

# Claims Report

United States Army Claims Service

## Personnel Claims Note

## General Principles

### When to Use (and How to Reject) a Carrier's Estimate

Several weeks ago, a hypothetical claimant, Soldier X, submitted a claim in which the carrier had damaged some picture frames after shipping them in mirror cartons to an Army field claims office. Soldier X filled out a Department of the Army (DA) Form 1840R and submitted estimates from two frame shops, both of which recommended replacing rather than repairing the frames. The carrier submitted an estimate from a furniture repair shop that recommended repairing the frames. Although the carrier's estimate was the least costly of the three, the Army claims office concluded that the frame shop estimates were more "reasonable" and reimbursed Soldier X for the lower of the two replacement estimates for the damaged items. If the carrier objects to the Army's decision to use a higher estimate, it may appeal the Army's demand to the Defense Office of Hearings and Appeals (DOHA). How would the DOHA decide a hypothetical case such as this one?

The result "depends." While a claims office has some latitude to determine the most reasonable estimate of those submitted by the claimant and the carrier, it must follow the guidance in the agreement between the Department of Defense and the carrier industry.

The Military-Industry Memorandum of Understanding on Loss and Damage Rules (MOU)<sup>1</sup> contains the rules governing repair estimates. The MOU discusses, among other issues, the general principles of processing carrier estimates, how to evaluate estimates submitted by carriers during any of the three "stages" following delivery, and the governing rules at each stage.<sup>2</sup>

Paragraph III(A) of the MOU requires claims offices to "evaluate itemized repair estimates" from "qualified and responsible firm[s] in the same manner as any estimate submitted by a claimant."<sup>3</sup> Accordingly, claims offices should scrutinize carrier estimates as carefully as they would scrutinize estimates provided by claimants, but give serious consideration only to those estimates itemized and prepared by reputable firms. Claims offices are *not* obliged to reimburse claimants based on opinions and estimates prepared by new repair firms whose reputations are unknown, or by established repairers whose reputations are untrustworthy.<sup>4</sup>

### Carrier Estimates Received Within Forty-Five Calendar Days of Delivery

Paragraph III(B)(1) of the MOU requires claims offices to *use*—not merely consider—carrier estimates they receive within forty-five calendar days of delivery, if: (1) the estimate is the lowest; and (2) the repair firm that provided it "can and will perform the repairs adequately for the price stated."<sup>5</sup> In short, a claims office should consider how quickly the firm will complete the repairs, the cost of the repair, and the repairer's qualifications and reliability. Claims offices should judge a firm's promise to repair the property by the firm's reputation within the local military community. If the repair shop has a good reputation, if the carrier proffered its estimate within forty-five calendar days of delivery, and if that estimate is the lowest one presented, the claims office should reimburse the claimant based on this estimate.<sup>6</sup>

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1. See Memorandum of Understanding, subject: Joint Military-Industry Memorandum of Understanding on Loss and Damage Rules (1 Jan. 1992), *reprinted in* U.S. DEP'T OF ARMY, PAM. 27-162, LEGAL SERVICES CLAIMS PROCEDURES fig. 11-5 (1 Apr. 1998) [hereinafter MOU].

2. See generally *id.*

3. *Id.* para. III(A).

4. See *id.* paras. III(A), (B)(1)-(2).

5. *Id.* para. III(B)(1).

6. See *id.* para. III(A).

On the other hand, if the carrier has submitted the lowest estimate, but there is good cause to select a higher one, then the claims office *must* promptly notify the carrier in writing of his reasons for not using its estimate. This explanation should address the specific reasons the claims office lacks confidence in the repair firm's ability and willingness to perform the repairs adequately for the price stated, based upon the firm's reputation for timely and satisfactory performance.<sup>7</sup> A claims office should provide this notice to the carrier during the adjudication of the claim—that is, before paying the claimant.<sup>8</sup> This requirement appears intended to encourage fair and open discussion between the parties. A claims office that uses an estimate higher than the carrier's estimate without giving the carrier advance written notice violates the MOU. In such cases, the carrier is entitled to a refund for the difference between its estimate and the amount of the offset.<sup>9</sup>

Claims offices must not postpone the adjudication and payment of claims while waiting for carriers to submit estimates. The forty-five day period specified in the MOU affords the carrier a reasonable time to obtain and submit its estimates.<sup>10</sup> Although some carriers diligently provide estimates, others do not. If an estimate arrives after the claims office has already paid the claimant, but within forty-five calendar days of delivery, claims offices should apply the standard criteria: (1) whether the estimate is lower than the others; and (2) whether it is from a reliable, reputable firm capable of completing the repairs for the stated price. If the estimate satisfies these criteria, the claims office should recover *the amount of the lower estimate* from the carrier, rather than the higher sum the claims office paid the claimant.<sup>11</sup>

*Carrier Estimates Received After Forty-Five Calendar Days,  
but Before Adjudication*

If the carrier submits the lowest estimate, but does so *more than* forty-five calendar days after delivering the property, the claims office may still be required to use the carrier's estimate. Under section III(B)(2) of the MOU, the claims office will use a carrier's itemized estimate if: (1) the estimate is lowest; (2) the claims office has not already adjudicated the claim; and (3)

if the repair firm "can and will perform the repairs adequately for the price stated."<sup>12</sup>

If the carrier has submitted the lowest estimate but there is good cause to use a higher one, the claims office *must* promptly notify the carrier of the reasons for this conclusion in writing.<sup>13</sup> If the carrier ignores this written notice or responds without adequately addressing the concerns listed in the notice, the claims office can use the higher estimate as planned.<sup>14</sup>

In the hypothetical scenario outlined at the beginning of this note, the carrier submitted its estimate from the furniture repair shop more than forty-five calendar days after the shipment was delivered, but before the claims office adjudicated the action. Although the claims office contacted the carrier, it did not inform the carrier of its reasons for selecting a higher-cost repair estimate. Instead, the claims office argued that it did not have to accept the carrier's lower estimate and challenged the carrier to explain why the estimate the Army used was unreasonable. Addressing a similar case, the DOHA noted:

[T]he MOU does not require use of the carrier's estimate merely because it is lower than the shipper's estimate. If the Army had advised the carrier in writing that the carrier's repairer was not qualified to assess the damages or perform repairs, after considering the carrier's response to the Army's concerns in this regard, we would have found in the Army's favor . . . . [T]he procedures require the service to advise the carrier in writing concerning its reason for not using the carrier's estimate when it is lowest overall.<sup>15</sup>

Although the DOHA acknowledged that "the Army had a substantial basis for not accepting the carrier's estimate," it upheld the carrier's appeal because the field claims office failed to communicate its reasoning to the carrier.<sup>16</sup> The DOHA ordered the Army to refund the carrier the difference between the value of the low estimate and the amount of the offset.<sup>17</sup>

7. *Id.* paras. III(B)(1)-(2).

8. *Id.* para. IV(A).

9. *Id.*; see *In re Stevens Transp. Co.*, No. 98010520, 1998 DOHA LEXIS 252 (May 13, 1998).

10. MOU, *supra* note 1, para. II(A).

11. *See id.*

12. *Id.* para. III(B)(2).

13. *Id.* paras. III(B)(2)-(3).

14. *Id.* para. IV(A).

15. *Stevens Worldwide Van Lines*, No. 97110307, 1997 DOHA LEXIS 878, at \*5 (Dec. 4, 1997).

A close reading of the MOU may prompt claims offices to question the difference between Paragraphs III(B)(1) and III(B)(2). Both discuss using “lowest,” “itemized” repair estimates, repair firms that “can and will perform the repairs adequately for the price stated,” and the obligation of the claims office to inform the carrier in writing whenever that office uses a higher estimate.<sup>18</sup> The only difference involves the time frame in which the provisions are effective: Paragraph III(B)(1) concerns estimates submitted *within* forty-five calendar days of delivery,<sup>19</sup> while Paragraph III(B)(2) concerns estimates submitted *more than* forty-five days after delivery, for claims that have not yet been adjudicated.<sup>20</sup> Under Paragraph III(B)(1), a claims office must always use a carrier’s low estimate, absent good cause. If a claims office pays the claimant but then receives a lower estimate from the carrier within forty-five calendar days of delivery, the office should use the carrier’s estimate to calculate the appropriate amount to recover from the claimant.<sup>21</sup> Paragraph III(B)(2), which becomes effective forty-five calendar days after delivery until adjudication, mirrors the rule under Paragraph III(B)(1). During this period, the claims office should still use the carrier’s low estimate, absent good cause.<sup>22</sup> Clearly, the drafters of the MOU considered forty-five calendar days sufficient time to submit an estimate and adjudicate a claim.<sup>23</sup> Paragraph III(B)(2) governs the procedures a claims office should use when one of the parties fails to act within this preferred period.<sup>24</sup>

If the claims office receives a low carrier estimate *after* it pays the claimant, Paragraph III(B)(3), graphically depicted below, governs.<sup>25</sup>

**Fig. 1—Flow Chart for Determining When to Use a Carrier’s Estimate**

<i>If the number of days since delivery is . . .</i>		
◀ Less than 45 days ▶	◀ More than 45 days, but before final adjudication and payment ▶	◀ After final adjudication and payment
<i>. . . then apply MOU Paragraph . . .</i>		
III(B)(1)	III(B)(2)	III(B)(3)
<i>. . . which directs claims offices to . . .</i>		
Use the carrier’s low estimate, or inform the carrier in writing of reasons why the estimate is unreasonable.	Use the carrier’s low estimate, or inform the carrier in writing of reasons why the estimate is unreasonable.	Use the carrier’s low estimate, if the carrier can establish that the estimate used by the claims office was unreasonable.

16. *Id.* at \*6-7.

17. *Id.* at \*7.

18. MOU, *supra* note 1, paras. III(B)(2)-(3).

19. *Id.* para. III(B)(1).

20. *Id.* para. III(B)(2).

21. *Id.* para. III(B)(1).

22. *Id.* para. III(B)(2).

23. *See id.* para. II(A).

24. *Id.* para. III(B)(2).

25. *Id.* para. III(B)(3).

*Carrier Estimates Received After the Claims Office Sends a Demand to the Carrier*

What if the carrier submits the lowest estimate *after* the claims office has already requested reimbursement from the carrier? Under Paragraph III(B)(3) of the MOU, the claims office must consider such estimates during the recovery, rebuttal, or appeal process, which runs until the parties reach an impasse and the carrier requests DOHA review. Note that the MOU does not say that Paragraph III(B)(3) takes effect after “adjudication” or “payment” of the claim, which is when Paragraph III(B)(2) concludes. Instead, Paragraph III(B)(3) takes effect “after the Demand on Carrier has been dispatched to the carrier’s home office.”<sup>26</sup> The MOU presumes that “paying” a claim and issuing a demand on the carrier occur virtually at the same time;<sup>27</sup> however, if the claims office receives a lower carrier estimate after paying the claimant, but before dispatching the demand, then it must apply the procedures in Paragraph III(B)(2)—inform the carrier in writing why the claims office used a higher estimate, and consider the carrier’s response before sending the demand.<sup>28</sup>

The standard of proof under Paragraph III(B)(3) is also different than it is before the claims office sends its demand to the carrier. Before the claims office sends its demand, it must inform the carrier why it did not use the lowest estimate. In “post-demand” (or “post adjudication”) cases, however, the burden shifts to the carrier to demonstrate that the estimate the claims office used was “unreasonable” when compared to the market price in the area or in relation to the pre-damage value of the goods.<sup>29</sup> In the scenario described at the beginning of this note, the claims office, which had challenged the carrier to show why the use of higher estimates was unreasonable, mistakenly applied the Paragraph III(B)(3) standard to Paragraph III(B)(2) facts. The claims office still had the burden to prove that the carrier’s estimate was unreasonable.

When a field claims office fails to notify the carrier in writing about why it used a higher estimate, the DOHA will likely require that the claims office reimburse the carrier for the difference between the estimate it submitted and the amount offset. Under the MOU’s strictly construed written notification provisions, unless the claims office gives written notice explaining its use of a higher estimate and carefully considers

the carrier’s reply, the carrier’s estimate is presumed to be meritorious and the carrier has an excellent chance of prevailing on appeal. Tom Kennedy.

## ***Tort Claims Note***

### **Damage to Rental Cars**

Government travelers on temporary duty (TDY) frequently use rental cars for official travel. When a rental car sustains damage, the rental agency may occasionally attempt to collect the amount of the damage from the traveler. How should travelers and their units respond to such collection attempts?

First, travelers should use their government VISA cards to rent cars for official travel; the credit card agreement with the issuing bank includes primary insurance coverage for all rentals up to thirty-one days.<sup>30</sup> This coverage applies to all authorized drivers of rental vehicles; it covers collision, theft, and other damage to the car, as well as towing charges and rental agency charges for loss of the car’s use—with no deductible. The coverage applies to most cars, minivans with a capacity of up to eight passengers, and some sport utility vehicles; it does not apply to trucks or larger vans. The traveler must initiate and complete the rental with the government VISA account and decline the rental agency’s Collision Damage Waiver (CDW) and Liability Damage Waiver (LDW). Travelers must report any losses to VISA within twenty days of the date of loss. The coverage excludes third-party liability and losses caused by intentional acts, such as drunken driving, illegal activity, off-road operation of the rental vehicle, or the traveler’s failure to exercise due caution in safeguarding the vehicle. It also excludes losses due to hostilities of any kind.<sup>31</sup>

Although the VISA web site indicates that this coverage ended on 1 March 2002,<sup>32</sup> the coverage remains in effect for all banks issuing government VISA cards. The Army Claims Service recently confirmed that the coverage will continue; the parties have not set any end date for it.<sup>33</sup>

Travelers should choose rental agencies carefully to minimize their exposure to rental agency claims. The Military Traf-

26. *Id.* para. III(B)(3).

27. *See id.* paras. III(B), IV(A).

28. *Id.* para. III(B)(2)-(3).

29. *Id.* para. III(B)(3).

30. For details, see VISA USA, *Visa Government Detailed Benefits*, at [http://www.usa.visa.com/business/cards/visa\\_government.html#a](http://www.usa.visa.com/business/cards/visa_government.html#a) (last visited Dec. 16, 2002) [hereinafter VISA Web Site]. VISA does not offer this coverage in Jamaica, Israel, or Ireland.

31. *Id.* To file a claim or for more information about the program, call 1-800-VISA-911 (1-800-847-2911). Practitioners outside the United States may call collect, at 1-410-902-8011. Ensure that you receive a VISA claim number from the VISA Claims Department. *Id.*

32. VISA Web Site, *supra* note 30.

fic Management Command (MTMC) has negotiated an agreement (MTMC Agreement), with many rental agencies in the United States and abroad.<sup>34</sup> The MTMC Agreement provides insurance coverage for rental vehicles that U.S. military and civilian employees use for official business; in many cases, this agreement also covers government contractors, Northern Alliance Treaty Organization (NATO) military members and employees, and U.S. government local national employees in some foreign countries.<sup>35</sup> Under the MTMC Agreement, the rental agency is primarily liable for the first \$25,000 in damages to the property of third persons,<sup>36</sup> and for \$100,000 per person and \$300,000 per incident for personal injury or wrongful death to third parties.<sup>37</sup> The MTMC Agreement also states that the rental agency will bear a portion of the responsibility for damage to the rental vehicle. This liability is subject to exclusions similar to those mentioned above: illegal activities, driver negligence, operation of the vehicle off-road or across international boundaries without authorization, or use of the vehicle to push or tow another vehicle.<sup>38</sup>

Under the pre-November 2001 terms of the MTMC Agreement, the rental agency assumed responsibility for damage caused by the driver's *simple* negligence; vehicle drivers were only responsible for damage caused by their gross negligence or willful misconduct.<sup>39</sup>

Under Amendment 6 to the MTMC Agreement, Version 2, however, vehicle operators are also responsible for damages caused by their simple negligence.<sup>40</sup>

This change was potentially devastating to units' travel budgets. Before 1 November 2001, few—if any—rental agency claims for damage to their vehicles were payable; most of the exceptions to the general rule of rental agency liability occurred when the driver was acting outside the scope of his duties. Under Amendment 6, however, the rental agency is entitled to compensation *from unit TDY funds* for damages up to the total value of the rental vehicle.<sup>41</sup> Units were presumably expected to collect these amounts from the drivers. Such large, unplanned expenses have the potential to wipe out units' annual travel budgets. Under the federal claims statutes, there is a two-year statute of limitations on claims,<sup>42</sup> so this threat to unit TDY funds is certain to remain for at least two years from the end of any rental period entered into between 1 November 2001 and 1 October 2002.

Representatives of the four armed services attempted to address the impact of this change by meeting with the Government Rental Car Program Manager in January and March 2002, seeking modifications to Amendment 6. As a result, MTMC and the industry created the new MTMC Agreement, Version 3, effective 1 October 2002.<sup>43</sup>

The new MTMC Agreement also clarifies several administrative issues regarding claims. First, upon request by the rental agency, a government traveler must now provide an official unit address and telephone number for billing purposes, as opposed to the traveler's home address.<sup>44</sup> Second, the new amendment requires that the rental agency submit bills for damage to rental vehicles to the unit at its official address.<sup>45</sup> Third, the rental

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33. Telephone Interview with Leator Smith, VISA Program Manager with Bank of America, Arlington, Virginia (Dec. 18, 2002). Besides rental car insurance, VISA provides government travelers with emergency cash services, message relay services, medical and legal referrals, transportation and ticket replacement assistance, lost luggage locator, translation services, and prescription medication services. *Id.*

34. U.S. Dep't of Defense, Military Traffic Management Command, U.S. Government Car Rental Agreement Number 3 (1 Oct. 2002), at <http://www.mtmc.army.mil/CONTENT/6603/CAR3.pdf> [hereinafter MTMC Agreement]. This newest version of the MTMC Agreement replaced Agreement Number 2 and its six amendments. *See id.* The current list of participating companies outside the United States may be found at the MTMC web site. U.S. Dep't of Defense, Military Traffic Management Command, *U.S. Government Car Rental Program, International Rates* (Aug. 30, 2002), at <http://www.mtmc.army.mil/frontDoor/0,1383,OID=3--215-219-514-516,00.html>. Travelers may also call the MTMC Passenger Programs Division at (703) 681-9442.

35. MTMC Agreement, *supra* note 34, para. 8. As of 12 October 2001, Advantage Rent-A-Car, Allstate Rent-A-Car, Gateway Rent A Car Systems, Inc., Leesville Motors, Inc., and Southwest Car Rentals did not extend the Agreement coverage to NATO members in the United States. Allstate and Leesville Motors, Inc., do not extend benefits to contractors. Telephone interview with Christine Braswell, Passenger Programs Office, MTMC (Oct. 12, 2001).

36. MTMC Agreement, *supra* note 34, para. 9a.

37. *Id.* para. 9a.

38. *Id.* para. 9b.

39. *Id.* amend. 5, para. 9b.

40. *Id.* amend. 6, para. 9a.

41. *Id.* amend. 6.

42. Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (2000); Military Claims Act, 10 U.S.C. § 2733 (2000).

43. Telephone Interview with Christine Braswell, Passenger Programs Office, MTMC (Sept. 26, 2002).

44. MTMC Agreement, *supra* note 34, para. 7.

agency may no longer bill the government renter's credit card for the damage.<sup>46</sup> Fourth, renters no longer need to specify additional drivers on rental contracts.<sup>47</sup> Fifth, rental companies outside the United States may no longer charge non-waivable excess fees for damage to rental vehicles, unless those fees are mandated by law. Currently, rental agencies often charge such fees to government renters, but all available evidence suggests that these fees are customary rather than required.<sup>48</sup> Instead, and in return for accepting liability for damage to the rental vehicle, MTMC-participating rental agencies must now impose a government administrative rate supplement of five dollars per vehicle per day.<sup>49</sup> Finally, rental agencies must now provide a toll-free emergency contact number for government renters to notify the rental agency of a collision or repair, to request a replacement vehicle if necessary, and to seek instructions for the disposition of a disabled vehicle. The renter must notify the company of any collision, fill out a company accident report when requested, and provide the company with copies of any police reports the vehicle operator receives.<sup>50</sup>

Travelers who do not rent cars using their government charge cards should authenticate their official travel status by presenting their travel orders or authorizations; by doing so, they increase the chances that the MTMC Agreement will apply and cover any subsequent damages. The MTMC Agreement does not *require* travelers to do so, but doing so will make it clear that the MTMC Agreement will apply. Under the Travel and Transportation Reform Act of 1998<sup>51</sup> and the MTMC Agreement, travelers *must* use their government charge cards to charge car rentals when they present the card to authenticate their official status.<sup>52</sup> The terms of the MTMC Agreement

supersede any individual rental agreement, except when the government agency rents under a special, promotional government, affinity, or discounted rental program.<sup>53</sup>

If damage to the rental vehicle falls under one of the listed exceptions (for example, when the renter drives the vehicle off-road), the rental agency must send any bill for damages to the traveler's unit, not directly to the traveler.<sup>54</sup> If the unit determines that the traveler was acting within the scope of his employment when the damage occurred, then it must pay the rental agency from unit TDY funds, using its servicing Defense Finance and Accounting Service office.<sup>55</sup> If the unit determines that the traveler was not acting within the scope of his employment when the damage occurred (for example, driving under the influence of alcohol), then it will inform the rental agency, and the rental agency may proceed against the traveler individually.<sup>56</sup>

Finally, if neither government credit card nor MTMC Agreement coverage is available, unit TDY funds must cover any damages to a rental vehicle resulting from a government driver's in-scope acts.<sup>57</sup> The traveler is individually responsible for out-of-scope claims of all kinds, except for claims arising outside the United States under the Foreign Claims Act.<sup>58</sup>

*Army Regulation 27-20* governs the payment of third-party tort claims not covered under the MTMC Agreement.<sup>59</sup> Units should instruct all claimants to file the *Standard Form 95* claim form at their servicing military claims offices. Claimants involved in in-scope incidents with cars rented from MTMC Agreement-participating agencies should pursue timely claims

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45. *Id.* para. 9(c).

46. *Id.* para. 7.

47. *Id.* para. 8.

48. Telephone Interview with Frances Adams, Air Force Tort and Litigation Service (Sept. 16, 2002).

49. MTMC Agreement, *supra* note 34, para. 2.

50. *Id.* para. 11.

51. Pub. L. 105-264, 112 Stat. 2350 (codified as amended in scattered sections of 5, 12, and 31 U.S.C. (2000)); *see also* U.S. DEP'T OF DEFENSE, JOINT FED. TRAVEL REG. para. 030301A (Nov. 2002) [hereinafter JFTR].

52. MTMC Agreement, *supra* note 34, para. 7.

53. *Id.* "The renter will not be bound by any stipulation in any rental agency agreement that is inconsistent with the agreement provisions." *Id.*

54. *Id.* para. 9c.

55. JFTR, *supra* note 51, ch. 3, para. U3415c(2)(b)-(c).

56. MTMC Agreement, *supra* note 34, para. 9c.

57. JFTR, *supra* note 51, ch. 3, para. U3415c(2)(b)-(c).

58. 10 U.S.C. § 2734 (2000).

59. *See* U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS chs. 3-4 (14 Nov. 2002).

against the participating rental companies to mitigate their damages. Their claims against the United States will be held in abeyance pending the outcome of the claimant's claim against the rental company directly.<sup>60</sup>

The current MTMC Agreement has closed the window on government liability for damage to participating companies' rental cars. For damages to rental vehicles resulting from simple negligence between 1 November 2001 and 1 October 2002, however, unit travel budgets remain exposed to large liability payments. Although amendments to the MTMC Agreement

have reduced units' exposure to liability, unit travel budgets must now absorb an additional five dollars per vehicle per day government administrative rate supplement. Units can limit their exposure to liability by training their travelers to proactively avoid potential liability. Units must stress safe driving, use of the government VISA card, timely reporting of damages to VISA, and the importance of renting from agencies that have signed the MTMC Agreement. Major Dribben.

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60. Interview with Joseph H. Rouse, Deputy Chief, Tort Claims Division, U.S. Army Claims Service, Fort Meade, Maryland (August 21, 2002).