death); Diaz Reyes v. U.S., 770 F. Supp 58 (D.P.R. 1991) (1981 hepatitis related transfusion does not provide basis for 1989 AIDS death nor was there a duty to inform wife of AIDS diagnosis); Kilburn v. U.S., Civ. # 87-328 (E.D. Ky. 1990) (failure to remove teeth prior to radiation for throat cancer did not cause osteoradionecrosis); Dutcher v. U.S., 736 F. Supp. 1142 (D.D.C. 1990) (failure to notify family of mental patient's AWOL did not cause suicide); Boyd

v. U.S., Civ. # 489-155 (S.D. Ga. 1990) (no duty to provide apnea monitor--would not have precluded death); Butts v. U.S., Civ. # C-86-0939-L(A) (W.D. Ky. 1990) (failure to diagnose mild preeclampsia did not cause premature birth and consequent injury); Midyette v. U.S., Civ. # 2:88-0256-1 (D.S.C. 1990) (delay in diagnosing colon cancer is not cause in fact as required by South Carolina law--cites Bramlette v. Charter Medical Columbia, Civ. # 23227 (D.S.C., June 18, 1990)); Bohn v. U.S., 724 F. Supp. 443 (N.D. Tex. 1989) (no proximate cause in delay of diagnosis of malignant melanoma); Heidrich v. U.S., Civ. # 85-1094 (D. Haw., 31 March 1989) (no proof that any delay in diagnosing breast tumor caused injury); Zimmer v. U.S., 702 F. Supp. 757 (E.D. Mo. 1988) (retinal tear which occurred in follow-up surgery not caused by improperly performed earlier surgery); Thompson v. U.S., 642 F. Supp. 762 (N.D. Ill. 1986) (delayed diagnosis of SLE not cause of death); DeJaynes v. U.S., Civ. # CV487-076 (S.D. Ga. 1989) (high spinal not cause of injury, since epidural was properly administered); Ching v. U.S., Civ. # 86-D-824-N (M.D. Ala. 1988) (hearing loss congenital not caused by administering Gentomycin); LaBoy v. U.S., 626 F. Supp. 105 (D.P.R. 1985) (no proof that Dalmane drug caused death of non-hospitalized mental patient, since quantity insufficient); Mathiesen v. U.S., Civ. # C-81-00853 (D. Utah, 29 Mar. 1985) (six months delay in diagnosing bronchiole-alveolar cell lung cancer--no proximate cause of metastasis); Fanguy v. U.S., 595 F. Supp. 456 (E.D. La. 1984) (failure by ER to consult vascular surgeon--not proximate cause of loss of leg); Efros v. U.S., Civ. # CV-80-3913 RG (C.D. Cal., 18 Feb. 1983) (giving pass to VA mental patient did not cause suicide attempt); Ragusa v. U.S., Civ. # EP-80-CA-385 (W.D. Tex. 1983) (fail to timely diagnose untreatable pancreatic cancer not cause of death); Richardson v. U.S., Civ. # 80-889-Civ-T-GC (M.D. Fla. 1982) (failure to properly examine optic nerve avulsion did not cause loss of sight, since loss was immediate); Carver v. U.S., 587 F. Supp. 794 (N.D. Cal. 1984) (U.S. not liable for chemotherapy to patient who was later found to have multiple sclerosis, not brain cancer); Falk v. U.S., Civ. # CIV-77-0368-B (W.D. Okla. 1979) (no recovery where Army doctors met standard of care and any delay in responding to neurological symptoms was caused by patient's failure to keep appointments). White v. U.S., 148 F.3d 787 (7th Cir. 1998) (choice

of Tegretol to treat mental patient is upheld - injury from idiosyncratic reaction). Wafford v. U.S., 1999 U.S. Dist. LEXIS 8173 (N.D. Cal 2 June 1999) Death from stroke shortly after admission in pre-eclamptic mother-not due to failure to meet standard of care. Vance v. U.S., 1999 U.S. App. LEXIS 14943 (6th Cir. 25 June 99) Failure to diagnose pneumonia and possible hip fracture from fall in VA Hospital not cause of death in aging Altheimer's patient.

(v) Informed Consent. The causation requirement also applies to informed consent actions. Hutchinson v. U.S., 841 F.2d 966 (9th Cir. 1988) (failure to warn that Predisone may cause aseptic neurosis must be material); Valdiviez v. U.S., # 91-5777 (5th Cir. 1992) (in 1984, prior to HIV testing, reasonable person would have chosen heart surgery requiring transfusion over threat of AIDS); Bankert by Bankert v. U.S., 937 F. Supp. 1169 (D. Md. 1996) (refusal of patient's request for C-Section due to USAF policy leaving it in the sole discretion of the physician is treatment without informed consent); Cooper v. U.S., 903 F. Supp. 953 (D.S.C. 1995) (failed to obtain written consent prior to extraction of wisdom tooth--not required under South Carolina law--additionally, no evidence patient would have refused treatment if informed of possibility of nerve damage); Sanders v. U.S., 1995 WL 144585 (E.D. La.), aff'd, 77 F.3d 478 (table) (5th Cir. 1996) (informed consent included loss of taste due to stapedectomy surgery--no proximate cause); Pettingill v. U.S., 867 F. Supp. 380 (E.D. Va. 1994) (failure to comply with Virginia statute requiring written consent to perform sterilization does not create cause of action, since purpose of statute is to protect physician); Hanna v. U.S., 845 F. Supp. 1390 (E.D. Cal. 1994) (suit for facial paralysis following parotoidectomy fails as USAF physician fully informed patient of risk and offered alternative modes of treatment); Parkins v. U.S., 834 F. Supp. 569 (D. Conn. 1993) (failure to explain either risk of paralysis or alternative treatment with increased rate of morbidity but lower risk of paralysis--U.S. liable); Campbell v. U.S., Civ. # 82-0236 (D. Haw. 1988) (informed consent to perform hysterectomy on gravid female need not include ovarian prolapse risk); Rosario v. U.S., 824 F. Supp. 268 (D. Mass. 1993) (no liability for total paralysis which followed arteriogram--informed

consent and proper care established); Redford v. U.S., Civ. # 89-2324 (CRR) (D.D.C., 10 Apr. 1992) (U.S. physician relies on diagnosis in medical records over history related by patient--no informed consent for hysterectomy); Mendes-Silva v. U.S., 980 F.2d 1482 (D.C. Cir. 1993) (failure to warn of risk of encephalitis when yellow fever shot and smallpox vaccination are given at same time can create liability); Sampson v. U.S., Civ. # 3:90-CV-2876-P (N.D. Tex., 19 Jan. 1993) (in 1980, failure to warn of risks of blood transfusion and offer autologous transfusion results in award in elective surgery case); Velasquez v. U.S., Civ. # 88-001171-DAE (D. Haw. 1991) (excision of mass in chest wall properly consented to and performed despite ensuing disability); Henderson v. U.S., Civ. #EP-90-CA-31-B (W.D. Tex. 1991) (poor result in reduction mammoplasty is negated by fully informed consent); Wachter v. U.S., 689 F. Supp. 1420 (D. Md. 1988) (failure to inform patient of Dr. Billings alleged incompetence not actionable--must show negligence cause of action); Todd v. U.S., 570 F. Supp. 670 (D.S.C. 1983) (spinal injury not caused by lack of informed consent); Bagley v. U.S., Civ. # 82-565-14 (D.S.C., 9 Feb. 1983) (two rod penile implant in patient with Peryonie's diease results in permanent erection—-consent adequate). But see MacDonald v. U.S., 767 F. Supp. 1295 (M.D. Pa. 1991) (where informed consent not obtained for reversing saphenous vein surgery--negligence need not be established under Pa. Law). Smith v. U.S., Civ. # 87-0891 (SDK) (D. Haw., 21 Mar 94) (failure to inform hemophiliac of risk of AIDS, while negligent, is not a factor as patient would have continued using Factor VIII concentrate in any event.

(vi) Forseeability. Forseeability of injury from negligent act or omission also a requirement for causation. Wolfe v. U.S., 604 F. Supp. 726 (S.D. Cal. 1985) (anxiety attack over swine flu program not foreseeable).

(c) Toxic Torts. Plaintiff has the burden of proof in toxic tort cases, but some courts have modified the burden. Allen v. U.S., 527 F. Supp. 476 (D. Utah 1981); Sindell v. Abbott Labs, 607 P.2d 924 (Cal. 1980); Summers v. Tice, 199 P.2d 1 (Cal. 1948). See also Palmer v. A.H. Robins Co. Inc., 684 P.2d 187 (Colo. 1984) (Dalkon shield--manufacturer liable); Hawkinson v. A.H. Robins Co. Inc., 595 F. Supp. 1290

(D. Colo. 1984) (same). Nonetheless, a plaintiff may still have difficulty meeting its burden. Timothy v. U.S., 612 F. Supp. 160 (D. Utah 1985) (ionizing radiation did not cause lymphoma neurofibrosarcoma, and CNA tumor). State-of-the-art and collateral estoppel defenses are important in "toxic" torts. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979)(offensive collateral estoppel); U.S. v. Mendoza, 464 U.S. 154 (1984) (collateral estoppel may not be used against U.S. whether different party involved or not). See also Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353 (E.D. Tex. 1981); Ezagui v. Dow Chemical Corp., 598 F.2d 727 (2d Cir. 1979).

(d) False Claims Act. 31 U.S.C. § 3279(a). Canestrino v. U.S., Civ. # 93-4465 (AJL) (D.N.J., Jan. 6, 1995) (court finds plaintiff was not injured as claimed and awards $5,000 to U.S. under Act).

(4) Private Person Defense for United States. United States is entitled to defenses available to private person, that is contributory negligence, imputed negligence, last clear chance, assumption or risk, release, fellow-servant doctrine, act of God, sudden emergency and others. See cases cited in Jayson, *Handling Federal Tort Claims*, § 214.01. See, e.g., Butler v. U.S., 726 F.2d 1057 (5th Cir. 1984) (hold harmless clause in flood control exculpates U.S.); Peters v. U.S., 596 F. Supp. 889 (E.D. Pa. 1984). (Virginia law on contributory negligence bars death claim of widow of deceased pilot); Goldman v. U.S., 790 F.2d 181 (1st Cir. 1986) (U.S. not liable where entire Federal plaza cleared except for one patch of ice); Warrior & Gulf Navigation Co. v. U.S., 864 F.2d 1550 (11th Cir. 1989) (excessive rainfall precludes finding of negligence--act of God defense); Ware v. U.S., 826 F. Supp. 16 (D.D.C. 1993) (action barred by Maryland's contributory negligence defense when plaintiff made left turn from right lane). However, comparative negligence may have diminished the effectiveness of many defenses. Roggow v. Mineral Processing Corp., 698 F. Supp. 1441 (S.D. Ind. 1988) (cites numerous cases on amelioration of traditional defenses by comparative negligence); Schumacher v. Cooper, 850 F. Supp. 438 (D.S.C. 1994) (damages reduced by 75% in case where swimmer injured by boat's propeller--reduced from $500,000 to $125,000).

b. Exclusions From FTCA. Subject to exclusions listed in 28 U.S.C. § 2680 and by other statute. First of which is 28 U.S.C. § 2680(a) (1st Clause), that is, claims based on

execution of statute or regulation (valid or not) provided due care is used. For cases, See IB1d.

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

(1) Nature of Discretionary Function Exclusion. Discretionary functions exclusions may apply at any level where decisions are made. Question is whether government policy making is reflected in decision. However, if decision is contrary to statute, regulation, or policy, discretionary function exclusions not applicable. Gaubert v. U.S., 499 U.S. 315, 111 S.Ct. 1267 (1991) (discretionary function exclusion covers only acts that are discretionary in nature, acts that involve elements of judgment or choice-—discretionary conduct is not confined to the policy or planning level, since day-to-day management requires judgment as to permissible courses of action—-clarifies Berkovitz); Berkovitz v. U.S., 486 U.S. 531, 108 S.Ct. 1954 (1988) (discretionary function exclusion applies to judgment or choice based on public policy--if polio vaccine released in absence of required test § 2680(a) does not apply); Staton v. U.S., 685 F.2d 117 (4th Cir. 1982) (ranger shoots hunting dogs in U.S. Park-- not discretionary as against Park Service policy); Hurst v. U.S., 739 F. Supp. 1377 (D.S.D. 1990) (failure of COE District Engineer to issue prohibitory order as required by Federal Regulation not discretionary); In re Sabin Oral Polio Vaccine Product Liability Lit., 984 F.2d 124 (4th Cir. 1993) (no discretion involved in whether techniques used by foreign manufacturer met standard). The burden of proving. the applicability of the discretionary function exclusion is on the government. Prescott v. U.S., 973 F.2d 696 (9th Cir. 1992) (burden of proving applicability of exclusion to Nevada test site workers is on U.S.). In Re: Orthopedic Bone Screw Products Liability Litigation, Civ. # 97-9196-5202 (E.D. Pa., 3 Nov. 98) FDA's 510(k) clearance of certain brands of pedicles is discretionary

- listing under FDA clearance of polio vaccine in Berkowitz supra.

(a) Meeting Government Standards. Government decision as to whether government standards are met falls within discretionary function exclusion. U.S. v. Varig Airlines, 467 U.S. 797, 104 S.Ct. 2755 (1984) (certifying air worthiness discretionary); General Public Utilities Corp. v. U.S., 745 F.2d 239 (3d Cir. 1984) (supervision by NRC of nuclear power plant); Hylin v. U.S. 755 F.2d 551 (7th Cir. 1985) (Federal mine inspection does not create duty for safety); Proctor v. U.S., 781 F.2d 752 (9th Cir. 1986) (entire certification process is discretionary); Chamberlin v. Isen, 779 F.2d 522 (9th Cir. 1985) (denial of patent discretionary—-follows Varig); Cooley v. U.S., 791 F. Supp. 1294 (E.D. Tenn. 1992) (negligent mine inspection by Bureau of Mines fell under exclusion); Zocco v. U.S. Dept. of Army, 791 F. Supp. 594 (E.D.N.C. 1992) (injured employee of subcontractor at Army fair cannot base claim on improper Army inspection); Joseph v. U.S., 1994 WL 705319 (E.D. Ky.) (negligent mine inspection falls under exclusion); Belcher v. U.S., Civ. # 94-0240-B (W.D. Va., May 26, 1995) (failure of Bureau of Mines inspector to enforce regulations governing safety canopy on roof bolt is discretionary where mine roof falls on miner); Estate of Denny Bernaldes v. U.S., 81 F.3d 428 (4th Cir. 1996) (failure to Bureau of Mines inspector to issue citation for deficiencies in coal shed falls under exclusion); Koch v. U.S., 814 F. Supp. 1221 (M.D. Pa. 1993) (decision not to require mine owner to install warning device for standpipe is discretionary). But see Collins v. U.S., 783 F.2d 1225 (5th Cir. 1986) (reopening gassy mine despite advise to contrary--cause of action permitted).

(b) Sale or Distribution of Government Property. Sale and/or distribution of government property falls under discretionary function exclusion. Dahelite v. U.S., 346 U.S. 15 (1953) (failure to warn of explosive properties of fertilizer is discretionary); Boruski v. U.S., 803 F.2d 1421 (7th Cir. 1986) (furnishing of flu vaccine to city is exempt); In re All Maine Asbestos Litigation, 581 F. Supp. 963 (D. Me. 1984) (selling asbestos without warning is discretionary); Stewart v. U.S., 486 F. Supp. 178 (C.D. Ill. 1980); Ford v. American Motors Corp., 770 F.2d 465 (5th Cir. 1985) (Postal Service decision to sell jeeps as surplus without warning of propensity to turn over is discretionary); Myslakowski v. U.S., 806 F.2d 94 (6th

Cir. 1986) (failure to warn re tip over propensities of surplus Postal Service jeep discretionary-—follows Varig); Tindall by Tindall v. U.S., 961 F.2d 53 (5th Cir. 1990) (distribution of explosives by BATF without warning label falls under § 2680(a)); Jurzec v. American Motors Corp. v. U.S., 856 F.2d 1116 (8th Cir. 1988) (sale of jeep with insufficient roll bar warning exempt): Grammatico v. U.S., 932 F. Supp. 1120 (C.D. Ill 1996), aff'd, 109 F.3d 1198 (7th Cir. 1997) (sale of surplus radial mill on "as is/where is" basis is discretionary by Defense Reutilization Management Office because it was not hazardous). But see Merklin v. U.S., 788 F.2d 172 (3d Cir. 1986) (U.S. as supplier of radioactive ore may have duty to warn unknowledgeable user).

(c) Establishment of Standards. Whether the government establishes standards is discretionary. Garbarino v. U.S., 666 F.2d 1061 (6th Cir. 1981) (FAA need not establish crashworthiness standards); Wells v. U.S., 655 F. Supp. 715 (D.D.C. 1987) (duty of EPA to establish proper lead exposure levels and warn public is discretionary).

(d) Design of Government Goods. The design of government goods falls within the discretionary function exclusion. Medley v. U.S., 480 F. Supp. 1005 (M.D. Ala. 1979) (design of Army dump truck); Creek Nation v. U.S., 905 F.2d 312 (10th Cir. 1990) (bomb design is discretionary--cites Boyle v. United Tech., 487 U.S. 500, 108 S.Ct. 2510 (1988)). MacCaffray v. U.S., 1998 WL 560047 (D. Vt.), decision not to install seatbelt in GOV used to transport prisoners is discretionary. Devito v. U.S., 12 F. Supp. 2d 269 (E.D.N.Y. 1998), method of protecting shoreline by COE is discretionary despite alleged erosion.

(e) Design of Dams and Waterways. Operation of dams and waterways is discretionary. Lawson v. U.S., 1996 WL 875077 (N.D. Ohio) (where boat strikes breakwater in the fog, design of breakwater and placement of navigational aids is discretionary); Ponderendolph v. Derry Township, 330 F. Supp. 1346 (W.D. Pa. 1971); (release of flood waters); Coates v. U.S., 181 F.2d 816 (8th Cir. 1950) (changing course of Mississippi River); Spillway Marina Inc. v. U.S., 445 F.2d 876 (10th Cir. 1971); Boyce v. U.S., 93 F. Supp. 866 (S.D. Iowa 1950); Thomas v. U.S., 81 F. Supp. 881 (W.D. Mo. 1949); Payne v. U.S., 730 F.2d 1434 (11th Cir. 1984) (house washed away by widening on river in COE project-—duty to warn

discretionary as would have required costly study); Sanders v. S.C. Public Service Authority, 856 F. Supp. 1066 (D.S.C. 1994) (COE decision to increase flow through diversionary canals on Cooper River is discretionary); Manns v. U.S., 945 F. Supp. 1349 (D. Or. 1996) (where boat hit sandbar, COE had broad discretion under title 33 U.S.C. when and where to dredge); National Union Fire Ins. Co. v. U.S., 115 F.3d 1415 (9th Cir. 1997) (COE decision to delay repairs on breakwater that later failed is discretionary). But see Bell v. U.S., 127 F.3d 1226 (9th Cir. 1997) (exclusion not applicable where Bureau of Reclamation assumes responsibility for covering pipeline at state reservoir and 14 year old diver strikes embankment 30"-40" below surface); Kennewick Irrigation District v. U.S., 880 F.2d 1018 (9th Cir. 1989) (design and construction of irrigation trench is not discretionary); Alabama Electric Co-op Inc. v. U.S., 769 F.2d 1524 (11th Cir. 1985) (COE dredging project designed not in accordance with standard—-causes current to erode land does not fall within discretionary function--cites a number of cases pro and con); Hurst v. U.S., 882 F.2d 306 (8th Cir. 1989) (COE must stop jetty project where its own regulations require same for permit violation). Devito v. U.S., CIV # 95-CV-2349 (J.S.)(E.D.N.Y., 30 Mar 98) COE design of Long Island south shore beach restoration is discretionary. Kerr Marina v. Oceanview Farms, Civ. #7:97-CV-120-F(3), COE design of lagoon for hog farm from which hog waste ran into New River is discretionary.

(f) Military Activities. Military activities are usually discretionary. F.E. Trotter Inc. v. Watkins, 869 F.2d 1312 (9th Cir. 1989) (noise study regarding fighter planes—-nature and content discretionary); Lakeland R-3 School District v. U.S., 546 A. 2d 1039 W.D. Mo. 1982 (firing—-exclusion applies); Shubert v. U.S., 246 F. Supp. 170 (S.D. Tex. 1965) (testing jet engines); Nichols v. U.S., 236 F. Supp. 241 (S.D. Cal. 1964) (same); Leavell v. U.S., 234 F. Supp. 734 (D.S.C. 1964) (same). Accord Barrol v. U.S., 134 F. Supp 441 (D. Md. 1955) (artillery firing). But see Perry v. U.S., Civ. # 71 C 1812 (N.D. Ill., 12 July 1974), aff'd, No. 74-2088 (7th Cir. 1975) (Army held liable for failing to inspect, thereby allowing soldier to leave post with booby trap simulators which he later deployed around Chicago). Shrieve v. U.S., 16 F. Supp. 2d 1853 (N.D. Ohio, 1998), USPS regulation re placement of curbside mailboxes is not a mandatory directive

requiring placement on nearside of road. Gold v. U.S., Civ.# 5-96-22 (D. Minn., 28 Dec. 98), in artillery firing blast damage case, compliance with army noise abatement regulation is discretionary consistent with mission accomplishment - additionally regulations do not create a state tort.

(g) Air Safety. Decisions related to air safety. Decisions related to air traffic control are discretionary. Monen v. U.S., 946 F. Supp. 196 (S.D.N.Y. 1996) (FAA decision concerning instrument landing system and management and training of commuter airline pilots are discretionary); Williams v. U.S., 504 F. Supp. 746 (E.D. Mo. 1980) (failure to report weather by FAA); Colo. Flying Academy Inc. v. U.S., 506 F. Supp. 1221 (D. Colo. 1981) (failure to establish VFR corridors in terminal control area); Medley v. U.S., 543 F. Supp. 1211 (N.D. Cal. 1982) (markings on aeronautical chart are discretionary); George v. U.S., 703 F.2d 90 (4th Cir. 1983) (FAA fails to prohibit certain type of fuel pickup, held discretionary); Sottile v. U.S., 608 F. Supp. 1040 (D.D.C. 1985) (decision by FAA to investigate whether a flight instructor is properly certified is discretionary); Baxley v. U.S., 767 F.2d 1095 (4th Cir. 1985); (decision by FAA not to regulate ultra-light planes is discretionary); Heller v. U.S., 803 F.2d 1558 (11th Cir. 1986) (denial of pilot's medical certificate by FAA is exempt); West v. FAA, 830 F.2d 1044 (9th Cir. 1987) (FAA designed airport takeoff procedures falls under § 2680(a)); Foster v. U.S., 923 F.2d 765 (9th Cir. 1991) (decision by Federal air surgeon to grant special medical certificate is discretionary); Redman by and through Redman v. U.S., 934 F.2d 1151 (10th Cir. 1991) (FAA decision to permit single engine pilot to fly multiengine without test is discretionary); Black Hills Aviation v. U.S., 34 F.3d 968 (10th Cir. 1994) (whether to investigate crash on Army reservation of civilian contracted aircraft is discretionary); AIG Aviation Ins. Svc. V. U.S., 887 F. Supp 1496 (D. Utah 1995) (failure of FAA inspector to report as a hazard overhead power lines running 30 feet above airport runway is discretionary); Foster v. U.S., Civ. # A86-515 Civil (D. Alaska, March 4, 1994), aff'd, 56 F.3d 71 (table), 1995 WL 316948 (9th Cir. 1995) (decision concerning which radar screen to turn off during repairs is discretionary in case where worker exposed to radiation due to mistake of co-worker). But see Leone v. U.S., 690 F. Supp. 1182 (E.D.N.Y. 1988) (failure to conduct physical exam prior to issuing

pilots license not exempt); Musick v. U.S., 768 F. Supp. 183 (W.D. Va. 1991) (exclusion not applicable to flying jet below 100 feet). Conrad v. Tokyo Aircraft Instrument Co. Ltd., 988 F. Supp. 1227 (W.D. Wisc., 1997) (failure of FAA to issue airworthiness directive re altimeter is discretionary in absence of a mandatory federal law or directive. Robbins v. U.S., Civ. # 98-0470-CIV-MORENO (S.D. Fla., 1 Feb 99), failure of FAA to close down skydiving service after discovery of numerous safety violations is discretionary. Management Activities Inc. v. U.S., 21 F. Supp. 1159 (C.d. Calif. 1998) failure to warn of wake characteristics of preceding plane is discretionary where following plane crash.

(h) Decision to Ban Goods. The Government's decision to ban certain goods may fall within the discretionary function exclusion. Jayvee Brand Inc. v. U.S., 721 F.2d 385 (D.C. Cir. 1983) (ban on Tris treated garments is excepted). But see Fisher Bros. Sales Inc. v. U.S., 17 F.3d 647 (3rd Cir. 1994) (decision of FDA Commissioner to bar entry to Chilean grapes was not discretionary if based on negligent FDA lab tests for cyanide).

(i) Decision to Warn About Danger. Government decisions to warn persons about particular dangers may fall within the discretionary function exclusion. Grunnet v. U.S., 730 F.2d 573 (9th Cir. 1984) (State Dept. fail to warn Congressman Ryan re Jonestown discretionary); Begay v. U.S., 768 F.2d 1059 (9th Cir. 1985) (decision by USPHS not to warn uranium miners of known hazard is discretionary); Barnson v. U.S., 816 F.2d 549 (10th Cir. 1987) (decision not to warn uranium miners of danger despite USPS research project is political, therefore, discretionary and not actionable); Hagy v. U.S., 976 F. Supp. 1373 (W.D. Wash 1997) (failure of NIH to warn of possibility of acquiring Creutzfeldt-Jakob Disease from taking human growth hormone is discretionary); King v. U.S. Forest Service, 649 F. Supp. 20 (N.D. Cal. 1986) (failure of U.S. Forest Service to warn of dangers of rafting when water is high); Bacon v. U.S., 810 F.2d 827 (8th Cir. 1987) (HUD clean up of dioxin in local roads—-failure to warn clean up crew is discretionary); Lockett v. U.S., 714 F. Supp. 848 (E.D. Mich. 1989) (EPA has no duty to warn neighborhood re PCB test sample at local plant); Lacock v. U.S., 106 F.3d 408 (table), 1997 WL 22463 (9th Cir. 1997) (no duty to warn about veteran diagnosed as being potentially dangerous to others).

But see Andrulonas v. U.S., 924 F.2d 1210 (2d Cir. 1991) (failure to warn bacteriologist of danger of working with rabies viruses is not discretionary); W.O. & A.N. Miller Companies v. United States, 963 F. Supp. 1231 (D.D.C. 1997) (failure to warn of buried chemicals not discretionary, but method of disposal is discretionary). Safeco Ins. Co. v. U.S., Civ. #S-95-2226 LKK/PAN (E.D. Cal., 25 Sep. 98), where contract provides that Forest Service will provide daily report on fire hazard danger to Government contractor clearing branch in National Forest, failure to do so is not discretionary; Lambert v. U.S., Civ. #97-5057 (D.S.D. 16 Sep 98), where contractor temporarily fills potholds on Indian reservation road under reconstruction, United States is not responsible to inspect and ward where traffic causes temporary till of gravel to ridge and create danger; Brewer v. U.S., Civ. # 92-1013-PHX-MS (D. Ariz. 5 Oct. 98), failure to warn of presence of logging trucks of Forest Service logging road is discretionary. Knockel ex rel Knockel v. U.S., 49 F. Supp.2d 1155 (D. Ariz. 1998) failure to follow directives concerning food handling and permitee inspections is not discretionary in injury claim for mauling by problem bear.

(j) Prosecution. The decisions concerning whether to prosecute a person is discretionary. Heywood v. U.S., 585 F. Supp. 590 (D. Mass. 1984) (whether to prosecute a person is discretionary); Bradley v. U.S., 615 F. Supp. 206 (E.D. Pa. 1985) (method of investigating and prosecuting VA employee regarding drug dealing is discretionary).

(k) Immigration. The decision to allow a person to enter this country is discretionary. Flammia v. U.S., 739 F.2d 202 (5th Cir. 1984) (decision to permit Cuban criminals to enter U.S. under Mariel boat lift--discretionary).

(l) Drug Testing. Bailey v. Eli Lilly Co. Inc., 607 F. Supp. 660 (M.D. Pa. 1985) (FDA action in approving Oraflex is discretionary); Forsyth v. Eli Lilly and Co., 904 F. Supp. 1153 (D. Haw. 1995) (FDA appraisal of Prozac falls under exclusion in murder-suicide claim). But see In re Sabin Oral Polio Vaccine Product Liability Lit., 984 F.2d 124 (4th Cir. 1993) (no discretion involved in whether techniques used by foreign manufacturer met standard); Baker v. U.S., 817 F.2d 560 (9th Cir. 1987) (distinguished Varig and

follows Griffin v. U.S., 500 F.2d 519 (3d Cir. 1974) re duty to test oral polio vaccine).

(m) Delays and Non-Issuance. Delays and non-issuance of licenses is discretionary. Wendler v. U.S., 782 F.2d 853 (10th Cir. 1985) (delay in reissuing suspended pilot's license not actionable); Heller v. U.S., 803 F.2d 1558 (11th Cir. 1986) (denial of pilot's medical certificate by FAA is exempt). Bessey v. U.S., Civ. # 97-CV-1790 (E.D. Va., 18 Mar. 1998) (decision as to when and how to issue security clearance to defense contractor employee is discretionary - cites Chesna v. U.S. DOD, 822 F. Supp. 90 (D. Conn. 1993).

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

(o) Investigation and Enforcement. Investigation and enforcement decisions are discretionary. Nankervis v. U.S., 127 F.3d 1102 (table), 1997 WL 650828 (6th Cir. 1997) (Social Security Administration's failure to properly investigate employee for sexual assualt in 1983 does not provide basis for claiming U.S. caused murder by same employee in 1992); Kline v. Republic of El Salvador, 603 F. Supp. 1313 (D.D.C. 1985) (extent to which U.S. must investigate death of American tourist in El Salvador is discretionary); Bradley v. U.S., 615 F. Supp. 206 (E.D. Pa. 1985) (method of investigating and prosecuting VA employee regarding drug dealing is discretionary); Sottile v. U.S., 608 F. Supp. 1040 (D.D.C. 1985) (decision by FAA to investigate whether a flight instructor is properly certified is discretionary); Cunningham v. U.S., 625 F. Supp. 1016 (D. Mont. 1985) (OSHA inspection does not form basis for cause of action in death due to equipment failure); Cox v. Secy. of Labor, 739 F. Supp. 28 (D.D.C. 1990) (failure to investigate pension fund as required by Federal law is discretionary); Employers Insurance of Wausau v. U.S., 830 F. Supp. 453 (N.D. Ill. 1993) (EPA decision to name Wausau "potentially responsible person" is not proper subject for FTCA claim); Crumpton v. U.S., 99 F.3d 1400 (D.C. Cir. 1995) (release of CID report of Army officer's suicide and fraudulent travel vouchers is discretionary. Crenshaw v. U.S., 959 F. Supp. 399 (S.D. Tex. 1997) (NASA sting operation into contracting practices falls under exclusion, even though it includes misrepresentation); U.S. v. Skipper,

781 F. Supp. 1106 (E.D.N.C. 1992) (method of CERCLA response is discretionary). But see Ayala v. U.S., 980 F.2d 1342 (10th Cir. 1992) (incorrect technical advice by Federal mine inspector as to how to correct methane warning system is not discretionary function barred—-on remand, held proximate cause was the effective intervening negligence of suppliers and miners--see Ayala v. U.S., 846 F. Supp. 1431 (D. Colo. 1993), aff'd, 49 F.3d 607 (10th Cir. 1995)).

(p) Service Members. Decisions concerning classification and control of service members falls within the discretionary function exclusion. Hart v. U.S., 894 F.2d 1539 (11th Cir. 1990) (how to search for and identify service members' KIA is discretionary); Geraldine Burns P.P.A. v. U.S., 618 F. Supp. 882 (D. Mass. 1985) (refusal to transfer soldier with children to U.S. at request of mother with custodial rights is discretionary); Crumholt v. U.S., Civ. # 85-370-A (M.D. La. 1986) (enlistment barred as security clearance refusal which refusal is discretionary); Mercado Del Valle v. U.S., 856 F.2d 406 (1st Cir. 1988) (USAF failure to supervise unrecognized student organization involved with ROTC held exempt); Simmons v. U.S., 754 F. Supp. 274 (N.D.N.Y. 1991) (decision to change classification of airman from MIA to KIA is discretionary); Lane v. U.S., 918 F. Supp. 864 (E.D. Pa. 1996) (manner in which DVA carries out statute authorizing DVA to seek out former POWs to permit application for increased benefits). Decisions to adminster certain drugs to soldiers before thay go into combat also fall under exclusion. Clark v. U.S., 974 F. Supp. 895 (E.D. Tex. 1997) (administration of drug to servicemember during Desert Storm which allegedly caused birth defects held discretionary); Minns v. U.S., 974 F. Supp. 500 (D. Md. 1997) (same facts and ruling as Clark).

(q) Use and Control of Informants. Decisions concerning use and control of informants is discretionary. Ostera v. U.S., 769 F.2d 716 (11th Cir. 1985) (use of FBI informant with homicidal tendencies as witness resulting in release from jail is discretionary). Accord Taitt v. U.S., 770 F.2d 890 (10th Cir. 1985).

(r) Staffing Decisions. Staffing decisions are discretionary. Wysinger v. U.S., 621 F. Supp. 773 (W.D. La. 1985) (decision not to have lifeguards discretionary).

(s) Law Enforcement. Decisions concerning criminal cases are discretionary. Lopez-Pacheco v. U.S., 627 F. Supp. 1224 (D.P.R. 1986) (no cause of action under Puerto Rican law for invasion of privacy--even if so, surveillance of known radical is exempt under § 2680(a)); Hydrogen Technology Corp. v. U.S., 831 F.2d 1155 (1st Cir. 1987) (FBI dismantling of machine in evidentiary exam falls under § 2680(a), provided that due care is used); Georgia Casualty & Surety Co. v. U.S., 823 F.2d 260 (8th Cir. 1987) (suit by good faith purchasers barred by § 2680(a)--repurchase of stolen autos in FBI covert operation); Mesa v. U.S., 827 F. Supp. 1210 (S.D. Fla. 1993), aff'd, 123 F.3d 1435 (11th Cir. 1997) (arresting wrong person with same name is discretionary and exclusion applies); Olson v. U.S., Civ. # CV89-4034 (E.D.N.Y., 10 Oct. 1991) (FBI use of concussion grenade which caused fire to remove guest-suspect from private home is discretionary); Poritz v. U.S., Civ. # CV 93-057-BU-JFB (D. Mont., Jan. 28, 1994) (claim for loss of business due to bad publicity caused by FBI's open and notorious investigation of theft and smuggling of Federal "insects" is discretionary); Kelley v. U.S., Civ. # CV 93-3963-WMB (C.D. Cal., Mar. 9, 1995) (payment of rewards to DEA informant under 26 U.S.C. § 524 is discretionary--equates to rewards by IRS (26 U.S.C. § 7623) and Customs Service (19 U.S.C. § 1619)). But see Patel v. U.S., 806 F. Supp. 873 (N.D. Cal. 1992) (method of routing drug dealer out of house by use of flammables is not discretionary and must be shown to be reasonable).

(t) Failure to Enforce Regulations. Government's failure to enforce regulations or orders is discretionary. U.S. v. Varig Airlines, 467 U.S. 797, 104 S.Ct. 2755 (1984) (certifying air worthiness discretionary); Smolar-Hutton v. Beech Aircraft Corp., 647 F. Supp. 1348 (D.N.J. 1986) (failure of FAA to enforce reg. regarding modification of aircraft part falls under exclusion—-follows Varig); Totten v. U.S., 806 F.2d 698 (6th Cir. 1986) (failure to enforce a USAF regulation re use of safety equipment falls under exclusion--follows Varig); Zabala Clemente v. U.S., 567 F.2d 1140 (1st Cir 1977) (FAA failure to warn that plane was overweight and did not have qualified crew held discretionary).

(u) Adjudicatory Decisions. Adjudicatory decisions are discretionary. Pierce v. U.S., 804 F.2d 101 (8th Cir. 1986) (denial of benefits by Social Security

examiner is exempt). Green v. U.S., 8 F. Supp. 2d 983 (W.D. Mich. 1998), decision to award loan to another applicant despite allegation that claimant was first on list was discretionary.

(v) Safety Inspection Duty Allocation. Decision to delegate duty of safety responsibility to contractor is discretionary. Andrews v. U.S., 121 F.3d 1435 (11th Cir. 1997) (Navy's pre-CERCLA/RCRA delegation of responsibility to comply with waste disposal regulations and negligent failure to supervise waste disposal independent contractor falls within the discretionary function exclusion--distinguishing Dickerson, Inc. v. United States, 875 F.2d 1577 (11th Cir. 1989)); Martinez v. U.S., 661 F. Supp. 762 (W.D. Tex. 1987) (delegation of safety by COE to construction contractor falls under § 2680(a) and bars claim by injured employee); Fortney v. U.S., 659 F. Supp. 127 (W.D. Va. 1987) (similar delegation of safety to GOCO contractor upheld); Fried v. U.S., 674 F. Supp. 636 (N.D. Ill. 1987) (reservation of safety supervision at nuclear lab discretionary). But see Routh v. U.S., 941 F.2d 853 (9th Cir. 1991) (discretionary function exclusion not applicable where contract required roll over bar on backhoe); Pelham v. U.S., 661 F. Supp. 1063 (D.N.J. 1987) (contractual provision held to impose liability towards injured construction worker).

(w) Maps and Charts. Markings on charts may fall within discretionary function. Sewell v. U.S., 732 F. Supp. 1103 (D. Colo. 1990) (no duty to mark power line on NOAA Navigational chart); Hyundai Merchant Marine Co. v. U.S., 888 F. Supp. 543 (S.D.N.Y. 1995) (10 U.S.C. § 279p immunity for military prepared maps). But see In re Glacier Bay, 71 F.3d 1447 (9th Cir. 1995) (exclusion does not apply to erroneous nautical charts caused by not following NOAA standards in suit where vessel is grounded). Barna v. U.S., 1998WL704101 (N.D. Ill.), failure to mark hill on NOAA chart is not discretionary as it violates Agency orders. Barna v. U.S., 22 F. Supp. 2d 784 (N.D. Ill., 1998) omission of trees from navigation chart prepared by National Ocean Service is not discretionary in fatal air crash.

(x) Hiring, Training and Retention of Employees. Hiring, training and retention of employees may fall within discretionary function. Attallah v. U.S., 758 F. Supp. 81 (D.P.R. 1991) (discretionary function applied to hiring and training of customs agents who rob and murder courier); Footman v. U.S., Civ. # 92-

0474-CIV-ORL-18 (M.D. Fla., 28 Sept. 1993) (drowning in NASA swim lake of 7-year-old allegedly due to having untrained and unskilled lifeguards falls under discretionary function exclusion); Tonelli v. U.S., 60 F.3d 492 (8th Cir. 1995) (claims for peeking at adult mail by postal worker while mail was in a sealed post office box--claims based on negligent hiring excluded by § 2680(a)); Dobbins v. U.S., Civ. # CIV-S-95-117 DFL PAN (E.D. Cal., 12 Feb. 1997) (decision to hire and retain air traffic controller is discretionary); Big Owl v. United States, 961 F. Supp. 1304 (D.S.D. 1997) (failure to notify teacher that she would not be rehired as prescribed in school pamphlets is discretionary).

(y) Security. Decision whether to provide security to contractor is discretionary. Fazi v. U.S., 935 F.2d 535 (2d Cir. 1991) (whether to protect contract mail carrier with security guard is discretionary).

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

(aa) Government Operations. Clayton v. U.S., Civ. # CV-90-057-BU, (D. Mont., 9 July 1993) (Federal High Administration decision to conduct one lane nighttime operation was discretionary-—cause of death was claimant’s own negligence, not method by which operation was conducted); Prescott v. U.S., 858 F. Supp. 1461 (D. Nev. 1994) (method of protecting workers at National Test Site from ionizing radiation is discretionary); Fritz v. U.S., Civ. # 93-705 JP/LFG (D.N.M., Mar. 17, 1994) (failure of government contracting officer to require construction contractor to obtain workmen’s compensation insurance is discretionary); Scruggs v. U.S., 959 F. Supp. 1537 (S.D. Fla. 1997) (USAF has discretion regarding safety measures); Tippett v. U.S., 108 F.3d 1194 (10th Cir. 1997) (decision concerning permitting snowmobiles to pass moose in National Park is discretionary). But see Plum Creek Timber Co. v. U.S. Department of Agriculture, Civ. # CV 94-0335-N-EJL (D. Idaho, 26 Sept. 1996) (decision to proceed with controlled burn which escaped does not involve public policy considerations); Sanchez v. Bellefeville, 855 F. Supp. 587 (N.D.N.Y. 1994) (design and control of temporary

checkpoint by INS border patrol not in conformance with Agency handbook is not discretionary).

(bb) Decision to Terminate Contract. Osborne v. U.S., Civ. # 4:95-cv-37 (JRE) (M.D. Ga., Oct. 30, 1995) (exclusion applies to Army's decision not to renew contracts).

(cc) Weather Reporting. Government decisions to report weather is discretionary). Brown v. U.S., 790 F.2d 199 (1st Cir. 1986) (U.S. not liable for drowning of fisherman based on failure to report correct weather—- U.S. did not create danger); Bergquist v. U.S., 849 F. Supp. 1221 (N.D. Ill. 1994) (failure of National Weather Service to warn of tornado is discretionary).

(dd) Secret Government Experiments. See Orlikow v. U.S., 682 F. Supp. 77 (D.D.C. 1988) (CIA secret psychiatric experiment not discretionary).

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

(a) Treatment by Mental Health Professionals. See generally, Magee v. U.S., 121 F.3d 1 (1st Cir. 1997) (VA decision to help schizophrenic mental patient on prolixin obtain driver's license is a policy judgment within the discretionary function exclusion); Lacock v. U.S., 1997 WL 22263 (9th Cir.) (Montana law requiring mental health personnel to warn third party of dangerous propensities of patient did not apply since no thret of harm made by patient); Naisbitt v. U.S., 611 F.2d 1350 (10th Cir. 1980) (reviews many cases); Johnson v. U.S., 576 F.2d 606 (5th Cir. 1978); Hendry v. U.S., 418 F.2d 774 (2d Cir. 1969) (reviews many cases); Fahey v. U.S., 153 F. Supp. 878 (S.D.N.Y. 1957). See also Fraser v. U.S., 83 F.3d 591 (2d Cir. 1996) (VA had no duty to control psychiatric outpatient who later stabbed to death plaintiff's decedent); Rousey v. U.S., 115 F.3d 394 (6th Cir. 1997), aff'g, 921 F. Supp. 155 (E.D. Ky. 1996)(no duty to warn Rousey or anyone else, since VA mental patient was reasonably determined not to be harmful--shooting of four occupants of car including his wife three weeks after discharge from 28 day VA psychiatric program falls under exclusion); Leedy v. Hartnett, 510 F. Supp. 1125 (M.D. Pa. 1981) (release of VA mental patient); Sellers v. U.S., 870 F.2d 1098 (6th Cir. 1989) (no duty to warn

general public of violent propensities of OP mental patient released on lithium); Sage v. U.S., 974 F. Supp. 851 (E.D. Va. 1997) (Army mental patient commits ruthless, public murder without motive—-no duty to warn that he is a recovering mental patient). Usually decisions related to the treatment of persons with mental health problems falls within the discretionary functions exclusion. Speer v. U.S., 512 F. Supp. 670 (N.D. Tex. 1981) (holds U.S. not liable for suicide of patient based on improper treatment); Burchfield v. U.S., 750 F. Supp. 1312 (S.D. Miss. 1990) (U.S. not liable for assault of random victim of ex-VA voluntary patient); Pessagno v. U.S., F. Supp. 149 (S.D. Iowa 1990) (U.S. not liable for suicide of voluntary mental patient on pass off grounds); Katta v. U.S., 774 F. Supp. 1134 (N.D. Ill. 1991) (release of VA mental patient who commits suicide held discretionary); Fraser v. U.S., 83 F.3d 591 (2nd Cir. 1996) (no duty to control known psychotic in absence of knowledge of foreseeable victim); Trapnell v. U.S., 926 F. Supp. 534 (D. Md. 1996) affirmed 1997 WL 768581 (4th Cir., MD) (VA failure to hospitalize schizophrenic who committed suicide later same). A U.S. employee's decision to release, or not release, a mental patient falls within the discretionary function exclusion. Hokansen v. U.S., 868 F.2d 372 (10th Cir. 1989) (no duty not to release voluntary VA mental patient); Hasenei v. U.S., 541 F. Supp. 999 (D. Md. 1982); Ankony v. U.S., 646 F. Supp. 156 (S.D. Iowa 1989); Eanes v. U.S., 407 F.2d 823 (4th Cir. 1969); Soutear v. U.S., 646 F. Supp. 524 (E.D. Mich. 1986); Castillo v. U.S., 552 F.2d 1385 (10th Cir. 1977); Moye v. U.S., 735 F. Supp. 179 (E.D.N.C. 1990) (no duty to control or commit voluntary patient); Cantrell v. U.S., 735 F. Supp. 670 (E.D.N.C. 1988) (same); Case v. U.S., 523 F. Supp. 317 (S.D. Ohio 1981) (release of mental patient). However, courts sometimes hold that mental health decisions do not fall within the discretionary function exclusion. Chrite v. U.S., 564 F. Supp. 341 (E.D. Mich. 1983) (duty to warn potential victim where danger foreseeable and identifiable in connection with release of mental patient); Jablonski v. U.S., 712 F.2d 391 (9th Cir. 1983) (duty to warn as in Chrite--cites White v. U.S., 317 F.2d 13 (4th Cir. 1963) and Underwood v. U.S., 356 F.2d 92 (5th Cir. 1966)); Peterson v. U.S., Civ. # H-80-1357 (S.D. Tex. 1982) (murder of daughter and wounding of wife by AWOL service member—-U.S. held liable as improper treatment by untrained mental health social worker--use of social worker created special relationship under Texas law); Collazo v. U.S., 850

F.2d 1 (1st Cir. 1988) (refusal to readmit VA mental patient not excluded); Mahomes-Vinson v. U.S., 751 F. Supp. 913 (D. Kan. 1990) (VA mental patient in and out of involuntary status over period assaults child--U.S. held liable even though VA had no authority to commit); Mayer v. U.S., 774 F. Supp. 1114 (N.D. Ill. 1991) (release of VA mental patient who kills claimant is not discretionary).

(b) Parolees and Informants. The government's method of controlling parolees, informants and witnesses falls within the discretionary function exclusion. Bergman v. U.S., 689 F.2d 789 (8th Cir. 1982) (no duty to supervise criminal in Federal Witness Program); Weissich v. U.S., Civ. # C-88-3583 RHS (N.D. Cal. 1992), aff'd, 4 F.3d 810 (9th Cir. 1993) (method of controlling parolee who committed murder while on parole is discretionary); Vaughn v. U.S., 933 F. Supp. 660 (E.D. Ky. 1996) Aff'd Civ. #96-6336 (6th Cir., 16 Dec 1996) (failure of FBI to supervise informant who shoots Harry Vaughn at party falls under exclusion). However, some courts have held that the discretionary function exclusion does not bar suits concerning the control of informants and parolees. Payton v. U.S., 679 F.2d 475 (5th Cir. 1982) (release of Whisenhant, a homicidial psychotic, on parole not excluded); Liuzzo v. U.S., 508 F. Supp. 923 (E.D. Mich. 1981) (FBI permitting informant to accompany KKK not cause of assault resulting in his death Selma voting rights march--not excluded); Ochran v. U.S., 117 F.2d 495 (11th Cir. 1997) (where AUSA voluntarily assumes duty to protect government witness, her failure to inform of available remedies against intimidation and harassment by ex-boyfriend who she is testifying against is not discretionary). In any event, the U.S.' decision to revoke a person's parole is discretionary. Wilson v. U.S., 767 F. Supp. 551 (S.D.N.Y. 1991).

(c) Riots. Decisions concerning police and troop positioning during riots are discretionary. See, generally. National Board of YMCA v. U.S., 395 U.S. 85, 89 S.Ct. 1511 (1969) (Panama Canal Zone riots). See also Goldstar (Panama) S.A. v. U.S., 967 F.2d 965 (4th Cir. 1992); Monarch Insurance Co. of Ohio v. D.C., 353 F. Supp. 1249 (D.D.C. 1973), aff'd, 497 F.2d 684 (D.C. Cir.), cert. denied, 419 U.S. 1021 (1974) (Oxford, Miss. Riot); Smith v. U.S., 330 F. Supp. 867 (E.D. Mich. 1971) (Detroit riots). Ashley v. U.S., 37 F. Supp.2d 1027 (W.D. Tenn., 1997), all of inmate's

personal property not returned after riot in which warden ordered all cells cleared - falls under 2680(a).

(d) Control of Service Members. The control of service members is usually discretionary. Doyle v. U.S., 530 F. Supp. 1278 (C.D. Cal. 1982) (discharge of service member who kills policeman two days later); Carlyle v. U.S. Dept. of Army, 674 F.2d 554 (6th Cir. 1982) (failure to supervise applicants for enlistment who threw bench from window of hotel room rented at Army expense); Fair v. U.S., 234 F.2d 288 (5th Cir. 1956). Roskiewich v. U.S., 1998 WL 77888 (4th Cir., W.C.) (whether to place sexual offender-prisoner on external work detail is discretionary in sexual assaut claim. Sigman v. U.S., Civ. # CS-96-090-JLG (E.D. Wash., 9 Jul 98) (failure to follow recommendation of mental health professional to discharge airman with long history of mental illness is discretionary but failure to properly screen at enlistment is not, as mandatory regulation not followed). Pineda v. U.S., Civ. #BP-96-CA-478-FB (W.D. Tex. 24 Jan 98), exclusion applies to failure to control or warn visitors in double murder by soldier - only fore knowledge of unit was domestic disturbance several months earlier- expressly rejects Otis Engineering Corp v. Clark, 801 SW.3d 307 (Tex. 1983).

(e) Duty to Prisoners. Assignment of prisoners to particular prisons or cells falls within the discretionary function exclusion. Ross v. U.S., 641 F. Supp. 368 (D.D.C. 1986) (negligent transfer of prisoner to Marion--exempt); Calderon v. U.S., 923 F. Supp. 127 (N.D. Ill. 1996), aff'd, 123 F.3d 946 (7th Cir. 1997)(failure to remove cellmate who attacked Calderon falls under exclusion despite fact that Calderon has furnished criminal information on cellmate's relative); Bailor v. Salvation Army, 51 F.3d 678 (7th Cir. 1995) (decision to place prisoner in halfway house is discretionary, even though prisoner leaves and rapes and assaults plaintiff); Libretti v. U.S., Civ. # 94-1543 PHX PGR (SLV) (D. Ariz., 12 Sept. 1996)(method and implementation of prison shake-down is discrerionary); Caudle v. U.S., Civ. # TH 93-210-C-M/G (S.D. Ind., Feb. 24, 1995), aff'd, 72 F.3d 132 (table), 1995 WL 730817 (7th Cir 1995) (decision to place prisoner in cell block housing assaultive prisoners where he was later attacked is discretionary). The U.S. may also have no duty to warn of threats by prisoners. Barrett v. U.S., 845 F. Supp. 774 (D. Kan. 1994) (failure to investigate death threats to prisoner who was murdered, may have

been negligent, but did not cause prisoner's death). Dewer v. Vecera, 139 F.3d 1190 (8th Cir. 1998) Intoxicated prisoner at fair at Jefferson Memorial who is released by police later is struck by car and killed - release is discretionary. Dykstra v. U.S. Bureau of Prisoners, 140 F.3d 791, (8th Cir. 1995) Failure to advise youthful appearing who was subsequently sexually assaulted about protective custody is discretionary. Muhammed v. U.S., 6 F. Supp. 2d 582 (N.D. Tex. 1998), 18 U.S.C. 4042, which imposes duty on Bureau of Prisons to provide suitable quarters creates a private duty under FTCA to paraparetic prisoner. Cohen v. U.S., 151 F.2d 1338 (11th Cir. 1998), placing prisoner in minimum security facility is discretionary--reverses award to prisoner beaten by fellow inmate. Snow v. U.S., Civ. # 58-CV-0161-PE (S.D. Ill., 12 Jan 99), where inmate is knocked unconscious and mutilated while walking in prison compound, method of controlling prisoners is discretionary; see also Mitchell v. U.S., Civ. # CIV-97-1915-PHX-PCR9MS) (D. Ariz., 30 June 1999). Jackson v. U.S., 24 F. Supp. 2d 823 (W.D. Tenn. 1998) method of responding to prisoner generated fire which resulted in claimant inhaling smoke while locked in cell doesn't fall under 2680(c).

(f) Protection From Harm. The decision whether to protect an individual from potential harm may fall within the discretionary function exclusion. Weissach v. U.S., 4 F.3d 810 (9th Cir. 1993) (U.S. Probationary Service regulations do not create a duty to warn ex District Attorney of threat by prisoner to kill him); Simmons v. U.S., 626 F.2d 985 (3d Cir. 1982) (no duty to protect individual because of his own request--duty is to public); Bates v. U.S., 517 F. Supp. 1350 (W.D. Mo. 1981), aff'd, 701 F.2d 737 (8th Cir. 1983) (murder of three teenagers and assault of another by on-duty MP using service revolver, U.S. held not liable based on Missouri law); Sellers v. U.S., 870 F.2d 1098 (6th Cir. 1989) (no duty to warn general public of violent propensities of OP mental patient released on lithium); Flax v. U.S., 791 F. Supp. 1035 (D.N.J. 1992) (method of tailing kidnapper is discretionary); Manderville v. U.S., No. 89-00549 HMF (D. Haw., 14 Dec. 1992) (no duty under Hawaii statute requiring assistance to those in trouble to do more under circumstances to call police to scene of bar fight in Navy Club); Zielinski v. U.S., 89 F.3d 831 (table), 1996 WL 329492 (4th Cir. 1996) (Army reservist who is under a bar letter gains access to Navy base by presenting Army ID and kidnaps and assaults plaintiff—-degree and nature of security is

discretionary). But see Ochran v. U.S., 117 F.2d 495 (11th Cir. 1997) (where AUSA voluntarily assumes duty to protect government witness, her failure to inform of available remedies against intimidation and harassment by ex-boyfriend who she is testifying against is not discretionary); Red Lake Band of Chippewa Indians v. U.S., 800 F.2d 1187 (D.C. Cir. 1986), later appeal, 936 F.2d 1320 (D.C. Cir. 1991) (FBI removal of all law enforcement officers from hostage situation is not exempt—on later appeal, U.S. held not liable because injury resulting from riot would have occured even if officers had not been pulled out); Peterson v. U.S., Civ. # H-80-1357 (S.D. Tex. 1982) (use of untrained mental health counselor creates liability based on special relationship with patient under Texas law). Further, the decision to protect people is not discretionary when mandated by Congress. Knop v. U.S., Civ. # 4:95CV01416 ERW (E.D. Mo., 23 Sept. 1996) (NPS plan to carry out congressional mandate to protect park visitors not followed-—discretionary function exclusion not applicable).). Aoah v. U.S., Civ. # 96-CV-1061-B (D. Wyo., 13 Feb 1998) (FBI agent's order not to render aid at shooting scene is not under exclusion as he was without authority to give order to local police. Gager v. U.S., 149 F.3d 918, (9th Cir., Nev. 1998) (decision not to train postal employees to detect mail bomb is discretionary.

(g) Investigation, Prosecution and Arrest. Investigation, prosecution and arrest of individuals fall within the discretionary function exclusion. Barbion v. U.S., 132 F.3d 30 (table), 1997 WL 758737 (1st Cir. 1997) (decision to investigate and prosecute is discretionary , even if discretion abused); Ward v. U.S., 738 F. Supp. 129 (D. Del. 1990) (decision to investigate FECA fraud suspicion on USPS employee is discretionary); Amato v. U.S., 549 F. Supp. 863 (D.N.J. 1982) (discretionary function bars suit by criminal shot by police in bank robbery contending that he should have been arrested for a lesser offense earlier); K.W. Thompson Tool Co. v. U.S., 836 F.2d 721 (1st Cir. 1988) (EPA’s decision to prosecute discretionary); Flax v. U.S., 847 F. Supp. 1183 (D.N.J. 1994) (method of surveillance by FBI in kidnapping is discretionary in case for wrongful death of victim); Chandler v. U.S., 875 F. Supp. 1250 (N.D. Tex. 1994) (presenting false evidence to AUSA who then unsuccessfully prosecutes two GSA employees does not fall under exclusion); Cole v. U.S., 874 F. Supp. 1011 (D. Neb. 1995) (FBI electronic expert’s review of tapes

of strange telephone noises and concluding erroneously that it was wire tapping is discretionary); Golden v. U.S., Civ. # 93-N-2660-NE (N.D. Ala., July 28, 1994) (decision to continue investigation and suspend clearance of whistleblowing DAC is discretionary); Garcia v. U.S., 896 F. Supp. 467 (E.D. Pa. 1995) (extensive body search by Customs of two U.S. citizens returning from vacation in Jamaica is discretionary); Heinze v. U.S., Civ. # 94-913-JE (D. Or., Jan. 20, 1995) (planning by ATF of sting operation is discretionary—-forseeability of high speed leads to common law negligence); Doherty v. U.S., 905 F. Supp. 54 (D. Mass. 1995) (exclusion applies to search by federal agents of wrong residence to find perpetrators of armored car robbery); Clark v. Buchko, Civ. # 94-755 (CSF) (D.N.J., Jan. 11, 1995) (Buchko, a deputy sheriff, utilized by FBI for bank robbery investigation arrests third parties-—plaintiff argues that U.S. liable on basis that FBI did not follow FBI manual on arrest--exclusion applies); Sabow v. U.S., 93 F.3d 1444 (9th Cir. 1996) (nature and manner of NIS and JAG investigation into suicide of U.S. Marine officer are discretionary—-case remamded as discretionary function exclusion does not bar claim for intentional infliction of emotional distress concerning conduct of general and other military personnel during meeting with family); Hobdy v. U.S., 762 F. Supp. 1459 (D. Kan. 1991) (method of conducting CID investigation is discretionary--cites Bradley v. U.S., 615 F. Supp. 206 (E.D. Pa. 1985), aff'd sub nom., Pooler v. U.S., 787 F.2d 868 (3d Cir.), cert. denied, 479 U.S. 849 (1986)); Kelly v. U.S., 737 F. Supp. 711 (D. Mass. 1990) (DEA decision whether to investigate leak is discretionary). Sellers v. U.S., __ F.3d __, 133838 (8th Cir. (No)) exclusion applicable to arrest and release of intoxicated man near busy intersection near National Park Service Fair is discretionary; Chandler v. U.S., 875 F. Supp. 1250 (N.D. Tex. 1994) (presenting false evidence to AUSA who then unsuccessfully prosecutes two GSA employees does not fall under exclusion). Johnson v. U.S., 47 F. Supp. 2d 1075 (S.D. Ind. 1999), where suspect flees into friend's house to avoid arrest, U.S. Marshal's use of teargas is discretionary. O'Ferrell v. U.S., 32 F. Supp. 2d, 1293 (M.d. ala. 1998) failure of proof that FBI was deliverately misleading in obtaining warrant in mail bombing case-method of investigating is discretionary.

(h) Mentally Disturbed Persons. U.S. may have no duty to control mentally disturbed persons. Abernathy v.

U.S., 773 F.2d 184 (8th Cir. 1985) (no duty to control mentally disturbed Indian on reservation who subsequently beat victim to death); Evans v. U.S., 883 F. Supp. 124 (S.D. Miss. 1995) (Mississippi Code on duty of psychiatrist precludes revealing of death threats—-Tarasoff doctrine of duty to warn is not applicable).

(i) Furnishing Medical Treatment. The government's furnishing of medical treatment is often not within the discretionary function exclusion. See, generally, U.S. v. Gray, 199 F.2d 239 (10th Cir. 1952); White v. U.S., 226 F. Supp. 129 (S.D. Iowa 1964), aff'd, 359 F.2d 989 (8th Cir. 1965); Supchak v. U.S., 365 F.2d 844 (3d Cir. 1966); Santa v. U.S., 252 F. Supp. 615 (D.P.R. 1966); Rufino v. U.S., 126 F. Supp. 132 (S.D.N.Y. 1954); Jackson v. Kelly, 557 F.2d 735 (10th Cir. 1977); Griffin v. U.S., 500 F.2d 1059 (3d Cir. 1974); Harr v. U.S., 705 F.2d 500 (D.C. Cir. 1983) (pilot medical qualifying exam by FAA). Medical decisions held to be within discretionary function exclusion. Baie v. Secretary of Defense, 784 F.2d 1375 (9th Cir. 1986) (CHAMPUS regulation barring payment for penile insert upheld); C.R.S. v. U.S., 11 F.3d 791 (8th Cir. 1993), aff'g, 820 F. Supp. 499 (D. Minn. 1993) (method of screening blood donors in 1983 for possibility of HIV+ is discretionary); Denny v. U.S., 171 F.2d 365 (5th Cir. 1949), cert. denied, 337 U.S. 919 (1949); Harris v. U.S., Civ. # 95-5106FDB (W.D. Wash., Feb. 22, 1996) (failure by DVA physician to seek involuntary commitment of VA mental patient without foundation and did not cause fatal collision). Fang v. U.S., 140 F.3d 1238 (9th Cir. 1998) (decision not to use backboard in emergency rescue is not discretionary). Crosby v. U.S., Civ. #A95-159 CV (JWS) (D. Alas., 6 Aug. 98), limiting health services in Navy contract employees in Aleutian Islands is discretionary. Fullmer v. U.S., 34 F. Supp. 2d 1325 (D. Utah, 1997), decision as to how to staff and train Army medical clinic is discretionary where wife of civilian employee dies from asthma attack; Fullmer v. U.S., 1999WL26871 (10th Cir. Utah), decision not to staff Dugway clinic 24 hours a day is discretionary.

(j) Management of Buildings and Lands. Management of U.S. Buildings and Lands. The discretionary function exclusion is applicable to U.S. Management of Buildings and Lands. Shansky v. U.S., 164 F.3d 688 (1st Cir. 1999), in slip and fall on antique wooden threshold at U.S. Forest Service preserve trading post, decision not

to place guardrail is discretionary; Chaffin v. U.S., 176 F.3d 1208 (9th Cir. 1999), case remanded on whether U.S. liable for polar bear attack on contract employee under Restatement 343 re storage of whale meat, under Restatement 413 re superior knowledge of danger and under Restatement 410 re prohibition on firearms; Cochran v. U.S., 38 F. Supp. 986 (W.D. Fla. 1998), decision to keep bowling alley open and leave stacks of resurfacing panels throughout is discretionary; Morales v. U.S.,1999WL221149 (E.D. La.), where jogger steps in grass-covered hole whose presence was known to Government caretaker, Government owed duty for failure to correct hazard; Smith v. U.S., Civ. 3:96 CV-650-M (W.D. Ky., 1 Jun 99), decision by recreation official to eject pregnant horse from Fort Knox post stable is discretionary. Gallardo v. U.S., 29 F. Supp.2d 572 (E.D. Md. 1998) slip and fall on stairs at Gateway Arch due to poor design falls under 2680(a). Gunter v. U.S., 10 F. Supp. 2d 534 (M.D. N. Car., 1998) no duty to warn of puddle on Post office floor on a rainy day.

(i) Buildings and Grounds. Cases where the discretionary function exclusion held applicable. Wiggins v. U.S. through Dept. of Army, 799 F.2d 962 (5th Cir. 1986) (decision not to remove 70-year-old pilings is discretionary); McCartney v. U.S., No. 85-1527 (5th Cir., 27 Aug. 1986) (tenant failure to properly change filters in gas furnace); Gales v. U.S., 617 F. Supp. 42 (W.D. Pa. 1985) (puddle of water with no tracks around it in busy corridor-—no duty to warn since presence unknown); Taylor v. U.S., 121 F.3d 86 (2nd Cir. 1997), aff'g, 946 F. Supp. 314 (S.D.N.Y. 1996) (where door slammed shut on child’s finger due to broken door closer, U.S. must be on actual notice for liability to attach); Linn v. U.S., 979 F. Supp. 521 (E.D. Ky. 1997) (canopy of ceiling fan falls on prison visitor when screw works loose from 4.5 years of operation—no duty to inspect and summary judgment for U.S.); Graves v. U.S., 517 F. Supp. 95 (D.D.C. 1981) (no second exit in boiler room as required by D.C. Code); Hess v. U.S., 666 F. Supp. 666 (D. Del. 1987) (no duty to warn of bare terrazzo floor between two mats at USPS facility entrance on a rainy day); Curtis v. U.S., Civ. # C-80-3744-WAI (N.D. Cal. 1982) (failure to build fence around post quarters resulting in injury to children not actionable); Doe v. U.S., 718 F.2d 1039 (11th Cir. 1983) (location of post office in high crime area); Jones v. U.S., 698 F. Supp. 826 (D. Haw. 1988) (no duty to warn

quarters occupant's of pesticide spraying of chlordane); Soni v. U.S., 739 F. Supp. 485 (E.D. Mo. 1990) (unusual stairway design for aesthetic reasons is discretionary); Calsagnol v. Figuerra, 765 F. Supp. 514 (D.P.R. 1991) (aesthetic design of El Morro is discretionary-—no duty to protect low wall with fencing); Kallas v. U.S., 763 F. Supp. 866 (S.D. Miss. 1991) (impulse cartridges properly stored in fenced and guarded area at Miss. NG at Gulfport-Biloxi Airport do not constitute attractive nuisance); Trammell v. U.S., Civ. # DC-88-4104-B-O (N.D. Miss. 1992) (issuing a warning by U.S. re dangers of state owned gym on leased federal land is discretionary); Miller v. U.S., Civ. # IP-92-165-C (S.D. Ind., 26 Mar. 93) (U.S. not liable for premises liability at Camp Atterbury Ind. Nat'l Guard owned and operated area); Duff v. U.S., 999 F.2d 1280 (8th Cir. 1993) (U.S. as landlord of government quarters has no duty to warn occupants of danger of fumes from floor varnish used by independent contractor); Tisdale v. U.S., 838 F. Supp. 592 (N.D. Ga. 1993) (HUD is not liable for injury to prospective tenant caused by collapsing stairway, since control of house has been turned over to independent contractor); Doe v. U.S., 533 F. Supp. 245 (S.D. Fla. 1982) (rape in lobby of post office in high-crime area); Maryland for use of Pumphrey v. Manor Real Estate & Trust Co., 176 F.2d 414 (4th Cir. 1949) (rat control); Castor v. U.S., 883 F. Supp. 344 (S.D. Ind. 1995) (method of conducting asbestos program in U.S. prison is discretionary); Armer v. U.S., Civ. # 92-C-568-B (N.D. Okla., 30 Sept. 1992) (failure to install center handrail on steps 88 inches wide is discretionary where historical nature of post office is being preserved); Domme v. U.S., 61 F.3d 787 (10th Cir. 1995) (exclusion applies to claim for injury to operating contractor's employee from electrical explosion at Sandia National Laboratory); Holland v. U.S., 918 F. Supp. 87 (S.D.N.Y. 1996) (slip and fall on wet floor in post office while waiting in line on rainy days falls under exclusion—-danger open and obvious); Stewart v. U.S., 918 F. Supp. 224 (N.D. Ill. 1996) (slip and fall by postal patron on crutches on overlapping mats outside post office falls under exclusion); Cue v. U.S., Civ. # CIV-95-1054-A (W.D. Okla., 18 Apr. 1996) (knowledge of puddle in lobby by postal employee required-—no inference that rain four hours earlier created puddle); Anderson v. U.S., 82 F.3d 417 (table), 1996

WL 185762 (6th Cir. 1996) (slip and fall in customer service area due to water on floor—-U.S. not liable); Rose v. U.S., 929 F. Supp. 305 (N.D. Ill. 1996) (USPS' failure to clear snow on a weekend from city owned sidewalk is not basis for liability where USPS had earlier cleared snow); Lancaster v. U.S., 927 F. Supp. 887 (D. Md. 1996) (nature and extent of warning re presence of lead paint in VA family housing is discretionary); Angle v. U.S., 89 F.3d 832 (table), 1996 WL 343531 (6th Cir. 1996) (USAF's decision not to remove lead paint, but paint over it or issue general warning to occupant of family house is discretionary); Logan v. U.S., Civ. # 95 CV 2812 (E.D.N.Y., 17 Nov. 1997) (plaintiff injured on ball field despite the fact that that field had been tilled to fallow during winter—exclusion applies); Soto-Gonzalez v. U.S., Civ. # 90-1942(DRD/ADC) (D.P.R., 31 Mar. 1997) (erection of steel and concrete barriers to protect USCG fence where state road turns left 90 degrees is discretionary in view of Commonwealth's failure to maintain state road); Duffy v. U.S., 1997 WL 83736 (E.D. Pa.) (fact that Navy mowing contractor failed to mow grass in area outside Philadelphia Navy Yard that it habitually mowed does not create liability for fall in manmade hole); McCutcheon v. U.S., 1996 WL 607083 (W.D.N.Y.) (decision by HUD to list housing without repairing stairs is discretionary); Chantal v. U.S., 104 F.3d 207 (8th Cir. 1997) (slip and fall on 4-inch step at Jefferson National Expansion Memorial (Gateway Arch) falls under exclusion, even though Rehabilitation Act of 1973 not complied with); Abrams-Folgiani v. U.S., 952 F. Supp. 143 (E.D.N.Y. 1996) (Army leased building to city in exchange for renovation and repair relieves U.S. from liability for stairway slip and fall of city employee). Discretionary function exclusion held not applicable. Wright v. U.S., 866 F. Supp. 804 (S.D.N.Y. 1994) (failure to warn of risk walking over floor grates in military chapel wearing narrow heels is not discretionary); Kitchens v. U.S., 604 F. Supp. 531 (M.D. Ala. 1985) (landlord has duty to tenant for loose porch rail in family quarters); Battista v. U.S., 889 F. Supp. 716 (S.D.N.Y. 1995) (telephone company employee falls from gallery to basement floor in unlit and unmarked shaft in Post Office); Ferguson v. U.S., 793 F. Supp. 107 (E.D. Pa. 1992) (failure to timely call snow removal contractor negates application of independent contractor exclusion); Denson v. U.S., Civ. # 90-1842 PHX RCB (D. Ariz., 21 Oct. 1992),

aff'd, 104 F.3d 265 (table), 1996 WL 748021 (9th Cir. 1996) (62,000 pound concrete form rolls down hill when contractor employee attempts to secure it—-U.S. as landowner is liable); Freedman v. U.S., Civ. # 81-3551 (9th Cir. 1982) (applies Washington law on warranty of habitability to temperature setting of hot water in family quarters); Gonzales v. U.S., 696 F. Supp. 251 (S.D.N.Y. 1988) (postal patron hit by falling stanchion not exempt); U.S. v. Angel, 755 F.2d 937 (9th Cir. 1985) (experienced worker electrocuted when he placed aluminum ladder against an insulated wire while sand blasting U.S. building has cause of action on duty to warn where U.S. retains custody and control of worksite); Younger v. U.S., 662 F.2d 580 (9th Cir. 1981) (smoke detector missing—-landlord warranty of liability); Amer. Exchange Bank of Madison, Wisconsin v. U.S., 257 F.2d 938 (7th Cir. 1958) (no center railing); Raymond v. U.S., 923 F. Supp. 1419 (D. Kan. 1996) (fall at post office allegedly due to placing handrail on graded terrazzo surface is not under exclusion); Gotha v. U.S., 115 F.3d 176 (3rd Cir. 1997) (Navy's failure to safeguard pathway with adequate lighting and stairs is not discretionary); Chadwick v. U.S., 86 F.3d 1161 (table), 1996 WL 2871188 (9th Cir. 1996) (deep drainage ditch at USPS facility in tourist area in Hawaii results in fall at night and $400,000 award); Sumner v. U.S., 794 F. Supp. 1358 (M.D. Tenn. 1992) (specific and proper warning of presence of LAW rocket dud in impact area is mandatory); Brown v. U.S., 1994 WL 3190015 (W.D.N.Y.) (recently improperly replaced ventilator cover on roof of Post Office blows off in high winds after inspection of new roof by USPS--not discretionary); Myers v. U.S., Civ. # 96-C-6064 (N.D. Ill., June 12, 1997) (fall on post office ramp which is too steep results in dislocated ankle and $134.970 award). Hibble v. U.S., 1998 WL2882 (4th Cir., Va.) (no duty to warn where Arlington National Cemetary visitor fell on leaf-covered stairway--Army Pamphlet 290-5 is not a mandatory regulation. Aragon v. U.S., __F.3d __, 10998 WL 331504 (10th Cir., N. Mex.) (pollution of adjacent land by washing aircraft with TCE prior to 1968-no mandatory directives in effect at the time. Walker v. U.S., 1998 WL 299928 (S.D.N.Y.) (slips and fall in post office not payable as actual constructive knowledge on oily sustance not known. Rabino v. U.S., 1998WL461855 (e.d. Pa.) 56-year-old postal patron trips over edge of reddish skid-proof safety rug in

lobby of Post office with light blue-grey tile-no liability; Manill v. U.S., 14 F. Supp.2d 1215, (D.R.I. 1998), no duty of USPS to remove snow during snowstorm - storm in progress rule applies in connecticut, Rhode Island, New York, West Birginia, Ohio, Michigan, among others.

(A) State or Local Building Code Applicability. Cooks v. U.S., 815 F.2d 34 (7th Cir. 1987) (standard applied to municipality re sidewalks applied to U.S. 1/2 inch difference in slab levels not actionable). Schuyler v. U.S., 987 F. Supp. 835 (S.D. Cal. 1997) (exception applies to design of ramp and how to fence (some portions of fence less in height than building code) where pedestrian thrown over guard rail). Shansky v. U.S., Civ # 96-12268-RCL (D. Mass. 27 Mar 98) Failure to meet building standards in recontractory Trading Pact and home at National Historic site is discretionary. Roggendorf v. U.S., 1998WL704350 (N.D. Ill.), U.S. not liable for natural accumulation of water near Post Office door during rainstorm, aff'd 1999WL265363 (7th Cir. Ill.).

(B) Security. Decision to provide security and the amount of security falls within the discretionary function exclusion. Haygan v. U.S., 627 F. Supp. 749 (D.D.C. 1986) (no cause of action for lack of security in on-post parking lot from which car is stolen); Hacking v. U.S., Civ. # 86-186-Col (M.D. Ga. 1987) (visitor shot at Fort Benning swimming pool—-amount of security is discretionary and not actionable); Turner v. U.S., 473 F. Supp. 317 (D.D.C. 1979) (too few guards); Hughes v. United States, 110 F.3d 765 (11th Cir. 1997) (postal patron shot in post office parking lot at 10:45 P.M.—-location of post office in high crime area nature and type of security is discretionary); Leslie v. U.S., 986 F. Supp. 900 (D.N.J. 1997) (robber murders three postal patrons in course of robbing post office with no security - exception applies - distinguishes Chachere v. U.S., 1990 WL 120618 (E.D. La.) where security was inadequate). Pierro v. U.S., Civ # 96-0495-T (W.D. Okla.) (amount of security in post office to preclude attacks in parking lot is discretionary). Leslie v. U.S., Civ. #98-6027 (3d Cir., 4 Mar. 99), where robber targets U.S. Post office which has no security and kills all witnesses,

Postmaster's decision not to provide security is discretionary.

(C) Trespassers. U.S. has no duty to trespasser except to refrain from willfully and wantonly injuring them. Landen v. U.S., # 85-4438 (5th Cir. 1985) (no duty to trespasser in impact area except to mark same as impact area); Vickery v. U.S., Civ. # CV 191-089 (S.D. Ga., 13 Apr. 1982) (no recovery for plaintiff trespassing in artillery impact area, since Army did not inflict injury either willfully or wantonly as required by Georgia law to sustain a finding of liability). In California, a landowner owes a duty of reasonable care to everyone, including trespassers. Murphy v. U.S. Dept. of the Navy, Civ. # 87-0195-JLI(CM) (S.D. Cal. 1991) (Navy did not breach duty of reasonable care to trespassers imposed under California law, since aerial gunnery range was clearly marked by warning signs).

(ii) Public Lands. Decision concerning management of public lands often within discretionary function exclusion. Rosebush v. U.S., 119 F.3d 438 (6th Cir. 1997) (fall of 16 month old child into fire pit at campground in Hiawatha National Forest is barred by discretionary function exclusion); Brown v. U.S., 403 F. Supp. 472 (C.D. Cal. 1975); Schieler v. U.S., 642 F. Supp. 1310 (E.D. Cal. 1986) (injured while standing on rock in park—-decision not to place lightening rod is discretionary); Harmon v. U.S., 532 F.2d 669 (9th Cir. 1975) (warn of white water); Gadd v. U.S., *971* F. Supp. 502 (D. Utah 1997) (no duty to warn prior to bear attack in U.S. Forest Service campground, since no basis for expecting bear attack because terrain was inhospitable for bears); Rubinstein v. U.S., 338 F. Supp. 654 (N.D. Cal. 1972) (warn of bears); Husovsky v. U.S., 590 F.2d 944 (D.C. Cir. 1978) (falling tree limbs); Martin v. U.S., 546 F.2d 1355 (9th Cir. 1976) (management of wild bears); Pierce v. U.S., 142 F. Supp. 721 (E.D. Tenn. 1955); Revels v. U.S., Civ. # 82-1693-R (W.D. Okla. 1986) (quad case—-diving from fallen tree in non-designed area—-no duty to warn); Kepp v. U.S., Civ. # 6-84-67, (S.D. Tex. 1984) (design of Galveston sea wall is a discretionary function, therefore, roadway on top is not U.S. responsibility, but that of city); Gleason v. U.S. on Behalf of Army COE, 857 F.2d 1208 (8th Cir. 1988) (bicyclist injured by bridge design-—held

discretionary); Adams v. U.S., Civ. # 86-98 (E.D. Ky. 1988) (amount and placement of signs discretionary in quad diving case); Ross v. U.S., 910 F.2d 1422 (7th Cir. 1990) (no duty to warn 12 year old drowning victim of danger of COE maintained breakwater); Arizona Maintenance Co. v. U.S., 864 F.2d 1497 (9th Cir. 1989) (seismic blasting by Dept. of Interior must conform to industry standard for discretionary function exclusion to apply); Graves v. U.S., 872 F.2d 133 (6th Cir. 1989) (after U.S. closes lock, nature of warning is discretionary); Self v. Fritts, Civ. # CV-F-88-680REC (N.D. Cal. 1989) (no duty to warn re danger of outdoor toilet door opening directly on road); Caplan v. U.S., 877 F.2d 1314 (6th Cir. 1989) (U.S. under duty to warn "cutting" contractor re hazard of dead tree where previously treated with herbicide); Weiss v. U.S., 889 F.2d 937 (10th Cir. 1989) (marking of cable car cable in National Forest is discretionary); Ayer v. U.S., 902 F.2d 1038 (1st Cir. 1990) (design of missile capsule discretionary--need not be made safe for visitors); Zumwalt v. U.S., 928 F.2d 950 (10th Cir. 1991) (failure to mark cave entrance--marking of trail which was laid out by U.S. Forest Service falls under exclusion where design was to maintain natural look); Cole v. U.S. Army Corps of Engineers, Civ. # 88-1549 (W.D. La. 1991) (17-year-old quad from diving into uneven bottom of shallow water--no duty); Aldrich Enterprises v. U.S., 938 F.2d 1134 (10th Cir. 1991) (U.S. as landowner had no knowledge that lessee's lake would overflow onto adjoining land); Richardson v. U.S., 943 F.2d 1108 (9th Cir. 1991) (decision not to place ground on power lines is discretionary); Johnson v. U.S. Dept. of Interior, 949 F.2d 332 (10th Cir. 1991) (Park Service decision as to when and how to rescue mountain climber is discretionary); Breland, By and Through Breland v. U.S., 791 F. Supp. 1128 (S.D. Miss. 1992) (safeguarding a LAW rocket dud in impact area is discretionary); Harris v. U.S., Civ. # 91 CV 0595 (SJ) (E.D.N.Y., 5 Oct. 1992) (method and time of repairing basketball court in Gateway National Recreational Area is discretionary, since it involves judgment as to the use of limited funds); Buffington v. U.S., 820 F. Supp. 333 (W.D. Mich. 1992) (drowning from breakwater due to high waves--design and operation of breakwater is discretionary); Koenig v. Army COE, Civ. # 5:93:cv:22 (W.D. Mich., 2 July 1993) (drowning from breakwater--wording of sign is discretionary--

follows Buffington); Autery v. U.S., 992 F.2d 1523 (11th Cir. 1993) (tree fell on car in national park--tree inspection program is discretionary); Parsons v. U.S., 811 F. Supp. 1411 (E.D. Cal. 1992) (method of fighting fire in National Forest is discretionary, even though fire escaped onto plaintiff's land); Webster v. U.S., 22 F.3d 221 (9th Cir. 1994), aff'g, 823 F. Supp 1544 (D. Mont. 1992) (BIA approval of lease to operate speedway on Indian lands does not make U.S. responsible for safe design or operation); Childers v. U.S., 40 F.3d 973 (10th Cir. 1994), cert. denied, 514 U.S. 1095 (1995)(decision not to close trails in winter at Yellowstone National Park is discretionary in case of 11-year old boy fell to death--good district court opinion in same case at Childers v. U.S., 841 F. Supp. 1001 (D. Mont. 1994)); Faher v. U.S., Civ.# CV 93-167 TUC IMR (D. Ariz., May 26, 1994) (failure to post signs in Coronado National Forest re danger of diving from falls was discretionary); Lesoeur v. U.S., 21 F.3d 965 (9th Cir. 1994) (National Park Service decision not to regulate Colorado River rafting trips by Hualopi Tribe in Grand Canyon National Park is discretionary);); Valdez v. U.S., 56 F.3d 1177 (9th Cir. 1995), aff'g, 837 F. Supp. 1065 (E.D. Cal. 1993) (claim concerning Park Service regulations re design of trail over falls and warning signs re danger are discretionary in claim for fall resulting in plaintiff becoming a quadriplegic based on negligent design of trail); Thune v. U.S., 872 F. Supp. 921 (D. Wyo. 1995) (U.S. employee sets fire in National Forest to increase forage for elk and incidentally destroys game hunter's camp--falls under exclusion); Lundgren v. U.S., Civ. # 8:94cv462 (D. Neb., Jan. 5, 1995) (National Park Service under no duty to warn person who is struck by golf ball in West Potomac Park); Roof v. U.S. Park Service, 882 F. Supp. 567 (S.D. W.Va. 1995) (visitor to National Park dies from infection caused by coliform bacteria after fall in creek--failure to post warning signs discretionary); Maher v. U.S., 56 F.3d 1039 (9th Cir. 1995) (miner going to his claim on BLM land where road not built or maintained by U.S. is licensee in non-recreational area to whom no responsible duty of care was required); McDaniel v. U.S., 899 F. Supp. 305 (E.D. Tex. 1995) (exclusion applies to Forest Service's method of using pesticides which caused damage to neighboring land); Gardner v. U.S., 896 F. Supp. 89 (N.D.N.Y. 1995) (exclusion applies to

injury which occurred when batter in unsponsored softball game tripped on 8-10 inch hole to batter's box); Tippett v. U.S., 108 F.3d 1194 (10th Cir. 1997) (exclusion applies to snowmobiles trying to pass moose as he had observed other snowmobilers do); Cooper v. U.S., Civ. # 95-3094-CV-S-4 (W.D. Mo., Aug. 22, 1995) (exclusion applies to claim for burns caused by geyser in Yellowstone where allegation was that warning sign was improperly placed); Wright v. U.S., 82 F.3d 419 (table), 1996 WL 172119 (6th Cir. 1996) (decision to cut trees in wilderness near trails is under exclusion); McMullen v. U.S., 956 F. Supp. 1068 (D. Kan. 1996) (method of safeguarding impact area at Fort Riley is discretionary); Blackburn v. U.S., 100 F.3d 1426 (9th Cir. 1996) (sign on bridge in Yosemite are adequate warning to quadriplegic diving case--California Resort Act is not applicable); Ward v. U.S., Civ. # 96-589-J (LSP) (S.D. Cal., 19 Sept. 1996) (discretionary function applies to fall into bonfire during fire ring at Camp Pendleton recreation area); Aragon v. United States, 950 F. Supp. 321 (D.N.M. 1996) (discretionary function applies to TCE pollution of acquifer from AFB closed in 1967); Schreoeder v. U.S., 1996 WL 754090 (N.D. Cal.) (discretionary function applies to placement of signs on snowmobile course in national forest when two snowmobilers died due to colliding with truck parked in hotel lot); Wilson v. U.S., 940 F. Supp. 286 (D. Or. 1996) (28 U.S.C. § 2680(a) applies to National Forest service decision not to remove floating wood debris from lake for fear of disturbing habitat) Negligent emergency rescue by NPS employee following car accident in Sequoia National Park falls under exclusion--cites Kiehn v. U.S., 984 F.2d 1160 (10th Cir. 1993)); Bowman v. U.S., 820 F.2d 1393 (4th Cir. 1987) (decision not to place guard rails on Blue Ridge Parkway, a scenic route, falls under § 2680(a)); Juan v. U.S., Civ. # C-89-4231-SBA (N.D. Cal. 1992) (issuance of climbing permit in Hawaii Volcano National Park is discretionary); Layton v. U.S., 984 F.2d 1496 (8th Cir. 1993), cert. denied, 510 U.S. 877 (1993) (decision to select contractors and delegate safety responsibility for tree cutting in National Forest is discretionary); Kiehn v. U.S., 984 F.2d 1100 (10th Cir. 1993) (no duty to warn commercial guide of danger from unstable sandstone rock in National Park). These cases have found discretionary function exclusion inapplicable. Duke v.

Department of Agriculture, 131 F.3d 1407 (10th Cir. 1997) (discretionary function exclusion inapplicable where Forest Service gave no reason, not even budgetary ones, for its failure to either post warning signs or prohibit camping where they knew that state had cut road into hillside causing slope which large boulders would roll down—cites Third Circuit's decision in Gotha v. U.S., 115 F.3d 176 (3rd Cir. 1997) with approval); Faber v. U.S., 56 F.3d 1122 (9th Cir. 1995) (Forest Service failed to post warning signs despite policy to do so re danger of diving from falls is not discretionary); Boyd v. U.S. ex rel. U.S. Army COE, 881 F.2d 895 (10th Cir. 1989) (decision to permit swimming and boating in same area is actionable and not barred by § 2680 (a)); Van Orden v. U.S., 85 F.3d 639 (table), 1996 WL 256585 (9th Cir. 1996) (Forest Service' failure to place safety warnings in timber sale contract does not fall under exclusion--purchaser felled boundary line tree injuring adjoining property owner); Coe v. U.S., 502 F. Supp. 881 (D. Or. 1980) (BLM failed to institute measures which would have minimized fire damage on Federal Lands); Caraballo v. U.S., 830 F.2d 19 (2d Cir. 1987) (quad case from diving in three feet of water in National Park--duty to warn superseded by unforeseeable act); Starret v. U.S., 847 F.2d 539 (9th Cir. 1988) (failure to develop SOP to preclude ground water pollution from demil operation is not barred by § 2680(a)); Lindgren v. U.S., 665 F.2d 987 (9th Cir. 1982) (failure to warn water skiers of fluctuating water levels); Prescott v. U.S., 724 F. Supp. 792 (D. Nev. 1989) (must use objective standards to protect persons employed at Nevada test site); Roberts v. U.S., 724 F. Supp. 778 (D. Nev. 1989); Summers v. U.S., 905 F.2d 1212 (9th Cir. 1990) (National Forest Services procedures requiring safety review not followed re beach fires and warning thereof--discretionary bar n/a); Williams v. U.S., Civ. # 91-007-S (E.D. Okla., 11 Dec. 1992), on remand from, 957 F.2d 742 (10th Cir 1992)(method of releasing water from lock and design of warning system for fisherman are not discretionary); Ortiz v. U.S., 885 F. Supp. 363 (D.P.R. 1995) (boater who went ashore at Navy maneuver area explodes simulation handed to him by 17 year old son--Navy held liable (70%) for lax enforcement into maneuver area--total award $162,000); Terry v. U.S., Civ. # 92-CV-1685 (N.D.N.Y., June 29, 1995) (exclusion not applicable to injuries to campers caused by slack cable not

constructed according to self-imposed safety requirements); Will v. U.S., 60 F.3d 656 (9th Cir. 1995) (at Forest Service request, Government contractor moves another contractor's road grader without owner's permission to area where it is vandalized--U.S. has duty under state law to warn owner). Nyazie v. Kennedy, 1998 WL32601 (E.D. Pa.) (failure to hand brochure warning of danger of Potomac to injured party's family even though such handouts were customary avoids the discretionary function exclusion. Alef v. U.S. Dept. of Interior, 990 F. Supp. 932 (W.D. Mich. 1997) No duty to warn of danger of diving from sand dune into National Forest Service Lake in quadriplegic diving case. Pearson v. U.S., 9 F.3d 1553, 1993 W.L. 438760 (9th Cir. (Aug)) Decision not to fence wild burros and to provide food and water near U.S. 95 is discretionary; Shively v. U.S., 5 F.3d 540, 1993 WL 312758 (9th Cir. (Calif.)) Decision by Forest Service not post signs on land where it is seen grazing permit is discretionary. Reetz v. U.S., Civ. # 1:97-CV-1036 (S.D. Mich., 1 April 1999), method of marking roads in National Forest for Off the Road Vehicle use is discretionary where driver goes onto public highway and collides on blind curve; Kahan v. U.S., Civ. # 96-01168BMK (D. Haw., 4 May 1999), movable barrier with warning signs is sufficient notice to preclude visitors from walking on beach close to lava flow and steam plane. Weingarten v. U.S., Civ. # 97--393-B (D.N.H., 11 Feb 99), failure to place guard rails at top of crevasse on slope of Mount Washington is discretionary. Gould v. U.S., 160 F.3d 1194 (8th Cir. 1998) where sledder is injured by flying over 6 feet off terrace above COE dams, duty to warn exists as COE ranger had superior knowledge; Caudill v. Dep't of Army, Civ. Action # 98-112 (E.D. Ky., 6 Nov. 1998) no duty to warn where decedent was killed by hitting a downed tree with his boat in COE lake with numerous downed trees. Miller v. U.S., 163 F.3d 591 (9th cir. Or. 1998) where multiple forest fires escape onto private land, method of Forest Service fighting fires is discretionary; Reed v. Avis Rent-a-Car, 29 F. Supp. 2d 121 (N.D. Calif., 1999) BLM is not responsible for sleeping camper being run over by a participant in a performance festival on BLM land based on issue of a permit; Whalen v. U.S., 29 F. Supp. 2d 1093 (D. S. Dak. 1998) where plaintiff walks a short distance from car and falls to death

off cliff in mountain table in national park, placement of warning signs is discretionary.

(iii) Delegation of Safety Responsibility. Cazules v. Leconlre, 994 F. Supp. 765 (S.D. Tex. 1997) Subcontractor is electrocuted while excavating in VA cemetery - delegation of safety to prime contractor is discretionary; Wallace v. U.S., 991 F. Supp. 1285 (D. N.Mex. 1996) Contractor employee is killed by gasoline explosion while excavating on federal land - delegation of safety is discretionary. Anderson v. U.S., Civ. # SA CV 92-404-AHS (EEY) (C.D. Calif., 18 Feb 99), method of managing controlled burn is discretionary where burn turns into wildfire and escapes public lands.

(k) Roads and Traffic Control Devices. Cases involving roads and traffic control devices where discretionary function exclusion held applicable. Rich v. U.S., 119 F.3d 447 (6th Cir. 1997) (type of guardrail on curve immediately before entering road is discretionary--repair of guardrail in same manner as originally constructed despite COE knowledge of previous accidents); Smith v. U.S., 546 F.2d 872 (10th Cir. 1976) (no warning signs); Driscoll v. U.S., 525 F.2d 136 (9th Cir. 1975) (improper traffic controls); Seaboard Coast Line Railroad Co. v. U.S., 473 F.2d 714 (5th Cir. 1973) (design of drainage ditch); Stanley v. U.S., 476 F.2d 606 (1st Cir. 1973) (no guardrails); American Exchange Bank of Madison, Wisconsin v. U.S., 257 F.2d 938 (7th Cir. 1958); Patton v. U.S., 549 F. Supp. 36 (W.D. Mo. 1982) (design of road discretionary); Sant v. U.S., 896 F. Supp. 639 (W.D. La. 1995) (exclusion applies to failure to place stop sign in National Forest where local parish was obligated to maintain roads); Pifer v. U.S., 906 F. Supp. 71 (N.D. W. Va. 1995) (exclusion applies to design of road at scenic overlook in National Forest); 1st National Bank of Effingham v. U.S., 565 F. Supp. 119 (S.D. Ill. 1983) (design of highway approved under Federal Highway Act not actionable); Schmitz v. U.S., 796 F. Supp. 263 (W.D. Mich. 1992) (leaving 12 inch stump, 1.5 feet from road is discretionary); Fahl v. U.S. Department of Interior, 792 F. Supp. 80 (D. Ariz. 1992) (where to place lights on safety rails in National Park is discretionary); Mellott v. U.S., 808 F. Supp. 746 (D. Mont. 1992) (method of marking of guy wire by Federal Power Administration is discretionary); Webster v. U.S., 22 F.3d 221 (9th Cir. 1994), aff'g, 823 F. Supp 1544 (D. Mont. 1992) (wrongful death claim

arises from out-of-control race car on Bureau of Indian Affairs land fails, since no duty to monitor race); Fadem v. U.S., Civ. # 88-1507 (S.D. Cal., 24 Feb. 1992) (design and construction of road on BLM land is discretionary as well as ranger supervision and placement of signs); Baum v. U.S., 986 F.2d 716 (4th Cir. 1993) (choice of materials for guardrail on Baltimore-Washington Parkway is discretionary); Alderman v. U.S., 825 F. Supp. 742 (W.D. Va. 1993) (failure to post pedestrian warning signs on Blue Ridge Parkway is discretionary); Arnesano v. U.S., Civ. # Cv-S-94-0122-LDG-(LRL) (D. Nev., 19 July 1994) (state, not U.S., is owner of U.S. 15--decision not to install guardrail is discretionary); Barrett v. U.S., Civ. # 3:95-cv-237 (E.D. Tenn., Aug. 24, 1995) (exclusion applies to failure to place guardrail on National Park road); Davis v. U.S., 918 F. Supp. 368 (M.D. Fla. 1996) (failure to repair or post warning signs on cracked and uneven roadway with designated historic district in National Seashore is discretionary); Rothrock v. U.S. By and Through Dept. of Transp., 883 F. Supp. 333 (S.D. Ind. 1995) (lack of guardrails on interstate highway bridge is discretionary); Moyer v. U.S., 106 F.3d 408 (table), 1997 WL 22422 (9th Cir. 1997) (no duty to remove tree along state road in national forest which fell and killed occupants of passing car--maintenance delegated to state--U.S. liability excluded by § 2680 (a)). Cases involving roads and traffic control devices where decisions found not to be within discretionary function exclusion. Beckford v. U.S., 950 F. Supp. 4 (D.D.C. 1977) (stretching 3.5 inch brown, unreflectorized wire in middle between two posts used for bicycycing at all hours is not under exclusion); Capifalli v. U.S., Civ. #88-1382 (HL) (D.P.R. 1990) (duty to mark road hazard created by DEH Traffic study); Phillips v. U.S., 801 F. Supp. 337 (D. Idaho 1992) (U.S. Forest Service has duty to warn truck driver of unsafe nature of road due to construction project); Noel v. U.S., 893 F. Supp. 1410 (W.D. Cal. 1995) (exclusion not applicable to injury caused by concessionaire's ice cream cart overturning when it hit "padeye" on tarmac at Naval Air Station). Perkins v. U.S., 1999 WL 148442 (E.D. La.), plaintiff's car scrapes 2-inch rebar on top of concrete parking block - no liability - car had low front end plus no prior accidents reported to VA.

(l) Waste and Surplus Property Disposal. Waste and surplus property disposal may be within discretionary function exclusion. Andrews v. U.S., 121 F.3d 1435

(11th Cir. 1997) (Navy's pre-CERCLA/RCRA delegation of responsibility to comply with waste disposal regulations and negligent failure to supervise waste disposal independent contractor falls within the discretionary function exclusion--distinguishing Dickerson, Inc. v. United States, 875 F.2d 1577 (11th Cir. 1989));Conlon v. U.S., 959 F. Supp. 683 (D.N.J. 1997) (death from explosion in scrap yard not proven to have resulted from military ordinance, and assuming it was military ordinance, no proof that it came from military base--cites Simpson v. U.S., 454 F.2d 691 (6th Cir. 1972) (involving grenade in wooded area near military training area and Poston v. U.S., 228 F.2d 389 (4th Cir. 1955) involving rifle grenade in dump on former Army reservation)). But see Woodman v. U.S., 764 F. Supp. 1455 (M.D. Fla. 1991) (failure to follow regulation re disposal of hazardous waste creates mandatory duty under Gaubert v. U.S., 499 U.S. 315, 111 S.Ct. 1267 (1991)); Hannon v. U.S., Civ. # 70-1003-W (D. Mass., 28 Dec. 1971) (inherently dangerous nature of exploding mines rejected by the government subjects U.S. to liability, even though plaintiff was a contractor employee).)). Savary v. U.S., Civ. # CV-95-7751-(E) (C.D. Calif., 13 Feb 1998) (discretionary exception applies to Army and subsequently NASA supervision at contracted research facility at Cal-Tech re toxic waste disposal.

(m) RUS Laws. Landowners duty to warn may be abated by State law, i.e., recreational use statute (RUS), exempting United States. A state's RUS statute may exempt the U.S., as it would a private landowner from a duty to warn. Simpson v. U.S., 652 F.2d 831 (9th Cir. 1981) (state statute applies to Federal land as U.S. FTCA liability is coextensive with that of private individual under State law). Accord Proud v. U.S., 723 F.2d 705 (9th Cir.), cert. denied, 467 U.S. 1252 (1984) (no RUS statute--U.S. has liability); Mackey v. U.S., Civ. # 79-221-C (E.D. Okla. 1980) (plaintiff jumps in 3 feet of water at COE project--no RUS--failure to warn and U.S. held liable).

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

(A) Alabama. RUS applicable. Russell v. TVA, 564 F. Supp. 1043 (N.D. Ala. 1983) (Alabama RUS applies to spillway at dam--not considered to be willful or malicious failure to guard--danger was open and obvious); Bowen v. U.S., Civ. # CV88-H-

2147-E (N.D. Ala. 1989) (RUS applies to playground injury in quarters at Ft. McClellan). But see George v. U.S., 735 F. Supp. 1524 (M.D. Ala. 1990) (Alabama RUS statute does not bar suit where unsuspecting swimmer is attacked by alligator known to Forest Service).

(B) Alaska. RUS not applicable. Stavik v. U.S., 121 F.3d 717 (table), 1997 WL 418875 (9th Cir. 1997) (death in a boat in Kenai river rapids after launch from U.S. improved landing site—-RUS not applicable based on University of Alaska v. Shanti, 835 P.2d 1225 (Alaska 1992)); ARBA Leisure Services v. U.S., 831 F.2d 193 (9th Cir. 1987) (duty to perform ordinary maintenance on roadway in Denali National Park not under RUS).

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

(D) Arizona. RUS applicable. Miller v. U.S., 723 F. Supp. 1354 (D. Ariz. 1989) (Arizona RUS applies to motorcyclist and disappearing road re: duty to warn); Wringer v. U.S., 790 F. Supp. 210 (D. Ariz. 1992) (tourist falls through thin ice which was not posted is under Ariz. RUS). But see Miller v. U.S., 945 F.2d 1464 (9th Cir. 1991) (Ariz. RUS does not bar claim where National Forest Service removed culvert from under abandoned road and provided no warning).

(E) California. RUS applicable. Phillips v. U.S., 590 F.2d 297 (9th Cir. 1979); Von Tagen v. U.S., 557 F. Supp. 256 (N.D. Cal. 1983) (National Recreational Area--California RUS applies to no guard rail and sharp curve); Judd v. U.S., 650 F. Supp. 1503 (S.D. Cal. 1987) (California RUS, not Health and Safety Code, applies to 35 foot dive

from rocks in National Forest); Spires v. U.S., 805 F.2d 832 (9th Cir. 1986) (no duty under California RUS to warn jogger of ditch which appeared overnight on beach); Toomey v. U.S., 714 F. Supp. 426 (E.D. Cal. 1989) (RUS applied to fence near off-road vehicle area); Chidester v. U.S., 646 F. Supp. 189 (C.D. Cal. 1986) (Cal. RUS applies to land leased to county re dive into creek); Mattice v. U.S. Dept. of Interior, 969 F.2d 818 (9th Cir. 1992), aff'g, 752 F. Supp. 905 (N.D. Cal. 1990)(car driven through redwood guardrail and off cliff in National Park—Cal RUS applies--§ 2680(a) also applies to retention of guardrail through which car crashed); Mansion v. U.S., 945 F.2d 1115 (9th Cir. 1991) (injury caused by fall at old timer's picnic at Alameda Naval Air Station is excluded by Cal. RUS); Hammon v. U.S., 801 F. Supp. 323 (E.D. Cal. 1992) (Cal. RUS applied even though camping fee charged for another part of national forest); Ravell v. U.S., 22 F.3d 960 (9th Cir. 1994) (Cal. RUS applied to fall over ground hooks used to tie down USAF planes at show on air base); Grippo v. U.S., 911 F. Supp. 437 (D. Nev. 1995) (Cal. RUS applies to injuries sustained by trespasser who falls in pool of scalding water in National Forest). Newman v. U.S., 86 F.3d 1163 (table), 1996 WL 279846, (9th Cir. 1996) (burn injuries to child who enters hot geothermal pool in the Inyo National Forest falls under exclusion); Chester v. U.S., 94 F. 3d 650 (table), 1996 WL 467685 (9th Cir. 1996) (claim for injury on tank at Naval air show precluded by RUS--payment for special seating is not fee, since it is not connected with viewing tank). But see Rost v. U.S., 803 F.2d 448 (9th Cir. 1986) (Cal. RUS does not bar claim for free swinging gate); Termini v. U.S., 963 F.2d 1264 (9th Cir. 1992) (Forest Service spar road along main canyon road which dead ended without warning sign does not fall under Cal. RUS); Donaldson v. U.S., 653 F.2d 414 (9th Cir. 1981) (California law--public expressly invited); Thompson v. U.S., 592 F.2d 1104 (9th Cir. 1979) (California law--fee paid); Coryell v. U.S., 847 F. Supp. 148 (C.D. Cal. 1994) (Cal. RUS not applied to fall due to gap in metal ramp at Miramar Air Show); Soto v. U.S., 748 F. Supp. 727 (C.D. Cal. 1990) (Cal. RUS not applicable to quad diving case in natural pool on so-called undeveloped area used by hundreds--duty to warn). Casas v. U.S., 19 F. Supp.2d 1104 (C.D.

Calif., 1998), civilian trips and falls on Marine Corps base while going to sign up for race - RUS applies.

(F) Colorado. RUS applicable. Kirkland v. U.S., 930 F. Supp. 1443 (D. Colo. 1996) (Colo. RUS applies to camper who injured fingers closing restroom door). But see Otteson v. U.S., 622 F.2d 516 (10th Cir. 1980) (Colo. Law applies to National Forest--RUS held not applicable).

(G) Connecticut. RUS applicable. Jennett v. U.S., 597 F. Supp. 110 (D. Conn. 1984) (Conn. RUS applies to child drowning in COE reservoir).

(H) Florida. RUS applicable. Zuk v. U.S., 698 F. Supp. 1577 (S.D. Fla. 1988) (no guard rails at Ft. Jefferson--RUS applies--cites Kleer v. U.S., 761 F.2d 1492 (11th Cir. 1985)); Arias v. U.S., Civ. #89-1169-CIV-SCOTT (S.D. Fla. 1990) (Florida RUS applies to U.S.); Schiano v. U.S., Civ. # 94-323-CIV-FTM-25D (M.D. Fla., 6 Aug. 1996) (fall from 16 foot government ladder while picking apples in national park--RUS applies even though he paid $6.00 for parking pad). See also Trowell v. U.S., 526 F. Supp. 1009 (M.D. Fla. 1981); Lewis v. U.S., 663 F.2d 818 (8th Cir. 1981) (Florida law). But see Griffin v. U.S., 637 F.2d 308 (5th Cir. 1981) (Florida law).

(I) Georgia. RUS applicable. Wilson v. U.S., Civ. # 388-40179-WS (N.D. Fla. 1991) (Ga. RUS precludes liabiity for quadriplegic in 16 year old male who dove from pole into waist deep water).

(J) Hawaii. RUS applicable. Palmer v. U.S., 945 F.2d 1134 (9th Cir. 1991) (Hawaii RUS absolves U.S. from liability for fall at urban swimming pool); Stout v. U.S., 696 F. Supp. 538 (D. Haw. 1987) (Hawaii RUS applies to tree climbing case in military housing area); Budde v. U.S., 797 F. Supp. 731 (N.D. Iowa 1992) (payment of billeting fee by visiting spouse not a charge for use of swimming pool at Naval base--Hawaii RUS applies); Covington v. U.S., 916 F. Supp. 1511 (D. Haw. 1996) (RUS bars claim for death by drowning at USAF beach allegedly due to insufficient number of lifeguards). But see Collard v. U.S., 691 F. Supp. 256 (D. Haw. 1988) (Hawaii RUS willfulness clause applied to large log near Marine Corps

beach). Kennedy v. U.S., Civ. # 97-15857 (9th Cir., 22 June 1999), family member who is injured in a fall on surging dock in Hickam AFB Harbor is barred by Hawaii RUS. Howard v. U.S., 171 F.3d 1064 (9th Cir. 1999), paying a fee for private sailing course at Hickam AFB Harbor is a fee negating applicatioon of Hawaii RUS - court distinguishes between "fee" and "consideration" in many jurisdictions.

(K) Idaho. RUS not applicable. Seyler v. U.S., 832 F.2d 120 (9th Cir. 1987) (Idaho's RUS not applicable to BIA maintained public highway re motorcycle single vehicle wreck); Twohig v. U.S., 711 F. Supp. 560 (D. Mont. 1989) (purchase of parking fee by plaintiff's companion voids Idaho RUS).

(L) Illinois. Illinois RUS held applicable. Hall v. U.S., 647 F. Supp. 53 (C.D. Ill. 1986) (scout injured in fall from cliff in National forest--no duty to warn as danger obvious); Ellstrom v. U.S., 694 F. Supp. 1331 (N.D. Ill. 1988) (no duty to warn of defective hunting stand in National Park). However, Illinois RUS applies only to land used on a casual basis for recreation. Miller v. U.S., 597 F.2d 614 (7th Cir. 1979); Stephens v. U.S., 472 F. Supp. 998 (C.D. Ill. 1979) (same as Miller); Davis v. U.S., 716 F.2d 418 (7th Cir. 1983) (court again holds U.S. liable for willful and wanton conduct as in Miller in failing to warn divers).

(M) Indiana. RUS applicable. Clem v. U.S., 603 F. Supp. 457 (N.D. Ind. 1985) (Indiana RUS applied to drowning in National Park); Reed v. U.S., 604 F. Supp. 1253 (N.D. Ind. 1984) (water-skiing accident on hidden berm at COE reservoir leased to State falls under RUS).

(N) Iowa. RUS applicable. Hegg v. U.S., 817 F.2d 1328 (8th Cir. 1987) (Iowa RUS applies to non-defective swing at COE recreation area); Duckworth v. U.S., Civ. # 86-463-B (S.D. Iowa, 24 Nov. 1986) (Iowa RUS bars claim by moped driver for faulty road design).

(O) Kansas. RUS applicable. Klepper v. City of Milford, Kansas v. U.S., 825 F.2d 1440 (10th Cir. 1987) (Kansas RUS applies to quad diving case at

COE lake); Jensen v. COE, Civ. # 86-1686-K (D. Kan. 1987) (faulty road design in COE recreational area barred by Kansas RUS and § 2680(a)).

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

(Q) Louisiana. RUS applicable. Hagan v. Kramer, 666 F. Supp. 91 (W.D. La. 1987) (Louisiana RUS applies to shooting of deer hunter by another hunter at Ft. Polk); Woods v. U.S., 909 F. Supp. 435 (W.D. La. 1995) (Louisiana RUS precludes claim for drowning at swimming area at forest service lake).

(R) Massachusetts. RUS applicable. Montejo v. U.S., 107 F.3d 1 (table), 1997 WL 51411 (1st Cir. 1997) (steel cable barrier across road in Cape Cod National Seashore struck by motorcyclist--Mass. RUS bars claim). But see DiMella v. Gray Lines of Boston, Inc., 836 F.2d 718 (1st Cir. 1988) (visit to USS Constitution in Navy yard--injured while alighting from bus--not under Massachusetts RUS).

(S) Michigan. RUS applicable. Miller v. U.S. Dept. of Interior, 649 F. Supp. 444 (W.D. Mich. 1986) (Michigan RUS bars claims for injuries from jump from rope swing in National Park); Lebeter by Lebeter v. U.S., 750 F. Supp. 322 (N.D. Ill. 1990) (Mich. RUS applies to rope swing injury to 14 year old in National Forest); Weaver v. U.S., 809 F. Supp. 526 (E.D. Mich. 1992) (Michigan RUS bars claim for injuries caused by diving from bridge in National Park).

(T) Mississippi. RUS applicable. Dorman v. U.S., 812 F. Supp. 685 (S.D. Miss. 1993) (Miss. RUS applies to slip and fall at boat landing, even though plaintiff paid fishing license fee).

(U) Missouri. RUS applicable. Wilson v. U.S., 989 F.2d 953 (8th Cir. 1993) (Mo. RUS applied to electrocution death of 13 year old Boy Scout who was climbing irrigation pipe held by two other Scouts--$2.00 fee paid for lodging to U.S. Army does not bar application of RUS). See also Will v. U.S., 656 F. Supp. 776 (E.D. Mo. 1987) (17 year old becomes quadriplegic diving from tree into BLM lake--no cause of action under Missouri law since

Restatement (Second) of Torts, §342 (1969) applies). Gould v. U.S., 904 F. Supp. 1176, 1998 WL 87415 (W.D. Mo.) (sledders at COE lake become airborne and are injured when leaving terraced bank - considered licensees and are excluded as danger is open and obvious.

(V) Montana. RUS applicable. Fisher v. U.S., 534 F. Supp. 516 (D. Mont. 1982) (Montana law applicable to U.S.).

(W) Nevada. RUS applicable. Gard v. U.S., 420 F. Supp. 300 (N.D. Cal. 1976), aff'd, 594 F.2d 1230 (9th Cir. 1979) (Nevada); Blair v. U.S., 433 F. Supp. 217 (D. Nev. 1977). But see McMurray v. U.S., 918 F.2d 834 (9th Cir. 1990) (Nev. RUS not applied to unmarked hot spring as no sign of danger known to BLM--warning required).

(X) New Mexico. RUS applicable. Maldonado v. U.S., 893 F.2d 267 (10th Cir. 1990) (diving case falls under New Mexico RUS re: duty to warn).

(Y) New York. RUS applicable. Rains v. U.S., 752 F. Supp. 71 (W.D.N.Y. 1990) (N.Y. RUS applies to COE breakwater slip and fall); Gutteridge v. U.S., 927 F.2d 730 (2nd Cir. 1991) (N.Y. RUS applied in face of argument that statute not applicable to state as U.S. is same as private person). But see Wilson v. U.S., 669 F. Supp. 563 (E.D.N.Y. 1987) (N.Y. RUS held inapplicable to urban federal park bike path).

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

(AA) Oklahoma. RUS applicable. Cox v. U.S., 881 F.2d 893 (10th Cir. 1989) (Oklahoma RUS applies to cyclist hitting speed bump in COE public use area). But see Boyd v. U.S. ex rel. U.S. Army COE, 881 F.2d 895 (10th Cir. 1987) (Oklahoma RUS does not apply to U.S. where swimmer struck boat propeller in waters where boats permitted).

(BB) Oregon. RUS applicable. McClain v. U.S., 445 F. Supp. 770 (D. Or. 1978); O'Neal v. U.S., 814 F.2d 1285 (9th Cir. 1987) (road on BLM land gave way--Oregon RUS applies); Ellis v. Hansen

Natural Resources Co., 857 F. Supp. 766 (D. Or. 1994) (motorcyclist injured by running into cable strung by Oregon National Guard--claim barred by Oregon RUS.

(CC) Pennsylvania. RUS applicable. Hahn v. U.S., 493 F. Supp. 57 (M.D. Pa. 1980); Flohr v. Pennsylvania Power and Light Co., 800 F. Supp. 1252 (E.D. Penn. 1992) (camping fee not a "charge" under Pa. RUS--RUS applies); Munley v. U.S., Civ. # 90-1273 (M.D. Pa., 21 Dec. 1990)(similar to Flohr, but involving parking fee). But see Rosa v. U.S., 613 F. Supp. 469 (M.D. Pa. 1985) (Pennsylvania RUS does not bar action for 8 year old non-swimmer's drowning where she was told to use deep boating area with her flotation device); Davidow v. U.S., 583 F. Supp. 1170 (W.D. Pa. 1984) (Pa. RUS held not applicable, since failure to place channel marker held willful negligence).

(DD) Tennessee. RUS applicable. Cogle v. U.S., 937 F.2d 1073 (6th Cir. 1991) (Tenn. RUS applies to battlefield cannon collapsing on child playing on it).

(EE) Texas. RUS applicable. Mann v. U.S., Civ. # W-84-CA-19 (W.D. Tex. 1989) (applied to U.S.); Sims v. U.S., Civ. # W-91-CA-344 (W.D. Tex., Sept. 15, 1992)(Texas RUS excludes claim where rock outcropping at COE lake collapsed and crushed fisherman). But see Martinez v. U.S., 780 F.2d 525 (5th Cir. 1986) (quadriplegic from shallow water dive--fail to warn of depth--Texas law not applied); Denham v. U.S., 834 F.2d 518 (5th Cir. 1987) (Texas RUS does not bar claim where COE failed to remove abandoned cement anchors in swimming area).

(FF) Utah. RUS applicable. Ewell v. U.S., 776 F.2d 246 (10th Cir. 1985) (applies Utah RUS law to U.S. land in motorcycle accident). Sulzen v. U.S., (D. Utah, 30 June 1999), Utah RUS applies to National Park where woman in picnic area is killed by falling rock dislodged from overhang by teenagers. Figueroa v. U.S., civ. # 1:97-CV-003S (D. Utah, 3 Feb. 99), RUS not applicable to picnic area subject to falling rocks, where U.S., but not injured party, on notice of prior death from falling rock.

(GG) Virginia. RUS applicable. Hamilton v. U.S., 371 F. Supp. 230 (E.D. Va. 1974). But see Piligian v. U.S., 642 F. Supp. 193 (D. Mass. 1986) (injured when chair collapsed in Pentagon concourse--Virginia RUS not applicable, since concourse is a commercial activity). Nyazie v. U.S., 1998WL633984 (E.D. Pa.), 15-year-old visitor drowns near waterfalls in Great Falls National Park- no duty to warn under "open and obvious" doctrine - cites numerous cases.

(HH) Washington. RUS applicable. Jones v. U.S., 693 F.2d 1299 (9th Cir. 1982) (Washington RUS law applies to ski slope in Olympic National Park); Morgan v. U.S., 709 F.2d 580 (9th Cir. 1983) (Washington RUS applies to electrocution caused by shorted-out pump discharging into lake).

(II) West Virginia. RUS applicable. Maynard v. U.S., Civ. #77-3263-H (S.D. W.Va. 1978).

(JJ) Wisconsin. RUS not applicable. Garfield v. U.S., 297 F. Supp. 891 (W.D. Wis. 1969) (hunting fee constitute "valuable consideration" which negates application of RUS).

(KK) Wyoming. RUS applicable. Childers v. U.S., 841 F. Supp. 1001 (D. Mont. 1993), aff'd, 40 F.3d 973 (9th Cir. 1994), cert. denied, 514 U.S. 1095 (1995) (Wyoming RUS bars claim for fall from icy observation deck in Yellostone National Park); Henretig v. U.S., 490 F. Supp. 398 (S.D. Fla. 1980) (Florida resident falls on incline in National Park in Wyoming--no duty to warn); Smith v. U.S., 383 F. Supp. 1076 (D. Wyo. 1978) (Wyoming RUS applies to minor who steps in thermal pool at Yellowstone).

(LL) New Jersey. Weber v. U.S., 1998 WL32480 (D.N.J.) (New Jersey RUS bars claim for metal yoke falling on plaintiff while she was on Fort Dix playground swing. Weber v. U.S., 991 F. Supp. 694 (D. N.J. 1998) Injury due to breaking of yoke on swing set at playground on Ft. Dix is excluded by New Jersey Ladowners Liability Act (N.J. Stat Ann 2A;42A-2

(ii) Fees. RUS may not be applicable if fee is paid. Graves v. U.S. Coast Guard, 692 F.2d 71 (9th Cir. 1982) (RUS does not apply to U.S. where fee

collected by U.S. concessionaire); Thompson v. U.S., 592 F.2d 1104 (9th Cir. 1979) (California law--fee paid); Twohig v. U.S., 711 F. Supp. 560 (D. Mont. 1989) (purchase of parking fee by plaintiff's companion voids Idaho RUS); Garfield v. U.S., 297 F. Supp. 891 (W.D. Wis. 1969) (hunting fee constitute "valuable consideration" which negates application of RUS). But see Wilson v. U.S., 989 F.2d 953 (8th Cir. 1993) (Mo. RUS applied to electrocution death of 13 year old Boy Scout who was climbing irrigation pipe held by two other Scouts--$2.00 fee paid for lodging to U.S. Army does not bar application by RUS); Hammon v. U.S., 801 F. Supp. 323 (E.D. Cal. 1992) (Cal. RUS applied even though camping fee charged for another part of national forest); Flohr v. Pennsylvania Power and Light Co., 800 F. Supp. 1252 (E.D. Penn. 1992) (camping fee not a "charge" under Pa. RUS); Munley v. U.S., Civ. # 90-1273 (M.D. Pa., 21 Dec. 1990)(similar to Flohr, but involving parking fee); Budde v. U.S., 797 F. Supp. 731 (N.D. Iowa 1992) (payment of billeting fee by visiting spouse not a charge for use of swimming pool at Naval base--Hawaii RUS applies); Dorman v. U.S., 812 F. Supp. 685 (S.D. Miss. 1993) (Miss. RUS applies to slip and fall at boat landing, even though plaintiff paid fishing license fee); Chester v. U.S., 94 F.3d 650 (table), 1996 WL 467685 (9th Cir. 1996)) (claim for injury on tank Naval air show precluded by RUS payment for special seating is not fee, since it is not connected with viewing tank); Schiano v. U.S., Civ. # 94-323-CIV-FTM-25D (M.D. Fla., 6 Aug. 1996) (fall from 16 foot government ladder while picking apples in national park--RUS applies even though he paid $6.00 for parking pad). Kennedy v. U.S., Civ. #97-15857 (9th Cir. 1999), excellent discussion on subject fees versus consideration provides listing of cases.

(iii) Willful and Wanton Conduct. RUS statute generally covers only simple negligence, not willful or wanton conduct. Miller v. U.S., 597 F.2d 614 (7th Cir. 1979); Stephens v. U.S., 472 F. Supp. 998 (C.D. Ill. 1979) (same as Miller); Davis v. U.S., 716 F.2d 418 (7th Cir. 1983) (court again holds U.S. liable for willful and wanton conduct as in Miller in failing to warn divers); Roten v. U.S., 850 F. Supp. 786 (W.D. Ark. 1994) (National Park Service knowledge of prior falls from cliff does establish malice required to negate application of Arkansas);

Collard v. U.S., 691 F. Supp. 256 (D. Haw. 1988) (Hawaii RUS willfulness clause applied to large log near Marine Corps beach); Russell v. TVA, 564 F. Supp. 1043 (N.D. Ala. 1983) (Alabama RUS applies to spillway at dam--not considered to be a willful or malicious failure to guard--danger was open and obvious).

d. Transmission of Postal Matter (28 U.S.C. § 2680(b)). Suits alleging the negligent transmission of postal matter is barred by this exclusion. See, e.g., Anderson v. USPS, 761 F.2d 527 (9th Cir. 1985) (bars claim for loss of insured mail during robbery of postal carrier); Marine Ins. Co. v. U.S., 378 F.2d 812 (2d Cir. 1967), cert. denied, 389 U.S. 953 (1967) (loss of emeralds, but such claims may be payable under Military Claims Act (10 U.S.C. § 2733) when loss occurs in possession of military postal personnel); Djordjevic v. Postmaster General, 911 F. Supp. 72 (E.D.N.Y. 1995) (undelivered package containing money and legal documents is subject to exclusion); Goger v. U.S., __ F.3d __, WL 338021 (9th Cir. (Nev.)); Allied Coin Investment Inc. v. USPS, 673 F. Supp. 982 (D. Minn. 1987) (claim for value of lost package of coins in excess of $500 maximum for express mail not payable); Kissell v. Mann, 750 F. Supp. 55 (D.N.H. 1990) (fail to leave notice in mail box re package is excluded by exclusion); Pruitt v. U.S. Postal Service, 817 F. Supp. 807 (E.D. Mo. 1993) (exclusion applies to suit for loss of package); Robinson v. U.S., 849 F. Supp. 799 (S.D. Ga. 1994) (exclustion applied to wrongful death claim caused by mail bomb delivered by USPS). This exclusion was not affected by the Postal Reorganization Act of 1970. Insurance Co. of North America v. USPS, 675 F.2d 756 (5th Cir. 1982); Suchomajcz v. U.S., 465 F. Supp. 474 (E.D. Pa. 1979). Exclusion not applicable to illegal opening of mail by U.S. employees. See Birnbaum, Avery & Cruikshank cases supra or where U.S. Postal Service violates own regulation by transmitting explosives. See also Barbieri v. Hartsdale Post Office, 856 F. Supp. 817 (S.D.N.Y. 1994) (placing wrongly-dated postmark on letter causing tax penalty does not fall under exclusion). Sump v. USPS, 1997 WL 808658 (D. Kan.) (document sent by certified mail lost in mail system - exception applies). Brandofino v. U.S. Postal Service, 14 F. Supp. 2d 1161 (D. Ariz. 1998) exception applies to USPS collecting lesser amount on COD package due to USPS error. Ruiz v. U.S., 160 F.3d 273 (5th Cir. 1998) failure of prisoner to receive his mail falls under exclusion. Genoa v. USPS, 1999WL16325 (N.D. Calif.) loss of package mailed from U.S. to France falls under exception. Ruiz v. U.S., 160 F.3d 273 (5th Cir. 1998), failure of prisoner to receive his mail falls under exception.

e. Collection of Taxes and Detention of Goods (28 U.S.C. § 2680(c)). See, e.g., Berridge v. U.S., 745 F. Supp. 732 (S.D. Ohio 1990) (taxpayer cannot challenge tax deficiency notice by using FTCA); Frasier v. Hegeman, 607 F. Supp. 318 (N.D.N.Y. 1985) (IRS levy on dairy for money owed taxpayer is not permitted as basis for action labeled "trespass of the case”). Cf. Green v. U.S., 658 F. Supp. 749 (S.D. Fla. 1987) (exclusion applies under Suits in Admiralty Act). This exclusion applies to money as well as goods. Halverson v. U.S., 972 F.2d 654 (5th Cir. 1992) (detention of goods exclusion is applicable money loss by INS); U.S. v. $149,345 U.S. Currency, 747 F.2d 1278 (9th Cir. 1984). It also applies to third parties as well as taxpayer. Murray v. U.S., 686 F.2d 1320 (8th Cir. 1982); Cardonadel Toro v. U.S., 791 F. Supp. 43 (D.P.R. 1992) (exclusion applies to FBI seizure of Mercedes from innocent purchaser). Accord Heritage Hills Fellowship v. Plouff, 555 F. Supp. 1290 (E.D. Mich. 1983). Injury or loss of goods while in possession is covered, since other remedies are available. (H. Rep. 245, 77th Cong., 2d Session 10 (1942); 56 Yale L.J. 534 (1947)). Claims may be payable under bailment provisions of Military Claims Act, 10 U.S.C. § 2733, but where damage occurs in deliberate act of obtaining evidence, e.g., subjecting evidence to scientific analysis, see paragraph 3-8, AR 190-22.

(1) Scope. Exclusion applies to both damages caused by wrongful detention of goods and from negligent handling of goods after detention. Kosak v. U.S., 465 U.S. 848, 104 S.Ct. 1519 (1984). Matsushita Elec. Co. v. Zeigler, 158 F.3d 1167 (11th Cir. 1998) detention of goods exception is applicable to damage caused by customs inspector during inspection and bars common law remedy against inspector individually.

(2) Applicability to Customs Service. Exclusion applies to seizure and detention of property by Customs and Border Patrol officials. Ysasi v. Rivkind, 856 F.2d 1520 (Fed. Cir. 1988) (Border Patrol seizes vehicle transporting aliens within exclusion); Millan v. U.S., 1994 WL 510455 (D.P.R.) (Seizure of winning lottery tickets by Customs falls under exclusion); Reuben v. U.S. Customs Service, Civ. # 3-94-381 (D. Minn., May 13, 1994) (claim for emotional distress based on inspection of herbal medicine in sealed leather pouches of belt being worn--exclusion applies); Locks v. Three Unidentified Customs Service Agents, 759 F. Supp. 1131 (E.D. Pa. 1990) (boring holes in metal sculpture to inspect does not raise to the level of a 4th amendment constitutional

claim); Romanach v. U.S., 579 F. Supp. 1017 (D.P.R. 1984) (damage caused by vandals to seized vessel not compensable); Milburn v. U.S., 647 F. Supp. 1521 (S.D. Fla. 1986) (return of plane to foreign government by Customs Service falls under exclusion). Exclusion may encompass non custom Service activities akin to Custom Service activities. Rufu v. U.S., 876 F. Supp. 400 (E.D.N.Y. 1994) (while exclusion is applicable to DEA seizure of luggage at JFK Airport, court will hear evidence on equitable relief as ordered by higher court in Rufu v. U.S., 20 F.3d 63 (2d Cir. 1994)); Formula One Motors Ltd. v. U.S., 777 F.2d 822 (2d Cir. 1985) (detention and search of vehicle by DEA sufficiently akin to customs activities to fall within exclusion); Sterling v. U.S., 749 F. Supp. 1202 (E.D.N.Y. 1990) (DEA seizure of currency at JFK airport is excluded by exclusion). Acosts v. U.S., 1998 WL 351837 (E.D. La.) (claim for damage to molds during customs inspection fells under exclusion).

(3) IRS Collection Activities. Exclusion applies to IRS collection activities. Perkins v. U.S., 55 F.3d 910 (4th Cir. 1995) (claim for death by asphyxiation of worker attempting to remove mine equipment to satisfy IRS lien falls under exclusion); Jones v. U.S., 16 F.3d 979 (8th Cir. 1994) (IRS tax investigation which includes wire tops, interviews of friends and business acquaintances, and search of home and business falls under exclusion); White v. C.I.R., 899 F. Supp. 767 (D. Mass. 1995) (exclusion applies to allegation that IRS provided defective and dangerous services and products to taxpayer); Fair v. Swenson, 753F. Supp. 875 (D. Colo. 1991) (filing fraudulent tax lien barred by exclusion); U.S. v. Raytown Lawnmower Co., 763 F. Supp. 411 (W.D. Mo. 1991) (exclusion bars counterclaims against IRS for prima facie tort, outrageous conduct, libel, slander and misrepresentation); Erie Industries v. U.S., 1995 WL 87122 (E.D. Mich.) (so-called unauthorized service of tax information scanners by IRS falls under exclusion); Jones v. FBI, 139 F. Supp. 38 (D. Md. 1956) (invasion of privacy by taking photos of taxpayer's property excluded); Capozzoli v. Tracey, 663 F.2d 654 (5th Cir. 1981); Johnson v. U.S., 680 F. Supp. 508 (E.D.N.Y. 1987) (applies to collection of taxes by IRS). But see Johnson v. Sawyer, 980 F.2d 1490 (5th Cir. 1992), rev'd by court en banc on other grounds, 47 F.3d 716 (5th Cir. 1995) (en banc) (claim for violation of IRS statute precluding public dissemination of tax information does not fall under exclusion--exclusion does not apply to press release by IRS concerning confidential plea bargain);

Hurt v. U.S., 914 F. Supp. 1346 (S.D. W.Va. 1996) (exclusion re collection of taxes not applicable to allegation of annual audit of taxpayer since 1973).

(4) Applicability to Agencies Other Than IRS or Customs Service. The circuits are split on whether the exclusion applies to seizure of goods by government agencies andthe care and disposal of such property when the agency isone other than the Customs service. Cases holding exclusion applicable to other agencies. Schlaebitz v. U.S. Dept. of Justice, 924 F.2d 193 (11th Cir. 1991) (U.S. Marshal turns over confiscated luggage to 3d party--exclusion applies); U.S. v. 2116 Boxes of Boned Beef, 726 F.2d 1481 (10th Cir. 1984), cert. denied, 469 U.S. 825 (1984) (seizure by Dept. of Agriculture falls under exclusion). Gifford v. U.S., Civ. # 90-98-BLG-JDS (D. Mont. 1991) (exclusion applies to horses injured in transport after seizure by Bureau of Land Management law officer). Cases holding exclusion limited to Customs service. Bazuaye v. U.S., 83 F.3d 482 (D.C. Cir. 1996) (seizure of bail money by Postal Inspector does not fall under exclusion--discusses split in circuits); Kurinsky v. U.S., 35 F.3d 594 (6th Cir. 1994) (exclusion applies only to detained goods in connection with customs and taxes despite contrary holding by six other circuits); Price v. U.S., 707 F. Supp. 1465 (S.D. Tex. 1989), rev'd on other grounds, 69 F.3d 46 (5th Cir. 1995) (exclusion does not apply to seizure by Army of Hitler's watercolors, since Army not customs agent); Hydrogen Technology v. U.S., 656 F. Supp. 1126 (D. Mass.), aff'd on other grounds, 831 F.2d 1155 (1st Cir. 1987) (exclusion not applicable to generator ruined by FBI during evidence exam, since limited to customs activities-FBI not negligent). Boggs v. U.S., 987 F. Supp. 11 (D.D.C. 1997) (Secret Service seizure of works of art does not fall under exception -- follows Bazuaye supra.

(5) Seizures With Arrests. Exclusion applies to seizures and detention of goods in connection with an arrest. Cheney v. U.S., 972 F.2d 247 (8th Cir. 1992) (turning over title of POV to third party who obtains POV from storage warehouse where place by arrested person falls under exclusion); Garnay Inc. v. M/V Lindo Maersk, 816 F. Supp. 888 (S.D.N.Y. 1993) (FBI agents' detention of perishable goods purchased in "sting" operation for 1.5 years fall under exclusion); Roe v. U.S., 1993 WL 121509 (D.D.C. 1993) (car seized by DDL during arrest of owner is auctioned by DC Government for failure to pay parking fines-claim is barred by exclusion); Moore v. U.S., 1996 WL 662446 (D. Kan.) (Probable cause existed

for arrest of wrong person due to numerous similarities in physical description and address); Van Buskirk v. U.S., 206 F. Supp. 553 (E.D. Tenn. 1962), aff'd, 304 F.2d 871 (6th Cir. 1962); Matthews v. U.S., Civ. # 92-2571 (OG) (D.D.C., July 21, 1994) (exclusion applies to claim for damages to two cars seized and returned by FBI in vandalized condition). May also apply to the loss of goods. Parmelee v. Carson, 77 F.3d 486 (table), 1996 WL 64701 (8th Cir. 1996) (exclusion applies to federal prison officer negligently disposing of prisoners property inventoried and detained disagrees with Mora v. U.S.,955 F.2d 156 (2d Cir. 1992) which holds that lost goods are not detained, therefore exclusion does not apply). If seized goods are forfeited without notice, exclusion is inapplicable and FTCA suit based on state tort of conversion may lie. Taft v. U.S., 824 F. Supp. 455 (D. Vt. 1993) (failure to follow notice procedures re seizure of truck by DEA precludes jurisdictional dismissal); Perez v. U.S., 844 F. Supp. 984 (S.D.N.Y. 1994) (DEA sale of detained goods without notice constitutes a conversion under N.Y. law--exclusion not applicable). Cf. Litzenbarger v. U.S., 89 F.3d 818 (Fed. Cir. 1996) (adequate notice of forfeiture of car by FBI to drug user meets due process requirements). But see Conkey v. Reno, 885 F. Supp. 1389 (D. Nev. 1995) (Hydrodic acid seized and destroyed by federal official under 21 U.S.C. § 881 without giving owner due process is valid).

(6) Tucker Act Applicability. However, even if the exclusion is applicable, a plaintiff may still have Tucker Act cause of action based on implied in fact contract. Hatzlachh Supply Co. Inc. v. U.S., 444 U.S. 460, 100 S.Ct. 647 (1980) (detention of goods exclusion does not preclude Tucker Act application); Newstead v. U.S., 258 F. Supp. 250 (E.D. Mo. 1966); Menkarell v. Bureau of Narcotics, 463 F.2d 88 (3d Cir. 1972); S. Schonfeld Co. Inc. v. SS AkraTenaron , 363 F. Supp. 1220 (D.S.C. 1973); U.S. v. 1500 Cases More or Less, 249 F.2d 382 (7th Cir. 1957); States Marine Lines Inc. v. Shultz, 359 F. Supp. 512 (D.S.C. 1973); Bambulas v. U.S., 323 F. Supp. 1271 (D.S.D. 1971); Walker v. U.S., 438 F. Supp. 251 (S.D. Ga. 1977). See also Paul v. U.S., 929 F.2d 1202 (7th Cir. 1991) (exclusion applied as no tort, but contract, arising out of plea bargain permitting return of moneywhich was, in fact, not returned by DEA--judge doubts exclusion applies to DEA); Bielass v. New England Safe System Inc., 617 F. Supp. 682(D. Mass. 1985) (sale of household goods without notice to known owners

exclusion applies, but implied contract remains as issue).

(7) Prisoners. U.S. must prove property is returned to prisoner. Sellers v. U.S., 97 F.3d 1454 (table), 1996 WL 525426 (7th Cir. 1996) (U.S. must prove that 41 books seized and inventoried from prisoner were, in fact, returned to him); Riley v. U.S., 938 F. Supp. 708 (D. Kan. 1996) (prisoner signed forms releasing inventoried property to him without indicating any discrepancies--no basis for claim).

f. Cognizable Under Suits in Admiralty Act (46 U.S.C. §§ 741-52) and Public Vessels Acts (46 U.S.C. §§ 781-90) (28 U.S.C. § 2690(d)). These two statutes cover most maritime torts. Roberts v. U.S., 498 F.2d 520 (9th Cir. 1974). Must not only have maritime situs on navigable waters, but also maritime nexus for these statutes to apply. Executive Jet Aviation Inc., 409 U.S. 249, 93 S.Ct. 493 (1972); Kropp v. Douglas Aircraft Co., 329 F. Supp. 447 (E.D.N.Y. 1971); Scott v. Eastern Airlines Inc., 399 F.2d 14 (3d Cir. 1967), cert. denied, 393 U.S. 979 (1968). See also Richardson v. Foremost Ins. Co., 641 F.2d 314 (5th Cir. 1981), aff'd, 457 U.S. 668 (1982) (collision of two vessels on navigable waters necessarily maritime tort); Polly v. Estate of Carlson, 859 F. Supp. 270 (E.D. Mich. 1994) (drownings from pleasure boat in Lake Huron is under maritime jurisdiction--cites Sisson v. Ruby, 497 U.S. 358 (1990) and Foremost Ins. Co. v. Richardson, 467 U.S. 668 (1982) as the leading cases); White v. U.S., 53 F.3d 43 (4th Cir. 1995) (security guard employed by ship repairer falls under gangway while exiting Navy vessel--suit is maritime). Where maritime tort not covered, FTCA applies. Executive Jet Aviation Inc. v. City of Cleveland, 409 U.S. 249, 93 S.Ct. 493 (1972); Moran v. U.S., 102 F. Supp. 275 (D. Conn. 1951); Ira S. Bushey & Sons Inc. v. U.S., 276 F. Supp. 518 (E.D.N.Y. 1967);; Kelly v. U.S., 531 F.2d 1144 (2d Cir. 1976). See also Kelly v. U.S., 512 F. Supp. 356 (E.D. Pa. 1981) (held nuclear radiation exposure at sea falls under FTCA); Diaz v. U.S., 655 F. Supp. 411 (E.D. Va. 1987)(ship supplier falls on deck--no maritime nexus); Coats v. Luedtke Engineering Co., 744 F. Supp. 884 (E.D. Wis. 1990) (fall on stairs on connecting barge anchored to provide access to dredge not under maritime jurisdiction, but FTCA).

(1) Pleasure Boats. Pleasure boats fall under exclusion. Sisson v. Ruby, 497 U.S. 358 (1990); Foremost Ins. Co. v. Richardson, 457 U.S. 668, 102 S.Ct. 2654 (1982); Beeler v. U.S., 256 F. Supp. 771 (W.D. Pa. 1966); Bevilacqua v. U.S., 122 F. Supp. 493 (W.D. Pa. 1954); Chapman v. U.S., 541 F.2d 641 (7th Cir. 1976); Chute v.

U.S., 449 F. Supp. 172 (D. Mass. 1978); Hartman v. U.S., 522 F. Supp. 114 (D.S.C. 1981); Estate of Callas v. U.S., 682 F.2d 613 (7th Cir. 1982). See also Respess v. U.S., 586 F. Supp. 861 (E.D. La. 1984) (pleasure boat collides with branch overhanging canal); Bolton v. U.S., Civ. #78-C-4225 (N.D. Ill. 1986) (pleasure fishing boat capsizes downstream from lock on Illinois river--maritime jurisdiction); Duke v. U.S., 711 F. Supp. 332 (E.D. Tex. 1989) (pleasure boat collision is under SIAA and 2 year SOL applies); Wright v. U.S., 883 F. Supp. 60 (D.S.C. 1994) (U.S. third party renters of pleasure boat in suit by injured passenger upheld under maritime jurisdiction--cites Sisson v. Ruby, 497 U.S. 358 (1990) and In re Bird, 794 F. Supp. 575 (D.S.C. 1992)).

(2) Damage to Land-Based Objects. Damage on land can fall under exclusion if wrong bears significant relationship to traditional maritime activities. Szyka v. U.S. Secretary of Defense, 525 F.2d 62 (2d Cir. 1975); J.W. Peterson Coal and Oil Co. v. U.S., 323 F. Supp. 1198 (N.D. Ill. 1970); Feehan v. U.S. Lines Inc., 522 F. Supp. 811 (S.D.N.Y. 1980). But see Ellis v. Riverport Enterprises, Inc., 957 F. Supp. 105 (E.D. Ky. 1997) (fall on floating walkway is not maritime since floating walkway is extension of dock, which is, in turn, an extension of land); Dirma v. U.S., 695 F. Supp. 714 (E.D.N.Y. 1988) (maritime jurisdiction does not apply to naval vessel in dry-dock--cites cases). Young v. Players Lake Charles LLC, 47 F. Supp. 2d 832 (S.D. Tex., 1999), Maritime Dram Shop Law applies to death of motorist by drunken driver who became that way on a riverboat.

(3) Damage to Vessel From Land-Based Objects. Damage on boat can be caused by object on land or air. Utzinger v. U.S., 246 F. Supp. 1022 (S.D. Ohio 1965); Mings v. U.S., 222 F. Supp. 996 (S.D. Cal. 1963); Brown v. U.S., 403 F. Supp. 472 (C.D. Cal. 1975); T.J. Falgout Boats Inc. v. U.S., 361 F. Supp. 838 (C.D. Cal. 1972), aff'd, 508 F.2d 855 (9th Cir. 1974), cert. denied, 421 U.S. 1000 (1975).

(4) Navigable Waters. Navigable waters are usually interstate and used in commercial navigation. Kaiser Aetna v. U.S., 444 U.S. 164 (1979) (defines navigable waters); Chapman v. U.S., 575 F.2d 147 (7th Cir. 1978); Livingston v. U.S., 627 F.2d 165 (8th Cir. 1980). See also Reynolds v. Bradley, 644 F. Supp. 42 (N.D.N.Y. 1986) (lake separated from its interstate connection not navigable). The cases have held that navigability, and thus admiralty jurisdiction, can be destroyed. Adams v. Montana Power Co., 528 F.2d 437 (9th Cir. 1975)

(admiralty jurisdiction upstream removed by dam which spans river). But see Jones v. Duke Power Co., 501 F. Supp. 713 (W.D.N.C. 1980) (adopts divergent view that once body of water is navigable, it will be considered as such even though no longer so--also, it gives excellent summary of entire body of law). Particular bodies held to be navigable. Mullenix v. U.S., 984 F.2d 101 (4th Cir. 1993) (Potomac River is navigable even though wholly in Maryland and used for recreational traffic); Finneseth v. Carter, 712 F.2d 1041 (6th Cir. 1983) (COE dam straddling two states held navigable); U.S. v. DeFelice, 641 F.2d 1169 (5th Cir. 1981) (holds privately owned artificial canal navigable, since subject to ebb and flow).

(5) Army Maritime Claims Settlement Act. Maritime claims filed administratively not falling under FTCA must be considered under Army Maritime Claims Settlement Act (10 U.S.C. §§ 4801-04, 4806). Other services have similar authority: Navy (10 U.S.C. § 7621 et seq.), Air Force (10 U.S.C. § 9801 et seq.); Coast Guard (14 U.S.C. § 646). However, if claim is not settled, including issuance of check, within two years of accrual of claim, libel must be filed in court under SIAA or PVA. Otherwise, claim is barred by statute of limitations (32 C.F.R. § 752.2(a)). Dyer v. U.S., 827 F. Supp. 339 (E.D. Pa. 1993) (suit for injuries while repairing ship must be timely filed whether under Public Vessels Act or FTCA); T.J. Falgout Boats Inc. v. U.S., 361 F. Supp. 838 (C.D. Cal. 1972), aff'd, 508 F.2d 855 (9th Cir. 1974), cert. denied, 421 U.S. 1000 (1975); Kelly v. U.S., 512 F. Supp. 356 (E.D. Pa. 1981); Liberty Mutual Insurance Co. v. U.S., 145 F. Supp. 887 (S.D.N.Y. 1956). See also Epshteyn v. U.S., 657 F. Supp. 255 (S.D.N.Y. 1987) (Federal agency received FTCA claim, even though was maritime, nevertheless, suit under PVA barred, since not filed prior to two years); Morales v. U.S., 866 F. Supp. 84 (E.D.N.Y. 1993) (no equitable tolling permitted where seaman failed to file proper claim with Maritime Administration within 2-year limit under PVA); Mayeux v. U.S., 1997 WL 599303 (E.D.La.) (no equitable tolling permitted when COE informed claimant of 2 year filing requirement); Duke v. U.S., 711 F. Supp. 332 (E.D. Tex. 1989) (pleasure boat collision is under SIAA and 2 year SOL applies); Ammer v. U.S., 881 F. Supp. 1007 (D. Md. 1994) (furnishing SF 95 to PVA claimant shortly before expiration of 2 year SOL is not sufficient basis to equitably toll SOL); Weatherford v. U.S., 957 F. Supp. 830 (M.D. La. 1997) (small skiff strikes underwater pipeline--suit is prescribed, since not filed within 2

years); Corbett v. U.S., 1997 WL 215699 (E.D.N.Y.) (no equitable tolling under SIA since attorney had duty to file suit even though Navy took 7 months to determine SIA applied); Bovell v. U.S. DOD, 735 F.2d 755 (3d Cir. 1984) (does not toll SIA); Raziano v. U.S., 999 F.2d (11th Cir. 1993) (equitable tolling under SIA Act not permitted where negotiation with Coast Guard ran past 2 year filing limit). Contra McCormick v. U.S., 680 F.2d 345 (5th Cir. 1982) (obstacle in navigable water placed by COE does not fall under FTCA where COE held administrative claim until two year filing requirement under SIA expired); Northern Metal Co. v. U.S., 350 F.2d 833 (3rd Cir 1965).

(6) Admiralty Remedy Exclusive. Exclusive nature of admiralty remedy prevails, even where claimant is barred by other exclusion. Harrington v. U.S., 748 F. Supp. 919 (D.P.R. 1990) (Coast Guard arrest on high seas falls under PVA, but claim barred due to lack of reciprocity with foreign nationals country of origin); Simonowycz v. U.S., 125 F. Supp. 847 (N.D. Ohio 1954) (alien plaintiff barred by 46 U.S.C. § 785); Tankrederiet Gefion a/s v. U.S., 241 F. Supp. 83 (E.D. Mich. 1964) (lack of venue as required by 46 U.S.C. § 742).

(7) SIAA Discretionary Function. Discretionary function exclusion implicit in Suits in Admiralty Act. Some relevant older cases. Patentas v. U.S., 687 F.2d 707 (3d Cir. 1982) (good general discussion); Canadian Transport Co. v. U.S., 663 F.2d 1081 (D.C. Cir. 1980); Rappenecker v. U.S., 509 F. Supp. 1018, 1024 (N.D. Cal. 1981); Estate of Callas v. U.S., 682 F.2d 613 (7th Cir. 1982); In re Ohio River Disaster Litigation, 579 F. Supp. 1273 (S.D. Ohio 1984); Bearce v. U.S., 614 F.2d 556 (7th Cir. 1980), cert. denied, 449 U.S. 837 (1980); Gercey v. U.S., 540 F.2d 536 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977); Gemp v. U.S., 684 F.2d 404 (6th Cir. 1982). More recent cases applying the SIAA's discretionary function exclusion. Corporacion Insular de Seguros v. U.S., 646 F. Supp. 1230 (D.P.R. 1986) (no duty by U.S. to mark breakwater); American Global Lines Inc. v. U.S., 645 F. Supp. 783 (S.D.N.Y. 1986) (failure of Coast Guard to issue additional endorsement to pilot's license is discretionary); B & F Trawlers Inc. v. U.S., 841 F.2d 626 (5th Cir. 1988) (sinking of boat by Coast Guard for carrying marijuana discretionary); Wiggins v. U.S. through Dept. of Army, 799 F.2d 962 (5th Cir. 1986) (failure to remove abandoned pilings outside channel is discretionary); Figueroa v. Dept. of Army, 695 F. Supp. 85 (E.D.N.Y. 1988) (failure to mark wreck not in channel is discretionary; Faust v. South Carolina State Highway

Dept., 721 F.2d 934 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984) (marking ferry cable discretionary); In re Ohio River Disaster Litigation, 862 F.2d 1235 (6th Cir. 1988) (discretionary function applies to failure to contain ice flow on Ohio River); Kearney Barge Co. v. Andre LeDoux Inc., 709 F. Supp. 720 (E.D. La. 1989) (certification of hull by USCG discretionary); Graves v. U.S., 872 F.2d 133 (6th Cir. 1989) (boat went over dam--failure to warn held discretionary); Sealand Service Inc. v. U.S.A., 919 F.2d 888 (3d Cir. 1990) (discretionary function bars SIAA suit for contribution by vessel owner re: asbestos exposure by seaman); In re Lloyd's Leasing Ltd., 764 F. Supp. 1114 (S.D. Tex. 1990) (when and how to dredge channel is at COE discretion and falls under exclusion in SIAA suit);. Cassens v. St. Louis River Cruise Lines, 44 F.3d 508 (7th Cir. 1995) (discretionary function exclusion applies to certification by Coast Guard of vessel with defective hand rails); Baldassaro v. U.S., 64 F.3d 206 (5th Cir. 1995) (exclusion applies to injury to seaman caused by fall from bank of U.S. vessel when detachable sea rail separated); Tew v. U.S., 86 F.2d 1003 (10th Cir. 1996) (neither COE or Coast Guard has duty to remove private party's unauthorized understructure in wrongful death suit--Wreck Removal Statute, 33 U.S.C. § 403c *et seq* is discretionary); Good v. Ohio Edison, 1996 WL 652593 (N.D. Ohio) (where boat collides with an unlit concrete and steel platform on Lake Erie--USCG has discretion regarding inspection); O'Barry v. U.S., 915 F. Supp. 345 (S.D. Fla. 1995) (method of preventing environmental activists from reaching underwater explosion is discretionary). But see Sutton v. Earles, 26 F.3d 903 (9th Cir. 1994) (Non-discretionary duty to warn of presence of buoy in areas where Navy permitted pleasure boats); Dinger v. Hornbeck Offshore Services, Inc., 968 F. Supp. 957 (S.D.N.Y. 1997) (discretionary function exclusion not applicable to Coast Guard inspection of vessel where inspector did not know of requirement for relief valve). The discretionary function exclusion also applies to the Public Vessels Act. U.S. Fire Ins. Co. v. U.S., 806 F.2d 1529 (11th Cir. 1985). Good v. Ohio Edison, __F.3d__, 1998 WL 404256 (6th Cir., Ohio) (nonmandatory inspection by Coast Guard of light on tower falls under discretionary function. Also holds 3d party plaintiff must show victims relied on CG's inspection. Pennisi v. U.S., Civ. # C9700530 SBA (N.D. Calif., 14 August 1998) discretionary function does not apply to dumping of 1000 pound Navy mine fished up by trawler outside designated dumping area. Theriot v. U.S., Civ. # 97-30982 (5th Cir., 1 Dec 98, method of warning public of sill or weir

to divert water to keep channel from silting is discretionary.

(8) Punitive Damages. Punitive damages are not payable by U.S. under Suits in Admiralty Act. Doty v. U.S., 508 F. Supp. 250 (N.D. Ill. 1981). See also Kasprik v. U.S., 87 F.3d 462 (11th Cir. 1996) (exclusionary provision of Suits in Admiralty Act precluded action for punitive damages). Accord O'Connell v. Interocean Management Corp., 90 F.3d 82 (3rd Cir. 1996).

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

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

(11) Contribution and Indemnity. Sea-Land Service Inc. v. U.S., 689 F.2d 450 (D.N.J. 1988) (contribution and indemnity claim must be filed within two years of incident-not from date of recovery).

(12) Ship Chartered From U.S. Dearborn v. Nav Ship Operations, 113 F.3d 995 (9th Cir. 1997) (suit by wiper on chartered naval ship is against U.S., since charterer is agent of U.S.). But see Nelsen v. Research Corp. of The University of Hawaii, 752 F. Supp. 350 (D. Haw. 1991) (unseaworthy Navy vessel on bare boat charter to U. of Hawaii--exclusivity provision of PVA does not bar suit, since U. of Haw. is not agent of U.S.).

(13) Maintenance and Care. Suits against agents of U.S. for maintenance and cure. Shields v. U.S., 662 F. Supp. 187 (M.D. Fla. 1987) (suit against Sea-Land as agent of U.S. is independent of SIAA where maintenance and care benefits denied).

(14) Administrative Filing Requirement Under AEA. Saint Paul Fire & Marine Ins. Co. v. U.S., 28 F. Supp. 2d 472 (E.D. Tenn. 1998) Admiralty Extension Act contains administrative filing requirement. Where suit and claim filed simultaneously, court has no jurisdiction, as six months period did not run.

g. Administration of Trading with Enemy Act (28 U.S.C. § 2680(e). This exclusion is broadly construed. See, e.g., Price v. U.S., 69 F.3d 46 (5th Cir. 1995) (archive of photos by Hoffman, Hitler's photographer confiscated by U.S. Attorney General in 1951 under Trading with Enemy Act--exclusion applies); Gubbins v. U.S., 192 F.2d 411 (D.C. Cir. 1951).

h. Imposing a Quarantine, 28 U.S.C. § 2680(f). Where damages arise from negligent testing by U.S. during quarantine, misrepresentation exclusion (28 U.S.C. § 2680(h)) may be involved. Hall v. U.S., 274 F.2d 69 (10th Cir. 1959); Rey v. U.S., 484 F.2d 45 (5th Cir. 1973); Saxton v. U.S., 456 F.2d 1105 (8th Cir. 1972). See also Green v. U.S., 629 F.2d 581 (9th Cir. 1980).

i. Intentional Torts, 28 U.S.C. § 2680(h). Only torts expressly listed in 28 U.S.C. § 2680(h) are excluded. See, e.g., Hatahley v. U.S., 351 U.S. 173 (1956); Birnbaum v. U.S., 588 F.2d 319 (2d Cir. 1978); O'Ferrell v. U.S., 968 F. Supp. 1519 (M.D. Ala. 1997) (where FBI agent obtains warrant on deliberately false statement, claims for libel and loss of business are excluded, but claim for trespass and outrageous conduct are upheld). Artful pleading to avoid excluded torts named not permitted. Effort is usually to plead negligence. Hoesl v. U.S., 629 F.2d 586 (9th Cir. 1980); Moos v. U.S., 225 F.2d 705 (8th Cir. 1955); Bergman v. U.S., 567 F. Supp. 460 (D. Colo. 1983); U.S. v. Neustadt, 281 F.2d 596 (4th Cir. 1960), cert. denied,. 364 U.S. 926 (1960). But see Quinones v. U.S., 492 F.2d 1269 (3d Cir. 1974) (which avoids libel and slander and misrepresentation exclusions and uses Pennsylvania law despite fact Federal law should define excluded tort). See IIB.1a(3) supra for additional citations. See also Mortise v. U.S., 910 F. Supp. 74 (N.D.N.Y. 1995), aff'd, 102 F.3d 697 (2nd Cir. 1996) (National Guard on military exercise mistakenly believes

civilian driving ATV is enemy force and points guns--allegations of assault and intentional infliction of emotional distress are one and the same--on appeal, court held that question of assault is not reached, since there is no tort of negligent infliction of emotional distress--intentional infliction not plead).

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

(a) Apprehension. The A or B includes placing in apprehension by mere words. U.S. v. Hambleton, 185 F.2d 564 (9th Cir. 1950). The A or B exclusion also includes intentional assaults with vehicles. Martinez v. U.S., 746 F. Supp. 399 (D.S.C. 1990) (exclusion applied as assault with GOV intentional); Brooks v. U.S., 20 F. Supp. 613 (N.D. Calif., 1998) Ranger in national park shoots plaintiff's dog, then allegedly waves gun in air - no assault as he did not point gun at plaintiff..

(b) Battery. A or B exclusion includes torts which constitute battery alone. Lambertson v. U.S., 528 F.2d 441 (2d Cir. 1976); Blatchford v. Geurra, 548 F. Supp. 406 (S.D. Fla. 1982); Melchiorri v. U.S., 674 F. Supp. 1241 (W.D. La. 1987) (lack of intent due to intoxication in shooting-still a battery).

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

(d) Medical Care. A or B exclusion does not apply to medical care. Lane v. U.S., 225 F. Supp. 850 (E.D. Va. 1964); Hulver v. U.S., 393 F. Supp. 749 (W.D. Mo. 1975); Fontenelle v. U.S., 327 F. Supp. 801 (S.D.N.Y. 1971); Blanton v. U.S., 428 F. Supp. 360 (D.D.C. 1977). See also Kelly v. U.S., Civ. # 91-01-CIV-3-BR (E.D.N.C., 27 Aug. 1992), aff'd, 4 F.3d 985 (table), 1993 WL 321581 (4th Cir. 1993) (no assault in performing tubal ligation as proper consent was obtained). But see Bembenista v. U.S., 866 F.2d 493 (D.C. Cir. 1989) (sexual molestation of patient by medical technician assigned to her care not barred by exclusion due to high duty of care applicable); Hernandez v. U.S., 465 F. Supp. 1071 (D. Kan. 1979);

Holloway v. U.S., Civ. # CV296-65 (S.D. Ga., 14 Aug. 1996) (X-ray technician while x-raying female patients unnecessarily disrobes them--A or B exclusion bars claim). The courts are split on whether the use of electroshock therapy falls within the A or B exclusion. See Woods v. U.S., 720 F.2d 1451 (9th Cir. 1983) (use of "shock" therapy act--A or B). Contra Lojuk v. Quandt, 706 F.2d 1456 (7th Cir. 1983) (use of electric therapy without consent--held a battery); Moos v. U.S., 225 F.2d. 705 (8th Cir. 1955). Even if an action is technically an assault or battery, the U.S. may still be held liable on an alternative theory. Gess v. U.S., 952 F. Supp 1529 (M.D. Ala. 1996) (where medical technician assaulted newborn with lidocane, U.S. is liable, since hospital had knowledge of technician being unfit prior to his assignment to nursery). Further, the Gonzales Act, 10 U.S.C. § 1089, may bar the imposition of 28 U.S.C. § 2680(h) under certain circumstances. Andrews v. U.S., 548 F. Supp. 603 (D.S.C. 1982).

(e) Federal Law Enforcement Officers. The A or B exclusion does not apply to Federal Law Enforcement Officers (P.L. 253, 88 Stat. 50 (March 16, 1974)). For citations on who is a Federal Law Enforcement Officer, see IIB.2j, supra. Officer must be within scope, since the color of office is not enough. See, e.g., Sanchez v. Rowe, 651 F. Supp. 571 (N.D. Tex. 1986) (Border Patrol are Federal Law Enforcement Officers--beating within scope); Celestine v. U.S., 841 F.2d 851 (8th Cir. 1988) (VA Hospital security guards are Federal Law Enforcement Officers); Daniels v. U.S., 470 F. Supp. 64 (E.D.N.C. 1979); Pennington v. U.S., 406 F. Supp. 850 (E.D.N.Y. 1976). See also Kinard v. U.S., Civ. # 86-47-CIV-3 (E.D.N.C. 1986) (off-duty MPs are not Federal Law Enforcement Officers and A or B exclusion applied); Delong v. U.S., 600 F. Supp. 331 (D. Alaska 1984) (Marine guards are not Federal Law Enforcement Officers). United States is entitled to all defenses available to individual, i.e., good faith and reasonable belief. Norton v. U.S., 581 F.2d 390 (4th Cir. 1978); Goehring v. U.S., 870 F. Supp. 106 (D. Md. 1994) (USPS postal inspector is not liable under Maryland law for assault during raid on house as there was no malice); Joyce v. U.S., 795 F. Supp. 1 (D.D.C. 1992) (probable cause exists where forcible removal occurs after plaintiff refused to move double-parked car and locked doors); Stewart v. U.S., 101 F.3d 1392 (table), 1996 WL 387219 (2nd Cir. 1996) (both detention

and length thereof justified in FBI drug bust relative to 15 year old male and 12 year old female).

(f) Negligence Claims. Generally, claims based on negligence not barred by A or B exclusion. Harden v. U.S., 485 F. Supp. 380 (S.D. Ga. 1980); Cerri v. U.S., 80 F. Supp. 831 (N.D. Cal. 1948); Tastor v. U.S., 124 F. Supp. 548 (N.D. Cal. 1954) (accidental or wild shots). Compare U.S. v. Jasper, 222 F.2d 632 (4th Cir. 1955); Duff v. U.S., 171 F.2d 846 (4th Cir. 1949); Ballew v. U.S., 389 F. Supp. 47 (D. Md. 1975); Coffey v. U.S., 387 F. Supp. 539 (D. Conn. 1975); Thompson v. U.S., 504 F. Supp. 1087 (D.S.D. 1981); Rutherford v. U.S., Civ. #81-0039-H (S.D. Ala. 1982) (extending enlistment of service member with criminal record is discretionary function)

(g) Negligent Supervision. Negligent supervision prevails over A or B exclusion, i.e., where actor is not U.S. employee. U.S. v. Muniz, 374 U.S. 150 (1963); Panella v. U.S., 216 F.2d 622 (2d Cir. 1954), cert. denied, (1965); Gibson v. U.S., 457 F.2d 1391 (3d Cir. 1972); Rogers v. U.S., 397 F.2d 12 (4th Cir. 1968); Gale v. U.S., 491 F. Supp. 574 (D.S.C. 1980); Loritts v. U.S., 489 F. Supp. 1030 (D. Mass. 1980). Where actor is U.S. employee, A or B exclusion prevails. Naisbitt v. U.S., 611 F.2d 1350 (10th Cir. 1980); Bates v. U.S., 517 F. Supp. 1350 (W.D. Mo. 1981); Gale v. U.S., 525 F. Supp. 260 (D.S.C. 1981); Taylor v. U.S., 513 F. Supp. 647 (D.S.C. 1981); Hughes v. U.S., 662 F.2d 219 (4th Cir. 1981); Hughes v. Sullivan, 514 F. Supp. 667 (E.D. Va. 1980); Bates v. U.S., 701 F.2d 737 (8th Cir. 1983) (discussing Missouri law); Wine v. U.S., 705 F.2d 366 (10th Cir. 1983) (follows Naisbitt). Contra Peterson v. U.S., Civ. # H-80-1357 (S.D. Tex. 1982) (citing cases). But see Senger v. U.S., 103 F.3d 1437 (9th Cir. 1996) (applies negligent hiring and supervision to postal employee with old record of domestic violence who is told to tow employee's illegally parked POV--distinguishes Sheridan v.U.S., 487 U.S. 392, 108 S.Ct. 2449 (1988) and states that assualt forseeable under Oregon law). Castilla v. U.S., Civ # 4-96-1013 (D. Minn. 24 Apr 1990) Failure of DOL regional supervisor to take action to preclude DOL employee from sexually assaulting state employee is dismissal based on Snearer supra.

(h) Sexual Assault. A sexual assault by a U.S. government employee may fall within the A or B exclusion. Gay v. U.S., 739 F.2d 275 (D. Md. 1990) (no

negligent hiring or training of health care worker who commits indecent assault on Navy patient); Bajowski v. U.S., 787 F. Supp. 539, (E.D.N.C. 1992) (U.S. not liable for off post sexual assault based on enlistment of known criminal); Turner v. U.S., 595 F. Supp. 708 (W.D. La. 1984) (recruiter conducts on-the-spot physical exam of four female applicants--A or B exclusion applied); Johnson v. U.S., 788 F.2d 845 (2d Cir. 1986) (postman assaults infant--follows Shearer); Doe v. U.S., 769 F.2d 174 (4th Cir. 1985) (assault exclusion applied to sexual assault by AF clinical social worker of female patient); Hinkley v. U.S., Civ. # H-94-1735 (S.D. Tex., Jan. 19, 1995) (negligent hiring of recruiter does not provide basis for claim for sexual assault); Thigpen v. U.S., 618 F. Supp. 239 (D.S.C. 1985) (exclusion applied to sexual assault by Naval hospital corpsman of minor female patients); Garcia v. U.S., 776 F.2d 116 (5th Cir. 1985) (exclusion applied to alleged sexual assault by Army recruiter of a female applicant); Jump v. U.S., Civ. # 486-19 (S.D. Ga. 1986) (A or B exclusion bars claims arising out of sexual relationship between Army Chaplain and female he was counseling). But see Sheehan v. U.S., 896 F.2d 1169 (9th Cir. 1990) (sexual assault by fellow employee not barred--supervisor should have intervened); Morrill v. U.S., 821 F.2d 1426 (9th Cir. 1987) (Ninth Cir. holds that A or B exclusion does not bar claim based on negligent supervision for rape of "go-go dancer" in EM club); Bennett v. U.S., 803 F.2d 1502 (9th Cir. 1986) (off-duty teacher at Indian School sexually assaults pupils--claim permitted--Shearer distinguished); Doe v. U.S., 838 F.2d 220 (7th Cir. 1988) (duty to protect day care center children precludes application of exclusion in sexual molestation); Doe v. Scott, 652 F. Supp. 549 (S.D.N.Y. 1987) (exclusion not applicable to abuse of children at West Point day care center--cites Loritts v. U.S., 489 F. Supp. 1030 (D. Mass. 1980) which concerns rape of visitor by cadet at West Point); Lyle v. U.S., Civ. #C-85-1824-SC (W.D. Cal. 1985) (enlisted therapist has intercourse with patient held scope--not A or B). Compare Lyle with Focke v. U.S., 597 F. Supp. 1325 (D. Kan. 1982) regarding scope issue. Benavidez v. U.S., 998 F. Supp. 1225 (D.N.M. 1997) (A or B exlcusion bars claims for sexual assault on teenage patient by IHS psychologist. Wise v. U.S., 8 F. Supp. 2d 535 (E.D. Va. 1998)(rape-murder by two Navy Seals falls under exception - rejects negligent hiring and retention as well as special relationship). Benavidez v. U.S., 177 F.3d 927, 1999WL317449 (10th Cir. N. Mex.) unconsented sex between Government psychologist and her

16-year-old patient is not an assault. Olds v. U.S., Civ. # 96-2682 (W.D. La., 10 Feb 1989), due to special relationship between rape victim or gym employees, U.S. is responsible by failing to follow mandatory SOP award of $89,170. Leleux v. U.S., Civ. #97-1125 (W.D. La., 5 August 1998), affirmed 178 F.3d 750 (5th Cir. 1999), consensual sex between recruiter and recruit constitutes battery and 2680(h) exclusion cannot be circumvented by plea of negligent hiring, retention and supervision.

(i) Feres and A or B Exclusion. Cause of action based on negligent supervision barred by A or B exclusion and/or Feres. U.S. v. Shearer, 473 U.S. 52, 105 S. Ct. 3039 (1985) (A or B exclusion applied in case in which one off-duty soldier murders another off-duty soldier off-post--cause of action based on negligent supervision); Hoot v. U.S., 790 F.2d 836 (10th Cir. 1986) (assault of civilian by knowingly untreated mentally unbalanced soldier barred by Shearer); Sage v. U.S., 974 F. Supp 51 (E.D. Va. 1997) (Army physician under treatment for mental problems commits ruthless, wanton, public murder without reason or motive--no special relationship based on doctor-patient relationship); Bolton v. U.S., 604 F. Supp. 1219 (S.D. Miss. 1985) (active duty service member kills son--failure to furnish mental health counseling--action barred by Feres); Spaulding v. U.S., 621 F. Supp. 1150 (D. Me. 1985) (one Job Corps trainee kills another--follows Shearer); Marbley v. U.S., 620 F. Supp. 811 (D.D.C. 1985) (GSA custodial worker murdered on premises--follows Shearer). But see Kearney v. U.S., 815 F.2d 535 (9th Cir. 1987) (murder of civilian female by soldier not barred by Shearer); Ordahl v. U.S., 646 F. Supp. 4 (D. Mont. 1985)(blowgun in barracks known to superiors used in attack--A or B exclusion not applicable).

(j) Contingency on Employment Relationship. Cases applying test that A or B exclusion bars claims only where claim contingent on employment relationship. Sheridan v. U.S., 487 U.S. 392, 108 S.Ct. 2449 (1988) (failure of fellow seaman to restrain drunk sailor who got away and shot at passing car is not barred by exclusion); Pattle v. U.S., 918 F. Supp. 843 (D.N.J. 1996) (recruiter in scope while performing fat measurement on applicant--negligent hiring and supervision barred by Sheridan--no premises liability based on duty to make recruiting station safe--A or B exclusion applies); Kenna v. U.S., 927 F. Supp. 62

(E.D.N.Y. 1996) (assault of security guard by IRS employee with known violent propensities is under exclusion based on Sheridan).

(k) Search, Seizure and Arrest. A or B exclusion applies only during course of search, seizure, or arrest. Pooler v. U.S., 787 F.2d 868 (3d Cir. 1986). Contra Harris v. U.S., 677 F. Supp. 403 (W.D.N.C. 1988)(citing cases). Allison v. U.S., Civ. # 3:98-CV-223H (W.D. Ky., 9 July 1999), citation for carrying a concealed weapon located under front seat (ammo in glove compartment) properly issued under Ky. Rev. Stat. Ann. Sect. 527.020(1) during gate search at Fort Knox.

(l) Special Relationship. Absent a special relationship, U.S. has no duty to protect a person from harm. Guccione v. U.S., 878 F.2d 32 (2d Cir. 1989) (negligent supervision not applicable to assault by FBI undercover agent); McGlockin v. U.S., 849 F. Supp. 750 (D. Idaho. 1994) (Custom agents did not bear special relationship to fugitive who entered U.S. and abducted and shot plaintiff--exclusion applied); Hallett v. U.S. Dept. of Navy, 850 F. Supp. 874 (D. Nev. 1994) (military relationship between superior and subordinate to govern conduct does not create special relationship necessary to claim of negligent supervision at Tailhook Convention). But see Mulloy v. U.S., 884 F. Supp 622 (D. Mass. 1995), later proceedings, 937 F. Supp. 1001 (D. Mass. 1996) (felon who conceals criminal record is recruited into Army in Chicago is in special relationship to Army wife he murders in Germany 7 months later); Marin v. U.S., 814 F. Supp. 1468 (E.D. Wash. 1992) (failure to warn key witness of threats by felon prior to his release--U.S. cannot defend claim for murder based on exclusion).

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

(n) Miscellaneous A or B Exclusion Cases. A or B exclusion applicable. D.R. v. Univ. of Minn., Civ. # 3-92-254 (D. Minn., 8 Sept. 1992) (U.S. not liable for assault of ROTC cadet by ROTC instructor); Jager v. U.S., Civ. # H-95-2233 (S.D. Tex., Feb. 23, 1996) (recruiter assaults recruit--falls under exclusion); Miami North v. U.S. Department of Labor Penebscot County, 939 F. Supp. 53 (D. Me. 1996) (assault by Job

Corps youths of minor in arcade falls under exclusion); Hogan v. U.S., 642 F. Supp. 813 (S.D. Cal. 1986) (U.S. Marine assaults civilian referee at football game--no cause of action). A or B exclusion held inapplicable. Spencer v. U.S., Civ. # 1:88-CV-2581-JOF (N.D. Ga., 14 Jan. 1991)(U.S. liable for shooting deaths of soldier's wife and daughter due to failure to properly carry out regulatory procedures of Army's family abuse program); Harris v. U.S., 797 F. Supp. 91 (D.P.R. 1992) (mistreatment by DOD school teacher judicable question of negligent supervision).

(o) Excessive Force is Within Exclusion. Pendarvis v. U.S., 241 F. Supp. 8 (D.S.C. 1965); Smith v. U.S., 330 F. Supp. 867 (E.D. Mich. 1971); Cotter v. U.S., 279 F. Supp. 847 (S.D.N.Y. 1968); U.S. v. Faneca, supra; Nichols v. U.S., 236 F. Supp. 260 (N.D. Miss. 1964). See also Garcia v. U.S., 826 F.2d 806 (9th Cir. 1987) (Border Patrol agent shooting Mexican justifiable as self defense); Bonilla v. City of San Diego, 755 F. Supp. 293 (S.D. Cal. 1991) (response with deadly force by border guards justified); Waybenais v. U.S., 769 F. Supp. 306 (D. Minn. 1991) (Minn. reasonable force test met by DIN police in effecting arrest).

(2) False Arrest or Imprisonment. False imprisonment, false arrest, malicious prosecution, and abuse of process all fall within exclusion. See, e.g., Blitz v. Boog, 328 F.2d 596 (2d Cir. 1964), cert. denied, 379 U.S. 855 (1964) (wrongful detention of mental patient); Puccini v. U.S., 978 F. Supp. 760 (N.D. Ill. 1997) (suit alleging that prison administrators wrongly failed to release prisoner at end of her sentence barred by exclusion, since suit was one arising out of false imprisonment). Terms include wrongful detention. Restatement (Second) of Torts § ; *Prosser on Torts*, 42-49 (4th Ed. 1971); 32 Am. Jur. 2d*, False Imprisonment* § 1, 5 Am. Jur. 2d *Arrest* § 1. Cannot avoid exclusion by couching in constitutional terms. Misko v. U.S., supra; Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977); Economou v. U.S. Dept. of Agriculture, 535 F.2d 688 (2d Cir. 1976), or as negligent maintenance of records. Duenges v. U.S., 114 F. Supp. 751 (S.D.N.Y. 1953). But see Ferguson v. U.S. Army, 938 F.2d 55 (6th Cir. 1991) (false arrest action dismissed, but cause of action for negligent records keeping under Kentucky law permitted as negligent infliction of emotional distress). Other cases finding exclusion applicable. General Dynamics Corp. v. U.S., 139 F.3d 1280, (9th Cir. 1998) reversed __ F.3d __ 1998 WL 136209 (recovery of $25,880,752 in attorneys fees expended in

defense of federal criminal action for fraud based on negligent DCAA audit barred by discretionary function exclusion-—auditor negligence did not cause damage:discretionary decision to prosecute did);Gray v. Bell, 712 F.2d 490 (D.C. Cir. 1983) (indictment of former Acting Director of FBI not actionable); Hohri v. U.S., 586 F. Supp. 769 (D.D.C. 1984) (WWII West Coast evacuation of Japanese-Americans not actionable); Wilkins v. May, 872 F.2d 190 (7th Cir. 1989) (original arrest by local police continues when FBI takes over--arrest is defined as a continuing event); Kaiser v. U.S., 761 F. Supp. 150 (D.D.C. 1991) (questioning claimant to get statement when claimant was trying to get emergency care for her wounded dog is not an arrest); Matthews v. U.S., 805 F. Supp. 712 (E.D. Wis. 1992) (claim for conspiracy to entrap which led to Federal indictment is excluded); Enterprise Electronics Corp. v. U.S., 825 F. Supp. 983 (M.D. Ala. 1992) (exclusion applies to negligent DCAA audit which led to several suits against Government contractor); Employer Ins. of Wassau V. U.S., 1993 WL 61406 (N.D. Ill. 1993) (EPA CERCLA enforcement action falls under exclusion); Sutton v. U.S., 819 F.2d 1289 (5th Cir. 1987) (discusses interplay between § 2680(a) and § 2680(h) re decision of postal inspector to investigate and prosecute); U.S. v. Articles of Drug v. Midwest Pharmaceuticals Inc., 825 F.2d 1238 (8th Cir. 1987) (applied to decision to seize drugs and prosecute pharmaceutical company); McElroy v. U.S., 861 F. Supp. 585 (W.D. Tex. 1994) (forcible arrest of occupants from other side of duplex during drug bust is discretionary and use of law enforcement exception in § 2680(h) is not permitted as discretionary function exclusion in § 2680(a) predominates--cites Sutton v. U.S., 819 F.2d 1289 (5th Cir. 1987). But see Chandler v. U.S., 875 F. Supp. 1250 (N.D. Tex. 1994) (GSA investigator presents false evidence to AUSA who prosecutes unsuccessfully for perjury--two GSA employees recover $5,000 each). See also Maldanado v. Pharo, 940 F. Supp. 51 (S.D.N.Y. 1996) (suit of malicious prosecution permitted, but not for abuse of process, where claimant was not arrested and charges for possession of controlled substances were dropped). Of course even if exclusion not applicable, causation must be shown. Exclusion bars suit based on criminal complaint which lead to arrest. See, e.g., Rourke v. U.S., 744 F. Supp. 100 (E.D. Pa. 1988) (decision to file criminal complaint is discretionary and suit precluded, however must establish proximate cause for arrest).

(a) Medical Care. This exclusion applies to Medical Care. Johnson v. U.S., 547 F.2d 688 (D.C. Cir. 1976);

Blitz v. Boog, 328 F.2d 596 (2d Cir. 1964), cert. denied, 379 U.S. 855 (1964); Gamage v. U.S., 217 F. Supp. 381 (N.D. Cal. 1962). See, however, the Gonzales Act, 10 U.S.C. § 1089.

(b) Federal Law Enforcement Officers. Exclusion does not apply to Federal Law Enforcement Officers (P.L. 93-253), supra. See, e.g., Pooler v. U.S., 787 F.2d 868 (3d Cir. 1986) (Assistant U.S. Attorney is not Federal Law Enforcement Officer, since not making an arrest, search or seizure when exercising prosecutorial discretion to bring charges); U.S. v. Rubin, 573 F. Supp. 1123 (D. Colo, 1983) (DOJ attorneys anr not "law enforcement officers" for purposes of § 2680(h)). For citations on who is Federal Enforcement Officer, see IIB.2j, supra. For discussion as to whether prison guards are Federal Law Enforcement Officers, see Citizens National Bank of Waukegan v. U.S., 594 F.2d 1154 (7th Cir. 1979), Milliken v. U.S., 439 F. Supp. 290 (D. Kan. 1976) and Krohn v. U.S., 578 F. Supp. 1441 (D. Mass. 1983). See also Flechigu v. U.S., 786 F. Supp 646 (E.D. Ky. 1991) (exclusion applies to correction officer, re: sexual assault at rehab activity, since Federal law enforcement officer performing search). Dodd v. U.S., 1998 WL 355611 (N.D. Cal.) (National Park policeman arrests civilian on public street for drunk driving - MOU authorizing such is invalid as U.S. statute for park police proscribes same. However, arrest valid as citizen's arrest.

(c) Lawful Arrest Including Arrests for Petty Offenses. Whether or not Federal Law Enforcement Officer is involved, probable cause defense available or the lesser defense of reasonableness and good faith, provided arrest is otherwise lawful under State law. Dellums v. Powell, 556 F.2d 667 (D.C. Cir. 1977); Mundt v. U.S., 611 F.2d 1257 (9th Cir. 1982); Benjamin v. U.S., 554 F. Supp. 82 (E.D.N.Y. 1982); Deary v. Evans, 570 F. Supp. 189 (D.V.I. 1983); Brubaker v. King, 505 F.2d 534 (7th Cir. 1974); Townsend v. Carmel, 494 F. Supp. 30 (D.D.C. 1979); Norton v. U.S., 581 F.2d 390 (4th Cir. 1978); Brown v. U.S., 653 F.2d 196 (5th Cir. 1981). The validity of the arrest is governed by state law. Garza v. U.S., 881 F. Supp. 1103 (S.D. Tex. 1995) (Border agents stop, point weapons and frisk possible suspect--arrest is privileged under Texas law); Arnsberg v. U.S., 757 F.2d 971 (9th Cir. 1984) (no personal service as required by Oregon law governing arrest by warrant--action lies); Belcher v. U.S., 511 F. Supp. 476 (E.D. Pa. 1981) (state law determines

validity of arrest, e.g., can arrest for felony even though felony is assault and battery on Federal officer in violation of 18 U.S.C. § 111). No cause of action exists if probable cause supported officer's actions. Cases finding probable cause. Contreras v. U.S., 672 F.2d 307 (2d Cir. 1982); Marvilla v. U.S., 867 F. Supp. 1363 (N.D. Ind. 1994) (no cause of action where decedent is shot in back by officer entering on valid warrant while decedent is engaged in gun battle out of his window); Paulino v. U.S., 1996 WL 457303 (S.D.N.Y.) (probable cause existed for arrest of the wrong person due to numerous physical similarities and similar address); Amaya De Morua v. U.S., 129 F.3d 125 (table), 1997 WL 697382 (9th Cir. 1997) (Border Patrol had probable cause to stop and search Dodge Ram Charger with Mexican plates after border crossing, since similar vehicle had been discovered with drugs three days previously); Rodriguez v. U.S., 847 F. Supp. 231 (D.P.R. 1994) (probable cause exists where person arrested resembled person described in warrant--no need to wait for fingerprint examination); Johnson v. Grob, 928 F. Supp. 889 (W.D. Mo. 1996) (probable cause exists where BATF agent and state trooper stop car containing passenger wanted for aggravated assault); Kane v. U.S., 962 F. Supp.27 (E.D.N.Y. 1997) (Customs agents had probable cause to detain U.S. citizen returning from high risk country); Bernard v. U.S., 25 F.3d 98 (2nd Cir. 1994) (probable cause is presumed where grand jury returned an indictment in "buy and bust," case even though wrong contact was identified); Lora Rivera v. Drug Enforcement Agency, 800 F. Supp. 1049 (D.P.R. 1992) (probable cause exists even though charge dropped after plaintiff testified for prosecution); Medlin v. U.S., Civ. # 91-C-910-C (N.D. Okla. 1992) (probable cause exists even though prosecution dropped as evidence was inadmissible due to illegal search); Mesa v. U.S., 837 F. Supp. 1210 (S.D. Fla. 1993), aff'd, 123 F.3d 1435 (11th Cir. 1997) (arresting wrong person with same name is discretionary--exclusion applies); Dirienzo v. U.S., 690 F. Supp. 1149 (D. Conn. 1988) (former Deputy U.S. Marshal arrested by FBI--held probable cause defense applies); Richardson v. Dept. of Interior, 740 F. Supp. 15 (D.D.C. 1990) (probable cause even though not charged--four hour total time in custody); Hardge-Harris v. U.S., 741 F. Supp. 764 (E.D. Mo. 1990) (probable cause existed for arrest and prosecution of subsequently acquitted defendant for fraud); Green v. U.S., Civ. # 077-242T (W.D. Wash. 1982) (probable cause under Washington law). Cases finding no probable cause. Gasho v. U.S., 39 F.3d 1420

(9th Cir. 1994) (cause of action where arrest is based on owner's refusal to return airplane logs they remove with permission--owners do not have cause of action for infliction of emotional distress); Hyatt v. U.S., 546 F. Supp. 96 (E.D.N.Y. 1997) ($ 297,000 award for 99 days imprisonment based solely on identification of DEA agent who had seen suspect for one hour some 9 years previously and plaintiff did not match available identification record); Adedeji v. U.S., 782 F. Supp 688 (D. Mass. 1982) (detention and search of returning alien not based on reasonable suspicion of drug smuggling-award of $215,000); Kennedy v. U.S., 585 F. Supp. 1119 (D.S.C. 1984) (MPs had inadequate description--no probable cause). Of course, even if the arrest is valid, excessive force can not be used. Morales v. U.S., 961 F. Supp 633 (S.D.N.Y. 1997) (DEA agent's arrest of DOT employee attempting to tow an illegally parked vehicle may have involved excessive force). Also, there is no set amount of time that constitutes an unreasonable detention. Applewhite v. U.S. Air Force, 995 F.2d 997 (10th Cir. 1993) (wife of airman arrested in off-base drug bust along with husband and transported to base and held 3 hours while local police are being requested to take over her investigation--held arrest is reasonable and not violative of Posse Comitatus Act); Daniel v. Taylor, 808 F.2d 1401 (11th Cir. 1986) (two hours, 45 minutes executing search warrant does not constitute unreasonable detention). If an unreasonable detention occurs, damages will be awarded. Rhoden v. Department of Justice, 121 F.3d 716 (table), 1997 WL 408876 (9th Cir. 1997) ($4,500 award for unreasonable detention of 4 days is adequate). Arrests for petty offenses are also governed by state law. See M.C. Bassiouni, Charles Thomas, *Citizen's Arrest* (1977) (compendium of State laws on citizen's arrest and shoplifters statutes). U.S. v. Mullen, 178 F.3d 334 (5th Cir. 1999), MPs have authority to arrest and interrogate civilians they observe breaking into POV on post by virtue of citizen's arrest under Texas law - cites Kennedy v. U.S., 585 F. Supp. 1119, (E.S.C. 1984) and U.S. v. Banks, 539 F.2d 14 (9th Cir.) cert. Denied 429 U.S. 1028 (1976).

(d) Valid Warrant. Liability does not exist when arrest is based on execution of a facially valid and judicially authorized search warrant in a case of mistaken identity. Mesa v. U.S., 837 F. Supp. 1210 (S.D. Fla. 1993), aff'd, 123 F.3d 1435 (11th Cir. 1997) (DEA arrested wrong Pedro Pablo Mesa on a facially

valid warrant--method of execution is discretionary and claim is barred); Rodriguez v. U.S., 54 F.3d 41 (1st Cir. 1995) (arrest on facially valid warrant as to which the only discrepancy in description is 3-inch height difference is upheld); Druckenmiller v. U.S., 548 F. Supp. 193 (E.D. Pa. 1982). Cf. Wright v. U.S., 963 F. Supp. 7 (D.D.C. 1997) (search and arrest based on a valid search warrant issued on informant testimony valid). Or where based on detention by INS agents to determine whether illegal alien. Caban v. U.S., 728 F.2d 68 (2d Cir. 1984). Or execution of officially valid AWOL apprehension warrant. Maw v. U.S., 733 F.2d 174 (1st Cir. 1984). But see Humphrey v. U.S., Civ. # P-86-CA-05 (W.D. Tex. 1986) (person never in Army arrested as deserter--constitutional rights violated--no State tort cited-awarded $350,000 for 12 days detention). However, even if valid warrant, prisoner must be taken before magistrate in timely manner. Van Schaick v. U.S., 586 F. Supp. 1023 (D.S.C. 1983) (failure to take prisoner before Federal Magistrate in timely manner constitutes tort, even though arrest is valid). Washington v. Drug Enforcement Admin., Civ. #4:92-CV-2285 (CEJ) (E.D. Mo., 19 May 1998) (midnight raid on innocent homeowners upheld as warrant was based on testimony of immunized drug distributor; upheld on appeal, 183 F.3d 868 (8th Cir. 1999). Lima v. U.S., Civ. # 97-574T (D.R.I., 4 Jun 98) (arrest of Navy employee for stealing Navy tools is based on probable cause in turn based on testimony of Navy employee and brother. Voskerchian v. U.S., 1999 WL 66709 (W.D.N.Y.) warrantless search of dwelling not justified as being exigent.

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

(f) Wrongful Convictions. Applies to wrongful convictions. Vincin v. U.S., 468 F.2d 930 (Ct. Cl. 1972); Hitchmon v. U.S., 585 F. Supp. 256 (S.D. Fla. 1984) (SOL runs from date of original arrest). For another remedy, see 28 U.S.C. §§ 1495, 2513 ($5,000 authority in Court of Claims) and Tucker Act, 28 U.S.C. § 1346. See also McLean v. U.S., 73 F. Supp. 775 (D.S.C. 1947); U.S. v. Keegan, 71 F. Supp. 623 (S.D.N.Y. 1947). Rooney v. Wittich, 21 F. Supp 273, (S.D.N.Y. 1998) suit for false imprisonment falls under exclusion where conviction is overturned on appeal.

(g) Malicious Prosecution. Tort of malicious prosecution defined . Diminnie v. U.S., 522 F. Supp. 1192 (E.D. Mich. 1981). Discussing what constitutes a malicious prosecution. See Valder v. U.S., 65 F.3d 189 (D.C. Cir. 1995) (prosecutor not immune from charges of intimidating witnesses and disclosing grand jury testimony); Sutton v. U.S., Civ. # H-83-6674 (S.D. Tex., 26 Sept. 1996) (U.S. postal inspector who aggressively seeks indictment over many years and finally obtains it creates tort of malicious prosecution under Texas law). Plaintiff must show malice where no conviction and lack of probable cause. Brown v. U.S., 653 F.2d 196 (5th Cir. 1981). See also Friedman v. U.S., 927 F.2d 259 (6th Cir. 1991) (where charges dropped as U.S. did not want to turn over certain evidence--claim failed, since there was probable cause); Weber v. Nelson, Civ. # 4:94cv43-DJS (E.D. Mo., 6 July 1994), aff'd on district court opinion, 117 F.3d 1423 (table), 1997 WL 375177 (8th Cir. 1997) (suit for malicious prosecution dismissed, since FBI agent who informed on fellow agent had no authority to prosecute). Dachman v. U.S., 31 F. Supp. 2d 1003 (D. Md. 1998), charges brought based on alleged threat to superior but later dropped-malicious prosecution exclusion applies.

(3) Libel and Slander. See, generally, Jorgenson v. Mass. Port Authority., 905 F.2d 515 (1st Cir. 1990) (failure to salt runway--pilot's suit for lost income based on damage to reputation, even though Mass. Port Authority negligent--good discussion of defamation tort). The libel and slander exclusion is applicable in many situations: Ruderer v. U.S., 462 F.2d 897 (8th Cir. 1972)(grievance hearings); Chafin v. Pratt, 358 F.2d 349 (5th Cir. 1966), cert. denied, 385 U.S. 878 (1966) (to reports of mental disturbance of employee); Hoesl v. U.S., 629 F.2d 586 (9th Cir. 1980) (U.S. doctors psychiatric report on alcoholic); Smith v. DiCara, 329 F. Supp. 439 (E.D.N.Y. 1971)(same); Jimenez-Nieves v. U.S., 682 F.2d 1 (1st Cir. 1982) (stopping check for payment by computer error, letter by IG to claimant's supervisor), Philippus v. Griffin, 759 F.2d 806 (10th Cir. 1985) (letter by IG to claimant's supervisor); Art-Metal USA Inc. v. U.S., 753 F.2d 1151 (D.C. Cir. 1985)(*de facto* debarment); Bosco v. U.S. COE, 611 F. Supp. 449 (N.D. Tex. 1985)(same); Heywood v. U.S., 585 F. Supp. 590 (D. Mass. 1984) (false testimony of U.S. Postal Inspector before grand jury not actionable--defamation exclusion applies); Williams v. U.S., 71 F.3d 502 (5th Cir. 1995), aff'g, 862 F. Supp 151 (S.D. Tex. 1994) (exclusion

applies to allegation of defamatory remarks made by U.S. Congressman at press conference); Rojas v. U.S., 660 F. Supp. 652 (D.P.R. 1987) (exclusion applied to language used in decision by administrative law judge); Byrd v. U.S., 668 F. Supp. 1529 (M.D. Fla. 1987)(OSI investigation of personnel claim); Hosey v. Jacobik, 966 F. Supp. 12 (D.D.C. 1997) (supervisor's responses to new employer of RIFed employee are subject to exclusion); Adams v. U.S., Civ. # 95-00405 SPK (D. Haw., Feb. 8, 1996) (exclusion applies to report by Army physician sent to civilian hospital concerning performance of ex-Army surgeon while in Army); Aviles v. Lutz, 887 F.2d 1066 (10th Cir. 1989) (failure to expunge personnel file of Federal Civil Servant barred by libel exclusion); Bonham v. U.S. Gov't. Medical Review Board, Civ. # 90-0733 SS (D.D.C. 1990) (exclusion applies to Army Board labeling claimant as mentally handicapped); Guccione v. U.S., 670 F. Supp. 527 (S.D.N.Y. 1987) (applied to actions of FBI operative who committed intentional defamatory acts against magazine publisher); Cooper v. American Nato Ins. Co, 978 F.2d 602 (10th Cir. 1992) (negligent investigation by federal agency falls under libel and slander exclusion); McAdams v. Reno, 866 F. Supp. 425 (D. Mass. 1994) (exclusion applies to remarks made by DOJ investigator about relationship between plaintiff and federal inmates); Baker v. U.S., 943 F. Supp. 270 (W.D.N.Y. 1996) (placing false information in patient's medical record and then improperly releasing the record is barred by the exclusion and does not constitute tort of negligent record keeping--cites Talbert); Kugel v. U.S., 947 F.2d 1504 (D.C. Cir. 1991) (separate claim based on leak from FBI investigation does not lie, since it is based on defamation); Talbert v. U.S., 932 F.2d 1064 (4th Cir. 1991) (alleged negligently maintained personnel records of Federal employee falls under exclusion); Moessmer v. U.S., 760 F.2d 236 (8th Cir. 1985) (same). Contra Quinones v. U.S., 492 F.2d 1269 (3d Cir. 1974) (release of wrong records to prospective employer). The individual employee making the libelous or slanderous remarks also has some immunity. See Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894 (1978) (U.S. employees have qualified immunity for constitutional violations in scope, but absolute immunity as to State tort of defamation); Barr v. Mateo, 360 U.S. 564 (1959). See also Nietert v. Overby, 816 F.2d 1464 (10th Cir. 1987) (PX employee who is removed by boss uses "hot line" to have boss investigated, employee is immune). Artful pleading may not be used to avoid this exclusion. Thomas-Lazear v. FBI, 851 F.2d 1202 (9th Cir. 1988) (slander exclusion bars claim stated as invasion of

privacy); Hobdy v. U.S., 762 F. Supp. 1459 (D. Kan. 1991) (false light claim based on allegedly defamatory information in CID report falls under exclusion). But see Black v. U.S., 389 F. Supp. 529 (D.D.C. 1975) (wiretapped information released--labeled invasion of privacy and trespass). Popovic v. U.S., 1999WL228243 (4th Cir. Md.), suit for improper and prolonged investigation which ultimately results in plaintiff being clear and included numerous leaks to media is grounded in defamation and not negligence and invasion of privacy. Apampa v. Layng, 157 F.3d 1103 (7th Cir. 1988) DEA Bivens action for defamation is an FTCA claim because of Westfall Act-it fails as defamatory language not derived from illegal wiretap; Hartwig v. U.S., Civ. #1:92(CV)315 (N.D. Ohio, 26 Jan 1999), exception applies to claim for emotional distress by family of Navy member allegedly committing suicide by explosion on USS Iowa.

(4) Misrepresentation and Deceit. Includes negligent as well as intentional misrepresentation. Block v. Neal, 460 U.S. 289 (1983); U.S. v. Neustadt, 281 F.2d 596 (4th Cir. 1960), cert. denied, 366 U.S. 926 (1960) (FAA appraisal); Jones v. U.S., 207 F.2d 563 (2d Cir. 1953), cert. denied, 347 U.S. 921 (1954) (estimate re oil bearing land); Fitch v. U.S., 513 F.2d 1013 (6th Cir. 1975) (wrong draft number used for induction); Reamer v. U.S., 459 F.2d 709 (4th Cir. 1972) (recruiter's false statement re active duty date); Matthews v. U.S., 456 F.2d 395 (5th Cir. 1972) (AFJAG false statement re FTCA filing date--remanded for hearing in lower court and then settled out of court); Strauch v. U.S., 637 F.2d 477 (7th Cir. 1980) (failure to file against city where postal employee erroneously stated U.S. had jurisdiction over offending sidewalk--exclusion applied); Nieves v. U.S., 516 F. Supp. 693 (D.P.R. 1981) (loss of social security benefits as error on date of death); Provencal v. Michel Construction, 505 F. Supp. 770 (W.D. Mich. 1980) (improper evaluation of mechanic lien on house by FmHA); Reynolds v. U.S., 643 F.2d 707 (10th Cir. 1981) (FHA inspector's erroneous approval of residence); Zimmerman v. Susie, 534 F. Supp. 626 (W.D. Pa. 1982) (FHA inspector's erroneous termite report); Baroni v. U.S., 662 F.2d 287 (5th Cir. 1981), cert. denied, 460 U.S. 1036 (1983). Cases applying the misrepresentation exclusion. Sheridan v. U.S., 542 F. Supp. 1243 (E.D.N.Y. 1982) (failure to inform parents of deceased service member's death due to defective drug); Eimco-BSP Services Co. v. Davison Construction Co., 547 F. Supp. 57 (D.N.H. 1982) (publishing wrong standard for sewer emissions held misrepresentation); Scott v. 1st Investment Corp., 556 F.

Supp. 782 (W.D. Pa. 1983) (HUD's warranty re house is misrepresentation and thus barred); Harrah v. Miller, 558 F. Supp. 702 (S.D. W.Va. 1983) (FHA fails to tell owners house was in flood plain and should get insurance--held barred as misrepresentation); Krejci v. U.S. Army Material Dev. Readiness Command, 733 F.2d 1278 (7th Cir. 1984) (Postal Service employee transferred to Army and was told salary would not be reduced--it was, but action barred as misrepresentation); Jordan v. U.S., Civ. # 84-T-716-E (M.D. Ala. 1984) (plaintiff sold house and gave up job when told he could enlist--barred from enlisting as he had three children and barred by misrepresentation exclusion from recovering); Bergman v. U.S., 751 F.2d 314 (10th Cir. 1984), cert. denied, 474 U.S. 945 (1985) (exclusion applies to retroactive reclassification of job); Pennbank v. U.S., 779 F.2d 175 (3d Cir. 1985) (exclusion applies to failure of Federal inspector's failure to report faulty wiring causing loss of loan); Schinmann v. U.S., 618 F. Supp. 1030 (E.D. Wash. 1985), aff'd, 811 F.2d 1508 (9th Cir. 1987), cert. denied, 484 U.S. 924 (1987) (poor long range rain forecast by U.S. Bureau of Reclamation causes crop losses--exclusion applied); Ketchum v. U.S. Dept. of Transportation, 672 F. Supp. 450 (D. Nev. 1987) (discharge of air controller by perjured testimony barred by exclusion--only cause of action under Civil Service Reform Act); Alexander v. U.S., 787 F.2d 1349 (9th Cir. 1986) (FBI issuing erroneous "rap" sheet to employer is exempt under § 2680(h)); Cavanaugh v. U.S. Govt., 640 F. Supp. 437 (D. Mass. 1986) (failure of AF to investigate off-base suicide to parents' satisfaction not actionable); Chen v. U.S., 674 F. Supp. 1078 (S.D.N.Y. 1987) (failure to negotiate contract in good faith--barred by exclusion); Frigard v. U.S. (CIA), 862 F.2d 201 (9th Cir. 1988) (nondisclosure of CIA involvement in investment firms falls under exclusion); Harz v. U.S., 711 F. Supp. 114 (S.D.N.Y. 1989) (applies to AUSA unauthorized settlement of suit); Farmers State Savings Bank v. FHA, 891 F.2d 200 (8th Cir. 1989) (misrepresentation exclusion applies, since plaintiff relied on information communicated--not on negligent act which produced it); Carroll v. U.S. Postal Service, 764 F. Supp. 143 (E.D. Mo. 1991) (failure of USPS to obtain surety bond on repair contract falls under exclusion); Enterprise Electronics v. U.S., 825 F. Supp. 983 (M.D. Ala. 1992) (exclusion applies to negligent DCAA audit which led to several suits against Government contractor); Priohott v. Milstid, 891 F. Supp. 1541 (S.D. Ala. 1995) (exclusion applied to alleged misrepresentation of FmHA employee as to skill of home builder); Forsythe Meats Inc. v. U.S. Dept. of

Agriculture, 508 F. Supp. 237 (S.D.N.Y. 1981) (erroneous determination meat was adulterated). But see National Carriers Inc. v. U.S., 755 F.2d 675 (8th Cir. 1985) (exclusion does not apply to Federal meat inspector's erroneous determination that contaminated and uncontaminated beef need not be separated). Cases holding misrepresentation exclusion not applicable. Mundy v. U.S., 983 F.2d 950 (9th Cir. 1993) (misrepresentation exclusion not applicable where contract employee lost security clearance as his favorable FBI report was placed in his wife's personnel file); Appley Bros. v. U.S., 7 F.3d 720 (8th Cir. 1993) (exclusion is not applicable where U.S. closes grain warehouse without discovering violation); Guild v. U.S., 685 F.2d 324 (9th Cir. 1982) (Dept. of Agriculture plans for community built dam failed--held not misrepresentation as performing operational task). Lemke by Lemke v. City of Port Jervis, 991 F. Supp. 261 (S.D. N.Y. 1998) Misrepresentation exclusion not applicable where U.S. assumes responsibility to inspect house prior to making loan and fails to inform borrower of obvious lead pipe plumbing.

(a) Use of Words. Usually applies to use of words, spoken or written. National Mfg. Co. v. U.S., 210 F.2d 263 (8th Cir. 1954), cert. denied, 347 U.S. 967 (1954) (flood warning). But see Saraw Partnership v. U.S., 67 F.3d 567 (5th Cir. 1995) (exclusion not applicable to computer error which results in miscommunication to bank re mortgage loan resulting in foreclosure).

(b) Business Transactions. Can apply to business transaction with United States. Miller Harness Co. Inc. v. U.S., 241 F.2d 781 (2d Cir. 1957) (erroneous description of surplus cavalry saddle); Covington v. U.S. Dept. of Air Force, 303 F. Supp. 1145 (N.D. Miss. 1969) (erroneous invitation for bid re child care center); Saxton v. U.S., 456 F.2d 1105 (8th Cir. 1972) (improper diagnosis of diseased cattle resulting in loss from lack of timely treatment); Santoni v. FDIC, 508 F. Supp. 1012 (D.P.R. 1981) (bid on hotel owned by FDIC—-FDIC statement that it would treat bidders equitably did not require them to keep bidder informed--in any event, claim barred by misrepresentation exclusion). But see Saraw Partnership v. U.S., 67 F.3d 567 (5th Cir. 1995) (exclusion not applicable to computer error which results in miscommunication to bank re mortgage loan resulting in foreclosure); Hicks v. U.S., 511 F.2d 407 (D.C. Cir. 1975) (court required report on insane person-examination not performed-no

misrepresentation since only bare conclusion stated); Matthews, supra, 456 F.2d 395; Builders Corp. of America v. U.S., 259 F.2d 766 (9th Cir. 1958) (building housing project by military post on CO's representations of full occupancy which were not carried out); Park v. U.S., 517 F. Supp. 970 (D. Or. 1981) (FHA inspection faulty--holds no misrepresentation); Brown v. U.S., 193 F. Supp. 692 (N.D. Fla. 1961) (surplus bombs sold "as is," one exploded--no misrepresentation no matter how characterized). JBP Acquisitions LP v. U.S., Civ. # 1:98-CV-149-RWS (N.D. Ga., 22 Feb 1999), purchasers of foreclosed property at auction are not informed by Resolution Trust Co., that property is being condemned for Olympic Games - exception applies.

(c) Tucker Act Applicability. Excluded claims may be actionable under Tucker Act for breach of contract or warranty. Michigan Wisconsin Pipeline Co. v. Williams-McWilliams Co., 551 F.2d 945 (5th Cir. 1977); Holmes Herefords, Inc. v. U.S., 753 F. Supp. 901 (D. Wyo. 1990) (exclusion applied to U.S. promise to fence off easement on right-of-way to missile site--may fall under Tucker Act); Bonnett Enterprises, Inc. v. U.S., 889 F. Supp. 208 (W.D. Pa. 1995) (claims lie in contract where IRS misrepresented that U.S. had title to property in sealed bid sale). See also U.S. v. Fowder, 913 F.2d 1382 (9th Cir. 1991) (U.S. can recoup flood insurance payment made on erroneously issued policy--equitable estoppel not applicable to public funds). But see Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Shaffer v. U.S., Civ. # CIV-S-94-1287 GEB/GGH (E.D. Cal., March 22, 1995) (Indian Health Service reneged on promise to pay for outside medical care--falls under exclusion rather than Tucker Act).

(d) Personal Injuries. Applies to personal injuries. Diaz Castro v. U.S., 451 F. Supp. 959 (D.P.R. 1978) (representing prisoner as not dangerous); Flynn v. Nesbitt, 771 F. Supp. 766 (E.D. La. 1991) (exclusion applies to release of confidential information despite express promise not to do so); Martinez v. U.S., Civ. # 3:93-CV-0341-G (N.D. Tex. 1993) (emotional distress arising from deportation because INS agent failed to report adequate documentation existed to immigration judge is barred). But see McNeil v. U.S., 897 F. Supp. 309 (E.D. Tex. 1995) (exclusion not applicable to FmHA's failure to warn of defective smoke detector--knowledge of defect by one family member not imputable

to family member who was burned); Jimenez Nieves v. U.S., 618 F. Supp. 66 (D.P.R. 1985) (due to error in records U.S. dishonors social security check--exclusion applies to damage to reputation, but not to actual emotional injuries).

(e) Property Damage. Can apply to property damage as well as personal injuries. National Mfg. Co., supra, 210 F.2d 263; Bartie v. U.S., 216 F. Supp. 10 (W.D. La. 1963), aff'd on other grounds, 326 F.2d 754 (5th Cir. 1964), cert. denied, 379 U.S. 852 (1964); Summers v. U.S., 480 F. Supp. 347 (D. Md. 1979) (airworthiness certificate); Lynch v. U.S. Dept. of Army COE, 474 F. Supp. 545 (D. Md. 1978) (Ocean City dredging permit); Takacs v. Jump Shack, Inc., 546 F. Supp. 76 (N.D. Ohio 1982) (FAA markings on reserve parachute); Midland National Bank v. Conlogue, 720 F. Supp. 878 (D. Kan. 1989) (failure to tell lessor that plane would be used in drug bust falls under misrepresentation exclusion); Janowsky v. U.S., 913 F.2d 393 (7th Cir. 1991) (promise to pay informer without requisite authority is excluded); Commercial Union Ins. Co. v. U.S., 928 F.2d 176 (5th Cir. 1991) (approval of supplied air respirator equipment by Bureau of Mines falls under exclusion); Fleisher V. U.S. Department of Veteran Affairs, 955 F. Supp 731 (S.D. Tex. 1997) (exclusion applies to flood damaged home sold by broker who stated purchaser was not required to purchase flood insurance); Mullens v. U.S., 785 F. Supp 216 (D. Me. 1992) (FmHA not liable for failure to inform of presence of lead paint to purchasers of dwelling); Fridge Const. v. Federal Emergency Mgmt. Agency, 797 F. Supp. 1321 (S.D. Miss. 1992) (reliance on FEMA erroneous estimate of amount of hurricane damage falls under exclusion); Rich Products Corps v. U.S., 804 F. Supp. 1270 (E.D. Cal. 1992) (misrepresentation exclusion bars claims for erroneous Federal inspection of fruit which was rejected); Bergquist v. U.S. Nat. Weather Service, 849 F. Supp. 1221 (N.D. Ill. 1994) (claim based on negligent weather forecast concerning tornado which destroyed property and killled 29 people--exclusion applied). Contra Sullivan v. U.S., 299 F. Supp. 621 (N.D. Ala. 1968), aff'd, 411 F.2d 794 (5th Cir. 1969) (aeronautical chart); Reminga v. U.S., 631 F.2d 449 (6th Cir. 1980) (same); Ingham v. Eastern Air Lines Inc., 373 F.2d 227 (2d Cir. 1967) (improper flight information); Knudsen v. U.S., 500 F. Supp. 90 (S.D.N.Y. 1980) (airworthiness certificate); Kipf v. U.S., 501 F. Supp. 110 (D. Mont. 1980) (failure to inform of defects in house); Preston v. U.S., 596 F.2d

232 (7th Cir. 1979) (certification of grain warehouse); Leaf v. U.S., 661 F.2d 740 (9th Cir. 1981) (obtaining leased aircraft); General Public Utilities Corp. v. U.S., 551 F. Supp. 521 (E.D. Pa. 1982) (NRC inspection at Three Mile Island--states that misrepresentation exclusion does not apply to safety, but only to commercial transactions); Cross Bros. Meat Packers v. U.S., 705 F.2d 682 (3d Cir. 1983) (close of business due to misgrading of meat not covered by exclusion); Val-U Const. Co. of South Dakota v. U.S., 905 F. Supp. 728 (D.S.D. 1995) (exclusion not applicable to allegation that Bureau of Indian Affairs negligently guided general contractor in hospital construction contract). Gallehon Farming v. U.S., Civ. # CV-96-033-GF-PGH (D. Mont., 2 Jun 98) (Federal Grain Inspection Service miscalibrates device which measures protein content of grain-exclusion applies).

(f) Trespass. Can apply to damage resulting from U.S. contractor trespassing on land or easement due to improper direction on part of U.S. Vaughn v. U.S., 259 F. Supp. 286 (N.D. Miss. 1966) (gas pipeline); U.S. v. Van Meter, 149 F. Supp. 493 (N.D. Cal. 1957) (timberland). Exclusion not applicable. Anderson v. U.S., 259 F. Supp. 148 (E.D. Pa. 1966) (U.S. assumed liability by stipulation); Southern Natural Gas Co. v. Pontchartrain Materials Inc., 711 F.2d 1251 (5th Cir. 1983) (ignores exclusion in dredging case); Williams Pipe Line Co. v. Curtis Benson & Son Inc., 634 F. Supp. 668 (D. Minn. 1986) (not applied where U.S. Soil Conservation Service had knowledge of severed pipelines existence).

(g) Medical Malpractice. Usually does not apply in medical malpractice. Ramirez v. U.S., 567 F.2d 854 (9th Cir. 1977) (informed consent--overrules Hungerford v. U.S., 307 F.2d 99 (9th Cir. 1962) and De Lange v. U.S., 372 F.2d 134 (9th Cir. 1967)); Hill v. U.S., 751 F. Supp. 909 (D. Colo. 1990) (negligent misrepresentation does not apply to medical malpractice--no facts given). Accord Blanton v. U.S., 428 F. Supp. 360 (D.D.C. 1977) (outdated drug); Green v. U.S., 385 F. Supp. 641 (S.D. Cal. 1974) (negligent diagnosis); Herring v. Knab, 458 F. Supp. 359 (S.D. Ohio 1978) (risks of tubal ligation); Beech v. U.S., 345 F.2d 872 (5th Cir. 1965) (delayed treatment due to improper diagnosis following slip and fall); Betesh v. U.S., 400 F. Supp. 238 (D.D.C. 1974) (fail to inform of Hodgkins disease on induction physical despite rejection); Lucarelli v. U.S., 116 F.3d 464 (table),

1997 WL 351626 (1st. Cir. 1997) ($33,750 award for mistakenly informing patient that he was HIV positiive—-award deemed adequate). But see Wachter v. U.S., 689 F. Supp. 1420 (D. Md. 1988) (failure to inform of Dr. Billing's alleged reputation falls under exclusion); Kilduff v. U.S., 248 F. Supp. 310 (E.D. Va. 1960) (lung infection, developed TB).

(h) Enlistment. Can apply to enlistment contract. Bennett v. U.S. Navy, 1997 WL 176728 (E.D.N.Y.) (Navy recruiter's statement that applicant could become officer by enlisting and going to OCS is misrepresentation and does not provide basis for claim); Bruce v. U.S. Army, 508 F. Supp. 962 (E.D. Mich. 1981).

(5) Interference with Contract Rights. For general discussion, see General Foods Corp. v. U.S., 448 F. Supp. 111 (D. Md. 1978). See also Williamson v. U.S. Dept. of Agriculture, 635 F. Supp.114 (S.D. Miss. 1986) (applied to collection action by Farmers Home Administration on a loan); Saratoga S & L Assn. v. Federal Home Loan Bank of San Francisco, 724 F. Supp. 683 (N.D. Cal. 1989) (Federal bank examiner inspection falls under exclusion); Custadio v. U.S., 866 F. Supp. 479 (D. Colo. 1994) (physician convicted of filing false claim does not have cause of action based on CHAMPUS failing to instruct him how to file a proper claim); Moessmer v. U.S., 760 F.2d 236 (8th Cir. 1985) (exclusion applies to release of defamatory records to prospective employer); Federal Savings & Loan Ins. Corp. v. Williams, 599 F. Supp. 1184 (D. Md. 1984) (U.S. interference falls under exclusion); Sottile v. U.S., 608 F. Supp. 1040 (D.D.C. 1985) (exclusion applied to investigation by FAA of flight instructor's certification even though complaint withdrawn). *De facto* debarment claims fall under this exclusion. Art-Metal-U.S.A., Inc. v. U.S., 753 F.2d 1151 (D.C. Cir. 1985); Bosco v. U.S. Army COE, 611 F. Supp. 449 (N.D. Tex. 1985). Some claims plead as tort claims are purely contract claims, not FTCA claims. U.S. v. P.W. Parker Inc., 590 F. Supp. 453 (D. Md. 1984) (contractor's claims governed by Contract Disputes Act properly in U.S. Court of Federal Claims, not under FTCA). But see Nottingham Ltd. v. U.S., 741 F. Supp. 1445 (C.D. Cal. 1990) (U.S. turning over escrow funds is conversion, not a contract claim). Midland Psychiatric Associates Inc. v. U.S., 145 F.3d 1000 (8th Cir. 1998) (action against Medicare carrier and Medicare fails as Medicare carrier is considered a U.S. agency and exclusion applies.

(a) Prospective and Existing Rights. Can apply to prospective rights or economic advantage as well as existing rights. Small v. U.S., 333 F.2d 702 (3d Cir. 1964) (loss of business of Army dentist erroneously recalled to active duty); Midwest Knitting Mills Inc. v. U.S., 741 F. Supp. 1344 (E.D. Wis. 1990) (negligent failure of U.S. employee to make advance payments on which claimant relied to obtain materials is excluded); Roxfort Holding Co. v. U.S., 176 F. Supp. 587 (D.N.J. 1959); Canadian Transportation Co. v. U.S., 430 F. Supp. 1168 (D.D.C. 1977), aff'd in part, reversed in part, 663 F.2d 1081 (D.C. Cir. 1980) (holding up ship from loading); Fletcher v. VA, 103 F. Supp. 654 (E.D. Mich. 1952) (U.S. advises vets not to enter school); Forrester v. U.S. Govt., 443 F. Supp. 115 (S.D.N.Y. 1977) (U.S. prevents setting up of foreign gold trust); Dupree v. U.S., 264 F.2d 140 (3d Cir. 1959), cert. denied, 361 U.S. 823 (1959) (deprivation of security clearance). Shapiro v. U.S., 566 F. Supp. 886 (E.D. Pa. 1983)(slowness in obtaining opinion concerning ethics from U.S. delays entry into private practice); Moessmer v. U.S., 569 F. Supp. 782 (E.D. Mo. 1983). Contra Builders Corp. of America v. U.S., 259 F.2d 766 (9th Cir. 1958); Pedersen v. U.S., 191 F. Supp. 95 (D. Guam 1961); Colorado Ins. Group Inc. v. U.S., 216 F. Supp. 787 (D. Colo. 1963); Black v. Sheraton Corp. of America, 564 F.2d 531 (D.C. Cir. 1977). Shield v. U.S., Civ. # CV-98-31-GF-DWM (D. Mont., 12 July 1999), Indian Health Service upon discovering Native American Center, an Indian corporation, had hired a member of a non-Federally recognized tribe, caused his firing by threatening to withdraw federal funding=exception applies.

(b) Federal Employee Contract Claims. Review of contract claims of Federal employees wholly alien to FTCA remedy. Young v. U.S., 498 F.2d 1211 (5th Cir. 1974); Wham v. U.S., 458 F. Supp. 147 (D.S.C. 1978); Steinagel v. Jacobson, 507 F. Supp. 288 (S.D. Ohio 1980).

(c) Employment Rights. Can apply to interference with employment rights. Radford v. U.S., 264 F.2d 709 (5th Cir. 1959); Smith v. U.S. Air Force, 566 F.2d 957 (5th Cir. 1978); Baca v. U.S., 467 F.2d 1061 (10th Cir. 1972); Chafin v. Pratt, 358 F.2d 349 (5th Cir. 1966), cert. denied, 385 U.S. 878 (1966); Kiiskila v. U.S., 466 F.2d 626 (7th Cir. 1972) (Army employee barred by discretionary function); Garst v. Brown, 452 F. Supp. 427 (E.D. Va. 1978) (Army employee); Areskog v. U.S.,

396 F. Supp. 834 (D. Conn. 1975) (Navy civilian employee); Dupree, supra, 264 F.2d 140; Cafeteria and Restaurant Workers Union, Local 473 v. McElroy, 284 F.2d 173 (D.C. Cir. 1960) (cafeteria worker security clearance); Duncan v. U.S., 355 F. Supp. 1167 (D.D.C. 1973) (pilot's medical certification); Taxay v. U.S., 345 F. Supp. 1284 (D.D.C. 1972) (appointment as FAA medical examiner); Peterson v. Richardson, 370 F. Supp. 1259 (N.D. Tex. 1973) (physician excluded from Medicare participation); Field v. U.S., 340 F. Supp. 175 (S.D.N.Y. 1972) (longshoremen lost jobs as U.S. eliminates piers); Hendry v. U.S., 418 F.2d 774 (2d Cir. 1969) (withholding seaman's license--barred as negligent misrepresentation--also note that court used State law (New York) rather than applicable Federal law). Contra Mundy v. U.S., 983 F.2d 950 (9th Cir. 1993) (exclusion does not apply to firing by defense contractor due to withdrawal of security clearance due to FBI misfiling of documents); Socialist Workers Party v. U.S. Attorney General, 463 F. Supp. 515 (S.D.N.Y. 1978).

j. Treasury Operations. Fiscal operations of the Treasury or regulation of monetary system (28 U.S.C. § 2680(i)). See Forrester, 443 F. Supp. 115 (S.D.N.Y. 1977) (exclusion applied). But see In re Franklin National Bank Securities Litigation, 445 F. Supp. 723 (E.D.N.Y. 1978) (exclusion does not apply).

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

(1) Combat Training. The exclusion does not apply to wartime combat training. Skeels v. U.S., 72 F. Supp. 372 (W.D. La. 1947) (fisherman in Gulf of Mexico killed by bomb falling from plane in target practice). Nor does it apply to vessels returning from combat zone. Johnson v. U.S., 170 F.2d 767 (9th Cir. 1948).

(2) Medical Malpractice on Discharged Veterans. The exclusion does not apply to medical malpractice on discharged veterans injured in combat. U.S. v. Brown, 348 U.S. 110 (1954); Hungerford, supra; Griggs v. U.S., 178 F.2d 1 (10th Cir. 1949).

(3) Vietnam. The exclusion does apply to undeclared war in Vietnam. Morrison v. U.S., 316 F. Supp. 78 (M.D. Ga. 1970); Rotko v. Abrams, 338 F. Supp. 46 (D. Conn. 1971). However, the exclusion does not apply to genetic damage

claim from "Agent Orange". In re "Agent Orange" Product Liability Litigation, 580 F. Supp. 690 (E.D.N.Y. 1984).

(4) Desert Storm. The exclusion also applies to Desert Storm and pre-Desert Storm military activities in Persian Gulf. Koohi v. U.S., 976 F.2d 1328 (9th Cir. 1992) (shooting down of Iranian airliner by Navy near Kuwait in July 1988 falls under exclusion); Clark v. U.S., 974 F. Supp. 895 (E.D. Tex. 1997) (claims by serviceman administered drug to protect him from poison gas during Desert Storm which allegedly caused harm to him and allegedly caused his later born child to have birth defects barred by combatant exclusion); Minns v. U.S., 974 F. Supp. 500 (D. Md. 1997) (same facts and ruling as Clark).

(5) World War II. Applied to troop movements in Hawaii after Pearl Harbor. U.S. v. Marks, 187 F.2d 724 (9th Cir. 1951).

(6) Items Confiscated During Combat. Exclusion applies to items confiscated during war. Morrison v. U.S., 316 F. Supp. 78 (M.D. Ga. 1970) (soldier found $100,000 in cave in Vietnam).

l. Foreign Country (28 U.S.C. § 2680(k)). Price v. U.S., 69 F.3d 46 (5th Cir. 1995) (conversion of Hitler's water colors occurred in Germany, not U.S., when part of confiscated property was returned to owners, but not watercolors); Hoffman v. U.S., 53 F. Supp.2d 483 (D.D.C. 1999), attempt to relitigate Price based on new evidence is denied. Grunch v. U.S., 538 F. Supp. 534 (E.D. Mich. 1982) (failed sterilization in Germany). Cf. Orion Shipping & Trading Co. v. U.S., 247 F.2d 755 (9th Cir. 1957) (Korea) (same notion, but under SIAA).

(1) Examples of Operation of Exclusion. Falling within the exclusion are: (a) Leased Bases: U.S. v. Spelar, 338 U.S. 217 (1949) (Newfoundland); Heller v. U.S., 776 F.2d 92 (3d Cir. 1985) (Clark Air Force Base Philippines is not under FTCA); Bird v. U.S. 923 F. Supp. 338 (D. Conn. 1996) (Naval Medical Facility in Cuba falls under foreign country exclusion); Pedersen v. U.S., 191 F. Supp. 95 (D. Guam 1961) (Philippines); (b) Occupied territory: Cobb v. U.S., 191 F.2d 604 (9th Cir. 1951) ,cert. denied, 342 U.S. 913 (1952) (Okinawa); Welch v. U.S., 446 F. Supp. 75 (D. Conn. 1978) (Italy). See also Burna v. U.S., 240 F.2d 720 (4th Cir. 1957) (Okinawa); Roberts v. U.S., 498 F.2d 520 (9th Cir. 1974) (territorial waters of Okinawa); Brewer v. U.S., 79 F. Supp. 405 (N.D. Cal. 1948)

(Okinawa); Straneri v. U.S., 77 F. Supp. 240 (E.D. Pa. 1948) (Belgium); Rafftery v. U.S., 150 F. Supp. 618 (E.D. La. 1957) (Germany); Bell v. U.S., 31 F.R.D. 32 (D. Kan. 1962) (Japan); (c) Embassy Compounds: Gerritson v. Vance, 488 F. Supp. 267 (D. Mass. 1980) (embassy in Zambia); Meredith v. U.S., 330 F.2d 9 (9th Cir. 1964) (embassy in Thailand); (d) Trust territory: Kunh v. U.S., 541 F. Supp. 567 (C.D. Cal. 1982) (Marshall Islands); Brunell v. U.S., 77 F. Supp. 68 (S.D.N.Y. 1948) (Saipan); Callas v. U.S., 253 F.2d 838 (2d Cir. 1958), cert. denied, 357 U.S. 936 (1958) (Kwajalein); (e) Combat Zone: Morrison v. U.S., 316 F. Supp. 78 (M.D. Ga. 1970) (Vietnam); (f) Airspace Over Foreign Country: Pignataro v. U.S., 172 F. Supp. 151 (E.D.N.Y. 1959) (flight from Saudi Arabia to Eritrea); (g) Pre-treaty Canal Zone: Golden Panagia Steamship Inc. v. Panama Canal Commission, 557 F. Supp. 340 (E.D. La. 1983) (pre-treaty accident in Canal Zone not within jurisdiction of Federal District Court in Louisiana).

(2) Antarctica. Antarctica falls within the foreign county exclusion. Smith v. U.S., 507 U.S. 197, 113 S.Ct. 1178 (1993) (Antarctica is foreign country under FTCA).

(3) High Seas. Includes High Seas: Blumenthal v. U.S., 306 F.2d 16 (3d Cir. 1962) (plane over Sea of Japan);.

(4) Negligence in U.S., Injury in Foreign Country. Where negligence occurs in United States but effect occurs in foreign country, included within FTCA. See, generally, In re Paris Air Crash of 3 March 1974, 399 F. Supp. 732 (C.D. Cal. 1975); Leaf v. U.S., 588 F.2d 733 (9th Cir. 1978); Bryson v. U.S., 463 F. Supp. 908 (E.D. Pa. 1978). Compare Armiger et al. Estates v. U.S., 339 F.2d 625 (Ct. Cl. 1964); Manemann v. U.S., 381 F.2d 704 (10th Cir. 1967); Morrison, supra; In re "Agent Orange" Product Liability Litigation, 580 F. Supp. 690 (E.D.N.Y. 1984);. See also Couzados v. U.S., 105 F.3d 1389 (11th Cir. 1997) (drug sting operation initiated in Miami resulting in arrest and torture of plane crew in Honduras due to failure to notify police--exclusion is inapplicable); Minns v. U.S., 974 F.2d 500 (D. Md. 1997) (administration of drug to servicemember as part of program to protect troops from nerve gas during Desert Storm was "Headquarters tort"); Orlikow v. U.S., 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.); Sami v. U.S., 617 F.2d 755 (D.C. Cir. 1979) (outside foreign country where arrested in FRG due to erroneous message from Washington

D.C.); Glickman v. U.S., 626 F. Supp. 171 (S.D.N.Y. 1985) (administering electric shocks and LSD to U.S. citizen in France, outside exclusion as program was run from D.C.). But see Bretschneider v. U.S., 99 F.3d 1149 (table), 1996 WL 62063 (10th Cir. 1996) (Foreign Country exclusion applies to alleged conspiracy between Army and father of child born in 1960 in Germany to preclude payment of child support); Eaglin v. U.S. Dept. of Army, 794 F.2d 981 (5th Cir. 1986) (dependent wife of soldier slipped on "black ice" in Germany); Nwangoro v. U.S., 952 F. Supp. 394 (N.D. Tex. 1996) (suit based on false accusations by Army MPs in Germany falls under exclusion); Miller v. Manusou, Civ. # CV-92-178-GF-PGH (D. Mont., May 24, 1994) (exclusion applied to medical malpractice in Navy hospital in Japan--suit for wrongful death of active duty service member barred by exclusion); Cominotto v. U.S., 802 F.2d 1127 (9th Cir. 1986) (Secret Service operation primarily planned in Thailand--exclusion applies). Accord In re Consolidated U.S. Atmospheric Testing Litigation, 820 F.2d 982 (9th Cir. 1987)(re radiation exposure outside U.S).

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

n. Tucker Act Taking Claims. Tucker Act claims for taking are excluded. See IIB.5c below. Drury v. U.S. Dept. of Army, 902 F. Supp. 107 (E.D. La. 1995) (Suit for trespass and

conversion does not preclude simultaneous suit under Tucker Act); Teagarden v. U.S., __ Fed. CL__ 1998 WL787352 (Fed CL) taking action for loss of timber by fire allegedly due to Forest Service directing priorities elsewhere is brought after loss of FTCA suit due to 2680(a)-court has jurisdiction but adopts District Court decision.

o. Flood Control Immunity. Damage from flood and flood waters (33 U.S.C. § 702c (Act of 15 May 1928, 45 Stat. 535, as amended by the act of 22 June 1936, 49 Stat. 1570). Section 702c flood control immunity may bar a suit if government is actively managing dam, reservoirs or flood waters. See, e.g., Boudreau v. U.S., 53 F.3d 81 (5th Cir. 1995) (Coast Guard auxiliary acting as agent of COE to provide water safety on flood control lake injures claimant with his anchor during rescue attempt--immunity applies--court broadly construes James, infra, as meaning management of project even though flood waters not involved); Reese v. South Florida Water Management Dist., 59 F.3d 1128 (11th Cir. 1995) (fisherman drowns from release of waters from lock on water control device--immunity applies); Fryman v. U.S., 901 F.2d 79 (7th Cir. Ill. 1990), cert. denied 498 U.S. 920 (1990), (Section 702c applies to quad diving case from sandbar in COE reservoir); Mocklin v. Orleans Levee District v. Luhr Bros. Inc., 877 F.2d 427 (5th Cir. 1989) (Section 702c applies to child drowning in dredged flotation channel); McCarthy v. U.S., 850 F.2d 558 (9th Cir. 1988) (Section 702c immunity applies to quad diving case, since water level was controlled and fluctuated); Dawson v. U.S., 894 F.2d 70 (3d Cir. 1990) (Section 702c applies to drowning in swimming area of flood control lake); Dewitt Bank & Trust Co. v. U.S., Civ. # 88-2355 (8th Cir. 1989) (Section 702c applies to quadriplegic diving case at COE Recreational Site); Zavadil v. U.S., Civ. # 89-1813 (8th Cir. 1990) (quad diving case barred where dive into submerged concrete boat ramp from pier); Crowley Marine Services, Inc. v. Fed. Nav. Ltd., 924 F. Supp. 1030 (E.D. Wash 1995) (flood control immunity does not apply to CERCLA claims, but it precludes FTCA suit, even though release of water contained hazardous substances); Powers v. U.S., 787 F. Supp 1397 (M.D. Ala. 1992) (Section 702c bars claims based on failure to inform of availability of insurance under National Flood Control Act); Dawson v. U.S., Civ. # 86-739 (W.D. Pa. 1989)(Section 702c applies since water monitored daily); Minor v. U.S., No. 94-30493 (5th Cir., 17 Jan. 1995) (flood control immunity applies to child drowning in a stilling basin at Morganza Spillway). Accord Henderson v. U.S., 965 F.2d 1488 (8th Cir. 1992). However, the immunity does not apply in all situations where the government is managing water projects. The operation and setting of the water level must be in furtherance of flood

control. Bailey v. U.S. Dept. of Army Corps of Engineers, 35 F.3d 1118 (7th Cir. 1994) (in order to apply immunity, U.S. must show that flood control operations, e.g., water level, played a role in causing quadriplegia in diving case--many cases are compared); Cantrell v. U.S. Dept. of Army Corps of Engineers, 89 F.3d 269 (6th Cir. 1996) (stranded fisherman's barge driven by Corps employee strikes newly exposed shoreline due to annual drawdown of lake--immunity does not apply as Corps not fisherman was driving boat); E. Ritter & Co. v. Dept. of Army COE, 874 F.2d 1236 (8th Cir. 1989) (Section 702c inapplicable to failure to maintain drainage ditch causing inundated crop); Boyd v. U.S. ex rel. U.S. Army COE, 881 F.2d 895 (10th Cir. 1989) (Section 702c not applicable to injury to swimmer struck by boat propeller); Arkansas River Co. v. U.S., 840 F. Supp. 1103 (N.D. Miss. 1993) (claim for barges damaged in lock on Mississippi not excluded by 33 U.S.C. § 702c); Pueblo de Conchiti v. U.S., 647 F. Supp. 538 (D.N.M. 1986) (dam used for more than flood control--Section 702c does not bar action for failure to repair causing flood). Accord Clay v. U.S., 647 F. Supp. 110 (S.D. Miss. 1986). Central Green Co., v. U.S., __ F.3d __, Civ. #97-17321 (9th cir., 6 Oct 98), release of water from irrigation canal allegedly damaging pistachio farm falls under exclusion as canal is part of Central Valley Flood Control Project.

(1) Immunity Broadly Construed--covers both construction and operation of flood control project as well as man-made floods. U.S. v. James, 478 U.S. 597, 106 S.Ct. 3116 (1986) (drownings by opening gates on water-skiers and fishermen--immunity applies); Columbia Gas Transmission Co. v. U.S., 966 F. Supp. 1453 (S.D. Miss. 1997) (exclusion applies where natural gas lines are damaged due to erosion caused by increased channel flow due to dike construction); Parks v. U.S., 370 F.2d 92 (2d Cir. 1966); McClaskey v. U.S., 386 F.2d 807 (9th Cir. 1967) (negligent construction of RR crossing over creek); Stover v. U.S., 332 F.2d 204 (9th Cir. 1964), cert. denied, 379 U.S. 922 (1964) (broken levee); National Mfg. Co. v. U.S., 210 F.2d 263 (8th Cir. 1954), cert. denied, 347 U.S. 967 (1954); (failure to warn of impending flood); Ponderendolph v. Derry Township, 330 F. Supp. 1346 (W.D. Pa. 1971) (failure to warn of opening of floodgates); Lenoir v. Porters Creek Watershed District, 586 F.2d 1081 (6th Cir. 1978) (good general discussion); Ledford v. U.S., 429 F. Supp. 204 (W.D. Okla. 1977) (construction phase of dam); Sanborn v. U.S., 453 F. Supp. 651 (E.D. Cal. 1977) (flood caused by negligence, not climate); Florida East Coast Railway Co. v. U.S., 519 F.2d 1184 (5th Cir. 1975) (man-made flood); Callaway v.

U.S., 568 F.2d 684 (10th Cir. 1978) (construction phase); Accardi v. U.S., 599 F.2d 423 (Ct. Cl. 1979); Clark v. U.S., 218 F.2d 446 (9th Cir. 1954); Burlison v. U.S., 627 F.2d 119 (8th Cir. 1980), cert. denied, 450 U.S. 1030 (1981); Taylor v. U.S., 590 F.2d 263 (8th Cir. 1979). See also Swain v. U.S., 825 F. Supp. 966 (D. Kan. 1993) (injury due to striking submerged stump while sliding down waterslide on rented houseboat in Lake Eufaula, Oklahoma--immunity applies); Holt v. U.S., 46 F.3d 1000 (10th Cir. 1995) (ice on road across dam due to mist created by flood control releases--immunity applies); Stelly v. U.S. Dept. of Army, 598 F. Supp. 344 (W.D. La. 1984) (infiltration of saltwater from a lock onto a fresh water farm raising rice and crawfish). But see Denham v. U.S., 646 F. Supp. 1021 (W.D. Tex. 1986) (flood waters immunity not applicable to swimmer at COE reservoir who dives at swimming area).

(2) Limited to Flood Control Projects. See, generally, Peterson v. U.S., 367 F.2d 271 (9th Cir. 1966) (dynamiting log jam on river); Valley Cattle Co. v. U.S., 258 F. Supp. 12 (D. Haw. 1966) (failure to clear out culvert); Graci v. U.S., 456 F.2d 20 (5th Cir. 1971) (negligent construction of navigation ditch); Lunsford v. U.S., 570 F.2d 221 (8th Cir. 1977) (cloud seeding); Hayes v. U.S., 585 F.2d 701 (4th Cir. 1978) (recreational use of flood control project); Parada v. U.S., 420 F.2d 493 (5th Cir. 1970) (fail to inspect break in irrigation canal); Seaboard Coast Line Railroad Co. v. U.S., 473 F.2d 714 (5th Cir. 1973) (construction ditch washes out); Schell v. National Flood Insurers Assn., 520 F. Supp. 150 (D. Colo. 1981) (fail to notify public re flood insurance); Sligh v. TVA, 698 F.2d 1223 (6th Cir. 1982) (release in accordance with pre-established plan). Courts differ on whether a multi-purpose project comes within Section 702c. Cases holding that immunity bar applies in such situations. See State of Washington v. East Columbia Basin Irrigation District, 105 F.3d 517 (9th Cir. 1997) (immunity applies to broken wall in irrigation canal, since one of the purposes of project was flood control); Morici Corp. v. U.S., 681 F.2d 645 (9th Cir. 1982) (rejection of view that exclusionary bar applies to multi-purpose project only for flood control activities--projects must be wholly unrelated for liability to attach); Ellard Contracting Co. Inc. v. U.S., 554 F. Supp. 98 (N.D. Ala. 1982) (Section 702c applied to dam built for utility purposes). But see Dugger v. U.S., Civ. #1:87-CU-897-JTC (N.D. Ga. 1990) (distinguishes between water released for flood control and water released for power generation and holds U.S.

liable for drownings caused by latter when fish stocked and fishing extends below dam); Arkansas River Co. v. U.S., 947 F. Supp. 941 (N.D. Miss. 1996) (lock and dam on Arkansas river does not fall under flood waters immunity, since lock and dam is not part of flood control project); Respess v. U.S., 586 F. Supp. 861 (E.D. La. 1984) (Section 702c not applicable in navigation canal). Section 702c may also be applicable to facilities supporting the flood control projects. Dunavant v. U.S., 520 F. Supp. 39 (E.D. Ark. 1981) (earth berm to protect levee); Portis v. Folk Construction Co. Inc., 694 F.2d 520 (8th Cir. 1982) (lake control structure). Kennedy v. U.S., 179 F.3d 258 (5th Cir. 1999), injury from stepping on live cable on beach is not excluded by Flood Control Act - distinguishes U.S. v. James, 478 U.S. 595 (1986) and Boudreau v. U.S., 53 F.3d 81 (5th Cir. 1995) as both involved activities on water.

(3) FTCA Did Not Repeal 33 U.S.C. § 702c. FTCA did not repeal 33 U.S.C. § 702c, even though 33 U.S.C. § 702c was enacted earlier. Clark v. U.S., 218 F.2d 446 (9th Cir. 1954); Villarreal v. U.S., 177 F. Supp. 879 (S.D. Tex. 1959); Guy F. Atkinson Co. v. Merritt, Chapman & Scott Corp., 126 F. Supp. 406 (N.D. Cal. 1954); Peerless Serum Co. v. U.S., 114 F. Supp. 662 (W.D. Mo. 1953); Dahlstrum v. U.S., 228 F.2d 819 (10th Cir. 1956), Weiberg v. U.S., 193 F. Supp. 815 (D. Md. 1961); Long v. U.S., 241 F. Supp. 286 (D.S.C. 1965); Leisy v. U.S., 102 F. Supp. 789 (D. Minn. 1952).

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

p. [Reserved]

q. Federal Disaster Relief Act of 1954, 42 U.S.C. § 5173, contains a requirement that the local beneficiary (State or local jurisdiction) hold the United States harmless and assume all claims out of removal of debris or wreckage from public and private property. Agreements setting forth such procedures are worked out on each occasion, e.g., emergency snow removal. See IIB5v for case cites.

r. Nonjusticiability Doctrine, e.g., political question. Claims arising from wars or armed conflicts are generally barred. Aketepe v. U.S., 109 F.3d 1400 (11th Cir. 1997) (live U.S. Navy missiles fired during simulated attack on Turkish destroyer injuring and killing crew members falls under nonjusticiablity doctrine); Tiffany v. U.S, 931 F.2d 271 (4th Cir. 1991) (civilian plane in accident with USAF jet in air defense identification zone--nonjusticiablity doctrine applies); In re Korean Air Lines Disaster of Sept. 1, 1983, 597 F. Supp. 613 (D.D.C. 1984) (nonjusticiablity doctrine applies doctrine to deployment of military aircraft near KAL Flight 007, but not to provision of air traffic control); Saltany v. Reagan, 702 F. Supp. 319 (D.D.C. 1988) (nonjusticiablity doctrine applies to Libya raid); Nejad v. U.S., 724 F. Supp. 753 (C.D. Cal. 1989) (shooting down of Iranian airliner by U.S.S. Vincennes under nonjusticiablity doctrine); Dumas v. President of U.S., 554 F. Supp. 10 (D. Conn. 1982) (failure to remove POW in Korean War is a political question and may not be reviewed by court). See also Industria Panificadora v. U.S, 957 F.2d 886 (D.C. Cir. 1992); Lloyd's Syndicate 609 v. U.S., 780 F. Supp 998 (S.D.N.Y. 1991) (destruction of plane in Just Cause not under Prize Act, SIAA, PVA or FTCA). Accord Goldstar (Panama) S.A. v. U.S., 967 F.2d 965(4th Cir.), cert. denied, 506 U.S. 955 (1992). But see Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984) (nonjusticiablity doctrine not applicable to seizing ranch ostensibly owned by U.S. citizen in Honduras re its use for training El Salvador troops); McKay v. U.S., 703 F.2d 464 (10th Cir. 1983) (nonjusticiablity doctrine not applicable to property damage from radiation emanating from nuclear weapons plant). Likewise, the denial of a security clearance has been found to be nonjusticiable); Stehney v. Perry, 101 F.3d 925 (3rd Cir. 1996) (judicial review of denial of security clearance presents nonjusticiable political question in absence of violation of constitutional rights or failure to follow mandatory directives, citing Department of the Navy v. Egan, 484 U.S. 518 (1988) and numerous other cases).

s. Immunity of Defendant. Doe v. U.S., 829 F. Supp. 59 (S.D.N.Y. 1993) (legislative and judicial immunity-§ 2674)

(prosecutor immune where release of confidential information exposed claimant and family to possible harm).

t. Charts by Defense Mapping Agency (10 U.S.C. § 2798). Hyundai Merchant Marine Co. v. U.S., 888 F. Supp. 543 (S.D.N.Y. 1995) (DMA is immunized by 10 US.C. § 2798 from claims based on inaccurate charts).

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

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

a. Military Claims Act (10 U.S.C. §§ 2733, 32 C.F.R. §§ 436.1 *et seq*.).

(1) Negligence Outside U.S. Applies to negligence cases outside United States, i.e., in foreign countries. Poindexter v. U.S., 777 F.2d 231 (5th Cir. 1985)(negligence requirement contained in the regulation is valid, even though not in statute). However, a claim against a foreign country can be maintained only if the foreign country has waived sovereign immunity. McNamara v. U.S., Civ. # 2:94cv277 (E.D. Va., 23 June 1994) (slip and fall in Navy swimming pool in Panama--efforts to file claim under Panama Canal Treaty and Foreign Relations Act fail, since no waiver of sovereign immunity). Even with the Military Claims Act, a suit against the individual defendants for negligence occurring in a foreign country is not allowable. U.S. v. Smith, 499 U.S. 160, 111 S.Ct. 1180 (1991) (suit by parents for negligence in delivery of their child in Army hospital in Italy--U.S. substituted for individual physician and case dismissed under foreign country exclusion). Accord Miller v. U.S., 73 F.3d 878 (9th Cir. 1995) (suit for death of soldier in Japan in military hospital).

(2) U.S. Negligence. In United States, FTCA is exclusive negligence remedy. (See 424 P.L. § 601, 79th Congress, original FTCA.). See also Peak v. SBA, 660 F.2d 375 (8th Cir. 1981); FDIC v. Citizens Bank & Trust Co. of Park Ridge, Illinois, 592 F.2d 364 (7th Cir. 1979). Compare Gaidys v. U.S., 194 F.2d 762 (10th Cir. 1952).

(3) Non-Combat Activities. Cases based on non-combat activities, i.e., no negligence requirement, e.g., use and occupancy of real estate during training exercises, firing exercise damage and other peculiarly military activities. Laird v. Nelms, 406 U.S. 797 (1972); Ryan v. General Electric Co., 256 N.E.2d 188 (N.Y. 1970); Peterson v. U.S., 673 F.2d 237 (8th Cir. 1982); Wildwood Mink Ranch v. U.S., 218 F. Supp 159 (D. Minn. 1963) (sonic boom claims fall under MCA unless negligence shown); Maynard v. U.S., 430 F.2d 1264 (9th Cir. 1970); Abraham v. U.S., 465 F.2d 881 (5th Cir. 1972). But see Kirk v. U.S., 451 F.2d 690 (10th Cir. 1971) (B-52 on training mission falls under FTCA where flies too low, i.e., under 550 feet); U.S. v. Gruvelle, 407 F.2d 964 (10th Cir. 1969) (negligence found).

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

(5) Bailed Property. Kelly v. U.S., 630 F. Supp. 428 (W.D. Tenn. 1985) (duty to inventory and maintain chain of custody on personal property taken from Federal prisoner); Sterling v. U.S., 749 F. Supp. 1202 (E.D.N.Y. 1990) (enumerates standards for disposal of abandoned property under due process, e.g., sufficient notice--lists other cases).

(6) Mail in Possession of Army. Cf. Allied Coin Investment Inc. v. USPS, 673 F. Supp. 982 (D. Minn. 1987) (exception limits recovery to $500 maximum for express mail).

(7) Payment Under 10 U.S.C. § 1089. Payment of costs, settlements, judgments under 10 U.S.C. § 1089. See Chapter 3, AR 27-20.

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

(9) Decision of Agency is Final and Conclusive. Towry v. U.S., 620 F.2d 568 (5th Cir. 1980); Armstrong & Armstrong Inc. v. U.S. by & through Morton, 356 F. Supp. 514 (E.D. Wash. 1973); Barlow v. Collins, 397 U.S. 159 (1970); Adams v. Witmer, 271 F.2d 29 (9th Cir. 1958); Bryson, supra; Gerritson v. Vance, 488 F. Supp. 267 (D. Mass. 1980); Morrison v. U.S., 316 F. Supp. 78 (M.D. Ga. 1970); Welch v. U.S., 446 F. Supp. 75 (D. Conn. 1978); Broadnax v. U.S. Army, 710 F.2d 865 (D.C. Cir. 1983); LaBash v. Dept. of Army, 668 F.2d 1153 (10th Cir. 1982), cert. denied, 456 U.S. 1007 (1982). See also Hata v. U.S., 23 F.3d 230 (9th Cir. 1994) (denial of claim under Military Claims Act as incident to service withstands Constitutional challenge--suit for wrongful death of active duty service member in Navy hospital in Japan); Rodrigue v. U.S., 968 F. Supp. 1430 (1st Cir. 1992) (MCA "incident to service" determination not subject to judicial review); Minns v. U.S., 974 F. Supp. 500 (D. Md. 1997) (decision under 10 U.S.C. § 2733 that birth defected minor's claim allegedly due to father's exposure in Desert Storm is not subject to judicial review); Haas v. U.S. Air Force, 848 F. Supp. 926 (D. Kan. 1994) (USAF denial of claim for attorney fees by airman under Military Claims Act is not subject to review due to finality provisions of 10 U.S.C. § 2735); Schneider v. U.S., 27 F.3d 1327 (8th Cir. 1994), cert. denied, 513 U.S. 1077(1995) (denial by USAF of MCA claim arising in Okinawa does not create Constitutional claim); Collins v. U.S., 67 F.3d 284 (Fed. Cir. 1995) (denial of claim for attorney fees under MCA is final and conclusive); Minns v. U.S., 974 F. Supp. 500 (D. Md. 1997) (Secretary's decision on birthdefects due to administration of a drug to servicemember during Desert Storm is final and conclusive); Duncan v. U.S., Civ. # CA 96-1648-A (4th Cir., 24 June 1998) (six objections to finality of MCA decisions does not raise constitutional issues). Cf. Quarles v. U.S., 731 F. Supp 428 (D. Kan 1990) (upholds VA finality statute (38 U.S.C. § 211) and cites Supreme Court Cases). But see Wheeler Tarpeh Doe v. U.S., 771 F. Supp. 426 (D.D.C. 1991) (judge holds U.S. liable under FTCA for medical malpractice in Liberia in case of State

Department employee based on negligent supervision), rev'd due to lack of causation, 28 F.3d 120 (D.C. Cir. 1994). However, constitutional claims could still be subject to review. Rodrigue v. U.S., 968 F.2d 1430 (1st Cir. 1992) (MCA determination can only be reviewed for constitutional error); Torpeh-Doe v. U.S., 712 F. Supp. 1 (D.D.C. 1989), rev'd on appeal on other grounds, 28 F.3d 120 (D.C. Cir. 1994) (Fifth Amendment due process requirement applied to 22 U.S.C. § 2669--State Dept. version of MCA). Murrell v. U.S., 1998 WL 173191 (M.D. Fla.) (decision of VA on disability claim is not subject to review in Federal District Court). 38 USC 211.

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

(11) Damages Limitation. Damages limited by AR 27-20 (28 February 1990) (now superseded) to those authorized by the Death on the High Seas Act (DOHSA)(46 U.S.C. § 688). For leading cases, see Miles v. Apex Marine Corp., 498 U.S. 19, 111 S.Ct. 317 (1990) (discusses Gaudet and Moragne, and distinguishes Jones Act wrongful death actions); Moragne v. States Marine Lines Inc., 398 U.S. 375, 90 S.Ct. 1772 (1970); Sea Land Services Inc. v. Gaudet, 414 U.S. 573 (1974). See also Oldham v. Korean Airlines, Ltd., 127 F.3d 43 (D.C. Cir. 1997) (discussion of wrongful death damages under DOHSA, including whether sister can recover for loss of support or loss of guidance, training and advice, loss of inheritance and whether wurvivors would have been financial independent after age 18); Fox v. U.S., 1996 WL 440681 (N.D. Cal.) (Navy held liable for negligent rescue of pleasure craft and its passengers who were entitled to damages under general maritime law--only first mate of vessel was entitled to DOHSA recovery); Horsley v. Mobil Oil Corp., 1993 WL 255134 (D. Mass.) (Miles applies to PI as well as WD cases--non-pecuniary loss of spouse and children are not payable). Accord Michels v. Petroleum Helicopter, 995 F.2d 82 (5th Cir. 1993). Only dependents may recover under DOHSA. In the Matter of P & E Boat Rentals Inc., 872 F.2d 642 (5th Cir. 1989) (dependent defined as "where contributions are made for the purpose and have the result of, maintaining or helping to maintain the dependent in his customary standard of living"); Kline v. Maritime CP Inc., 791 F. Supp. 455 (D. Del 1992) (partial

payment by son for parents' home does not create dependency in wrongful death case under maritime law); Complaint of American Dredging Co., 873 F. Supp. 1539 (S.D. Fla. 1994) (recovery of non-pecuniary damages limited to dependents in fatal collision between pleasure boat and dredge); Anderson v. Whittaker Corp., 692 F. Supp. 764 (W.D. Mich. 1988) (no recovery for non-dependent parents); Neal v. Barisich Inc., 707 F. Supp. 862 (E.D. La. 1989) (nondependent parents only compensated for funeral). Decedent's pain and suffering is an allowable damage under DOHSA. Gray v. Lockheed Aeronautical Systems Co., 125 F.3d 1371 (11th Cir. 1997) (DOHSA permits surival action for pain and suffering--exhaustive analysis of legislative history and case law); Favaloro v. S/S Golden Gate, 687 F. Supp. 475 (N.D. Cal. 1987) (survival action for pain and suffering, even where DOHSA preempts general maritime law); Complaint of Conn. National Bank., 733 F. Supp 14 (S.D.N.Y. 1990) (pain and suffering must be conscious); Wahlstrom v. Kawaski Heavy Industries Ltd., 4 F.3d 1084 (2d Cir. 1993) (claim of nondependent parents for death is limited to pain and suffering and loss of support); Anderson v. Whittaker Corp., 692 F. Supp. 764 (W.D. Mich. 1988) (recovery for decedent's pain and suffering damages because they survive--court allows 7 percent for inflation and wage growth and 5 percent discount rate). Taxes are deducted from DOHSA damage awards. Howard v. Crystal Cruises, Inc., 41 F.3d 527 (9th Cir. 1994) (deduction of 30 percent from both wages and loss of services of both decedent and survivors); Complaint of Conn. National Bank, 733 F. Supp 14 (S.D.N.Y. 1990) (taxes, FICA and personal consumption, are deducted under DOSHA). Examples of DOHSA awards. Gray v. Lockheed Aeronautical Systems Co., 880 F. Supp. 1559 (N.D. Ga. 1995), aff'd, 125 F.3d 1371 (11th Cir. 1997) (awards under DOSHA ranging between $825,000 to parents to $1,850,000 to widow and parents); Matter of Adventure Bound Sport, Inc., 858 F. Supp. 1192 (S.D. Ga. 1994) (In DOSHA case, judge uses 6% inflation and 5% discount and says it is the discretionary case-by-case method found in Pfeifer v. Jones & Laughlin Steel Corp., 462 U.S. 523, 536-37(1983)); Stiehle v. U.S., 860 F. Supp. 136 (S.D.N.Y. 1994) (20 year-old single seaman survived by four sisters who received a total of $1100 annually--award $28,000 based on partial dependency). State WD laws, not DOHSA, apply where death of non-seaman in state territorial waters. Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 116 S.Ct. 619 (1996) (state wrongful death statutes apply to accidents to non-seaman in territorial waters). However, no recovery of nonpecuniary damages for death in

state territorial waters of seaman. Complaint of Goose Creek Trawlers, Inc., 972 F. Supp. 916 (E.D.N.C. 1997) (claim for nonpecuniary damages for death of self-employed shrimper within territorial waters is precluded under Yamaha exception to Miles rule). DOHSA damages do not include loss of society for nondependent parents. Zicherman v. Korean Airlines Co. Ltd., 516 U.S. 217, 116 S. Ct. 629 (1996) (nondependents not entitled to loss of society under DOHSA--does not reach question as to whether dependents can receive loss of society as held in In re Air Disaster of Lockerbie Scotland, 928 F.2d 1267 (2nd Cir. 1992), further proceedings,37 F.3d 801 (2nd. Cir. 1994)). Emotional distress damages are also not permitted without injury. McDermott v. Western Union Telegraph Co., 746 F. Supp. 1016 (E.D. Cal. 1990) (no allowable damages for emotional distress under Federal common law, see, e.g., Western Union Telegraph Co. V. Speight, 254 U.S. 17 (1920)); Briscoe v. Devall Towing and Boat Service, 799 F. Supp. 39 (W.D. La. 1992) (no recovery for emotional distress, under maritime law for seaman who is uninjured while jumping from sinking ship); Gaston v. Flowers Transportation, 675 F. Supp. 1036 (E.D. La. 1987) (does not include emotional injury from witnessing crash death of half-brother). But see Chan v. Society Expeditions, Inc., 39 F.3d 1398 (9th Cir. 1994) (claim for emotional distress permitted for child who was on raft when father washed overboard-zone of danger case). Dooley v. Korean Air Lines Co., Ltd., __U.S.__ 1998 WL 292072 (U.S.) (DOHSA precludes payment of predeath pain and suffering).

b. National Guard Claims Act (32 U.S.C. § 715, 32 C.F.R. § 536.410).

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

(2) National Guardsmen Are State Employees. National Guardsmen not in active Federal Service are not U.S. employees under FTCA, but state employees. Maryland for use of Levin v. U.S., 381 U.S. 41, 85 S.Ct. 1293 (1965); Storer Broadcasting Co. v. U.S., 251 F.2d 268 (5th Cir.

1958); Gross v. U.S., 177 F. Supp. 766 (E.D.N.Y. 1959); Leary v. U.S., 186 F. Supp. 953 (D.N.H. 1960); Pattno v. U.S., 311 F.2d 604 (10th Cir. 1962); Blackwell v. U.S., 321 F.2d 96 (5th Cir. 1963); LeFevere v. U.S., 362 F.2d 352 (5th Cir. 1966); Smither v. U.S., 342 F. Supp. 1384 (E.D. Ky. 1972); Ursulich v. Puerto Rico National Guard, 384 F. Supp. 736 (D.P.R. 1974); Crawford v. Dept. of Military Affairs, State of Florida, 412 So.2d 449 (Fla. App. 1982); Bloss v. U.S., 545 F. Supp. 102 (N.D.N.Y. 1982); Morrison v. State of Iowa, 179 N.W.2d 439 (Iowa 1970); Berk v. Ohio National Guard, Civ. #77-0287 (Court of Claims of Ohio (1978)). See also Miller v. U.S., Civ. # IP 92-165-C (S.D. Ind., 26 Mar. 1993) (Indiana National Guardsman on 2 weeks ADT remains state employee under state tort act); Gilkey v. U.S., 213 F. Supp. 387 (W.D. Ark. 1963) (National Guard officer driving to pre-summer camp meeting in Federal vehicle with regular Army personnel is state employee); Spangler v. U.S., 185 F. Supp. 531 (S.D. Ohio 1960) (Ill. National Guard soldier at two week IDT is not federal employee). But see Yeary v. U.S., 921 F. Supp. 549 (S.D. Ind. 1996) (Indiana policeman falls on stairs while training at Camp Atterbury allegedly due to negligence of § 709 employee--both state and U.S. are liable under Indiana's borrowed servant doctrine).

(3) Federally Funded Training Duty. National Guard Claims Act covers Guardsmen on Federally funded training duty, even though they remain State employees. However, employee under dual § 709 and § 503 status while returning from summer camp is under FTCA. Dezeeuw v. U.S., Civ. #77-187 (D. Minn. 1978). See also Matlack v. Treadway., 729 F. Supp 1574 (S.D. W Va. 1990) (Westfall act applies to § 503 duty).

(a) D.C. National Guardsmen. D.C. National Guardsmen are U.S. employees under FTCA. O'Toole v. U.S., 206 F.2d 912 (3d Cir. 1953). However, Puerto Rican Guardsmen are not. Ursulich v. Puerto Rico National Guard, 384 F. Supp. 736 (D.P.R. 1974).

(b) National Guard Claims Act Coverage and Finality. National Guard Claims Act has same coverage and finality as Military Claims Act. Decision of agency is final and conclusive. Rhodes v. U.S., 760 F.2d 1180 (11th Cir. 1985) (determination that Army National Guardsman driving U.S. sedan on four hour trip to register for civilian courses is not covered by Act is final and not subject to judicial review); County Commissioner of Morgan County West Virginia, Civ. #

3:93cv64 (STAMP) (N.D. W. Va., Nov. 23, 1994) (decision of USAF not to pay cleanup costs from plane crash to county is final and not subject to judicial review).

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

(d) National Guard Health Care Personnel. National Guard health care personnel may be reimbursed if sued, P.L. 94-464, 90 Stat. 1986 (8 Oct. 1976) (32 U.S.C. § 334). This act has been superseded by the Gonzales Act, 10 U.S.C. § 1089.

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

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

(2) Court of Federal Claims. Court of Federal Claims has exclusive jurisdiction over $10,000 for claims based on express or implied contract. See, e.g., O'Ferrell v. US., 968 F. Supp. 1519 (M.D. Ala. 1997) (claim for $ 500,000 FBI reward in mail bombing case is a breach of contract under jurisdiction of U.S. Court of Federal Claims); Advanced Materials, Inc. v. U.S., 955 F. Supp. 58 (E.D. La. 1997) (claim against DCAA for negligent

audit falls under contract's "disputes" clause vesting jurisdiction in either Court of Federal Claims under the Tucker Act or the Armed Services Board of Contract Appeal under the. Contracts Disputes Act); Burkins v. U.S., 112 F.3d 444 (10th Cir. 1997) (Court of Federal Claims has exclusive jurisdiction over backpay claim in amount of $ 170,000 denied by ABCMR); McAbee Construction Co. v. U.S., 97 F.3d 1531 (Fed. Cir. 1996) (adding additional dredging spoil to land on which COE has easement causing diminished value is a Court of Federal Claims case); Winchell v. U.S. Dept. of Agriculture, 790 F. Supp 214 (D. Mont. 1989) (bad faith in refusal to continue lending falls under exclusive jurisdiction of U.S. Claims Court-not an FTCA matter); Hall v. U.S., CIV. # 410-88C (Ct. Cl. 1990) (sale of ($167,550 aircraft engine by mistake as surplus for price of $15 is revocable as void *ab initio*); Wolf v. U.S., 855 F. Supp. 337 (D. Kan. 1994) (failure of FmHA to carry out provisions of mortgage contract constitutes a contract claim under Tucker Act); Chabal v. Reagan, 822 F.2d 349 (3d Cir. 1987) (back pay claim over $10,000 under exclusive jurisdiction of U.S. Court of Federal Claims); Blanchard v. St. Paul Fire & Marine Insurance Co., 341 F.2d 351 (5th Cir. 1965), cert. denied, 382 U.S. 829 (1965); Claxton v. SBA, 525 F. Supp. 777 (S.D. Ga. 1981) (contract for sale of land); Schell v. National Flood Insurers Association, 520 F. Supp. 150 (D. Colo. 1981); Brewer v. HUD, 508 F. Supp. 72 (S.D. Ohio 1980) (sale of HUD owned house-broker's cross claim against government solely within Court of Federal Claims jurisdiction). Federal District courts have concurrent jurisdiction under the Little Tucker Act when suit is for $10,000 or less, 28 U.S.C. § 1346(a) (2). Gardner v. Harris, 391 F.2d 885 (5th Cir. 1968). However, if a separate statute authorizes suit, suit may be brought under that statute as well. Navarro v. U.S., 586 F. Supp. 799 (D.V.I. 1984) ($10,000 limit not imposed where Small Business Act permitted suit with no limit). In order for a court to have jurisdiction under the Tucker Act, the plaintiff must be a party to the contract. Mortise v. United States, 102 F.3d 653 (2nd Cir. 1996) (agreement by National Guard to hold county harmless from third party liability does make not injured party a third party beneficiary of contract, since only county was beneficiary). However, non-contract claims are not cognizable under the Tucker Act. Coleman American Moving Services v. Weinberger, 716 F. Supp. 1405 (M.D. Ala. 1989) (claim for make up tonnage during suspension not under Tucker Act); A-B Cattle Co. v. U.S., 621 F.2d 1099 (Ct. Cl. 1980) (declaration of taking under 40 U.S. § 258a is not a contract); Martin v. U.S., 649 F.2d 701

(9th Cir. 1981) (holds failure to repair house U.S. sold is tort).

(a) Implied-in-Fact Contract. Implied-in-fact contract may permit recovery. See, e.g., Philadelphia Suburban Corp. v. U.S., 217 Ct. Cl. 705 (1978) (Coast Guard and local firefighters use plaintiff's foam in putting out fire--motion for summary judgment denied); Silverman v. U.S., 679 F.2d 865 (Ct. Cl. 1982) (implied-in-fact contract created for court reporting services). But see Lewis v. U.S., 70 F.3d 597 (Fed. Cir. 1995) (Customs Service informer award statute did not give rise to implied-in-fact contract); City of El Centro v. U.S., 922 F.2d 816 (Fed. Cir. 1990) (no implied-in-fact contract for medical expenses for illegal aliens treated at civilian hospital following chase and crash); Russell Corp. v. U.S., 537 F.2d 474 (Ct. Cl. 1976) (no implied-in-fact contract for land exchange). However, there is no recovery under an implied-in-law contract. Fincke v. U.S., 675 F.2d 289 (Ct. Cl. 1982) (no contract implied-in-fact, but contract implied-in-law, for broker's commissions for purchase of insurance of Greek employees of U.S. Embassy).

(b) Relationship to Detention of Goods Exclusion. Tucker Act application not excluded by detention of goods exclusion (28 U.S.C. § 2680(c)). See Hatzlachh Supply Co. Inc. v. U.S., 444 U.S. 460, 100 S.Ct. 647 (1980).

(3) Takings Cases. See, generally, Dugan v. Rank, 372 U.S. 609 (1963) (inverse condemnation); Roman v. Velarde, 428 F.2d 129 (1st Cir. 1970) (same); Sanborn v. U.S., 453 F. Supp. 651 (E.D. Cal. 1977) (same); Ware v. U.S., 626 F.2d 1278 (5th Cir. 1980) (taking cattle); Fromme v. U.S., 412 F.2d 1192 (Ct. Cl. 1969) (defined flowage easement); National By-Products Inc. v. U.S., 405 F.2d 1256 (Ct. Cl. 1969) (several floodings do not constitute a taking); Loesch v. U.S., 645 F.2d 905 (Ct. Cl. 1981), cert. denied, 454 U.S. 1099 (1981) (claimants must show flooding beyond that already owned by easement). See also Loveladies Harbor v. U.S., 27 F.3d 1545 (Fed. Cir. 1994) (upholds Federal Court of Claims decision ruling that denial of wetlands permit to developer constituted a 5th Amendment taking).

(4) May Result From Army Activities. U.S. v. Causby, 328 U.S. 256 (1956) (overflight); U.S. v. Dickinson, 331 U.S. 745, 67 S.Ct. 1382 (1947) (gradual flooding);

Eyherabide v. U.S., 345 F.2d 565 (Ct. Cl. 1965) (artillery firing) (gradual flooding); National Bd. YMCA v. U.S., 395 U.S. 85 (1969) (military strong point during riot--no taking); Kirk, 451 F.2d 690 (10th Cir 1971) (sonic boom-no taking). See also Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984) (taking claim inapplicable to use of U.S. citizen's claim that his Honduran ranch is being used for training El Salvadoran troops without his permission).

(5) Tort or Taking? It is often difficult to determine whether a tort or a taking has occurred. See, e.g., U.S. v. Causby, 328 U.S. 256 (1956) (overflights); U.S. v. Dickinson, 331 U.S. 745, 67 S.Ct. 1382 (1947); U.S. v. Willow River Power Co., 324 U.S. 499 (1945); Hurley v. Kincaid, 285 U.S. 95 (1932); Roman v. Velarde, 428 F.2d 129 (1st Cir. 1970); Eyherabide v. U.S., 345 F.2d 565 (Ct. Cl. 1965); Batten v. U.S., 306 F.2d 580 (10th Cir. 1962), cert. denied, (1963); Harris v. U.S., 467 F.2d 801 (8th Cir. 1972) (invasion by water); Bellamy v. U.S., 235 F. Supp. 139 (D.S.C. 1964); Kirk v. U.S., 451 F.2d 690 (10th Cir. 1971); U.S. v. Wald, 330 F.2d 871 (10th Cir.1964); U.S. v. 422,978 Square Feet of Land in City & County of San Francisco, 445 F.2d 1180 (9th Cir. 1971); Porter v. U.S., 473 F.2d 1329 (5th Cir. 1973); Maryland National Bank v. U.S., 227 F. Supp. 504 (D. Md. 1964); Lee v. U.S., 363 F.2d 469 (8th Cir. 1966); Savannah Singleton v. U.S., 6 Cl. Ct. 156 (1984) (must be recurring floods for taking to occur). Accord Bartz v. U.S., 633 F.2d 571 (Ct. Cl. 1980); Barnes v. U.S., 538 F.2d 865 (Ct. Cl. 1976). Cases holding that a taking occurred: Weiss v. Lehman, 642 F.2d 265 (9th Cir. 1981) (Forest Service employee held liable for taking-Tucker Act is alternative, not substitute remedy); Hohri v. U.S., 782 F.2d 227 (D.C. Cir. 1986) (covers property lost during WWII West Coast evacuation of Japanese-Americans, even though previous compensation under 50 U.S.C.A. § 1981 *et seq*); Owen v. U.S., 851 F.2d 1404 (Fed. Cir. 1988) (undercutting channel below high water mark can constitute navigational servitude and a taking); U.S. v. 255.21 Acres in Anne Arundel County, Maryland, 722 F. Supp. 235 (D. Md. 1989) (NSA changes mind about condemning land--holds up development--falls under Tucker Act); Broughton Lumber Co. v. Yeuttar, 939 F.2d 1547 (Fed. Cir. 1991) (deprivation of use of water rights falls under Tucker Act). Cases finding no taking. Karlen v. U.S., 727 F. Supp. 544 (D.S.D. 1989) (building road by BIA access private land held to be tort--not a taking); Nuclear Transport & Storage Inc. v. U.S., 890 F.2d 1348 (6th Cir. 1989) (DOE stores enriched radium at

other site, even though plaintiff built a facility to store it at great expense--neither a taking nor a tort); Owen v. U.S., Civ. # 73-851 (Ct. Cl. 1990) (channel not undercut by dredging for Tombigbee project, but by other forces--U.S. not liable for washing away house); Palm v. U.S., 835 F. Supp. 512 (N.D. Cal. 1993) (claims for emotional distress due to projectile explosions and low overflight at adjacent USAF base lie in tort, not taking); Worman v. U.S., 98 F.3d 1360 (table), 1996 WL 593938 (Fed. Cir. 1996) (Customs service seizure of tools and gun which they lost was not a 5th Amendment taking, since property was not seized for public use). Sometimes it is both a taking and a tort. Baez v. U.S., 976 F. Supp. 102 (D.P.R. 1997) (refusal of SBA to convey title to property on which plaintiff made $7,000 deposit and spent time and money cleaning is both a taking and a tort). Del Rio Drilling Programs Inc. v. U.S., 146 F.3d (Fed. Cir. 1998) (Tucker Act taking exists even if U.S. officials acts unauthorized but within scope; Thune v. U.S., __Fed. Cl.__, 1998 WL 293755 (Fed. Cl.) controlled burn escapes and destroys its personal property due to unanticipated wind shift - not taking). Bell South Telecommunications v. U.S., 991 F. Supp. 920 (E.D. Tenn. 1996) (Bell South contract at Oak Ridge is taken over by U.S. West. Bell South alleges U.S. West converted its equipment with U.S. assistance - case is one in contract - not tort. Warr v. U.S., Civ. # CY-98-3014-AAM (E.D. Wash, 3 Aug 98), where suit for loss of water rights turns on contractual duty to supply water, suit is a taking, not a tort.

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

d. Military Personnel and Civilian Employees Claims Act (31 U.S.C. §§ 240-43) (32 C.F.R. § 536.27).

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

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

. Includes property of immediate
amily household).

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

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

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

(7) Decision of Agency is Final. Macomber v. U.S., 335 F. Supp. 197 (D.R.I. 1971).

e. "Non-scope" Claims Act (10 U.S.C. § 2737) (32 C.F.R. § 536.90).

(1) Coverage. Covers claims not payable under other authorities as they arose out-of-scope.

(2) Limitations on Coverage. Limited to use of U.S. vehicle any place and other U.S. property on U.S. installation.

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

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

(5) Contributory Negligence. Contributory negligence bar.

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

g. Foreign Claims Act (10 U.S.C. § 2734) (32 C.F.R. § 536.36).

(1) Coverage. Covers all negligent and willful acts of U.S. service members in foreign countries, both in-and-

out-of-scope. However, there is no requirement that a Foreign Claims Act program be established because of a military operation in a foreign country. McFarland v. Cheney, 971 F.2d 766 (table), 1992 WL 168006 (D.C. Cir. 1992) (refusal to establish Foreign Claims Act program for Operation Just Cause is not subject to judicial review).

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

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

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

(5) Excludes Combat Claims. McFarland v. Cheney, , 971 F.2d 766 (table), 1992 WL 168006 (D.C. Cir. 1992) (refusal to establish Foreign Claim Act program for Operation Just Cause is not subject to judicial review).

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

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

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

(3) Settled by Receiving State. Settled by Receiving State under Receiving State law. As NATO-SOFA is reciprocal, in United States, U.S. Army Claims Service acts as Receiving State Office for all NATO Forces in United States (Belgium, Canada, Denmark, Greece, Iceland (separate agreement), Italy, Luxembourg, the Netherlands, Norway, Portugal, Turkey, the U.K., West Germany, and NATO Headquarters itself). Where the Netherlands rejects an Article VIII claim, U.S. National can sue under Suits in Admiralty or Public Vessels Acts. Newington v. U.S., 354 F. Supp. 1012 (E.D. Va. 1973). Contra Shafter v. U.S., 273 F. Supp. 152 (S.D.N.Y. 1967).

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

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

(6) NATO-SOFA Preempts Foreign Claims Act. Askou v. Aldridge, 695 F. Supp. 595 (D.D.C. 1980).

i. Army Maritime Claims Settlement Act, 10 U.S.C. §§ 4801-04, 4806, 32 C.F.R. § 536.45). See IIB4f(5) above.

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

k. Private Relief. Congress has almost unlimited authority to pay claims by private bill. U.S. v. Realty Co., 163 U.S. 427 (1896); McKenna v U.S., Civ. # 1:88CV4683 (N.D. Ohio, 9 Aug. 1995) (court had jurisdiction over claim from Federal Republic of Germany by private bill); Taylor v. U.S., 242 F. Supp. 759 (E.D. Va. 1965); See also Texas City Disaster Acts, 69 Stat. 707, 70 Stat. 516, 73 Stat. 706; Checotah Bomb Explosion Act, 100 Stat. 710, 3341.

l. Patent and Copyright Infringement. Exclusive jurisdiction of Court of Federal Claims under 28 U.S.C. § 1498 Turton v. U.S., 212 F.2d 354 (6th Cir. 1954). See also Fulmer v. U.S., 83 F. Supp. 137 (N.D. Ala. 1949)(dismissing FTCA actions for United States use of unpatented invention); Aktiebolaget Bofors v. U.S., 93 F. Supp. 131 (D.D.C. 1950) (same). But see Lariscey v. U.S., 949 F.2d 1137 (Fed. Cir. 1991) (Federal prisoner's invention used in prison shop is compensable as trade secret under Texas law); Birnbaum v. U.S., 436 F. Supp. 967 (E.D.N.Y. 1977) (allowing suit for violation of common law copyright under FTCA).

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

n. Quiet Title Act (28 U.S.C. § 2409c). Under exclusive jurisdiction of District court--sounds in tort and does not fall under Tucker Act. Quiet Title Act applies to actions in ejectment for possession of property. McClellan v. Kimball, 623 F.2d 83 (9th Cir. 1980) (applied to suit for ejectment against U.S. Forest Service supervisor); U.S. v. Santos, 878 F. Supp. 1358 (D. Guam 1995) (U.S. obtains ejectment injunction in suit under Act). Quiet Title Act also applies to Government action restricting access to property. Schultz v. Dept. of Army, U.S., 10 F.3d 649 (4th Cir. 1993) (where Army restricts historic routes across Ft. Wainwright, right to use modern route exists); Wright v. Gregg, 685 F.2d 340 (9th Cir. 1982) (applied to efforts of BLM to close entrance to bridge). Quiet Title Act also can be used to challenge liens on real estate. Robinson v. U.S., 920 F.2d 1157 (3d Cir. 1991) (IRS imposed lien without sending notice of deficiency--jurisdiction proper under Quiet Title Act); Egbert v. U.S., 752 F. Supp. 1010 (D. Wyo. 1990) (taxpayer can challenge IRS tax lien by filing action under Quiet Title Act). Quiet Title Act has further been held to apply to loss

of pay. Harrell v. U.S., 13 F.3d 232 (7th. Cir. 1993) (Quiet Title Act can be used to challenge loss of future wages, but here suit dismissed as frivolous); Arford v. U.S., 934 F.2d 229 (9th Cir. 1991) (Quiet Title Act applies to transfer of retired pay by USAF Finance Office to IRS to pay back taxes). The Quiet Title Act has a 12 year statute of limitations. Richmond, Fredericksburg and Potomac R. Co. v. U.S., 945 F.2d 765 (4th Cir. 1991) (1938 quitclaim to railroad for exclusive use for railroad purposes sufficient to trigger 12 year SOL); Tadlock v. U.S., 774 F. Supp. 1035 (S.D. Miss. 1990) (12 year SOL bars suit). The Quiet Title Act's 12 year SOL may be subject to equitable tolling. Fadem v. U.S., 52 F.3d 202 (9th Cir. 1995), remanded, ___ U.S. ___, 117 S.Ct. 1103, original opinion reinstated, 113 F.3d 167 (9th Cir. 1997) (equitable tolling of 12-year SOL in Act permitted as BLM did not inform landowner of results of survey). However, the U.S.' bringing of a condemnation suit will moot a quiet title action. Cadorette v. U.S., 988 F.2d 215 (1st Cir. 1993). Rosette Inc. v. U.S., 141 F.3d 1394 (10th Cir. 1998) (Rosette, lessee of geothermal power seeks declaratory judgment against BLM for trying to control Rosette's use of the power - Quiet Title applies. Lombard v. U.S., 28 F. Supp. 2d 44 (D. Mass. 1998) where claimants visited Cape Cod National Seashore in 1960's, they were not entitled to equitable tolling where Quiet Title Act suit in 1998.

o. Boards for Correction of Military Records (10 U.S.C. § 1552(c)). Permits payment of claims by service members for pay allowances, compensation, emoluments, or other pecuniary benefits as a result of correcting a military record. BCMR requests most be filed within six years. Kendall v. Army Board for Correction of Military Records, 996 F.2d 362 (D.C. Cir. 1993) (BCMR's application of requirement to file within 6 years upheld). BCMR administrative remedies must be exhausted before suit. Doe v. Department of Navy, 764 F. Supp. 1324 (N.D. Ind. 1991) (Navy veteran must exhaust BCMR remedy before seeking judicial relief re use of dropped court-martial charges in discharge board proceedings); Snearl v. U.S., 673 F. Supp. 165 (M.D. La. 1987) (National Guardsmen must exhaust ABCMR remedies--Feres barred in any court). But see Karr v. Carter, 818 F. Supp. 687 (D. Del. 1993) (National Guardsman is not required to exhaust BCMR remedies as BCMR cannot order Governor to comply). Court review of BCMR decisions. Cook v. Secretary of Air Force, 850 F. Supp. 901 (D. Or. 1994) (BCMR's refusal to reinstate airman to active duty following discharge for overweight is reviewable in U.S. Court of Federal Claims, not U.S. District Court); Burkins v. U.S., 865 F. Supp. 1480 (D. Colo. 1994) (ABCMR decision re post traumatic stress disorder is reviewed by District Court, even though amount involved exceeds $10,000); Henry v. Dept.

of Navy, 886 F. Supp. 686 (E.D. Ark. 1995) (District court overrules NBCMR on arbitrary and capricious standard after circuit court ordered case sent to BCMR for administrative exhaustion).

p. National Vaccine Act of 1986 (42 U.S.C. § 300). Institutes federal program to compensate persons injured by DPT vaccinations. Foyle by McMillan v. Lederle Labs, 674 F. Supp. 530 (E.D.N.C. 1987) (FDA regulations are evidence of due care, but not preemptive--$30,000 cap on lost earnings, pain and suffering and attorney fees, 42 U.S.C. § 300aa--death damages limited to $250,000, 42 USC 30aa-15(b)). Does not preempt existing remedies by terms of Act. Schaefer v. American Cyanamid Co., 20 F.3d 1 (1st Cir. 1994) (recovery of $750,000 under National Childhood Vaccine Act does not preclude recovery against manufacturer). However, remedies under the Act must be exhausted first. Brown v. HHS, 61 F.3d 905 (table), 1995 WL 395753 (7th Cir. 1995) (no suit under FTCA permitted until after remedy under Act is exhausted as to vaccine administered after Oct. 1, 1988). Additionally, a timely election after an adverse finding under the Act must be made. Gilbert v. U.S., Civ. # 93-CV-10295-BC (W.D. Mich., May 31, 1994) (no equitable tolling permitted in failure to file timely notice of election following adverse finding under Act).

q. Firefighting Costs. FEMA administers program for paying fire fighting costs when fire service fights fire on property under federal jurisdiction (15 U.S.C. § 2209). FEMA also administers program for Federal Flood Insurance (42 U.S.C. § 4072). See Ervinweed Marine Inc. v. Fireman's Fund Ins. Co., 750 F. Supp. 278 (N.D. Ohio 1990).

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

s. Privacy Act Including Right to Financial Privacy Act. The Privacy Act, 5 U.S.C. § 552a, may apply in a variety of contexts. Ezenwa v. Callen, 906 F. Supp. 978 (M.D. Pa. 1995)(expunging name from criminal record falls under Privacy Act or 4th Amendment); Nwangoro v. U.S., 952 F. Supp 396 (N.D. Tex. 1996) (Privacy Act violation must be brought under

the Act, not the FTCA--MPs turning over plaintiff's bank records to German police falls under Privacy Act's "routine use" exception); Sullivan v. U.S. Postal Service, 944 F. Supp. 191 (W.D.N.Y. 1996) (disclosing to applicant's present employer that he has applied for USPS is actionable). But see Jones v. U.S., 947 F. Supp 1507 (D. Colo. 1996) (use of airman's health records for court martial and discharge proceedings does not violate Privacy Act). However, the Privacy Act applies only to the government, not private individuals. Dong v. Smithsonian Institution, 125 F.3d 877 (D.C. Cir. 1997) (Smihsonian is not an "agency" subject to the Privacy Act); Walker v. U.S., 1996 WL 200284 (E.D. La.) (Privacy Act and Whistleblowers Act apply only to Government employees, not private individuals, therefore U.S. cannot be held liable under the FTCA). A Privacy Act suit has a 2 year SOL. Brown v. Dept. of Veterans Affairs, 1996 WL 263636 (D.D.C., 15 May 1996) (suit by prisoner for release of medical files by VA to Bureau of Prisons did not meet 2-year filing requirement of Privacy Act). The U.S. is liable under Act only if its conduct is willful, intentional or reckless. Webb v. Magaw, 880 F. Supp. 20 (D.D.C. 1995). Emotional distress damages may not be awarded under Privacy Act, but may be sued for under FTCA if actionable. DiMura v. FBI, 823 F. Supp. 45 (D. Mass. 1993) (actual damages under Act do not include emotional injuries); Webb v. Magaw, 880 F. Supp. 20 (D.D.C. 1995) (damages for emotional distress fall under FTCA). However, a Bivens action may not be maintained for violation of Privacy Act rights. Alexander v. FBI, 971 F. Supp. 603 (D.D.C. 1997) (while Privacy Act preempts Bivens action, it does not preempt common law tort of invasion of privavy--citing O'Donnell v. U.S., 891 F.2d 1079 (3rd Cir. 1989)); Williams v. Department of Veterans Affairs, 879 F. Supp. 578 (E.D. Va. 1995) (Bivens claim does not exist as counselor violation of patient's privacy does not constitute a constitutional tort--Privacy Act remedy is adequate). Right to Financial Privacy Act, 12 U.S.C. § 3401 *et seq*. See, e.g., Jones v. U.S., 947 F. Supp 1507 (D. Colo. 1996) (Failure to obtain administrative subpoena does not violate RFPA when criminal investigator furnished proper written notice).

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

u. Civil Rights Act of 1964. 42 U.S.C. § 1991 authorizes recovery of compensatory and punitive damages.

v. Disaster Relief Claims. Federal Emergency Management Agency is required to enter into agreement with state authorities providing that claim arising from use of troops for debris removal are sole responsibility of state in which disaster occurred. 42 U.S.C. § 512 *et seq*. See B&D Farms, Inc. v. U.S., Civ. # 94-1449-CIV-MARCUS (S.D. Fla., Dec. 21, 1994) (during Hurricane Andrew cleanup, heavy Army vehicles deposited and compacted gravel into claimant's soil--Act bars claim). But see Robert K. Ames Farms v. U.S., Civ. # 94-1488-CIV-MARCUS (S.D. Fla., Mar. 3, 1995) (during Hurricane Andrew cleanup, heavy Army vehicles utilized claimants land as motor pool causing soil compacting damage--Act does not apply, but claim excluded by 28 USC § 2680(a)); Sunrise Village Mobile Home Park v. Phillips & Jordan, 960 F. Supp. 283 (S.D. Fla. 1996) (role of U.S. in debris removal is discretionary--damage caused by Hurricane Andrew); Dureka v. U.S., __ Fed CL __, 1998 WL 884982 (Fed CL) attempt to circumvent prior ruling under FTCA on 2680(a) and Stafford Act exclusion for discretionary function by pleading FEMA contract to lease - discretionary function again applies as well as res adjudicata and collateral estoppel; Sunrise Village Mobile Home Park v. U.S., __ Fed CL __ 1998 WL 884948 (Fed CL) in accord; cites interpretation of Stafford Act in Ornallas v. U.S., 2 Ct. Cl. At 379-80.

w. CHAMPUS. CHAMPUS remedies must be exhausted prior to suit. Trauma Service Group v. Keating, 907 F. Supp. 110 (E.D. Pa. 1995) (claimant must exhaust CHAMPUS procedures before attempting collection action against individual soldiers). CHAMPUS Act precludes state law remedy against private CHAMPUS contractor. Bynum v. Aetna Govt. Health Plan, 907 F. Supp. 320 (S.D. Cal. 1995). Denial of benefits can be reviewed by court on an arbitrary and capricious standard. Wilson v. Office of Civilian Health and Med. Program, 866 F. Supp. 930 (E.D. Va. 1994). High dose chemotherapy. Compare Smith v. Office of Civilian Health and Med. Program, 66 F.3d 904 (7th Cir. 1995) (decision of CHAMPUS to deny coverage for experimental chemotherapy for breast cancer is not arbitrary and capricious)and Smith v. Office of Civilian Health and Medical Programs, 97 F.3d 951 (7th Cir. 1996) (CHAMPUS decision re high dose chemotherapy was not arbitrary and capricious) with Bishop v. CHAMPUS, 917 F. Supp. 1469 (E.D. Wash. 1996) (denial of coverage for treatment by high dose chemotherapy with peripheral stem cell rescue is arbitrary and capricious--costs and attorneys fees against United States).

x. Veterans Judicial Review Act. Hicks v. Small, 69 F.3d 967 (9th Cir. 1995) (Act preempts suit under FTCA for reduction of VA benefits as a retaliatory measure).

y. River and Harbors Act, 33 U.S.C. §§ 408-412. Arkansas River Co. v. U.S., 947 F. Supp 941 (N.D. Miss. 1996) (allision between tow and lock places strict liability on tow for damages to lock--cites cases).

z. Indian Tribal Court. Louis v. U.S., 969 F. Supp. 456 (D.N.M. 1997) (judgment in Acomom Tribal Court in medical malpractice action against Indian Health Service is not recognized by U.S. District Court).

aa. American with Disabilities Act (ADA). County of St. Louis v. Thomas, 967 F. Supp. 370 (D. Minn. 1997) (ADA does not provide a cause of action against the U.S.). Gordon v. U.S., __ F. Supp.2d __, 1999WL246407 (C.D. Ill.) where National Guard First Sergeant is reduced to master sergeant allegedly for insisting that he was fit for active duty. ADA does not provide a remedy.

bb. Miller Act. Failure of U.S. contractor to post required Miller Act bonds does not create cause of action against U.S. under FTCA, Miller Act, Tucker Act or for equitable relief. U.S. v. Munsey Trust, Co., 322 U.S. 234 (1947); Westbay Steel, Inc. v. U.S., 970 F.2d 648 (9th Cir. 1992) (FTCA); Arvanis v. Noslo Engineering Consultants, Inc., 739 F.2d 1287 (7th Cir. 1984) (Miller Act); United Electric Corp. v. U.S., 227 Ct. Cl. 236, 647 F.2d 1082 (1981) (Tucker Act); Automatic Sprinkler Corp v. Darla Environmental Specialists, Inc., 53 F.3d 181 (7th Cir. 1995). But see Blue Fox, Inc. v. U.S., 121 F.3d 1357 (9th Cir. 1997) (Administrative Procedure Act authorizes recovery on equitable lien theory against U.S.). Department of Army v. Blue Fox Inc., 119 S. Ct. 687 (1999) reverses Blue Fox Inc. v. U.S. on basis that Sect. 702c APA does not permit contractor to enforce liens on U.S. property.

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

dd. Radiation Compensation Act (RCA) (38 U.S.C. §§ 1110, 1154(a), 38 C.F.R. § 3303). RCA enacted in 1984 to assist VA in determining service connection of injuries allegedly relating to dioxin and ionizing radation exposure. Raney v.

Gober, 120 F.3d 1239 (Fed Cir. 1997) (RCA does not create a presumotion of service connection where soldier was on troop ship anchored in Nagasaki harbor for a single day, November 2, 1945).

ee. Title VII. Title VII preempts FTCA emotional distress claims based on sexual harassment in the workplace. Pfau v. Reed, 125 F.3d 927 (5th Cir. 1997) (DCAA auditor sexually harassed at work could not maintain action for intentional infliction of emotional distress under FTCA, since Title VII preempts such claim). Moreover, Title VII is the remedy for workplace harassment where a government agency is not involved. Rivera v. Heyman , 982 F. Supp. 932 (S.D.N.Y. 1997) (employment discrimination falls under Title VII, since Smithsonian Institution is not a federal agency) Wilds v. U.S. Postmaster General, 989 F. Supp. 178 (D. Conn. 1997) FTCA suit for negligent processing of drug test permitted in addition to Title VII suit. Hupp v. U.S. Dept. of the Army, 144 F.3d 1144 (8th Cir. 1998) (Title VII applies to Iowa NG sergeant applying for AGR position but Feres bars claims.

(ff) Administrative Procedures Act (APA). Department of Army v. Blue Fox Inc., __ U.S. __ (1999) failure of Army contracting officer to require posting of performance bond does not create equitable lien under Section 702 of APA as U.S. property may not be attached.

C. What Damages Are Payable?

1. State law Controls Payable Damages.

a. Which State Law Controls, e.g., impact or comparative impairment rule is applied whenever applicable. Richards v. U.S., 369 U.S. 1 (1962); Westerman v. Sears, Roebuck & Co., 577 F.2d 873 (5th Cir. 1978); In re Air Crash Disaster Near Chicago on 25 May 1979, 644 F.2d 594 (7th Cir. 1981), further proceedings, 701 F.2d 1189 (7th Cir. 1983); Costello v. U.S., 1997 WL 383278 (N.D. Ill.) (lists five factors in choice of law determination: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of judicial tasks; (4) advancement of forum government's interests; and (5) application of the better rule of law--citing with approval Hanker v. Royal Indemnity Co., 204 N.W.2d 897 (Wis. 1973) which was based on Lefler, *Choice Influencing Consideration in Conflict Law*, 41 N.Y. U. L. Rev. 267 (1966)); In re Air Crash at Washington, D.C. on 13 January 1982, 559 F. Supp. 333 (D.D.C. 1983); In re Pago Pago Air Crash of 30 January 1974, 525 F. Supp. 1007 (C.D. Cal. 1981); Guillory v. U.S., 699 F.2d 781 (5th Cir. 1983) (negligence in Texas--Louisiana law on damages applies, since

impact of death there); Halstead v. U.S., 535 F. Supp. 780 (D. Conn. 1981) (West Virginia air crash of private plane from Connecticut under control of tower at Dulles--West Virginia law governs negligence, but West Virginia death limit applies); Kiehn v. ElKem-Spigerverket a/s Kemi-Metal, 585 F. Supp. 413 (M.D. Pa. 1984) (corporate plane takes off and crashes in Norway with Pennsylvania businessman killed--applies Norwegian law on liability, but Pennsylvania law on damages); Metz v. United Tech. Inc., 754 F.2d 63 (2d Cir. 1985) (New York accident--court applies Louisiana law on damages); Poindexter v. U.S., 752 F.2d 1317 (9th Cir. 1984)(District Court improperly dismissed action based on Arizona Statutory Employer law to air crash in Nevada); Thomas v. FMC Corp., 610 F. Supp. 912 (M.D. Ala. 1985) (Alabama one-year SOL, rather than three-year German SOL, applies where U.S. soldier killed in Germany by howitzer); Foster v. U.S., 768 F.2d 1278 (11th Cir. 1985) (Florida resident killed in Illinois air crash while on way to Wisconsin-suit brought in Florida--Illinois wrongful death statute applies); Price v. Litton Systems, Inc., 784 F.2d 600 (5th Cir. 1986) (soldiers die in helicopter crash at Fort Rucker allegedly due to defective night goggles designed in California, manufactured in Virginia by company headquartered elsewhere, and suit brought in Mississippi--Alabama substantive law applies); Donaldson v. U.S., 634 F. Supp. 735 (S.D. Fla. 1986), later proceedings, 658 F. Supp. 211 (S.D. Fla. 1987) (Arizona law applied to crash of Florida plane in Arizona); In re Air Crash Disaster at Gander, Newfoundland on 12 Dec. 1985, 660 F. Supp. 1202 (W.D. Ky. 1987) (Kentucky law applies to crash of plane destined for Fort Campbell); Vogelaar v. U.S., 665 F. Supp. 1295 (E.D. Mich. 1987) (applies Michigan tort cause of action, i.e., negligent infliction of emotional distress to tort arising in Indiana); Richardson v. U.S., 841 F.2d 933 (9th Cir. 1988) (where state law changes while case is on remand, new law applies at second trial); Hensley v. U.S., 728 F. Supp. 716 (S.D. Fla. 1989) (flight origination in Florida, crashes in New Jersey due to FAA negligence in New York--Florida law applies under New York conflict law); Burgio v. McDonnell Douglas Inc., 747 F. Supp. 865 (E.D.N.Y. 1990) (air crash at USAF base, Federal Reservation Act, 16 USC § 457, is used to determine which state law applies); Spring v. U.S., 833 F. Supp. 575 (E.D. Va. 1993) (plane, piloted by Maryland resident, crashes in Maryland allegedly due to negligence of tower at Dulles Airport in Virginia--Maryland law applies); Licenziato v. U.S., 889 F. Supp. 162 (D.N.J. 1995) (N.Y. serious injury law applies--claimant's allegation that N.J. law applies, since insurance contract entered into there, is rejected); Blanchard v. Praxair, 951 F. Supp. 631 (S.D. Tex. 1996) (Texas premises law applies to Kansas slip and fall, since

Texas citizen and employee is plaintiff). Pramba-Cortes v. American Airlines, Inc., 177 F.2d 1272 (11th Cir. 1999) Florida law on damages applies to aircrash in Columbia even though claimant resides in Columbia.

b. Damage Limitations. Monetary limitations (cap) on damages in State law may be applicable. The cap is usually considered an affirmative defense which must be asserted. Ingraham v. Bonds v. U.S., 808 F.2d 1075 (5th Cir. 1987). Many states have such caps: (1) California (Civil Code § 3333.2). Non-economic damages in medical malpractice limit of $250,000 upheld by both U.S. and California Supreme Courts. Fein v. Permanente Medical Group, 474 U.S. 892, 106 S. Ct. 214 (1985), dismissing appeal for lack of a substantial federal question from, 121 Cal. App.3d 135, 175 Cal. Rptr. 177 (1981). These damage limitations have been held applicable to FTCA cases. Squires v. U.S., Civ. # CV-79-3108-MML (C.D. Cal. 1982); Hoffman v. U.S., 767 F.2d 1431 (9th Cir. 1985); Fetter v. U.S., 649 F. Supp. 1097 (S.D. Cal. 1986); Taylor v. U.S., 821 F.2d 1428 (9th Cir. 1987), cert. denied, 485 U.S. 992 (1988); (2) Indiana (Code § 16-9.5-2.2). Overall medical malpractice limit of $500,000 upheld by Johnson v. St. Vincent Hospital Inc., 404 N.E.2d 585 (Ind. 1980); Estate of Sullivan v. U.S., 777 F. Supp. 695 (N.D. Ind. 1991) (Indiana cap not applicable to Arizona medical malpractice act); Carter v. U.S., 982 F.2d 1141 (7th Cir. 1992) (Indiana $500k cap applied to U.S. and increased value of VA benefits is deductible after application of cap); (3) Louisiana (Rev. Stat. Ann. § 40:1299.42-3). Cap of $500,000 exclusive of future medical care and benefits. Sibley v. Board of Supervisors of Louisiana State Univ., 477 So.2d 1094 (La. 1985) (upholds cap); Kennedy v. U.S., Civ. # 88-1922 (W.D. La.1990) (La. cap applies under FTCA); Owen v. U.S., 935 F.2d 734 (5th Cir. 1991) (applies La. cap to FTCA PI case); (4) Nebraska (Rev. Stat. § 44-2825) (cap of $1,000,000). See Lozada v. U.S., 974 F.2d 986 (8th Cir. 1992) (medical malpractice cap of $1 million in Nebraska applies to U.S.); (5) New Mexico (Stat. Ann. § 41-5-6) (cap of $500,000 plus medical care and related benefits); (6) Ohio (Rev. Code Ann. § 2307.43). Cap of $200,000 for general damages not involving death held unconstitutional in three lower court decisions. See also Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991) ($200,000 "Cap" is unconstitutional); (7)South Dakota. See Knowles v. U.S., 829 F. Supp. 1147 (D.S.D. 1993) (S. Dakota $1,000,000 medical malpractice cap applies to suit against USAF Hospital in South Dakota); Knowles v. U.S., 29 F.3d 1251 (8th Cir. 1994) (holds that $1,000,000 cap established by S.D. Cod. Law Ann § 21-3-11 applies to entire family); Knowles v. U.S., 544 N.W.2d 183 (S.D. 1996) (Supreme Court of South Dakota declares S.D.

$100,000 cap unconstitutional and reinstates former cap of $500,000); Knowles v. U.S., 91 F.3d 1147 (8th Cir. 1995) (holds S.D. Cap does not apply to USAF medical technicians even though they are hospital employees); (8) Texas (Rev. Civ. Stat. Ann. Article 4590 § 11.02-3). Texas cap of $500,000 overall applies to FTCA. Overton v. U.S., Civ. #SA-79-CA-42 (W.D. Tex. 1984); Rose v. Doctor's Hospital, 801 S.W.2d 841 (Tex. 1990) (upholds cap in WD case, but not PI case); Lucas v. U.S., 807 F.2d 414 (5th Cir. 1986) (Texas cap does not violate Federal Constitution); Lucas v. U.S., 757 S.W.2d 687 (Tex. 1988) (Texas cap is unconstitutional under State constitution); (9) Virginia (Code Section 8.01-581.15). Overall cap of $1,000,000. Boyd v. Bulala, 877 F.2d 1191 (4th Cir. 1989) (held constitutional). See also Boyd v. Bulala, 672 F. Supp. 915 (W.D. Va. 1987); Boyd v. Bulala, 905 F.2d 764 (4th Cir. 1990); Clark v. Lewis, Civ. #85-0516 Record #890900 (Sup. Ct. Va. 1990) (cap applies to all claims including derivative claims); Starns v. U.S., 923 F.2d 34 (4th Cir. 1991) (Va. cap applies to FTCA--one cap applies to all claims--child's claim takes priority); (10) Wisconsin (Stat. 655.23). Cap on physician's liability of $200,000; (11) Illinois. See Best v. Taylor Machine Works, 689 N.E.2d 1057 (Ill. 1997) (holding Ill. cap. unconstitutional). See also Wright v. Central Du Page Hospital Assn., 347 N.E.2d 736 (Ill. 1976); (12) New Hampshire. See Carson v. Maurer, 424 A.2d 825 (N.H. 1980); (13) North Dakota. See Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) (all ruled unconstitutional). See also MacDonald v. General Motors Corp., 110 F.3d 337 (6th Cir. 1997) (University of Kansas student originally from North Dakota is killed in U. Kansas van accident in Tennessee--North Dakota law applied, where North Dakota has no damage cap, but Kansas has $100,000 cap on general damages); (14) Kansas (Stat. § 60-3407). Non-economic damages of $250,000--overall one million. Samsel v. Wheeler Transport Services, 789 P.2d 541 (Kan. 1990) (upholds Kansas cap as constitutional). But see Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251 (Kan. 1988) (ruled unconstitutional); Farley v. Engelken & Ditto, 740 P.2d 1058 (Kan. 1987) (holds collateral source restriction on medical malpractice case unconstitutional); (15) Massachusetts. (Gen. Law, Chapter 351, § 60H). Noneconomic cap of $500,000; (16) Michigan. (HB 5154). Noneconomic cap of $225,000;(17) Missouri (Stat. § 538.210). Limits noneconomic damages to $250,000. See also Romero v. U.S., 865 F. Supp. 585 (E.D. Mo. 1994) ($500,000 applies to each of two counts of malpractice, even though second surgery did not cause additional injury); (18) West Virginia (Code § 55-7B-8). Non-economic cap of one million; (19) Alaska ($500,000); (20) Colorado (Colo. Rev. Stat. § 13-21-203 ($250,000). See Hill v. U.S., 854 F. Supp. 727 (D. Colo. 1994) (Colorado

$1,000,000 cap in medical malpractice cases did not preclude award of $2,500,000 for physical impairment and disfigurement additional in case of brain damaged infant); (21) Florida. Laws of Florida (Chapter 86-160) ($450,000). See South v. Dept. of Insurance, Civ. #69-551 (Sup. Ct. Fla. 1987) (cap of $450,000 held unconstitutional--most of statute held constitutional); (22) Hawaii ($375,000); (23) Maryland ($350,000). See Franklin v. Mazda Motor Corp., 704 F. Supp. 1325 (D. Md. 1989) (Maryland $550,000 cap upheld); Bartucco v. Wright, 746 F. Supp. 604 (D. Md. 1990) (Md. cap applies separately to each survivor in WD case); U.S. v. Streidel, 620 A.2d 905 (Md. 1993) (Maryland cap of $350,000 does not apply to wrongful death action); (24) Minnesota ($400,000); (25) New Hampshire ($875,000); (26) Washington (variable). See Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989) (Washington non-economic cap unconstitutional); (27) Utah ($300,000); (28) Virgin Islands. See Davis v. Omitowoju, 883 F.2d 1155 (3d Cir. 1989) (Virgin Islands cap of $250,000 non-economic upheld); have all enacted caps; (29) Nevada. See Aguilar v. U.S., 920 F.2d 1475 (9th Cir. 1990) (Nevada cap of $50,000 applies to action involving Federal policeman as it applies to Nevada police); (30) Alabama. See Smith v. Schulte, 671 So.2d 1334 (Ala. 1995), cert. denied, ___ U.S. ___, 116 S.Ct. 1849 (1996) (Alabama damage cap is held unconstitutional). Vincoy v. U.S., Civ. # 97-029GJCILFG (D. N. Mex., 1 Jun 98) (New Mexico cap applies to health clinic under federally supported Health Care Center Assistance Act. Dipirro v. U.S., 43 F. Supp. 2d 327 (W.D.N.Y. 1999), excellent discussion of application of New York no-fault law to doubtful serious injury case; Colburn v. U.S., 45 F. Supp. 2d 787 (S.D. Cal. 1998), claims for emotional distress, loss of consortium, and spoliation dismissed in California wrongful death case as $250,000 economic cap applies to all claims for wrongful death; Louis v. U.S., Civ. #96-1161 BB/DIS (D. N. Mex., 29 January 1999), N. Mex. $500,000 applies to FTCA case from Indian Health Service Hospital; Feighery v. York Hospital, 38 F. Supp. 2d 142 (D. Me. 1999), Maine's cap for nonpecuniary damages of $150,000 does not include child's loss of care, nurture and guidance in wrongful death case; Rivera v. U.S., 1999WL316835 (2d Cir. N.Y.), uphold award for noneconomic loss as plaintiff met serious injury threshold under New York law. Johns v. U.S., 1998WL151282 (E.D. La.) La. medmal cap of $500,000 applies to U.S. and includes all claims arising from one death.

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

appeal does preclude award for last future earnings and medical bills).

3 Punitive Damages. Punitive damages are not payable (28 U.S.C. § 2674). See Molzof v. U.S., 502 U.S. 301, 112 S.Ct. 711 (1992) (first clause of 28 U.S.C. § 2674 refers to common law punitive damages and cannot be extended to loss of employment or collateral source recoveries).

a. State Statutes. This includes certain State Death Statutes which were ruled to be punitive in nature. Mass. Bonding & Insurance Co. v. U.S., 352 U.S. 128 (1956) (Massachusetts Death Statute); Berger v. Winer Sportswear Inc. v. U.S., 394 F. Supp. 1110 (S.D.N.Y. 1975) (same); Fitch v. U.S., 513 F.2d 1013 (6th Cir. 1975); Hoyt v. U.S., 286 F.2d 356 (5th Cir. 1961). See also Lauderdale v. U.S., 666 F. Supp. 1511 (M.D. Ala. 1987) (Federal law under DOHSA applies to wrongful death in Alabama, cites Edwards v. U.S., 552 F. Supp. 635 (M.D. Ala. 1982), which quotes Sea-Land Services Inc. v. Gaudet, 414 U.S. 573 (1974)); Montellier v. U.S., 202 F. Supp. 384 (E.D.N.Y. 1962); Harden v. U.S., 688 F.2d 1025 (5th Cir. 1982); Johnson v. U.S., 547 F.2d 688 (D.C. Cir. 1976); Detwiler v. U.S., 406 F. Supp. 695 (E.D. Pa. 1975); In re Paris Air Crash of 3 March 1974, 399 F. Supp. 732 (C.D. Cal. 1975); Hartz v. U.S., 415 F.2d 259 (5th Cir. 1969) (Georgia Death Statute). But see Tillman v. U.S., Civ. #85-1537 (S.D. Fla. 1986) (awards $400,000 for death of three-month-old child--uses Georgia wrongful death statute despite Hartz); Childs v. U.S., 923 F. Supp. 1570 (S.D. Ga. 1996) (holds a wrongful death is not punitive, even though statute so states--bases ruling on Molzof v. U.S., 502 U.S. 301, 112 S.Ct. 711 (1992)); Whitley v. U.S., Civ. # 3:94-cv-64 JTC (N.D. Ga., 19 Feb. 1997) ($ 1.2 million to parents of British Army Lieutenant killed in U.S. Army van accident--holds personal consumption and taxes are not deductible, since Georgia wrongful death statute not punitive--cites Molzof). Only actual pecuniary loss may be recovered. D'Ambra v. U.S., 481 F.2d 14 (1st Cir. 1973).

b. Applicable to Loss of Enjoyment of Life. Applicable to loss of enjoyment of life in certain cases. D'Ambra, supra; Hartz, supra; Felder v. U.S., 543 F.2d 657 (9th Cir. 1976); Kalavity v. U.S., 584 F.2d 809 (6th Cir. 1978); Ulrich v. VA, 853 F.2d 1078 (2d Cir. 1988); Ruffino v. U.S., 829 F.2d 354 (2d Cir. 1987); Flannery for Flannery v. U.S., 718 F.2d 108 (4th Cir. 1983). But see Imperial v. U.S., 755 F. Supp 695 (N.D. W.Va. 1990) (Flannery does not proscribe non-economic damages under W.Va. wrongful death statute.

c. Applicability to Total Off-Set. May be applicable to total off-set rule. Culver v. Slater Boat Co., 722 F.2d 114 (5th Cir. 1984), cert. denied sub nom., Reederei v. Byrd, 467 U.S. 1252 (1984); Scott v. U.S., 884 F.2d 1280 (9th Cir. 1989).

d. Certain Verdicts. Some verdicts give appearance of being punitive despite prohibition against. Murff v. U.S., 598 F. Supp. 290 (E.D. Tex. 1984) ($700,000 to parents of deceased unmarried 19-year-old); Lewis v. U.S., 718 F. Supp. 1525 (M.D. Ga. 1988) ($428,119.22 to parents of deceased 13-year-old, even though Georgia death statute has been ruled punitive).

4. No Separate Attorneys Fee. Attorneys fee not permitted as separate claim (28 U.S.C. §§ 2412, 2678). Only permitted where express statutory language allows same. See Hercules Inc. v. U.S., 516 U.S. 417, 116 S.Ct. 981 (1996) (manufacturers $9,000,000 attorney fees and costs from settling Agent Orange claim is not compensable as an implied-in-fact contract); U.S. v. Worley, 281 U.S. 339 (1930); In re Kenneth Turner, 14 F.3d 637 (D.C. Cir. 1994) (Pentagon policeman who successfully contested DOJ nonscope in hot pursuit case is entitled to costs, but not attorney fees); Hull v. U.S., 971 F.2d 1499 (10th Cir. 1992) (where guardian *ad litem* performs attorney services, fees not deductible as costs); Shannon v. HUD, 577 F.2d 854 (3d Cir. 1978) (citing cases); Dyer v. Walters, 646 F. Supp. 791 (E.D. Mo. 1986) (statutory limit of $10 for attorney fees under Veterans Benefit Law does not violate due process or First Amendment rights). For discussion of application of Equal Access to Justice Act (28 U.S.C. § 2412, Supp. V 1981). See also Bergman v. U.S., 844 F.2d 353 (6th Cir. 1988) (attorney fees payable under EAJA when U.S. or losing party acts in bad faith under common law principles); Ellis v. U.S., 711 F.2d 1571 (Fed. Cir. 1983). Expressly excludes torts (28 U.S.C. § 2412d(1)(A)). See, e.g., Lucerelli v. U.S., 943 F. Supp. 157 (D.P.R. 1996) (Equal Access to Justice Act does not permit payment of attorney fees separate from FTCA award); Campbell v. U.S., 835 F.2d 193 (9th Cir. 1987) (EAJA attorney fees not applicable to FTCA); Sanchez v. Rowe, 870 F.2d 291 (5th Cir. 1989) (cannot collect EAJA attorney fees where elect remedy in tort). State law authorizing attorney fees as additional damages to prevailing party not applicable under FTCA by virtue of either private person analogy or Equal Access to Justice Act (EAJA). Anderson v. U.S., 127 F.3d 1190 (9th Cir. 1997); Joe v. U.S., 772 F.2d 1535 (11th Cir. 1985). Accord Johnson v. U.S., 780 F.2d 902 (11th Cir. 1986). Conversely, state laws which attempt to limit fees are preempted, since FTCA sets cap on maximum allowable attorney's fee in FTCA cases. Jackson v. U.S., 881 F.2d 707 (9th Cir. 1989) (attorney fees not limited by California statute). There are cases which deal with

computation of the FTCA attorney fee in a structured settlement situation. Godwin v. Schramm, 731 F.2d 153 (3d Cir. 1984), cert. denied sub nom., Behrend v. Goodwin, 469 U.S. 882 (1984)) (in structured settlement, undecided whether fee limitation is 20 percent of cost to U.S.); Wyatt v. U.S., 783 F.2d 45 (6th Cir. 1986) (attorney's fee is 20 percent of the present value of the structure--here 20 percent of the cost where structure is up front cash and periodic pay annuity).

5. No Interest. Interest is not permitted except after judgment (28 U.S.C. § 2411). See Wilson v. U.S., 756 F. Supp. 213 (D.N.J. 1991) (verdict cannot include post-judgment interest by virtue of 28 U.S.C. § 2411 alone); Richerson v. Jones, 551 F.2d 918 (3d Cir. 1977); Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984). See also McGehee v. Panama Canal Commission, 872 F.2d 1213 (5th Cir. 1989) (award of interest permitted when U.S. agency acts as commercial enterprise not applicable here). Burden to file transcripts in GAO to start running of interest is on plaintiff. McDonald v. U.S., 825 F. Supp. 683 (M.D. Pa. 1993) (failure of plaintiff to notify GAO bars payment of post-judgment interest); Moyer v. U.S., 612 F. Supp. 239 (D. Nev. 1985) (must file transcript to start interest running); Rooney v. U.S., 694 F.2d 582 (9th Cir. 1982); Reminga v. U.S., 695 F.2d 1000 (6th Cir. 1982); U.S. v. Varner, 400 F.2d 369 (5th Cir. 1968); U.S. v. State of Maryland, 349 F.2d 693 (D.C. Cir. 1965). Interest limited to 4 percent prior to 1982. Oakley v. U.S., 622 F.2d 447 (9th Cir. 1980). Amendment in 1982 raised post-judgment interest to new formula which is "Such interest shall be calculated from the date of entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of 52-week United States Treasury bills settled immediately prior to the date of the judgment" (28 U.S.C. §§ 1304 (1981). See also Campbell v. U.S., 809 F.2d 563 (9th Cir. 1987) (retroactive application of T-bill rate to post-judgment interest). Appeal does not stop accrual of post-judgment interest. Transco Leasing Corp. v. U.S., 992 F.2d 552 (5th Cir. 1993). Interest may be apportioned between tortfeasors. Andrulonis v. U.S., 26 F.3d 1224 (2nd Cir. 1994) (proportions post judgment interest by co-defendants U.S. and state of New York). Palmer v. U.S., __F.3d__, 1998 WL 285213 (6th Cir., Ky) (award of prejudgment interest is reversed). Herbert v. U.S., 1998 WL 171668 (E.D. La.) awards interest from date of original demand as U.S. is sued under Louisiana law - ignores 28 U.S.C. 2411.

6. Costs. The assessment of costs is within the discretion of the court. Muller v. U.S., 811 F. Supp. 328 (N.D. Ohio 1992) (allowance of costs is wholly within discretion of court--even though U.S. prevailed, costs of $534.55 not assessed against

nonaffluent, but nonfrivolous plaintiff). Costs of filing and documenting claims not payable. Muenich v. U.S., 410 F. Supp. 944 (N.D. Ind. 1976). Hall by Hall v. U.S., 978 F.2d 570 (10th Cir. 1992). Expert witness fees are limited to statutory amount set by 28 U.S.C. § 1920.

7. No Service Member's Benefits. Amounts recoverable by service member or his survivors through military or veteran's compensation system are not payable despite collateral source rule. U.S. v. Brown, 348 U.S. 110 (1954); Brooks v. U.S., 176 F.2d 482 (4th Cir. 1949); U.S. v. Gray, 199 F.2d 239 (10th Cir. 1952); Johnson v. U.S., 271 F. Supp. 205 (W.D. Ark. 1967); Joyce v. U.S., 329 F. Supp. 1242 (W.D. Pa. 1971); U.S. v. Harue Hayaski, 282 F.2d 599 (9th Cir. 1960); Feeley v. U.S., 337 F.2d 924 (3d Cir. 1964); Christopher v. U.S., 237 F. Supp. 787 (E.D. Pa. 1965); Cooper v. U.S., 313 F. Supp. 1207 (D. Neb. 1970); Swanson v. U.S. by & through the VA, 557 F. Supp. 1041 (D. Idaho 1983) (discusses 38 U.S.C. § 310 benefits); Shaw v. U.S. VA, 711 F.2d 156 (11th Cir. 1983); Green v. U.S., 530 F. Supp. 633 (E.D. Wis. 1982); Johnson v. U.S. v. Hay, 510 F. Supp. 1039 (D. Mont. 1981); Smith v. U.S., 437 F. Supp. 1004 (E.D. Pa. 1977), aff'd, 587 F.2d 1013 (3d Cir. 1978).

8. Mental Anguish In PI Claims. Mental anguish of injured party's family not recoverable in personal injury cases unless permitted by local law. Betancourt v. J.C. Penney Co. Inc., 554 F.2d 1206 (1st Cir. 1977) (Puerto Rico). See also Chambers v. U.S., 656 F. Supp. 1447 (S.D. Tex. 1987) (father in house when son ran over by GOV--$30,000 bystander recovery); Scott v. U.S., 884 F.2d 1280 (9th Cir. 1989) (continuing mental anguish of parents is permitted in brain damaged baby case); Anderson v. U.S., 731 F. Supp 391 (D.N.D 1990) (loco parentis grandma recovers $520,000 in brain damaged baby case). Even if allowed, not permitted where anguish is not beyond normal amount. Schales v. U.S., 488 F. Supp. 33 (E.D. Ark. 1979). There are three states which permit recovery by statute, Washington (RCA § 42.24.010 (1975)); Idaho (ICA § 5.3120-11 (1975)); Iowa (ICA § RCP8 (1974)). See also Shockley v. Prier, 225 N.W.2d 495 (Wis. 1975). For more recent cases, see II.B1c(4), where Texas and California have permitted mental anguish damages to parents who were witnesses to injuries-are these "zone of damages" cases?. See also Reben v. Ely, 705 P.2d 1360 (Ariz. App. 1985). However, recovery does not occur in all cases. Hay v. Med. Center Hospital of Vermont, 496 A.2d 939 (Vt. 1985) (not permitted where parents turn over brain damaged child to foster parents); Nemmers v. U.S., 612 F. Supp. 928 (C.D. Ill. 1985); Bode v. Pan American World Airways Inc., 786 F.2d 669 (5th Cir. 1986) (bystander not permitted to recover for mental anguish for witnessing plane crash 50 feet from home in Louisiana).

9. Subsequent Malpractice. Original tortfeasor may be liable for subsequent malpractice. See 8 A.L.R. 639 (collecting cases). See also U.S. Lines Inc. v. U.S., 470 F.2d 487 (5th Cir. 1972); Travelers Co. Inc. v. U.S., 283 F. Supp. 14 (S.D. Tex. 1968); Williams v. U.S., 352 F.2d 477 (5th Cir. 1965); Elliott v. U.S., 329 F. Supp. 621 (D. Me. 1971); Kotler v. Monticello Hospital, 290 N.Y.S.2d 385 (Sup. Ct. 1968); Herrero v. Atkinson, 38 Cal. Rptr. 490 (Ct. App. 1964); Derby v. Prewitt, 187 N.E.2d 556 (N.Y. 1962); Henry v. Georgetown University., 892 F.2d 74 (table), 1989 WL 152391 (4th Cir. 1989) (G.U. dental students attempting to correct overbite by adjustments causes G.U. to be liable for Navy's negligent overbite surgery).

10. Collateral Source. Brooks v. U.S., 337 U.S. 49, 69 S.Ct. 918 (1949) is original seminal case. Normally, evidence of collateral source recovery is inadmissible. Denton v. Con-way Southern Express, Inc., 261 Ga. 41, 402 S.E.2d 269 (1991). Statute limiting collateral source benefits applies under FTCA. Reilly v. U.S., 863 F.2d 149 (1st Cir. 1988). Accord Schieb v. Fla. Sanitarium & Benev. Assn., 759 F.2d 859 (11th Cir. 1985). However, the collateral source rule is a creature of tort law and does not apply to contracts. U.S. v. City of Twin Falls, Idaho, 806 F.2d 862 (9th Cir. 1986).

a. Government Benefits From General Revenue. Only those benefits paid by unfunded general revenues are deductible. U.S. v. Harue Hayashi, 282 F.2d 599 (9th Cir. 1960). Accord Titchnell v. U.S., 681 F.2d 165 (3d Cir. 1982). See also U.S. v. Price, 288 F.2d 448 (4th Cir. 1961) (civil service retirement not deductible); U.S. v. Brooks, 176 F.2d 482 (4th Cir. 1949) (NSLI benefits not deductible). However, value of Federal medical care may be deducted from award--because it is not a collateral source. Feeley v. U.S., 337 F.2d 924 (3d Cir. 1964).

b. Sick Leave. Federal sick leave is collateral source and is not deductible from award. Leeper v. U.S., 756 F.2d 300 (3d Cir. 1985).

c. Increased Medical Costs From Non-Use of Federal Facilities. Increased civilian medical expenses not recoverable where claimant no longer uses military hospital because of medical malpractice. Blanton v. U.S., 428 F. Supp. 360 (D.D.C. 1977).

d. Social Security. Social Security benefits may be collateral source, e.g., where injured party contributed to fund from whence benefits are derived. Smith v. U.S., 587 F.2d 1013 (3d Cir. 1978) (citing cases); Barnes v. U.S., 516 F. Supp. 1376 (W.D. Pa. 1981); Johnson v. U.S., 510 F. Supp.

1039 (D. Mont. 1981); Swanson v. U.S., 557 F. Supp. 1041 (D. Idaho 1983); Coates v. U.S., 612 F. Supp. 592 (C.D. Ill. 1985) (Social Security benefits not deductible as they are collateral source as held in U.S. v. Harue Hayashi, 282 F.2d 599 (9th Cir. 1960)); Manko v. U.S., 830 F.2d 831 (8th Cir. 1987) (Social Security benefits not deductible). But see Steckler v. U.S., 549 F.2d 1372 (10th Cir. 1977) (percentage contributed by U.S. deductible).

e. Income Tax. Income taxes may be deductible from award. Harden v. U.S., 688 F.2d 1025 (5th Cir. 1982) (allows income tax deduction); McCauley v. U.S., 470 F.2d 137 (10th Cir. 1972); U.S. v. Becker, 378 F.2d 319 (9th Cir. 1967) (reviews all 9th Circuit decisions and permits deduction for income taxes in wrongful death diversity case); Graves v. U.S., 517 F. Supp. 95 (D.D.C. 1981). General argument can be based on Norfolk & Western Railway Co. v. Liepelt, 444 U.S. 490 (1980). Furthermore, it can be argued that a court's failure to deduct taxes amounts to punitive damages. Felder v. U.S., 543 F.2d 657 (9th Cir. 1976). See also Shaw v. U.S., 741 F.2d 1202 (9th Cir. 1984) (limits DeLucca to California law and requires tax deduction under Washington law). But see Manko v. U.S., 830 F.2d 831 (8th Cir. 1987 (non-deduction of income tax from award does not constitute punitive damages); DeLucca v. U.S., 670 F.2d 843 (9th Cir. 1982) (does not follow Felder). Even if deductible, the cases are split on whether the deduction should apply to lower and middle income taxpayers. Kalavity v. U.S., 584 F.2d 809 (6th Cir. 1978)(no). But see Hollinger v. U.S., 651 F.2d 636 (9th Cir. 1981) (yes). However, Second Circuit rejected Supreme Court view in favor of State law (New York) in Vasina v. Grummann Corp., 644 F.2d 112 (2d Cir. 1981). But see O'Connor v. U.S., 269 F.2d 578 (2d Cir. 1959). Many federal courts follow the Second Circuit approach of looking to state law for deductibility of taxes. Kirchgasser v. U.S., 958 F.2d 158 (6th Cir. 1992) (income tax is deductible under Michigan law); In re Air Crash Disaster Near Chicago, 25 May 1979, 803 F.2d 304 (7th Cir. 1986) (uses Arizona law--declines to follow McCauley v. U.S., 470 F.2d 137 (10th Cir 1972); Nemmers v. U.S., 612 F. Supp. 928 (C.D. Ill. 1985) (Maryland does not deduct income taxes); Smith v. Industrial Constructors Inc., 783 F.2d 1249 (5th Cir. 1986) (income tax deduction allowed from future earnings under Mississippi Death Statute); Savic v. U.S., 702 F. Supp. 695 (N.D. Ill. 1988) (income tax not deductible under Illinois law); Barnes v. U.S., 685 F.2d 66 (3d Cir. 1982) (applying Pennsylvania law); Kuntz v. Windjammer "Barefoot" Cruises Ltd., 573 F. Supp. 1277 (W.D. Pa. 1983) (follows Barnes). Another court holds that Supreme Court view in Liepelt is limited to FELA is Gerbich v. Evans, 525 F. Supp. 817 (D. Colo. 1981).

Palmer v. U.S., __F.3d__, 1998 WL 285213 (6th Cir., Ky.)(no deduction for taxes under Kentucky law).

f. Medicare. Medicare to which plaintiff did not contribute is deductible and not collateral source. Overton v. U.S., 619 F.2d 1299 (8th Cir. 1980). See also Romero v. U.S., 865 F. Supp. 585 (E.D. Mo. 1994) (Medicare furnished care is not a collateral source as plaintiff could not prove his contribution to fund); Denekas v. Shalala, 943 F. Supp. 1073 (S.D. Iowa 1996) (medicine bills are subject to apportionment along with loss of consortium claims in wrongful death case in which total award exceeds amount of insurance coverage). But see Manko v. U.S., 830 F.2d 831 (8th Cir. 1987) (Medicare benefits are collateral source); Berg v. U.S., 806 F.2d 978 (10th Cir. 1986)(same). Accord Siverson v. U.S., 710 F.2d 557 (9th Cir. 1983); Titchnell v. U.S., 681 F.2d 165 (3d Cir. 1982).

g. VA Disability Benefits. Granting of VA disability more liberal standard, thereby, not conclusive on granting FTCA disability. Sweet v. U.S., 687 F.2d 246 (8th Cir. 1982); O'Keefe v. U.S., 490 F. Supp. 79 (W.D. Okla. 1980). Nonetheless, VA furnished medical care is a collateral source. U.S. v. Gray, 199 F.2d 239 (10th Cir. 1952). VA benefits can be setoff against those elements of damage VA benefits were intended to compensate for. Pike v. U.S., 652 F.2d 31 (9th Cir. 1981); Mosley v. U.S., 538 F.2d 555 (4th Cir. 1976); Christopher v. U.S., 237 F. Supp. 787 (E.D. Pa. 1965); Johnson v. U.S., 510 F. Supp. 1039 (D. Mont. 1981). See also Carter v. U.S., 785 F. Supp. 797 (N.D. Ind. 1992) (enhanced VA benefits should be deducted); MacDonald v. U.S., 781 F. Supp. 320 (M.D. Pa. 1991) (same); Nye v. U.S., Civ. # 85-747-D (D. N.H. 1992) (increase in VA benefits due to malpractice may be offset); Morgan v. U.S., 968 F.2d 200 (2d Cir. 1992) (same holding as Nye). Other cases on deductibility of VA benefits. Smith v. U.S., 437 F. Supp. 1004 (E.D. Pa. 1977), aff'd, 587 F.2d 1013 (3d Cir. 1978); Green v. U.S., 530 F. Supp. 633 (E.D. Wis. 1982); Swanson v. U.S. by & through VA, 557 F. Supp. 1041 (D. Idaho 1983); Shaw v. U.S. VA, 711 F.2d 156 (11th Cir. 1983). However, not all VA benefits are deductible, but § 351 clearly are. Ulrich v. VA Hospital, 853 F.2d 1078 (2d Cir. 1988) (VA benefits under 38 U.S.C. § 314(o) should not be setoff as required for 38 U.S.C. § 351 benefits--fact that VA will furnish free medical care does not preclude award for future medical expenses--cites Feeley v. U.S., 337 F.2d 924 (3d Cir. 1964)); Cole v. U.S., 861 F.2d 1261 (11th Cir. 1988) (District Court cannot recharacterize § 331 VA benefits as § 351 benefits to avoid setoff for future benefits). See also Schales v. U.S., 488 F. Supp. 33 (E.D. Ark. 1979) (periodic payments by VA to

widow in lieu of lifetime disability benefits is collateral source); O'Keefe v. U.S., 490 F. Supp. 79 (W.D. Okla. 1980) (disability benefits in excess of retirement can be deducted). The parties may not attempt to recharacterize VA benefits in settlement agreements. Welborn v. U.S., 736 F. Supp. 1070 (D. Kan. 1990) (settlement agreement cannot affect terms of VA pension which is determined by 38 CFR § 3.27(a)). However, there is no offset if the award is for a different injury. Poirier v. U.S., 745 F. Supp. 22 (D. Me. 1990) (cannot deduct VA disability pension when award is based on medical malpractice injury when a different injury); Powers v. U.S., 589 F. Supp. 1084 (D. Conn. 1984); Christopher v. U.S., 237 F. Supp. 787 (E.D. Pa. 1965).

h. CHAMPUS Benefits. For a description of CHAMPUS benefits, see Barnett v. Weinberger, 818 F.2d 953 (D.C. Cir. 1987) (CHAMPUS covers care which can only be obtained in hospital, even though domiciliary in nature). CHAMPUS benefits already paid are not a collateral source because they are paid out of general revenues. Mays v. U.S., 806 F.2d 976 (10th Cir. 1986), cert. denied, 482 U.S. 913 (1987); Washington v. U.S., Civ. # 83-2332-RS (C.D. Cal. 1990). See also MacDonald v. U.S., 900 F. Supp. 483 (M.D. Ga. 1995) (CHAMPUS benefits are not a collateral source, since claimant did not make a monetary contribution to earn the benefit). Accord Mooney v. U.S., 619 F. Supp. 1525 (D.N.H. 1985). But see Murphy v. U.S., 836 F. Supp. 350 (E.D. Va. 1993) (CHAMPUS benefits are collateral source in claim by dependent as spouse earned them as compensation for his service). However, courts disagree on the proper characterization of CHAMPUS benefits under state law. Ganley v. U.S., 878 F.2d 1351 (11th Cir. 1989) (under Florida law, past medicals covered by insurance can only be deducted from that portion of award); Kornegay v. U.S., 929 F. Supp. 219 (E.D. Va. 1996) (CHAMPUS benefits are not collateral source under Va. Law). Accord Diaz v. U.S., 655 F. Supp. 411 (E.D. Va. 1987). Contra Murphy v. U.S., 836 F. Supp. 350 (E.D. Va. 1993) (which holds CHAMPUS benefits are part of service members' compensation and therefore collateral source). The Supreme Court has ruled that future CHAMPUS benefits deductiblity on state law. Molzof v. U.S., 502 U.S. 301, 112 S.Ct. 711 (1992) (future medical expenses can be collateral source depending upon state law--however, medical care already recovered at U.S. expense is deductible--on appeal after remand, 7th Circuit holds, Molzof v. U.S., 6 F.3d 461 (7th Cir. 1993), that future DVA care is a collateral source under Wisconsin law) See also Reilly v. U.S., 863 F.2d 149 (1st Cir. 1988) (future CHAMPUS benefits not deductible); Edwards v. U.S., Civ. #Y-86-3695 (D. Md. 1988) ($100,000 to terminal cancer patient being currently treated by Army as uncertain whether CHAMPUS would reimburse

costs). Kirkland v. U.S., 1998WL895658 (N.D. Ill.), $14,654.56 ordered to be deducted from prior award of $275,000 as it represents CHAMPUS bill paid by U.S. from federal treasury funds.

i. PIP Benefits. PIP benefits may be barred from being paid twice by statute and thus not a collateral source. Callaway v. Callaway, Civ. #84-410 (D.N.J. 1985) (interpreting N.J.S.A. 39:6A-12).

j. State Statutes. Bar to collateral source may be found in State law. Crowe v. Wigglesworth, 623 F. Supp. 699 (D. Kan. 1985) (Kansas bars certain special costs, e.g., medical bills already covered in medical malpractice cases); Callaway v. U.S., Civ. #84-410 (D.N.J. 1985) (New Jersey bars payment of bills covered by PIP); In re Air Crash Disaster near Cerritas, Cal., 982 F.2d 1271 (9th Cir. 1992) (funeral expenses paid by airline are not collateral source. But see Danowski v. U.S., 924 F. Supp. 661 (D.N.J. 1996) (payment of ERISA medical bills are not prohibited by N.J. Collateral Source Rule (N.J. Stat. Ann. 2A:15-97) which prohibits double recovery).

11. Mitigation of Damages. Duty on claimant to mitigate damages, e.g., by submitting to operation. Stark v. Shell Oil Co., 312 F. Supp. 145 (N.D. Miss. 1970); Wright v. Standard Oil Co. Inc., 470 F.2d 1280 (5th Cir. 1972). See also Toledo Peoria & Western Ry. v. Metro Waste-System, 59 F.3d 637 (7th Cir. 1995) (railroad is entitled to both $94,000 for unsuccessful repairs and replacement value as law requires mitigation of damages). The duty to mitigate damages does not violate the First Amendment. Munn v. Algee, 924 F.2d 568 (5th Cir. 1991) (Jehovah Witness accident victim dies after failure to accept transfusion--failure to mitigate not violative of 1st Amendment); Burns v. Algee, 730 F. Supp. 21 (N.D. Miss. 1990) (death due to refusal to accept transfusion due to religious belief--no recovery for wrongful death). Risk of operation must be balanced against potential gain. Fruge v. Damson Drilling Co., 423 F. Supp. 1276 (W.D. La. 1976). If reasonably prudent person would submit to operation, then those damages operation would alleviate not recoverable. Verrett v. McDonough Marine Svc., 705 F.2d 1437 (5th Cir. 1983) (lumbar laminectomy would alleviate pain, but not necessarily restore function--recovery allowed for future lost earnings). See also); Salas v. U.S., 974. F.Supp 202 (W.D.N.Y. 1997) (reusal to take three psychiatric drugs does not constitute a failure to mitigate); Williams v. Rene, 886 F. Supp. 1214 (D.V.I. 1995) (no requirement for man with back injury to undergo surgery for two bulging discs as only 80% chance of success); Cline v. U.S., 270 F. Supp. 247 (S.D. Fla. 1967).

12. Follow Medical Orders. Plaintiff must follow medical orders or timely seek treatment or suffer deduction. Wyatt v. U.S., 939 F. Supp. 1402 (E.D. Mo. 1996) (failure to use pressure cushion on trip by paraplegic results in hospitalization for pressure sores where he continues to smoke--10 % comparative negligence); Austin v. U.S., Civ. # CIV-92-264-S (E.D. Okla., 23 Dec. 1992) (parents are responsible for pneumonia death by failing to return child for 2 days); Parkins v. U.S., 834 F. Supp. 569 (D. Conn. 1993) (refusal to seek earlier treatment results in denial of wrongful death suit); Kilburn v. U.S., Civ. # 90-179 (E.D. Ky. 1990) (duty to seek dental follow-up care to lessen risk of radiation injury to teeth); Hunt v. U.S., Civ. # EP-89-CA-273-B (W.D. Tex. 1991) (patient fails to autoinflate ear as ordered following stapedectomy--U.S. not liable for punctured ear drum); Lovejoy v. U.S., Civ. # 89-0039-L(CS) (W.D. Ky. 1991) (15 percent deduction for failing to seek follow-up in breast cancer case despite several explicit instructions, rescheduling and offering of transportation); Shelton v. U.S., 804 F. Supp. 1147 (E.D. Mo. 1992) (50% deducted from award for failure to follow medical orders); Norton v. U.S., Civ. # SA-91-CA-241 (W.D. Tex. 1992) (30% deducted from award for failure to follow medical orders); Brazil v. U.S., 484 F. Supp. 986 (N.D. Ala. 1979); Smith v. Perlmutter, 496 N.E.2d 358 (Ill. App. 1986) (failure to seek attention for severe chest pains); Grippe v. Momtazee, 705 S.W.2d 551 (Mo. App. 1986) (failure to return for follow-up exam re breast cancer); Tenney v. Bedell, 624 F. Supp. 305 (S.D.N.Y. 1985) (failure to show for post-op follow-up); Lebrecht v. Tuli, 473 N.E.2d 1322 (Ill. App. 1985) (noncompliant patient with disc problem); Gumper v. Bach, 474 So.2d 420 (Fla. App. 1985) (failure to seek follow-up for pain after root canal); Shultz v. Rice, 809 F.2d 643 (10th Cir. 1986) (failure to seek advice re progesterone injections); Tisdale v. Johnson, 339 S.E.2d 764 (Ga. App. 1986) (failure to notify physician of side effects of Thorazine). Contra Clark v. Hoerner, 525 A.2d 377 (Pa. 1987) (failure to seek treatment for 12 hours after spitting up blood); Stager v. Schneider, 494 A.2d 1307 (D.C. 1985) (failure to inquire re results of cancer test); Owens v. Stokoe, 485 N.E.2d 537 (Ill. App. 1985) (noncompliant dental patient); Norman v. Mandarin Emergency Care Center Inc., 490 So.2d 76 (Fla. App. 1986) (patient injured on the job failed to seek follow-up emergency care); Barenbrugge v. Rich, 490 N.E.2d 1368 (Ill. App. 1986) (delay in notifying physician of change in condition); Esfandiari v. U.S., 810 F. Supp. 1 (D.D.C. 1992) (failure to return for treatment is not burden of patient where told by one physician that radiation is of no benefit in prostate cancer); Severn v. U.S., Civ. # 93-00781HG (D. Haw., May 30, 1995) (failure to seek hysteroscopy for Asherman's Syndrome when recommended in 1992 does not effect award, even though treatment was delayed until 1995). Glover v. U.S., 1998 WL 887077 (N.D. Ill.) plaintiff is

40 percent negligent for failure to report to opthalmologist in a timely manner as instructed by ER doctor.

13. Loss of Use.

a. State Law. Loss of use damages allowable only where permitted by state law. Executive Jet Aviation Inc. v. U.S., 507 F.2d 508 (6th Cir. 1974) (loss of an airplane); Atlantic Aviation Corp. v. U.S., 456 F. Supp. 121 (D. Del. 1978) (loss of tractor-trailer).

b. Measure of Damages. Measure of damages is time needed to repair or replace. American Tel. and Tel. Co. v. Connecticut Light & Power Co., 470 F. Supp. 105 (D. Conn. 1979) (loss of telephone cable); U.S. v. Hatahley, 257 F.2d 920 (10th Cir. 1958) (loss of horses); Russell v. U.S., 113 F. Supp. 353 (M.D. Pa. 1953) (loss of house); U.S. v. Sutro, 235 F.2d 499 (9th Cir. 1956) (loss of rental value); Lightenburger v. U.S., 298 F. Supp. 813 (C.D. Cal. 1969) (rental of substitute planes); Maurer v. U.S., 219 F. Supp. 253 (E.D. Wis. 1963) (loss of truck). See also Koninklijke Luchtvaart Maatschaapij v. United Tech., 610 F.2d 1052 (2d Cir. 1979) (proof of financial loss not necessary, only loss of right to use); Kuwait Airways Corp. v. Ogden Allied Aviation Service, 726 F. Supp. 1389 (E.D.N.Y. 1989) (good discussion concerning when replacement vehicle is available). Loss of use damages do not include time to get sufficient funds to replace or repair. Cuddy v. U.S., 490 F. Supp. 390 (D. Mont. 1980); Southern Pacific Transportation Co. v. U.S., 471 F. Supp. 1186 (E.D. Cal. 1979) (replacement of boxcars).

14. Lost Earnings.

a. Lost Wages. A person must work if able after their injury. Margreiter v. New Hotel Monteleone, 509 F. Supp. 264 (E.D. La. 1979). Proof of lost wages should be supported by more than being absent from work, e.g., medical testimony. Taylor v. Pre-Fab Transit Co., 616 F.2d 374 (8th Cir. 1980). See also Reising v. U.S., 60 F.3d 1241 (7th Cir. 1995) (failure of proof of future lost profits where 56 year old insurance broker injured back in collision, but continued to work); Byrd v. U.S., 945 F. Supp. 1073 (S. D. Miss. 1996) (failure of proof where disability is related to delayed back injury, although Alabama law permits loss of earnings to be based on percentage of disability); Lariscy v. U.S., 655 F. Supp. 1053 (D.D.C. 1987) (no future earning loss where injured party suffered only headaches and fear of driving). Of course, the trier of fact is free to reject such testimony. Leefe v. Air Logistics Inc., 876 F.2d 409 (5th Cir. 1989) (rejects economists testimony and awards no future

lost earnings); Edwards v. U.S., 672 F. Supp. 910 (E.D. Va. 1987) (testimony of rehabilitation counselor rejected as physician testified no permanent physical disability. May not be speculative. Mass. Bonding & Ins. Co. v. U.S., 352 U.S. 128 (1956). However, where the testimony supports the claimed damages, the award can be quite high. Tiffany v. U.S., 726 F. Supp. 129 (W.D. Va. 1989) ($1.4 million for attorney); Groves v. U.S., 778 F. Supp. 54 (D.D.C. 1991) ($4.6 million for lost earnings discounted by 10% for speculative nature of future earnings resulting in award of $1.2 million for death of 29-year-old TV producer); Muensterman v. U.S., 787 F. Supp. 499 (D. Md. 1992) ($1.8 million for loss of earnings in brain damage child case); Ferrarelli v. U.S., Civ. # CV-90-4478 (JMA) (E.D.N.Y. 1992) ($1 million lost earnings for 34-year-old construction worker earning over $60,000 a year due to deducting collateral source as required by N.Y. law); Sumner v. U.S., 794 F. Supp. 1358 (M.D. Tenn. 1992) ($1.67 million lost earnings for unemployed 18-year-old male); In re Air Crash Disaster at Lockerbie, 887 F. Supp. 71 (E.D.N.Y. 1995) ($9,000,000 for financial loss in death of 39 year old VP of British Petroleum). In a death case, lost wages are measured by survivor's, not decedent's, life expectancy, if survivor's life expectancy is shorter, as determined by survivor's state of health. McCluskey v. U.S., 562 F. Supp. 515 (S.D.N.Y. 1983).

b. Incapacitated Claimant. In the case of incapacitated claimant who is awarded medical expenses and future lost wages, a determination should be made as to whether the awards are duplicative, e.g., does the medical expense award cover living expenses. Flannery for Flannery v. U.S., 718 F.2d 108 (4th Cir. 1983).

c. Loss of Inheritance. See, e.g., Marks v. Pan American World Airways Inc., 591 F. Supp. 827 (E.D. La. 1984), aff'd, 785 F.2d 539 (5th Cir. 1986) (cannot be speculative, depends on saving and spending habits of decedent--sets aside $2 million injury award--cites numerous cases-upheld on appeal); Weil v. Seltzer, 873 F.2d 1453 (D.C. Cir. 1989) (loss of passive earnings must be based on decedent's contribution--cites Vesey v. U.S., 626 F.2d 627 (9th Cir. 1980)); Douglas v. Delta Air Lines., 897 F.2d 1336 (5th Cir. 1990) (not entitled to present value of entire estate, but only portion lost due to decedent's adroit management).

d. Lost Profits. Lost business profits are not lost earnings unless shown to result from injury. Reising v. U.S., 60 F.3d 1241 (7th Cir. 1995) (failure of proof of future lost profits where 56 year old insurance broker

injured back in collision, but continued to work); Metz v. United Tech., 754 F.2d 63 (2d Cir. 1985); Midwest Knitting Mills Inc. v. U.S., 950 F.2d 1225 (7th Cir. 1991) (lost profits not payable in absence of personal injury for tort of negligent supervision). See also Schuler v. U.S., 675 F. Supp. 1088 (W.D. Mich. 1987) (excellent discussion of loss to partnership due to death).

e. Lost Wages for Comatose Persons. Where comatose person awarded total care costs, no additional award for lost wages as is covered by total care costs. Corrigan v. U.S., 609 F. Supp. 720 (E.D. Va. 1985); Nemmers v. U.S., 612 F. Supp. 928 (C.D. Ill. 1985) (deducts future care costs from lost wages).

f. Present Value. Lost wages must be reduced to present value in both death and personal injury cases. Burke v. U.S., 605 F. Supp. 981 (D. Md. 1985); McCrann v. U.S. Lines Inc., 803 F.2d 771 (2d Cir. 1986) (using New York law as set forth in Doca v. Marina Mercante Nicaraguense, S.A., 634 F.2d 30 (2d Cir. 1980) (applies two percent discount rate to future lost earnings); Trevino v. U.S., 804 F.2d 1512 (9th Cir. 1986) (disallows minus two percent discount rate in case of brain damaged baby and suggests one to three percent rate); Bowen v. U.S., Civ. # CV-86-0382 (CBM) (D. Haw. 1987) ($325,000 in future lost earnings for lung cancer death of 61-year-old retired at 60 after deducting for personal consumption and taxes and discounted to present value); Colleen v. U.S., 843 F.2d 329 (9th Cir. 1987) (zero discount rate must be based on credible testimony).

g. Wage Loss Due to Care of Family Member. Does not apply to loss due to care of injured child. Hota NME Hospitals Inc., 690 F. Supp. 1539 (E.D. La. 1988) (no wage loss for persons not directly injured).

h. Enhancement by Future Training. Waldorf v. Shuta, 896 F.2d 723 (3rd Cir. 1990) (no evidence that 24-year-old high school dropout was going to train to be an attorney--award for loss of earnings as attorney improper--cites other cases).

i. Duty to Mitigate Lost Earnings. Rainey v. Honeywell, Inc., 540 F.2d 932 (8th Cir. 1976); Heckman v. Federal Press Co., 587 F.2d 612 (3d Cir. 1978); Thomson v. National RR Passenger Corp., 621 F.2d 814 (6th Cir. 1980). However, mitigation of damages does not require a plaintiff to alter his/her career. Walmsey v. Brady, 793 F. Supp. 392 (D.R.I. 1992) (veterinarian not required to alter career in order to mitigate lost earning capacity--cites Draisma v. U.S., 492 F. Supp. 1317 (C.D. Mich. 1980)).

j. Loss of Earnings Versus Loss of Earning Capacity. See, e.g., Michels v. U.S., 815 F. Supp. 1244 (S.D. Iowa 1993) (unemployed college student awarded $190,000 for loss of earning capacity as a result of leg injury).

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

a. Treasury Bonds. Money invested in U.S. Treasury bond carries 10-11 percent interest and greater than rate of inflation. Gaston v. Aquaslide 'N' Dive Corp., 487 F. Supp. 16 (E.D. Tenn. 1980).

b. Discount Rate. Object of discounting lost future wages is to give plantiff an amount of money which if invested safely will grow to a sum equal to those wages. O'Shea v. Riverway Towing, 677 F.2d 1194 (7th Cir. 1982) (good discussion of relationship between inflation and discount rate). Five percent discount amply covers present inflation rate. Espana v. U.S., 616 F.2d 41 (2d Cir. 1980). See also Roselli v. Hellenic Lines Ltd., 524 F. Supp. 2 (S.D.N.Y. 1980) (Six percent discount permitted on future wages and future pain and suffering). Where future earnings are speculative, discount rate should be higher. Douglass v. Hustler Magazine Inc., 769 F.2d 1128 (7th Cir. 1985).

c. Inflation Factor Applicability. Inflation factor may be applied to future damages, but not for past damages. Foskey v. U.S., 490 F. Supp. 1047 (D.R.I. 1979). Other inflation cases: Williams v. U.S., 435 F.2d 804 (1st Cir. 1970); Vizzini v. Ford Motor Company, 569 F.2d 754 (3d Cir. 1977); Feldman v. Allegheny Airlines Inc., 524 F.2d 384 (2d Cir. 1975); Hoffman v. Sterling Drug Inc., 485 F.2d 132 (3d Cir. 1973); Magill v. Westinghouse Electric Corp., 464 F.2d 294 (3d Cir. 1972); Byrd v. Heinrich Schmidt Reederei, 688 F.2d 324 (5th Cir. 1982); Culver v. Slater Boat Co., 688 F.2d 280 (5th Cir. 1982), rev'd, 722 F.2d 114 (5th Cir. 1983), cert. denied,467 U.S. 1252 (1984) (holds only one rule appropriate on inflation as otherwise too complicated--applies net discount rule (1 to 3 percent)); Harden v. U.S., 688 F.2d 1025 (5th Cir. 1982) (allows inflation, but uses 5 percent discount rate under Georgia law on future earnings); Bach v. Penn Central Transportation Co., 502 F.2d 1117 (6th Cir. 1974); Morvant v. Construction Aggregates Corp., 570 F.2d 626 (6th Cir. 1978); Drayton v. Jiffee Chemical Corp., 591 F.2d 352 (6th Cir. 1978). Riha v. Jasper Blackburn Corp., 516 F.2d 840 (8th Cir. 1975); Sauers v. Alaska Barge & Trans. Inc., 600 F.2d 238 (9th Cir. 1979); U.S. v. English, 521 F.2d 63 (9th Cir. 1975); Shaw v. U.S., 741 F.2d 1202 (9th Cir. 1984);

Deweese v. U.S., 576 F.2d 802 (10th Cir. 1978); Steckler v. U.S., 549 F.2d 1372 (10th Cir. 1977); Draisma v. U.S., 492 F. Supp. 1317 (W.D. Mich. 1980); Huddell v. Levin, 395 F. Supp. 64 (D.N.J. 1975), rev'd other grounds, 537 F.2d 726 (3d Cir. 1976); Beaulieu v. Elliott, 434 P.2d 665 (Alaska 1967); Brooks v. U.S., 273 F. Supp. 619 (D.S.C. 1967); Brown v. U.S., 615 F. Supp. 391 (D. Mass. 1985) (uses 1.5 percent productivity and 2 percent discount in SIAA suit); Meader by and through Long v. U.S., 881 F.2d 1056 (11th Cir. 1991) (application of Culver v. Slater Boat, supra, below the market discount rate is not mandatory under Georgia law where total offset rule was followed for future costs of care); Brown v. U.S., 615 F. Supp. 391 (D. Mass. 1985) (uses 1.5 percent productivity and 2 percent discount); Graves v. U.S., 517 F. Supp. 95 (D.D.C. 1981) (four percent discount permitted); Pretre v. U.S., 531 F. Supp. 931 (E.D. Mo. 1981) (three percent authorized); Matter of Adventure Bound Sport Inc., 858 F. Supp. 1192 (S.D. Ga. 1994) (In DOSHA case, judge uses 6% inflation and 5% discount and says it is the discretionary case-by-case method found in Pfeifer v. Jones & Laughlin Steel Corp., 462 U.S.523, 536-37(1983)).

d. Total Setoff. No reduction to present value as inflation equals earnings on investments. Presently only Alaska and Pennsylvania have so held. See, e.g., Hollinger v. U.S., 651 F.2d 636 (9th Cir. 1981) (approving language in Beaulieu v. Elliott, 434 P.2d 665 (Alaska 1967)); Kaczkowski v. Bolubasz, 421 A.2d 1027 (Pa. 1980) (Pennsylvania adopts total offset rule—future inflation will equal future interest rates); Polischeck v. U.S., 535 F. Supp. 1261 (E.D. Pa. 1982); Barnes v. U.S., 685 F.2d 66 (3d Cir. 1982) (Pennsylvania law). Use of total setoff not mandatory in Federal Courts, even in states which have such law, e.g., Pennsylvania. Monessen Southwestern Railway Co. v. Morgan, 486 U.S. 330, 108 S.Ct. 1837 (1988) (Pennsylvania zero discount rule does not automatically apply in FELA case); Jones v. Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 103 S.Ct. 2541 (1983). See also Scott v. U.S., 884 F.2d 1280 (9th Cir. 1989) (rejects automatic application of Alaska's total offset rule in absence of economic testimony); Funston v. U.S., 513 F. Supp. 1000 (M.D. Pa. 1981); Kuntz v. Windjammer "Barefoot" Cruises Ltd., 573 F. Supp. 1277 (W.D. Pa. 1983). Cf. Kirckgassor v. U.S., 958 F.2d 158 (6th Cir. 1992) (use of 1-3 percent discount rate rather than 5 percent prescribed by Michigan law is upheld); McCrann v. U.S. Lines Inc., 803 F.2d 771 (2d Cir. 1986) (two percent discount rate is acceptable in face of economist's testimony that zero rate should be used); Dearing v. U.S., 835 F.2d 226 (9th Cir. 1987) (zero discount may not be used as compromise when no testimony presented). McCarthy v. U.S., 870 F.2d 1499 (9th Cir. 1989) (uses real

interest rate). Nonetheless, the court may follow the state rule. Wilson v. U.S., 613 F. Supp. 1322 (E.D.N.Y. 1985) (states total setoff rule adopted in Metz v. United Tech., 754 F.2d 63 (2d Cir. 1985)); Childs v. U.S., 923 F. Supp. 1570 (S.D. Ga. 1996) (by using Georgia wrongful death statutory discount rate of 5% and inflation of 6%--arrives at award of $1,083,000 for death of unborn fetus). However, an inflation factor may be used in computing a damage award only if general inflationary trends linked to specific components of income. Vesey v. U.S., 626 F.2d 627 (9th Cir. 1980).

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

f. Discount Applicable to Pain and Suffering

(1) No - Taylor v. Denver & Rio Grande Western Railroad Co., 438 F.2d 351 (10th Cir. 1971); U.S. v. Harue Hayashi, 282 F.2d 599 (9th Cir. 1960); Texas & Pacific Railway Co. v. Buckles, 232 F.2d 257 (5th Cir.), cert. denied, 351 U.S. 984 (1956); Chicago & NW Ry. v. Candler, 283 F.2d 881 (8th Cir. 1922); Braddock v. Seaboard Air Lines Railroad Co., 80 So.2d 662 (Fla. 1955); O'Hara v. City of Scranton, 19 A.2d 114 (Pa. 1941); Parrott v. Edwards, 148 S.E.2d 175 (Ga. 1966); Missouri Pacific Railroad Co. v. Handley, 341 S.W.2d 203 (Tex. 1960); Hall v. Chicago & N.W. Railway Co., 110 N.E.2d 654 (Ill 1953); Friedman v. C & S Car Service, 527 A.2d 871 (N.J. 1987); Rhodan v. U.S., 754 F. Supp. 76 (D.S.C. 1991) (up to discretion of trier of fact).

(2) Yes - Chiarello v. Domencio Bus Services Inc., 542 F.2d 883 (2d Cir. 1976); Metz v. United Technologies Corp., 754 F.2d 63 (2d Cir. 1985); O'Brien v. Loeb, 201 N.W.2d 488 (Mich. 1924). Accord 1st of America Bank Mid-Michigan, N.A. v. U.S., 752 F. Supp. 764 (E.D. Mich. 1990) (follows Michigan rule). Estevez v. U.S., 1999 US Dist. Lexis 11567 (S.D.N.Y., 30 July 1999) discount future P & S to present value.

16. Pain and Suffering.

a. Past and Future Awards. Should be broken down between past and future award and adjusted for future earning power and inflation. Gretchen v. U.S., 618 F.2d 177 (2d Cir. 1980). See also Parkins v. U.S., 842 F. Supp. 617 (D. Conn. 1993) (damages for pain and suffering need not be reduced for predicted life expectancy had surgery been refused--not akin to such a reduction for future lost earnings).

b. Delays in Treatment. Should be limited to pain and suffering caused by negligent delay in treatment and not to condition itself. See Grant v. Brandt, 796 F.2d 351 (10th Cir. 1986) (medical bills over $15,000--total award of $15,000 upheld--six month delay in symptoms following collision); Isaac v. U.S., 490 F. Supp. 613 (S.D.N.Y. 1979).

c. Occurrence of Injury. Injury does not necessarily occur where car forced off road by eighteen wheeler and damage moderate. Jury finding of no injury upheld. Miller v. Borden Inc., 664 F.2d 543 (5th Cir. 1981).

d. Pre-Impact Pain and Suffering. Pre-impact pain and suffering not recoverable in air crash under impact rule. In re Air Crash Disaster Near Chicago, Illinois on 25 May 1979, 507 F. Supp. 21 (N.D. Ill. 1980) (rejects pre-impact pain and suffering in absence of physical injury); Fogarty v. Campbell 66 Express Inc., 640 F. Supp. 953 (D. Kan. 1986)(same). Contra Shu-Tao Lin v. McDonnell Douglas Corp., 742 F.2d 45 (2d Cir. 1984) (allows $10,000); Haley v. Pan American World Airways Inc., 746 F.2d 311 (5th Cir. 1984) (allows $15,000); Pregeant v. Pan American World Airways Inc., 762 F.2d 1245 (5th Cir. 1985) ($20,000 for two to three seconds pre-impact).

e. Severe Injuries. Severe injuries should not mandate inflationary general damages. Wright v. U.S., 507 F. Supp. 147 (E.D. La. 1981) (compares various awards). But see Siverson v. U.S., 710 F.2d 557 (9th Cir. 1983)($1 million to 62-year-old completely paralyzed--dissent says should be cut in half as short life expectancy).

f. Comparative Awards. Krys v. Lufthansa German Airlines, 119 F.3d 1515 (11th Cir. 1997) ($1.8 million for 47 year old who suffered increased heart damage due to refusal of pilot to land early); Eiland v. Westinghouse Elec. Corp., 58 F.3d 176 (5th Cir. 1995) (in case of electrician extensively burned from arcing circuit breaker who returned to full-time employment within 21 months--$5,000,000 in non-economic damages reduced to $3,000,000); Salas v. U.S., 974. F.Supp 202 (W.D.N.Y. 1997) ($90,000 for pain and suffering where high school teacher is permanently work disabled from minor soft tissue accident); In Re Air Crash Disaster at Charlotte, N.C., 982 F. Supp. 1115 (D.S.C. 1997) ($550,000 for pain, suffering and disfigurement to flight attendant for third degree burns on 10-11% of body, plus $478,000 lost earnings); Tisdel v. Barber, 968 F. Supp. 957 (S.D.N.Y. 1997) ($25,000 verdict inadequate award for truck driver who slipped on ice and injured back where past medical expenses were $31,361.34 and no award made for pain); Elliott By And Through Elliott

v. U.S., 877 F. Supp. 1569 (M.D. Ga. 1992) (award of $2,500,000 in personal injury claim of semi-comatose quadriplegic); Consorti v. Armstrong World Industries, Inc., 64 F.3d 781 (2d Cir. 1995) (pain and suffering award reduced to $5 million in asbestos case cites numerous awards); Noble v. U.S., CIV. # CV-N-93-570-PHA (D. Nev., Aug. 15, 1995) (videotape taken surreptitiously shows claimant performing acts she testified she could not perform due to shoulder injury--$25,000 award of which $15,000 is for pain and suffering); Brannon v. U.S., Civ. # 94-30-B (E.D. Okla., June 14, 1995) ($673,845.99 award to 55 year old unemployed food service worker for broken ankle includes $524,000 for pain and suffering); Machesney v. Larry Bruni, M.D., P.C., 905 F. Supp. 1122 (D.D.C. 1995) ($4,100,000 award remitted to $2,100,000 for mental suffering where physician erroneously informed patient he was HIV positive); Stratis v. Eastern Air Lines Inc., 682 F.2d 406 (2d Cir. 1982); Ouachita National Bank v. Tosco Corp., 686 F.2d 1291 (8th Cir. 1982) (judge reduces jury award of $2,215,320.60 for nursing service to $228,082.25 and $500,000 loss of consortium to $250,000); Shaw v. U.S., 741 F.2d 1202 (9th Cir. 1984) (where $4,700,000 awarded for future medical expenses and home care and $4,600,000 for pain and suffering on appeal); Marks v. Mobil Oil Corp., 562 F. Supp. 759 (E.D. Pa. 1983) ($3,500,000 for pain and suffering to college student with spastic paraplegia and global brain damage and awareness of his plight); Blevins v. Cessna Aircraft Co., 728 F.2d 1576 (10th Cir. 1984) ($1.3 million pain and suffering for broken ribs and cartilage--not excessive); Lucas v. U.S., Civ. #EP-81-CA-289 (W.D. Tex. 1984) ($1.5 million for pain and suffering to minor paraplegic); Robbins v. U.S., 593 F. Supp. 634 (E.D. Mo. 1984) (registered nurse undergoes above-the-knee amputation and retains badly damaged other leg following vehicle accident--lost wages $13,000 and medicals $63,000 receives $1,750,000 or about $1,700,000 pain and suffering--contrast with Guerry v. U.S., Civ. # 84-C1V-2632 (PKL) or (1984 WL 1134) (S.D.N.Y. 1984), in which 76-year-old male in poor health is so badly burned he can no longer ambulate and receives $40,000 total award all for pain and suffering (case not appealed) and Duty v. U.S. Dept. of Interior, 735 F.2d 1012 (6th Cir. 1984) (remanded for low damages, i.e., $17,517.80 (half for pain and suffering) for spinal fusion to adult female)); Dogan v. Hardy, 587 F. Supp. 967 (N.D. Miss. 1984) ($600,000 award to 85-year-old female for unspecified injuries which require custodial care); Haley v. Pan American World Airways Inc., 746 F.2d 311 (5th Cir. 1984) (reduces parent's award for mental anguish from $350,000 each to $200,000 (Louisiana law)); Wurdemann v. U.S., Civ. #82-Z-1639 (D. Colo. 1984) ($980,000 pain and suffering for rectal-vaginal fistula followed six surgeries); Gonzalez v. U.S.,

600 F. Supp. 1390 (W.D. Tex. 1985) ($250,000 pain and suffering for one-hour delay in diagnosing appendicitis); Dixon v. International Harvester Co., 754 F.2d 573 (5th Cir. 1985) ($2.8 million for loss of testicles, complete avulsion of femoral artery and vein, avulsion of skin on penis and abdomen to naval and severing of femoral nerve while pinned in tractor--not excessive); Dabney v. Montgomery Ward & Co. Inc., 761 F.2d 494 (8th Cir. 1985) ($2 million pain and suffering not excessive for second and third degree burns to 36 percent of upper body); Wells v. Ortho Pharmaceutical Corp., 615 F. Supp. 262 (N.D. Ga. 1985) ($3 million pain and suffering for birth defect from spermicide); Trevino v. U.S., 804 F.2d 1512 (9th Cir. 1986) ($2 million pain and suffering reduced to $1 million on appeal); Reilly v. U.S., 863 F.2d 149 (1st Cir. 1988) ($1 million for child brain damaged at birth); Moreno v. U.S., Civ. # 86-0555 (D. Haw. 1987) ($2 million for child brain damaged at birth); Zerangue v. Delta Towers Ltd., 820 F.2d 130 (5th Cir. 1987) (sexually assaulted four times after being forced into abandoned house--$228,000 reduced to $200,000); Brown v. McBro Planning and Dev. Co., 660 F. Supp. 1333 (D.V.I. 1987) (chipped patella in slip and fall--$1 million reduced to $200,000); Gumbs v. Pueblo International Inc., 823 F.2d 768 (3d Cir. 1987) (sprained coccyx in slip and fall, $900,000--reduced to $525,000 by trial judge--further reduced to $235,000); Couch v. St. Croix Marine Inc., 667 F. Supp. 223 (D.V.I. 1987) (broken wrist, dislocation left lurate to carpal bone--$400,000 reduced to $150,000); Kwasny v. U.S., 823 F.2d 194 (7th Cir. 1987) (perforated windpipe during operation, pre-death pain and suffering--$350,000 reduced to $175,000); Snead v. U.S., 595 F. Supp. 658 (D.D.C. 1984) (pre-death pain and suffering in 38-year-old female with lung cancer--$773,000); Williams v. Martin Marietta Alumina Inc., 817 F.2d 1030 (3d Cir. 1987) ($550,000 for soft tissue back injury, $330,000 for pain and suffering reduced to $100,000--cites other awards); Edwards v. U.S., Civ. # Y-86-3695 (D. Md. 1988) ($500,000 to breast cancer victim who was terminal at time of trial); Cardillo v. U.S., 622 F. Supp. 1331 (D. Conn. 1984), (swine flu death after six years of slowly progressing polyneuritis--$5 million); Villar v. Wilco Truck Rentals, 627 F. Supp. 389 (M.D. La. 1986) ($1 million verdict clearly excessive for concussion and traumatic amputation of arm); Laaperi v. Sears, Roebuck & Co. Inc., 787 F.2d 726 (1st Cir. 1986) ($750,000 verdict excessive for 1st and 2d degree burns over 12 percent of body of 13-year-old girl); Hope v. Seahorse Inc., 651 F. Supp. 976 (S.D. Tex. 1986) ($1 million for lung cancer death of 41-year-old recently married father of small child); De Centeno v. Gulf Fleet Crews Inc., 798 F.2d 138 (5th Cir. 1986) ($776,000 verdict of which $459,000 was pain and suffering for failure to treat diabetes resulting in

death remanded as excessive); Zeno v. Great Atlantic & Pacific Tea Co., 803 F.2d 178 (5th Cir. 1986) ($95,000 verdict with medicals of $807 for two fractures--not excessive, but with strong dissent); Neyer v. U.S., 845 F.2d 641 (6th Cir. 1988) ($1 million pain and suffering for broken leg and 12% burns--not excessive, but cannot recover for both loss of consortium and loss of services); Nairn v. National Railroad Passenger Corp., 837 F.2d 565 (2d Cir. 1988) ($400,000 pain and suffering for 15% back--excessive, cites other cases); Sharpe v. City of Lewisburg, Tennessee, 677 F. Supp. 1362 (M.D. Tenn. 1988) ($100,000 pain and suffering for man who lived only a few minutes after shooting--excessive); Miller v. U.S., 901 F.2d 894 (10th Cir. 1990) ($1.5 million pain and suffering for 17-year-old coma victim); McCarthy v. U.S., 870 F.2d 1499 (9th Cir. 1989) ($2 million reduced to $1 million); Washington v. U.S., Civ. # 83-2332-RS (C.D. Cal. 1990) ($2 million for third degree burns to child); Larson v. U.S., Civ. # EP-85-CA-304-H (W.D. Tex. 1990) ($1.5 million to scoliosis quad); Heitzenrater v. U.S., 930 F.2d 33 (table), 1991 WL 35198 (10th Cir. 1991) ($2 million reduced to $1 million); O'Bryan v. U.S., Civ. # 89-2374-2 (D. Mass. 1991) ($160,000 for pain caused by ruptured ectopic pregnancy); Wade v. U.S., Civ. # 83-00226-HMF (D. Haw. 1991) ($500,000 for pain caused by stillborn twins--no wrongful death for stillbirth in Hawaii); Belardinelli v. Carroll, 773 F. Supp. 657 (D. Del 1991) ($500,000 to injured 70-year-old male and $250,000 to wife for loss of consortium for broken ankle and patella remitted to $100,000 and $50,000 respectively); Toole v. McClintock, 778 F. Supp. 1543 (M.D. Ala. 1991) (award of $250,000 reduced to $150,000 in silicone implant case); Musick v. U.S., 781 F. Supp. 445 (W.D. Va. 1991) ($120,000 for bodily injury and $100,000 for pain and suffering in head injury case); Maylie v. National RR Passenger Corp., 791 F. Supp. 477 (E.D. Pa. 1992) ($2 million pain and suffering award reduced to $550,000 for back injury requiring two surgeries and capable of light work); Doe v. U.S., 976 F.2d 1070 (7th Cir. 1992) ($25,000 award to 2-year-old sexually abused in USAF day care center is adequate); Robison v. U.S., Civ. # CIV-91-1339-C (W.D. Okla. 1992) ($200,000 award including disfigurement in jaw realignment surgery resulting in doubtful reflex sympathic dystrophy); Scala v. Moore McCormack Lines, 965 F.2d 680 (2d Cir. 1993) ($1.5 million reduced to $750,000 for torn up knee and ruptured disc in case of 33-year-old stevedore); Schneider v. National RR Passenger Corp., 987 F.2d 132 (2d Cir. 1993) ($1,250,000 not excessive for post traumatic stress disorder following brutal attack on railroad ticket agent); Stutzman v. CRST, Inc., 997 F.2d 291 (7th Cir. 1993) ($600,000 pain and suffering for traumatic aggravation of congenital spondylolisthesis in low back); Sales v. Republic of Uganda, 828 F. Supp. 1032

(S.D.N.Y. 1993) ($1.2 million award for 32-year-old construction worker who crushed both heels in fall from ladder not excessive); Datskow v. Teledyne Continental Motors, 826 F. Supp. 677 (W.D.N.Y. 1993) ($107,000,000 pain and suffering of 4 decedents who died within minutes of air crash); Allred v. Maersk Line, LTD, 826 F. Supp. 965 (E.D. Va. 1993) (fall from ladder results in broken arm and 20-30 disability in arm--$1 million award with no specials reduced to $500,000); Sheehan v. U.S., 822 F. Supp. 13 (D.D.C. 1993) ($15,000 fractured orbit of eye resulting in effect on vision and memory); Withrow v. Cornwell, 845 F. Supp. 784 (D. Kan. 1994) (no award for pain and suffering despite award of $734.00 for some of medical bills); Anthony v. G.M.D. Airline Services Inc., 17 F.2d 490 (1st Cir. 1994) (remittur order where pilot received $566,765 for pain and suffering and medical bills totaled $1,385); Hodgen v. Forest Oil Corp., 862 F. Supp. 1552 (W.D. La. 1994) (paraplegic oil worker awarded $1.5 million general damages); Foster v. U.S., 858 F. Supp. 1157 (M.D. Fla. 1994) ($10 awarded to woman who bends to retrieve mail from mailbox as postal truck pulls away and strikes her head); Estate of Zarif by Jones v. Korean Airlines, 836 F. Supp. 1340 (E.D. Mich. 1993) ($1 million pre-death pain and suffering KAL Flight 007 crash); Hamilton v. U.S., Civ. #93-150-Civ-J-20 (M.D. Fla., Sept. 2, 1994) ($3.5 million to contract employees for 2nd and 3rd degree electrical burns over 66 percent of body surface); Taylor v. National RR Corp. Passenger, 868 F. Supp. 479 (E.D.N.Y. 1994) ($275,000 reduced to $175,000 for soft tissue injury resulting from escalator fall to 75 year old with extensive preexisting problems--cites numerous cases); Smith v. U.S. Dept. of Veterans Affairs, 865 F. Supp. 433 (N.D. Ohio 1994) ($1,000 per day for 12.6 year life expectancy totaling $4.6 million in case for failure to diagnose spinal abscess in VA mental patient who became a quadriplegic); Gautreax v. Scarlock Marine, Inc., 84 F.3d 776 (5th Cir. 1996) ($300,000 for pain and suffering for loss of eyeball is not excessive); Capella v. Moresca, 921 F. Supp. 84 (D. Conn. 1995) (back injury due to police brutality remitted from $180,000 to $150,000 based on comparative awards); White v. WalMart Stores, Inc., 921 F. Supp. 1046 (W.D.N.Y. 1996) ($1,000 for pain and suffering where plaintiff broke first metatarsel bone in foot is not excessively low); Davis v. U.S., 1996 WL 426421 (E.D. Mich.) (19 year old rear-seat passenger strikes both knees on front seat alleged torn loose in rear end collision--no non-economic damages permitted); Velasquez v. U.S., Civ. #95-00768 ACK (D. Haw., June 19, 1996) ($600,000 award for surgery that was too extensive and resulted in life of pain until suicide 10 years later); Adams v. U.S., 964 F. Supp. 510 (D. Mass. 1997) (award in soft tissue back claim limited to $26,625 by use of IME and neighbor testimony);

Pineda v. U.S., Civ. # 89-00239DAE (D. Haw., May 12, 1997), later proceedings, Civ. # 89-00239DAE (D. Haw., July 11, 1997) ($1,025,000 award based on Shaw v. U.S., 741 F.2d 1202 (9th Cir. 1984), Scott v. U.S., 884 F.2d 1280 (9th Cir. 1989), Trevino v. U.S., 804 F.2d 1512 (9th Cir. 1986) and Yako v. U.S., 891 F.2d 738 (9th Cir. 1989)); Garcia v. U.S., 1997 WL 51508 (N.D. Ill.) ($12,000 pain and suffering award to 1995 rearender who still had back pain at time of trial with $2,096 lost wages and $2,218 in medical expenses); Zuchowicz v. U.S., 140 F.3d 381 (2d Cir. 1998) ($900,000 for pain and suffering and loss of enjoyment to young woman who died 34.5 months after receiving drug overdose at Navy hospital); Wareing through Wareing v. U.S., 943 F. Supp. 1504 (S.D. Fla. 1996) ($1.5 million to brain damaged at birth 10 year old child who has 72 IQ and who can function socially at 10 year old level when adult); Cadassa v. U.S., 1996 WL 529723 (S.D.N.Y.) ($35,000 to 5 year old who suffered 1st and 2nd degree burns caused by being caught in machine); Simplicio v. U.S., Civ. # C-88-2349 EFL (N.D. Cal., 6 Dec. 1991) ($535,000 pain and suffering award out of $861,791.67 total award for extensives fractures caused by being crushed by U.S. vehicle); Green v. U.S., Civ. # HM79-1930 (D. Md., 4 Dec. 1980) ($6,000 for pain and suffering where wrong fallopian tube removed during tubal ligation, but no lost earnings awarded as none proven); Trembula v. U.S., No. 80-1034 (3rd Cir. 1980) ($61,840 award for death of 12 year old child of which $60,000 was for pain and suffering and the remainder for funeral expenses, since no pecuniary loss under N.J. wrongful death or survival acts); French v. U.S., Civ. # 85-1317-T (D. Kan., 6 July 1987) ($25,000 for severed vas defrens); Buice v. U.S., Civ. # 80-9-COL (M.D. Ga., 11 Dec. 1980) ($223,504.83 award, including $125,000 for pain and suffering, to truck driver involved in collision with Army truck and forced to endure 4 operations and ongoing physical therapy with signifigant reduction in employability) Hinojosa v. U.S., 1998WL57004 (N.D. Cal.) $150,000 pain and suffering for soft-tissue injury to neckw ith $26k in medical bills. In Re Asbestos Litigation, 986 F. Supp. 761 (S.D.N.Y. 1997) (awards of $2.2 to $2.4 million for predeath pain and suffering for shipyard worker's asbestos lung disease not excessive). Crilly v. U.S., 1998 WL 272176 (E.D. Pa.) ($125,000 award for thoracic outlet syndrome from Government-POV accident. Goldstein v. U.S., __F. Supp. __, 1998 WL 341023 (E.D.N.Y.) ($965,000 for multiple fractures including $235,000 for future medical costs. Nariddin v. U.S., Civ. # 2:96-1203-12 (D.S.C., 16 Apr. 98) ($1.5 million for pain and suffering and disfigurement for 2d or 3d degree burns to legs covering 8% of body surface of 17 month old child. Cone v. National Emergency Services, Civ. #98-257 (La. App. 3d Cir., 3 March 1999), 1999 La. App. Lexis 480 $5.5 award for loss of

remaining testicle due to failure to timely diagnose torsion; LaMarca v. U.S., 31 F. Supp. 2d 111 (E.D.N.Y. 1998), $375,000 for pain and suffering in wrongful death of 64-year-old male after four months hospitalization after fall from bed and broken hip, Konkel v. Bob Evans Farms, Inc., 165 F.3d 275 (4th Cir. 1999) $1 million award reduced to $25,000 where customer drank cleaning detergent in hot water poured by waitress; Smith v. K Mart Corp, 177 F.3d 18 (1st Cir. 1999) upholds $500,000 award to woman who was hit on head by falling 8.5 cooler and suffered soft-tissue injury with continuing serious sequelae but remits to $100,000, $250,000 award to husband who witnessed incident. Goldstein v. U.S., 9 F. Supp. 2d 173 (E.D.N.Y. 1998) fractures to knee, ankle, and humerus bring total award of $965,000 including $680,000 for P&S - decision contains numerous comparable awards for each fracture. Jackson v. U.S., civ. # A-96-Ca-491-AA (W.D. Tex., 20 Aug. 98) $2,247,280 for brachial plexus injury to newborn of which $1,950,000 is for general damages.

g. Loss of Enjoyment. For a complete discussion of meaning of loss of enjoyment, see McDougald v. Garber, 538 N.Y.S.2d 937 (Ct. App. 1989). A comatose claimant is entitled to damages for loss of enjoyment. Molzof v. U.S., 502 U.S. 301, 112 S.Ct. 711 (1992). See also Molzof v. U.S., Civ. # 88-C-9048 (W.D. Wis. 1992), rev'd on other grounds, 6 F.3d 461 (7th Cir. 1993) (on remand, award of $60,000); Zuchowicz v. U.S., 1996 WL 776585 (D. Conn.) ($550,000 award for loss of enjoyment in addition to $350,000 for pain and suffering in case of death of 31 year old mother who died 34.5 months after receiving drug overdose at Navy hospital). Prior to Mozlof, the general rule was that a loss of enjoyment award is dependent upon whether injured party has no loss of sense of enjoyment, otherwise, constitutes punitive damages. Flannery For Flannery v. U.S., 718 F.2d 108 (4th Cir. 1983)(injured party was unconscious). See also Nemmers v. U.S., 681 F. Supp. 567 (C.D. Ill. 1988) (limits recovery to $400,000 in view of limited comprehension). These prior cases are in accordance with general rule. Mariner v. Marsden, 610 P.2d 6 (Wyo. 1980); NOTE: 61 Geo. L.J. 1555-6. See also Corrigan v. U.S., 609 F. Supp. 720 (E.D. Va. 1985) (follows Flannery, since plaintiff not conscious). But see Rufino v. U.S., 829 F.2d 354 (2d Cir. 1987) (declines to follow Flannery--loss of enjoyment award for comatose patient not punitive--cites Klavity v. U.S., 584 F.2d 809 (6th Cir. 1978)); Yako v. U.S., 891 F.2d 739 (9th Cir. 1989) (Flannery argument again rejected).

h. Nature of Loss of Enjoyment of Life Damages. Loss of enjoyment of life is sometimes included as part of pain and suffering and is sometimes not a separate element. See,

e.g., Wright, supra; Frankel v. Heym, 466 F.2d 1226 (3d Cir. 1972); McNeill v. U.S., 519 F. Supp. 283 (D.S.C. 1981); Aretz v. U.S., 456 F. Supp. 397 (S.D. Ga. 1978); Tyminski v. U.S., 481 F.2d 257 (3d Cir. 1973); Green v. U.S., 530 F. Supp. 633 (E.D. Wis. 1982); Nemmers v. U.S., 612 F. Supp. 928 (C.D. Ill. 1985) (declines to award "quality of life" damages to damaged child). See also Corrigan v. U.S., 609 F. Supp. 720 (E.D. Va. 1985); Sherrod v. Berry, 629 F. Supp. 159 (N.D. Ill. 1985), aff'd, 827 F.2d 195 (7th Cir. 1987), on rehearing, 856 F.2d 802 (7th Cir. 1988); Brereton v. U.S., 973 F. Supp. 752 (E.D. Mich. 1997) (hedonic damages not recognizable in wrongful death case under Michigan law); Livingston v. U.S., 817 F. Supp. 601 (E.D.N.C. 1993) (loss of enjoyment not recoverable in wrongful death case under N.C. Law).

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

j. SIAA Cases. Federal common law includes pain and suffering in death case under SIAA case. Brown v. U.S., 615 F. Supp. 391 (D. Mass. 1985).

17. Life Expectancy. A plaintiff’s life expectancy effects the calculation of damages, and the parties' failure to present evidence on the issue may effect the damage award. Slade v. Whitco Corp., 811 F. Supp 71 (N.D.N.Y. 1993) (where neither party presented evidence of life expectancy as to 13-year-old quadriplegic--$500,000 award for future medical is remitted to $9,000,000 because jury used 10-year life expectancy in awarding future pain and suffering). Mortality tables do not constitute "absolute guides," but data to be taken into account with other evidence. Espana v. U.S., 616 F.2d 41 (2d Cir. 1980); City-Wide Trucking Corp. v. Ford, 306 F.2d 805 (D.C. Cir. 1962). But see Elliott By and Through Elliott v. U.S., 877 F. Supp. 1569 (M.D. Ga. 1992) (Judge rejects without explanation life expectancy

tables for black males which contains shorter life expectancy). Tables may be outweighed by other probative evidence. Cook v. American R.S. Co., 53 F.3d 733 (6th Cir. 1995) (admission of evidence concerning serious alcoholism was proper as to work life expectancy); Buschbaum v. Hale, 182 N.E.2d 93 (Ind. 1932); Garton v. Powers, 233 N.W.2d 373 (Mich. 1930); McCluskey v. U.S., 562 F. Supp. 515 (S.D.N.Y. 1983). Of course, the trier of fact is free to reject such evidence. Smith v. U.S. Dept. of Veterans Affairs, 865 F. Supp. 433 (N.D. Ohio 1994) (court refuses to reduce life expectancy based on medical evidence as this would benefit tortfeasor); Crane v. Crest Tankersline, 47 F.3d 292 (8th Cir. 1995) (prejudicial error to admit into evidence slide rule "Future Damage Calculator"). Crespo v. U.S., Cv. 498-127 (S.D. Ga., 5 March 1999) U.S. admits negligence but presents evidence that newborn had only several hours of life-award $150,000 only for intangible value of life.

18. Seatbelt Defense. Since 1984, 24 jurisdictions have accepted seatbelt laws which require front seat occupants to use available seatbelts-California, Colorado, Connecticut, D.C., Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Tennessee, Texas, Utah, Virginia and Washington. California, Montana and Washington require use by rear seat occupants. Failure to use seatbelts may increase injuries and thus be a failure to mitigate damages. Alexander v. Watson, 929 P.2d 6 (Colo. Ct. App. 1996) (no pain and suffering award to passenger who did not use seat belt based on C.R.S. § 42-4-237-7 (1995 cum. Supp.); Wilson v. Volkswagen of America, 445 F. Supp. 1368 (E.D. Va. 1978); Ins. Co. of North America v. PasaKarnis, 451 So.2d 447 (Fla. 1984); Parise v. Fehnel, 406 A.2d 345 (Pa. 1979); Wendlandt v. Shepherd Construction Co. Inc., 342 S.E.2d 352 (Ga. App. 1986); Wemyss v. Coleman, 729 S.W.2d 174 (Ky. 1987); McCoy v. Hollywood Quarries Inc., 544 So.2d 274 (Fla. App. 1989); Cappadona v. State of New York, 546 N.Y.S.2d 124 (App. Div. 1989). See also McElyea v. Navistar Inter. Trans. Corp., 788 F. Supp 1366 (E.D. Pa. 1991) (failure to use seatbelt bars passenger claim in crashworthiness case against supplier). Contra Clarkson v. Wright, 483 N.E.2d 268 (Ill. 1985) (even under pure comparative negligence rule); Amend v. Bell, 570 P.2d 138 (Wash. 1977); Fields v. Volkswagen of America, 555 P.2d 48 (Okla. 1976); Horn v. General Motors Corp., 551 P.2d 398 (Cal. 1976); Thomas v. Henson, 695 P.2d 476 (N.Mex. 1985); Waterson v. General Motors Corp., 544 A.2d 357 (N.J. 1988); Foley v. City of West Allis, 335 N.W.2d 824 (Wis. 1983); Spier v. Barker, 323 N.E.2d 164 (N.Y. 1974); Shelter Mutual Ins. Co. v. Tucker, 748 S.W.2d 136 (Ark. 1988); Franklin v. Gibson, 188 Cal. Rptr. 23 (1982); Quinn v. Millard, 358 So.2d 1378 (Fla. 1978); Lowe v. Estate Motors Ltd.., 410 N.W.2d 706 (Mich. 1987); Dunn v. Durso, 530 A.2d 387 (N.J.

Super. 1986); Woods v. City of Columbus, Ohio, 492 N.E.2d 466 (Ohio App. 1985); Dahl v. Bayerische Motoren Werke (BMW), 748 P.2d 77 (Or. 1987); Britton v. Doehring, 242 So.2d 666 (Ala. 1970); Nash v. Kamrath, 521 P.2d 161 (Ariz. 1974); Lipscomb v. Diamiani, 226 A.2d 914 (Del. 1967); Fischer v. Moore, 517 P.2d 458 (Colo. 1973); D.W. Boutwell Butane Co. v. Smith, 244 So.2d 11 (Miss. 1971); Miller v. Miller, 160 S.E.2d 65 (N.C. 1968) McCord v. Green, 362 A.2d 720 (D.C. App. 1976); Kopischke v. First Continental Corp., 610 P.2d 668 (Mont. 1980); MacDonald v. General Motors Corp., 784 F. Supp 486 (M.D. Tenn. 1992) (applying Tenn. law). Cf. Dare v. Sobule, 674 P.2d 960 (Colo. 1984) (motorcyclist's failure to wear mandatory protective helmet inadmissible).

19. Fair Market Value. Fair market value is the proper measure of damages. U.S. v. Reynolds, 397 U.S. 14 (1970); U.S. v. Virginia Electric & Power Co., 365 U.S. 624 (1961); U.S. v. Cors, 337 U.S. 325 (1949); U.S. v. Miller, 317 U.S. 369, 63 S.Ct. 276 (1943); Porter v. U.S., 473 F.2d 1329 (5th Cir. 1973); U.S. v. Certain Property in Borough of Manhattan, 403 F.2d 800 (2d Cir. 1968). See also Gulick v. U.S., Civ. # 8-79-502 (D. Conn. 1983) (loss in value of race horse is measure of damages--not anticipated profits); Seravalli v. U.S., 849 F.2d 1571 (Fed. Cir. 1988) (discusses methods of calculating).

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

b. Flooding Cases. King v. U.S., 427 F.2d 767 (Ct. Cl. 1970) (degree of flooding is governing factor).

20. Prejudgment Interest. Not payable, see 28 U.S.C. § 2411. In re Air Crash Disaster Near New Orleans, Louisiana on 9 July 1982, 789 F.2d 1092 (5th Cir. 1986)(interest only runs from date of judgment). Loss of use damages may be, in fact, prejudgment interest and is unallowable in that circumstance. Southern Pacific Transportation Co. v. U.S., 471 F. Supp. 1186 (E.D. Cal. 1979) (replacement of boxcars). But see Manko v. U.S., 830 F.2d 831 (8th Cir. 1987) (award for lost pension earnings is not prejudgment interest).

21. Overhead. Overhead must be factually related to the actual repair work and represent reasonable charges for it to be compensable. U.S. v. Peavey Barge Lines, 590 F. Supp. 319 (C.D. Ill. 1983), aff'd, 748 F.2d 395 (7th Cir. 1984); Department of Water and Power v. U.S., 131 F. Supp. 329 (S.D. Cal. 1955); State Road Dept. of Fla. v. U.S., 85 F. Supp. 489 (N.D. Fla. 1949). General rule is that presentation of proof that overhead charge is in accordance with agency's regulations or standard policy is

not sufficient. U.S. v. Denver & Rio Grande Western Railroad Co., 547 F.2d 1101 (10th Cir. 1977); U.S. v. Gopher State, 614 F.2d 1186 (8th Cir. 1980). However, public utilities may charge arbitrary percentage by virtue of state law, such as Haw. R.S. § 296-32, and thus permit indirect costs. Should be in accordance with a uniform system of accounting. Duguesne Light v. Rippel, 478 A.2d 472 (Pa. Sup. Ct. 1984); P.G. & E. v. Moorteer, 136 Cal. Rptr. 280 (Cal. App. 1977); P.G. & E. v. Alexander, 90 Cal. App.3d 253, 153 Cal. Rptr. 319 (1979); Curt's Trucking Co. v. City of Anchorage, 589 P.2d 975 (Alaska 1978); Hartford Elec. Light v. Beard, 213 A.2d 536 (Conn. Cir. Ct. 1965); Public Svc. E. & G. v. Stone, 446 A.2d 578 (N.J. Dist. Ct. 1982); N.Y. State E. & G. v. Fischer, 250 N.Y.S. 2d 310 (N.Y. App. Div. 1965).

22. Expected Profits. Generally, expected profits of a commercial business are too remote, speculative, and uncertain to permit a recovery of damages for their loss. See, e.g., 22 Am. Jur. 2d, Damages, § 171; Cargill Inc. v. Taylor Towing Service Inc., 642 F.2d 239 (8th Cir. 1981); Chase v. Hilton Hotels Corp., 682 F. Supp. 316 (E.D. La. 1988) (recovery for lost profits on cashews to be grown on non-existent trees too speculative). See also Carpenter v. Land O' Lakes, Inc., 976 F. Supp. 968 (D. Or. 1997) (good discussion on loss of milk products from loss of milking cows from moldy feed). Jones v. U.S., 9 F. Supp. 2d 1119 (N. Neb. 1998), loss of business due to communication of tax information in violation of 26 USC 6103(a) - contains detailed discussion on how to calculate.

23. Wrongful Birth and Wrongful Life.

a. Normal Healthy Child. Zohr v. Haugen, 871 P.2d 1006 (Or. 1994) (costs of raising child granted in failed tubal ligation case).

(1) Cost of Raising Child Not Permitted. Cost of raising child not recoverable: D.C. (Flowers v. D.C., 478 A.2d 1073 (D.C. 1984)); Iowa (Nanke v. Napier, 346 N.W.2d 520 (Iowa 1984)); Georgia (Fulton-DeKalb Hospital Authority v. Graves, 314 S.E.2d 653 (Ga. 1984)); Florida (Fassoulas v. Ramey, 450 So.2d 822 (Fla. 1984)); Illinois (Cockrum v. Baumgartner v. Tulsky, 447 N.E.2d 385 (Ill.1983)); Kentucky (Schork v. Huber, 648 S.W.2d 861 (Ky. 1983)); Pennsylvania (Mason v. Western Pa. Hospital, 453 A.2d. 974 (Pa. 1982)); Alabama (Boone v. Mullendore, 416 So.2d 718 (Ala. 1982)); New Hampshire (Kingsbury v. Smith, 442 A.2d 1003 (N.H. 1982)); Arkansas (Wilbur v. Kerr, 628 S.W.2d 568 (Ark. 1982)); Wyoming (Beardsley v. Wierdsma, 650 P.2d 288 (Wyo. 1982)); New York (Weintraub v. Brown, 470 N.Y.S.2d 634 (App. Div. 1983)); Delaney v. Krafte, 470 N.Y.S.2d 936 (App. Div. 1984); Texas (Sutkin

v. Beck, 629 S.W.2d 131 (Tex. App. 1982)); Hickman v. Myers, 632 S.W.2d 869 Tex. App. 1982); New Jersey (P. v. Portadin, 432 A.2d 556 (N.J. App. 1981)); Virginia (McNeal v. U.S., 689 F.2d 1200 (4th Cir. 1982)); White v. U.S., 510 F. Supp. 146 (D. Kan. 1981) (applying Georgia law); Ohio (Johnson v. Univ. Hosp of Cleveland., 540 N.E. 2d 1371 (Ohio 1989)).

(2) Balancing. Cost of raising child must be balanced against benefits: Maryland (Jones v. Malinowski, 473 A.2d 429 Md. 1984)); Arizona (Univ. of Ariz. Health Sciences Ctr. v. Superior Court, 667 P.2d 1294 (Ariz. 1983)); Connecticut (Ochs v. Borrelli, 445 A.2d 883 (Conn. 1982)); California (Morris v. Frudenfeld, 185 Cal. Rptr. 76 (Cal. 1982)); Michigan (Clapham v. Yanga, 300 N.W.2d 727 (Mich. 1980)).

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

b. Damaged Child.

(1) Payable to Parents. Added costs of raising payable to parents as no wrongful life claim permitted. Robak v. U.S., 658 F.2d 471 (7th Cir. 1981) (applying Alabama law); Phillips v. U.S., 575 F. Supp. 1309 (D.S.C. 1983); Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978); Becker v. Schwartz , 386 N.E.2d 807 (N.Y. 1978); Dumer v. St. Michael's Hosp., 233 N.W.2d 372 (Wis. 1975); Moores v. Lucas, 405 So.2d 1022 (Fla. App. 1981); Gallagher v. Duke University v. Mickey, 852 F.2d 773 (4th Cir. 1988) (North Carolina added costs of raising during childhood only); Garrison v. Med. Center of Del., 571 A.2d 586 (table), 1989 WL 160433 (Del. 1989); Lininger v. Eisenbaum, 764 P.2d 1201 (Colo. 1988); Blake v. Cruz, 698 P.2d 315 (Idaho 1984); Siemieniec v. Lutheran General Hospital, 512 N.E. 2d 691 (Ill 1987); Bruggeman v. Schimke, 718 P.2d 635 (Kan 1986); Profitt v. Bartolo, 412 N.W. 2d 232 (Mich. App 1989); Wilson v. Kuenzi, 751 S.W. 2d 741 (Mo. 1988); Smith v. Cote, 513 A.2d 341 (Neb. 1986); Azzolino v. Dingfelder, 337 S.E.2d 528 (N.C. 1985); Nelson v. Kruson, 678 S.W.2d 918 (Tex. 1984); James G. v. Caserta, 332 S.E.2d (W. Va. 1985).

(2) Payable to Child. Added costs paid to child, but no recovery of general damages--wrongful life claim permitted. Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1983); Turpin v. Sortini, 643 P.2d 954 (Cal.

1982); Procanik v. Cillo, 478 A.2d 755 (N.J. 1984); Azzolino v. Dingfelder, 322 S.E.2d 567 (N.C. App. 1984).

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

24. Future Medical Care.

a. Generally. Future medical care of infant may be claimed either by parents or infant. McNeill v. U.S., 519 F. Supp. 283 (D.S.C. 1981). Future care cost payable even though beneficiary dies while case is on appeal. Molzof v. U.S., 6 F.3d 461 (7th Cir. 1993). Future care costs are subject to deduction where plaintiff entitled to non-collateral source health care benefits. Dempsey by and through Dempsey v. U.S., 32 F.3d 1490 (11th Cir. 1994) (in brain damage baby case, set off of full amount for drugs, 75% for medical treatment and 0% for nursing care, since father is retired USAF and child is entitled to CHAMPUS lifelong). Where future medical care includes cost of food, room, and clothing, future lost wages should be deducted. Corrigan v. U.S., 609 F. Supp. 720 (E.D. Va. 1985). For a child, care may be either institutional or residential. Ingraham v. Bonds v. U.S., 808 F.2d 1075 (5th Cir. 1987) (orders residential care, rather than institutional care, for blind quadriparetic child). In all cases, the award of future medical care must be supported by the evidence. Keeler v. Richards Mfg. Co. Inc., 817 F.2d 1197 (5th Cir. 1987) ($150,000 award for future care not sustainable as no evidence hip screw was defective); Smith v. U.S. Dept. of Veterans Affairs, 865 F. Supp. 433 (N.D. Ohio 1994) (court refuses to award costs of future care at home due to lack of family support where patient-claimant is in DVA facility). Pineda v. U.S., 1999WL311214 (9th Cir. Haw.), upholds determination that attendant care is needed 24 hours a day, even while child is asleep-award of $7,163,441 for attendant care alone.

b. Examples of Large Awards. Pineda v. U.S., Civ. # 89-00239DAE (D. Haw., 12 May 1997), later proceedings, Civ. # 89-00239DAE (D. Haw., July 11, 1997) ($ 8,606,670 for future home care as such care in best interests of child); Bankert by Bankert v. U.S., 937 F. Supp. 1169 (D. Md. 1996) ($430,000 future expenses and losses awarded to child with 5 minute Apgars of 1 and 1 due to malpractice in delivery, despite life care plan by doctor); McDonald v. U.S., 555 F. Supp. 935

(M.D. Pa. 1983) ($2.7 million for future medical care out of $3.9 million award for paraplegic); Shaw. v. U.S., 741 F.2d 1202 (9th Cir. 1984) (upholds $4.7 million for future medical care); Ouachita National Bank v. Tosco Corp., 686 F.2d 1291 (8th Cir. 1982) (reduction for future nursing care from $2.2 million to $228,000); Bonds v. U.S., Civ. # DR-81-CA-05 (M.D. Tex. 1982) ($3.5 million to brain damaged birth child of which $1.8 million is future care); Trevino v. U.S., 804 F.2d 1512 (9th Cir. 1986) ($3.5 million for future care reduced by $1,757,667 for lifetime attendant, since such care not needed); Reilly v. U.S., 863 F.2d 149 (1st Cir. 1988) ($8.9 million for future care to be placed in trust, but rejects structured settlement); Moreno v. U.S., Civ. # 86-0555 (D. Haw. 1987) ($6.4 million for future care). Martinez v. U.S., 780 F.2d 525 (5th Cir. 1986) ($4.5 million for adult quadriplegia, of which $3.1 million if for future medical care--reduced by 35% for contributory negligence); Garcia v. U.S., 697 F. Supp. 1570 (D. Colo. 1988) ($2.3 million of which $1.3 million is for future medical care including home for VA quad patient age 53 with limited life expectancy preexisting); Oliveira v. AMF, Civ. # C-86-278 (S.D. Tex. 1988) ($3.9 million for future medical expenses for Coast Guard quadriplegic); Miller v. U.S. ex rel. Department of the Army., 901 F.2d 894 (10th Cir. 1990) ($5 million plus for future care of 17-year-old quadriplegic); Gordon v. U.S., Civ. # C90-5206T (W.D. Wash. 1991) ($4.5 million for future care); Muensterman v. U.S., 787 F. Supp 499 (D. Md. 1992) ($2.5 million for cost of care in brain damaged baby case); Scott v. U.S., 884 F.2d 1280 (9th Cir. 1995) ($8.1 million total award in brain damage baby case); Elliott By and Through Elliott v. U.S., 877 F. Supp. 1509 (M.D. Ga. 1992) ($3,800,000 for future care of semi-comatose male with 41-year life expectancy); Wareing through Wareing v. U.S., 943 F. Supp. 1504 (S.D. Fla. 1996) ($1.4 million for future medical care--excellent discussion of what should be included in life care plan); Wyatt v. U.S., 939 F. Supp. 1402 (E.D. Mo. 1996) ($2,082,625 future medical expenses for paraplegic who had both legs amputated); Deasy v. U.S., 99 F.3d 534 (10th Cir. 1996) (award of $ 3,993,971 in future medical expenses including treatment of preexisting injury allowed, since DVA malpractice created fear of using DVA facilities).

c. Included in Future Care. Examples of what is included in future care. Federal cases. Andrulonis v. U.S., 924 F.2d 1210 (2d Cir. 1991) (court awards $2,417,238 future care in home based on 24 hour a day RN coverage--demand for $6,841,925 for nursing home rejected); Hoppe v. G.D. Searle Co., 770 F. Supp. 1413 (S.D.N.Y. 1991) (cost of in vitro for litigation appropriate in infertility case); Manko v. U.S., 636 F. Supp. 1419 (W.D. Mo. 1986) (winter trips to Palm

Springs permitted for partially paralyzed GBS swine flu victim, family care services disallowed but treatment for impotency, broken ankle and toe allowed). State cases. Squeo v. Comfort Control Corp., 494 A.2d 313 (N.J. 1985) (orders building of a self-contained apartment attached to home of quadriplegic victim's parents); Haga v. Clay Hyder Trucking Lines, 397 So.2d 428 (Fla. App. 1981) (orders construction of swimming pool for double amputee victim); Firestone Tire & Rubber Co. v. Vaughn, 381 So.2d 740 (Fla. App. 1980) (same); Peace River Electric Corp. v. Choate, 417 So.2d 831 (Fla. App. 1982) (awards modular home); Pine Bluff Parks and Recreation v. Porter, 639 S.W.2d 363 (Ark. App. 1982) (awards partial expenses of costs of project designed for paraplegics); Mamone v. Griege, 424 N.Y.S.2d 782 (App. Div. 1980) (24 hours a day nursing care where indicated not in best interest to be placed in nursing home). See also 2A Larson, *Workman's Compensation Law*, § 61.0 (1983).

25. Child's Loss of Consortium. See, generally, *Restatement (Second) Torts*, § 707A; 11 A.L.R. 4th 549 (1982). For update, see Schneider, *"Loss of Parent Consortium,"* For The Defense, August 1991. Child's loss of consortium of parent recognized in Iowa (§ 613.15 Iowa Code), Michigan, Wisconsin, Massachusetts, Washington, Vermont, Indiana, Texas, West Virginia, Wyoming and Alaska. See Audubon-Exira Ready Mix Inc. v. Illinois Central Gulf RR Co., 335 N.W.2d (Iowa 1983); Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981); Berger v. Weber, 267 N.W.2d 124 (Mich. App. 1978), aff'd, 303 N.W.2d 424 (Mich. 1981); Theama v. City of Kenosha, 344 N.W.2d 513 (Wis. 1984); Ferriter v. Daniel O'Connell's Sons Inc., 413 N.E.2d 690 (Mass. 1980); Ueland v. Reynolds Metals Co., 691 P.2d 190 (Wash. 1984); Hay v. Medical Center Hospital of Vermont, 496 A.2d 939 (Vt. 1985); Dearborn Fabricating & Engineering Corp. v. Wickham, 532 N.E.2d 16 (Ind. App. 1988); Reagan v. Vaughn, 804 S.W.2d 463 (Tex. 1990); Williams v. Hook, 804 P.2d 1131 (Okla. 1991); Belcher v. Goins, 400 S.E.2d 830 (W.Va. 1990); Nulle v. Gillette-Campbell County Joint Powers Fire Board, 797 P.2d 1171 (Wyo. 1990); Hibpshman v. Prudhoe Bay Supply Inc., 734 P.2d 991 (Alaska 1987). See also Scott v. U.S., 884 F.2d 1280 (9th Cir. 1990) (Alaska law); Hancey v. U.S., 967 F. Supp 443 (D. Colo. 1997) (parent’s loss of injured child’s consortium cognizable under Colorado law); Fairchild v. U.S., 769 F. Supp. 964 (W.D. La. 1981) ($50,000 for minor son where mother's initial PI claim was $10,000, but later amended to 1.2 million for psychic injuries). Not cognizable in other jurisdictions. Norwest v. Presbyterian Intercommunity Hosp., 652 P.2d 318 (Or. 1982); Salin v. Kloempken, 322 N.W.2d 736 (Minn. 1982). See also Kelleher v. Boise Cascade Corp., 676 F. Supp. 22 (D. Me. 1988) (Maine does not recognize cause of action). Mondille v. Board of Education of East Haddam, 717 A.2d 1177 (St. Ct. Conn., 1998) denies claim for child's loss of

parental consortium-excellent ciscussion lists many cases, not majority rule.

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

a. Compensability of Property Damage. For injury to property to be compensable, must have interest in the property allegedly damaged. Bradley v. Stump, 971 F. Supp. 1149 (W.D. Mich. 1997) (no protected property right in continued Federal employment where base commander is removed for nepotism); Randall v. U.S., Civ. # 92-96-CIV-3-AR (E.D.N.C., 21 May 1995) (Army phsycian who voluntarily resigns after being reported to the National Practitioners Data Bank has no property interest in Army career). Compare Shaner v. U.S., 976 F.2d 990 (6th Cir. 1992) (no property interest in loan which was not made due to improper processing) with Meyer v. Fidelity Savings, 944 F.2d 562 (9th Cir. 1991), rev'd on other grounds, 510 U.S. 471 (1994) (property interest in future employment under California law). Some costs incurred in assessing and cleaning up debris are not compensable damages. Charles Burton Builders Inc. v. U.S., 768 F. Supp. 160 (D. Md. 1991) (expenses to determine damages to property as a result of dumping are not payable as net injury or loss of property); Gavcus v. Potts, 808 F.2d 596 (7th Cir. 1986) (changing locks and adding burglar alarms not compensable as not physical damages); County Commission of Morgan County, W. Va. v. U.S., Civ. # 3:93CV64 (STAMP) (N.D. W. Va., Nov. 25, 1994) (clean up costs to public services from Air National Guard plane crash are not property damage and not payable). Cf. Djordjevic v. Postmaster General, U.S. Postal Service, 957 F. Supp. 31 (E.D.N.Y. 1997) (claim for $ 400 and legal documents lost in the mail not payable as is a claim for phone calls in connection therewith). Additionally, the loss of some types of property may be hard to value. Gasperini v. Center for Humanities, Inc., 972 F. Supp. 765 (S.D.N.Y. 1997) (on remand from Supreme Court (518 U.S. 415, 116 S.Ct. 2211 (1996)), award of $375,000 for loss of 310 photographic slides by journalist--discusses how to value slides and sets out criteria). City of Boise v. USEPA, Civ. #95-067-S-FVS (D. Ida., 8 June 1998) (City is stuck with guaranteeing credit for clean-up due to EPA's failure to do so - no property loss

only injury to pocket book - cites Charles Barton Builders Inc. v. U.S., 768 F. Supp. 160 (D. Md. 1991) which denied cost of testing to owner of land adjacent to polluted land.

b. Fire Suppression Costs. The term "money damages" as defined in FTCA, does not include fire suppression costs by public firefighters. State of Oregon by & through its State Forester v. U.S., 308 F.2d 568 (9th Cir. 1962), cert. denied, 372 U.S. 941 (1963); People of Calif. v. U.S., 307 F.2d 941 (9th Cir. 1962), cert. denied, 372 U.S. 353 (1963); State of Idaho ex rel. Trombley v. U.S. Dept. of Army COE, 666 F.2d 444 (9th Cir. 1982).

c. Attorneys Fees Incurred in Improperly Brought Criminal Case. The rule is that the recovery of attorney fees for improperly brought criminal prosecutions is barred absent a statue authorizing such recovery. General Dynamics Corp. v. U.S., 139 F.3d 1280, (9th Cir. 1998) reversed on other grounds, ___ F.3d ___, 1998WL136209 (9th Cir.) (recovery of $25,880,752 attorneys fees expended in defending criminal charge based on unprofessional DCAA audit not allowable because decision to prosecute discretionary) with Resolution Trust Corp. v. Miramon, 935 F. Supp. 838 (E.D. La. 1996) (recovery under FTCA of attorneys fees expended in defense of criminal action by RTC is denied under 28 U.S.C. § 2412 as fee shifting).

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

28. Value of Emotional Loss.

a. Resulting From Death. Walters v. Mintec/International, 758 F.2d 73 (3d Cir. 1985) ($250,000 to each of minor children reduced to $25,000--had not seen father in seven years); Poyser v. U.S., 602 F. Supp. 436 (D. Mass. 1984) ($500,000 to mother for loss of 15-year-old son); Winbourne v. Eastern Air Lines Inc., 758 F.2d 1016 (5th Cir. 1984) ($500,000 for loss of wife and $150,000 for each of two daughters); Grandstaff v. City of Borger, Texas, 767 F.2d 161 (5th Cir. 1985) ($200,000 to father of 31-year-old decedent); Pregeant v. Pan American World Airways Inc., 762 F.2d 1245 (5th Cir. 1985) ($150,000 to each parent of 35-year-old flight attendant); In re Air Crash Disaster Near New Orleans, La. on 9 July 1982, 767 F.2d 1151 (5th Cir. 1985) (widower receives $500,000 for loss of wife and $150,000 for each of three children); Cavnar v. Quality Control Parking, 696 S.W.2d 549 (Tex. 1985) ($300,000 to one child and $150,000 to each of the others for loss of mother); Gutierrez v. Exxon

Corp., 764 F.2d 399 (5th Cir. 1985) ($1,150,000 to parents of adult child); Gulf States Utilities Co. v. Reed, 659 S.W.2d 849 (Tex. App. 1983) ($1 million to parents of minor child); Johnson v. U.S., 780 F.2d 902 (11th Cir. 1986) ($2 million to parents of 21-month-old infant who died from medical overdose is excessive); Wheat v. U.S., 860 F.2d 1256 (5th Cir. 1988) ($6.7 million for cancer death of 42-year-old woman leaving husband and two children (one adult)--reduced to $5.5 million on appeal); Phipps v. U.S., Civ. # A-87-CA-125 (W.D. Tex. 1989) ($2.2 million for 38-year-old housewife); Mark v. Pan American World Airways Inc., 785 F.2d 539 (5th Cir. 1986) ($250,000 to each of four minors for loss of parents); Morales v. U.S., 642 F. Supp. 269 (D.P.R. 1986) ($48,000 to widow and $6,000 to each daughter and $0 to grandchildren including conscious pain and suffering in death case); Nowell v. Universal Electric Co., 792 F.2d 1310 (5th Cir. 1986) (evidence of remarriage permitted under Mississippi law--cites New York cases); Morrissey v. Welsh Co., 821 F.2d 1294 (8th Cir. 1987) ($6.5 million to parents of daughter not excessive under Missouri law--cites numerous cases); Rodriquez v. U.S., 823 F.2d 735 (3d Cir. 1987) ($500,000 for lost companionship etc., of deceased husband not excessive under New Jersey law); Stanford v. Leaf River Forest Products Inc., 661 F. Supp. 678 (S.D. Miss. 1986) ($375,000 or $1.7 million total to widow and three children for loss of society--reduced to $1,060,000 total); Morgan Guaranty Trust Co. of New York v. Texas-Gulf Aviation Inc., 669 F. Supp. 81 (S.D.N.Y. 1987) ($866,000 for loss of society reduced to $250,000 where six out of eight children have left home--cites cases); Schuler v. U.S., 675 F. Supp. 1088 (W.D. Mich. 1987) ($750,000 to widow of 41-year-old decedent and $200,000 each to children, ages 18 and 16, $200,000 to widow of 6-year-old decedent and $50,000 each to 5 adult children); DaSilva v. American Brands Inc., 845 F.2d 356 (1st Cir. 1988) ($1.5 Million to widow and four children not excessive); Williams v. U.S., 681 F. Supp. 763 (N.D. Fla. 1988) ($900,000 to each parent--consistent with Florida awards); Larsen v. Delta Air Lines Inc., 692 F. Supp. 914 (S.D. Tex. 1988) ($3 million for death of 32-year-old engineer, of which $1.8 was for emotional loss); Peck v. Garfield, 862 F.2d 1 (1st Cir. 1988) ($300,000 mental anguish to widow of 80-year-old male); Ruiz-Rodriguez v. Colberg-Comas, 882 F.2d 15 (1st Cir. 1989) (son's anguish over father's death does not rise to compensable level under Puerto Rican law); Transco Leasing v. U.S., 896 F.2d 1435 (5th Cir. 1990) ($500,000 for mother's loss of only daughter reduced to $250,00 under LA law); Grayson v. U.S., 748 F. Supp. 854 (S.D. Fla. 1990) (mental anguish for loss of wife and two small children over $2 million--cites many awards); Valenzuela v. U.S., Civ. # EP-88-CA-200-H (W.D. Tex. 1991) ($250,000 to parents of 28-year-

old unmarried decedent); Garrison v. Mollers North America Inc., 820 F. Supp. 814 (D. Del. 1993) (award of $616,615.50, after 25% reduction, for mental anguish of survivors is excessive, since it is 7 times special damages); Doe v. U.S., 805 F. Supp. 1513 (D. Haw. 1992) (mental anguish of child not payable for watching parents die from AIDS); Estate of Zarif by Jones v. Korean Airlines, 836 F. Supp. 1340 (E.D. Mich. 1993) ($500,000 to adult child for death of mother in KAL 007 crash); Walls v. Armour Pharmaceutical Co., 832 F. Supp. 1505 (M.D. Fla. 1993) ($2 million to parents for death of child from AIDS due to defective blood products); Dunn v. Consolidated Rail Corp., 890 F. Supp. 1262 (M.D. La. 1995) (widow awarded $1,000,000 and each of three children awarded $500,000 for general damages in wrongful death of railway worker--remitted to $800,000 and $500,000 total respectively); Pescatore v. Pan American World Airways, Inc., 97 F.3d 1 (2nd Cir. 1996) ($5 million for loss of society plus $ 9 million for loss of support to widow of victim of Lockerbie crash--held not excessive). Heller v. U.S., Civ. # 96-1743-PHX-SMM (D. Ariz., 13 Nov. 98), widow who was separated from deceased and living with another man recovered nothing for emotional anguish.

b. Resulting from Personal Injury. Wells v. Ortho Pharmaceutical Corp., 615 F. Supp. 262 (N.D. Ga. 1985) ($500,000 to mother of child damaged before birth by spermicide); Ingraham v. Bonds v. U.S., 808 F.2d 1075 (5th Cir. 1987) ($750,000 for mother's loss of child's society); Trevino v. U.S., 804 F.2d 1512 (9th Cir. 1986) ($400,000 for loss of love and companionship and injury to child relationship--reduced to $100,000); Dearing v. U.S., 835 F.2d 226 (9th Cir. 1987) ($300,000 to parents not excessive). Colleen v. U.S., 843 F.2d 329 (9th Cir. 1987) ($300,000 to parents of damaged child not excessive); Jenkins v. McLean Hotels Inc., 859 F.2d 598 (8th Cir. 1988) ($600,000 to 9-month-old male for 12 inch cut to thigh--not excessive); Robichaud v. Theis, 858 F.2d 392 (8th Cir. 1988) ($450,000 for 8 percent permanent partial disability to back caused by 5 mph rearender--not excessive); Meader v. U.S., 881 F.2d 1056 (11th Cir. 1989) ($6 million for adult quadriplegic from medical malpractice); Yako v. U.S., 891 F.2d 738 (9th Cir. 1989) (loss of filial consortium-Alaska law--$300,000); Chenault v. U.S., Civ. #88-00590ACk (D. Haw. 1990) ($500,000 for each parent). Masaki v. General Motors Corp., 780 P.2d 566 (Haw. 1989) ($1 million for each parent by including negligent infliction of emotional distress, not from witnessing the event, but for caring for victim); Raucci v. Town of Rotterdam., 902 F.2d 1050 (2d Cir. 1990) (no emotional anguish in N.Y. death case--$250,000 reduced to $100,000 for death of 6 year old); DeLeon Lopez v.

Corporacion Insular de Seguras, 742 F. Supp. 44 (D.P.R. 1990) (award of $800,000 reduced to $110,000 where grandfather witnessed switching of twins in hospital nursery); Reilly v. U.S., Civ. #856748P (D.R.I. 1990) (no mental anguish damages to parents of brain damaged at birth child); Heitzenrater v. U.S, 930 F.2d 33 (table), 1991 WL 35198 (10th Cir. 1991) ($750,000 award reduced to $100,000, since mental anguish not permitted in Colorado--award in guise of loss of consortium to wife); Bolden v. SEPTA, 820 F. Supp. 949 (E.D. Pa. 1993) ($350,000 award for emotional injury not excessive where employee was forced to take unconstitutional drug test); Mitchell v. Globe Intern Pub Co., 817 F. Supp. 72 (W.D. Ark. 1993) ($650,000 award for publishing photo of elderly newspaper carrier without permission was excessive-remittur of $500,000 appropriate); Gough v. Natural Gas Pipeline Co. of America, 996 F.2d 763 (5th Cir. 1993) (award of $1,444,599 for emotional injury to captain of vessel which struck pipeline reduced to $600,000); Marchica v. Long Island R. Co., 31 F.2d 1197 (2nd Cir. 1994) (award of $55,000 for fear of AIDS based on accidental stick by hypodermic needle); Pineda v. U.S., Civ. # 89-00239DAE (D. Haw., 12 May 1997), later proceedings, Civ. # 89-00239DAE (D. Haw., July 11, 1997) ($ 800,000 to mother and $ 500,000 to father of damaged child). Jones v. U.S., 9 F. Supp. 2d 1119 (N. Neb. 1998) excellent discussion and listing of comparable awards by federal courts on emotional loss.

29. AFDC Income Formula Applicability. Under 42 U.S.C. § 602(a)(17) and 45 C.F.R. § 233.20(a)(3)(ii)(D) welfare payments stop for entire family unit when one member receives excessive extra income. Lukhard v. Reed, 481 U.S. 368, 107 S.Ct. 1807 (1987) (rule applied under Virginia regulations, benefits are income, not resources); LaMadrid v. Hegstrom, 830 F.2d 1524 (9th Cir. 1987) (states must treat personal injury awards as income as provided by 45 C.F.R. § 233.20(a)(3)(ii)(f).

30. Toxic Torts

a. Increased Risk of Developing Disease.

(1) No Cause of Action: Laswell v. Brown, 683 F.2d 261 (8th Cir. 1982) (radiation); Stites v. Sundstrand Heat Transfer Inc., 660 F. Supp. 1516 (W.D. Mich. 1987) (toxic chemicals in drinking water); Plummer v. Abbott Laboratories, 568 F. Supp. 920 (D.R.I. 1983) (DES); Mink v. Univ. of Chicago, 460 F. Supp. 713 (N.D. Ill. 1978); Ayers v. Township of Jackson, 461 A.2d 184 (N.J. 1983) (toxic chemicals in drinking water); Adams v. Johns-Manville Sales Corp., 783 F.2d 589 (5th Cir. 1986) (asbestos); Anderson v. W.R. Grace & Co., 628 F. Supp.

1219 (D. Mass. 1986) (polluted ground water); Herber v. Johns-Manville Corp., 785 F.2d 79 (3d Cir. 1986); Hagerty v. L & L Marine Services Inc., 788 F.2d 315 (5th Cir. 1986); Kesecker v. U.S. Dept. of Energy, 679 F. Supp. 726 (S.D. Ohio 1988) (uranium in drinking water).

(2) Permits Cause of Action: Sterling v. Velsicol Chemical Corp., 855 F.2d 1202 (6th Cir. 1988) (polluted ground water); Larson v. Johns-Manville Sales Corp., 399 N.W.2d 1 (Mich. 1986).

b. Fear of Future Disease, e.g., Cancerphobia. Permits cause of action. Cantrell v. GAF Corp., 999 F.2d 1007 (6th Cir. 1993) (recovery permitted, even though no recovery for increased risk of cancer); Wetherill v. Univ. of Chicago, 565 F. Supp. 1553 (N.D. Ill. 1983); Laxton v. Orkin Exterminating Co. Inc., 639 S.W.2d 431 (Tenn. 1982); Payton v. Abbott Labs, 437 N.E.2d 171 (Mass. 1982); Nutt v. A.C. & S. Inc., 466 A.2d 18 (Del. Super. 1983); Ayers v. Township of Jackson, supra; Sterling v. Velsicol Chemical Corp., supra; Stites v. Sundstrand Heat Transfer Inc., supra; McAdams v. Eli Lilly & Comapany, 638 F. Supp. 1173 (N.D. Ill 1986); Hagerty v. L & L Marine Service Inc., supra; Barth v. Firestone Tire and Rubber Co., 661 F. Supp. 193 (N.D. Cal. 1987); Merry v. Westinghouse Electric Corp., 684 F. Supp. 847 (M.D. Pa. 1988). No cause of action. Metro-North Commuter Railroad v. Buckley, ___ U.S. ___, 117 S.Ct. 2113 (1997) (no recovery for negligently inflicted emotional distress until symptoms of Asbestosis are manifested); Laswell v. Brown, supra; Palter v. Firestone Tire and Rubber Co., 863 P.2d 795 (Col. 1993) (Proof of fear of cancer requires exposure to toxic substance and corroboration of fear by a reliable expert); Rabb v. Orkin Exterminating Co., 677 F. Supp. 424 (D.S.C. 1987) (no cause of action, since no testimony presented); Jones v. U.S., 698 F. Supp. 826 (D. Haw. 1988) (no causal relationship--no emotional injury permitted for quarters spraying); In Re: Hawaii Federal Asbestos Cases, 734 F. Supp. 1563 (D. Haw. 1990) (no cause of action for cancer phobia in absence of functional impairment); Landry v. Florida Power & Light Corp., 799 F. Supp. 94 (S.D. Fla. 1992) (inhaled asbestos on repair job at nuclear facility--no cause of action for fear of cancer).

c. Costs of Future Medical Surveillance. See, generally, Day v. NLO, 851 F. Supp. 869 (S.D. Ohio 1994) (employees and frequenters of nuclear weapons plant where radiation was released are entitled to emotional distress damages and medical); Ayers v. Township of Jackson, supra; Schroeder v. Perkel, 432 A.2d 834 (N.J. 1981); Barth v. Firestone Tire & Rubber Co., 661 F. Supp. 193 (N.D. Cal. 1987). Villari v.

Terminix International Inc., 677 F. Supp. 330 (E.D. Pa. 1987) (permitted); Merry v. Westinghouse Electric Corp., 684 F. Supp. 847 (M.D. Pa. 1988); Hagerty v. L & L Marine Services Inc., 788 F.2d 315 (5th Cir. 1986); Herber v. Johns-Manville Corp., 785 F.2d 79 (3d Cir. 1986); Friends For All Children Inc. v. Lockheed Aircraft Corp., 746 F.2d 816 (D.C. Cir. 1984). Cases allowing the recovery of medical monitoring costs. Redland Soccer Club v. Dept. of Army of U.S., 55 F.3d 827 (3d Cir. 1995) (exposure of children for over a total of 33 hours on township soccer field built on former Army disposal site warrants medical monitoring); In re Paoli RR Yard PCB Litigation, 35 F.3d 719 (3rd Cir. 1994) (medi cal monitoring costs allowed despite threshold conditions from PCB leakage from railyard); Bacook v. Ashland Oil Inc., 819 F. Supp. 330 (S.D. W.Va. 1993) (claim for surveillance costs exists under Ky. Law); Cain v. Armstrong World Industries, 785 F. Supp 1488 (S.D. Ala. 1992) (awards of $80,000 and 100,000 for future medical monitoring). Some courts require that a certain minimum level of exposure be met before medical monitoring costs will be allowed. Abuan v. General Elec. Co., 3 F.3d 329 (9th Cir. 1993) (must meet Paoli test set forth in Brown v. Monsanto Co., 916 F.2d 829 (3rd Cir. 1990), cert. denied, 499 U.S. 961 (1991), that is to suffer a significant risk of contracting disease in future); Ball v. Joy Technologies Inc., 958 F.2d 36 (4th Cir. 1992) (mere exposure insufficient to recover for mental distress and medical surveillance); O'Neal v. Department of Army, 852 F. Supp. 327 (M.D. Pa. 1994) (costs of medical monitoring not allowable where increase of risk is .03% from ground water pollution by Army aircraft maintenance facility). Even if not recoverable under FTCA, medical surveillance costs may be response costs under CERCLA. Williams v. Allied Automotive Autolite Division, 704 F. Supp. 782 (N.D. Ohio 1988)

d. Causation. A plaintiff must show a casual connection between exposure to toxic chemicals and their injury. General Electric Co. v. Joiner, ___ U.S. ___, 118 S.Ct. 512 (1997) (Supreme Court upholds district court's determination that expert testimony that PCBs cause cancer was not sufficiently reliable to warrant admission under stadard set forth in Daubert v. Merrell Dow Pharmaceuticals Inc. v. U.S., 509 U.S. 579, 116 S.Ct. 189 (1995))--appellate court standard of review of district court decision to admit or exclude evidence, including expert testimony, is abuse of discretion); Robinson v. Union Carbide, 805 F. Supp. 514 (E.D. Tenn. 1991) (clash of experts concerning death of married couple with Alzheimer's Disease--held death from mercury poisoning not established); Prescott v. U.S., 858 F. Supp. 1461 (D. Nev. 1994) (injury from ionizing radiation to National Test Site workers not proven); In Re Paoli Rail Yard

PCB Litigation, 113 F.3d 444 (3rd Cir. 1997) (failure of proof regarding physical effects of PCB exposure since PCB was heat degraded-stigma property damage turns on whether physical effects of pollution remain after cleanup); Darby v. Armstrong Rubber Co., 780 F. Supp 1097 (S.D. Miss. 1991) (no proof of injury and diminution in value in hazardous waste dumping case); Johnston v. U.S., 597 F. Supp. 374 (D. Kan. 1984) (plaintiff's expert opinion inadmissible). See also Viterbo v. Dow Chemical Co., 826 F.2d 420 (5th Cir. 1987); Rubanick v. Witco Chemical Corp., 542 A.2d 975 (N.J. Super. 1988); Will v. Richardson-Merrell Inc., 647 F. Supp. 544 (S.D. Ga. 1986); Larsen v. International Business Machine Corp., 87 F.R.D. 602 (E.D. Pa. 1980); In re Related Asbestos Cases, 543 F. Supp. 1142 (N.D. Cal. 1982).

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

(1) Yes - U.S. v. Conservation Chemical Co., 653 F. Supp. 152 (W.D. Mo. 1986); Continental Ins. Co. v. Northeastern Pharm. & Chemical Co. Inc., 811 F.2d 1180 (8th Cir. 1987), later proceedings, 842 F.2d 977 (8th Cir. 1988) (if done in mitigation); Bankers Trust Co. v. Hartford Accident & Indemnity Co., 518 F. Supp. 371 (S.D.N.Y. 1981).

(2) No - Mraz v. Canadian Universal Insurance Co. Ltd., 804 F.2d 1325 (4th Cir. 1986) (interpreting language of insurance coverage); Atlantic City Municipal Utilities Auth. v. Cignal Companies, Civ. # A-1320-8477 (N.J. Sup. Ct. 1987); USF & G v. Wilken Insulation Co., Civ. # 84-CH-11676 (Chancery Ct. 1987); Platte Pipe Line Co. v. U.S., 846 F.2d 610 (10th Cir. 1988) (oil spill cleanup costs fall under Clean Water Act 33 U.S.C. § 1321(i)(1) and are under exclusive jurisdiction of U.S. Claims Court--non-cleanup damage falls under FTCA).

f. Use of Discretionary Function Exclusion. Cases falling under the discretionary function exclusion. Andrews v. U.S., 121 F.3d 1435 (11th Cir. 1997) (Navy's pre-CERCLA/RCRA delegation of responsibility to comply with waste disposal regulations and negligent failure to supervise waste disposal independent contractor falls within the discretionary function exclusion--distinguishing Dickerson, Inc. v. United States, 875 F.2d 1577 (11th Cir. 1989)); Daigle v. Shell Oil Co., 972 F.2d 1527 (10th Cir. 1992) (method of cleaning pond at Rocky Mountain Arsenal is discretionary); Employers Ins. of Wausau v. U.S., 27 F.3d 245 (7th Cir. 1994) (EPA decision to use CERCLA is discretionary); Wells v. U.S., 851 F.2d 1471 (D.C. Cir. 1988) (EPA decision not to clean up polluted

neighborhood near lead smelter corridor falls under § 2680(a); Schwartzman, Inc. v. ACF Industries, Inc., Civ. # 93-0027-M-Civil (D.N.M., 12 Dec. 1996) (GOCO contractor is an independent contractor and degree of supervision by U.S. re toxic waste disposal is discretionary); Aragon v. U.S., 950 F. Supp. 321 (D. Nev. 1996) (disposal of industrial waste during operation of now closed Air Force base is discretionary); Core v. U.S., Civ. # 1:91CV00430 (E.D.N.C., 26 Aug. 1993) (Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.,* does not impose a mandatory duty to notify of a spill); Laurence v. U.S., 851 F. Supp. 1445 (N.D. Cal. 1994) (when independent contractor constructed Navy housing project 1944, contaminated soil was used--Navy is entitled to independent contractor and discretionary function defenses); Bowman v. U.S., 848 F. Supp. 979 (M.D. Fla. 1994) (Navy buried pyridine on land relinquished in 1963--pyridine uncovered by bulldozer in 1988-method of disposal was discretionary as was failure to warn). Cases not falling under the discretionary function exclusion. Dube v. Pittsburgh Corning, 870 F.2d 790 (1st Cir. 1989) (Navy's failure to warn shipyard workers of asbestos exposure not under § 2680(a)); Redland Soccer Club v. Dept. of Army, 835 F. Supp. 803 (M.D. Pa. 1993), aff'd in part, rev'd in part without discussion of point, 55 F.3d 827 (3d Cir. 1995) (disposal of property containing landfill with toxic materials to township in 1972 to develop park is not discretionary).

g. Trespass v. Nuisance. See, e.g., Maddy v. Vulcan Materials Co., 737 F. Supp. 1528 (D. Kan 1990) (to constitute trespass, invading fumes must cause physical damage to land, otherwise constitutes a nuisance).

h. CERCLA. Exhaustion of CERCLA Remedies. See Redland Soccer Club v. Dept. of Army, 801 F. Supp. 1432 (M.D. Pa. 1992), aff'd in part, rev'd in part without discussion of point, 55 F.3d 827 (3d Cir. 1995) (plaintiffs must await completion of CERCLA and other statutory remedies before using FTCA). Right to damages under CERCLA. Richland Lexington Airport v. Atlas Properties, 854 F. Supp. 400 (D.S.C. 1994) (no waiver of sovereign immunity under CERCLA--letter to EPA did not contain sum certain required for FTCA--EPA cleanup contractor entitled to Government contractor defense); Werlein v. U.S., 746 F. Supp. 887 (D. Minn. 1990) (medical response costs not payable under CERCLA, but as common law tort). But see Williams v. Allied Automotive Autolite Division, 704 F. Supp. 782 (N.D. Ohio 1988) (Medical surveillance costs may be response costs under CERCLA). However, FTCA counterclaim may be asserted in CERCLA case.

U.S. ex rel Dept. of Fish & Game v. Montrose, 788 F. Supp 1485 (C.D. Cal. 1992).

i. Loss of Property Value. Loss of Property Value due to Stigma of Contamination. In re Paoli RR Yard PCB Litigation, 811 F. Supp. 71 (E.D. Pa. 1992) (EPA is still in process of clean-up--none of properties sold--no loss)

j. Control of Independent Waste Disposal Contractors. USF & G v. U.S., 638 F. Supp. 1068 (M.D. Pa. 1986) (improper instructions to cleanup contractor--U.S. 60% liable); State of New York v. Shore Realty v. Aar Technical Svc. Ctr., 648 F. Supp. 255 (E.D.N.Y. 1986) (U.S. may be liable for dumping of toxic waste by its contractor if it is ultra hazardous); Dickerson Inc. v. Holloway, 685 F. Supp. 1555 (M.D. Fla. 1987), aff'd, 875 F.2d 1577 (11th Cir. 1989) (DPDS responsible for supervising independent contractor from cradle to grave while disposing of PCB waste); Clark v. U.S., 660 F. Supp. 1164 (W.D. Wash. 1987) (failure to follow SOP on Air Base held negligence *per se*, as SOP required U.S. to follow State law). But see Andrews v. U.S., 121 F.3d 1435 (11th Cir. 1997) (Navy's pre-CERCLA/RCRA delegation of responsibility to comply with waste disposal regulations and negligent failure to supervise waste disposal independent contractor falls within the discretionary function exclusion--distinguishing Dickerson, Inc. v. United States, 875 F.2d 1577 (11th Cir. 1989)).

k. Idiosyncrasy Defense. Idiosyncrasy defense—-unusual reaction of a particular person to a particular drug. Griggs v. Combe, Inc., 456 So.2d 790 (Ala. 1984) (allergic reaction); Brown v. Superior Court (Abbott Labs), 245 Cal. Rptr. 412 (Cal. 1988); Lemoine v. Aero-Mist, Inc., 539 So.2d 712 (La. App. 1989).

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

32. *Prima Facie* Tort and Surreptitious Entry. Socialist Workers Party v. Attorney General of U.S., 642 F. Supp. 1357

(S.D.N.Y. 1986) (FBI agent engaged in disruption activities, surreptitious entries and use of informants--$2,500 for each of 17 disruptions, $500 for each of 193 entries, and $12,500 for use of 73 informants on average over 23 months).

33. Family Services. Are family services to the injured compensable? See 90 A.L.R. 2d 1323 (1963); Fifield Manor v. Finston, 354 P.2d 1073 (Cal. 1960). See also Camacho v. U.S., Civ. #A-87-CA-780 (W.D. Tex. 1989) (permits recovery); Washington v. U.S., Civ. #83-2332-RS (C.D. Cal. 1990) (same); 1st of Americal Bank Mid-Michigan v. U.S., 752 F. Supp. 764 (E.D. Mich. 1990) (same); Waters v. U.S., Civ. #87-130-NN (E.D. Va. 1989) (holds yes); Hill v. U.S., 81 F.3d 118 (10th Cir. 1996) (award of $1,017,500 to parents for round-the-clock past nursing care upheld at rate for specialized care as care was of same quality). Cf. Rayfield v. Lawrence, 253 F.2d 209 (4th Cir. 1958) (Plaintiff allowed to recover for value of medical services provided by Portsmouth Naval Hospital, even though he did not pay for these medical services). But see Hota v. NME Hospitals Inc., 690 F. Supp. 1539 (E.D. La. 1988) (no wage loss for persons taking care of injured child); Warren Trucking Co. v. Chandler, 277 S.E.2d 488 (Va. 1981) (no recovery for family services when services not of specialized nature). Accord In re Klapacs's Case, 242 N.E.2d 862 (Mass. 1968) (similar, but under Mass. W.C. law).

34. Percentage of Recovery in Loss of Chance. Pietrantonio v. U.S., 827 F. Supp. 458 (W.D. Mich. 1993) (full recovery under Michigan law where percentage exceeds 50 percent); Bointy-Tsotigh v. U.S., 953 F. Supp. 358 (W.D. Okla. 1996) (95% chance of survival reduced to 20% by delay in diagnosis--plaintiff recovers 25% of damages minus 5% for comparative negligence).

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

36. Moral Damages. Lopez Nieves v. Marrero Vergel, 939 F. Supp. 124 (D.P.R. 1996) (discusses moral damages principles under Puerto Rico law-requires affective relationship-–usually limited to parents, spouses, ex-spouses common law spouses, sons, daughters and siblings of the deceased--requires long moral suffering and anguish and not just a passing affliction).

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

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

1. Immunity Statutes. There are many immunity statutes. The Westfall Act covers all federal employees acting within the scope of their employment, 28 U.S.C. § 2679. Other immunity statutes include: 10 U.S.C. § 1084 (DOD-CIA), 38 U.S.C. § 4116 (VA); 42 U.S.C. § 2459a (NASA); 22 U.S.C. § 815(c) (State and AID); 42 U.S.C. § 233(c) (PHS); 42 U.S.C. § 247b(k)(5) (Swine Flu).

a. Westfall Act. U.S. employees may not be sued individually in any court if they are acting within the scope of their employment. See, e.g., Beran v. U.S., 759 F. Supp. 886 (D.D.C. 1991) (applies Westfall Act to Secret Service Agents who assault and arrest motorist near White House); Davis v. U.S., 791 F. Supp. 793 (E.D. Mo. 1992) (Westfall Act immunizes employee, even though U.S. cannot be sued due to 28 U.S.C. § 2680 exclusion); Miller v. U.S., 73 F.3d 878 (9th Cir. 1995) (suit for death of soldier in military hospital in Japan dismissed--U.S. substituted under Westfall Act and foreign country exclusion applied). But see Vu v. Meese, 755 F. Supp. 1375 (E.D. La. 1991) (§ 2679 does not bar suit against Coast Guardsmen because of wording of § 2680(h) exception for law enforcement officers). The Westfall Act is constitutional. While the Westfall Act is a federal law, the law defining what constitutes scope of employment is determined by state law in a FTCA proceeding. Maron v. U.S., 126 F.3d 317 (4th Cir. 1997). Lunsford v. Price, 885 F.2d 236 (5th Cir. 1989) (upholds Westfall Act). A defendant's improper motivations for a tortious act is not enough to strip a defendant of Westfall act immunity as long as tortious acts within the defendabt's job duties. Maron v. U.S., 126 F.3d 317 (4th Cir. 1997) (NIH physician's harassment of fellow NIH physician is within scope, even though motivated in part by ill will so long as acts were engendered by their duties). The Westfall Act is also retroactive. Sowell v. American Cyanamid Co., 888 F.2d 802 (11th Cir. 1989) (Westfall Act applied retroactively in products liability case); Connell v. U.S., 737 F. Supp. 61 (S.D. Iowa 1990) (Westfall Act is retroactive and applies in a FECA case). The Westfall Act and can be applicable to defense contractors under certain circumstances. Gulati v. Zuckerman, 723 F. Supp. 352 (E.D. Pa. 1989) (Westfall Act applied to defense contractor engaged in Federal investigation).

(1) Individual Federal Employees. If federal employee sued individually in State court, suit may be removed to Federal court upon defendant's request. (28 U.S.C. §§ 1441-1451; 28 C.F.R. Part 15). Nappi v. U.S., Civ. # 85-7433 (E.D. Pa. 1984) (Army doctor working in civilian hospital is still U.S. employee under Pennsylvania law--removal permitted). Removal does not vest jurisdiction in Federal court. Leddy v. USPS, 525 F. Supp. 1053 (E.D. Pa. 1981).

(2) DOJ Certification. After removal, the DOJ will issue a certification, if requested, concerning whether the federal employees actions or inactions were within the scope of their employment. Sullivan v. Freeman, 944 F.2d 334 (7th Cir. 1991) (public defender is not immune under Westfall Act, even though a Federal employee, because Attorney General was not requested to certify). In issuing the certification, the Attorney General is not reqiured to assume the facts plead are true. Deane v. Light, 970 F. Supp. 465 (E.D. Va. 1997) (citing Melo v. Hafer, 13 F.3d 736 (3rd Cir. 1994)and Kimbro v. Velten, 30 F.3d 1501 (D.C. Cir. 1994), cert. denied., 515 U.S. 1145, 115 S.Ct. 2584 (1995)). Courts are split on whether the certification, once made, can be withdrawn. Jamison v. Wiley, 14 F.3d 222 (4th. Cir. 1994) (DOJ can withdraw scope certification and district court can hold evidentiary hearing on whether scope should be granted); Jackson v. Neuger, 783 F. Supp. 558 (D. Colo. 1992) (Attorney General certification of scope may not be withdrawn in sexual assault by psychologist case). The AG’s certification is binding as to removal, but is subject to judicial review as to scope determination and substitution of U.S. as defendant. Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 115 S.Ct. 2227 (1995) (Attorney General’s certification of scope conclusive only as to removal, but not as to substitution). The certification is sufficient to meet the government’s *prima facie* burden of proving scope of employment. Maron v. U.S., 126 F.3d 317 (4th Cir. 1997). The burden is on the plaintiff to disprove DOJ's scope certification, and only if the plaintiff produces persuasive evidence refuting the certification is the government required to produce evidence to support the certification. Maron; Rogers v. Management Technology, Inc., 123 F.3d 34 (1st Cir. 1997); Kimbro v. Velten, 30 F.3d 1501 (D.C. Cir. 1994), cert. denied., 515 U.S. 1145, 115 S.Ct. 2584 (1995)). However, a plaintiff's failure to object to substitution of U.S. for its employees may waive right to have scope reviewed. D'Huyvetter & Swichkow, P.C. v. McGladrey & Garcia, Civ.

1:95-cv-959-GET (N.D. Ga., 21 Aug. 1995). The court may order discovery before ruling on the scope issue. Arbour v. Jenkins., 903 F.2d 416 (6th Cir. 1990) (Westfall Act is subject to discovery and judicial review). This would likely happen when the AG's certification is deemed insufficient. Wood v. U.S., 991 F.2d 915 (1st Cir. 1992), reaff'd, 995 F.2d 1122 (1st Cir. 1993) (Attorney General may not issue scope certificate that simply denies sexual assault occurred); Jackson v. U.S., 751 F. Supp. 910 (D. Colo. 1990) (suit remanded to state court as scope certificate did not allege sexual misconduct within scope of psychotherapist's employment). The court may also order a hearing on the scope issue. Melo v. Hafer, 13 F.3d 736 (3d. Cir. 1994)(while a decision on scope is up to the judge, a hearing must be held whenever there is a genuine dispute of fact); Arthur v. U.S. By and Through Veterans Admin., 45 F.3d 292 (9th Cir. 1995) (court must hear facts on scope before acting in suit by patient against psychiatrist for sexual abuse). Timberline Northwest Inc. v. Hill, 1998 AL 123119 (9TH Cir., Mont.) (DOJ certification of scope does not preclude RICO claim based on allegation that Forest Service employee stole its fire hose clamp invention. Lyons v. Brown, 158 F.3d 605 (1st Cir. Me. 1998), sexual harassment which covers period of time, scope can be decided on an act-by-act basis.

(3) Federal Employees in Scope. When federal employees are within scope of employment, the case against them will be dismissed. See, e.g., Aviles v. Lutz, 887 F.2d 1046 (10th Cir. 1989) (fellow employees in Indian Health Service dismissed under Westfall Act in defamation action); Dimick v. U.S., 952 F. Supp. 323 (M.D. Pa. 1997) (no pendant jurisdiction permitted where tenant sues both landlord-lessee and U.S. as property owner in slip and fall on premises); Andrulonis v. U.S., 724 F. Supp. 1421 (N.D.N.Y. 1989) (CDC employee dismissed under Westfall Act failure to warn New York State employee of danger); Baggio v. Lombardi, 726 F. Supp. 922 (E.D.N.Y. 1989) (USPS employees dismissed under Westfall Act--defaming fellow employee); Petrousky v. U.S., 728 F. Supp. 890 (N.D.N.Y. 1990) (supervisor dismissed under Westfall Act for libel--judge rejects DOJ scope certification); Mitchell v. U.S., 896 F.2d 128 (5th Cir. 1990) (Army nurse dismissed under Westfall Act for assault); S.J. & W. Ranch Inc. v. Lehtinen, 717 F. Supp. 824 (S.D. Fla. 1989) (Westfall Act shields AUSA from defamation suit); Jordan v. Hudson, 879 F.2d 98 (4th Cir. 1989) (Westfall Act precludes action against whistle blowers); Nadler v. Marm., 731 F. Supp 493 (S.D. Fla 1990); (Westfall Act

shields AUSA in defamation action); Deutsch v. Federal Bureau of Prisons., 737 F. Supp. 261 (S.D.N.Y. 1990) (Westfall Act applies to placement of prisoner in cell where another prisoner has AIDS); Forest City Mach. Works v. U.S., 953 F.2d 1086 (8th Cir. 1992) (Dept. of Commerce attorney action scope when filing 3d party complaint); Dillon v. State of Miss. Military Dept., 827 F. Supp. 1258 (S.D. Miss. 1993) (suit against Miss. Natl. Guardsman as individuals by other Miss. Natl. Guardsman barred under Westfall Act); Riley v. U.S., Civ. # 94-183 (N.D. Iowa, Cedar Rapids, 1 Sept. 1994) (Westfall Act bars individual suit against U.S.P.S. driver who was in scope); Zeglis v. Sutton, 980 F. Supp. 959 (N.D. Ill. 1997) (removal prior to default judgment results in void default judgment-—U.S. substituted and case dismissed for failure to file administrative claim).

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

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

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

(1) Individual Suits. Individual suits are not permitted even where foreign country exception is applicable due to the Westfall Act. U.S. v. Smith, 499 U.S. 160, 111 S.Ct. 1180 (1991).

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

(3) Certain Statutory Exclusions Not Waived. Passage of 10 U.S.C. § 1089 does not "waive" the Feres doctrine.

Hawe v. U.S., 670 F.2d 652 (6th Cir. 1982); Howell v. U.S., 489 F. Supp. 147 (W.D. Tenn. 1980). The foreign country exclusion to the FTCA is not waived either, Powers v. Schultz, 821 F.2d 295 (5th Cir. 1987) (10 U.S.C. § 1089(f) does not permit suit against USAF physician where cause of action arose in foreign country--sole remedy is FTCA, but barred by foreign country exclusion--cites Jones v. Newton, 775 F.2d 1316 (5th Cir. 1985)); Pelphrey v. U.S., 674 F.2d 243 (4th Cir. 1982), or FECA, Baker v. Barber, 673 F.2d 147 (6th Cir. 1982), or the independent contractor exclusion. DeShaw v. U.S., 704 F. Supp. 186 (D. Mont. 1988) (§ 1089 does not abrogate independent contractor exclusion to FTCA).

(4) Discretionary Function Exclusion. Discretionary function exclusion not applicable to medical care of patients whose claim is not excluded by Feres doctrine. Jackson v. Kelly, 557 F.2d 735 (10th Cir. 1977); Martinez v. Schrock, 537 F.2d 765 (3d Cir. 1976), cert. denied, 430 U.S. 920 (1977); Henderson v. Bluemink, 511 F.2d 399 (D.C. Cir. 1974). Bass v. Parsons, 577 F. Supp. 944 (S.D. W.Va. 1984); Hall v. U.S., 528 F. Supp. 963 (D.N.J. 1981); Taylor v. Duke University, Civ. # C-84-211-D (M.D.N.C. 1985) (suit permitted under § 1089(f)).

(5) Intentional Tort Exclusion. Courts are also split on whether § 1089 waives the 2680(h) exclusion. Jordan v. U.S., 740 F. Supp. 810 (W.D. Okla. 1990) (§ 1089(a) does not waive 2680(h) against U.S.--designed to preclude A or B suits against health care workers individually); Andrews v. U.S., 548 F. Supp. 603 (D.S.C. 1982) (§ 1089 bars imposition of 28 U.S.C. § 2680(h)); Heller v. U.S., 776 F.2d 92 (3d Cir. 1985). Cf. Franklin v. U.S., 992 F.2d 1492 (10th Cir. 1993)(VA immunity statute nullified application of § 2680(h) assault exclusion where a negation of unauthorized surgery alleged).

(6) Non-Scope Acts. Doe v. U.S., 769 F2d 174 (4th Cir. 1985) (§ 1089(f) does not extend to non-scope acts.)

(7) Duty of Care. Bembenista v. U.S., 866 F.2d 193 (D.C. Cir. 1989) (reverses lower court on applicability of § 1089(e) and resolves issue on higher duty of care).

c. Miscellaneous Immunities.

(1) Other Persons. Others may be immune due to duties being performed Plourde v. Ferguson, 519 F. Supp. 14 (D. Md. 1980) (Exchange detective). Raisig v. U.S., 34 F.

Supp.2d 1053 (W.D. Mich, 1998) postal supervisor is in scope when he reported assault by postal employee.

(2) Nuclear Contractors. 42 U.S.C. § 2212 immunizes Federal nuclear contractors only where suit under FTCA is permitted. In re Consolidated U.S. Atmospheric Testing Litigation, 616 F. Supp. 759 (N.D. Cal. 1985)(Feres and foreign country exclusions also apply). But see Prescott v. U.S., 959 F.2d 792 (9th Cir. 1992) (holding in Consolidated is overruled by Berkovitz v U.S., 486 U.S. 531, 108 S.Ct. 1954 (1988)).

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

d. Representation. Representation of Government employees and attorney fees. Representation by U.S. Attorney may be requested (28 C.F.R. Part 0). Action brought in bad faith may permit U.S. to recover counsel fees. Moon v. Smith, 523 F. Supp. 1332 (E.D. Va. 1981). Reimbursement of attorney fees not permitted unless approved in advance by Department of Justice. Castillo v. U.S., 707 F.2d 422 (9th Cir. 1983). Romero v. Witherspoon, 7 F. Supp. 2d 808 (W.D. La., 1998), nonsettling contract physician not entitled to contribution from settling Army hospital under La. Law. Will v. U.S., 1998WL448858 (9th Cir. Wash), where Forest Service employee and contract logger move Will's road grader to place where it is vandalized, under RCW4.22.070(1) vandals cannot be held at fault nor can logger as he is not a party.

2. Indemnity or Contribution.

a. Generally. U.S. may seek indemnity or contribution where it is allowed by state law and private defendants may do likewise. See, e.g., Rudelson v. U.S., 602 F.2d 1326 (9th Cir. 1979) (under Hawaii law, U.S. may seek indemnity, but contractor may require jury determination on his share); GAF Corp. v. U.S., 1996 WL 422491 (D.D.C.) (no indemnity permitted against U.S. by settling part in asbestos shipyard cases arising in California, Florida, Hawaii, Massachusetts and New York); Owen v. U.S., 713 F.2d 1461 (9th Cir. 1983)

(Such claims are governed by State law); U.S. v. Yale New Haven Hospital, 727 F. Supp. 784 (D. Conn. 1990) (Connecticut law does not permit contribution among joint tortfeasors, but U.S. permitted to seek apportionment based on successive tortfeasors); Pickett v. U.S., 724 F. Supp. 390 (D.S.C. 1989) (third party action against Sterling Medical Association employer of ER contract physician permitted); Saunders v. S.C. Public Service Authority, 856 F. Supp. 1066 (D.S.C. 1994) (contractual indemnity by South Carolina as operator of Cooper River); In re General Dynamics Asbestos Cases, 602 F. Supp. 497 (D. Conn. 1984) (no contribution permitted as none under Connecticut law--also cannot third party U.S. since no active negligence); Estate of Warner by Warner v. U.S., 669 F. Supp. 234 (N.D. Ill. 1987) (U.S. cannot third party civilian hospital under Illinois law for negligent supervision of drug patient who caused fatal accident as victim cannot sue hospital); Boys and Girls Clubs of Chicago v. U.S., 855 F. Supp. 975 (N.D. Ill. 1994) (Boys and Girls Clubs cannot seek contribution from U.S. from drowning deaths in Indiana because Indiana law does not recognize contributions among joint tortfeasors); Foote v. U.S., 648 F. Supp. 735 (N.D. Ill. 1986) (contribution may be sought from prior medical provider in case of failing to diagnose quadriceps rupture). Cf. Brown v. U.S., 838 F.2d 1157 (11th Cir. 1988) (where plaintiff recovers from civilian hospital under Florida Uniform Contribution Act--cannot recover from U.S.). However, if case settled prior to filing suit, FTCA procedures must be complied with. USAA v. U.S., 105 F.3d 185 (4th Cir. 1997) (when USAA voluntarily settled a claim against it insured prior to the filing of a suit, neither USAA nor U.S. employee entitled to indemnity since FTCA procedures not followed, since case never removed to federal court and injured party never made claim against U.S.). Moreover, when bringing a contribution or indemnity claim, all the normal attributes of a lawsuit must be complied with including jurisdiction, the relevant SOL and causation. USAir, Inc. v. U.S. Department of the Navy, 14 F.3d 1410 (9th Cir. 1994) (Navy employee's briefcase falls on head of passenger when USAir attendant opens overhead compartment—-attendant's actions not superseding cause); Santiago v. U.S., 884 F. Supp. 45 (D.P.R. 1995) (U.S. cannot third party city due to failure to meet 90-day filing requirement even though state SOL is two years); Hill v. U.S., 815 F. Supp. 373 (D. Colo. 1993) (court lacked jurisdiction over non-resident physician under Colorado long arm statute).

b. Attorney General Review. Attorney General must review case prior to settlement if U.S. is, or may be, entitled to indemnity or contribution (28 C.F.R. § 14.6). Doganieri v. U.S., 520 F. Supp. 1093 (N.D. W. Va. 1981).

c. Proportional Fault. Some states have statutes which allow defendants only to pay the amount of their proportional fault. Martin By and Through Martin v. U.S., 984 F.2d 1033 (9th Cir. 1993) (Calif. Fair Share Responsibility Act applicable to rapist where U.S. bore certain responsibility for kidnapping of 6-year-old in day care); Mittiga v. U.S., 945 F. Supp. 476 (N.D.N.Y. 1996) (under N.Y. C.P.L.R. § 1471 (McKinney 1991), U.S. held 60% liable where GOV struck pedestrian). However, such laws may have some effect on contribution or indemnity. See, e.g., Yanez v. U.S., 1996 WL 310120 (N.D. Cal.) (U.S. cannot third party joint tortfeasor who settles on a proportional basis under Col. Civ. Code § 877.6 without informing U.S). Krieser v. Hobbs, 166 F.3d 736 (5th Cir. 1999), distinguishes between pro tanto recovery (modified joint and several) and proportional fault - lists cases from many states. Romero v. Witherspoon, 7 F. Supp.2d 808 (W.D. La. 1998) nonsettling contract physician not entitled to contribution from settling Army hospital under La. Law. Will v. U.S., 1998 WL 448858 (9th Cir. Wash) where Forest Service employee and contract logger move Will's road grader to place where it is vandalized, under RCW4.22.070(1) vandals cannot be held at fault nor can logger as he is not a party.

d. Indemnity. Indemnity may not be sought prior to final judgment and then administrative filing requirement must be met. Johns-Manville Sales Corp. v. U.S., 690 F.2d 721 (9th Cir. 1982); Barron v. U.S., 654 F.2d 644 (9th Cir. 1981).

e. Settlement by Plaintiff of Claims Against One Party. Whether release of joint tortfeasor releases U.S. is a question of material fact. Collins v. U.S., 708 F.2d 499 (10th Cir. 1983). Such a settlement may reduce the amount the non-settling defendant has to pay. Hunter v. Sperry Top Sider Inc., 630 F. Supp. 1244 (E.D. Mich. 1986) (joint tortfeasor entitled to pro tanto reduction of any judgment against it where injured party had previously settled with other joint tortfeasor--cites cases); Whatley v. Armstrong World Industries Inc., 861 F.2d 837 (5th Cir. 1988) (Texas law permits judgment against non-settling tortfeasor after deducting settling tortfeasor's share--cites Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984)); Wardell v. U.S., 764 F. Supp. 679 (D. Me. 1991) (applies setoff of amounts collected from 3rd party tortfeasor to judgment against U.S.). But see Yost v. American Overseas Marine Corp., 798 F. Supp. 313 (E.D. Va. 1992) (settling party is not entitled to offset for workmen’s compensation benefits mistakenly paid). Or, a good faith settlement may give the non-settling defendant no relief. Burden v. U.S. Army Corps of Engineers,

794 F. Supp. 184 (S.D. W. Va. 1992) (good faith settlement with estate bars third party complaint by U.S. in wrongful death case)

f. “Mary Carter” Agreements. “Mary Carter" agreements are those where claimant assigns to a joint tortfeasor a portion of his potential recovery against the remaining tortfeasors in exchange for a partial settlement in advance of trial. Usually they are secret. Such arrangements should be avoided as being against public policy and subject to being set aside. Bass v. Phoenix Seadrill/78 Ltd., 562 F. Supp. 790 (E.D. Tex. 1983). Where contribution is refused and U.S. desires to pay its share, "Mary Carter" agreement should be avoided. See Riggle v. Allied Chemical Corp., 378 S.E.2d 282 (W.Va. 1989); Abbott Ford Inc. v. Superior Court & Ford Motor Co., 239 Cal. Rptr. 626 (Cal. 1987); Bass v. Phoenix Seadrill/78 Ltd. v. Crown Rig Building Services Inc., 749 F.2d 1154 (5th Cir. 1985); Leger v. Drilling Well Control Inc., 592 F.2d 1246 (5th Cir. 1979). See also 65 A.L.R. 3d 602 (1975).

g. Seckinger Clause. Rhoades v. U.S., ___ F. Supp. ___, 1997 WL 748738 (D. Del.) (where AAFES's and renovation contractor's joint negligence cause patron's fall, Seckinger clause held U.S. harmless, cite U.S. v. Seckinger, 397 U.S. 203 (1970); Smith v. U.S., 497 F.2d 500 (5th Cir. 1974); Gibbs v. U.S., 599 F.2d 36 (2d cir. 1979); U.S. v. Hollis, 424 F.2d 188 (4th Cir. 1970); Gillen v. U.S., 825 F.2d 1155 (7th Cir. 1989); contra U.S. v. English, 521 F.2d 63 (9th Cir. 1975).

h. State Review Panel. Songne v. U.S., 1998 WL 352175 (E.D. La.) (where U.S. third parties civilian hospitals in medical malpractice suit - U.S. and civilian hospital are subject to state medical review board jurisdiction as state law applies.

3. Only One Full Recovery. Amount recovered by claimant from other tortfeasor is deductible from U.S. award as there is only one full recovery, Kassman v. American Univ., 546 F.2d 1029 (D.C. Cir. 1976), or may release U.S. completely. Dickun v. U.S., 490 F. Supp. 136 (W.D. Pa. 1980).

4. Immunity of Joint Tortfeasor. Where joint tortfeasor is immune, indemnity or contribution may not be available, e.g., a State. Hill v. U.S., 453 F.2d 838 (6th Cir. 1972); U.S. v. Texas, 143 U.S. 621 (1892); Williams v. U.S., 674 F. Supp. 334 (N.D. Fla. 1987) (U.S. third parties defunct corporation--barred by 3 year Florida “winding up” statute); Estate of Warner by Warner v. U.S., 669 F. Supp. 234 (N.D. Ill. 1987) (U.S. cannot third party civilian hospital under Illinois law for negligent

supervision of drug patient who caused fatal accident as victim cannot sue hospital); Stifle v. Marathon Petroleum, 644 F. Supp. 260 (S.D. Ill. 1986) (Illinois Structural Work Act does not permit contribution where employer settles with injured party); In re All Maine Asbestos Litigation (PNS cases), 772 F.2d 1023 (1st Cir. 1985) (land based third party claims barred by State Workmen's Comp. & LHWCA--dual capacity doctrine not applicable). But see Colombo v. Johns-Manville Corp., 601 F. Supp. 1119 (E.D. Pa. 1984) (Pennsylvania Workmen's Compensation Law exclusivity provision bars third party action against U.S., but maritime law and Federal law on contribution permits same). This works both ways, since where U.S. is immune, it can not be sued for indemnity or contribution. Armstrong v. A.C. & S. Inc., 649 F. Supp. 161 (W.D. Wash. 1986) (FECA precludes U.S. from being joint tortfeasor subject to contribution under Washington law); LaBarge v. County of Mariposa, 798 F.2d 364 (9th Cir. 1986) (U.S. immune from suit for contribution under California W.C. law as U.S. is in-state employer under private person analogy). However, a plaintiff's release of a co-defendant does not render that party immune. Barrett v. U.S., 668 F. Supp. 339 (S.D.N.Y. 1987) (U.S. permitted to third party State of New York even though injured party has released State and cannot bring direct action). Sometimes a private defendant may assert the immunity of the U.S. Yearsley v. W.A. Ross Construction Co., 309 U.S. 18, 60 S.Ct. 413 (1940) (in public works projects, contractor can assert immunity of U.S. if specs followed--see cases cited therein); Bynum v. FMC Corp., 770 F.2d 556 (5th Cir. 1985) (Mississippi Guardsman injured in Georgia when cargo carrier went off bridge--Government contractor defense applicable as matter of Federal common law). Similarly, where State law provides for joint and several liability, U.S. may pay entire amount or in a comparative negligence jurisdiction, the other tortfeasors share. Mattschei v. U.S., 600 F.2d 205 (9th Cir. 1979); Ferrero v. U.S., 603 F.2d 510 (5th Cir. 1979); Hood v. Dealers Transport Co., 472 F. Supp. 250 (N.D. Miss. 1979); Johnson v. U.S., 496 F. Supp. 597 (D. Mont. 1980). See also Rooney v. U.S., 634 F.2d 1238 (9th Cir. 1980) (Under California law, U.S. must pay for contractor's share of liability); Dyer v. U.S., 551 F. Supp. 1266 (W.D. Mich. 1982) (where U.S. pays $825,225 for death of passenger based on 20 percent negligence of U.S. as opposed to 80 percent of pilot). However, this does not mean that the U.S. may not third party in the other tortfeasor in an attempt to collect the moneys paid. Azure v. U.S. H.H.S., 758 F. Supp. 1382 (D. Mont. 1991) (joinder of claimant's driver is not barred due to fact that he is judgment proof).

5. Pendent Jurisdiction.

a. Nature of Pendent Jurisdiction. Pendent jurisdiction permits suit in Federal court where joint tortfeasor would

normally be sueable only in State court, e.g., medical malpractice by both Federal and local hospital. Finley v. U.S., 490 U.S. 545 (1989) barred pendant jurisdiction under FTCA. The Finley ruling was overturned by Judicial Improvements Act of 1990, codified at 28 U.S.C. § 1367, which permits pendant jurisdiction, but lists four exceptions for the judge's discretion. The Judicial Improvements Act of 1990 was not retroactive. See Haamid v. Postal Svc., 754 F. Supp. 54 (E.D. Pa. 1990) (denied pendant jurisdiction as suit filed prior to above enactment's effective date on 1 Dec. 1990).

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

(1) Intentional Tort Exception. Rodriguez v. Naylor Industries Inc., 763 S.W.2d 411 (Tex. 1989).

(2) Parent-Sibling Corporation Exception. Gaines v. Excell Industries Inc., 667 F. Supp. 569 (M.D. Tenn. 1987).

(3) Dual Capacity Doctrine. Budzichowski v. Bell Telephone Co. of Pennsylvania, 503 Pa. 160, 469 A.2d 111 (1983).

6. Claimant-Employee of Independent Contractor. In suit against U.S. by employee of independent contractor, third party action by U.S. against independent contractor as joint tortfeasor may be permitted by contract expressly or impliedly despite independent contractor's immunity under State law. U.S. v. Seckinger, 397 U.S. 203, 90 S.Ct. 880 (1970); American Agricultural Chemical Co. v. Tampa Armature Works Inc., 315 F.2d 856 (5th Cir. 1963); Spurr v. LaSalle Construction Co., 385 F.2d 322 (7th Cir. 1967); Larive v. U.S., 318 F. Supp. 119 (D.S.D. 1970); Rooney v. U.S., 434 F. Supp. 766 (N.D. Cal. 1977); Gibbs v. U.S., 599 F.2d 36 (2d Cir. 1979); Barron v. U.S., 473 F. Supp. 1077 (D. Haw. 1979); Barr v. Brezina Construction Co. Inc., 464 F.2d 1141 (10th Cir. 1972); U.S. Lines Inc. v. U.S., 470 F.2d 487 (5th Cir. 1972); Petznick v. U.S., 575 F. Supp. 698 (D. Neb. 1983); Smith v. U.S., 497 F.2d 500 (5th Cir. 1974); Morris v. Uhl & Lopez Engineers Inc., 442 F.2d 1247 (10th Cir. 1971). See also Casey v. U.S., 635 F. Supp. 221 (D. Mass. 1986) (followed Seckinger rule--permits U.S. right to seek indemnity against employer-independent contractor); Keil v. U.S., 705 F. Supp. 346 (E.D. Mich. 1988) (permits indemnity to U.S.); Kennewick Irrigation District v. U.S., 880 F.2d 1018 (9th Cir. 1989) (wording of contract costs clause does not preclude Seckinger action). This may occur in suits based on injuries from medical devices and equipment. Price v. U.S., 530 F. Supp. 1010 (S.D.

Miss. 1981) (hold-harmless clause must clearly require indemnitor to cover U.S. negligence to be valid particularly in emergency situations). In such suits, several liability may be applicable. See Denson v. U.S., 104 F.3d 365 (table), 1996 WL 740821 (9th Cir. 1996) (in construction site accident, several liability applied--U.S. 20%, contractor 60% and plaintiff 20%).

7. Statutory Employer. In suit against United States by employee of independent contractor, United States may be "statutory employer" and thus not subject to suit. Bergeron v. U.S, 495 F. Supp. 222 (W.D. La. 1980); Roelofs v. U.S., 501 F.2d 87 (5th Cir. 1974), cert. denied, 423 U.S. 830 (1975); Stacey v. U.S., 270 F. Supp. 71 (E.D. La. 1967); Wright Associates Inc. v. Rieder, 277 S.E.2d 41 (Ga. 1981); Thomas v. Calavar Corp., 679 F.2d 416 (5th Cir. 1982); Griffin v. U.S., 644 F.2d 846 (10th Cir. 1981) (Kansas law). See also Vega-Mena v. U.S., 990 F.2d 684 (1st Cir. 1993) (Navy contract security guard is statutory employee); Kohler v. U.S., 602 F. Supp. 747 (W.D. Pa. 1985) (Pennsylvania statutory employer bars claim against U.S. by mail contractor employee injured at Post Office loading dock); Womack v. U.S., Civ. # 87-789-N (E.D. Va. 1988) (applies to NOAA contract for maintenance of NOAA vessel); Garrett v. U.S., Civ. # 89-1906-LC (W.D. La. 1990) (statutory employer defense applies to injury in impact area to contractor employee); Nofsinger v. U.S., 727 F. Supp. 586 (D. Kan. 1989) (contract employee at Sunflower Army Ammunition Plant falls under defense); Anderson v. U.S., 744 F. Supp. 640 (E.D. Pa. 1990) (contract computer programmer at DLA is statutory employee under Pa. Law); Matthews v. U.S., 756 F. Supp. 511 (D. Kan. 1991) (GOCO employee at KAAP falls under bar of statutory employer); MaKaffey v. U.S., 785 F. Supp. 148 (D. Kan. 1992) (U.S. is statutory employer under Kansas law re suit by employee of construction contractor at Ft. Riley); Hyman v. U.S., 796 F. Supp. 905 (E.D. Va. 1992) (handyman for subcontractor engaged in installing insulation aboard ship is statutory employee while moving his POV); Pendley v. U.S., 836 F.2d 689 (4th Cir. 1989) (U.S. is statutory employer of employee of engineering consultant injured in fire of rocket propellant); Perry v. U.S., 882 F. Supp. 537 (E.D. Va. 1995) (U.S. is statutory employer of Boeing mechanic who is injured while repairing Navy aircraft on base); Belluomini v. U.S., 64 F.3d 299 (7th Cir. 1995) (U.S. is statutory employer of contract security guard for U.S. Marshall's Service despite fact U.S. did not pay workers comp premiums); Vernon v. U.S., 103 F.3d 869 (table), 1997 WL 93257 (4th Cir. 1997) (surface support equipment mechanic for Lockheed at naval base is a statutory employee of U.S., since he is performing electrical work as U.S. employee); Wilcox v. U.S., 910 F.2d 477 (8th Cir. 1990) (U.S. is statutory employer under Missouri law); Allen v. U.S., Civ. # 2:93cv136 (E.D. Va., 20 Aug. 1993) (United States is statutory employer of contract security guard who suffered fall at Norfolk Naval Shipyard);

McCoy v. U.S., Civ # 92-113-COL (M.D. Ga., April 5, 1994) (contract mess hall attendant is statutory employee of U.S.); McCorkle v. U.S., 737 F.2d 957 (11th Cir. 1984) (underground fuel tanks on Army reservation being cleaned by subcontractor--Georgia statutory employer defense not applicable to U.S. unless U.S. is more than owner in possession, e.g., in "control"); Cottrell v. U.S., 582 F. Supp. 75 (W.D. La. 1984) (applies to work site injury of contractor employee at COE construction project); Lewis v. U.S., 501 F. Supp. 39 (D. Nev. 1980) (U.S. "principal contractor" under Nevada law). But see Yehou Ringer Associates, S9360 738 (Sep 13, 1993) (93 FCDR 3310); Chartes v. U.S., 15 F.3d 400 (5th. Cir. 1994) (contract sandblaster on Navy ship is not statutory employee, since he recovered under LHWCA); Denson v. U.S., Civ. # 90-1842 PHX RCB (D. Ariz., 20 Oct. 1992), aff'd without discussion of relevant point, 104 F.3d 365 (table), 1996 WL 748021 (9th Cir. 1996) (U.S. not a statutory employer as policy aspects of Arizona law are not clear--construction project on BLM land); Borah v. U.S., 953 F. Supp. 59 (E.D.N.Y. 1997) (maintenance employee of contractor who falls at work site is not a statutory employee); Petznick v. U.S., 575 F. Supp. 698 (D. Neb. 1983) (U.S. not a statutory employer where electrician injured on U.S. air base); Fried v. U.S., 579 F. Supp. 1212 (N.D. Ill. 1983) (U.S. not statutory employee under Illinois law for nuclear explosion injury to employee of University of Chicago which operates Argonne National Lab); Pearman v. U.S., 528 F. Supp. 598 (W.D. Va. 1981) (statutory employer defense applied to U.S. as a result of Glaser v. U.S., Civ. # 80-91-MAC (M.D. Ga. 1981), but not where U.S. owns land); Manning v. Georgia Power, 314 S.E.2d 432 (Ga. 1984). This question turns on State law, including conflict of laws analysis. Poindexter v. U.S., 752 F.2d 1317 (9th Cir. 1984) (Arizona law on statutory employer not applicable to death in air crash in Nevada, even though contract for hire made in Arizona). The statutory employer defense applies most frequently where workmen's compensation premiums are paid by United States under contract, e.g., cost plus. Snow v. U.S., 479 F. Supp. 936 (D. Nev. 1979); Barker v. Luna, 439 F. Supp. 810 (D. Nev. 1977) (not statutory employer where contractor did not comply with Workmen's Compensation law insurance provisions); Prescott v. U.S., 523 F. Supp. 918 (D. Nev. 1981); Watkins v. U.S., 479 F. Supp. 785 (D.S.C. 1979); Olveda v. U.S., 508 F. Supp. 255 (E.D. Tex. 1981); Glaser v. U.S., Civ. # 80-91-MAC (M.D. Ga. 1981) (where premium included in contract cost and U.S. if private employer would have been secondarily liable). Cf. Olivas v. U.S., 506 F.2d 1158 (9th Cir. 1974) (setoff benefits under State law); Bramer v. U.S., 412 F. Supp. 569 (C.D. Cal. 1976) (Plaintiff barred from suing because Atomic Energy Commission had agreed to indemnify University which ran its facility for all radiation exposure injuries). State law frequently requires statutory employer to customarily or normally engaged in same activity as employer. Rivera v. COE, 891 F.2d

567 (5th Cir. 1990) (security guard under contract falls from chair--not statutory employee, since security not part of U.S. trade or business); Griffin v. U.S., 644 F.2d 846 (10th Cir. 1981) (applies to GSA contract for moving furniture which is GSA's business); Greene v. U.S, 745 F. Supp. 1486 (D. Me. 1990) (teacher at Job Corps Center not statutory employee as not usual business); Vandergrift v. U.S., 500 F. Supp. 237 (E.D. Va. 1979) (not a statutory employer under Virginia law because not in trade or business). The statutory employer defense must be asserted in a timely manner. Massey v. U.S., 733 F.2d 760 (11th Cir. 1984) (Georgia statutory employer defense not permitted where U.S. has already agreed to settle after admitting liability). Commercial Union Insurance Co. v. U.S., 1998WL637379 ((E.D. La.), employment information management contractor who works in Navy building for Naval Reserve Information Systems Office is statutory employee. Eades v. U.S., 1999 WL 25549 (4th Cir., S. Car.) electrical firm and its employees are not statutory employees of VA hospital while performing electrical testing, but not repairs. Makavoca v. U.S., 1999WL 58693 (S.D.N.Y.) ballet dancer who was contracted by Kennedy center to participate in musical is statutory employee under D.C. Law.

8. U.S. as Additional Named Insured.

a. Generally. In cases in which the United States is held liable for operation of employee's POV (or rented car), United States may be additional named insurer under policy covering POV. U.S. v. GEICO, 612 F.2d 705 (2d Cir. 1980); GEICO v. U.S., 349 F.2d 83 (10th Cir. 1965), cert. denied, 382 U.S. 1026 (1966); U.S. v. GEICO, 409 F. Supp. 986 (E.D. Va. 1976); Harleysville Insurance Co. v. U.S., 363 F. Supp. 176 (E.D. Pa. 1973). Where in scope Federal employee's insurance pays injured party, general rule is that U.S. is not released, but is entitled to offset. Branch v. U.S., 979 F.2d 948 (2d Cir. 1992) (citing Munson v. U.S., 380 F.2d 976 (6th Cir. 1967)). Policy containing clause excluding FTCA liability may be void. See, e.g., Montellier v. U.S., 315 F.2d 180 (2d Cir. 1963); Ogima v. Rodriguez, 799 F. Supp. 626 (M.D. La. 1992) (U.S. is additional insured--exclusionary clause is invalid); Lentz v. U.S., 921 F. Supp. 628 (N.D. Iowa 1996) (State Farm policy exclusion stating no coverage where U.S. might be liable is void as being ambiguous); Richards v. Office of the Postal Inspector in Charge, 1989 WL 319835 (N.D. Ohio) (U.S. held additional insured on employee's POV policy when exclusion clause ambiguous); Comes v. U.S., 918 F. Supp. 382 (M.D. Ga. 1996) (U.S. is additional insured, exclusionary clause in invalid); Dziubakowski v. U.S., 1994 WL 914019 (E.D. Tenn.) (FTCA exclusionary clause in State Farm policy is too vague and ambiguous and is not upheld--citing State Farm Auto Insurance Co. v. Malcom, 259

N.W.2d 833 (Iowa 1979) , Mroz v. U.S., Civ. #93-411 (S.D. Ill. 1994), Ogima and Reeves); GEICO v. U.S., 400 F.2d 172 (10th Cir. 1968); Reeves v. Miller, 418 So.2d 1050 (Fla. App. 1982) (Automobile Insurance Cases 24644). See also New Hampshire Insurance Co. v. U.S., 92 F.3d 1193 (table), 1996 WL 436509 (9th Cir. 1996) (judgment against U.S. in the amounts of $2.1 million and $1 million in case where Navy employee was driving POV in scope--U.S. recovers policy limits plus interest and $1.9 million punitive damages where insurer tried to conceal that U.S. was an additional named insured) But see Awbrey v. U.S., 1997 WL 166108 (S.D. Ind.) FTCA exclusion clause upheld in United Farm bureau policy as being unambiguous despite 4 contrary cases and public policy argument); Decker v. Lawrence, 1994 WL 91329 (W.D. Wis.)

b. Rental Cars. Damages to rented car should be paid by DFAS processing TDY voucher for U.S. employee who rented car and waived deductible (JTR M 4405(c)); JTR C 2101(c)). May be filed by either the employee or by rental company. Abrams v. Tranzo, 1997WL72179 (11th Cir., Fla.) Tranzo, a USAF officer, had an accident in a rental car while on TDY. U.S. as renter of car cannot recover from USAA, Trunza's insurer, as a covered person.

9. No-Fault. Under private person analogy. Nationwide Mutual Life Ins. Co. v. U.S., 3 F.3d 1397 (10th Cir. 1993) (U.S. stands in shoes of private insurer in view of financially responsible policies in paying for injuries under FECA). State No-Fault law may bar claim against United States under FTCA. Lykins v. Hatten, 886 F. Supp. 11 (E.D. Ky. 1995) (no-fault insurer is precluded from recovery as postal truck is insured vehicle under KVRA); Lafferty v. U.S., 880 F. Supp. 1121 (E.D. Ky. 1995) (same holding as Lykins except NG HUMVEE is the insured vehicle); Licenziato v. U.S., 889 F. Supp. 162 (D.N.J. 1995) (suit brought in New Jersey for accident which occurred in New York--New York no fault law requiring proof of serious injury bars suit); Young v. U.S., 71 F.3d 1238 (6th Cir. 1995) (Kentucky no-fault bars insurer from recovering PIP benefits from U.S); Westfield Cos. v. U.S., 858 F. Supp. 658 (W.D. Mich. 1993) (Michigan no-fault bars recovery for personal property damage where Army truck damages men's clothing store); Patrello v. U.S., 757 F. Supp. 216 (S.D.N.Y. 1991) (N.Y. no-fault bars personal injury claim against U.S.); Zotos v. U.S., 654 F. Supp. 36 (E.D. Mich. 1986) (Michigan no-fault applies to U.S.); Caruana v. U.S., Civ. # 81-71396 (E.D. Mich. 1985) (same); Liberty Mutual Insurance Co. v. U.S., 490 F. Supp. 328 (E.D.N.Y. 1980); Leftwich v. Ames, 1996 WL 239865 (E.D. Pa.) (Pennsylvania Motor Vehicle Financial Responsibility Law, 75 Pa. Cons. Stat. Ann. §§ 1701-1799.7 bars claim for non-economic damages against U.S. in motor vehicle accident, except where serious injuries occur); Witty v. U.S., 947 F. Supp 137 (D.N.J.

1996) (N.J. no-fault applies to U.S. re verbal threshold--bulging disc does not meet threshold); Mittiga v. U.S., 945 F. Supp. 477 (N.D.N.Y.) (medical expenses of $ 27,923.27 and lost earnings of $ 18,000 not recoverable under N.Y. no-fault, since the total does not meet threshold--pain and suffering is recoverable). It may also lessen any recovery. Commercial Union Ins. Co. v. U.S., Civ. # 91-1009-WF (D. Mass., Oct. 27, 1992) (Massachusetts no-fault law bars recovery from U.S. of subrogated PIP benefits); Insurance Co. of North America v. U.S., Civ. # 93-10486 NG (D. Mass., Jan. 31, 1995) (in accord with Commercial Union Ins. Co.); U.S. Fidelity & Guaranty Co. v. U.S., 728 F. Supp. 651 (D. Utah 1989) (no-fault precludes PIP recovery against U.S); Yeary v. U.S., 754 F. Supp. 546 (E.D. Mich. 1991) (permits recovery of non-economic damages only under FTCA); Strand v. U.S., Civ. # 3-90-18 (D. Minn. 1922) (basic economic benefits not payabale by U.S. under Minnesota no-fault). See also Marose v. Hennameyer, 347 N.W.2d 509 (Minn. Ct. App. 1984) and Lindner v. Land, 352 N.W.2d 68 (Minn. Ct. App. 1984). However, United States must be "covered" person or U.S. vehicle must be "covered" vehicle. Lykins v. Hatten, 886 F. Supp. 11 (E.D. Ky. 1995) (no fault insurer is precluded from recovery as postal truck is insured vehicle under KVRA); Cooper v. U.S., 635 F. Supp. 1169 (S.D.N.Y. 1986) (postal truck hits pedestrian--claim not barred by New York no-fault law). Barry v. U.S., 1998 WL 29639 (2d Cir., N.Y.) New York's serious injury threshold not met where extent of back injury is determined by surveillance tapes rather than physician's testimony. Davidson v. U.S., 1998 WL 314706 (E.D. Pa.) (driver and passenger in uninsured vehicle cannot recover for pain and suffering medical expenses or lost wages under McClung v. Breneman, 700 A.2d 495 (Pa. Super. Ct. 1997)). Rivera v. U.S., 994 F. Supp. 406 (E.D.N.Y. 1988) (New York serious injury threshold can be met based on injured parties subjective complaints in absence of credible medical support. O'Donnell v. U.S., 1998WL603214 (S.D.N.Y.), no summary judgment where Port Authority policeman alleges serious injury under N.Y. no-fault threshold where he has continuing soft-tissue injury and retires several years after accident with U.S. postal vehicle. Safety Insurance Company v. U.S. Post Office, __ F. Supp. 2d, 1999 WL 27190 (D. Mass.) U.S. is not an insured person under Massachusetts no-fault law, therefore, does not have to pay subrogated PIP benefits; Dipirro v. U.S., 43 F. Supp. 2d 327 (W.D.N.Y.) excellent discussion of serious injury threshold in doubtful serious injury case.

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

by DVA); Commercial Union Ins. Co. v. U.S., 999 F.2d 581 (D.C. Cir. 1993) (U.S. does not have priority over injured party, but must share insurance on a proratable, equitable basis under FMCRA); Hall v. U.S., Civ. # 91-595-PA (D. Or., Dec. 21, 1994) (recovery under Act permitted where reservist on weekend training is killed in off-post collision); Green v. Hall, 881 F. Supp. 451 (D. Or. 1995) (U.S. entitled to recover under Act for medical expenses incurred while off-post, off-duty accident by weekend reservist going out for coffee as he was determined to be LOD). Based on a fault concept and may not permit recovery in a no fault jurisdiction. U.S. v. Dairyland Insurance. Co., 674 F.2d 750 (8th Cir. 1982); U.S. v. Travelers Indemnity Co., 729 F.2d 735 (11th Cir. 1984). See also U.S. v. Trammel., 899 F.2d 1483 (6th Cir. 1990) (no fault $10,000 limit precludes U.S. recovery); Government Employees Ins. Co. v. Andujar, 773 F. Supp. 282 (D. Kan. 1991) (U.S. not entitled to uninsured motorist benefits for medical expenses as U.S. not an insured). Other state statutes may also bar recovery. U.S. v. Oliveria, 489 F. Supp. 981 (D. S.D. 1980) (guest statute bars U.S. recovery). Contra U.S. v. Forte, 427 F. Supp. 340 (D. Del. 1977)(Delaware guest statue inapplicable); GEICO v. Gate, 414 F. Supp. 658 (E.D. Ark. 1975) (Arkansas guest statue inapplicable); U.S. v. Haynes, 445 F.2d 907 (1st Cir. 1971) (La. Law requiring injury to wife to be brought only by husband inapplicable); U.S. v. Moore, 469 F.2d 788 (3rd Cir. 1972), cert. denied, 411 U.S. 905 (1973) (intra-family immunity doctrine does not bar recovery). The Government's own negligence may also bar recovery. Calif. Pacific Utilities v. U.S., 194 Ct. Cl. 703 (1971) (U.S. own negligence bars recovery). The MCRA has a three year SOL. U.S. v. Hunter, 645 F. Supp. 758 (N.D.N.Y. 1986) (MCRA three year SOL starts when medical care furnished--exclusive of period when cause of action not known absent due diligence). See also U.S. v. State Farm Insurance Co., 599 F. Supp. 441 (E.D. Mich. 1984) (Quasi-contract applied to permit U.S. to recover despite statute of limitations). The OMB established daily hospital rate must be proven in court in absence of regulation showing basis for determination. U.S. v. Wall, 670 F.2d 469 (4th Cir. 1982). Equitable principles may lessen the government's recovery. Cockerham v. Garvin, 768 F.2d 784 (6th Cir. 1985) (VA recovery reduced proportionally by discount factor and cost of bringing suit). The courts are split on whether a plaintiff may recover for medical benefits paid by the government. McCotter v. Smithfield Packing Co., Inc., 868 F. Supp. 160 (E.D. Va. 1994) (Dept. of Agriculture inspector injured at packing plant cannot recover cost of medical expenses paid by U.S.); Guyote v. Mississippi Valley Gas Co., 715 F. Supp. 778 (S.D. Miss. 1989) (MCRA does not preclude injured party from submitting proof of full value of damage). Mosey v. U.S., 2 F. Supp. 2d 1133 (D. Nev., 1998) (where VA sat passively by and let injured party's attorney collect judgment including VA's $49,502 medical costs,

VA recovery reduced 25% amount would have been needed to hire attorney to pursue action.

11. Collateral Estoppel. The doctrine of collateral estoppel bars the relitigation of certain issues actually litigated and decided in a prior action where a decision on these issues was necessary to the prior decision. See, e.g., Johnson v. U.S., 576 F.2d 607 (5th Cir. 1978) (where U.S. is held liable in earlier suit for murder of another victim in same incident, decision binds different court in suit of another victim); Blohm v. Bradley, 821 F. Supp. 1451 (S.D. Ala. 1993) (FTCA action for libel and slander barred by doctrine as same issues involved in prior criminal case); O'Connor v. U.S. Army Claims Service, Civ. 29 F.3d 633 (table), 1994 WL 283616 (9th Cir. 1994) (claimant's state court suit against soldier not in scope dismissed as soldier not negligent--subsequent suit against U.S. barred by collateral estoppel). But see Gallardo v. U.S., 697 F. Supp. 1243 (E.D.N.Y. 1988) (driver and U.S. cross claim--passengers sue driver--jury finds driver 100 percent liable--judge holds driver can recover from U.S. as not barred by collateral estoppel); Freques v. U.S., 789 F. Supp 1141 (M.D. Ala. 1992) (collateral estoppel not applicable to cleaning woman who fell in construction hole while entering NCO Club and lost state action against building contractor due to her contributory negligence). Bars U.S. cross-claim where injured party sues both driver and U.S. and driver exonerated by jury. Georges v. Hennessey, 545 F. Supp. 1264 (E.D.N.Y. 1982). However, mere litigation or settlement offer of an aspect of case in some tribunal does not constitute collateral estoppel. Faughnan v. Big Apple Car Service, 828 F. Supp. 155 (E.D.N.Y. 1993) (where veterans disability rating is increased by DVA, U.S. is not estopped from contesting liability in medical malpractice action); Carter v. U.S. Dept. of Agriculture FHA, No. 3:93-CV-163BC (S.D. Miss., 8 Oct. 1993) (offer by Department of Agriculture to settle disputed FTCA claim does not constitute admission of liability or equitable estoppel). Collateral estoppel is an affirmative defense and must be raised at trial. Harbeson v. Parke-Davis Inc., 746 F.2d 517 (9th Cir. 1984) (drug company is found not liable at earlier trial for failure to warn and U.S. is held liable at later trial). St Louis University v. U.S., Civ. # SFM-95-3639 (D. Md., 29 April 1999), plaintiff files second suit in an attempt to recast claims from same incident as different torts-collateral estoppel applies.

12. Judgment Under 28 U.S.C. § 2676 as Bar. Hoosier BanCorp of Indiana Inc. v. Rasmussen, 90 F.3d 180 (7th Cir. 1996) (judgment in favor of U.S. bars Bivens action--citation to Rodriguez v. Handy. 873 F.2d 814 (5th Cir. 1989)--Branch v. U.S., 979 F.2d 948 (2nd Cir. 1992) and Henderson v. Bluemink, 511 F.2d 399 (D.C. Cir. 1974) not controlling)).

E. How is a Claim Investigated?

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

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

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

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

(1) Ex Parte Contacts. Ex parte contact with claimant's private physician should be avoided even though physician-patient privilege has been waived by placing his or her physical condition in issue. Moses v. McWilliams, 549 A.2d. 950 (Pa. Super. Ct. 1988); Manion v. NPW Medical Center of NE Pa., 676 F. Supp. 585 (M.D. Pa 1987); Sklagin v. Greator SE Comm Hosp., 625 F. Supp. 991 (D.D.C. 1984); Stemplor v. Speidell., 495 A.2d 857 (N.J. 1985); Covington v. Sawyer., 458 N.E.2d 465 (Ohio App. 1983); Doe v. Eli Lilly and Co., 99 F.R.D. 126 (D.D.C. 1983); State ex rel. McNatt v. Keet., 432 S.W.2d 597 (Mo. 1968). Additional cases are cited in IIE9 below.

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

(3) Private Physicians. To achieve an environment of cooperation conducive to settlement, contact should be made with private physician through claimant. Some courts have ruled that fiduciary relationship survives waiver. Hammonds v. Aetna Casualty., 243 F. Supp. (N.D. Ohio 1965); Loudon v. Myhre, 756 P.2d. 138 (Wash 1988); Petrillo v. Syntex Labs., 499 N.E.2d. 252 (Ill App 1986); Roosevelt Hotel v. Sweeney, 394 N.W.2d. 353 (Iowa 1986).

(4) Articles. For general discussion, see Glaser and Asher's "Defense" Ex Parte Interviews with Plaintiff's Treating Physician, Aug. 1990; 20 A.L.R. 3rd 1109 (1968); Ward, Pretrial Waiver of Physician Patient Privilege, 32 Gonzaga L. Rev. 59 (1986-87).

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

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

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

4. Discoverable Items Can be Released Administratively. Anything which is discoverable under the Federal Rules may be released administratively. This includes the names of expert witnesses. Requests under FOIA should be processed on this basis. McClellan Ecological Seepage Situation v. Garlucci, 835 F.2d 1282 (9th Cir. 1987) (requests under FOIA for information to be utilized in a tort claim cannot be denied on the basis that there is a commercial interest). Hernandez v. U.S., 1998 WL 230200 (E.D. La.) (both USPS accident report and USPS driver's personnel file must be released to plaintiff.

5. Admissions. Murrey v. U.S., 73 F.3d 1448 (7th Cir. 1996) (reversible error not to admit into testimony admission of Secretary of DVA that poor care contributed to death of patient--while not judicial admission, the statement had evidentiary value).

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

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

8. Medical Quality Assurance Act (10 U.S.C. § 1102). In re U.S.A., 864 F.2d 1153 (5th Cir. 1989) (precludes release of QA review, even when not timely raised). Accord Pickett v. U.S., 724 F. Supp. 390 (D.S.C. 1989); East v. U.S., Civ. # B-87-3092 (D. Md. 1989). But see Doe v. U.S., Civ. # CV 191-102 (S.D. Ga., 5 Nov. 1992) (CID report's allusion to QA investigation is subject

to protective order requiring modification of plaintiff's brief); Gess v. U.S., 952 F. Supp. 1529 (M.D. Ala. 1996) (where OSI investigates at time of incident and includes medical expert opinion, OSI report is admissible even though opinion later withdrawn). Classen v. Brown, 33 F. Supp. 2d 511 (N.D. W. Va., 1998) records gathered under QA process can be used in discharge of VA physician.

9. Pretrial IME. May be enforced even though claim is still in administrative stage by Fed.R.Civ.P. 35. See Martin v. Reynolds Metals Corp., 297 F.2d 49 (9th Cir. 1961) (used to perpetuate evidence); Vaughn v. Commercial Union Insurance Co. of New York, 263 So.2d 50 (La. 1972) (outlines procedural steps).

10. Ex parte communications. Ex parte communication with claimant's treating physician or expert. Perkins v. U.S., 877 F. Supp. 330 (E.D. Tex. 1995) (ex parte communication with treating physicians of plaintiff prohibited under applicable Texas law--states majority rule is in accord and lists cases); Duquette v. Superior Court & Lamberty, 778 P.2d 634 (Ariz. App. 1989) (bars same--says barred in 12 States and permitted in 7 States). See also Annotation Discovery: Right to Ex Parte Interview With Injured Party's Treating Physician, 50 A.L.R. 4th 714 (1986). But see Rea v. Perdo., 522 N.Y.S.2d 393 (N.Y. App. 1987) (permits release of claimant's medical records to physician's insurance carrier); MacDonald v. U.S., 767 F. Supp. (M.D. Pa. 1991) (Pa. Law, i.e., public policy did not prohibit ex parte contact by defendant with plaintiff's treating physician). Some states may also allow ex parte interviews with former employees of corporate entities. H.B.A. Management, Inc. v. Schwartz, 693 So.2d 541 (Fla. 1997) (ex parte interview of corporate defendant's former employees permitted, since employees can no longer speak for the corporation). Calarza v. U.S., Civ. # 97-1732 H (AJB) (S.D. Calif., 12 May 98) (no objection to ex parte interviews by AUSA of treating physicians at Balbou Naval Medical Center - Federal, not state law applies.

11. Rule 11 Sanctions. Sanctions may be applied in favor of the U.S. Napier v. Thirty of More Unidentified Federal Agents, 855 F.2d 1080 (3d Cir. 1988); Christen v. Ward, 916 F.2d 1462 (10th Cir. 1990) (sanctions imposed on claimant who keeps adding judges and U.S.A. as defendants in suit originally commenced in 1972); Domingos v. U.S., 883 F. Supp. 16 (E.D.N.C. 1993), aff'd, 35 F.3d 555 (table), 1994 WL 445700 (4th Cir. 1994) (action dismissed as a sanction for counsel's dilatory behavior in presenting proof or expert testimony that a cause of action exists); Saunders v. Bush, 15 F.3d 64 (5th Cir. 1994) (sanctions properly imposed where plaintiff was warned about filing frivolous FTCA claim and then filed again); Lillie v. U.S., 40 F.3d 1105 (10th Cir. 1994) (failure to provide proof of lessor's

failure to make repairs pursuant to USPS request is subject to nominal sanctions against plaintiff); Roundtree v. U.S., 40 F.3d 1036 (9th Cir. 1994) (attorney who brought repetitive suits against FAA concerning licensing of pilot was properly sanctioned); Phillips v. U.S., 1997 WL 43621 (E.D. La.) ($1,000 fine plus costs sanctions imposed for failure to provide expert opinion and meet physical examination deadline in medical malpractice case); Banjo v. U.S., 1996 WL 426364 (S.D.N.Y.) (pro se plaintiff in vehicle collision gives false deposition--complaint dismissed with prejudice and $200 in Rule 11 sanctions imposed); Raabe v. U.S., Civ. # C-90-1251-DLJ (N.D. Cal. 1992) (Rule 11 sanctions imposed on plaintiff's counsel for filing motion to exercise pendant jurisdiction in on-post dog bite case). Sanctions may also be applied against the U.S. Mattingly v. U.S., 711 F. Supp. 1535 (D. Nev. 1989) (sanctions applied against the U.S. for pursuing corporate officer re payroll tax); Schwartzman, Inc. v. ACF Industries, Inc., 167 F.R.D. 694 (D.N.M. 1996) (sanctions imposed on DOJ for failure to participate in good faith in settlement conference by failing to send representative who had been delegated settlement authority). For an article on the subject, see note on page 10 in For the Defense, Defense Law Institute May 1993. Palmer v. U.S., __F.3d__, 1998 WL 285213 (6th Cir., Ky.) (sanctions against agents' DOJ trial attorney reversed as no proof attorney "knowingly" failed to make material disclosure. U.S. v. Shaffer Equipment Co., 790 F. Supp. 938 (S.D. W. Va., 1993) aff'd in part, rev dir, vacated and remanded, 11 F.3d 450(4th Cir. 1993), further proceedings, 158 FRD80 (S.D. W. Va. 1994), Government failed to disclose impeachment evidence during discovery; Chilcutt v. U.S., 4 F.3d 1313 (5th Cir. 1993), cert. denied subnom, Means v. Wortham, Government produced document in untimely and incomplete manner; Dawson v. U.S., 68 F.3d 886 (5th Cir. 1995), sanctions reversed originally imposed for lack of good faith negotiations by Government; FDIC v. Calhoun, 34 F.3d 1291 (5th cir. 1994), sanctions reversed, originally imposed on Government under Rule 11 and 28 U.S.C. (1927), In re Payne, Misc # 3:94-MC45-H (N.D. Tex., 22 August 1998), sanctions reversed, originally imposed on Government attorney who personally verified a complaint containing inaccurate facts.

12 Privilege. Straughter v. U.S., 1999WL33456 (8th Cir. Mo.) validity of search warrant is based on testimony of confidential informant - deecision supports withholding of identity under Roviaro v. U.S., 353 U.S. 53, 77 S. Ct. 623 (1956); Weskoty v. U.S., 30 F. Supp. 2d 1343 (D. N. Mex. 1998) recognize self-critical analysis privilege in context of morbidity and mortality conferences based on interpretation of Federal Rule of Evidence 501 found in Jaffee v. Redmond, 518 U.S. 1, 116 S. Ct. 1923 (1996) and lists state cases; Cheromiah v. U.S., Civ. # CV97-

1418MV/RLP (D. N. Mex., 11 Feb 99) follows Jaffee supra in regard to ex parte interviews and release of psychotherapy record.

F. What are the Advantages of an Administrative Settlement?

1. Faster. Much faster, including larger claims.

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

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

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

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

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

7. Structured Settlement. Structured settlements are not expressly provided by FTCA, Frankel v. Heym v. U.S., 466 F.2d 1226 (3d Cir. 1972), but may be adopted or encouraged by court. Gretchen v. U.S., 618 F.2d 177 (2d Cir. 1980); Foskey v. U.S., 490 F. Supp. 1047 (D.R.I. 1979); Robak v. U.S., 658 F.2d 471 (7th Cir. 1981). Hankins v. U.S., Civ. # F-96-6037 DLB (E.D. Calif., 30 Apr 98) (Federal, not state, law applies). Estevez v. U.S., 1999 U.S. Dist. LEXIS 11567 (S.D.N.Y., 30 July 1999) judgments under FTCA must be structured where required by state law, e.g., N.Y. judgment amount over $250,000 - cites Reilly v. U.S., 863 F.2d 149 (1st Cir. 1988) which states where controlling permits Fla. Stat. Ann. 768.51(1)(b)), Cal. Civ. Proc. Code Sect. 667.7(a), Wisc. Stat. Ann. Sect 655.015 - also by agreement of parties or where a trust, annuity, etc., can bring just due.

a. Tax Benefits. Structured settlements are in use in administrative claims settlements and may provide tax free

benefits, e.g., P.L. 97-473 97th Congress, 14 January 1983; Rev. Rul. 76-133, 1976 C.B.34; Rev. Rul. 77-230 1977-2 C.B.214; Rev. Rul. 79-220, 1979-2 C.B.74; Rev. Rul. 79-313, 1979-2 C.B.75; § 104(a)(2), Internal Revenue Code.

b. Reversionary Trust. Such settlements permit a reversionary trust to U.S. where the injured party's life expectancy is uncertain and future costs are overwhelming which is tax free including the monthly payment to family. Hull v. U.S., Civ. # 88-C-1645-E (N.D. Okla., Mar. 8, 1996) (discusses tax free nature of reversionary trust including monthly payment to family). A district court has inherent authority to order a reversionary trust for damaged child. Hull v. U.S., 971 F.2d 1499 (10th Cir. 1992); Hill v. U.S., 81 F.3d 118 (10th Cir. 1996) (reversionary trust may be ordered by court in same manner as provided under Colorado Health Care Availability Act for future care costs, but not for future lost earnings or purchase of home); Deasy v. U.S., 99 F.3d 354 (10th Cir. 1996) (award of $ 3,993,371 reversionary trust for future medical expenses upheld). See also Hull v. U.S., 53 F.3d 1125 (10th Cir. 1995) (guardian ad litem fees are proper costs where guardian ad litem is acting for child beneficiary--parents have no authority to challenge reversion of trust). But see Hill v. U.S., 864 F. Supp. 1030 (D. Colo. 1994), rev'd as to denial of reversionary trust for life care costs only, 81 F.3d 118 81 F.3d 118 (10 th Cir. 1996) (court refuses to order reversionary trust as Hull v. U.S., 971 F.2d 1499 (10th Cir. 1992) is exception not the rule); Pineda v. U.S., Civ. # 89-000239DAE (D. Haw, 12 May 1997), later proceedings, Civ. # 89-00239DAE (D. Haw., July 11, 1997) (court refuses to order reversionary trust since it is in best interest of child's guardian to keep liquidity of cash award); Wyatt v. U.S., 939 F. Supp. 1402 (E.D. Mo. 1996) (structuring of $ 2 million future medical expenses required under Mo. R.S. § 538.202, but there is no basis for instituting a reversionary trust). See also Wyatt v. U.S., 944 F. Supp. 803 (E.D. Mo. 1996).

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

in trust); Wheeler Tarpeh Doe v. U.S., 771 F. Supp. 426 (D.D.C. 1991) (judge requires parties to develop plan, e.g., annuities, trust or other to avoid the windfall of future medical costs to parents in event of early demise of brain damaged child).

d. Attorney Fees and Structured Settlements. Goodwin v. Schramm, 731 F.2d 153 (3d Cir.), cert. denied sub nom, Behrend v. Goodwin, 469 U.S. 882 (1984) (discussion as to whether 20 percent attorney fee is paid out of cost to U.S.); Wyatt v. U.S., 783 F.2d 45 (6th Cir. 1986) (20 percent of present value which is cost of annuity and up front money); Gerow v. U.S., 1997 WL 538910 (N.D.N.Y.) (court limits attorney fees of settlement after deduction of substantial costs).

e. Constitutionality. Structured settlements are constitutional. American Bank & Trust Co. v. Community Hospital, 683 P.2d 670 (Cal. 1984) (upholds constitutionality of periodic payments for "future damages" in medical malpractice cases).

8. Validity of Release Including Plaintiff's Release of Another Defendant. Normally, a plaintiff's signing of a release relieves the defendant from further liability. Huber v. U.S., 244 F. Supp. 537 (1965) (settlement of property damage claim bars later claim for personal injury based on working of 28 U.S.C. § 2675 and of release); Linebarger v. U.S., 927 F. Supp. 1280 (N.D. Cal. 1996) (U.S. cannot be ordered to pay shortfall in annuity payment due to bankruptcy of Executive Life--exculpatory language in settlement agreement prevails); in accord Massie v. U.S., 166 F.3d 1164 (Fed. Cir. 1999); Helmandollar v. U.S., Civ. # 96-358C (Ct. of Fed. Claims, 3 Dec. 1997) (compromise settlement states annuity to be purchased from A+ life insurance company—U.S. can not be ordered to pay shortfall caused by bankruptcy of Executive Life); Anderson v. Salter, 1996 WL 434996 (D.D.C.) (Bivens action against FBI agents for damage to property seized in warrantless search fails as claim settled with FBI and release is binding); Hogan v. U.S., Civ. # C-91-1386 SBA (ARB) (PJH) (C.D. Cal., 20 July 1993), aff'd, 88 F.3d 1162 (table), 1996 WL 280001 (9th Cir. 1996) (validity of 28 U.S.C. § 2672 release is not open to question, since no grounds for setting it aside based on claimant's motion are set forth in statute). A settlement can not be set aside except upon a showing of fraud, bad faith willful effort to mislead. Wright v. U.S., 427 F. Supp. 726 (D. Del. 1977), (settlement cannot be aside in absence of fraud, bad, willful effort to mislead or lack of meeting of minds). See also Barrett v. U.S., 622 F. Supp. 574 (S.D.N.Y. 1985), further proceedings, 660 F. Supp. 1291 (S.D.N.Y. 1987) (1955 release set aside as role of U.S. in tort was concealed and U.S. was not a

party to the action); Reynosa v. U.S., Civ. # 93-1784 H (BTM) (S.D. Cal., Dec. 20, 1994) (court enforces settlement in excess of $10,000 on claim of rape, which AUSA attempted to withdraw based on later discovered allegations of fraud, even though settlement had already been sent to GAO for payment); Gess v. U.S., 909 F. Supp. 126 (M.D. Ala. 1996) (letter from claims office to unrepresented claimant stating authority of agency was only $25,000 which resulted in $25,000 settlement--set aside due to fraud in inducement). Cf. Weldon v. U.S., 70 F.3d 1 (2d Cir. 1995) (judgment obtained by U.S. can be reconsidered where fraud is alleged, even though no explicit waiver of immunity in FTCA). If settlement agreement is breached and amount involved is over $ 10,000, jurisdiction lies in the U.S. Court of Federal Claims, not the U.S. District courts. A.G. Edwards v. U.S., Civ. # 92-0434 (JHG) (D.D.C., Oct. 29, 1993), aff'd, 1994 WL 541250 (D.C. Cir. 1994) (enforcement of settlement agreement over $10,000 is not under jurisdiction of U.S. District court, since it is a breach of a government contract which under the Tucker Act may be sued upon in the Court of Federal Claims). If a minor is injured and there are multiple claims, extra care must be taken because parent's claim may be legally distinct from child's or a court approval of the settlement is required. Reo v. U.S., 98 F.3d 354 (3rd. Cir. 1996) (settlement of administrative claim of 3 year old for $2,500 by USPS in 1994 is not binding, since not approved by N.J. court--action by child at age 19 permitted); Schwarder v. U.S., 974 F.2d 1118 (9th Cir. 1992) (Children's wrongful death action not barred by prior administrative settlement of parent's claim, since they have separate cause of action under California Wrongful death statute). Plaintiff's release of another defendant involved in the same incident may also release U.S., but any such release is subject to interpretations under contract principles. Thompson v. Wheeler., 898 F.2d 406 (3rd Cir. 1990) (interpretation of release by other vehicle--does release include right of contribution from U.S. for GOV passenger's claim?); Combs v. U.S., 768 F. Supp. 584 (E.D. Ky. 1991) (release by plaintiff of Army reservist's POV insurer did not release); Bazuaye v. U.S., 1995 WL 519995 (S.D.N.Y.) (general release for one suit is binding in another suit for property loss arising out of same transaction). Bienville Parish Police Jury v. U.S. Postal Serv., 8 F. Supp. 2d 563 (W.D. La., 1998), where injured party recovers from rural mail carrier's POV policy and gives general release with no reservation of rights, claimant also can recover from USPS. Massie v. U.S., 166 F.3d 1164 (Fed. Cir. 1999) where life insurance company fails, payment of annuities where release in MCA does not state that U.S. cannot guarantee payments. Kee v. U.S. 168 F.3d 1133 (9th Cir. 1999) release of Government driver upon collection of her liability insurance does not release United States as employee (Government driver) is immune under 28 USC 2679.

9. Agency Must Deal With Claimant's Attorney. While claimant is not required to be represented by an attorney, once one is retained, agency must deal with the attorney.

10. Admissibility of Efforts to Settle. Bradbury v. Phillips Petroleum Co., 815 F.2d 1356 (10th Cir. 1987) (barred by Rule 408, however, settlements in companion cases may be admissible to show incident in question was not result of accident or mistake).

G. What Methods of Negotiation are Used?

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

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

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

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

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

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

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

c. Agency Notification of Final Action by Certified Mail. He must be notified in writing of final agency action by certified mail (28 C.F.R. § 14.9). Conn v. U.S., 867 F.2d 916 (6th Cir. 1989) (if no notice, SOL runs indefinitely).

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

a. Tolls Statute of Limitation. Such a request gives the agency another six months to make final disposition thus the

six months statute of limitations may be tolled by such a request. But requesting party must be informed by agency that request is being reconsidered to toll six months statute of limitations. Woirhaye v. U.S., 609 F.2d 1303 (9th Cir. 1979).

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

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

d. Binding on Claimant. Goodman v. U.S., 324 F. Supp. 167 (M.D. Fla. 1971); Wright v. U.S., 427 F. Supp. 726 (D. Del. 1977).

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

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

9. Need Authority to Settle. Settlements made by a U.S. official not authorized to do so is ultra vires and void. Bohlen v. U.S., 623 F. Supp. 595 (C.D. Ill. 1985); U.S. v. Kates, 419 F. Supp. 846 (E.D. Pa. 1976). See also White v. U.S. Dept. of Interior, 639 F. Supp. 82 (M.D. Pa. 1986) (settlement in amount of $2 million by AUSA set aside as ultra vires--no detriment to survivors who spend money and decline employment while awaiting trial--cites Federal Crop Insurance Corp. v. Merrill, 333 U.S. 798 (1947)). Presidential Gardens v. U.S. ex rel Sec of HUD, 175 F.3d 133 (2d Cir. 1999), provisions in settlement agreement granting U.S. District Court to determine dispute over settlement is insufficient to grant court jurisdiction as only court of Federal Claims has authority over contract disputes; Burgess v. U.s. Post Office, Civ. # 98-CV-4390 (WGB) (D.N.J., 6 July 1999), where USPS' labor relations specialist and Customer Service supervisor alleged contract to pay tort claim, the contract is not enforceable as neither has authority to contract.

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

H. What are Payment Procedures?

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

2. Payment of Larger Amounts. Payments over $2,500 are processed by Financial management Service Department of Treasury. Processing time is longer-usually from 4 to 6 weeks. Payment may be made in foreign currency converted as of date of award. Rose Hall Ltd. v. Chase Manhattan Overseas Banking Corp., 566 F. Supp. 1558 (D. Del. 1983); In re Good Hope Chemical Corp., 747 F.2d 806 (1st Cir. 1984) (American law where breach of contract occurred requires conversion rate for currency to be date of breach); Gathercrest Ltd. v. First American Bank & Trust, 649 F. Supp. 106 (M.D. Fla. 1985) (if obligation arises under Foreign law, judgment date determines exchange rate, if it arises under U.S. law, breach date determines exchange rate). See also Hicks v. Guinness, 269 U.S. 71 (1925) and Die Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517, 47 S.Ct. 166 (1926).

3. Congressional Approval No Longer Needed. Payments over $100,000 no longer need to be processed by Congress, since 31 U.S.C. § 724a was amended in 1978.

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

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

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