

possessions, including areas under the jurisdiction of the United States, implements the FCA and prescribes the substantive basis and special procedural requirements for settlement of claims of inhabitants of a foreign country, or of a foreign country or a political subdivision thereof, against the United States for personal injury, death, or property damage caused by service members or civilian employees, or claims that arise incident to non-combat activities of the armed forces.

(b) *Effect of Military Claims Act (MCA).* Claims arising in foreign countries will be settled under the MCA if the injured party is an inhabitant of the U.S., for example, a member of the U.S. armed forces, a U.S. civilian employee, or a family member of either category. In a wrongful death case, if the decedent is an inhabitant of a foreign country, even though his survivors are U.S. inhabitants, the FCA will apply. See § 536.74(c). For claims arising outside the U.S. involving foreign-born spouses, see DA Pam 27-20, paragraph 2-20a.

(c) *Effect of Army Maritime Claims Settlement Act (AMCSA) (10 U.S.C. 4801, 4802 and 4808).* A maritime claim may be settled under the FCA.

§ 536.137 Claims payable under the Foreign Claims Act.

(a) A claim for death, personal injury, or loss of or damage to property may be allowed under this subpart if the alleged damage results from non-combat activity or a negligent or wrongful act or omission of soldiers or civilian employees of the U.S. armed forces, as enumerated in § 536.23(b), regardless of whether the act or omission was made within the scope of their employment. This includes non-U.S. citizen employees recruited elsewhere but employed in a country of which they are not a citizen. However, a claim generated by non-U.S. citizen employees in the country in which they were recruited and are employed will be payable only if the act or omission was made in the scope of employment. But claims arising from the operation of U.S. armed forces vehicles or other equipment by such employees may be paid, even though the employees are not acting within the scope of their

employment, provided the employer or owner of the vehicle or other equipment would be liable under local law in the circumstances involved.

(b) Claims generated by officers or civilian employees of the American Battle Monuments Commission (36 U.S.C. 2110), acting within the scope of employment, will be paid from American Battle Monuments Commission appropriations.

(c) Claims for the loss of, or damage to, property that may be settled under this subpart include the following:

(1) Real property used and occupied under lease, express, implied, or otherwise. See § 536.34(m) of this part and paragraph 2-15m of DA Pam 27-162.

(2) Personal property bailed to the government under an agreement, express or implied, unless the owner has expressly assumed the risk of damage or loss.

§ 536.138 Claims not payable under the Foreign Claims Act.

A claim is not payable if it:

(a) Results wholly from the negligent or wrongful act of the claimant or agent;

(b) Is purely contractual in nature;

(c) Arises from private or domestic obligations as distinguished from government transactions;

(d) Is based solely on compassionate grounds;

(e) Is a bastardy claim for child support expenses;

(f) Is for any item whose acquisition, possession, or transportation is in violation of Department of the Army (DA) or Department of Defense (DOD) directives, such as illegal war trophies.

(g) Is for rent, damage, or other payments involving the acquisition, use, possession, or disposition of real property or interests therein by and for the DA. See § 536.34(m) of this part and paragraph 2-15m of DA Pam 27-162.

(h) Is not in the best interest of the United States, is contrary to public policy, or otherwise contrary to the basic intent of the governing statute (10 U.S.C. § 2734); for example, claims for property loss or damage, or personal injury or death caused by inhabitants of unfriendly foreign countries or by individuals considered to be unfriendly to the United States.

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

(j) Is for damages or injury, the claim for which a receiving State should adjudicate and pay pursuant to an international agreement, subject to waiver by the Commander USARCS. See DA Pam 27-162, paragraph 3-4a(2), for a discussion of the conditions of waiver.

(k) Is listed in §§ 536.45 and 536.46, except for the exclusions listed in §§ 536.45(e), (h) and (k). Additionally, the exclusions set forth in §§ 536.45(a) and (b) do not apply to a claim arising incident to noncombat activities.

(l) Is brought by a subrogee.

(m) Is covered by insurance on the involved U.S. Armed Forces' vehicle or the tortfeasor's privately owned vehicle (POV), in accordance with requirements of a foreign country, unless the claim exceeds the coverage or the insurer is insolvent. See § 536.139(c).

(n) Is payable under subpart C of this part or AR 27-20, chapter 11.

(o) Is brought by or on behalf of a member of a foreign military force for personal injury or death arising incident to service, or pursuant to combined military operations. Combined military operations include exercises and United Nations and North Atlantic Treaty Association (NATO) peacekeeping and humanitarian missions. Derivative claims arising from these incidents are also excluded.

§ 536.139 Applicable law for claims under the Foreign Claims Act.

(a) *Venue of incident and domicile of claimant.* In determining an appropriate award, apply the law and custom of the country in which the incident occurred to determine which elements of damages are payable and which individuals are entitled to compensation. However,

where the claimant is an inhabitant of another foreign country and only temporarily within the country in which the incident occurred, the quantum of certain elements of damages, such as lost wages and future medical care, may be calculated based on the law and economic conditions in the country of the claimant's permanent residence. Where the decedent is the subject of a wrongful death case, the quantum will be determined based on the country of the decedent's permanent residence regardless of the fact that his survivors live in the U.S. or a different foreign country than the decedent. See § 536.77 for further damages guidance.

(b) *Other guidance.* The guidance set forth in §§ 536.77(b) through (d) as to allowable elements of damages is generally applicable. Where moral damages, as defined in DA Pam 27-162, paragraph 2-53c(4), are permitted, such damages are payable. In some countries it is customary to get a professional appraisal to substantiate certain claims and pass this cost on to the tortfeasor. The Commander USARCS or the chief of a command claims service may, as an exception to policy, permit the reimbursement of such costs in appropriate cases. Where feasible, claimants should be discouraged from incurring such costs.

(c) *Deductions for insurance.* (1) Insurance coverage recovered or recoverable will be deducted from any award. In that regard, every effort will be made to monitor the insurance aspect of the case and encourage direct settlement between the claimant and the insurer of the tortfeasor.

(2) When efforts under paragraph (c)(1) of this section are of no avail, or when it otherwise is determined that an insurance settlement will not be reasonably available for application to the award, no award will be made until the chief of the command claims service or the Commander USARCS, has first granted consent. In such cases, an assignment of the insured's rights against the insurer will be obtained and, in appropriate cases, reimbursement action will be instituted against the insurer under applicable procedures.