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**Military Veterans
& Their Families**

The Federal Tort Claims Act

What Every Service Member
and Their Attorney
Need to Know

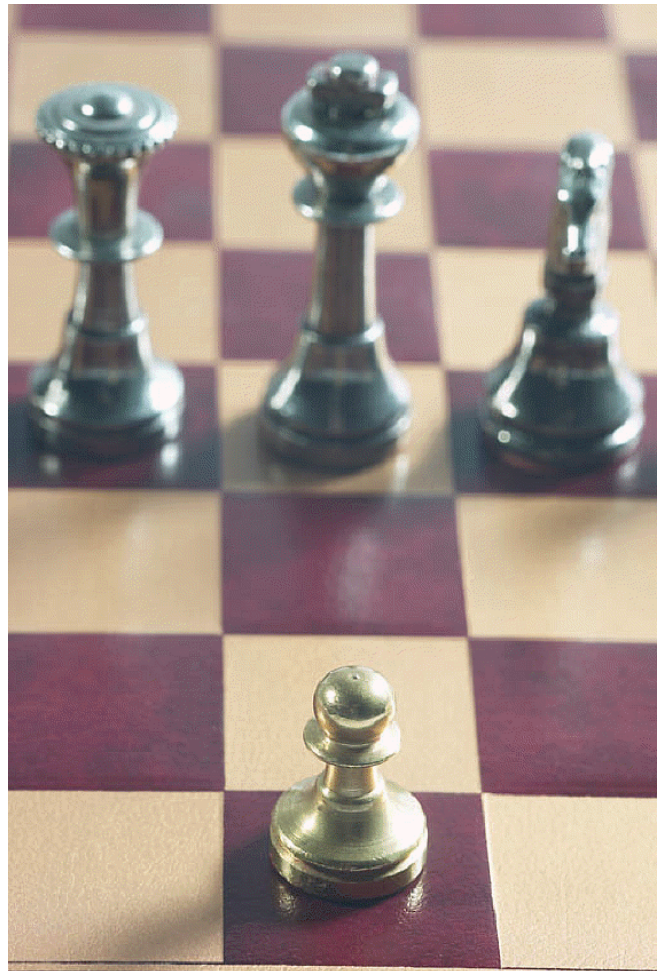
Karl J. Profil, Jr.

When the United States, as sovereign, allowed itself to be sued under the Federal Tort Claims Act (“FTCA”), it imposed many rules and limitations on that right. I do not, however, believe that the Congress that enacted the FTCA could have imagined that the Supreme Court decision of *Feres v. United States*, 346 U.S. 135 (1950) just a few years later would have eliminated the rights of active duty service members to pursue FTCA claims. In their decision, the Supreme Court interpreted the language in the statute “incident to service” as completely taking away the right of active duty service members to make a claim under the FTCA. The purpose of this article is to assist service members, veterans, their families, and attorneys in navigating the FTCA.


The simple rule is that an active duty service member cannot bring a claim under the FTCA for injuries they sustained while on active duty. This is unfair in my opinion and in a sense makes active duty service members second class citizens because they lack the same rights that all other injured parties possess. While there have been attempts in Congress to change this injustice, it has never passed both houses of Congress.

Documenting Service Connected Injuries.

Whenever the issue of allowing active duty service members to file claims under the FTCA arises, the argument from those who oppose it is that active duty service members have a right to apply for disability benefits for service connected injuries upon discharge. While these benefits include disability payments which are tax-free, as well as medical care administered by the Veterans Administration hospital system, the disability benefits are much less than one




might recover in an FTCA claim. A recurrent problem with qualifying for service connected disabilities is that service members who are injured on active duty do not have their medical condition documented in their medical record and, as a result, they are oftentimes unable to obtain disability benefits for injuries they sustained on active duty. It is imperative that active duty service members document their medical record by providing a complete history to physicians and insuring that those histories become part of their medical record. This needs to be done prior to leaving active duty so a claim for disability benefits that is filed at a later time has a reasonable possibility of success. Active duty service members who sustain significant injuries while on active duty will often be the subject of a medical board action to determine their ability to remain on active duty. In that case, it is easier to document injuries sustained while on active duty as there is a record. If a service member is concerned as to whether their injuries are being fully documented, I urge them to obtain a copy of their medical record and review it before leaving active duty. It is only by having a well-documented medical record that they will be able to insure eligibility for disability benefits upon discharge. On rare occasions, if the health



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care provider does not document the medical injury, then the service member should try to have the medical condition documented in their personnel file.

The remainder of this article will focus on the nuts and bolts of how to file a claim under the FTCA. It includes a summary of the rights that active duty service members, as well as the rights that veterans and family members have, under the FTCA. I caution, however, that the FTCA is extremely complex and has many rules which can trip up an unsuspecting claimant. Therefore, I urge any active duty service member who has a potential claim to consult with an attorney so that their claim can be investigated.

Any person who is not on active duty can bring a claim if they are injured by a government employee. This includes retirees, civilians, children, and spouses of service members. A person's duty status at the time of the injury controls whether they can file a claim and service members who are injured while on active duty cannot file a claim for injuries they sustained while on active duty. 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.¹ Family members cannot bring a claim for injuries

1 The FTCA applies to acts occurring within the United States, its possessions, and territories. The

to an active duty service member because their claims are derivative of the active duty service member's claim. When a family member is injured, however, the active duty service member's claim is derivative of the family member's claim. Therefore, the injured family member may make a claim and the active duty service member may also bring a claim because it is derivative of the family member's claim.

Statute of Limitations – When Must a Claim Be Filed

When Congress enacted the FTCA, they implemented a two (2) year statute of limitations. This means that a claim must be filed within two years of the date of the wrong. Because the FTCA set up the statutory scheme by which the United States can be sued, Federal law controls this issue and state statutes of limitation do not apply. For medical negligence cases, the claim accrues when the claimant discovered or by reasonable diligence should have discovered the injury and its cause. A claimant is not required to know of the negligent or wrongful nature of the act and a claimant cannot wait to file a claim until they know the full extent of their injuries.² As soon as your claim form containing all of the statutory elements is filed, 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.³ 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 service member need not show that their military service prejudiced their ability to file a claim.⁴ As I discussed earlier, a service member's claim would have to be derivative of a family member's claim because of the *Feres* bar. You see the application of the SCRA most frequently in birth injury 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.

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 *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.

3 *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).

4 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).

How to File a Claim

To file a claim, the claimant must file written notice of the negligent act with enough details 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 specific amount of money.⁵ The appropriate agency is the one that employs the person who caused the injury. Each agency has a separate claims office and, if contacted, they will inform you where to file the claim. I strongly urge you to make broad allegations in the claim because you will have an opportunity to narrow your criticisms later. If you start with narrow accusations, however, you may be limited to those accusations if you decide to file suit. The claim must also demand a specific amount of money 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 with a power of attorney to sign for the claimant, those documents should also be filed with the claim. There have been cases where the court refused to allow affidavits to be filed at trial to cure a failure to file a power of attorney with the administrative claim. 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

⁵ 28 U.S.C. §2401 and 2675b.

jurisdictional requirement necessitating dismissal of the suit. Because state substantive law controls, whatever authority you submit should comply with your state law requirements.

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 other support you file prior to the statute of limitations expiring will be considered together with the original claim. Therefore, you can supplement your claim after the claim form has been filed.

The claim should be filed with the agency whose employee caused the injury, although, in some cases, it may not be possible to determine which agency is responsible. In those situations, make a decision about which agency you think is responsible and file the claim with that agency. Although not the best situation, this should stop limitations from running even if you have filed the claim with the incorrect agency. If you file with the incorrect agency, there are regulations that require the agency to transfer a misfiled claim filed to the proper agency. When in doubt, you may want to consider filing identical claims with multiple agencies. If you do so, you should send copies of all claims filed to both agencies and tell them which agency you believe is the most responsible agency.⁶

⁶ 28 C.F.R. 14.2.



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Wrongful Death Claims

Many states have special rules concerning who may file a wrongful death claim. If you are in a state 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. This can be done at the local courthouse or at the Registrar of Wills Office. Most of the time, you will need to bring a death certificate, Will (if any) and list of heirs to the Registrar's Office. You should call your local courthouse before appearing and they will give you a list of documents to bring. If it is later discovered that a wrongful death claim was filed by someone who had not been appointed as the personal representative and limitations has run, your claim may be dismissed.

Finally, if you have multiple claimants, you should file a separate claim form for each claimant. A personal representative filing a claim on behalf of multiple beneficiaries should file a separate claim form for each wrongful death beneficiary. By doing so, there will be no questions as to what each claimant is demanding.⁷

⁷ *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.

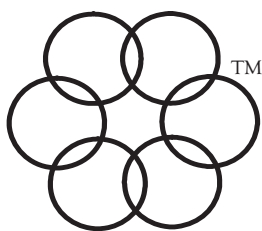
Requirements for a Specific Demand

A claimant must ask for a specific dollar amount when a claim is filed. Make sure the amount is high enough to recover all potential future expenses because the amount you ask for in the claim may limit your recovery if you choose to file suit.⁸ If you fail to file for a specific dollar amount, the agency should put you on notice of the deficiency. A specific dollar amount on the claim form may be amended for good cause at any time prior to final agency action, but only if the initial claim was a valid claim.

Torts or Wrongs Included Under the FTCA

Generally, you may receive compensation for torts or wrongs committed by government employees acting within the scope of their employment. Examples of such cases are injuries suffered because of medical negligence, injuries caused by motor vehicle accidents, and claims for harm suffered in government buildings due to negligence. Examples of medical negligence may include failure to diagnose cancer, a stroke, or a heart attack, birth injury suffered by newborn

⁸ 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.



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