



DEPARTMENT OF THE AIR FORCE  
AIR FORCE MATERIEL COMMAND LAW OFFICE  
WRIGHT-PATTERSON AIR FORCE BASE, OHIO

31 October 2001

MEMORANDUM FOR HQ AF/LEHM

FROM: AFMC LO/JAVR  
4225 Logistics Ave. Room N237  
Wright-Patterson AFB, OH 45433-5762

SUBJECT: Applicability of the Military Personnel and Civilian Employees Claims Act (MPCECA) to Air Force Privatized Housing

1. You have asked us whether the Military Personnel and Civilian Employees Claims Act (MPCECA), 31 U.S.C. § 3721, authorizes the payment of claims of USAF members arising as a result of property damage or loss that occurs in housing provided under the Military Housing Privatization Initiative (MHPI), codified at 10 U.S.C. §§ 2871-2885. Upon researching the applicable statutes, implementing regulations, and case law in this area, and consulting with the Chief of General Claims from the Air Force Legal Services Agency (AFLSA/JACC), we have concluded that the act does apply to military members occupying this housing. However, due to concerns we have that the MPCECA does not specifically address these new and unique approaches to providing our military members with housing, we are asking for your support of a legislative initiative submitted by AFLSA/JACC giving the Service Secretaries the discretion to determine which projects, if any, should receive the protection afforded by this claims' statute.
2. Claims for personal property damage or loss that occurs "incident to service" are payable under the MPCECA. Broadly defined, "incident to service" comprises certain aspects of military living such as frequent movements in response to orders, assignment to quarters, and duty in foreign countries. Claims arising therefrom have traditionally been limited to those alleging personal property damage or loss caused by theft, vandalism, and other "unusual occurrences." Acts of God, power outages, sewer backups and the like are deemed unusual occurrences within the meaning of Air Force Instruction (AFI) 51-502, Personnel and Government Recovery Claims, USAF controlling regulatory authority for the payment of claims under the MPCECA.
3. The statute, however, bars the payment of claims for personal property damage or loss that occurs at quarters occupied by a claimant within a State or the District of Columbia that were not *assigned* or *provided in-kind* (emphasis added) by the government. 31 U.S.C. § 3721 (e). Consistent with the statute, AFI 51-502, para. 2.33.2, reads "within the United States, loss or damage from quarters that the government does not assign or provide are not payable." Therefore, with respect to privatized housing, the issue comes to a determination if the quarters are being "assigned" or "provided in-kind." It is clear that when military members occupy traditional military family housing or dormitories, they are being provided "assigned" or "in-kind" quarters, and the MPCECA applies. It is equally clear that when military members are receiving Basic Allowance for Quarters (BAH) and living in quarters off-base either because of choice or because traditional military housing or dormitories are not available, they are not being provided "assigned" or "in-kind" quarters, and the MPCECA does not apply. Privatized housing presents itself somewhere in between these two opposing scenarios.

4. The authorities given the military services under the MHPI can lead to a variety of scenarios on how a project is set up and who owns or possesses the various property interests involved. Some examples include 1) the government leasing units from the private developer and providing those units to the military members without charge and without entitlement to BAH; 2) the government leasing out to the developer its own land and units, then leasing back the units and providing those units to the military members without charge and without entitlement to BAH; 3) the government leasing out to the developer its own land, deeding over or selling government owned units to the developer, and then requiring the developer to enter into a lease agreement with eligible military members with rent based on the military members BAH minus a utilities allowance; and 4) the government deeding over to the developer both the land and units and then requiring the developer to enter into a lease agreement with eligible military members with rent based on the military members BAH minus a utilities allowance. While scenarios 1 and 2 are not currently being used by the Air Force under the new housing privatization authorities to provide housing to members, they clearly resemble traditional housing arrangements where the government would provide or assign the member a housing unit, and thus fall within the MPCECA requirements of "assigned" or "provided in-kind" housing. Scenarios 3 and 4, however, are more problematic because they tend to resemble the typical off-base housing arrangements in which the MPCECA would not applied. Nevertheless, our analysis has concluded that these scenarios do meet the definition of "assigned" housing and therefore invoke the applicability of the MPCECA.

5. We analyzed the regulations, administrative opinions, and federal case law interpreting the part of the statute exempting out certain housing located within the CONUS, and determined that the degree of government control exercised over the housing area governs if housing is "assigned."

a. Only two federal court cases have dealt with this issue, with both cases arising from the same incident. In 1950, an Air Force B-29 crashed at Fairfield-Suisun AFB in California just after takeoff. The plane exploded near a trailer park on the base damaging 17 trailers and property owned by the residents of the trailers, all who were active duty military members assigned to the base. The trailers were private property of the servicemembers and the government had no interest in them. The owners of the trailers were free to live off base and those who chose to live in the park did so by making a voluntary application for permission to live there. The park was established for the convenience and accommodation of personnel, and for the mutual benefit of the personnel and the Air Force (there were shortages of on and off-base housing). Those living in the park drew a quarters allowance (BAH in today's terms) and paid rent to the government for the space and the utilities that the government provided. There were detailed procedures controlling the operation and maintenance of the trailer park, and only AF personnel and their families assigned to the base were eligible to use it. Entitlement to the space ended when the member was no longer stationed to the base, and specific assignments to a space were made by the base billeting officer. The trailer park was under military protection and subject to the jurisdiction of military police.

b. In *Fidelity-Phenix Fire Ins. Co. v. United States*, 111 F.Supp. 899 (N.D. Cal. 1953), insurance companies who had policies covering the trailers and personal property destroyed by the crash, and who had paid these claims to the affected servicemembers, filed suit against the Air Force under the Federal Torts Claim Act (FTCA) for recovery of these payments, alleging the military was negligent in the accident. In determining that the insurance companies did not have a cause of action under the FTCA, the court first looked to whether the loss was "incident to their service" under the Military Personnel Claims Act (what is now the MPCECA), and focused their attention on whether this housing was assigned. The court concluded the housing was "assigned" in accordance with the statute, stating, "The

trailers were parked in specific locations assigned by the Base Billeting Officer. They were permanently placed in position while they remained in the park, and were connected to airforce[sic] utility lines which could be disconnected only by airforce[sic] installation personnel. That the occupants of the trailer park paid a fee, and received a quarter's allowance in lieu of government housing, does not alter the fact that they were occupying quarters specifically 'assigned' to them." 111 F.Supp. at 906.

c. On appeal in *Preferred Insurance Company v. United States*, 222 F.2d 942 (9<sup>th</sup> Cir. 1955), the 9<sup>th</sup> Circuit Court of Appeals upheld the lower court's ruling in *Fidelity-Phenix*, but did not specifically address the meaning of "assigned" quarters as it pertained to the then named Military Personnel Claims Act. Instead, the court focused on the definition of "incident to their service" as it applied to the FTCA. However, the court did say this about the MPCECA, and the Air Force's payment of claims for the members' losses to their personal property:

The allowance and payment of the claims made under such Act by appellant's insureds for damage to personal property . . . must be presumed to have been based on an administrative determination that the property damage occurred "incident to service" since such is a requirement of the Act and regulations for allowable claims. The Act does not provide for judicial review of administrative action on claims; but even if it did, administrative findings of fact would have to be accepted by a court unless arbitrary, capricious or without evidentiary support.

222 F.2d at 947

In short, the court was stating the government had already determined the trailers were "assigned" housing, and that this determination was not reviewable by any court.

d. In an administrative decision on this point, the Comptroller General of the United States, in the *Matter of: U.S. Forest Service*, 64 Comp. Gen 93 (1984), concluded that Government-owned rental housing located at a remote ranger station within a national forest may properly be viewed as "assigned" quarters for purposes of [the MPCECA] even though the government employee renting the house was not required to live there as a condition of employment. The opinion stated it was applying the rationale from the *Fidelity-Phenix* case in reaching this conclusion, but failed to elaborate in any more detail.

e. Like the MPCECA statute and AFI 51-502, Title 32 of the Code of Federal Regulations at Part 842.22 sets out the limitation on payment of claims at quarters (in the U.S.) by defining quarters as "(1) Housing the government assigns or otherwise provides in kind to the claimant." But the regulation goes on to say that quarters also "includ[es] substandard housing and trailers, when the claimant pays the government a fixed rental while *drawing basic allowance for quarters (BAQ)*. (2) *Privately owned mobile or manufactured homes parked on base in spaces the government provides*. (3) *Transient housing accommodations, wherever located, such as, hotels, . . . or other lodgings the government furnishes or contracts for.*" (emphasis added) 32 CFR 842.31(b) permits payment of claims for losses at "*other authorized places,*" and defines "*Other authorized places*" as "*A recreation area or any real estate the Air Force or any other DOD element uses or controls.*" (emphasis added) Many of these same provisions are outlined in AFI 51-502.

6. When looking at all these authorities, meeting the definition of “assigned” quarters can be met even though the member is entitled to BAH, the member pays rent to the government, the housing is owned by someone other than the government, or the housing is located off-base. As can be seen from factors cited in *Fidelity-Phenix* and the Comptroller General decision, viewed as a whole, the degree of control which the government exercises over the housing will dictate whether it may be deemed “assigned” for purposes of the MPCECA as well as other relevant statutory authority. Consistent with this analysis, where a significant measure of control is established over privatized housing the housing is assigned and claims for payment of personal property damage or loss that occurs therein are cognizable under the MPCECA.

7. Given the significant control the Air Force has placed (and will place) in its contractual agreements with the developer, little distinction can be made between the control the government exercises over privatized housing and the control it exercises over traditional military family housing. Additionally, the manner in which Air Force intends its members to view privatized housing also is with little distinction from traditional military family housing. First, assignment to government or privatized quarters is done on a voluntary basis. Second, the Air Force intends the privatized development to be filled with eligible military members only, requiring the developer to lease units to military members first, and only to other individuals if military occupancy rates cannot be sustained. Third, rent and utility allowances are set to equal the BAH the member will receive, so there should be no out of pocket expenses. Fourth, there cannot be any ancillary support facilities within the privatized project that provide merchandise or services in direct competition with the Army and Air Force Exchange Service, Defense Commissary Agency, or any nonappropriated fund activity of the DoD for the morale, welfare, and recreation of members of the armed forces. Fifth, servicemembers will be placed into privatized units by size and style based on their rank and family size. Sixth, the Air Force is requiring the developer to abide by strict accounting of all income received and payments made in support of the project through the use of escrow accounts and a portfolio management plan involving direct government oversight. Seventh, the government will typically provide some form of contribution to the project, to include lease of government land, the deeding over of government housing, the loaning of money to the developer, or the promise of a loan guarantee. All of these contributions give the government a financial stake in the project. Finally, the new law providing for privatized housing makes it clear that this is to be viewed as “military housing.” For instance, the subchapter that includes all the new authorities is entitled “Alternative Authority for Acquisition and Improvement of **Military Housing**.” (emphasis added) Additionally, all throughout the various authorities, the term “military housing” is used.

8. In the final analysis, the MPCECA is a morale program authorizing the payment of claims that are incident to service. Under the statute, members are compensated for losses that bear a direct relationship to their military service. Historically, the interpretation of “incident to service” has been broadly interpreted. Losses that have occurred on property used or controlled by USAF formed the basis for the payment of claims that occurred in lodging on base or off the Federal enclave. Privatization efforts, as proposed, may result in members residing in traditional government housing as close as next door or across the street from members who live in privatized housing. Consider the destruction of morale for the member who lives in privatized housing and the guilt experienced by the member who resides in traditional housing should a natural or man-made disaster occur (given the current high ops-tempo) with only the member who resides in traditional housing being compensated for the loss under this program. If nothing more, the services are morally bound to carefully weigh the decision not to pay claims associated therewith.

9. While we are cognizant of the fact that members are being paid BAH while occupying homes under this authority, and this BAH includes a stipend for renter's insurance, we are not convinced there is a sufficient link between the two to deny members the benefit of the MPCECA. First, the court in the *Fidelity-Phenix Fire Ins. Co* case was not persuaded. And second, the different coverage one receives under the claims act vice renter's insurance is significant enough to make it difficult, if not impossible, to substitute one for the other.

10. We have contacted the Chief of General Claims from AFLSA/JACC who provides guidance in these matters for the Air Force. In an earlier opinion rendered to the Air Force Center For Environmental Excellence (AFCEE) concerning the applicability of the act to the Lackland AFB housing privatization project, he rendered an opinion consistent with the one we have reached above. He also concurs with our analysis that the MPCECA will apply to all housing privatization projects unless there is a showing that the government exercises little to no control over a particular project.

11. While JACC and our office stand behind this opinion, the unique situation these new initiatives pose can cause reasonable minds to differ. With these deals lasting up to 50 years, a change in the interpretation of the application of the act years into the program may have unintended consequences to the detriment of our military members being served. To respond to this possibility, JACC submitted a legislative initiative aimed at providing the Service Secretaries with the authority to designate those projects which would fall under the application of the act, and which ones would not. Such an initiative, if adopted, not only gives JACC and the base claims offices clear guidance on the application of the MPCECA, but it also provides your office the flexibility to adapt policy influenced by the application or non-application of the act. In short, if you prefer to have the act apply, it would. I have attached the wording of this proposed legislative change. Finally, if this initiative is not passed, then an opinion from the Comptroller General may be a prudent course of action to take.

12. Please direct any questions to me at DSN 787-6869 or e-mail me at [kevin.fleming@wpafb.af.mil](mailto:kevin.fleming@wpafb.af.mil).

//signed//

KEVIN J. FLEMING, Major, USAF  
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Atch  
Proposed Change to Claims Legislation

**SEC. \_\_\_\_ . APPLICATION OF THE MILITARY PERSONNEL AND CIVILIAN EMPLOYEES CLAIMS ACT (MPCECA) TO "PRIVATIZED" MILITARY HOUSING**

Section 3721 of title 31 United States Code, is amended by adding at the end the following: "As used in this subsection "assigned or provided in kind" includes, to the extent provided in regulations issued by the head of an agency, housing occupied by members of the armed forces under the Military Housing Privatization Initiative."