

## **A REFRESHER ON THE FEDERAL TORT CLAIMS ACT: HOW TO SUE THE UNITED STATES**

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The Federal Tort Claims Act was enacted by Congress in 1946 in recognition of the inequities caused by the failure to permit tort suits against the United States Government. Prior to the enactment of the FTCA, private bills requiring Congressional consideration each session was the only avenue for civil recovery against the government. When the United States Government is now sued in tort, the Federal Tort Claims Act, 28 U.S.C. § 346(b), 2671 - 2680, comes into play, providing a limited waiver of sovereign immunity. The Act allows monetary recovery against the United States for damages, loss of property, personal injury or death. In seeking recovery, one must show that the damages occurred as a result of the negligent or wrongful acts of government employees acting within the scope of their 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. 28 U.S.C. § 1346(b).

The provisions of 1346(b) making the United States liable for certain injuries if a private person would be liable in accordance with the law of the place where the injury occurred does not make the law of the state applicable in determining the legal relationship between the United States and its alleged employees, but does make state law applicable in determining whether the act(s) of an employee, once that relationship has been found to exist, is one upon which liability can be predicated. Thus, whether one is an employee of the United States or an independent contractor is determined by reference to federal law. *Cavazos By and Through Cavazos v. U.S.*, 776 F.2d 1263 (5th Cir. 1985). For purposes of the FTCA, the common law of torts and agency defines the distinction between independent contractors, for whose torts the government is not responsible, and an employee, servant or agent, for whose torts the government is responsible. *B. & A. Marine Co., Inc. v. American Foreign Shipping Co., Inc.*, 23 F.3d 709 (2d Cir. 1994).

Because the United States cannot be sued in tort except to the extent that Congress has enacted legislation authorizing suit, it is to the FTCA alone that most tort litigants suing the federal government must turn. With the exception of maritime torts, the Act as amended sets forth the boundaries of any potential claim against the United States sounding in tort. While the passage of the FTCA constitutes a limited waiver of sovereign immunity, Congress specifically limited the government's amenability to suit in a variety of different circumstances. Indeed, in 28 U.S.C. § 2680, Congress specified that its limited waiver of immunity would not apply to the following claims:

(a) any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether or not such

statute or regulation be valid, or based upon the exercise of performance or the failure to exercise or perform a 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;

(b) any claim arising out of the loss, miscarriage or negligent transmission of letter or postal matter;

(c) any claim arising in respect to the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer;

(d) any claim for which a remedy is provided by sections 741, 752, 781, 790 of Title 46, relating to claims or suits in admiralty against the United States;

(e) any claims arising out of an act or omission of an employee of the government in administering the provisions of sections 1 - 31 of Title 50, Appendix;

(f) any claims for damages caused by the imposition or establishment of a quarantine by the United States;

(g) Repealed;

(h) any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: PROVIDED that, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this Chapter and section 1346(b) of this Title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal Law;

(i) any claim for damages caused by the physical operations of the Treasury or by the regulation of the monetary system;

(j) any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war;

(k) any claim arising in a foreign country;

(l) any claim arising from the activities of the Tennessee Valley Authority;

(m) any claim arising from the activities of the Panama Canal;

(n) any claim arising from the activities of the Federal Land Bank, a federal intermediary credit bank, or a bank for cooperatives.

The FTCA specifically does not extend to claims arising in foreign countries. However, in 1956, the administrative claim provisions of the FTCA were extended to cover claims for personal injury or death or property damage resulting from the negligent or wrongful acts or omissions of federal employees engaged in state department operations while acting within the scope of employment. See 28 U.S.C. § 2401(b).

There are a number of specific statutory provisions providing for recovery against the United States that are beyond the scope of this article. For example, Congress has established the National Vaccine Injury Compensation program (42 U.S.C. § 300) (aa-10) which covers claims arising from the delivery of certain vaccines. The Omnibus Taxpayer Bill of Rights enacted in 1988 (26 U.S.C. § 7432(a)) authorizes taxpayers to sue in the United States District Court for damages if employees of the Internal Revenue Service either knowingly or negligently release confidential taxpayer information or fail to release a lien or otherwise recklessly or intentionally disregard any tax related statute or regulation. The Federal Employees Compensation Act provides the exclusive remedy for federal employees who sustain injury in the course of their employment. These and other statutes provide other potential remedies, but traditional tort claims for damages are typically covered exclusively by the FTCA.

It should be noted that as a general proposition, claims for injury or death of servicemen are not within the scope of the Act if such injury or death was sustained "as an incident to service." See generally, *Feres, Executrix, v. United States*, 340 U.S. 135 (1950). Personal injury or death claims for active duty servicemen, while excluded for coverage under the FTCA, does not mean that there are no benefits available to compensate for disability or death of service connected and non-service connected injuries. It is important to recognize, however, that service persons not on active duty and veterans who are victims of medical negligence may have valid FTCA claims notwithstanding the proscriptions of the *Feres* decision. Suffice it to say that as a general proposition claims will not lie for personal injury or death claims for active duty servicemen and women and their families if the injury or death claim arises out of or is "incident to their service."

Under the express terms of 28 U.S.C. § 1346(b), the United States is liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or 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. While the government's waiver of sovereign immunity is limited by the FTCA's express provisions, if a claimant can bring himself within the purview of the Act, there is no limit on the amount of recovery. The only damage limitation is provided in that portion of the Act which states that the United States should be liable in the same manner and to the same extent as a private individual would under like circumstances. Unfortunately for claimants, this does not extend to liability for punitive damages. See 28 U.S.C. § 2674.

The language of the FTCA does not countenance suits seeking to hold the government liable under strict or absolute liability theories. *Laird, Secretary of Defense, v. Nelms*, 406 U.S. 797 (1972). Nor may the United States be liable unless the cause of action is predicated on the negligence of an employee of the government. This does not include, for example, a contractor or other person who received funds and guidance from the United States but over whom the United States does not exercise physical day to day control. Even if government property is utilized, the United States is not liable for acts or omissions of its contractors. See, *Borguez v. United States*, 773 F.2d 1050 (9th Cir. 1985); *Watson v. Morris*, 689 F.2d 604 (5th Cir. 1982).

The FTCA was never intended to reach employees or agents of all federally funded programs. *U.S. v. Orleans*, 425 U.S. 807, 96 S.Ct. 1971, 48 L.Ed. 2d 390 (1976). Under the Act, the term "Federal Agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States. 28 U.S.C. § 2671.

## JURISDICTIONAL PRE-CONDITIONS TO SUIT

Most plaintiff lawyers are familiar with the ante-litem requirements of certain types of lawsuits against municipal, state, or county governmental entities. The same species of ante-litem notice is required under the FTCA by the express provisions of 28 U.S.C. § 2675. Because that statute is so important to an understanding of the mandatory and jurisdictional pre-requisites to a lawsuit under the FTCA, its provisions are printed herein in full: 28 U.S.C. § 2675:

(a) An action shall not be instituted on a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this sub-section shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party cross claims or counter claims;

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts relating to the amount of the claim;

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

As is clear from an examination of the language of this code section, before suit may be filed against the United States Government, an administrative claim must be filed with the federal agency alleged to be vicariously or independently responsible for the act or omission which caused the injury. This requirement is a mandatory jurisdictional pre-requisite to suit. If an administrative claim is not timely filed, a putative plaintiff cannot sue the United States Government thereafter.

To be timely filed, an administrative claim must be filed with the appropriate federal agency within two years from the date of the accident which gave rise to the claim. 28 U.S.C. § 2401(b). If an administrative claim is not filed within this two year statute of limitations, it will be time barred. While most agencies have their own regulations governing the filing of administrative claims, in most cases, they are similar to the regulations issued by the Department of Justice. (See, 28 CFR part 14). Since the administrative claim procedure is a mandatory pre-requisite to any later court action under the FTCA, it cannot be waived. Nor can the government be estopped from asserting this jurisdictional defense. Accordingly, it is extremely important for the plaintiff to abide by the requirements of a complete administrative claim form.

We have printed as an attachment a standard claim form 95 which contains the information which must be made available to the government when filing an administrative claim under the FTCA. The purpose of the required ante-litem notice is to spare the courts the burden of trying cases by affording the government an opportunity to consider settlement of a claim. As set forth in 28 U.S.C. § 2675, once a claim is received, the agency receiving the claim has up to six months to act upon it before the claim shall be considered by law to be denied. In other words, assuming an administrative claim is timely filed within the statute of limitations, suit cannot be filed for another six months. If the claim is denied earlier than six months, suit may be filed once the agency has denied in writing the submitted claim even if time remains on the two year limitation period for presentment of a claim. Once the agency's rejection period has expired, suit must be brought within six months of the denial. Otherwise, it will also be denied by the statute of limitations. See generally, *Bernard v. United States*, 475 F.2d 1134 (4th Cir. 1973). While some Courts have recognized equitable tolling of the limitation period due to unique factual circumstances, counsel obviously does not want to rely on a tolling argument to defeat a limitation defense. Thus, claims should always be pursued on a timely basis.

While the FTCA does not mandate the use of the standard form 95, it does require filing a written claim which contains certain detailed information. The standard form 95 contains all the required information required by federal agencies and, in the opinion of the author, should be used if at all possible at least as a "go-by" form to make sure that required information is not inadvertently omitted from a claim.

An administrative claim must include a sum certain claimed amount of damages and enough information to provide a basis for investigation by the agency. 28 CFR part 14. As set forth in 28 U.S.C. § 2675(b), once a sum certain claim is made, a subsequent lawsuit may not seek any amount in excess of that sum unless it is based on newly

discovered evidence not reasonably discoverable at the time of presenting the claim or upon allegation and proof of intervening facts relating to the amount of the claim. Indeed, failure to submit a sum certain claim is probably a fatal jurisdictional defect under the law. Thus, the prudent practitioner will always make sure that he or she has fully complied with the provisions of 28 CFR part 14.

Prudence dictates that a completed form 95 be submitted with necessary attachments in support of the claim. All such attachments and the claim forms should be sent by certified or registered mail, return receipt requested, to the head of the agency involved, generally located in Washington D.C., and to the agency's general counsel, together with copies to the local agency head and any local counsel identified. These documents must be received by the indicated agency representative within the two year period and not simply mailed within the two year period as the FTCA requires that the written claim be "presented". An ante-litem claim to be valid must be in writing. A telephone call or an oral presentation to a local agency office will not suffice under the Act to toll the Statute of Limitation nor will it suffice to "present" a claim.

The regulations define who may file an administrative claim. 28 CFR § 14.3(b). A claim may be presented by the executor or administrator of a decedent's estate or any person legally entitled to assert such a claim in accordance with applicable state law. As an example, in some states, wrongful death actions may only be brought by the surviving spouse or on behalf of minor children. In such situations, an administrative claim form filed by an executor or administrator of an estate may be considered void unless it could be shown that the personal representative received authorization to file on behalf of the individuals entitled under state law to recover.

The fact that the United States is aware of a potential claim because of a related action or has actual notice of a claim, does not vitiate the administrative claim requirement. However, some courts have demonstrated a willingness to avoid strict compliance with the administrative claim requirement where the rights of unprotected children are involved. *See generally, Locke v. United States*, 351 F. Supp. 185 (D. Hawaii 1972). Some suits have been dismissed where the Plaintiff was not the executor or administrator of the estate at the time the claim was filed but had qualified by the time the action was commenced. *Pringle v. United States*, 419 F. Supp. 289 (D. S.C. 1976). It is imperative that counsel also understand that separate claims, i.e, separate form 95's must be filed for each claimant. Thus, in a wrongful death context, under Georgia law, if the estate has a claim for conscious pain and suffering of the deceased and for medical bills, that claim must be submitted separate and apart from the wrongful death claim of the surviving spouse or children.

A form 95 should be signed by the claimant or signed by claimant's counsel with evidence of the written authority to do so attached, i.e., a copy of the employment contract or power of attorney. If an executor of an estate files a claim, copies of the appointment as executor should be attached so that the agency has evidence of the claimant's legal authority to present the claim. While some courts have not favored the view that a "legal representative" must provide evidence of authority to represent the

claimant, the Department of Justice regulations, 28 CFR part 14, presently require that a person acting in a representative capacity must submit with the claim evidence of his or her authority to act on behalf of the claimant. While these regulations are undeniably valid as instructions to agencies regarding disposition of administrative claims, some courts have tended not to apply the regulations to litigation. At least one court has held that a claimant's failure to obtain authority required under state law does not bar an FTCA suit, however, the practitioner would be well advised to furnish evidence of authority to present the claim as a part of the claimant's initial claim package to the agency. *See generally, Free v. United States*, 885 F.2d 840 (11th Cir. 1989).

While it is possible to comply with the administrative requirements for completing a form 95 through providing only minimally required information, the practitioner would be well advised to provide the agency involved with all pertinent materials in his or her position which support the claim. A form 95 claims form should be as complete as possible and typically submitted as part of a settlement brochure to the agency. While there are certain jurisdictional pre-requisites which are required to be included as a part of the claim, the prudent practitioner should include materials over and above that absolutely required to satisfy jurisdictional requirements. This is because many agencies will settle claims without the necessity of suit if liability and damages are satisfactorily established. Of course, the more complicated the issues of liability and damages, the less likely it is that a particular agency may understand or appreciate all the legal and factual issues involved (e.g., a complicated medical malpractice case). Nonetheless, attorneys genuinely interested in pre-trial settlement will always include with required claim forms all appropriate materials which will present the agency with a fair opportunity to settle the claim without the necessity of litigation.

## SUING UNCLE SAM AFTER CLAIM DENIAL

A plaintiff must wait to file suit until the agency rejects the claim or if six months pass without the agency's rejection, this may be treated as a denial. 28 U.S.C. § 2675(a). If a suit is filed during the first six months after the administrative claim is filed, such an action will be dismissed by the court for lack of jurisdiction, although the dismissal may be without prejudice to refile once there has been compliance with the statute. *See, Fuller v. Daniel*, 438 F. Supp. 929 (N.D. Ala. 1977).

When the government is sued under the FTCA, the complaint should name the United States of America as the defendant and not the federal agency. The action may only be brought in the United States District Court, not in state court. It must also be brought in the federal judicial district where the plaintiff resides or where the negligent act or omission occurred. 28 U.S.C. § 1402(b). There is no right to a jury trial. 28 U.S.C. § 2402. If the plaintiff prevails, damages are measured by the law of the place where the act or omission occurred, meaning the whole law of that jurisdiction. *Richards, et. al. v. United States, et. al.*, 369 U.S. 1, 6-7 (1962).

An attorney filing suit under the FTCA is well advised to explain the basis on which the court's jurisdiction is predicated (28 U.S.C. § 1346(b)) and to allege that an

administrative claim has been presented and denied, or presented and left without action by the agency for six months, permitting suit to be instituted without final action on the claim (§ 2675). The damages claimed in any complaint are limited to the amount asserted in the administrative claim form, unless an increased amount is based upon newly discovered evidence which was not reasonably discoverable at the time of presenting the claim to the federal agency or upon allegation and proof of intervening facts. 28 U.S.C. § 2675(b); *Kielwein v. United States*, 540 F.2d 676 (4th Cir. 1976), *cert. den.*, 429 U.S. 979 (1976).

Although private litigants must answer complaints within twenty days, the Federal Rules of Civil Procedure give the government sixty days to answer a complaint, in recognition of the difficulty of obtaining and supplying factual material to the responsible Assistant U.S. Attorney or Justice Department Attorney. F.R.C.P. 12(a). Service of the summons and complaint on the United States is governed by F.R.C.P. 4(d)(4). Service should be made by serving a copy of summons and complaint on the United States attorney for the district in which the action is brought. Another copy of the summons and complaint must be sent by registered certified mail to the Attorney General of the United States in Washington D.C. This service must be accomplished within one hundred and twenty days after filing of the complaint or the plaintiff will be faced with dismissal by the court. FRCP 4 (l). While civil practice under the FTCA is much the same as practice in any other federal civil case, of course, it must be kept in mind at all times that the trier of fact will probably be the same judge who presides over motions and discovery in the case.

#### DAMAGES AVAILABLE UNDER THE FTCA

If the plaintiff prevails, damages are measured by the law of the place where the act or omission occurred. See *generally*, 28 U.S.C. § 1346(b). Consequently, one must always be sure to know exactly what types of damages state law allows. If one is presenting a wrongful death claim under the FTCA, for example, then the state law measurement of damages controls. As set forth above, if a state law confers a cause of action upon a particular party, the claim must be filed with proof of authority of the claimant to proceed under the Act. Further, the measurement of damages is likewise controlled by the FTCA and state law must be again referred to in determining exactly what those damages are. Because a federal tort case is triable to the court, not the jury, Federal Rule of Civil Procedure 52 is the standard for appellate review. A damage award entered by a district court will be sustained unless it is "clearly erroneous." Because this stringent standard of review makes damage appeals extremely difficult, the bench trial provided by the FTCA is all important in damage assessment.

As stated above, punitive damages per se are not allowed against the United States under the Federal Tort Claims Act. 28 U.S.C. § 2764. However, under Georgia law, the wrongful death statute is considered to be potentially punitive in nature, thus creating some interesting legal issues. The United States Supreme Court in *Molzof v. United States*, 502 U.S. 301, 112 S.Ct. 711, 116 L.Ed. 2d 731 (1992) held that damages for the loss of enjoyment of life may be awarded to a prevailing plaintiff in a wrongful death action. The question in Georgia is whether the punitive aspects of the wrongful death

claim may be compensated under the FTCA notwithstanding the prohibitions contained in 28 U.S.C. § 2674. It would appear that the answer is in the affirmative based on the case of *Childs v. United States*, 923 F.Supp. 1570 (S.D.Ga. 1996).

## 1) ATTORNEY'S FEES, COSTS AND INTEREST

Attorney's fees are limited to no more than twenty-five percent of any judgment or settlement after suit is filed, or twenty percent of any administrative settlement prior to litigation. 28 U.S.C. § 2678. It is important that plaintiff's counsel also be familiar with rest of section 2678:

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than two thousand dollars or imprisoned not more than one year or both.

In other words, it is a misdemeanor and a criminal offense to charge more than is allowed as recoverable attorney's fees under the act.

After a settlement or judgment is final, the Justice Department must submit the judgment or settlement to the General Accounting Office for payment. Typically, it takes from six to eight weeks from the date of transmittal of request for payment to the General Accounting Office until receipt of the check. If a structured settlement offer is involved, however, in order to lock in favorable interest rates, the Government may have to act more expeditiously. In that context, it may be possible to get the settlement funds at an earlier date.

Costs are taxable against the United States in FTCA suits just as if it were a private defendant, except for attorney's fees. 28 U.S.C. § 2412(c). These costs do not include fees to expert witnesses. With respect to interest, the United States is not liable at all for pre-judgment interest. 28 U.S.C. § 2674. Post judgment interest is allowed under 28 U.S.C. § 1961, calculated from the date of the entry of judgment. The rate is equal to the coupon issue yield equivalent as determined by the Secretary of Treasury of the average accepted price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of judgment. § 1961(a). However, the entitlement to post judgment interest is limited by 31 U.S.C. § 724(a) which provides that interest shall be paid only when such judgment becomes final after review on appeal or petition by the United States, and then only from the date of the filing of the transcript thereof with the General Accounting Office to the date of the mandate of affirmance. Since the statutory language refers to "mandate of affirmance" the filing and subsequent withdrawal of the notice of appeal does not entitle a plaintiff to collect interest. Imposition of interest is not automatic but is predicated upon the filing of a transcript with the General Accounting Office. *United States v. Varner*, 400 F.2d 369 (5th Cir. 1968).

## 2) COLLATERAL SOURCE RULE

State collateral source rules often permit plaintiffs to receive double recovery for their damages. Under such rules, if an injured person received compensation from a source wholly independent of the tortfeasor, the payment should not be deducted from the damages which he or she would otherwise collect from the tortfeasor. As regards FTCA claims, however, it is not at all clear that the courts will follow state collateral source rules. The principal reason for resistance to following state law in this area seems to be the impact on the public treasury in general. In a leading case on this issue, the Supreme Court rejected the government's contention that serviceman's benefits paid to both an injured serviceman and survivors' benefits to the family of a deceased serviceman were the exclusive remedies available where both servicemen were not injured "incident to their service" since both were on leave. The Court held that viable claims existed under the FTCA but that the government was not obligated to pay twice for the same injury. The government was entitled to credit for hospital and medical expenses provided; military pay was a credit against loss of earnings claims; and any disability benefits payable would likewise be a credit. *Brooks v. United States*, 337 U.S. 49 (1949). However, whether the government is entitled to set off benefits received under Social Security and Medicare seems to be determined, at least by some courts, based upon application of local state law. See generally, *Manko v. United States*, 830 F.2d 831 (8th Cir. 1987). Plaintiff's counsel should argue that state law controls, however, because there are federal cases dealing with a variety of different set of situations, each case must be decided on an ad hoc basis at least as regards the government's rights to a set off. At the very least, plaintiffs should argue that the government must raise its right to set off as an affirmative defense in its pleadings. See generally, *Hassan v. U.S. Postal Service*, 842 F.2d 260, 263 (11th Cir. 1988).

## INDEMNITY AND CONTRIBUTION

The United States is liable under the FTCA for indemnity and contribution just like any other private litigant. Actions may be brought against the United States for either indemnity or contribution through a third party proceeding or through a separate suit. *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951). If an attempt is made to circumvent any of the statutory or judicially created exceptions to recovery under the FTCA, however, a third party claim for indemnity or contribution is not likely to be successful.

## CONCLUSION

Fortunately for claimants, the government is not immune from suit under antiquated doctrines of sovereign immunity. However, in order to insure that those with valid claims are compensated for their damages, it is necessary that the practitioner carefully follow the FTCA. Hopefully, this article will serve as a refresher to the plaintiff's bar on those steps that need to be taken to protect victims of government negligence.