

# Claims Report

United States Army Claims Service

## Tort Claims Notes

### Use of Annuities for Claims Arising in Foreign Countries

For individuals seeking compensation for injuries or damage incurred in foreign countries and caused by U.S. employees, they generally must pursue their remedy under the Military Claims Act (MCA),<sup>1</sup> or the Foreign Claims Act (FCA).<sup>2</sup> Both statutes give the Secretary of the Army authority to prescribe regulations to implement their terms.<sup>3</sup> Under the implementing regulations, the Commander, United States Army Claims Service (USARCS), may require future periodic payments<sup>4</sup> of damages.<sup>5</sup> The Commander, USARCS may require such payments when:

- (1) It is necessary to ensure adequate care and compensation for a minor or other incompetent claimant or unemployed survivor over a period of years[;]
- (2) A medical trust is necessary to ensure the long-term availability of funds for anticipated future medical care, the cost of which is difficult to predict[; or]
- (3) The injured party's life expectancy cannot be reasonably determined or is likely to be shortened.<sup>6</sup>

Normally, such settlements involve sums that require USARCS action or approval.<sup>7</sup> However, field offices may encounter instances within their settlement authority that will

involve future periodic payments to minors at the time they reach the age of majority. In some foreign countries it may be difficult or even impossible to obtain court approval of a minor's claim. If the claim is settled with the parents and the settlement is challenged when the minor reaches the age of majority, particularly where the parents have benefited and not the minor, the settlement may not be considered valid. Whether court approval is required or not, it is especially important that the settlement be structured to ensure that the minor actually receives the proceeds of the settlement after reaching the age of majority.<sup>8</sup> One way of handling the problem is to purchase an annuity payable at the time the child attains the age of majority or later. Another way is to pay the settlement amount to a trust account.<sup>9</sup>

In the case of annuities, an annuity is purchased from an insurance company that will guarantee the future periodic payment of a sum of money. Often, the future periodic payments are for life. A life annuity is one that guarantees a stream of income until the beneficiary's death. Because the cost of an annuity for life is very sensitive to the beneficiary's date of birth, carriers will not provide a life quote until proof of age is established.

It is USARCS policy<sup>10</sup> to use only insurance carriers that meet the qualifications of the Uniform Periodic Payments of Judgments Act.<sup>11</sup> The company must have a minimum of \$100,000,000 capital and surplus exclusive of any mandatory security valuation and reserve.<sup>12</sup> In addition, the company must

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1. 10 U.S.C. § 2733 (2000).

2. *Id.* § 2734.

3. *Id.* §§ 2733(a) (MCA), 2734(a) (FCA). The MCA is implemented by U.S. DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, chs. 2-3 (31 Dec. 1997) [hereinafter AR 27-20]. The FCA is implemented by AR 27-20, *supra*, chs. 2, 10.

4. A structured settlement that calls for specific amounts to be paid to the claimant at specified future dates or events, such as hospitalization or reaching designated ages. See generally U.S. DEP'T OF ARMY, PAM. 27-162, LEGAL SERVICES: CLAIMS PROCEDURES, para. 2-83 (1 Apr. 1998) [hereinafter DA PAM. 27-162].

5. AR 27-20, *supra* note 3, para. 2-46. In contrast, the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680 (2000), is implemented by Department of Justice (DOJ) regulations—Administrative Claims Under the Federal Tort Claims Act, 28 C.F.R. §§ 14.1-.11 (1999)—that do not require or even mention the use of annuities as a mode of settlement even though it is widely used by USARCS and other agencies. See AR 27-20, *supra* note 3, para. 2-46a.

6. AR 27-20, *supra* note 3, para. 2-46a(1)-(3); DA PAM. 27-162, *supra* note 4, para. 2-83b(1)-(3).

7. See AR 27-20, *supra* note 3, paras. 3-6 (settlement authority under the MCA), 10-9 (settlement authority under the FCA).

8. For guidance on claims involving minors and the requirement to obtain court approval, see AR 27-20, *supra* note 3, para. 2-56b. Generally, whether court approval is required depends on the local law of the domicile of the minor. See *id.* At a minimum, parents should be appointed as guardians or have such authority under local law.

9. See DA PAM. 27-162, *supra* note 4, para. 2-83a.

10. See Standard Operating Procedure, Torts Division, United States Army Claims Service, subject: SOP Governing the Use of Structured Settlements (18 May 2000) (on file with the Torts Division, USARCS).

have a qualifying rating from at least two of four listed rating organizations.<sup>13</sup>

Certain problems arise in claims under the FCA when the injured party and beneficiary of the annuity are inhabitants of a foreign country. Life insurance companies will not write life annuities if the beneficiary resides in a foreign country because they feel they cannot validate the beneficiary's date of birth through a birth certificate or social security number. Similarly, they may also be unable to validate the death of the beneficiary. Whether such beliefs are founded or not, carriers are skeptical of proof of age and death outside the United States. The problem, however, does not apply to claims under the MCA where a family member or civilian employee is temporarily residing in a foreign country. One method of avoiding the uncertainties of verification is to structure the periodic payments for a term of years or periodic lump-sum payments.

Problems may also be encountered with banks in foreign countries. Carriers will not allow direct deposits of annuity payments to a claimant's bank in a foreign country unless the bank is a member of the American Banking Association (ABA) and it has a listed ABA number. If direct deposit is not an option, ensure that the claimant has a post office box number or other qualified address to assure receipt of checks. If that is not feasible, checks can be mailed directly to the claimant's bank. Mr. Dolan.

### Denials Under Both the FTCA and the MCA

In the United States, the Federal Tort Claims Act (FTCA)<sup>14</sup> provides an exclusive negligence remedy unless judicially determined to be inapplicable.<sup>15</sup> If a claim arises in the United States that only alleges negligence, the denial of such claim should be based upon the FTCA.<sup>16</sup> The denial letter should

include a paragraph giving the claimant the right to request reconsideration. Because the office that is denying the claim is supposed to reconsider its decision to deny upon a request from the claimant, the reconsideration paragraph should specifically advise the claimant to send the request for reconsideration to that office. The field office's address should be given in the letter, not the U.S. Army Claims Service's (USARCS) address. That will prevent the claimant from sending his reconsideration directly to USARCS and bypassing the field offices. Claimants will be advised in the letter acknowledging receipt of the reconsideration request that, if the field office does not change its decision, then reconsideration will be forwarded to higher authority for final administrative action.

For claims arising outside the United States, the FTCA is inapplicable. For negligence claims arising outside the United States by family members of soldiers and U.S. civilian employees, as well as U.S. civilians, tourists, or citizens not permanently residing in a foreign country, a denial must cite the Military Claims Act (MCA)<sup>17</sup> unless a current Status of Forces Agreement applies.<sup>18</sup> The MCA denial letter must have an appeal paragraph giving the claimant an opportunity to appeal within sixty days of receipt of the denial letter.<sup>19</sup> As with the FTCA reconsideration provisions, the appeal paragraph should clearly state which office is to receive the appeal to avoid delay in processing the appeal.<sup>20</sup>

Claims arising out of noncombat activities of the armed forces worldwide should be considered under the MCA. While such claims may be paid under the MCA, denials should be under both the FTCA and MCA.<sup>21</sup> Consider the example of a claim alleging property damage from blasting activities from an adjacent military installation. Whether negligence was actually involved is something that may never be ascertained. When the property damage is shown to have been caused by the blasting activities, the resolution of such claims should not be delayed

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11. UNIF. PERIODIC PAYMENT OF JUDGMENTS ACT §§ 1-24, 14 U.L.A. 10-42 (Supp. 1998), *reprinted in* DANIEL W. HINDERT ET AL., STRUCTURED SETTLEMENTS AND PERIODIC PAYMENT OF JUDGMENTS app. B (2000).

12. *Id.* § 18(b)(3).

13. *Id.* § 18(b)(4). The ratings and organizations are as follows: from A.M. Best Company, an Unqualified A+, A+, or A; from Moody's a AAA, AA1, AA2, or AA3; from Standard and Poors a AAA, AA+, or AA; from Duff and Phelps a AAA, AA+, AA, or AA-.

14. 28 U.S.C. §§ 1346, 2671-2680 (2000); *see* AR 27-20, *supra* note 3, chs. 2, 4.

15. *See* AR 27-20, *supra* note 3, para. 3-2b.

16. *See* DA PAM. 27-162, *supra* note 4, fig. 261-A (sample FTCA denial letter).

17. 10 U.S.C. § 2733 (2000); AR 27-20, *supra* note 3, ch. 3. The Military Claims Act applies worldwide and allows recovery for damage caused by the negligent or wrongful conduct of service members and civilian employees. It also allows recovery for damage caused by the noncombat activities of the armed forces.

18. *See* DA PAM. 27-162, *supra* note 4, para. 3-4a (1).

19. *Id.* fig. 2-60 (sample MCA denial letter).

20. *Id.*

21. *Id.* fig. 2-61B (sample FTCA/MCA combination denial letter).

by trying to investigate whether negligence existed. For example, it will be time-consuming to determine whether a range was located too close to an adjacent town or whether a unit continued firing when they knew that a neighboring landowner's land was on fire. If the National Guard conducts noncombat activities, such as blasting activities, the claim would be considered under the National Guard Claims Act (NGCA),<sup>22</sup> not the MCA. Denials of the National Guard claims should be under both the FTCA and the NGCA.<sup>23</sup>

When there are multiple claimants whose claims all arise out of a single disaster, such as a chemical spill or a major explosion caused by noncombat activities in their state capacity, the question always arises about paying the smaller claims immediately. Because the FTCA does not allow advance payments as does the MCA, the MCA should be used to pay these claims. If such claims are denied, deny under both the FTCA and the MCA. Ms. Haffey.

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22. AR 27-20, *supra* note 3, ch. 6.

23. 32 U.S.C. § 715 (2000); AR 27-20, *supra* note 3, ch. 6 (implementing the NGCA).