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TORTS

INTRODUCTION

The Federal Tort Claims Act (FTCA) defines government liability for the tortious conduct of its employees.[1] Before enactment of the FTCA, parties injured by the negligent acts of government employees sought a private relief bill directly from Congress.[2] To effectively address the growing number of claims, and to provide a more accessible remedy, Congress enacted the FTCA in 1946.[3] The FTCA waives sovereign immunity, allowing claims for injury caused by the negligent or wrongful acts or omissions of government employees. Private parties may hold the United States liable if the law of the state where the act or omission occurred would impose liability on a private individual, subject to certain limitations.[4]

This Survey reviews Tenth Circuit holdings on three FTCA cases decided during the Survey period.[5] These cases focused on three issues: the discretionary function exception, the government's liability as an employer of independent contractors, and the government's reversionary interest in future damages awarded to private citizens. In two cases, *Tew v. United States*[6] and *Bowman v. United States* (*Bowman II*),[7] the court utilized conventional analyses in determining government liability. In the third case, *Hill v. United States* (*Hill III*),[8] the court struck new ground in finding that the government maintained a reversionary interest in future damages awarded to a private citizen.

I. GOVERNMENT LIABILITY UNDER THE DISCRETIONARY FUNCTION EXCEPTION

A. *Background*

1. The Discretionary Function Exception

The FTCA's waiver of sovereign immunity is narrow in scope and subject to several exceptions. The discretionary function exception provides that private parties cannot hold the government liable for "[a]ny claim based upon . . . the exercise or performance or the failure to exercise or perform a

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1. 28 U.S.C. §§ 1346, 1402, 2401-2402, 2411-2412, 2671-2680 (1994).

2. Mark A. Dombroff, *United States Government Liability*, *in* AIRCRAFT CRASH LITIGATION 1984, at 227, 236 (PLI Litig. & Admin. Practice Course Handbook Series No. 267, 1984).

3. Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812, 842-47 (1946). *See generally* 1 LESTER S. JAYSON, HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES, § 65.01, at 3-3 to 3-4 (1964) (discussing the two dominant objectives for enacting the statute).

4. 28 U.S.C. § 1346(b).

5. The survey period extended from September 1995 through August 1996.

6. 86 F.3d 1003 (10th Cir. 1996).

7. 65 F.3d 856 (10th Cir. 1995) (*Bowman II*).

8. 81 F.3d 118 (10th Cir. 1996) (*Hill III*), *cert. denied*, 117 S.Ct. 56 (1996).

discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[9] Application of this exception evolved through a series of United States Supreme Court cases, most recently in *Berkovitz v. United States*[10] and *United States v. Gaubert*.[11]

In *Berkovitz*, the Court developed a two-part test for applying the discretionary function exception. First, courts must consider whether a government agent's judgment or choice produced the questionable conduct.[12] If no element of choice or judgment existed, the court should neither find discretion nor apply the exception.[13] If a court concludes that the conduct involved an element of judgment, then it must make a second determination: whether the exception shields that type of judgment from judicial review.[14] The *Berkovitz* Court concluded that Congress intended to shield only conduct that involved the permissible exercise of policy judgment.[15]

Gaubert addressed government conduct subject to the discretionary function exception.[16] The Court rejected a distinction based on the level of government at which the decision making occurred.[17] The *Gaubert* Court focused on the nature of the conduct, rather than the status of the actor.[18] In applying the *Berkovitz* two-part test, the *Gaubert* Court held that when a federal statute, regulation, or agency guideline gave discretion to a government agent, a presumption arose that the agent's conduct was properly grounded in public policy.[19] *Berkovitz* and *Gaubert* developed a discreet discretionary function exception analysis, which allows for a flexible and broad application.[20]

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9. 28 U.S.C. § 2680(a) (1994).

10. 486 U.S. 531 (1988). *See generally* Irl I. Nathan, *Torts—Governmental Immunity—Causes of Action Stemming from Federal Government's Negligence in Implementing Mandatory Regulations or Statutes Are Not Barred by Discretionary Function Exception of Federal Tort Claims Act:* Berkovitz v. United States, 20 ST. MARY'S L.J. 1018 (1989) (discussing the Supreme Court's analysis); Thomas H. (Speedy) Rice, Berkovitz v. United States: *Has a Phoenix Arisen form the Ashes of* Varig?, 54 J. AIR L. & COM. 757 (1989) (discussing Supreme Court and federal circuit decisions leading up to *Berkovitz* and *Berkovitz*'s effect on discretionary function exception analysis); Patricia M. Clarke, Note, *Torts—The Discretionary Function Exception: Immunity for the Negligent Execution of Agency Policy*—Berkovitz v. United States, 61 TEMP. L. REV. 281 (1988) (concluding that the Court incorrectly decided *Berkovitz* and thereby inappropriately expanded government immunity and contradicted Congressional intent).

11. 499 U.S. 315 (1991). *See generally* Carolyn K. Dick, United States v. Gaubert*: Potential Liability for Federal Regulations Under the "Discretionary Function" Exception of the Federal Tort Claims Act*, 36 S.D. L. REV. 180 (1991) (analyzing the applicability of the discretionary function exception to federal regulators who assume operational control of financial institutions).

12. *Berkovitz*, 486 U.S. at 536.

13. *Id.*

14. *Id.*

15. *Id.* at 536-37.

16. *Gaubert*, 499 U.S. at 325-26.

17. *Id.* at 325 ("A discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policymaking or planning functions . . . [d]iscretionary conduct is not confined to the policy or planning level.").

18. *Id.*

19. *Id.* at 324.

20. *See generally* David S. Fishback & Gail Killefer, *The Discretionary Function Exception to the Federal Tort Claims Act:* Dalehite *to* Varig *to* Berkovitz, 25 IDAHO L. REV. 291 (1989) (reviewing discretionary function exception case law and concluding that there is a sensible framework rooted in Congressional intent for applying the exception); William P. Kratzke, *The Supreme*

2. The Suits in Admiralty Act

The Suits in Admiralty Act (SAA),[21] like the FTCA, waives sovereign immunity. The SAA, however, applies specifically to maritime issues.[22] It allows suit against the government if, under similar circumstances, the plaintiff could maintain an admiralty proceeding against a private vessel and/or cargo owner.[23] The FTCA and SAA provide mutually exclusive jurisdiction.[24] The SAA does not explicitly contain a discretionary function exception.

B. Tew v. United States[25]

1. Facts

Robert Tew died when his raft capsized on the Illinois River.[26] The accident occurred after Tew's raft passed over an underwater structure constructed by a private citizen without the consent of the government.[27] The Army Corps of Engineers (Corps) knew of the structure, but neither the Corps nor the United States Coast Guard (Coast Guard) had removed it or placed warning markers near it.[28]

Representatives of Tew brought a wrongful death action under the FTCA and SAA claiming that the Corps and the Coast Guard had negligently failed to mark or remove the obstruction.[29] The district court granted summary judgment for the United States.[30]

Court's Recent Overhaul of the Discretionary Function Exception to the Federal Torts Claims Act, 7 ADMIN. L.J. AM. U. 1 (1993) (concluding that recent Supreme Court cases offer flexible guidelines rather than precise tests in applying the discretionary function exception); Donald N. Zillman, *Protecting Discretion: Judicial Interpretation of the Discretionary Function Exception to the Federal Tort Claims Act*, 47 ME. L. REV. 365 (1995) (reviewing Supreme Court precedent and all federal court decisions interpreting the discretionary function exception since *Berkovitz*).

21. 46 U.S.C. app. § 742 (1994).

22. *See generally* 1 PAUL S. EDELMAN, MARITIME INJURY AND DEATH 459-79 (1960); GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 11-11 (1957); James C. Helfrich, *Suits Against the United States Pursuant to the SIAA, PVA, EAA, FTCA, and FECA*, 26 TRIAL LAW. GUIDE 121, 124-25 (1982); Kathryn C. Nielsen, Comment, *The Discretionary Function Exception and the Suits in Admiralty Act: A Safe Harbor for Negligence?*, 4 PUGET SOUND L. REV. 385, 386-88 (1981).

23. 46 U.S.C. app. § 742 ("In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding . . . may be brought against the United States . . . .").

24. *See* Ashland v. Ling-Temco-Vought, Inc., 711 F.2d 1431, 1435 (9th Cir. 1983) (holding that SAA provided exclusive jurisdiction for maritime torts); Keene Corp. v. United States, 700 F.2d 836, 843 n.11 (2d Cir. 1983) (holding that the jurisdictional bases of the FTCA and SAA are mutually exclusive); EDELMAN, *supra* note 22, at 479; DANIEL A. MORRIS, FEDERAL TORT CLAIMS § 12.1 (1993); Helfrich, *supra* note 22, at 126-27. *But cf.* Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc., 772 F.2d 62, 64-65 (3d Cir. 1985) (holding that FTCA includes jurisdiction over maritime torts except for those torts for which a remedy was provided by the SAA or Public Vessels Act).

25. 86 F.3d 1003 (10th Cir. 1996).

26. *Tew*, 86 F.3d at 1004.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

2. Decision

The Tenth Circuit first reviewed the FTCA and SAA as waivers of the United States' sovereign immunity.[31] As a matter of first impression, the court then considered whether the SAA contained an implied discretionary function exception.[32] The court stated that the FTCA's discretionary function exception maintained the separation of powers by preventing independent judicial review of legislative and administrative decisions.[33] Since adherence to the doctrine of separation of powers remains equally desirable in maritime issues,[34] the court found a discretionary function exception in the SAA.[35]

The court then applied the two-part test for the discretionary function exception set forth in *Berkovitz*.[36] In order for the United States' conduct to fall within the exception, it must: (1) involve an element of judgment or choice, and (2) be grounded in public policy considerations.[37]

Tew argued that the United States had a non-discretionary duty to mark or remove the underwater structure.[38] Specifically, Tew asserted that 14 U.S.C. § 86 required the Coast Guard to mark the structure, and 33 U.S.C. §§ 403, 409, 414, and 415 required the Corps to remove the structure.[39]

The court concluded that 14 U.S.C. § 86 gave the Secretaries of Transportation and Navy discretion to mark obstructions.[40] When delegated to the Coast Guard District Commanders, the authority maintained its discretionary character.[41] Further, the court concluded that the Coast Guard primarily based its decision to leave the obstruction unmarked on economic considerations.[42] The court held that the Coast Guard properly based its exercise of discretion on such public policy considerations.[43] Therefore, the Coast Guard's conduct fell within the discretionary function exception.[44]

The court then reviewed 33 U.S.C. §§ 403, 409, 414, and 415. Section 403 and accompanying regulations prohibit the creation of obstructions in navigable waters.[45] The court concluded that the regulations did not create a duty to remove obstructions.[46] In fact, it expressly refused to create a non-

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31. *Id.* at 1004-05.
32. *Id.* at 1005.
33. *Id.*
34. *Id.*
35. *Id.* The Tenth Circuit's decision is in line with the majority of the circuits. *Id.* For criticism of this imputation, see Nielsen, *supra* note 22, at 403-14.
36. *See supra* notes 12-15 and accompanying text.
37. *Tew*, 86 F.3d at 1005.
38. *Id.* at 1005-06.
39. *Id.*
40. *Id.* at 1006. The court specifically pointed to the language of the statute which states that the "secretary *may* mark . . . any sunken vessel or other obstruction existing on the navigable waters . . . of the United States in such manner and for so long as, in his judgment, the needs of maritime navigation require." *Id.* (quoting 14 U.S.C. § 86) (emphasis in original).
41. *Id.* (citing 33 C.F.R. § 64 (1991)).
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*

discretionary duty.[47]

Sections 409, 414 and 415, commonly known as the Wreck Act, prohibit obstruction of navigable waters and require owners of obstructions to mark and remove them.[48] If the owner does not remove the obstruction, the Act permits the Secretary of the Army to remove it.[49] The court held that neither the statutes nor the accompanying regulations created a requirement that the Army remove obstructions.[50] Rather, language such as "shall have the right to remove" and "may undertake to remove" indicated the existence of government discretion.[51] Further, the court held that the Corps' decision not to remove the obstruction fell within the discretionary function exception since the Corps based its decision on public policy considerations regarding allocation of limited resources.[52]

The court concluded that since the Corps' and the Coast Guard's conduct fell within the exception, the district court did not retain subject matter jurisdiction to review the claims.[53] Therefore, the court affirmed the grant of summary judgment.[54]

C. *Other Circuits*

During the survey period, two other circuits addressed the discretionary function exception to the FTCA and the SAA. In *Baldassaro v. United States*,[55] the Fifth Circuit first found that the SAA contained an implied discretionary function exception.[56] After considering the wording of relevant statutes, the court determined that the government's decision regarding the design of bunks in National Defense Reserve Fleet vessels was discretionary.[57] Further, the government properly grounded the decision in public policy.[58] The court concluded that the plaintiff had failed to rebut a presumption, defined in *Gaubert*, that the government grounded its decision in the same policy considerations which underlie the statute authorizing discretion.[59]

In *Glacier Bay United Cook Inlet Drift Ass'n v. Trinidad Corp.*,[60] the Ninth Circuit also held that the SAA contained an implied discretionary function exception.[61] The court then considered each contested government action

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47. *Id.* ("[N]othing contained in this Part shall establish a non-discretionary duty on the part of district engineers nor shall deviation from these procedures give rise to a private right of action against a district engineer.") (quoting 33 C.F.R. § 326.1 (1991)).
48. *Id.*
49. *Id.* (citing 33 U.S.C. §§ 414, 415).
50. *Id.* at 1006-07.
51. *Id.* at 1006.
52. *Id.* at 1007.
53. *Id.*
54. *Id.*
55. 64 F.3d 206 (5th Cir. 1995), *cert denied*, 116 S. Ct. 1823 (1996).
56. *Baldassaro*, 64 F.3d at 208.
57. *Id.* at 209.
58. *Id.* at 211.
59. *Id.* at 212.
60. 71 F.3d 1447 (9th Cir. 1995).
61. *Glacier Bay*, 71 F.3d at 1450.

separately to determine if government agents possessed discretion.[62] The court concluded that where relevant manuals gave mandatory instructions or required decisions involving the application of objective scientific standards, the discretionary function exception did not apply.[63]

D. *Analysis*

Application of the discretionary function exception within the FTCA highlights two conflicting Congressional objectives. First, Congress intended to provide private parties with a viable remedy when harmed by government employees.[64] The FTCA sought to have the United States treated "in the same manner and to the same extent as a private individual under like circumstances . . . ."[65] Secondly, Congress restricted government liability through the discretionary function exception to prevent judicial second-guessing of legislative and administrative decisions grounded in policy.[66]

Courts must necessarily balance these conflicting objectives.[67] In *Tew*, the Tenth Circuit chose to limit judicial review of policy-based government decision making. This conclusion, as discussed above, comports with recent Supreme Court decisions and those of other federal circuits.[68] Further, the relevant federal statutes and regulations clearly defined the removal of obstructions as discretionary conduct.[69] In addition, the government made decisions based on the quintessential legislative policy choice of allocating limited re-

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62. *Id.* at 1451.

63. *Id.* at 1452-53. *See generally* D. Scott Barash, Comment, *The Discretionary Function Exception and Mandatory Regulations*, 54 U. CHI. L. REV. 1300, 1327-34 (1987).

64. *See* Dombroff, *supra* note 2, at 236.

65. 28 U.S.C. § 2674 (1994).

66. Berkovitz v. United States, 486 U.S. 531, 536-37 (1988) (citing United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984)); *see also* Kratzke, *supra* note 20, at 7 ("Certainly resolution of political questions or agency policy should not occur in the context of a negligence suit . . . . Court scrutiny of government conduct for unreasonableness . . . should occur only in a setting where it will not affect the very essence of government activity.").

67. For criticism that the scope of the exception is too wide, see John W. Bagby & Gary L. Gittings, *The Elusive Discretionary Function Exception From Government Tort Liability: The Narrowing Scope of Federal Liability*, 30 AM. BUS. L.J. 223, 268-69 (1992); Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 UCLA L. REV. 871, 915 (1991); Osborne M. Reynolds, Jr., *The Discretionary Function Exception of the Federal Tort Claims Act: Time For Reconsideration*, 42 OKLA. L. REV. 459, 479-81 (1989); Barry R. Goldman, Note, *Can the King Do No Wrong? A New Look at the Discretionary Function Exception to the Federal Tort Claims Act*, 26 GA. L. REV. 837, 858-60 (1992).

68. *See generally* Richard P. Shafer, Annotation, *Liability of United States for Failure to Warn of Danger or Hazard Resulting from Governmental Act or Omission as Affected by "Discretionary Function or Duty" Exception to Federal Tort Claims Act (28 U.S.C.S. § 2680(a))*, 65 A.L.R. FED. 358 (1983); Jean F. Rydstrom, Annotation, *Claims Based on Construction and Maintenance of Public Property as Within Provision of 28 USCS § 2680(a) Excepting from Federal Tort Claims Act Claims Involving "Discretionary Function or Duty,"* 37 A.L.R. FED. 537, 588-91 (1978); Michael J. Kaplan, Annotation, *Liability of United States for Injuries or Damage Resulting from Failure to Establish, or Properly Maintain or Operate, Aids to Maritime Navigation*, 19 A.L.R. FED. 297 (1974).

69. *See supra* notes 41, 48, 52 and accompanying text. After determining that this first prong of the *Berkovitz* test was satisfied, the Tenth Circuit could have used the presumption analysis laid out in *Gaubert*. The court would have then focused on the sufficiency of the plaintiff's evidence in rebutting a presumption that the government's acts were grounded in policy.

sources.[70] One may argue that the Corps and Coast Guard should have utilized a safer policy, however Congress did not intend to allow courts to review such policy decisions under the FTCA.[71]

II. GOVERNMENT LIABILITY AS EMPLOYER OF AN INDEPENDENT CONTRACTOR

A. *Background*

1. The FTCA

The FTCA allows claims against the United States if a private individual would be liable to the claimant "in accordance with the law of the place where the act or omission occurred."[72] Federal courts must therefore apply the relevant law of the state where the conduct occurred. In *Bowman II*, the Tenth Circuit construed Wyoming law regarding an owner's duty toward the employees of independent contractors.[73]

2. Relevant State Law

Under Wyoming law, an owner may be liable to employees of independent contractors for injury caused by an unsafe condition on the owner's premises.[74] However, the law does not require owners to protect independent contractor employees from hazards incidental to the work performed.[75] The owner's delegated control of the job site to the independent contractor provides the rationale behind this exception.[76] If an owner retains sufficient control over part of the work, such as directing performance or assuming affirmative duties for safety,[77] the exception does not apply.[78]

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70. *See* Domme v. United States, 61 F.3d 787, 793 (10th Cir. 1995) (concluding that Dept. of Energy's inspection decisions were based on policy decision of how to utilize limited resources); Baum v. United States, 986 F.2d 716 (4th Cir. 1993) (holding that the National Park Service's decision on how to best allocate resources was inherently based on economic policy); Johnson v. United States Dep't of Interior, 949 F.2d 332 (10th Cir. 1991) (holding that National Park Service's decisions to undertake search and rescue missions were properly based on policy consideration of best use of limited economic resources); Bearce v. United States, 614 F.2d 556 (7th Cir. 1980) (concluding that allocation of funds for construction of navigation aids requires policy judgments). *See generally* Kratzke, *supra* note 20, at 46 (stating that courts are unable to adequately review the reasonableness of government decisions involving the pursuit of competing goals with limited resources).

71. *See* Bowman v. United States, 820 F.2d 1393, 1395 (4th Cir. 1987) (no relationship to *Bowman I* or *Bowman II*) ("What is obvious is that the decision was the result of a policy judgment. One can argue that another policy . . . is more desirable. However, by the discretionary function exception, Congress intended to prevent courts from second-guessing federal policy.").

72. 28 U.S.C. § 1346(b) (1994).

73. For other examples of government tort liability as a property owner, see Kathleen M. Dorr, Annotation, *Federal Tort Claims Act: Liability of United States for Injury or Death Resulting from Condition of Premises*, 91 A.L.R. FED. 16 (1989).

74. Jones v. Chevron U.S.A., Inc., 718 P.2d 890, 894 (Wyo. 1986). For general background on the liability of owners/employers to independent contractors and the independent contractors' employees, see THEOPHILUS J. MOLL, A TREATISE ON THE LAW OF INDEPENDENT CONTRACTORS AND EMPLOYERS' LIABILITY (1910); 2 ROBERT W. WOOD, LEGAL GUIDE TO INDEPENDENT CONTRACTOR STATUS 325-49 (2d ed. 1996).

75. *Jones*, 718 P.2d at 894.

76. *Id.* at 895.

77. Moloso v. State, 644 P.2d 205, 211-12 (Alaska 1982).

B. Bowman v. United States[79]

1. Facts

In October 1989, John Bowman, Inc. (JBI) entered into a government contract with the Air Force to repair historic housing on F. E. Warren Air Force Base in Cheyenne, Wyoming.[80] JBI, an independent contractor,[81] maintained direct supervisory responsibility over the work and safety of its employees.[82] The contract required JBI to comply with federal safety regulations, including provision of guards on all circular saws.[83] The United States reserved the right to inspect the job site for compliance with the terms of the contract.[84] JBI employed Mearl Dean Bowman[85] as a carpenter on the project.[86] While attempting to use a saw that lacked a safety guard, Bowman severely injured his right hand after it became caught in the saw blade.[87]

Mearl Bowman sought damages for his injuries, and his wife sought damages for loss of consortium.[88] The Bowmans alleged that the United States, through its inspectors, knew or should have known of the missing saw guard and negligently failed to take corrective action.[89] The district court granted the government's motion for summary judgment.[90]

2. Decision

The Tenth Circuit first reviewed the extent of the FTCA's waiver of sovereign immunity.[91] The court acknowledged that a claimant may sue the government if a private defendant would be liable according to the law of the place where the act or omission occurred.[92] The court then continued with a review of the relevant Wyoming state law.

Relying on *Jones v. Chevron*,[93] the court stated that employees of independent contractors may hold a property owner liable only if the owner maintained control over the hazard that caused the harm.[94] If the owner "retain[ed]

78. RESTATEMENT (SECOND) OF TORTS § 414 (1965).
79. 65 F.3d (10th Cir. 1995) (*Bowman II*).
80. *Bowman II*, 65 F.3d at 857.
81. Bowman v. United States, 821 F.Supp. 1442, 1445 (D. Wyo. 1993) ("The contract evidences that the intent of the parties was to create an independent contractor relationship in that [JBI] obligated itself to perform all operations necessary to repair the housing units under the language of the contract.") (*Bowman I*), *aff'd*, 65 F.3d 856 (10th Cir. 1995) (*Bowman II*).
82. *Bowman II*, 65 F.3d at 857.
83. *Id.*
84. *Id.*
85. No familial relationship existed between plaintiffs and John Bowman of JBI. *Id.*
86. *Id.*
87. *Id.*
88. *Bowman I*, 821 F. Supp. at 1444.
89. *Bowman II*, 65 F.3d at 857.
90. *Bowman I*, 821 F.Supp. at 1446.
91. *Bowman II*, 65 F.3d at 857-58.
92. *Id.* at 858 (citing 23 U.S.C. § 1346).
93. 718 P.2d 890 (Wyo. 1986) (holding that owner oil company's retention of control over the deenergizing of power lines created a duty of care to the employees of an independent contractor hired to install the lines).
94. *Bowman II*, 65 F.3d at 858.

the right to direct the manner of an independent contractor's performance, or assume[d] affirmative duties with respect to safety," then the owner sufficiently controlled the worksite to create such a duty.[95] However, if the owner merely reserved and exercised the right to inspect work for adherence to contract terms, or retained only the right to require the contractor to observe safety rules, then the owner did not have a duty toward independent contractor employees.[96]

Applying these rules to the JBI contract, the court held that the United States did not retain control over JBI's work performance or assume affirmative safety duties.[97] Therefore, the United States did not maintain control over the hazard that caused Bowman's injury and could not be held liable.[98] Although the government retained and exercised the right to inspect the workplace for adherence to the contract terms, this fact did not create a duty towards Bowman.[99]

C. *Other Circuits*

The Eleventh and Fourth Circuits also addressed the treatment of independent contractors under the FTCA during the survey period. In *Tisdale v. United States*,[100] the Eleventh Circuit determined that the United States relinquished possession and control of property where an independent contractor's employee suffered an injury.[101] Under Georgia law, therefore, the independent contractor assumed the duties for keeping the premises safe.[102] The fact that the United States retained authority to ensure performance of contract obligations did not defeat a finding that the contractor controlled the property.[103] The court concluded that the plaintiffs could not hold the United States liable and affirmed summary judgment for the government.[104]

In *Robb v. United States*,[105] the Fourth Circuit affirmed dismissal of plaintiff's claim against the United States for alleged negligent treatment by physicians at an Air Force hospital.[106] The court characterized the physicians as independent contractors, not employees of the United States.[107] Plaintiffs could not hold the United States liable for the physicians' acts because the FTCA does not waive sovereign immunity for injuries resulting from the actions of independent contractors.[108] The fact that the United States reserved

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95. *Id.* at 859 (quoting *Jones*, 718 P.2d at 896).
96. *Id.* at 858.
97. *Id.* at 859.
98. *Id.* The court also reviewed analogous Wyoming state and Tenth Circuit cases to support its holding. *Id.* at 859-61.
99. *Id.* at 859.
100. 62 F.3d 1367 (11th Cir. 1995).
101. *Tisdale*, 62 F.3d at 1373.
102. *Id.* at 1372-73.
103. *Id.* at 1372.
104. *Id.*
105. 80 F.3d 884 (4th Cir. 1996).
106. *Robb*, 80 F.3d at 886.
107. *Id.* at 893.
108. *Id.* at 887.

the right to evaluate the independent contractor's services did not create a employer-employee relationship.[109]

D. *Analysis*

Bowman II met the FTCA's goal of holding the United States liable to the extent that a private person would be liable under state law where the incident occurred.[110] Relevant Wyoming law has consistently precluded employer liability toward independent contractor employees where the employer did not retain sufficient control over the job site.[111] Wyoming courts have also routinely allowed employers to inspect performance and require observance of safety standards without imposing liability.[112] The Tenth Circuit's decision conformed to these principles by recognizing that the United States lacked control of the job site and was therefore not liable for Bowman's injuries.[113]

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109. *Id.* at 893.

110. *See* 28 U.S.C. § 1346(b).

111. *See e.g.*, Abraham v. Andrews Trucking Co., 893 P.2d 1156, 1157-58 (Wyo. 1995) (holding that defendant employer did not owe employee of an independent contractor a legal duty because defendant had not assumed control or affirmative safety duties at the job site); Ramsey v. Pacific Power & Light, 792 P.2d 1385, 1388 (Wyo. 1990) (holding that defendant landowner was not liable for injury of independent contractor's employee because owner did not have control of the worksite at the time of injury); Cockburn v. Terra Resources, Inc., 794 P.2d 1334, 1342-43 (Wyo. 1990) (holding that defendant employer was not liable to injured employee of an independent contractor because defendant did not have a controlling and pervasive role at the work site); Hill v. Pacific Power & Light, 765 P.2d 1348, 1350 (Wyo. 1988) (holding that defendant landowner was not liable for injuries suffered by independent contractor's employee because defendant did not have control over details of the work performed and did not assume affirmative safety duties); Stockwell v. Parker Drilling Co., Inc., 733 P.2d 1029, 1033 (Wyo. 1987) (holding that defendant landowner was not liable to independent contractor's employee because no evidence existed that defendant had retained control of the work site or assumed safety duties).

112. *See* cases cited *supra* note 114. This view comports with the RESTATEMENT (SECOND) OF TORTS § 414 cmt. c (1965) ("It is not enough that [the employer] has merely a general right . . . to inspect [the independent contractor's] progress . . . . There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.")

113. *Bowman II* also comports with previous Tenth Circuit opinions. *See* Flynn v. United States, 631 F.2d 678, 681 (10th Cir. 1980) (holding that the existence of a government safety program did not create liability where the contractor was primarily responsible for safety); Craghead v. United States, 423 F.2d 664, 666 (10th Cir. 1970) (holding that the government's reservation of the right of inspection and the right to enforce safety measures did not constitute control); Irzyk v. United States 412 F.2d 749, 751 (10th Cir. 1969) (holding that the government's right and exercise of inspection of independent contractor's work did not render it liable); United States v. Page, 350 F.2d 28, 31 (10th Cir. 1965) (holding that government's safety program did not constitute exercise of control); Grogan v. United States, 341 F.2d 39, 43 (10th Cir. 1965) (holding that the government was not liable because it reserved the right to inspect the work of an independent contractor or because of a contract provision requiring that the independent contractor observe safety standards).

III. DAMAGES UNDER THE FTCA

A. *Background*

1. Damages under the FTCA

The United States is liable under the FTCA "in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."[114] The FTCA grants the jurisdiction to award "money damages."[115] As discussed above, substantive state law where the conduct occurred determines government liability.[116] Subject to the FTCA's restrictions, state law also determines the nature and measure of damages.[117] For example, courts apply state law to determine the kind of damages recoverable,[118] the amount recoverable,[119] application of collateral source rules,[120] comparative or contributory negligence doctrines,[121] damage caps,[122] and indemnity and contribution rules.[123] Courts apply federal law, however, when interpreting the FTCA's prohibitions on punitive damages and prejudgment interest.[124]

2. Periodic Payments

Traditionally, the common law allowed for payment of a damage award as a single lump sum payment, also referred to as the single recovery rule.[125] Periodic payment of damages, on the other hand, consists of an "arrangement to compensate a claimant over time, rather than with a single lump sum. The term means that the claimant will not receive compensation all at once, but

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114. 28 U.S.C. § 2674.

115. 28 U.S.C. § 1346(b).

116. 28 U.S.C. § 1346(b). *See generally* MORRIS, *supra* note 24, § 4.1 (discussing how local law applies to the government the same as to individuals under the FTCA).

117. 28 U.S.C. §1346(b); *see also*, JAYSON, *supra* note 3, § 226, at 10-12; MORRIS, *supra* note 24 § 4.1; Walter D. Phillips, *Damages Limitations Under the Federal Tort Claims Act*, 33 A.F. L. REV. 59, 63-66 (1990).

118. *See* JAYSON, *supra* note 3, § 226, at 10-14 to 10-18.

119. *Id.* § 228.01, at 10-41.

120. *See* Reilly v. United States, 863 F.2d 149, 161 (1st Cir. 1988); Scheib v. Florida Sanitarium & Benevolent Assoc., 759 F.2d 859, 864 (11th Cir. 1985); Feeley v. United States, 337 F.2d 924, 927 (3rd Cir. 1964).

121. *See* JAYSON, *supra* note 3, § 228.04, at 10-51.

122. *See* Carter v. United States, 982 F.2d 1141, 1143 (7th Cir. 1992); Lozada v. United States, 974 F.2d 986, 987 (8th Cir. 1992); Lucas v. United States, 807 F.2d 414, 416 (5th Cir. 1986); Hoffman v. United States, 767 F.2d 1431, 1433 (9th Cir. 1985).

123. *See* JAYSON, *supra* note 3, § 228.06.

124. *Id.* § 226, at 10-20 to 10-21.

125. *See* Jones & Laughlin Steel Corp. v. Pheifer, 462 U.S. 523, 533 (1983) ("The award could in theory take the form of periodic payments, but in this country it has traditionally taken the form of a lump sum, paid at the conclusion of the litigation."); Frankel v. United States, 466 F.2d 1226, 1228 (3rd Cir. 1972) ("[C]ourts of law had no power at common law to enter judgment in terms other that a simple award of money damages."); DANIEL W. HINDERT ET AL., STRUCTURED SETTLEMENTS AND PERIODIC PAYMENT JUDGMENTS § 1.02[1] (1986); Thomas C. Downs, *Periodic Payment of Claims: New Hope for CERCLA Settlements?*, 8 TUL. ENVTL. L.J. 387, 398 (1995); Ralph C. Thomas, *Medical Prophesy and the Single Award: The Problem and a Proposal*, 1 TULSA L.J. 135, 136 (1964).

will receive instead a promise from some entity to make future payments according to an agreed schedule."[126] Most courts apply the single recovery rule and only reluctantly implement periodic payment of judgments absent agreement of the parties, an overriding need to protect the victim, or statutory instruction.[127] State legislation requiring periodic payments, however, has become prevalent in recent years, especially in the field of medical malpractice.[128]

Whether the FTCA contemplates periodic payments remains unclear. Some courts have interpreted the FTCA to allow only lump sum money judgments.[129] However, other courts have structured damage awards in certain situations.[130] The Tenth Circuit became the first circuit court to address application of a state statute mandating periodic payments under the FTCA.

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126. HINDERT ET AL., *supra* note 125, § 1.01[1], at 1-3. The term "periodic payment" applies to both judgments and settlements; however, this paper focuses only on the periodic payment of judgments. For general background on periodic payment of judgments and settlements see UNIF. PERIODIC PAYMENT OF JUDGMENTS ACT, 14 U.L.A. 9 (Supp. 1996); HINDERT ET AL., *supra* note 125, § 1.02 at 1-6 to 1-7; Brian Brown & Lisa Chalidze, *Structured Settlements: An Overview*, 22 VT. B.J. & L. DIG. 14 (1996); Richard L. Kligler, *Structured Settlements as a Negotiation Tool, in* EVALUATING AND SETTLING A PERSONAL INJURY CASE 1992, at 73 (PLI Litig. & Admin. Practice Course Handbook Series No. 438, 1992); Marcus L. Plant, *Periodic Payment of Damages for Personal Injury*, 44 LA. L. REV. 1327 (1984); John W. Turk & William L. Winslow, *Structured Settlements in the 1990s*, 49 J. MO. B. 197 (1993); Dirk Yandell, *Advantages and Disadvantages of Structured Settlements*, 5 J. LEGAL ECON. 71 (1995).

127. *See* cases cited *infra* note 129; Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120, 128 (1904) (holding that the district court lacked the power to order periodic payment of damages in a wrongful death case); Gretchen v. United States, 618 F.2d 177, 181 n.5 (2d Cir. 1980) (noting that it is beyond the power of the court to order periodic payments without legislative authority); *see also* HINDERT ET AL., *supra* note 125, § 1.02[2], at 1-8 ("The . . . reasons why courts have not fashioned periodic payment judgments are practicality and risk."); Downs, *supra* note 125, at 398-99 ("An order requiring periodic payments, without specific statutory authority, appears to be improper as a matter of law.").

128. *See* HINDERT ET AL., *supra* note 125, § 1.02[3]. For examples of state statutes implementing periodic payments see *id.* at app. C(2); Russell G. Donaldson, Annotation, *Validity of State Statute Providing for Periodic Payment of Future Damages in Medical Malpractice Action*, 41 A.L.R. 4TH 275 (1985).

129. *See Reilly*, 863 F.2d at 169-70 (affirming the district court's insistence on lump sum payment absent special circumstances); *Frankel*, 466 F.2d at 1228-29 (holding that district court does not have power to make other then lump-sum money judgments absent Congressional authorization); Andrulonis v. United States, 724 F.Supp 1421, 1520 n.616 (N.D.N.Y. 1989) (court lacks power to enter judgment other than lump sum award contemplated by FTCA), *aff'd in part, rev'd in part on other grounds*, 924 F.2d 1210 (2d Cir. 1991), *vacated* New York State Dep't of Health v. Andrulonis, 502 U.S. 801 (1991); JAYSON, *supra* note 3, § 225, at 10-6.

130. *See* Hull v. United States, 971 F.2d 1499, 1505 (10th Cir. 1992) ("[N]othing in the FTCA prohibits courts from exercising their inherent authority to structure awards . . . to ensure that the damage recovery is in the best interest of the victim."); *Reilly*, 863 F.2d at 169 n.16 (concluding that periodic damage awards are permissible if a controlling statute permits, if the parties in interest agree, or if it is necessary to ensure the victim receives his due); Robak v. United States, 503 F.Supp. 982, 983 (N.D. Ill. 1980) (allowing creation of a reversionary trust to which both parties agreed) *aff'd in part, rev'd in part on other grounds*, 658 F.2d 471 (7th Cir. 1981).

B. Hill v. United States[131]

1. Facts

On October 17, 1988, the parents of four and one-half month old Tasha Hill took her to Evans Army Community Hospital in Fort Carson, Colorado.[132] Physicians diagnosed and treated her for spinal meningitis.[133] As a result of the doctors' alleged negligence, Tasha suffered severe, permanent mental and physical disabilities.[134] Plaintiffs asserted several claims of negligence, including failure to perform prompt assessment, delay of administration of medication, absence of appropriate supervision by the attending physician, unreliable medical records, and failure to treat complications of Tasha's meningitis.[135]

Because the government conceded liability, the trial addressed only the issue of damages.[136] The district court awarded plaintiff damages totaling $13,528,400.[137] The judge placed Tasha's damages in a trust, but refused to include the government's proposed reversionary clause.[138] The clause would permit any funds existing in the trust at Tasha's death to revert to the U.S. Treasury.[139] The district court concluded that it could only implement a reversionary trust when considering the best interests of the victim.[140] Since a reversionary clause would benefit only the defendant, the court denied the request.[141] The United States appealed the district court's refusal to grant the United States a reversionary interest.[142]

2. Decision

The Tenth Circuit affirmed the award of damages to Tasha's parents and reversed on the issue of a reversionary trust.[143] The opinion addressed each of the United States' arguments in turn.

The government argued that avoidance of the unjust enrichment of Tasha's heirs necessitated the reversionary trust for Tasha's future damages.[144] Damages compensate Tasha for her expenses only; therefore, funds left in the trust at Tasha's death should return to the government, not her es-

131. 81 F.3d 118 (10th Cir. 1996) (*Hill III*), *cert. denied*, 117 S. Ct. 56 (1996).
132. Hill v. United States, 854 F.Supp 727, 729 (D. Colo. 1994) (*Hill I*), *aff'd in part*, 81 F.3d 118 (10th Cir. 1996), *cert. denied*, 117 S.Ct. 56 (1996).
133. *Hill I*, 854 F.Supp. at 729.
134. *Id.*
135. *Id.*
136. *Id.*
137. Hill v. United States, 864 F.Supp. 1030, 1031 (D. Colo. 1994) (*Hill II*), *rev'd*, 81 F.3d 118 (10th Cir. 1996) (*Hill III*), *cert. denied*, 117 S.Ct. 56 (1996).
138. *Hill II*, 864 F.Supp. at 1032.
139. *Hill III*, 81 F.3d at 120.
140. *Hill II*, 864 F.Supp. at 1032 (citing Hull v. United States, 971 F.2d 1499, 1505 (10th Cir. 1992)).
141. *Id.*
142. *Hill III*, 81 F.3d at 119.
143. *Id.* at 121.
144. *Id.*

tate.[145] The government based its argument on two theories: first, the court can fashion a remedy that approximates a state statutory provision, and second, the court retains the inherent power to create a reversionary trust.[146]

The government's first theory relied on the Colorado Health Care Availability Act (HCAA).[147] The HCAA requires trial judges, in civil actions against health care professionals and institutions,[148] to order periodic payment of future damage awards exceeding $150,000.[149] Payments cease at the death of the tort victim, except for payment of loss of future earnings.[150]

The United States argued that under the FTCA, courts must treat the government in the same manner as a private health care provider under like circumstances.[151] Therefore the court should fashion a remedy that would "further the intent and approximate the outcome" of the HCAA even though the statute did not specifically apply to the United States.[152] The government supported this contention by citing cases that allowed the government to benefit from state damage caps even though the courts did not subject it to the state statutory scheme.[153]

The Tenth Circuit refused to rely on the state damage cap cases cited by the government.[154] In those cases, the state statutes affected the parties in exactly the same manner as they would have if a private individual had injured the victim. The court concluded that "[n]one of these cases offers direct support for the proposition that the United States may attempt to create a *rough equivalent* to a state statute when they are clearly ineligible for the precise remedy provided therein."[155] The court stated that the government's proposal did not promote the FTCA's mandate for like treatment because, unlike the HCAA, it allowed reversion of future earnings damages.[156]

The court went on to conclude that the district court could create a remedy that *did* approximate the result that the HCAA contemplated.[157] The HCAA prevented damages paid for future medical costs from passing to the victim's heirs at death.[158] Therefore, the government could receive a reversionary interest in the damages awarded to Tasha for "life care costs."[159]

In its second theory, the government argued that the court had the inher-

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145. *Id.*
146. *Id.* at 120-21.
147. *Id.* at 120 (citing Health Care Availability Act, COLO. REV. STAT. §§ 13-64-201 to -212 (Supp. 1996)).
148. "'Health care institution' means any licensed or certified hospital, health care facility, dispensary, or other institution for the treatment or care of the sick or injured." COLO. REV. STAT. § 13-64-202(3).
149. COLO. REV. STAT. § 13-64-203. If the award for future damages is equal to or less than $150,000, then the court *may* order periodic payments. *Id.* (emphasis added).
150. COLO. REV. STAT. § 13-64-206(3).
151. *Hill III*, 81 F.3d at 120.
152. *Id.*
153. *Id.* at 120-21.
154. *Id.* at 121.
155. *Id.* (emphasis added).
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*

ent power to create a reversionary trust under *Hull v. United States*.[160] In *Hull*, the Tenth Circuit held that the district court had the inherent power to create a reversionary trust in the victim's best interest.[161] This power ensured that the victim would receive the benefit of his award.[162] The *Hill III* court refused to rely on *Hull* since the reversionary trust clearly did not benefit Tasha.[163]

C. *Analysis*

The Tenth Circuit's decision focused on application of the FTCA's "like treatment" provision. The court's authorization of a reversionary trust treated the government in the same manner as a private health care provider. If doctors in a private hospital had injured Tasha, she would have received future care damages in periodic payments ending at her death. Likewise, the United States' payment of future damages will end at Tasha's death. The court also relied on relevant state law to determine the extent of the government's liability, as dictated by the FTCA.

The court's opinion, however, did not address the possible conflict of state periodic payment statutes and the FTCA's grant of jurisdiction to award "money damages."[164] In *Frankel v. Heym*,[165] the Third Circuit interpreted the FTCA to allow only lump sum awards.[166] If the FTCA's term "money damages" contemplates only one-time, lump-sum payments, an internal conflict arises when the FTCA also requires application of state law which mandates periodic payments. It is unclear whether the "money damages" term or the incorporated state statute should control. In the only decision to directly address the issue, the First Circuit suggested in dicta that the state statute would control.[167] Considering important policy issues involved in periodic payments,[168] and the narrow construction required for waivers of sovereign im-

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160. *Id.* (citing Hull v. United States, 971 F.2d 1499, 1504-05 (10th Cir. 1992).
161. *Hull*, 971 F.2d at 1504.
162. *Id.* at 1506.
163. *Hill III*, 81 F.3d at 121.
164. 28 U.S.C. § 1346(b)(1).
165. 466 F.2d 1226 (3rd Cir. 1972).
166. *Frankel*, 466 F.2d at 1228-29.

> [S]ection 1346(b) authorizes district courts to entertain "civil actions on claims against the United States, for money damages . . . ." Arguably, this language at least implies that primary awards in such civil suits must take the form of common law's money judgments, the only form of "money damages" known to the common law . . . . [I]n administering the legislation in question a district court should not make other than lump-sum money judgments unless and until Congress shall authorize a different type of award. The relaxation of sovereign immunity is peculiarly a matter of legislative concern, responsibility and policy. If novel types of awards are to be permitted against the government, Congress should affirmatively authorize them.

Id. (citing 28 U.S.C. § 1346(b)).

167. *Reilly*, 863 F.2d at 169 n.16 ("Periodic damage awards are permissible in lieu of lump sums . . . if a controlling statute permits . . . ."). *But see* Phillips, *supra* note 117, at 65 (concluding that state periodic payment statutes "do not apply to the United States because the FTCA establishes federal procedural law, which is independent of the FTCA's reliance upon state substantive law . . . .").

168. For the pros of structured judgments, see UNIF. PERIODIC PAYMENT OF JUDGMENTS ACT,

munity,[169] other courts may side with the *Frankel* court and await Congressional authorization to award periodic payment judgments under the FTCA.

On the other hand, considering the emerging popularity of periodic payments,[170] courts could favor state periodic payment statutes, as the Tenth Circuit did in *Hill III*. In addition, future Congressional approval of periodic payment judgment appears uncertain. Congress recognized periodic payment judgments in at least two instances, childhood vaccinations[171] and the Internal Revenue Code.[172] However, Congress failed to pass President Clinton's proposed Health Care Liability Reform and Quality of Care Improvement Act of 1992.[173] This act would have amended the FTCA to allow periodic payment of future economic loss damages in health care liability actions against the United States.[174] Until Congress resolves the issue, federal courts continue to confront the periodic payment issue.

CONCLUSION

The Tenth Circuit addressed three different aspects of the FTCA during the survey period. In both *Tew* and *Bowman*, the court followed precedent and maintained a conservative approach in construing government liability. In *Hill III*, the court struck new ground by finding that the FTCA allowed the government to receive a reversionary interest in future damages awarded to private

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commissioner's prefatory note, 14 U.L.A. 10-12 (Supp. 1996); Memorandum by Jeffrey Axelrad on Structured Settlements (July 1, 1992), *in* DAMAGES UNDER THE FEDERAL TORT CLAIMS ACT, 522-89 (Civil Div., U.S. Dep't of Justice 1992); HINDERT ET AL., *supra* note 125, § 1.03[1] to 1.04; Plant, *supra* note 126, at 1329-40. For the cons of structured judgments, see Smith v. Meyers, 887 P.2d 541, 548 (Ariz. 1994) (holding that state statutory periodic payment scheme for future damages in medical malpractice actions impermissibly limited right of plaintiffs to recover damages); Carson v. Maurer, 424 A.2d 825, 836 (N.H. 1980) (holding that statute requiring periodic payment of future damages violated equal protection clause of state constitution); HINDERT ET AL., *supra* note 125, § 1.04; Philip H. Corboy, *Structured Injustice: Compulsory Periodic Payment of Judgments*, 66 A.B.A. J. 1524 (1980).

169. *See* United States v. Kubrick, 444 U.S. 111 (1979) ("We should also have in mind that the [FTCA] waives the immunity of the United States and that in construing . . . a condition of that waiver, we should not take it upon ourselves to extend the waiver beyond that which Congress intended."); Soriano v. United States, 352 U.S. 270, 276 (1957) ("[T]his Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied."). *But see* Indian Towing Co. v. United States, 350 U.S. 61, 68 (1955) ("There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation.").

170. States utilize periodic payments in many areas, including child support, workers' compensation, alimony, automotive accident liability, and, of course, medical malpractice. *See* HINDERT ET AL., *supra* note 125, § 1.02[3], app. C; Downs, *supra* note 125, at 399-401.

171. 42 U.S.C. § 300aa-15(f)(4) (1994) (allowing courts to order purchase of an annuity, with permission of the petitioner, for damages in childhood vaccination cases).

172. 26 U.S.C. § 104(a)(2) (1994) (providing that personal injury damages received in periodic payments are not included in calculations of gross income). *See generally* HINDERT ET AL., *supra* note 125, § 2.01.

173. Health Care Liability Reform and Quality of Care Improvement Act of 1992, S. 3387, 102d Cong. (1992).

174. S. 3387 § 402.

citizens. With a growing number of state tort reform statutes requiring periodic payment of damages, future decisions must resolve the conflict between the FTCA's term "money damages" and the term requiring application of relevant state law.

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