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## Litigating a Federal Tort Claims Act case

WHEN IT APPLIES, HOW TO FILE YOUR CLAIM, AND LITIGATION STRATEGIES

Imagine a prospective client contacts you after a serious automobile collision. She tells you that she was stopped at a red light when she was suddenly struck from behind by another vehicle. She was transported by ambulance to the hospital and was diagnosed with serious injuries. She wants to know if you're willing to take her case.

Before accepting, you ask for some basic facts. One of your first questions is likely: Who was the other driver? If that vehicle was a private car, a commercial truck, or a vehicle operated by a local or California state government entity, any lawsuit arising from that collision would eventually find its way to state court and be tried to a jury. But not this case.

Gathering the preliminary information, you eventually learn that the other vehicle was a mail truck of the United States Postal Service. That means one thing: Unlike private citizens or businesses or even California governmental entities, this prospective client's case will be governed by the Federal Tort Claims Act ("FTCA"), filed in federal court and bench-tried before a federal judge.

Familiarity with the FTCA and its intricacies is critical to representing a plaintiff in a personal-injury action against the federal government and its agencies. While most California attorneys are comfortable with the California Tort Claims Act for claims against California public entities, the procedure under the FTCA is markedly different. But, like the Tort Claims Act, compliance with the FTCA's requirements is mandatory, and failure to comply can lead to dismissal.

This article discusses several aspects of the FTCA, including its history, the limitations imposed on attorneys' fees, the mechanics of an FTCA action,

and specific requirements for a pre-filing FTCA claim presented to the government. It often illustrates the FTCA's nuances by comparison with California's Tort Claims Act. Additionally, this article provides strategies and considerations when litigating an FTCA action. It does not, however, purport to contain all requirements and restrictions imposed by the FTCA, but is instead intended as a primer on this complex topic.

### What is the FTCA, and when does it apply?

Before the FTCA was enacted, the federal government enjoyed sovereign immunity for tort claims, making it immune from any lawsuit for its employees' negligence. Instead, Congress compensated persons injured by federal employee negligence by passing "private bills" specific to individuals who had petitioned Congress. As the nation and the government grew, Congress began devoting more and more of its time addressing specific cases. Eventually, the process became so cumbersome that it distracted Congress from considering and passing national legislation. (See generally *Feres v. United States* (1950) 340 U.S. 135, 139-40 [discussing history of the FTCA's initial enactment].) Thus, in 1946, Congress passed and President Harry Truman signed the predecessor version of the FTCA into law.

To avoid the headache of the "private bill" system, the FTCA waived sovereign immunity for tort claims. Specifically, the statute provides that the federal government may be sued "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission" of any federal employee

where liability would be imposed on a private party. (28 U.S.C. § 1346(b).) This waiver of sovereign immunity mirrors California's statutory sovereign-immunity waiver. (See Gov't Code, § 815.2, subd. (a) ["A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative."].)

Most personal injury or wrongful-death claims fall within that waiver of sovereign immunity, but some special cases need not be brought under the FTCA. For instance, personal injuries or wrongful-death claims arising from violation of a plaintiff's constitutional rights by federal agents may be brought directly under the U.S. Constitution in an action under *Bivens v. Six Unknown Fed. Narcotics Agents* (1971) 403 U.S. 388. Although such a case may also be brought as an FTCA action due to a specific waiver of sovereign immunity for intentional torts committed by "investigative or law enforcement officers of the United States," see 28 U.S.C. section 2680(h), it does not have to be. A *Bivens* action, even where predicated on facts that could support an FTCA claim, may be brought outside of the FTCA, tried to a jury, and result in an award of punitive damages. (*Carlson v. Green* (1980) 446 U.S. 14, 24.)

### Federal government's independent contractors

In addition to whether the claim falls within the FTCA, two frequently litigated questions are whether a claim against

*See Panish & Samson, Next Page*

the federal government's independent contractor must be litigated under the FTCA or whether the independent contractor enjoys the government's immunity. Another article in this edition addresses those weighty issues in detail, so we will not discuss them here.

In most instances where a personal injury or wrongful death occurred due to the actions or omissions of a federal employee or agency, the FTCA will apply. For instance, the hypothetical rear-end collision described at the beginning of this article would almost certainly be governed by the statute. However, attorneys should carefully investigate the facts of each case to determine whether a cognizable claim outside of the FTCA's reach exists. Pursuing a *Bivens* claim, as the plaintiff in *Carlson* did, may provide an avenue out of the FTCA's restrictions on jury trial and recoverable damages.

### The FTCA's fee limitations

Although an FTCA action begins with a claim form, the statute's requirements kick in long before the claim is filed. The FTCA not only governs the procedure for filing an administrative claim and a later federal action, it also controls the relationship between attorneys and their clients. The FTCA limits attorneys' fees to 20% of any administrative settlement and 25% of any settlement or judgment achieved after the case is filed. (See 28 U.S.C. § 2678.) The same section of the statute provides that anyone who "charges, demands, receives, or collects" more than the specified amounts is guilty of a federal crime punishable by a \$2,000 fine and one year imprisonment.

Given the clear-cut restrictions, and the threat of criminal liability for attorneys, any retainer agreement in an FTCA matter should mirror the language of the statute. A retainer should not seek more than the statutory maximum. Further, if a potential FTCA claim is discovered after the retainer is signed, a new retainer with the FTCA fee provisions should be executed.

### How does the FTCA work?

The overall structure of an FTCA case is fairly familiar: a claim form submitted to the relevant governmental entity, which, if denied or ignored, permits the claimant to file a lawsuit within a specific time period. Although that framework is simple, the devil is in the details, and, with the FTCA, the details can derail a meritorious case on procedural technicalities.

The statute did not always utilize the claim form-denial-lawsuit framework. The original version of the FTCA simply waived sovereign immunity and provided two options for claimants: sue the federal government in federal court, or file an administrative claim seeking a settlement. A pre-filing denial was not required, leading to many claimants avoiding the administrative process and heading to court. In 1966, Congress amended the FTCA and created the pre-filing administrative claim procedure still in use today.

### FTCA time limits

An FTCA action begins with an administrative claim filed with the relevant federal agency. Although California follows a similar process and generally requires a claim to be presented within six months of injury, an FTCA claimant has two years to present the claim. (28 U.S.C. § 2401(b).) As with California's government tort-claim procedures, presentation of a proper claim is a mandatory prerequisite to suing the government in court. (28 U.S.C. § 2675(a).)

The government could, of course, accept the claim and settle it. But the more likely outcomes are either an actual denial or a failure to act, which operates as a constructive denial. Like California's system, a claimant has six months to file a lawsuit from the date of an actual denial of his or her FTCA claim. (28 U.S.C. § 2401(b); *cf.* Gov't Code, § 945.6, subd. (a)(1).) Also as in California, the claim may be constructively denied through inaction, with a constructive denial arising

after six months of inaction as opposed to the 45-day period in California.

However, the timelines for filing after a constructive denial are different. In California, a constructive denial eliminates the six-month limitations period from the denial and reverts the filing deadline to the underlying statute of limitations. (Gov't Code, § 945.6, subd. (a)(2).) But under the FTCA, an agency's failure to take action within six months of claim presentation means that a claimant may at "any time thereafter" file in federal court.

### Federal court jurisdiction and governing law

Federal district courts have exclusive jurisdiction over FTCA claims. After denial, a lawsuit may be filed in the district where the injury occurred or where the plaintiff resides. Trials are non-jury and heard by a federal judge. Unlike California, where the parties have an opportunity to disqualify a judge pursuant to Code of Civil Procedure section 170.6, there is no such right in federal court. The judicial assignment is random, and the judge that is drawn will hear the case at trial.

Finally, like diversity cases, the law of the forum state controls FTCA cases. (28 U.S.C. § 1346(b)(1).) The legal theory against the government must be one in which "a private person would be liable," and must be grounded in existing state tort law. (See *U.S. v. Olson* (2005) 546 U.S. 43, 45-47.) Likewise, if there is a substantive limitation in state law, that applies to the government, too. For instance, MICRA's limitations on damages apply to FTCA medical malpractice claims brought in California. (*Taylor v. United States* (9th Cir. 1987) 821 F.2d 1428, 1431-32.)

### The claim form: Important differences from the California Government Code

Since an FTCA action may be instituted only after the actual or constructive denial of a proper

*See Panish & Samson, Next Page*

administrative claim, preparing and submitting a proper claim form is essential. That's true in California, too, but there are minor differences between FTCA and California forms that can have a major difference on the case.

#### **Claim specificity**

The timing, contents, and information required on the claim form are governed by statute and by regulations. The statute requires presentation of a written claim and a sum certain. (28 U.S.C. § 2675(a).) The written claim must provide sufficient notice for the relevant agency to investigate, value the claim, and determine whether the government is liable, all of which are relevant to the agency's decision whether to settle.

Although the statute does not specify what information and materials should be included with a claim, regulations promulgated by the Attorney General under 28 U.S.C. section 2672 do. (See 28 C.F.R. part 14 [containing the regulations].) In addition to the Attorney General's guidelines, many federal agencies have specific regulations for claims made to them. (See, e.g., 29 C.F.R. Part 15 [regulations for claims made to the Department of Labor].) The Attorney General's regulations, however, supersede any conflicting regulation. (See 28 C.F.R. § 14.11 [permitting agencies to promulgate their own regulations for FTCA claims that are "consistent with the regulations in this part"].) While there is some case law indicating that compliance with the regulations is not "a jurisdictional prerequisite" to maintain an FTCA action, (see *Warren v. U.S. Dept. of Interior Bureau of Land Management* (9th Cir. 1984) 724 F.2d 776, 778), compliance with the regulations will help ensure the claim presents sufficient information to comply with the statute.

Inclusion of facts and legal theories does not just put the government on notice. It also ensures that a later FTCA action will not be limited by failure to include information. Federal courts generally hold that a later FTCA action cannot rely upon facts outside of those set forth in the claim form. Consequently,

including all of the relevant facts, witnesses, and information ensures that a later action will be limited by the scope of information in the claim form.

#### **A sum certain for damages – err on the high side**

Failure to include a sum certain will lead to dismissal of an FTCA claim. That is opposite to California's procedure. In California, if a tort claim is over \$10,000, then "no dollar amount shall be included in the claim." (Gov't Code, § 910(f).) The same is not true for an FTCA claim. Instead, the claim must contain a dollar amount, and that dollar amount serves as a cap for any damages a court may award. (28 U.S.C. § 2675(b).)

This limitation is strictly construed. Federal courts have repeatedly dismissed cases where the claimed damages on the form are not a "sum certain" For instance, in *Blair v. I.R.S.* (9th Cir. 2002) 304 F.3d 861, the claimant filed a claim against the I.R.S. alleging that its agents used excessive force when they arrested him for interfering with seizure of his property. The claimant sought two categories of damage: medical expenses, and loss of earnings.

The claimant's medical damages allegedly arose from the I.R.S. agents' arrest and transportation to a detention center. The claimant's form described his injuries (fractures in his wrist from the agents' handcuffs) and identified his physicians, but it did not include a "sum certain" for medical damages. Instead, it stated: "Medical expenses are still being incurred, with no end presently in sight. Best estimates could perhaps be obtained by the IRS from the treating physicians listed in Item No. 11 above." Despite the information, the Ninth Circuit affirmed the dismissal of the medical damages claim as failing to meet the "sum certain" requirement. (*Id.* at 868.)

*Blair* also illustrates the contrary point: When a "sum certain" is included, then a claim may be pursued up to the amount of the stated damages. The claimant also alleged that his injuries from the agents' conduct left him unable to work as a tree harvester. His claim

form stated that his lost wages were over \$17,000,000 for a twenty-two year period (approximately \$750,000 per year), calculated by including a 10% increase each year in his salary, which started at \$200,000 (and so became \$220,000 the next year, \$242,000 the next, and so forth). Although the plaintiff's recovery of lost wages on that methodology was unlikely (to put it mildly), neither the Ninth Circuit nor the government even considered that issue. Instead, the only consideration was whether the plaintiff had included a "sum certain," which, by claiming \$17,000,000, he had.

The only time a plaintiff is permitted to recover more than the "sum certain" is set forth in the claim form. But, as *Blair* shows, a plaintiff's explanation that damages are "still being incurred" is not a "sum certain" and subjects the claim to dismissal. Relying on production of later evidence risks failure to provide a sum certain and jurisdictional dismissal.

Attorneys completing an FTCA claim form must include a sum certain or risk dismissal on procedural grounds. The rule is clear and inflexible. Overstating the amount of damages, by contrast, does not have adverse procedural effects; it merely serves as a ceiling on the total that may be awarded. (In this way, the sum certain requirement is similar to damages figures provided in a statement of damages requested under Code of Civil Procedure section 425.11.) To avoid dismissal under 28 U.S.C. section 2675, a claim form should err on overstating the amount of damages rather than undercounting or explaining that they will be calculated later.

#### **Litigating the case: Strategies and considerations**

Once the claim form is filed and either actually or constructively denied by the relevant government agency, the claimant may become plaintiff and file suit in federal court. That claim must be filed either where the plaintiff lives or the injury occurred. (28 U.S.C. § 1402(b).)

*See Panish & Samson, Next Page*

Since the case will be litigated in federal court, the Federal Rules of Civil Procedure will apply. Complaints must meet the “plausible” pleading requirements established by *Twombly* and *Iqbal* or be subject to dismissal. Discovery does not commence until after the pleadings are at issue and the parties conduct a discovery conference. Both sides must make initial disclosures pursuant to Rule 26. Retained experts must provide expert witness reports, and, unless governed by the scheduling order entered by the court, the timing of the disclosures is provided by the Rules. Finally, local rules and individual judges’ practices govern important details like the deadlines for motions, reservation or selection of hearing dates, and division of issues between an Article III judge and magistrate judge. Attorneys representing an FTCA plaintiff must be familiar with these rules and procedures, and avoid giving an undue advantage to the United

States attorneys who represent the federal government exclusively in federal court.

Beyond those procedural considerations, attorneys must consider the nature of the trial and the trier of fact. Issues a jury may seize upon could be wholly unpersuasive to a judge, and vice versa. For instance, a complex and detailed legal argument or a liability theory turning upon strict legal interpretation are far more likely to impact with a judge than a jury. Judges are accustomed to viewing cases dispassionately and are likely to be less susceptible to emotional appeals and arguments. But, as with any case, these general observations are just that: general. The facts of the case, the credibility of the key witnesses, and the judge assigned all dictate how a case should be framed and tried.

Navigating an FTCA action can be challenging in light of the procedural hurdles and the differences from

ordinary negligence cases in state court. Only through familiarity with the rules and procedures can attorneys assure themselves that a procedural pitfall does not doom the entire claim.

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