

FILING CLAIMS AGAINST THE UNITED STATES PURSUANT TO THE
FEDERAL TORT CLAIMS ACT: AN OVERVIEW*

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For over 150 years, the United States, as a sovereign nation, enjoyed sovereign immunity. Just as with the kings of olden days, there was no statutory scheme by which the United States or its employees could be sued in tort nor was there any common law remedy. Then, in 1949, Congress enacted the Federal Tort Claims Act (FTCA), which waived sovereign immunity and set up a statutory scheme whereby citizens could seek to hold the United States responsible in tort or for property damage and the Act applies to tort or property damage occurring in the United States, its commonwealths, territories, and possessions. The FTCA is codified in 28 U.S.C. §1346(b), §1402(b), §2401(b), and §2671-2680. The purpose of this article is to review the basic concepts involved in bringing a claim against the United States pursuant to the FTCA.^{FN1}

Who is a Proper Claimant.

Any non-active duty service member can bring a claim if they are injured by a government employee. This includes retirees, civilians, children, and spouses of service members. Claims can be brought against any agency for matters as diverse as medical negligence, automobile accidents, or premises liability. Under United States v. Feres, 340 U.S. 135 (1950) and United States v. Johnson, 107 S.Ct. 2063 (1987), neither active duty service members nor their family may bring a claim if the active duty service member is injured.^{FN2} Family members cannot bring a claim because their claims are derivative of the active duty service member's claim. When a family member is injured,

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however, the active duty service member's claim is derivative of their claim. Therefore, the injured family member may make a claim and the active duty service member may also bring a claim that is derivative of the family member's claim.

Statute of Limitations – When Must a Claim Be Filed.

When Congress enacted the FTCA, they set the statute of limitations (SOL) at two (2) years from the date of the wrong. Remember that because the FTCA set up the statutory scheme by which the United States can be sued, Federal law controls this issue. For medical negligence cases, the claim accrues when the claimant discovered or by reasonable diligence should have discovered the injury and its cause, but a claimant is not required to know of the negligent or wrongful nature of the act.^{FN3} In medical negligence cases, you cannot wait until you know the full extent of your injuries.^{FN4} As soon as your claim form containing all of the statutory elements is received, the SOL is tolled.

Another important distinction from most state laws is that the SOL under the FTCA is not tolled during periods of infancy or incompetence.^{FN5} There are, however, a few instances where the SOL can be extended in an FTCA case. Most importantly, if you have a claimant who is on active duty, their SOL does not start to run until they leave active duty. The Servicemembers Civil Relief Act (SCRA) extends the SOL and the soldier need not show that their military service prejudiced their ability to file a claim.^{FN6} As I discussed earlier, a service member's claim would have to be a derivative claim because of the Feres bar. You see the application of the SSCRA most frequently in birth trauma cases where parents either wait to contact an attorney because they believe their child will get better, or they do not understand that negligence was involved.

You can also extend the SOL if fraudulent concealment is involved and situations where the tortfeasor covers up the wrong or lies to the injured party may provide enough

of a basis to extend the SOL. Finally, because state law applies, you can rely on the continuing treatment rule if your state recognizes it.^{FN7}

The Mechanics of Filing A Claim.

To file a claim, you must file written notice of the event sufficient to allow the United States to investigate the matter. The written claim should be filed with the appropriate agency of the United States and demand a sum certain.^{FN8} The appropriate agency is the one that employs the person who caused the tort. Each agency has a separate claims office and you can call the agency and ask for the proper address and point of contact to file the claim. I strongly urge you to make the allegations broad. You can narrow your criticisms later, but if you start out narrow, you may be limited to those accusations once limitations runs or you decide to file suit. The claim must also demand a sum certain and be dated and signed by the claimant or by someone with the authority to sign for the claimant. If the claim is signed by someone other than the claimant, you must file those documents with the claim. There have been cases where the court did not allow affidavits to be filed at trial to cure the failure to produce a power of attorney with the administrative claim.^{FN9} Most courts that have considered this issue, however, have allowed an affidavit to be filed later and have not made the failure to present the authority to sign for the claimant a jurisdictional requirement necessitating dismissal of the suit. Because state law controls, whatever authority you submit should be in accordance with your state law.

As a practical matter, the United States has a standard form 95 (SF95) which you may use, but use of the form is not mandatory. You can access the form online at www.usdoj.gov/civil/forms/sf95. Any documents or letters you file prior to the statute of limitations running are to be read together with the original claim, so if you forget an

essential element of the claim and need to supplement your claim, you may do so. Just be sure that all essential elements are filed with the United States before limitations runs.

The claim should be filed with the agency whose member committed the tort.^{FN10} In some cases it may not be possible to figure out which agency is responsible. In those cases, make a decision about which agency you think is responsible and file it there. This should toll limitations even if you have filed it with the incorrect agency, although some agencies have a regulation that seems to contradict this. The Army Regulation 27-20, Claims, for instance, has a provision that reads “Receipt of a claim by another Federal agency does not toll the SOL. Receipt of a U.S. Army claim by DOD [Department of Defense], Navy, or Air Force does toll the SOL. There are regulations that require the agency to transfer any claim filed in the wrong place to the proper agency.”^{FN11} You may also file with multiple agencies and if you do so, you should send copies of all claims filed to both agencies and tell them which agency you believe is the lead or most responsible agency.^{FN12}

If you are in a jurisdiction that requires a personal representative to file a wrongful death claim, make sure someone is appointed as the personal representative before you file the claim. If it is later discovered that someone filed a wrongful death claim who had not been appointed as the personal representative and limitations have run, your claim could be dismissed.

Finally, I recommend that if you have multiple claimants, you file a separate claim form for each claimant. This includes a wrongful death claim filed by a personal representative. Even if the personal representative files a claim on behalf of multiple beneficiaries, I also recommend that you file a separate claim form for each beneficiary. That way, there will not be any question about what each claimant is asking for and you

will have a sum certain on behalf of each separate claimant. There have been instances where the amount claimed has limited the ad damnum available at trial or when the failure to list the appropriate claimants has precluded adding them at trial.^{FN13}

Sum Certain Requirements.

This simply means that you must ask for a specific dollar amount when you file your claim. Make sure the amount is high enough to recover all potential future expenses because you may be limited to that amount as your cap if you have to file suit.^{FN14} If you fail to file for a sum certain, the agency is supposed to put you on notice of the deficiency.^{FN15} A sum certain on the claim may be amended at any time prior to final agency action, but only if the initial claim was a valid claim (i.e., contained a sum certain).^{FN16} If you amend the claim form to include a new cause of action (i.e., loss of consortium), the 6 month administrative review period starts over. Remember that this must be done before the limitations runs.

Torts Included in the FTCA.

Generally, torts involving negligence are covered if committed by government employees acting within the scope of their employment. Those include medical negligence, motor vehicle and premises liability causes of action. There is, however, a long list of torts for which the United States cannot be held accountable and this list includes intentional acts like assault, libel, and slander, as well as a discretionary function exception.^{FN17} Prior to taking any claim, you should check this list to see if the claim you are considering is an excludable act. If you have a claim involving an intentional act, I recommend that you investigate the facts to see if there is an underlying act of negligence. For instance, if an off-duty service member shoots someone, you should

investigate the matter to see if negligence was involved in allowing the service member to take the gun home.

The FTCA gives jurisdiction for causes of action involving injury, monetary claims, death, and property loss caused by the negligence or wrongful act or omission of any employee of the government.^{FN18} Once you establish this, check to see if the act is an excepted one as set forth above. The FTCA does not impose liability on the United States for negligent acts on the part of independent contractors or on those who receive federal funds but on whom the United States does not exercise day-to-day control.^{FN19} This is true even if government property is used in the commission of the tort.^{FN20} Likewise, if a government employee is injured on the job by another employee and they are covered by the Federal Employment Compensation Act (FECA), then FECA is their exclusive remedy.^{FN21} The FECA exclusion, however, does not apply to property losses.

Problems will sometime arise in medical negligence cases involving a physician who is an independent contractor. It is often difficult to tell if an independent contractor is involved. In those instances, you should file your claim and if an independent contractor is involved, my experience is that the claims officer will immediately tell you. In those instances, you would then pursue that case just as you would any other non-FTCA case pursuant to the rules within that jurisdiction. Because most state limitations periods are longer than the limitation period under the FTCA, this is generally not a problem.

Agency Action After You File a Claim.

You wait, and wait, and then you may wait some more. Under the law, the United States must be given six (6) months to investigate the claim.^{FN22} Unfortunately, decisions are rarely made within that 6-month period so you should make sure to tell your clients

that nothing is likely to happen within the first 6 to 12 months. Because the SOL is tolled as long as the claim is pending, you can continue to wait for an answer or, after 6 months and a day passes, you may file suit in the appropriate United States District Court (USDC). The law allows you to file suit in the USDC where the tort occurred or where your client currently resides. If your client is affiliated with the military, they will likely move every 2 to 3 years so before you file suit, you should see if they will be changing jurisdictions. This will allow you to do a little forum shopping because they may be going to a jurisdiction with a more favorable bench. If you file suit in a USDC other than where the tort took place, keep in mind that that court will apply the substantive law of the jurisdiction where the tort occurred. If you have a choice, carefully consider the place where you will file suit, especially if the new jurisdiction has a cap on damages. If the tort occurred in a location that had no damage caps and the new jurisdiction has a damage cap, the judge in the new jurisdiction may feel constrained by the cap in their jurisdiction as they may never have awarded damages in excess of their cap. There are also circumstances where you must file suit within 6 months of certain agency action. Those situations are described below.

Interaction and Negotiating with the Agency.

After you file a claim, you will receive an initial letter acknowledging receipt of the claim. I recommend that you file all of your claim forms using some method where you will have a written record of the delivery date. When you receive the acknowledgment letter, check the date the agency claims to have received it and if their date is incorrect, send them a letter with a copy of your proof that the claim was filed earlier.

The initial letter will also contain a list of documents that the agency wants you to provide. It will cite the Code of Federal Regulations (CFR) and indicate that your failure to provide this material may be grounds for dismissal of the claim. If you decide not to pay any attention to that part of the letter on the theory that Congress has set the jurisdictional requirements for a proper claim, then make sure you have adequately documented the claim with enough evidence and information so it can be investigated. Failure to document a claim may make it a nullity.^{FN23} As a practical matter, however, you have an important choice to make. The claims officer will likely be overwhelmed with the number of claims assigned to them, so if you provide the information they need and make it easy to evaluate your client's claim, it will likely be evaluated more quickly. On the other hand, if you get too specific about the allegations of negligence, you may be limited to that position if you are forced to file suit.

As part of the investigative process, the claims representative may want to interview your client. This is usually done at the client's home and is not recorded or transcribed. Generally, if the investigation progresses to a claimant interview, it means that the agency is contemplating making an offer. Before you entertain allowing a claimant interview, I recommend that you get a commitment from the claims representative that they concede or are satisfied with the government's liability. You should also set parameters on the topics to be covered at the interview and prepare your client just as if it were a deposition.

Settlement Offers or Denial of the Claim: What Next?

If the agency makes an offer, you negotiate just as if you were handling any other case, with a few exceptions. Each agency has limited settlement authority, after which they must go to the Department of Justice (DOJ) for approval to pay more than the

agency authority. The most any agency has is \$200,000 and agencies with \$200,000 in authority include the various Armed Services and the Veterans Administration.

Experienced claims officers will tell you this up front and will have a good idea (but not a guarantee) that they can get approval before they make a conditional offer in excess of their agency's authority. Because state law controls, any damage caps applicable in the jurisdiction where the tort took place will be in effect. If you settle the claim, attorney's fees are limited to 20% if settlement occurs at the administrative claims level and 25% if settlement occurs after suit is filed.

If the claims officer offers something less than their agency authority, you can usually tell when the claims representative has offered their maximum dollar if they make a written final offer. I urge you to wait until you get to that point before you make a decision on whether or not to accept any offer. Once you get the written final offer, the statute gives you 6 months to either accept the offer or file suit in USDC. If you wait more than 6 months to accept the offer or file suit, then the claim will no longer be valid and you are entitled to nothing.

If the claims officer denies your claim, then you likewise have 6 months to file suit in USDC and, for purposes of the FTCA, a final written offer of settlement is treated the same as a final denial.^{FN24} There are provisions to request reconsideration and you can submit additional written support for your client's claim during the reconsideration period. The request for reconsideration must be made within the 6 month period following a written final offer or denial and once you request reconsideration of the claim, the SOL once again is tolled.^{FN25} If your request for reconsideration is denied, then the 6 month period within which you must file suit starts to run as of the date of the denial of the request for reconsideration or 6 months from the filing of the request for

reconsideration with the claimant having the option to choose which date to use, at the claimant's option.^{FN26}

Filing Suit.

The claims service loses jurisdiction over the claim, and they will issue a pro-forma denial even if they took no previous action on the case. You can file suit in the USDC where the tort occurred or where the claimant resides at the time you file suit. Because the USDC has original exclusive jurisdiction, you do not file a certificate of merit or comply with other state filing requirements. When you file suit, the United States is the only named defendant and you serve the Attorney General and the U.S. Attorney for the jurisdiction where you file suit. The United States has 60 days to file an answer and, after that, your case will proceed just as any other case filed in USDC. One important difference, however, is that your client gets no jury – only a bench trial.

FOOTNOTES

1. The FTCA applies to acts occurring within the United States, its possessions, and territories. The Military Claims Act (MCA) applies to covered acts occurring outside the United States. The MCA is codified in 10 U.S.C. §2733 et seq. and is very similar to the FTCA with two major differences. First, the MCA is administrative only and there is no right to any judicial review. Second, different agencies have what is known as “single service jurisdiction” over claims occurring in a particular location. This applies mainly to claims against the armed forces. That means, for instance, that no matter what agency employee commits a tort, in England, the Air Force will investigate and process all of those claims. Single service claims responsibility as assigned by the Department of Defense can be found in 10 U.S.C. 2733, DODD 5515.8 and Army Regulation 27-20, Claims, paragraph 1-20 a(2).
2. Although the 9th Circuit held that medical malpractice claims were not necessarily barred in 1986, this decision was modified and subsequently reversed by the 9th Circuit in 1987. Atkinson v. United States, 825 F.2d 202 (9th Cir. 1987), cert. denied 485 U.S. 987 (1988).
3. 28 U.S.C. §2401(b).
4. Kubrick v. United States, 444 U.S. 111 (1979). Because there has been substantial litigation around the meaning and extent of Kubrick, I urge you to fully research this issue before accepting or declining a case when it appears the SOL has run. There are over 100 cases, some following Kubrick closely and others using an objective test.
5. Pittman v. United States, 341 F.2d 739 (9th Cir. 1965) cert. denied, 382 U.S. 941 (1965). There have been cases, however, where the SOL was extended for a claimant in a coma because no guardian was appointed. Washington v. United States, 769 F.2d 1436 (9th Cir. 1985).
6. Formerly known as the Soldiers and Sailors Civil Relief Act (SSCRA), the Servicemembers Civil Relief Act (SCRA) excludes time spent in military service from statute of limitations periods. In general, see SCRA 50 U.S.C. App. §§501-596. See §526 for Statute of Limitations. Conroy v. Anis Keff, 113 S.Ct. 1562 (1993).
7. Otto v. NIH, 815 F.2d 985 (4th Cir. 1987); Sanders v. U.S. Department of Army Surgeon General, 551 F.2d 458 (D.C. Cir. 1977).
8. 28 U.S.C. §2401 and 2675b.
9. Triplett v. United States, 501 F. Supp. 118 (D. Nev. 1980).
10. 28 C.F.R. 14.2.

11. 28 U.S.C. §§2401b, 2675c.
12. 28 C.F.R. 14b(2).
13. Davis v. Marsh, 807 F.2d 908 (11th Cir. 1987), where an administrative claim named the children of decedent and demanded \$100,000. At trial, 3 additional children were added, but the ad damnum was limited to \$100,000; Rode v. United States, 812 F. Supp. 45 (M.D. Pa. 1992), where the failure to include the spouse in an administrative claim precluded adding the spouse as a party once suit was filed.
14. Ad damnum in suit may be raised to an amount higher than that claimed if you can show that there is newly discovered evidence that was not reasonably available prior to filing the claim. See Spivey v. United States, 912 F.2d 80 (4th Cir. 1990), disallowing an upward amendment because the injury could have been discovered prior to filing the claim.
15. Molnar v. United States, 515 F.2d 246 (5th Cir. 1975).
16. 28 C.F.R. 14.2.
17. 28 U.S.C. §2680(a) to §2680(j).
18. 28 U.S.C. §1346(h).
19. United States v. Orleans, 425 U.S. 807 (1976); Logue v. United States, 412 U.S. 521 (1973).
20. Borguez v. United States, 773 F.2d 1050 (9th Cir. 1985); Watson v. Marsh, 689 F.2d 604 (5th Cir. 1982).
21. 5 U.S.C. 8116(c). For more information on the operation of FECA, see 5 U.S.C. 8101-8150.
22. 28 U.S.C. §2675(a).
23. 28 C.F.R. 14.4. Keene Corp. v. United States, 700 F.2d 836 (2d Cir. 1983), cert. denied, 104 S.Ct. 195 (1983); GAF Corp. v. United States, 818 F.2d 901 (D.C. Cir. 1987); Cotto v. United States, 993 F.2d 274 (1st Cir. 1993).
24. 28 U.S.C. §2401(b); Jerves v. United States, 96 F.2d 517 (9th Cir. 1992).
Written notice of the final denial is required. 28 C.F.R. 14.9.
25. 28 U.S.C. §2401(b).
26. 28 U.S.C. §2675(a).