

FEDERAL TORT CLAIMS ACT

I.

INTRODUCTION

For most of our nation's history, private individuals and corporations could not sue the federal government or its employees (for work-related claims) because traditional Anglo-American law did not allow lawsuits against the sovereign. That tradition officially changed in 1948 when Congress passed the Federal Tort Claims Act (" FTCA "), 28 U.S.C. §2671 et seq. Except for maritime torts, the FTCA, as amended, sets forth the terms and limitations on tort suits against the United States. The provisions of the FTCA are found in Title 28 of the United States Code. 28 U.S.C. §1346(b), §1402(b), §2401(b), and §§2671-2680.

Through the FTCA, the government has waived its sovereign immunity for a number of torts and established the procedure for presenting a claim against the government and its employees. The United States cannot, however, be sued in a tort action unless it is clear that Congress has waived the government's sovereign immunity and authorized suit under the FTCA. Dalehite v. United States, (1953) 346 U.S. 15, 30-31. Also, claims based on an exercise of discretionary decision making are not allowed by the FTCA. Berkovitz v. United States, (1988) 486 U.S. 531.

The FTCA provides a limited waiver of the federal government's sovereign immunity when its employees are negligent within the scope of their employment. Under the FTCA, the government can only be sued "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). Thus, the FTCA does not apply to conduct that is uniquely governmental, that is, incapable of performance by a private individual.

The FTCA is limited by a number of exceptions pursuant to which the government is not subject to suit, even if a private employer could be liable under the same circumstances. The most significant of these exceptions is the discretionary function exception, which bars a claim “based upon the exercise or 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.” 28 U.S.C. §2680(a).

In order to bring a valid action against the United States under the FTCA, all administrative remedies must be exhausted and the claim filed within the two-year statute of limitations.

II.

JURISDICTIONAL PRECONDITIONS TO SUIT

A. Administrative Claims

Before an action may be filed under the Federal Tort Claims Act, an administrative claim must be presented to the federal agency employing the person whose act or omission caused the injury. Presentation of an administrative claim to the appropriate agency is a jurisdictional prerequisite to suit. McNeil v. United States, (1993) 508 U.S. 106, 113 S.Ct. 1980; 28 U.S.C. §2675. The claim must include the amount of damages sought and must include sufficient information to allow the agency to investigate the merits of the claim. 28 C.F.R., Part 14.

Normally, an administrative claim should be presented on a government form called the Standard Form 95 (SF 95) (see attached example). Filling out the form according to the instructions on the form should assure that all necessary information is provided.

After an administrative claim is presented to the appropriate agency, the agency has six months to either admit or deny the claim. A complaint cannot be filed until the administrative claim has been denied or until six months has passed without the agency acting on the administrative claim. (Filing early is a wasted effort since the court will dismiss for lack of jurisdiction and will not retain jurisdiction over the case, even if the six-month waiting period has expired in the interim.) Jerves v. United States, (9th Cir. 1992) 966 F.2d 517. Failure to act on an administrative claim within six months of presentment can, at the option of the claimant, be treated as a denial of the administrative claim after the six months has passed. 28 U.S.C. §2675(a). A claimant may also choose not to file suit after six months has passed. Unless the administrative claim is denied, the six-month statute of limitations does not begin to run and a claimant has an indefinite time within which to file suit. 28 U.S.C. §2675(a).

An action may not be brought for damages greater than the amount of the claim presented to the federal agency. An exception is made when the increased amount is based on newly discovered evidence that was not reasonably discoverable at the time the claim was presented or when there are intervening facts relating to the amount of the claim. 28 U.S.C. §2675(b).

B. The Westfall Legislation

The substitution provision of the Federal Employees Liability Reform and Tort Compensation Act (FELRTCA) (a.k.a.: “ The Westfall Legislation ”) provides that “ upon certification by the Attorney General that the defendant employee was acting within the scope of

his office or employment at the time of the incident out of which the claim arose . . . the United States shall be substituted as the party defendant.” 28 U.S.C. §2679(d)(1). The purpose of this amendment to the Federal Tort Claims Act was to “ remove the potential personal liability of Federal employees for common law torts committed within the scope of their employment, and . . . instead provide that the exclusive remedy for such torts is through an action against the United States under the FTCA.” H.R. Rep. No. 700, 100th Cong., 2d Sess. 4 (1988).

III.

SUBSTANTIVE PRECONDITIONS TO SUIT

By its terms, the FTCA grants jurisdiction for actions on monetary claims for injury, property loss or death “ caused by the negligent or wrongful act or omission of any employee of the Government.” 28 U.S.C. §1346(b). This language, broad as it is, is limited to negligence actions and does not grant jurisdiction for suits seeking to hold the United States liable on strict or absolute liability theories. Laird v. Nelms, (1972) 406 U.S. 797. Nor may the United States be held liable unless the cause of action is predicated on the negligence of an employee of the government, rather than a contractor or other person who receives funds and guidance from the United States but over whom the United States does not exercise physical, day-to-day control. United States v. Orleans, (1976) 425 U.S. 807.

The FTCA applies only to create liability for acts or omissions of an employee of the government “ while acting within the scope of his office or employment.” The United States may be held liable “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). While the United States may not be visited with novel or unprecedented forms of liability, so long as neutral principles of tort law would impose liability

upon a private individual undertaking the same activity, the United States may be held liable for its otherwise actionable negligence, even if the activity for which the United States is sued is not one commonly undertaken by a private individual. Indian Towing Co. v. United States, (1955) 350 U.S. 61.

The duty of the United States in a tort action is defined in accordance with the law of the state where the negligence occurred. Richards v. United States, (1962) 369 U.S. 1 (negligence occurred in Oklahoma, aircraft crashed in Missouri). Neither federal statutes nor the Constitution create a cause of action under the FTCA. Thus, plaintiffs attempting to assert constitutionally based claims do not state a claim within the jurisdiction of the court under the FTCA unless they can point to an actionable tort duty recognized under the law of the state where the act or omission occurred. Jaffee v. United States, (3rd Cir. 1979) 592 F.2d 712, cert. denied, 441 U.S. 961.

The provisions of the FTCA are exclusive. If a tort suit does not lie under the FTCA, the action is barred altogether. Safeway Portland Employees' Federal Credit Union v. FDIC, (9th Cir. 1974) 506 F.2d 1213.

IV.

LIMITATIONS

The statute of limitations applicable to actions under the Federal Tort Claims Act is found at 28 U.S.C. §2401(b) and states:

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun six months after the date of mailing, by certified or registered mail,

of notice of final denial of the claim by the agency to which it was presented.

Whether a claim accrues under the FTCA is a question of federal law. See Brazzell v. United States, (8th Cir. 1986) 788 F.2d 1353, 1355. The general rule is that an FTCA claim accrues at the time of injury. United States v. Kubrick, (1979) 444 U.S. 111. In Kubrick the Supreme Court recognized that the general rule under the FTCA has been that a tort claim accrues at the time of the plaintiff's injury, regardless if a plaintiff failed to bring suit because he was incompetently or mistakenly told that he did not have a case.

Certain kinds of tolling allegations appear with predictable frequency. Most courts have, however, rejected arguments for tolling the FTCA's statute of limitations. Mann v. United States, (9th Cir. 1968) 399 F.2d 672.

V.

EXCEPTIONS TO THE FTCA

The FTCA includes specific, enumerated exceptions in 28 U.S.C. §2680. If an exception applies, the United States may not be sued and litigation based upon an exempt claim is at an end. Griffin v. United States, (3rd Cir. 1974) 500 F.2d 1059.

A. Discretionary Function Exception

Perhaps the most frequent exception applied to the FTCA is the “discretionary function” exception, 28 U.S.C. §2680(a).

The discretionary function exception precludes suit “based upon an act or omission of an employee of the Government, exercising due care in the execution of a statute or regulation” or “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty.” It bars suits against the United States based on the discretionary actions of

federal employees. It applies without regard to the kind of employee or official charged with the breach of duty, so long as the employee or official is performing, or failing to perform, a discretionary function. Moreover, the exception applies despite allegations of abuse of discretion, by the terms of the exception itself. Dalehite v. United States, (1953) 346 U.S. 15.

In Berkovitz v. United States, (1988) 486 U.S. 531, 108 S.Ct. 1959, the Supreme Court outlined a two-prong test: (1) whether the challenged conduct involved an element of judgment or choice and (2) whether the decision involved was the kind the discretionary function exception was designed to shield.

The first prong of the test will be satisfied if the agency decisions are “ grounded in social, economic and political policy.” Once it is established that the decision is of the kind that brings it in the discretionary function exception, the second prong will only be satisfied “ if the action challenged in the case involves the permissible exercise of policy judgment.” The “ permissible exercise of policy judgment ” is likely to include any action or decision based on “ considerations of public policy.” Id. at 531.

In Boyle v. United Technologies Corp., (1988) 487 U.S. 500, 108 S.Ct. 2510, the Supreme Court pointed out that if an agency fails “ to act in accord with a specific mandatory directive, the discretionary function exception does not apply.” The necessary corollary to this statement is that if there is no federal statute, agency regulation, or policy directive which imposes mandatory duties upon the federal agency or employee, then the agency or employee will have to exercise discretion, and the discretionary function exception may (and probably will) preclude jurisdiction under the FTCA.

Absent specific statutes or regulations, where the particular conduct is discretionary, the failure of the government properly to train its employees who engage in that conduct is also discretionary. See, Flynn v. U.S., (10th Cir. 1990) 902 F.2d 1524 (failure of National Park Service to train its employees as to proper use of emergency equipment was discretionary).

B. Other Exceptions

Section 2680(h) bars suits under the FTCA which allege assault, false imprisonment, and other intentional torts, with the proviso that the United States may be sued for certain intentional torts when the tortfeasor is an investigative or law enforcement officer.

Suits arising from all kinds of misrepresentations are barred, whether grounded on intentional or negligent misrepresentations. Where a misrepresentation is critical to the claim, it is barred. Carolinas Cotton Growers Assn. v. United States, (4th Cir. 1986) 785 F.2d 1195.

Despite the exclusion of libel, slander, misrepresentation, and deceit from the provisions of the FTCA, some courts have found that certain claims for invasion of privacy are not subsumed within the scope of these exemptions.

A number of other exceptions to the FTCA are included in Section 2680, including exceptions for admiralty claims (2680(d)), any claim arising out of combatant activities of the military or naval forces during time of war (2680(j)), any claim arising in a foreign country (2680(k)), and, among other matters, any claim arising from the activities of a federal land or cooperative bank (2680(n)).

VI.

PRACTICE AND PROCEDURE

Since the complaint is filed in federal court, notice pleading is the rule. See, Rule 8(a), F.R.C.P. Adequate allegations of jurisdiction are required. It is well advised to allege the basis upon which the court's jurisdiction is predicated, 28 U.S.C. §1346(b), and to allege that an administrative claim has been presented and either denied or has been left without action by the agency for six months, permitting suit to be instituted without final action on the claim. 28 U.S.C. §2675. Venue lies only in the district where the plaintiff resides or where the act or omission at issue occurred. 28 U.S.C. §1402(b).

Litigation under the FTCA is much the same as litigation in any other federal civil case. It should be kept in mind that there is no right to a jury trial. Therefore, unless a magistrate judge is assigned the pretrial task of handling discovery disputes, the judge who hears the motions and discovery disputes will also be the trier of fact.

VII.

DAMAGE ISSUES

A. Generally

If the plaintiff prevails, damages are measured by the law of the place where the negligent act or omission occurred, determined by applying the whole law of that jurisdiction. Richards v. United States, (1962) 369 U.S. 1, 6-7. Generally, damages under the FTCA are governed by state law. Since FTCA cases are tried to the court and not to a jury, the standard for appellate review of damage awards entered by district courts is the “clearly erroneous” standard. Rule 52(a), F.R.C.P.

The FTCA bars punitive damages from being awarded against the government. 28 U.S.C. §2674. The punitive damages prohibition has been construed to mean that income taxes must be subtracted from gross income and future economic losses must be reduced to present value. Trevino v. United States, (9th Cir. 1986) 804 F.2d 1512.

B. Collateral Source Rule

Issues relating to the collateral source rule frequently arise in FTCA actions. Shortly after enactment of the Federal Tort Claims Act, the Supreme Court in Brooks v. United States, (1949) 337 U.S. 49, 53-54, observed: “ we now see no indication that Congress meant the United States to pay twice for the same injury.”

The collateral source rule as articulated in Brooks has not been consistently followed by the lower courts. The district and circuit courts have sometimes ignored the limits on double recoveries enacted in the FTCA and have allowed what amounts to a double recovery against the United States. A long line of cases in which the United States was the defendant have held that Social Security insurance benefits, Civil Service retirement benefits, and Medicare payments for the cost of medical expenses even though they are paid by the United States, are each payments from a so-called “collateral source.” Therefore, tort judgments against the United States may not be reduced by the amount of these payments from the United States to the plaintiff.

Arguably, this permits a double recovery that, if challenged, may be difficult to justify. In general, when litigating against the government, expect the government to take the position that the claimant is not entitled to double payment for benefits provided from public funds.

C. Other Limitations on Damages

A growing number of states have enacted statutes limiting liability (e.g., the California recreational use statute, Civil Code §846) or imposing caps on the amount of non-economic damages that may be awarded. These statutes apply to bar or limit recoveries against the United States, since liability under the FTCA is analogous to private person liability. Hoffman v. United States, (8th Cir. 1985) 767 F.2d 1431 (California cap on non-economic damage awards applied to United States).

VIII.

AFTER THE JUDGMENT

If a plaintiff prevails, he is entitled to seek taxation of costs pursuant to 28 U.S.C. §1920 and Rule 54(d), F.R.C.P. Similarly, if the United States prevails, it is entitled to seek costs under these provisions.

Prejudgment interest may not be awarded against the United States. 28 U.S.C. §2674. Post-judgment interest may be awarded against the United States only when the United States appeals and the preconditions set forth in 31 U.S.C. §1304 are strictly met. Reminga v. United States, (6th Cir. 1982) 695 F.2d 1000.

Attorneys' fees are limited to no more than twenty percent of any administrative settlement prior to litigation and to no more than twenty-five percent of any judgment or settlement after suit is filed. 28 U.S.C. §2678.

After a settlement or judgment is final, the Justice Department must submit the settlement or judgment to the General Accounting Office (in Washington, D.C.) for payment. It typically takes from six to eight weeks from the date the settlement or judgment is sent to the General

Accounting Office until checks are received by the United States Attorney's Office or the Department of Justice Attorney handling a matter.

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