

Claims Report

United States Army Claims Service

Personnel Claims Note

1998 Table of Adjusted Dollar Value

This table, which is attached at the Appendix, updates the 1997 Table of Adjusted Dollar Value (ADV) previously printed in the July 1998 issue of *The Army Lawyer*.¹ Paragraph 11-14 of *Army Regulation 27-20*,² and paragraph 11-14f(5) of *Department of Army Pamphlet 27-162*³ state that claims personnel should use this table *only* when no better means of valuing property exists.

Adjudicators should not use this table when a claimant cannot substantiate a purchase price. Additionally, do not use it to value ordinary household items when the value can be determined by using average catalog prices.

To determine an item's value using the ADV table, find the column for the calendar year the loss occurred. Multiply the purchase price of the item by the "multiplier" in that column for the year the item was purchased. Depreciate the resulting "adjusted cost" using the Allowance List-Depreciation Guide (ALDG). For example, the adjudicated value for a comforter purchased in 1990 for \$250, and destroyed in 1995, is \$219. To determine this figure, multiply \$250 times the 1990 "year purchased" multiplier of 1.17 in the "1995 losses" column for an "adjusted cost" of \$292.50. Then depreciate the comforter as expensive linen (item number 88, ALDG) for five years at a five-percent yearly rate to arrive at the item's value of \$219 (i.e., \$250 x 1.17 ADV = \$292.50 @ 25% depreciation = \$219).

This year's ADV table only covers the past twenty-seven years. To determine the ADV for items purchased prior to 1972 or for any other questions concerning this table, contact Mr. Lickliter, U.S. Army Claims Service, telephone number: (301) 677-7009 ext 313. Mr. Lickliter.

Tort Claims Note

What Constitutes A Proper Tort Claim?

The Federal Tort Claims Act (FTCA) is, by its terms, the exclusive negligence remedy for torts committed by United States employees, which arise in the United States.⁴ A person seeking compensation under the FTCA must file an administrative claim before filing suit.⁵ While the FTCA itself does not define what constitutes a claim, it permits the Attorney General of the United States to prescribe regulations governing claims.⁶

The Attorney General's Regulations (AGR)⁷ define a claim as:

- (1) A demand for money damages in a sum certain;
- (2) Written notification of the incident giving rise to the claim; and
- (3) Signed by the claimant or a person properly authorized to sign, to include evidence of the authority to present a claim as agent, executor, administrator, parent, guardian or other representative.

Failure to present a proper administrative claim deprives the federal court of jurisdiction.⁸ Therefore, courts have carefully scrutinized the AGR. Some courts, however, do not require claimants to comply with the AGR as a jurisdictional prerequisite to suit. These courts impose a mere minimal notice standard.⁹ Courts, however, have universally accepted Requirements 1 and 2 under the minimal notice standard for federal jurisdiction.¹⁰ Courts and government litigators have been reluctant to enforce AGR requirement 3 (proof of authority) on the grounds that "hyper-technicalities" should not preclude federal jurisdiction.

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1. Personnel Claims Note, *1997 Table of Adjusted Dollar Values*, ARMY LAW., July 1998, at 88.
 2. U.S. DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES, CLAIMS, para. 11-14 (1 Apr. 1998).
 3. U.S. DEP'T OF ARMY, PAM 27-162, CLAIMS PROCEDURES, para. 11-14f(5) (1 Apr. 1998) [hereinafter DA PAM 27-162].
 4. See Legislative Reorganization Act of 1946, ch. 3, §§ 401-424, Pub. L. No. 79-601, 60 Stat. 812-844, 842.
 5. 28 U.S.C.A. §§ 2401(b), 2672, 2675(a) (West 1998).
 6. *Id.* § 2672.
 7. 28 C.F.R. § 14.2(a) (1998).
 8. 28 U.S.C.A. § 2675(a) (providing an exception for third-party complaints).
 9. *Kanar v. United States*, 118 F.3d 527, 529 (7th Cir. 1997).

Three decisions, however, appear to rest on the principle that the claimant need not cooperate with the administrative process. In other words, the claimant must give the government adequate notice to permit the government to investigate, but need not cooperate in the administrative process, for example, by furnishing adequate proof of damages.¹¹

In *Warren v. United States Department of Interior Bureau of Land Management*, the Ninth Circuit held that the AGR did not have a jurisdictional effect. In *Warren*, the Bureau of Land Management informed the plaintiff's attorney of the requirement to show his legal authority to present the claim. Although he failed to do so, the Ninth Circuit refused to dismiss the suit, ruling that the agency had considered the claim on its merits, even though the plaintiff did not comply with agency regulations.¹² In *Knapp v. United States*,¹³ a wrongful death case, the Seventh Circuit ruled that a plaintiff could present proof of authority prior to filing of suit, even though he presented such proof more than two years after the claim accrued.¹⁴ The court dismissed the argument that the AGR established jurisdictional prerequisites.¹⁵ In *Conn v. United States*,¹⁶ the Sixth Circuit ruled that when an attorney signs an administrative claim without presenting proof of authority to sign, the court is not deprived of jurisdiction even though a non-associated attorney is the one who files suit.

Does the FTCA require plaintiff's to exhaust administrative remedies prior to filing suit? While the circuit court opinions cited above would seem to indicate that it does not, in *McNeil*

*v. United States*¹⁷ the Supreme Court took a different approach. In *McNeil*, the Supreme Court held that the FTCA requirement to present a claim to the appropriate federal agency was evidence of congressional¹⁸ intent that plaintiffs must completely exhaust executive remedies before they invoke the judicial process.

Based on *McNeil*, the Seventh Circuit reconsidered its position in *Kanar v. United States*, holding that the AGR are reasonable and the attorney signing the administrative claim must show evidence of his authority to represent the claimant.¹⁹ Because the attorney refused to send evidence of his authority, the agency refused to proceed further; therefore, the settlement process, as intended by Congress, was frustrated. Implied in *Kanar*, is that if the agency had investigated in spite of the defect, the plaintiff could have filed suit since the administrative settlement process would not have been frustrated. Thus, the agency had authority to waive the signature requirement, based on the presumption that the attorney had a power of attorney. The *Kanar* court did not hold that the AGR are jurisdictional.

In the past, many courts have held that the FTCA statute of limitations is jurisdictional. When the Supreme Court held that the doctrine of equitable tolling applied to the United States,²⁰ the "jurisdictional" nature of the statute of limitations "fell by the wayside" as lower courts began applying the doctrine of equitable tolling to the FTCA.²¹

10. Courts have generally upheld the sum certain requirement although they have strained to find a way to do so. *See, e.g.*, *Molinar v. United States*, 515 F.2d 246 (9th Cir. 1975) (holding that bills attached to the SF 95 state a sum certain); *Williams v. United States*, 693 F.2d 555 (5th Cir. 1982) (permitting the sum stated in a state suit to act to fill the requirement). *But see* *Blue v. United States*, 567 F. Supp. 394 (D. Conn. 1983) (awarding damages despite the complete absence of a sum certain). In *Blue*, the plaintiff was the only one of 53 prisoners injured in a fire to fail to name a sum in his claim. Because the government had extensive notice of his injuries as a result of several investigations, the judge permitted the award. *Cf.* *Bernard v. Calejo*, 17 F. Supp. 2d 1311 (S.D. Fla. 1998) (permitting the suit to proceed despite the complete absence of a sum certain). In *Bernard*, the government had exact information of the injuries as the plaintiff was an immigration detainee who was badly beaten by a guard while in custody. A number of cases have also dealt with the second requirement (written notification of the incident. *See, e.g.*, *Wadsworth v. United States*, 721 F.2d 503 (5th Cir. 1983); *Adams v. United States*, 615 F.2d 284 (1980 5th Cir.); *Cook v. United States*, 978 F.2d 164 (8th Cir. 1982); *Tidd v. United States*, 786 F.2d 1565 (11th Cir. 1986); *Bembenista v. United States*, 886 F.2d 493 (D.C. Cir. 1989). Requirement 2 does not require documentation, merely sufficient notice to permit investigation.

11. *See Adams*, 615 F.2d 284.

12. 724 F.2d 776 (9th Cir. 1984). *But see* *House v. Mine Safety Appliance, Co.*, 573 F.2d 609 (9th Cir. 1978) (holding that the plaintiff's attorney had not shown his authority to sign the claim; thus, even though the government had not raised the issue, the plaintiff had not been presented a valid claim); *Caidin v. United States*, 564 F.2d 284 (9th Cir. 1977) (ruling that FTCA jurisdictional requirements were not met by failure to show authority). The majority in *Warren* neither discussed *House* or *Caidin* nor indicated why it was making a change in circuit case law. *Caidin*, however, involved a class action and is not squarely on point. *Cf.* *Lansford v. United States*, 570 F.2d 221 (8th Cir. 1977). *Lansford* is another class action suit.

13. 844 F.2d 376 (6th Cir. 1988).

14. Under the FTCA, a claimant must present the administrative claim within two years of the date of accrual. *See* 28 U.S.C.A. § 2401(b).

15. *See Knapp*, 844 F.2d at 378, 379 (citing *Douglas v. United States*, 658 F.2d 445, 447 (6th Cir. 1981) and *Adams*, 615 F.2d at 289 (dealing with the plaintiff's failure to document damages)). *See also* *Hawa v. United States*, 22 F. Supp. 2d 353 (D. N.J. 1998) (holding that the plaintiff need not no present proof of authority).

16. 867 F.2d 916 (6th Cir. 1989).

17. 508 U.S. 105 (1993).

18. 28 U.S.C.A. § 2675(c).

19. *See Kanar v. United States*, 118 F.3d 527 (7th Cir. 1997).

Should an agency proceed with the administrative process without proof of authority to sign? Congress created the administrative process to alleviate the burden on the courts. It has long been the practice of the USARCS to try to settle administrative claims equitably, and to avoid suit. Frequently, the process continues without proof of authority. When a defective claim is acknowledged, the written acknowledgement should include the notice that the claim has not met one or more of the three requirements.²² If the claim is paid, the claimant and attorney both must sign the release, which includes proof of the plaintiff's authority to sign. If the claim is denied and there is no proof of authority to sign, the claims office should inform the claimant and his attorney that suit may be barred because they did not present authority.

The administrative process provides both the claimant and the government with an economical and efficient way to resolve a claim. This process requires that both sides fully cooperate. When the claimant, through his attorney or otherwise, deliberately fails to comply with the administrative filing requirements, government litigators should try to return the case to the administrative process. Litigation attorneys should seek to dismiss the case only as a last resort. This policy will further the congressional intent that claims be handled administratively, and will avoid forcing courts to dismiss an otherwise meritorious case on a technicality. Mr. Rouse.

Reserve Officer Training Corps (ROTC) Cadet Training Injuries

The Federal Employees Compensation Act (FECA) authorizes benefits for senior ROTC²³ cadets and ROTC applicants²⁴ who suffer injury, disease, illness, disability, or death in the line of duty while performing any authorized ROTC training or traveling to or from the training site.²⁵ If the applicant or member is a member of a reserve component, including the National Guard,²⁶ veteran's benefits preempt his entitlement to FECA benefits. These individuals cannot collect benefits from both sources.

In *Brown v. United States*,²⁷ an advanced Army ROTC cadet, who was also an inactive reservist, fractured his right femur in a required physical fitness test. He filed suit under the FTCA²⁸ alleging his injury was aggravated by the negligent care he received in General Leonard Wood Army Community Hospital, where he was admitted as a family member of a retired Army member. He applied for and received the FECA benefits. The FECA benefits, however, stopped when he applied for and received benefits from the Department of Veterans Affairs (VA).²⁹ The court held that the incident-to-service doctrine barred the plaintiff's suit,³⁰ despite his plea that he was admitted to the hospital as a family member.³¹

In *Wake v. United States*,³² an advanced Naval ROTC cadet was seriously injured when her active duty Marine Corps driver

20. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990).

21. *See, e.g., Glarner v. Veterans Admin.*, 30 F.3d 697 (6th Cir. 1994); *Schmidt v. United States*, 933 F.3d 639 (8th Cir. 1991).

22. DA PAM 27-162, *supra* note 3, para. 2-8.

23. Senior ROTC (SROTC) is offered at college-level institutions and the college-level element of Military Junior Colleges. *See* U.S. DEP'T OF ARMY, REG. 145-1, 15, SENIOR RESERVE OFFICERS TRAINING CORPS PROGRAM: ORGANIZATION, ADMINISTRATION AND TRAINING, Glossary, sec. II, (May 1992) [hereinafter AR 145-1]. The Junior ROTC Program (JROTC) conducted at high-school-level institutions is separate. There is no federal benefit program for JROTC nor can the injured cadet sue the United States under the FTCA for negligent or wrongful acts or omissions of JROTC instructors as such instructors are not federal employees but employees of the institution. *See Cavazos v. United States*, 776 F.2d 1263 (6th Cir. 1985); *McFeely v. United States*, 700 F. Supp. 414 (S.D. Ind. 1988) (holding that when the JROTC instructor is an active duty Army member, an FTCA suit may be allowed).

24. An applicant for membership is a student enrolled but not contracted during a semester or other enrollment term in a course that is part of SROTC instruction at an educational institution. AR 145-1, *supra* note 23, para. 3-49b.

25. A training site can be on or off campus. *See* 10 U.S.C.A. § 2109 (West 1998). Traditionally, training where FECA was authorized was limited to summer camp and practice cruises. This narrow interpretation of the 10 U.S.C.A. § 2109 resulted in an opinion by Administrative Law Division, OTJAG, pointing out that FECA coverage under 5 U.S.C.A. § 8140 contained no such limitation. FECA, Op. OTJAG (on file with author).

26. Advanced cadets in SROTC are required to be members of the inactive reserve or National Guard except in land grant institutions.

27. 151 F.3d 800 (8th Cir. 1998).

28. 28 U.S.C.A. §§ 1346(b), 1402, 2671-2680 (West 1998).

29. These benefits were in the amount of \$1620 per month for permanent disability.

30. *See Feres v. United States*, 340 U.S. 135 (1950).

31. *Army Regulation 145-1* authorizes medical care at an Army medical treatment facility for SROTC cadets who are injured in line of duty. *See* AR 145-1, *supra* note 23, para. 3-49a.

32. 89 F.3d 53 (2nd Cir. 1996).

allegedly caused a vehicle accident while she was returning to her school following a pre-commissioning physical examination at Brunswick Naval Air Station. She sued the United States and various active duty members. She applied for and received VA benefits based on her prior active service. She then applied for and received FECA benefits. She dropped her FECA benefits, however, after discovering that FECA was her exclusive remedy against the United States.³³ The Department of Labor then reversed its award, as she was not entitled to FECA benefits for travel to and from a physical examination.³⁴ The court held that the incident-to-service doctrine barred her FTCA suit.³⁵

In *Hudiburgh v. United States*,³⁶ an ROTC cadet who was not a reservist was injured in an on-campus rappelling exercise. He filed a claim under the FTCA based on negligent supervi-

sion and inadequate training. He was informed that his claim was not payable as his injury was caused by his own negligence. He then filed for and received FECA benefits. He later filed an FTCA suit. The court, however, held that his FTCA suit was barred, as FECA was his exclusive remedy against the United States.³⁷

The exclusive remedy for senior ROTC cadets injured in line of duty while training on or off campus or while going to and from training is either FECA, or, if the cadet is a reservist or National Guard member, the VA benefit program. This is true even if the injury results from the negligent or wrongful act or omission of an active duty service member or federal employee. Mr. Rouse.

33. See 5 U.S.C.A. § 8116(c) (West 1998).

34. See *id.* § 8140 (covering only travel to and from training).

35. *Wake*, 89 F.3d at 57.

36. 26 F.2d 813 (10th Cir. 1980).

37. *Id.* at 814.

Appendix

1998 Table of Adjusted Dollar Value

Year Purchased	Multiplier for 1998 Losses	Multiplier for 1997 Losses	Multiplier for 1996 Losses	Multiplier for 1995 Losses	Multiplier for 1994 Losses
1998	1				
1997	1.02				
1996	1.04	1.02			
1995	1.07	1.05	1.03		
1994	1.10	1.08	1.06	1.03	
1993	1.13	1.11	1.09	1.05	1.03
1992	1.16	1.14	1.12	1.09	1.06
1991	1.20	1.18	1.15	1.12	1.09
1990	1.25	1.23	1.20	1.17	1.13
1989	1.31	1.29	1.26	1.23	1.20
1988	1.38	1.36	1.33	1.29	1.25
1987	1.44	1.41	1.38	1.34	1.30
1986	1.49	1.46	1.43	1.39	1.35
1985	1.51	1.49	1.46	1.42	1.38
1984	1.57	1.55	1.51	1.47	1.43
1983	1.64	1.61	1.57	1.53	1.49
1982	1.69	1.66	1.63	1.58	1.54
1981	1.79	1.77	1.73	1.68	1.63
1980	1.98	1.95	1.90	1.85	1.80
1979	2.25	2.21	2.16	2.10	2.04
1978	2.50	2.46	2.41	2.34	2.27
1977	2.69	2.65	2.59	2.51	2.45
1976	2.86	2.82	2.76	2.68	2.60
1975	3.03	2.93	2.92	2.83	2.75
1974	3.31	2.26	3.18	3.09	3.01
1973	3.67	3.61	3.53	3.43	3.34
1972	3.90	3.84	3.75	3.65	3.55