PRACTICE

The Federal Tort Claims Act: An Overview

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INTRODUCTION

The Federal Tort Claims Act (FTCA) is a comprehensive legislative scheme by which the United States has waived its sovereign immunity to allow civil suits for actions arising out of negligent acts of agents of the United States. The United States cannot 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*, 346 U.S. 15, 30-31 (1953). Therefore, a litigant wishing to sue the United States in tort must do so under the FTCA alone.

Only the United States may be sued under the FTCA. Other parties whom the claimant wishes to bring into the action may be sued as pendent parties under 28 U.S.C. § 1367, if the claims are related to the primary suit 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. Except for maritime torts, the FTCA, as amended, sets forth the terms and limitations on tort suits against the United States.

This presentation is not intended to be a complete statement of the law relating to the FTCA nor is it intended to be a guide to trying an aviation case against the United States. Rather, this presentation is an elementary statement of the important procedural and substantive provisions of the FTCA, with the emphasis on avoiding traps for the unwary.

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JURISDICTIONAL PRECONDITIONS TO SUIT

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*, 508 U.S. 106, 113 S.Ct. 1980 (1993); *Meridian Intern. Logistics, Inc. v. United States*, 939 F.2d 740 (9th Cir. 1991). 28 U.S.C. § 2675. The claim must include a sum certain 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). Filling out the form according to the instructions on the form should assure that all necessary information is provided. The staff attorneys for the applicable agencies or the United States Attorney's Office will provide SF 95's for the presentation of administrative claims.

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.) *McNeil v. United States*, *supra*; *Jerves v. United States*, 966 F.2d 517 (9th Cir. 1992). 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); *Douglas v. United States*, 658 F.2d 445, 449-450 (6th Cir. 1981).

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); *Allgeier v. United States*, 909 F.2d 869 (6th Cir. 1990); *Low v. United States*, 795 F.2d 466 (5th Cir. 1986); *O'Rourke v. Eastern Airlines*, 730 F.2d 842 (2d Cir. 1984); *Kielwein v. United States*, 540 F.2d 676 (4th Cir.), *cert. denied*, 429 U.S. 979 (1976).

Administrative claims are not required before filing counterclaims and cross-claims under Rule 13 of the Federal Rules of Civil Procedure nor when filing third-party actions under Rule 14 of the Federal Rules of Civil Procedure. 28 U.S.C. § 2675(a). Third-party claims must be true third-party claims. *Spawr v. United States*, 796 F.2d 279 (9th Cir. 1986); *West v. United States*, 592 F.2d 487 (8th Cir. 1979) (fourth-party claim). Suit must be pending in federal court in order for this provision to be applicable. *See, A.L.T. Corp. v. Small Business Admin.*, 801 F.2d 1451, 1454-62 (5th Cir. 1986).

Although the administrative claim requirement is inapplicable to true third-party actions, 28 U.S.C. § 2675, the administrative claim requirement applies with full force to free-standing suits

seeking indemnity or contribution. *Keene Corp. v. United States*, 700 F.2d 836 (2nd Cir. 1983); *Johns-Manville Sales Corp. v. United States*, 690 F.2d 7211 (9th Cir. 1982).

The requirement that a claimant must present an administrative claim and receive a denial or wait for six months to pass before filing suit only applies when suit is filed against the United States. The administrative claim requirements of 28 U.S.C. § 2675(a) and the time limitations of 28 U.S.C. § 2401(b) do not apply if a suit is commenced directly against a government employee for actions taken while in the scope of his (or her) office or employment. The Westfall legislation, passed in 1988, amended 28 U.S.C. § 2679 to allow for the substitution of the United States as a defendant in place of an individual employee sued for actions within the scope of his (or her) employment. Once the United States is substituted for the individual employee, if the suit is dismissed for failure to file an administrative claim, the claimant will have 60 days after dismissal of the action to present an administrative claim. Thereafter, the claim will be considered timely if it would have been timely if it had been presented on the date the underlying civil action was commenced. 28 U.S.C. § 2679(d)(5).

Generally, a hyper-technical interpretation of the administrative claim requirements is not required, but the reported decisions have consistently recognized that the government agency is entitled to notice of the negligent act giving rise to the claim and to a sum certain statement of damages alleged. See, *Wardsworth v. United States*, 721 F.2d 503 (5th Cir. 1983), cert. denied, 469 U.S. 818 (1984). But see, *Adams v. United States*, 615 F.2d 284 (5th Cir.), clarified, 622 F.2d 197 (1980) (notice of claim sufficient to permit an agency to investigate it along with a sum certain suffices to comply with the administrative claim presentation requirement); *Tidd v. United States*, 786 F.2d 1565 (11th Cir. 1986) (if a "claim" does not supply sufficient information to permit a reasonable investigation, it is not adequate to meet jurisdictional requirements); *Bembenesta v. United States*, 866 F.2d 493 (D.C. Cir. 1989) (prolix submission held to give insufficient notice to amount to presentment of medical malpractice claim). Not surprisingly, the Ninth Circuit has gone farther than the other circuits in permitting vague allegations to cover a broad variety of claims. See, *Avila v. Immigration & Naturalization Service*, 731 F.2d 616 (9th Cir. 1984); *Broudy v. United States*, 722 F.2d 566 (9th Cir. 1983).

If a derivative claim is intended to be presented, a separate, signed claim must be received. *Manko v. United States*, 830 F.2d 831 (8th Cir. 1987); *Rucker v. United States Department of Labor*, 798 F.2d 891 (6th Cir. 1986). Similarly, reference in a claim to injuries suffered by other persons does not suffice to amount to a claim on behalf of any person other than the signatory. *Montoya v. United States*, 841 F.2d 102 (5th Cir. 1988).

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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, 406 U.S. 797 (1972); Borquez v. United States, 773 F.2d 1050 (9th Cir. 1985). 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, 425 U.S. 807 (1976); Logue v. United States, 412 U.S. 521 (1973).

Even if government property is utilized, the United States is not liable for acts or omissions of its contractors. Borquez v. United States, 773 F.2d 1050 (9th Cir. 1985); Watson v. Marsh, 689 F.2d 604 (5th Cir. 1982). Moreover, retention of contractual rights to inspect and control contractor activities does not warrant a different conclusion. Brooks v. AR&S Enterprises, 622 F.2d 8 (1st Cir. 1980). See also, Gober v. United States, 778 F.2d 1552 (11th Cir. 1986) (rejecting failure to warn theory of liability). See also, Letnes v. United States, 820 F.2d 1517 (9th Cir. 1987) (contrasting "contractor" with "employee") and Brandes v. United States, 783 F.2d 895 (9th Cir. 1986) (defining "employee"); Leone v. United States, 910 F.2d 46, 49-50 (2nd Cir. 1990); cert. denied, 111 S.Ct. 1103 (1991).

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, 350 U.S. 61 (1955).Thomas v. Calavar Corp, 679 F.2d 416 (5th Cir. 1982)Pendley v. United States, 856 F.2d 699 (4th Cir. 1988) However, agency regulations do not create a gratuitous undertaking when the regulations are written for the purpose of protecting agency interests and disclaim an intention to assist others. Moody v. United States, 774 F.2d 150 (6th Cir. 1985), cert. denied, 107 S.Ct. 65 (1986).

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, 369 U.S. 1 (1962) (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, 592 F.2d 712 (3d Cir.), cert. denied, 441 U.S. 961 (1979); Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982), cert., denied, 462 U.S. 1118 (1983); Clemente v. United States, 766 F.2d 1358, 1363 (9th Cir. 1985); Pereira v. United States Postal Service, 964 F.2d 873, 876 (9th Cir. 1992).

The FTCA covers acts or omissions of employees of the Executive departments, Legislative Branch employees for non-legislative acts of the Congress, McNamara v. United States, 199

F.Supp. 879 (D.D.C. 1961), and Judicial Branch officers for non-judicial acts. United States v. Le Patourel, 571 F.2d 405 (8th Cir. 1978); 28 U.S.C. § 2671.

Employees of non-appropriated fund activities, such as armed forces flying clubs (aero clubs) and officers' clubs, have been held to have been employees of the government and, therefore, covered by the provisions of the FTCA. Walls v. United States, 832 F.2d 93, 94 n.2 (7th Cir. 1987); Woodside v. United States, 606 F.2d 134, 136 (6th Cir. 1979), cert. denied, 445 U.S. 904 (1980); United States v. Holcombe, 277 F.2d 143 (4th Cir. 1960). As previously mentioned, contractors are not within the definition of federal employee. 28 U.S.C. § 2671.

The provisions of the FTCA are exclusive. Even special "sue and be sued" jurisdiction enacted to cover specific agency activities does not permit suits sounding in tort (28 U.S.C. § 2679(a)). If a tort suit does not lie under the FTCA, the action is barred altogether. F.D.I.C. v. Meyer, _ U.S. _, 114 S.Ct. 996 (1994); Colonial Bank & Trust Co. v. American Bankshares Corp., 439 F.Supp. 797, 803 (E.D. Wisc. 1977); Safeway Portland Employees' Federal Credit Union v. FDIC, 506 F.2d 1213 (9th Cir. 1974). See also, FDIC v. Shinnick, 635 F.Supp. 983 (D. Minn. 1986) (FTCA applied to counterclaim).

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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, 500 F.2d 1059 (3d Cir. 1974) Smith v. United States, _U.S._, 113 S.Ct. 1178, 1182 (1993); Kosak v. United States, 465 U.S. 848, 104 S.Ct. 1519 (1984); United States v. Orleans, 425 U.S. 807, 813, 96 S.Ct. 1971, 1975 (1976); Dalehite v. United States, 346 U.S. 15, 31, 73 S.Ct. 956, 965 (1953).

Discretionary Function Exception

Among the exceptions to the FTCA most frequently applied are the "discretionary function" exception, 28 U.S.C. § 2680(a), and the exceptions for several specific kinds of torts, including intentional torts such as libel, slander, misrepresentation, deceit, and interference with contract rights. 28 U.S.C. § 2680(h)

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." This exception has probably been grist for the Judicial mill in more reported decisions than any other exception, especially since the VarigUnited States v. S.A. Empresa Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797 (1984) decision in 1984. It bars suits against the United States based on the discretionary actions of federal employees. The discretionary function exception is grounded in the constitutional principal of separation of powers. Tiffany v. United States, 931 F.2d 271, 276-279 (4th Cir. 1991); Canadian Transport Co. v. United States, 663 F.2d 1081 (D.C. Cir. 1980). 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, 346 U.S. 15 (1953).

The Supreme Court reaffirmed the vitality of the discretionary function exception in Varig, in which the Supreme Court ruled that the discretionary function exception barred an FTCA suit for negligent certification of an aircraft.

In Berkovitz v. United States, 486 U.S. 531, 108 S.Ct. 1959 (1988), the Supreme Court refined the Varig test's focus on "the nature of the conduct" and the Dalehite focus on policy. The Berkovitz 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 . . . ." 108 S.Ct. at 1959, quoting Varig, 467 U.S. at 814. Once it is established that the decision is of the kind that brings 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." 108 S.Ct. at 1959. The "permissible exercise of policy judgment" is likely to include any action or decision based on "considerations of public policy." 108 S.Ct. at 1959.

In Boyle v. United Technologies Corp., 487 U.S. 500, 108 S.Ct. 2510 (1988), the Supreme Court reaffirmed its earlier holdings in both Dalehite and Varig Airlines concerning the broad scope of the discretionary function exception. Boyle, at 517, expansively construed the discretionary function exception to bar a tort suit against a government contractor (Sikorsky Division of United Technologies) for negligent design of a helicopter escape hatch. The court held "selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function since [i]t often involves . . . judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness." Boyle v. United Technologies Corp., 487 U.S. at 511. Boyle illustrates the broad range of policy considerations which may be used to justify the application of the discretionary function exception.

In Boyle, as in Berkovitz, the Court pointed out that if an agency fails "to act in accord with a specific mandatory directive, the discretionary function exception does not apply." Berkovitz, 108 S.Ct. at 1963. 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.

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. "Investigative or law enforcement officer" is defined to be any officer of the United States "who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."

Suits arising from all kinds of misrepresentations are barred, whether grounded on intentional or negligent misrepresentations. This exception probably was enacted in recognition, at least in part, that disputes over what was said, or not said, by a government official are legion. In the circumstances, it is considered better to protect the public fisc than to subject the government to liability for representations allegedly made by employees, but not amounting to contracts on behalf of the government. United States v. Neustadt, 366 U.S. 696 (1961).

The Supreme Court has permitted pleadings seeking to evade the misrepresentation exception included in 28 U.S.C. § 2680(h) to stand where the pleadings allege an independent tort. Block v. Neal, 460 U.S. 289 (1983). Cf., Baroni v. United States, 662 F.2d 287 (5th Cir. 1981), cert. denied, 460 U.S. 1036 (1983); Krejci v. U.S. Army Materiel Development Readiness Command, 733 F.2d 1278 (7th Cir.), cert. denied, 469 U.S. 918 (1984). Block does not countenance an unlimited range of artful pleading. Where a misrepresentation is critical to the claim, it is barred. See, e.g., Carolinas Cotton Growers Assn. v. United States, 785 F.2d 1195 (4th Cir. 1986); Chen v. United States, 674 F.Supp. 1078 (S.D.N.Y. 1987), affirmed without reaching this issue, 854 F.2d 622 (2d Cir. 1988).

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. See, e.g. Quinones v. United States, 492 F.2d 1269 (3d Cir. 1974); O'Donnell v. United States, 891 F.2d 1079 (3rd Cir. 1989) (holding that Privacy Act remedy was not exclusive); Black v. Sheraton Corp. of America, 564 F.2d 531 (D.C. Cir. 1977). For example, in Birnbaum v. United States, 588 F.2d 319 (2d Cir. 1978), a claim that protected rights were invaded by a mail-opening program was held not actionable under the FTCA to the extent that it was based on a constitutional theory, but viable as to the extent that it was grounded upon state tort principles.

A number of other exceptions to the FTCA are included in Section 2680, including exceptions for matters arising out of the assessment or collection of any tax or customs duty or the detention of goods or merchandise (2680(c)), -- construed broadly in Kosak v. United States, 465 U.S. 848 (1984) -- admiralty claims (2680(d)), claims for damages caused by the fiscal operations of the Treasury or by regulation of the monetary system (), 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)).

Although not barred by a legislative exception to the FTCA, suits by members of the military or naval service arising out of acts incident to service are barred, whether the suits be brought directly by the injured individuals or by their heirs. Feres v. United States, 340 U.S. 135 (1950); United States v. Johnson, 107 S.Ct. 2063 (1987); United States v. Stanley, 107 S. Ct. 3054 (1984); United States v. Shearer, 473 U.S. 52 (1985). Nor may such suits be brought indirectly in the form of third-party claims. Lockheed Aircraft Corp. v. United States, 460 U.S. 190

(1983)5 U.S.C. §§ 8101., et seq. Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977). An exhaustive exposition on the Feres doctrine is beyond the scope of this paper. However, within the context of this presentation, you should be aware that no claim on behalf of an individual who was injured while on a military aircraft and on current (not retired) military status has ever succeeded.

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PRACTICE AND PROCEDURE

Since the complaint is filed in federal court, notice pleading is the rule. See, Rule 8(a), F.R.Civ.P. However, adequate allegations of jurisdiction are required. An attorney filing suit under the FTCA 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).

While private litigants must answer complaints within 20 days, the government is allowed 60 days within which to answer a complaint. Rule 12(a), F.R.Civ.P. Service of the summons and complaint upon the United States is governed by Rule 4(i).

Practice under the FTCA is much the same as practice 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.

Discovery from the government can be more limited than that from other parties. There are a number of well-recognized privileges incorporated in Rule 501 of the Federal Rules of Evidence. Among these are the privileges normally encompassed under the rubric of "executive privilege" but now more commonly specifically referred to as national security, deliberative process, etc., privileges. Similarly, depositions of high-level government officials are not normally permitted.

Rule 803(8) of the Federal Rules of Evidence is an exception to the hearsay rule for records, including data compilations, of agencies setting forth the activities of the office or agency or matters observed pursuant to duty imposed by law as to which matters it has a duty to report. In civil cases, this includes factual findings resulting from an investigation made pursuant to authority granted by law, absent evidence of lack of trustworthiness. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 109 S.Ct. 439 (1988). This exception to the "hearsay rule" is separate and in addition to the exception for records of regularly conducted activity, commonly known as the business records exception. See, Rule 803(6), F.R.E.

Amendments to the FTCA, commonly known as the "Westfall" legislation, create an exclusive remedy under the FTCA for the common law, but not constitutionally based, torts of federal

employees. If the employee was acting within the scope of his employment, upon proper certification, the United States is to be substituted as defendant. 28 U.S.C. § 2679(d)(2). Thereafter, the suit shall proceed against the United States "subject to the limitations and exceptions applicable to those [FTCA] actions." 28 U.S.C. § 2679(d)(4).

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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.

This statute of limitations was authoritatively construed in United States v. Kubrick, 444 U.S. 111 (1979). In Kubrick, plaintiff sued for damages allegedly resulting from medical malpractice on the part of government personnel. He recovered a judgment from the district court, which was affirmed on appeal by the Third Circuit, after he established that the injury caused by government medical treatment was not known to have resulted from lack of due care during treatment until shortly before the claim was presented.

The Supreme Court reversed the judgment for lack of subject matter jurisdiction in view of the limitations statute, 28 U.S.C. § 2401(b). In doing so, the Supreme Court reiterated that the general rule under the FTCA "has been that a tort claim accrues at the time of the plaintiff's injury" but might be deemed to extend in medical malpractice cases "until the plaintiff has discovered both his injury and its cause." Kubrick, 444 U.S. at 120. However, even in medical malpractice cases, the Supreme Court was unwilling to extend the statutory period beyond this limit. In broad language, the Supreme Court instructed that if a plaintiff: fails to bring suit because he is incompetently or mistakenly told that he does not have a case, we discern no sound reason for visiting the consequences of such error on the defendant by delaying the accrual of the claim until the plaintiff is otherwise informed or himself determines to bring suit, even though more than two years have passed from the plaintiff's discovery of the relevant facts about injury. [444 U.S. at 124.]

Some courts have shown more than a little reluctance to apply Kubrick. See, e.g., Hohri v. United States, 782 F.2d 227 (D.C. Cir. 1986), rehearing en banc denied, 793 F.2d 304 (D.C. Cir. 1986), vacated, 107 S.Ct. 2246 (1987), on remand, 847 F.2d 279 (Fed. Cir. 1988), cert. denied, 109 S.Ct. 307 (1988); Waits v. United States, 611 F.2d 550 (5th Cir. 1980). Other courts have adhered to Kubrick's holdings both in form and in substance. See, e.g., Herrera-Diaz v. United States, 845 F.2d 1534 (9th Cir. 1988); Sexton v. United States, 832 F.2d 629 (D.C. Cir. 1987); Barren v. United States, 839 F.2d 987 (3rd Cir. 1988), cert. denied, 109 S.Ct. 79 (1988), Gustavson v. United States, 655 F.2d 1034 (l0th Cir. 1981); Dyniewicz v. United States,

742 F.2d 484 (9th Cir. 1984); Fernandez v. United States, 673 F.2d 269 (9th Cir. 1982); Zeleznik v. United States, 770 F.2d 20 (3d Cir. 1985), cert. denied, 1065 S.Ct. 1513 (1986).

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, 399 F.2d 672 (9th Cir. 1968) (FTCA action filed by minor Indian was not tolled); Casias v. United States, 532 F.2d 1339, 1342 (l0th Cir. 1976) (insanity does not toll the statute of limitations); Smith v. United States, 588 F.2d 1209 (8th Cir. 1978) (minority does not toll limitations). Cf., Clifford by Clifford v. United States, 738 F.2d 977 (8th Cir. 1984) (a claim does not accrue until guardian appointed for adult incompetent); Washington v. United States, 769 F.2d 1436 (9th Cir. 1985) (similar) [distinguished from minors, Landreth v. United States, 850 F.2d 532 (8th Cir. 1988)]; McDonald v. United States, 843 F.2d 247 (6th Cir. 1988) (continuing treatment rule applied).

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DAMAGE ISSUES

Generally

There is no right to a jury trial in an FTCA action. 28 U.S.C. § 2402. 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, 369 U.S. 1, 6-7 (1962). 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.Civ.P.

The Federal Tort Claims Act, however, prohibits award of punitive damages. 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, 804 F.2d 1512 (9th Cir. 1986); Shaw v. United States, 741 F.2d 1202 (9th Cir. 1984).

A discount factor must be applied in FTCA litigation as a matter of federal law. See, e.g., Colleen v. United States, 843 F.2d 329 (9th Cir. 1987); Hollinger v. United States, 651 F.2d 636, 641 (9th Cir. 1981); United States v. English, 521 F.2d 63, 70 (9th Cir. 1975); O'Connor v. United States, 269 F.2d 578, 585 (2d Cir. 1959). But see, Barnes v. United States, 685 F.2d 66 (3d Cir. 1982) ("total offset" method not punitive); DeLucca v. United States, 670 F.2d 843 (9th Cir. 1982) (addition to award to compensate for taxes on income that would be earned by investing the award).

Failure to deduct income taxes from the income calculation permits an excessive, punitive recovery in some cases. Felder v. United States, 543 F.2d 657, 670 (9th Cir. 1976); Cf., Kalavity v. United States, 584 F.2d 809 (6th Cir. 1978) (income tax need not be taken into account for persons whose incomes are in the lower range); Harden v. United States, 688 F.2d 1025 (5th Cir.

1982); Kalavity-style limitation of income tax deduction rejected). Contra, Manko v. United States, 830 F.2d 831 (8th Cir. 1987).

The FTCA bars punitive damages from being awarded against the government. 28 U.S.C.§ 2674 At one time, this bar was interpreted expansively in favor of the government and was held to bar any form of damages that was not truly compensatory in nature. See, e.g. D'Ambra v. United States, 481 F.2d 14 (1st Cir.), cert. denied, 414 U.S. 1075 (1973); (Rhode Island Wrongful Death Statute); Massachusetts Bonding & Ins. Co. v. United States, 352 U.S. 128 (1956); (plaintiff obtained compensatory damages notwithstanding whether state wrongful-death statute utilized punitive standard). Flannery by Flannery v. United States, 718 F.2d 108 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984).

In Molzof v. United States, 502 U.S. 301, 112 S.Ct. 711 (1992), the Supreme Court liberalized FTCA damage law relating to punitive damages. In Molzof the Supreme Court took a narrower view of punitive damages and held that punitive damages should be interpreted according to the traditional, common law meaning and not to mean damages that were not purely compensatory. In Molzof the question was whether or not damages for future medical expenses could be awarded when the injured party was receiving medical care from the Veteran's Administration and whether or not the court could award damages for "loss of enjoyment of life." The District Court and the Court of Appeals held that damages for future medical expenses, when the plaintiff was not paying future medical expenses, and for "loss of enjoyment of life" were not compensatory in nature and, therefore, punitive within the meaning of 28 U.S.C. § 2674. The Supreme Court did not agree with this interpretation and held that the punitive damages prohibition of Section 2674 barred only damages that are punitive in nature and intended to punish the defendant and not damages that were not, strictly speaking, not compensatory.

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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 observed:

[w]e now see no indication that Congress meant the United States to pay twice for the same injury. Certain elements of tort damages may be the equivalent of elements taken into account in providing disability payments. It would seem incongruous, at first glance, if the United States should have to pay in tort for hospital expenses it had already paid, for example.

Brooks v. United States, 337 U.S. 49, 53-54 (1949).

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 commented upon by the Supreme Court in Brooks 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 [United States v. Hayashi, 282 F.2d 599 (9th Cir. 1960); Smith v. United States, 587 F.2d 1013

(3d Cir. 1978)], Civil Service retirement benefits [United States v. Price, 288 F.2d 448 (4th Cir. 1961)], and Medicare payments for the cost of medical expenses, [Siverson v. United States, 710 F.2d 557 (9th Cir. 1983); Titchnell v. United States, 681 F.2d 165 (3d Cir. 1982) (cf., Overton v. United States, 619 F.2d 1299 (8th Cir. 1980)], 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. But see, Steckler v. United States, 549 F.2d 1372 (10th Cir. 1977); (the proportion of Social Security disability payments attributable to payments from federal revenues should be offset against an FTCA award for economic loss due to the disability); Berg v. United States, 806 F.2d 978 (10th Cir. 1986) (applying collateral source rule to Medicare payments and questioning Steckler).

As a result, a plaintiff may receive a tort judgment that includes amounts earmarked to compensate him for these expenses, even though the United States has actually paid benefits to the plaintiff in the past or is bound by law to do so in the future. Arguably, this permits a double recovery that, if challenged, may be difficult to justify.

The Restatement states the rationale for the collateral source rule as:

[t]o the extent that the defendant is required to pay the total amount there may be a double compensation for a part of the plaintiff's injury. But it is the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor. . . . The law does not differentiate between the nature of the benefits, so long as they did not come from the defendant or a person acting for him.

Restatement (2d) Torts, § 920A (comment b). Thus, it must be recognized that the collateral source rule sanctions a double recovery under certain circumstances. Invocation of the collateral source rule permits "the plaintiff to exceed compensatory limits in the interest of ensuring an impact upon the defendant." Note, v. "Unreason In The Law Of Damages: The Collateral Source Rule," 77 Harvard L.Rev. 741, 742 (1964). Automatic incantation of the collateral source rule has been deemed "the most dubious of practices" (Id., at 753).

Similarly, at least one appellate court has stated that it perceives "no compelling reason for providing the injured party with double recovery . . . and we are not in the business of redistributing the wealth beyond the goal of making the victim . . . whole." EEOC v. Enterprise Assn. Steamfitters, 542 F.2d 579, 592 (2d Cir. 1976), cert. denied, 430 U.S. 911 (1977). 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.

Unlike most other benefits paid to injured FTCA claimants, veterans' disability benefits paid pursuant to 38 U.S.C. § 310 may be deducted from damages prior to entry of judgment. Both past and future non-service-connected disability payments, paid on account of the same injury involved in an FTCA action, may be deductible from any award made against the United States. United States v. Gray, 199 F.2d 239 (10th Cir. 1952); United States v. Brooks, 176 F.2d 482 (4th Cir. 1949) (on remand from the Supreme Court). See also, Swanson v. United States, 557 F.Supp. 1041 (D.Ida. 1983). In contrast, future benefits to be paid under 38 U.S.C. § 351,

applicable to injuries received as a result of medical treatment, cannot be deducted. By the terms of the statute, the benefits are suspended until the judgment is recouped. If the benefits have been paid, the judgment should be reduced by past payments. Kubrick v. United States, 581 F.2d 1092 (3d Cir. 1978), reversed on other grounds, 444 U.S. 111 (1979).

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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. Proud v. United States, 723 F.2d 705 (9th Cir.), cert. denied, 467 U.S. 1252 (1984); Hoffman v. United States, 767 F.2d 1431 (8th Cir. 1985) (California cap on non-economic damage awards applied to United States); Taylor v. United States, 821 F.2d 1428 (9th Cir. 1987) (California cap on non-economic damage awards applied to United States); Lucas v. United States, 811 F.2d 270 (5th Cir. 1987) (Texas cap on non-economic damages applied to United States upheld against federal constitutional challenge and state constitutional issues certified to state court); Scheib v. Florida San. and Ben. Assn., 759 F.2d 859 (11th Cir. 1985) (Florida statute abrogating collateral source rule applied to United States).

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.Civ.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, 695 F.2d 1000 (6th Cir. 1982), cert. denied, 460 U.S. 1086 (1983); Rooney v. United States, 694 F.2d 582 (9th Cir. 1982).

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.

APPENDIX A

THE FEDERAL TORT CLAIMS ACT-APPLICABLE STATUTES

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV--JURISDICTION AND VENUE
CHAPTER 85--DISTRICT COURTS; JURISDICTION

Current through P. L. 103-354, approved 10-13-94

Sec. 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, 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.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

Sec. 1402. United States as defendant

(a) Any civil action in a district court against the United States under subsection (a) of section 1346 of this title may be prosecuted only:

(1) Except as provided in paragraph (2), in the judicial district where the plaintiff resides;

(2) In the case of a civil action by a corporation under paragraph (1) of subsection (a) of section 1346, in the judicial district in which is located the principal place of business or principal office or agency of the corporation; or if it has no principal place of business or principal office or agency in any judicial district (A) in the judicial district in which is located the office to which was made the return of the tax in respect of which the claim is made, or (B) if no return was made, in the judicial district in which lies the District of Columbia. Notwithstanding the foregoing provisions of this paragraph a district court, for the convenience of the parties and witnesses, in the interest of justice, may transfer any such action to any other district or division.

(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

Sec. 2401. Time for commencing action against United States

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) 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 within 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.

Sec. 267 1. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

Sec. 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, 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: Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

Sec. 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee
of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

Sec. 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six

months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

Sec. 2676. Judgment as bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

Sec. 2678. Attorney fees; penalty

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

Sec. 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government–

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) 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, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) 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, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the

employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if--

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

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