

ALERT

OCTOBER 24, 2011

SUBROGATION AND RECOVERY

News Concerning
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STATE IMMUNITY LAWS AND THE FTCA

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Introduction

Many states have enacted laws which provide forms of immunity to its state employees, such as firefighters and police officers. If you have a claim against the federal government under the Federal Tort Claims Act, the United States may assert that it's entitled to the same immunity as is afforded to its state counterparts. The U.S. Supreme Court and the U.S. Court of Appeals for the 9th Circuit precedent hold that this is not a valid defense.

The Extent to Which State Immunity Law Is Applicable in FTCA Actions

State governmental immunity statutes do not provide immunity to the United States for actions brought under the Federal Tort Claims Act (FTCA). The FTCA provides that the United States may be liable in tort if a private individual would have been liable under the laws of the state where the act or omission occurred. 28 U.S.C. § 1346(b) Many states have enacted laws that provide immunity for state government agencies and state employees. In *Stuart v. United States*, 23 F.3d 1483 (9th Cir. 1994), the 9th Circuit held that the federal government cannot rely on the immunity provided by state laws for state employees.

In *Stuart*, a border patrol agent's vehicle pursuit caused an automobile collision in California. Under California state law, peace officers are immune for civil damages resulting from a collision of a vehicle being operated by a criminal suspect who is being pursued by a peace officer, provided certain requirements are met. The United States argued that the border patrol agent should be entitled to the same immunity afforded a comparable state officer.

The 9th Circuit held that state-conferred immunity for local governments does not immunize the federal government. *Id.* at 1488. The *Stuart* court relied on earlier Ninth Circuit precedent

and U.S. Supreme Court precedent. *See Wright v. United States*, 719 F.2d 1032 (9th Cir. 1983 (holding that California state law providing immunity for state officials from malicious prosecution claims does not provide immunity to the United States under a FTCA claim for malicious prosecution); *United States v. Muniz*, 374 U.S. 150 (1963) (holding that federal prisoners could sue under the FTCA despite the fact that in some states jailers are immune from liability); *Indian Towing Co. v. United States*, 350 U.S. 61, (1955) (holding that under the FTCA the United States could be liable for the performance of activities private persons do not perform).

Just as the federal government cannot rely on state statutes for immunity, plaintiffs cannot rely on state government statutes as a basis for finding the federal government liable. The U.S. Supreme Court explained that the basis for liability must be that which is applied to *private* persons in the state. *United States v. Olson*, 546 U.S. 43 (2005).

Also, note that the federal government *can* rely on state laws providing immunity to *private* persons. *See Ewell v. United States*, 776 F.2d 246 (10th Cir. 1985) (holding that Utah state law providing that landowners had no duty to keep land safe for recreational users applied to federal government).

Conclusion

In conclusion, immunities afforded state, county, and municipal employees are not applicable to the federal government when sued under the FTCA. However, immunities created by state law which are available to private persons will immunize the federal government because it is liable only as a private individual under like circumstances.

To discuss any questions you may have regarding this Alert, or how it may apply to your particular circumstances, please contact Leslie A. Hulburt (lhulburt@cozen.com or 619-234-1700).

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