

2 FAM 280

CLAIMS AGAINST THE UNITED STATES

(CT:GEN-353; 02-23-2009)
(Office of Origin: L)

2 FAM 281 TORT CLAIMS

2 FAM 281.1 Authority

(CT:GEN-350; 01-23-2009)

Authorities addressed in this subchapter include the Federal Tort Claims Act (28 U.S.C. 1346, 2671-2680) and the State Department Basic Authorities Act of August 1, 1956, as amended (22 U.S.C. 2669-1), which authorize the Secretary of State to receive, consider, settle, and pay tort claims against the United States.

2 FAM 281.1-1 Tort Claims Within the United States

(CT:GEN-353; 02-23-2009)

Under the Federal Tort Claims Act, the Secretary of State or designee is authorized to consider and settle administratively tort claims, except those specifically excluded by the act (28 U.S.C. 2680), on account of damage to or loss of property or on account of personal injury or death arising in the United States as a consequence of the negligent or wrongful act or omission of any employee of the Department acting within the scope of the employee's employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2 FAM 281.1-2 Tort Claims Outside the United States

(CT:GEN-353; 02-23-2009)

Under the State Department Basic Authorities Act, the Secretary of State is authorized to pay tort claims arising in foreign countries in connection with Department of State operations abroad in the same manner as tort claims arising in the United States are paid under the administrative settlement provisions of the Federal Tort Claims Act, 28 U.S.C. 2672.

2 FAM 281.1-3 Tort Claims Not Addressed in This Subchapter

(CT:GEN-353; 02-23-2009)

- a. Property damage claims arising out of the activities of the United States Section, International Boundary and Water Commission, United States, and Mexico. For such claims, consult 22 U.S.C. 277e, which provides in part: "The Secretary of State acting through such officers as he may designate, is further authorized to consider, adjust, and pay from funds appropriated for the project, the construction of which resulted in damages, any claim for damages accruing after March 31, 1937, caused to owners of lands or other private property of any kind by reason of the operations of the United States, its officers or employees, in the survey, construction, operation, or maintenance of any project constructed or administered through the American Commissioner, International Boundary and Water Commission, United States and Mexico, if such claim for damages does not exceed \$1,000 and has been filed with the American Commissioner within one year after the damage is alleged to have occurred, and when in the opinion of the American Commissioner such claim is substantiated by a report of a board appointed by the said Commissioner."*
- b. Property damage claims by U.S. Government employees at a post abroad when the claims arise incident to their employment. For such claims, consult 14 FAM 640.*
- c. Personal injury claims by U.S. Government employees at a post abroad when the claims arise incident to their employment (workers' compensation claims). For such claims, please consult 3 FAM 3630.*

2 FAM 281.1-4 Tort Claims of Agencies Other Than State

(CT:GEN-353; 02-23-2009)

The U.S. Agency for International Development, the Foreign Agricultural Service of the Department of Agriculture, the Department of Commerce, the Departments of the Army, Navy, and Air Force, and the Veterans' Administration have separate authority to consider, settle, and pay tort claims arising in foreign countries attributed to negligent acts or omissions of their personnel in connection with activities of such agencies abroad. Tort claims arising out of activities of the above-mentioned agencies and based on negligent or wrongful acts or omissions of their personnel are not cognizable under the State Department Basic Authorities Act. Such claims are handled in accordance with the existing regulations and procedures with the existing regulations and procedures of the respective agencies.

2 FAM 281.2 Delegation of Authority

(CT:GEN-350; 01-23-2009)

- a. The Legal Adviser and the Deputy Legal Advisers are authorized to consider, ascertain, adjust, determine, compromise, and settle claims in an amount of \$25,000 or less, which are capable of administrative settlement under the Federal Tort Claims Act and the State Department Basic Authorities Act. The Assistant Legal Adviser and Deputy Assistant Legal Adviser for International Claims and Investment Disputes (L/CID) are authorized to consider, ascertain, adjust, and determine all claims arising from the above acts, including the denial of all claims, and to compromise and settle such claims in the amount of \$10,000 or less. Chiefs of mission and principal officers of fiscal-reporting posts are authorized to consider, ascertain, adjust, determine, and settle claims in an amount of \$2,500 or less, which are capable of administrative settlement under the State Department Basic Authorities Act, arising out of the activities of their respective posts.
- b. Awards in excess of \$25,000 require the prior approval of the Attorney General or the Attorney General's designee.

2 FAM 281.3 Limitations

(CT:GEN-350; 01-23-2009)

Claims arising under the Federal Tort Claims Act and the State Department Basic Authorities Act must be presented in writing within 2 years after accrual.

2 FAM 281.4 Action by Claimant

2 FAM 281.4-1 Claimant

(TL:GEN-95; 08-24-1967)

- a. Claims for property loss or damage may be filed by the owner of the property, the owner's duly authorized agent or legal representative, or survivors.
- b. A claim for loss wholly compensated by an insurer with the rights of a subrogee may be presented by the insurer.
- c. A claim for loss partially compensated by an insurer with the rights of a subrogee may be presented by the parties individually as their respective

interests appear, or jointly.

- d. Claims for personal injury may be filed by the injured person, the person's duly authorized agent or legal representative.
- e. Claims for death may be filed by the executor or administrator of the decedent's estate or by any other person legally or beneficially entitled to assert such a claim in accordance with applicable local law governing the rights of survivors.
- f. When filed by an agent or legal representative, the claim is presented in the name of the real claimant; is signed by the agent or legal representative; shows the title or legal capacity of the person signing; and is accompanied by evidence of the person's authority to present a claim on behalf of the claimant as agent, legal representative, executor, administrator, parent, guardian, or other legal representative.

2 FAM 281.4-2 Form of Claim

(CT:GEN-350; 01-23-2009)

All claims must be submitted in writing, preferably on Form SF-95, Claim for Damage, Injury, or Death. Copies of the claim must be furnished upon request to the Department. The claim must contain sufficient information to allow the Department to conduct an investigation of the matter, which will be conducted by the relevant post or bureau, often in coordination with L/CID. It is especially important that the claimant specify the amount claimed for property damage and for personal injury, and that the claimant or his/her representative sign the document.

2 FAM 281.4-3 Place of Filing Claim

(CT:GEN-350; 01-23-2009)

A claim must be submitted directly to the office, bureau, division, or Foreign Service establishment of the Department, or of the Commission, out of whose activities the accident or incident occurred, if known; if not known, to the Office of the Assistant Legal Adviser for International Claims and Investment Disputes, L/CID, Department of State, Washington, DC 20520.

2 FAM 281.4-4 Evidence and Information To Be Submitted by Claimant

(CT:GEN-350; 01-23-2009)

- a. **General:** The amount claimed on account of damage to or loss of property or on account of personal injury or death must, so far as possible, be substantiated by competent evidence. Supporting statements, estimates, and the like must, if possible, be obtained from disinterested parties. When possible, all documents in other than the English language should be accompanied by English translations.
- b. **Death:** In support of a claim based on death, the claimant may be required to submit the evidence or information listed in 28 CFR 14.4 (a).
- c. **Personal injury:** In support of a claim for personal injury, including pain and suffering, the claimant may be required to submit the evidence or information listed in 28 CFR 14.4 (b).
- d. **Damage to property:** In support of a claim for damage to or loss of property, real or personal, the claimant may be required to submit the evidence or information listed in 28 CFR 14.4 (c).

2 FAM 281.5 Investigation of Claims

(CT:GEN-350; 01-23-2009)

- a. When a claim (except those arising outside the United States in an amount of \$2,500 or less) is received, the office, bureau, division, or post out of whose activities the claim arose should inform L/CID immediately. Unless informed otherwise, and in consultation with L/CID, the relevant office, bureau, division, or post should then make such investigation as may be necessary or appropriate for a determination of the validity of the claim. Such investigation will include a statement by the supervisor of the activities out of which the claim arose, setting forth the supervisor's views concerning the accident or incident and any additional information or evidence relating to the claim.
- b. The claim, together with all pertinent material, and a recommendation based on the merits of the case with regard to allowance or disallowance of the claim, will be transmitted to L/CID for a decision. (With regard to the processing of vouchers for a claims settlement award, see 4 FAM 480.)
- c. If the claim arises outside the United States and is less than \$2,500 in

total, it is not necessary to transmit the above materials to L/CID. A decision on allowance or disallowance may be made by the chief of mission or the principal officer of a fiscal-reporting post (see 2 FAM 281.2), unless the conditions set forth in 2 FAM 281.7 are present.

- d. A chief of mission or principal officer of a fiscal-reporting post may, at that officer's discretion, appoint from among post personnel a committee of no less than three U.S. Government officers or employees to review claims arising at the officer's post or at a constituent post and to make recommendations as to the settlement of claims. The determination and settlement of a claim will be made by the chief of mission or principal officer of a fiscal-reporting post, even when an advisory committee has also reviewed the claim.
- e. Pursuant to instructions from the Department, acting at the request of any other Federal agency, a post must make such investigations as may be necessary or appropriate for the determination of the validity of the claim arising outside the United States and thereafter must forward the claim, together with all pertinent material, and a recommendation regarding allowance or disallowance of the claim, to L/CID for transmission to the requesting agency.

2 FAM 281.6 Determination of Claims

(CT:GEN-350; 01-23-2009)

Claims will be determined in accordance with the applicable statute and the applicable subpart of this part. Questions of law will be determined in accordance with the law of the place where the accident or incident occurred. The procurement of legal services by post (see 2 FAM 283) may be necessary in order to determine whether payment is appropriate.

2 FAM 281.7 Adjustment or Settlement of Claims

(CT:GEN-350; 01-23-2009)

- a. No claim may be adjusted or settled by a chief of mission or principal officer of a fiscal-reporting post if it exceeds \$2,500.
- b. Except on written instructions from the Legal Adviser, a Deputy Legal Adviser, the Assistant Legal Adviser for L/CID, or the Deputy Assistant Legal Adviser for L/CID, no claim may be adjusted or settled by a chief of mission or principal officer of a fiscal-reporting post if it falls within one of the following categories:

- (1) A new precedent or new point of law;
 - (2) A claim that involves or may involve a question of policy;
 - (3) A claim in which the United States is or may be entitled to indemnity or contribution from a third party, and the claim against the third party has not been settled;
 - (4) A claim whose adjustment or settlement would, for any reason, control the disposition in a related claim in which the amount to be paid may exceed \$25,000; and
 - (5) A claim in which the United States, an employee, agent, or cost-plus contractor is involved in litigation based on a claim arising out of the same transaction.
- c. If a chief of mission or principal officer of a fiscal-reporting post determines, after the investigation of the claim has been completed, that the claim may fall within one of the categories listed in paragraphs a or b of this section, the responsible officer must transmit the claim, together with all pertinent material, to L/CID.
- d. When the Legal Adviser, a Deputy Legal Adviser, or the Assistant Legal Adviser for L/CID determines that a claim falls within one of the categories listed in paragraphs a or b of this section, he or she should consult the Department of Justice. Such consultation may be initiated by a written communication addressed to the Assistant Attorney General, Civil Division, containing:
- (1) A short and concise statement of the facts and of the reasons for the referral;
 - (2) Copies of relevant portions of the claim file; and
 - (3) A statement of the recommendations and views of the Department.
- e. The settlement of a claim for an amount in excess of \$25,000 may not be effected until the Legal Adviser, Deputy Legal Adviser, the Assistant Legal Adviser for L/CID, or the Deputy Assistant Legal Adviser for L/CID has obtained the written approval of the Department of Justice. Consultations with a view to obtaining such approval should be initiated as provided in paragraph d of this section. For the purpose of this paragraph, a principal claim and a derivative or subrogated claim will be treated as a single claim.

2 FAM 281.8 Final Denial of Claim

(CT:GEN-350; 01-23-2009)

Final denial of an administrative claim will be made in writing in accordance with 28 CFR 14.9 (a).

2 FAM 281.9 Acceptance of Award or Settlement by Claimant

(CT:GEN-350; 01-23-2009)

The acceptance by the claimant of an award, compromise, or settlement is considered by the Department to be final and conclusive on the claimant, the claimant's agent, attorney, or legal representative, and any person on whose behalf (or for whose benefit) the claim has been presented, and constitutes a complete release of any claim against the United States and against any employee of the Government whose act or omission gave rise to the claim, by reason of the same subject matter. It is important to obtain the relevant party's signature on a settlement and release form prior to payment of a settlement. L/CID will provide posts with appropriate settlement and release language upon request.

2 FAM 281.10 Attorney's Fees

(CT:GEN-350; 01-23-2009)

Attorneys' fees for services rendered in connection with a claim are limited by 28 U.S.C. 2678.

2 FAM 282 UNASSIGNED

2 FAM 283 PROCUREMENT OF LEGAL SERVICES BY THE POST

(CT:GEN-353; 02-23-2009)

See also Welfare and whereabouts (7 FAM 100); Suits Against the U.S. Government and/or U.S. Government Employees (7 FAM 970); and Extradition of Fugitives to the United States (7 FAM 1620).

2 FAM 283.1 Authorization of Principal Officer To Procure Legal Services

(CT:GEN-350; 01-23-2009)

Whenever legal services are required by the post to protect the U.S. Government's interests or to enable a U.S. Government officer or employee to perform duties (including protection of U.S. nationals) or to carry on service in an efficient manner, the principal officer must inform the Office of Diplomatic Law and Litigation (L/DL) of the situation and request authorization to procure necessary legal services. Except as provided in section 2 FAM 283.2, such requests are made on a case-by-case basis, and no agreement or obligation may be made with any attorney or solicitor (which includes lawyers, barristers, and other legal advisers or representatives) prior to approval by the Department.

2 FAM 283.2 Emergency Authorization

(CT:GEN-350; 01-23-2009)

In exceptional circumstances involving an emergency when it is evident that any delay would cause irreparable injury to the interests of the Government, or when legal services need to be obtained without delay to enable the Government to meet its responsibilities in the protection of a U.S. national, the chief of mission may approve procurement of legal services when in his or her judgment the facts appear to warrant such action. However, this authority does not extend to the procurement of legal services to represent the interests of the U.S. Government in matters before foreign courts or other foreign tribunals. (See 2 FAM 284.) This authority also does not extend to a Government commitment for employing legal counsel to represent a U.S. citizen. An immediate report of each such case must be provided to the Office of Diplomatic Law and Litigation, including all the information required under 2 FAM 283.4.

2 FAM 283.3 Special Post Situation

(CT:GEN-350; 01-23-2009)

In any post where recurring problems are anticipated because of the provisions of local law or because of special circumstances peculiar to the post, a full report must be submitted to L/DL, with a request for authorization to enter into an agreement with a local attorney or solicitor for services on a retainer basis. Complete information as required by 2 FAM 283.4 must be furnished, and no agreement or commitment may be entered into until approval is received from the Department, including from L/DL.

2 FAM 283.4 Information Required for Approval of Legal Services

(CT:GEN-350; 01-23-2009)

The following information must be furnished to L/DL to request approval to obtain legal services, or to report emergency procurement of such services:

- (1) The factual situation out of which the legal questions have arisen, or are expected to arise;
- (2) Name, address, telephone and fax numbers of the attorney or solicitor whose services are desired, or whose services are employed;
- (3) Statement of the general background, qualifications, and experience of the attorney or solicitor, and if listed under 7 FAM 990;
- (4) Comparative standing of the attorney or solicitor in the law profession, indicated by reputation and rating, as given in any professional rating service available; and
- (5) Estimated cost of services and length of time for which they will be or were required.

2 FAM 284 SUITS IN FOREIGN COUNTRIES AGAINST THE UNITED STATES

2 FAM 284.1 Background

(CT:GEN-350; 01-23-2009)

- a. It has been agreed by the Departments of State, Defense, and Justice that the Justice Department will represent the Government's interests in suits instituted in foreign courts against the United States or its agencies and instrumentalities, and suits against officers and employees of the United States when such suits are apparently based upon the individual's performance of official acts.
- b. Action by the Justice Department in the event of litigation within the purview of this section will include the engagement and instruction of local legal counsel (which includes attorneys, solicitors, lawyers, barristers, and other legal advisers and representatives). Accordingly,

section 2 FAM 283 is not applicable in such cases.

2 FAM 284.2 Scope

(CT:GEN-350; 01-23-2009)

- a. **Suits against the United States or an agency thereof:** From time to time, suits are filed in foreign countries against the U.S. Government or against its agencies such as Army, Navy, and Air Force bases; missions, and units; post and naval exchanges; officers' and noncommissioned officer clubs and messes; military assistance advisory groups (MAAGs); U.S. operations missions (USOMs); USAID missions; embassies and consulates, etc. Most agencies are not legal persons under U.S. law, and suits against them should be treated as suits against the U.S. Government.
- b. **Suits against individuals:** Suits are also filed from time to time against individual U.S. officers and employees. Suits apparently related to the performance of official duties should be reported under this section. If a suit clearly is based upon the individual defendant's private acts, it is not within the purview of this section, but should be reported in accordance with section 2 FAM 226.

2 FAM 284.3 Foreign Litigation

(CT:GEN-353; 02-23-2009)

- a. **Receipt of notice:** Embassies and other posts abroad can receive notices from host state judicial or other tribunals either requesting information, testimony or records or communicating notice of litigation. Such notice may arrive at post by mail, by messenger, or under cover of a diplomatic note. In rare cases, notice is sometimes provided by publication in a newspaper or other means. The notice may identify as a party the United States, the U.S. Government, the embassy, a current or former embassy official, or even a component part of the diplomatic or consular mission, such as a USAID mission or public information office. In all cases, the Department (L/DL) and the Department of Justice, Office of Foreign Litigation, immediately should be notified via a front channel cable. If, due to time constraints, a cable cannot be sent, notification may be made via email, fax or telephone, or a combination of those methods.
- b. **Information provided to the Office of Diplomatic Law and Litigation (L/DL) should include:**

- (1) The precise date on which the notice was received;
- (2) All details concerning how the papers were delivered or how notice was received;
- (3) A description of the documents received (e.g., letter or formal court paper);
- (4) The name and location of the court or tribunal mentioned on the papers;
- (5) The name(s) of the plaintiffs/claimants;
- (6) The identities of the U.S. parties named as defendant(s) (i.e., the embassy, USAID, the consul general);
- (7) Whether the documents and all attachments are in English;
- (8) The date by which a response to the papers is required/requested; and
- (9) What the case is about, to the extent post can determine such information from the notice. Where practicable, the papers should be faxed or emailed to the Department (L/DL) together with a summary translation if the originals are not in English.

c. **Response by the Department:** The Department will consult with the Justice Department and, as appropriate, with other U.S. Government agencies and respond to post regarding next steps as soon as possible. If the notification of the individual or entity is insufficient under customary international law, post usually will be instructed to send the papers and a covering diplomatic note to the Ministry of Foreign Affairs (MFA) with a request that service properly be made. L/DL will provide posts with specific language for any necessary diplomatic notes in a given case. The U.S. Government position is that acceptable service of process on the U.S. Government generally is service transmitted through the foreign ministry, providing adequate time of at least 60 days after such service before any court appearance or responsive pleading is required. The U.S. Government also requests that official documents be served with an English translation to facilitate a response.

d. **Conducting litigation:**

- (1) **Report to Department:** L/DL and the Department of Justice will contact reporting posts for information about the nature of a lawsuit and any information the post may wish to have considered in respect of its particular local situation. Requested information

regarding the nature of the suit may include a detailed report on both the facts of the case and the issues that have been or are expected to be raised in the litigation by any party to the case, as well as the identification of relevant documents and witnesses; and

- (2) **Action by post during course of suit:** The Justice Department will retain and supervise attorneys to handle local litigation, subject to 2 FAM 512. The Justice Department and the local attorney will be working with post, both to obtain information and to seek guidance on factual issues and policies. L will continue to provide the Department of State's input regarding legal policy questions (e.g., assertion of sovereign immunity) after consultation with relevant bureaus and other agencies. Posts should refrain from instructing local counsel in any of the matters with which counsel is charged by the Justice Department, but should feel free to raise any concerns with L/DL or the Office of Foreign Litigation at the Justice Department. In addition, posts should keep L/DL and the Justice Department currently informed of any activity (e.g., receipt of documents; communication from the ministry of foreign affairs (MFA), the court, the plaintiff, or other individual, etc.) in the case.

2 FAM 284.4 Sovereign Immunity

2 FAM 284.4-1 Claim of Sovereign Immunity Through Diplomatic Channels

(CT:GEN-350; 01-23-2009)

Posts must not claim sovereign immunity through diplomatic channels without first obtaining L/DL's authorization and instructions. If the Department decides that representations should be made through diplomatic channels to the government concerned, it will so advise the Department of Justice and will send appropriate instructions to the post. The Department's decision will be based on the established policy for sovereign immunity cases. However, if the Department has reason to believe that the case is of unusual interest to a particular post, the post will be asked to comment if it has not already done so.

2 FAM 284.4-2 Pleading a Defense of Sovereign Immunity Through Local Counsel

(CT:GEN-350; 01-23-2009)

- a. **Consultation with the Department:** The Department of Justice

consults with the Department in cases in which it contemplates filing a plea of sovereign immunity.

- b. **Possible foreign policy objection to filing a plea of sovereign immunity:** Communicate any foreign policy considerations relevant to asserting or failing to assert a plea of sovereign immunity to the Department (L/DL). Any such concerns will be resolved by consultation between the interested entities in Washington.

2 FAM 284.5 Post To Be Kept Informed Concerning Suits

(TL:GEN-95; 8-24-67)

- a. The Department of Justice will keep the posts informed concerning suits against the United States or any of its agencies by making them an information addressee of its correspondence with local counsel either directly or through the Office of the Legal Adviser of the Department.
- b. Posts will prepare and process vouchers for payment of adverse judgments or compromise settlements only in accordance with instructions to be furnished in each case by the Department.

2 FAM 284.6 Necessity To Avoid Default Judgments

(TL:GEN-95; 8-24-67)

Strict adherence to the foregoing procedures established by this section is required in order to avoid having default judgments entered against the United States Government, its agencies, instrumentalities, and officers and employees.

2 FAM 285 THROUGH 289 UNASSIGNED