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FEDERAL GOVERNMENT LIABILITY AND TORT CLAIMS

Sovereign Immunity Generally

Sovereign immunity refers to a government's immunity from being sued by its citizens in its own courts without its consent. It can trace its roots as far back into the English common law as the 13th Century. Underlying sovereign immunity is the concept that "the king can do no wrong," because his word was the law. The American legal system is predicated on an entire body of laws not found in any books – English Common Law. Sovereign immunity found its way into American law books via the common law. Long before the Federal Tort Claims Acts was passed in 1946, the only way to sue the federal or state government was to get its consent, something rarely given. For many years after the ratification of the U.S. Constitution there were no exceptions to the immunity of the federal government. The U.S. Constitution declared that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. Art. I, § 9. The only way to sue the federal government was by private bill. Congress could then pass that special bill and the action could proceed in court. Congress attempted to pass on this claims processing work to the courts, but the U.S. Supreme Court declared that this violated the separation of powers. *Hayburns Case*, 2 U.S. 409 (1792). As the federal government grew uncontrollably, the sheer number of claims made this process unworkable. The process was changed in 1855, when the Court of Claims was established.

For many years, the Court of Claims had the power to issue only advisory opinions and would only investigate claims against the federal government and recommend action. This made the Court of Claims an Article I court with the protection afforded the judges of an Article III court. In 1861, President Abraham Lincoln proposed giving the court the power to render final judgments and in 1863 Congress gave the court the ability to render final judgments and gave the U.S. Supreme Court jurisdiction to review Court of Claims judgments. In 1887, the Tucker Act was passed. It allowed citizens to sue the federal government for claims based on the U.S. Constitution and gave federal circuit courts concurrent jurisdiction with the Court of Claims for amounts up to $10,000. Also, in 1887, the Little Tucker Act was passed, giving federal district courts original jurisdiction, concurrent with the Court of Claims over any civil action against the U.S. 28 U.S.C. § 1346(a)(2).

In 1911, Congress transferred this jurisdiction to the federal district courts. In 1992, the Court of Claims was renamed the Court of Federal Claims and consisted of sixteen judges appointed for terms of fifteen years. Appeals from the Court of Federal Claims are heard by the U.S. Court of Appeals for the Federal Circuit. It hears only (1) Fifth Amendment takings claims, (2) claims for tax refunds, and (3) suits against the government based on contract disputes. 28 U.S.C. § 1491. It does not have jurisdiction to hear tort claims against the U.S. because those claims must be brought under the Federal Tort Claims Act.

Federal Tort Claims Act

The Federal Tort Claims Act (FTCA) is a limited waiver of the sovereign immunity of the U.S. It was passed in 1946 in order to make the federal government liable for certain torts and actions of its employees in the same way a private individual might be liable, although with many exceptions. Title IV, 60 Stat. 812, "28 U.S.C. Pt. VI Ch. 171", 28 U.S.C. §§ 1346(b), 2671-2680. It allows recovery *"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."* It is strictly construed in favor of the federal government and all ambiguities are decided in favor of the government. The FTCA operates vicariously – if a government employee commits a tort in the course of his or her employment, the federal government, not the employee, becomes the defendant. All damages are paid by the government, not the employee. As mentioned above, the federal district courts have exclusive jurisdiction over FTCA actions.

The FTCA relies on substantive tort law of the state in which the claim is filed. *Molzof v. U.S.,* 502 U.S. 301 (1992). Therefore, if a particular action is not recognized in that particular state, the plaintiff cannot sue. *Midwest Knitting Mills, Inc. v. U.S.,* 950 F.2d 1295 (7th Cir. 1991). The extent of the United States' liability under the Act is determined by state law, except that punitive damages are not allowed. 28 U.S.C. § 2674; *Molzof,* supra*.* The FTCA is the exclusive remedy in any civil case resulting from actions committed by a federal employee in the course and scope of employment. If the employee is sued in state court rather than the U.S., the Attorney General will have the case removed to a federal court, once it has been certified that the employee was acting within the scope of his or her employment.

Process for Filing Demand and Lawsuit

In order to sue the federal government, you must first file an *administrative claim* prior to filing suit. This claim must give the governmental agency enough notice of its nature and basis so that it can begin its own investigation and evaluation, and it must demand payment for a "sum certain." The administrative claim must be filed within two (2) years of the injury. 28 U.S.C. § 2401(b). Tort claims against the U.S. are forever barred unless they are first presented in writing to the appropriate federal agency within two (2) years of accrual of the cause of action, and then brought in court within six (6) months following denial by that agency. 28 U.S.C.A. § 2401(b); *Severtson v. U.S.*, 806 F. Supp. 97 (E.D. La. 1992). Failure to file an administrative claim means any lawsuit will be dismissed for lack of subject matter jurisdiction. After a plaintiff files an administrative claim, the government must deny the claim *in writing* before suit can be filed. If the government does not take action on the claim within six (6) months, it will be considered to be denied and then suit can be filed. 28 U.S.C. § 2675(a). After the claim is denied (either by direct denial or inaction), the plaintiff has six (6) months to file suit. 28 U.S.C. § 2401(b).

Sufficient *notice* must be given in the claim. It must be specific enough to make the government aware of the action, so it can prepare to defend itself. The claim is not required to provide more than the minimal details of the facts involved in the incident in order to give the government sufficient notice. Standard Form 95 is frequently used to present claims against the U.S. under the FTCA. It can be found **HERE**. Standard Form 95 is not required to present a claim under the FTCA, but it is a convenient format for supplying the information necessary to bring an FTCA claim and is the preferred method for doing so.

There is no right to a jury trial in actions brought under the federal statute, even if one would have existed in a suit against the employee. 28 U.S.C. § 2402. Also, by forcing the injured party to bring the action against the federal government instead of the individual federal employee, a two (2) year statute of limitations applies no matter what the statute of limitations may be under state law. The FTCA's two (2) year statute of limitations will apply even to allow a claim which would be time-barred under state law.

Damages

The FTCA allows recovery "*for injury or loss of property, or personal injury or death….*" 28 U.S.C. § 1364(b)(1). Compensatory damages are the only damages recoverable. Injunctions, attorneys' fees, and/or punitive damages are expressly forbidden. 28 U.S.C. § 2674; *Joe v. U.S.*, 772 F.2d 1535 (11th Cir. 1985). Attorneys' fees claimed by attorneys for successful plaintiffs are limited to 25%. 28 U.S.C. § 2678. Unlike the Tort Claims Acts of many states, the FTCA does not contain a damages cap. The amount recoverable is unlimited, other than limitations a private party would be limited under the relevant state law. Therefore, the U.S. is able to take advantage of any damage limitations or tort reform measures in the state in which the suit is pending. *Carter v. U.S.,* 982 F.2d 1141 (7th Cir. 1992).

Exceptions to FTCA

While the FTCA waives immunity of the federal government, it does not waive all immunity for all actions. There are major exceptions set forth in the statute 28 U.S.C. § 2680.

Product Liability Claims. Products liability claims are not specifically addressed in the FTCA. However, cases that have dealt with questions of federal government liability for defective products generally dispose of such claims on a government contractor or discretionary function grounds. In one case against the federal government involving exposure to toxic chemicals by an infant, the claims against the government were barred under either the independent contractor exception or discretionary function exception. *Goewey v. U.S.,* 886 F. Supp. 1268 (S.C. 1995). Strict liability for ultra hazardous activities is also not allowed against the federal government under the FTCA. *Laird v. Nelms*, 406 U.S. 797 (1972).

Discretionary Acts. This is the broadest and most contentious of the FTCA's exceptions. As is the case with most of the state Tort Claims Acts and state case law involving claims against states, municipalities, and local governments, the most significant exception to liability under the FTCA is the "discretionary function" exception. Section 2680(a) precludes recovery from the government for:

> *"[A]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or 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."*

This is the discretionary-function exception and it is the most litigated of all exceptions to the FTCA. The federal government retains immunity for the *discretionary acts* of government employees. A "discretionary function" is an act involving an exercise of personal judgment. The basis for the discretionary function exception to the FTCA is the legislative branch's desire to prevent judicial second-guessing through tort actions of legislative and administrative decisions grounded in social, economic, and political policy. The discretionary function exception appears to be, in some respects, an affirmative defense that can arise to an absolute defense and allow the federal court to dismiss claims. This defense to liability arises when the act in question requires the exercise of judgment in carrying out official duties. It applies unless a plaintiff can show that a reasonable person in the official's position would have known that the action was illegal or beyond the scope of that official's legal authority. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

While the plaintiff has the initial burden of proving subject matter jurisdiction in a case brought pursuant to the FTCA, most federal courts have determined that the government has the burden of proving that the discretionary function exception applies. The term "discretionary function" means a function or duty that necessarily requires the exercise of reason and adoption of a means to an end, discretion as to how, when, or where an action shall be done, and the course to be pursued in the attainment of congressional programs. *Fahey v. U.S.*, 153 F. Supp. 878 (S.D. N.Y. 1957). A rule of thumb in framing an effective response to a discretionary function defense is to tie the government employee's negligent acts to a statute, rule, policy, or regulation. Whether the performance of an act is discretionary under the discretionary function exception depends on whether mandatory regulations require a specific course of conduct and whether the government's decision is of the type that normally involves considerations of public policy.

The U.S. Supreme Court has developed a two-step test to determine whether a particular government action constitutes a discretionary action. In *Berkovitz v. U.S.*, 486 U.S. 531 (1988), affirmed in *U.S. v. Gaubert*, 499 U.S. 315 (1991), the Court noted that a trial court must ascertain the precise governmental conduct at issue and consider whether that conduct was "discretionary," meaning whether it was "a matter of judgment or choice for the acting employee." If a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow, and the employee follows it, the action is not discretionary. In many cases the issue becomes whether the act in question was controlled by a "shall" versus a "may." If the act is governed by a "shall", the employee has no rightful option but to adhere to the law. If it is determined that the employee's actions were discretionary, the second element is whether the discretion requires the exercise of judgment based on considerations of public policy. The subjective intent of the employee in exercising the discretion conferred by statute or regulation is not the issue. Rather, the court looks at the nature of the actions taken and on whether they are susceptible to policy analysis. The challenged action must be based on considerations of social, economic, or political policy – the type of judgments the exception was intended to protect. The second prong is met if the actions were "susceptible to policy analysis," regardless of whether the government employee actually made a policy determination. This second prong gives judges considerable leeway, and is frequently used to reflect and inject political preferences. If both elements of the *Berkovitz-Gaubert* test are met, the discretionary function exception to the waiver of sovereign immunity applies and the government may not be sued.

Ministerial Acts. Immunity from tort liability does not apply if the action was mandated by law or regulation and the employee had no choice or discretion in how to undertake the actions. Ministerial acts are those that do not require an official's discretion because they follow a predetermined plan and cannot be changed, such as following a health department checklist regulation, or they do not involve any special expertise, such as operating a motor vehicle. Similarly, if the government builds and operates something, then it has a ministerial duty to maintain it, and will be liable for failing to do so. *Berkovitz* is an important case on the discretionary function applied to the FTCA and contrasts with *U.S. v. Varig Airlines*, 467 U.S. 797 (1984), There, a polio vaccine taken by plaintiff's infant son resulted in the child contracting the disease and becoming paralyzed as a result. A unanimous Supreme Court allowed the plaintiffs to recover under the FTCA when the federal government failed to follow its own regulations for approving the polio vaccine. The determination of how to test the polio vaccine was a discretionary function because it involved an element of choice or judgment on the employee's part. For this, the government could not be held liable under the FTCA. Once a regulation was made on how to test the vaccine, employee discretion was taken away, and the function became ministerial. Therefore, immunity did not apply because the government has a duty to follow its own regulations. Because the discretionary exception is meant to shield the government from liability for actions that require judgment according to public policy, the government was not liable in *Varig,* but was liable in *Berkovitz*. The regulatory scheme in *Varig* gave the agency broad powers to inspect aircraft in a manner it deemed best with the resources the agency possessed. The employee in *Berkovitz*, however, had no discretion to approve a bad batch of polio vaccine.

Examples of Discretionary Acts. The allocation of federal funds is a core governmental function that the discretionary function should protect. Negligence in deciding which is discretionary in nature is only an abuse of discretion, but once that decision has been made, any further negligence in acting upon it is an actionable tort giving rise to a cause of action against the U.S. An important difference between discretionary and proprietary/ministerial actions is that the government has broad latitude to use cost benefit analysis for the former, but not for the latter. For example, if highway design is governmental, the state might choose to not provide guard rails because their cost outweighs the savings in accident prevention. If this is a proprietary function, the standard will be set by the reasonable highway design, which might include guardrails despite their costs. The government will nearly always be immune for its actions so long as it has not enacted regulations that completely eliminate the discretion of its employees.

Examples of Ministerial Acts. Examples of ministerial or proprietary functions of government include owning and renting out real property, in which case the government is wearing its landlord hat; providing medical or psychiatric care, in which case the government wears a physician hat; owning and operating a school, in which case it wears a parent hat. Also, proprietary would be operating an electric utility. If a government escalator malfunctions, there is no statutory or regulatory law specifically governing how the government should respond in that situation. Therefore, it is discretionary and immune. A prime example of a ministerial act which is *not* immune and for which the government is liable is "negligence in the operation of motor vehicles. *U.S. v. Gaubert,* 499 U.S. 315 (1991). Although driving requires the constant exercise of discretion, the official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy.

Intentional Acts

The Federal Tort Claims Act provides exceptions for certain intentional torts from its general waiver of sovereign immunity. 28 U.S.C. § 2680. One of these exceptions is *"any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights."* 28 U.S.C. § 2680(h). With regard to intentional acts, § 1983 actions are brought against state officials to remedy the violation of one's constitutional rights (constitutional torts). Since these violations are not subject to Tort Claims Acts, vicarious liability does not apply, and officials can be held personally liable. The intentional tort exception is simply inapplicable to torts that fall outside the scope of § 1346(b)'s general waiver. There is no exception in § 2680 which disallows a claim for the infliction of emotional distress by government agents. Claims against the government for intentional infliction of emotional distress are not excepted from the FTCA. *Sheehan v. U.S.,* 896 F.2d 1168 (9th Cir. 1990). Nor has such an exception been read into the statute. The Supreme Court has taken a very strict approach to the reading of § 2680. It has held that *"[t]here is no justification for this Court to read exemptions into the Act beyond those provided by Congress." Rayonier, Inc. v. U.S.,* 352 U.S. 315 (1957).

Claims based on intentional actions that are excluded from the FTCA may be brought as *Bivens* actions, if they rise to the level of constitutional violations (constitutional torts). A *Bivens* action is a claim against federal officials, sued in their individual capacities, for a violation of a person's constitutional rights. It comes from Justice Brennan's opinion in *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971). *Bivens* established that the victims of a constitutional violation by a federal agent may have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. To state a claim under *Bivens*, a plaintiff must allege that he was deprived of a constitutional right by a federal agent acting under color of federal authority. A *Bivens* action is the federal counterpart of a civil rights action brought under 42 U.S.C. § 1983.

Defenses to Bivens and § 1983 Claims

Allowing liability claims against state and federal employees may be necessary to protect against arbitrary actions against individuals, but they can paralyze government actions if they make governmental employees fearful of acting. To limit this threat, state and federal law recognizes two immunity-based defenses to *Bivens* and § 1983 claims. Absolute immunity is not available to most officials. Unlike qualified immunity, the nature of the act is not as important as the position of the official. Generally, only judges, prosecutors, legislators, and the highest executive officials of all governments are absolutely immune from liability when acting within their authority. Medical peer review participants may also receive absolute immunity. *Ostrzenski v. Seigel,* 177 F.3d 245 (4th Cir. 1999). Absolute immunity only applies to acts committed within the scope of the official's duties. Usually, this will not include acts that are committed by the official with malice or corrupt motives. Qualified immunity is a judicially created affirmative defense which protects public officials from being tried for violations of constitutional rights. This defense to liability for constitutional claims operates in a similar manner as the discretionary function exception to tort liability. Qualified immunity applies to federal, state, and local officials equally. *Butz v. Economou*, 438 U.S. 478 (1978). This immunity is designed to be immunity from suit, not merely from a finding of liability. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). The distinction is important because qualified immunity can be invoked, and the lawsuit dismissed on summary judgment without the suit going through pretrial procedure and discovery.

Subrogation Under the FTCA

An insured and its subrogated insurer may both proceed against the U.S. government under the FTCA. *U.S. v. Aetna Casualty & Surety Co.,* 338 U.S. 366 (1949). Although an insurer that is subrogated to the rights of its insured may maintain an action under the FTCA, the insurer's claims against the government are limited to only such rights as the insured possesses. *Kodar, LLC v. U.S. (F.A.A.)*, 879 F. Supp.2d 218 (D.R.I. 2012). The pleadings should be made to reveal and assert the actual interest of the plaintiff and to indicate the interests of others in the claim. An insurer making a subrogation claim under the FTCA must provide notice to the U.S. government under the same timeline and in the same manner as the insured. *Great American Ins. Co. v. U.S.,* 575 F.2d 1031 (2nd Cir. 1978); *Liberty American Ins. Group v. U.S. Air Force,* 2008 WL 906848 (N.D. Fla. 2008). Where the insured does not file a claim with the government agency, the insurer must do so within two (2) years after the incident, regardless of when their claim payments were made. *Progressive Am. Ins. Co. v. U.S.*, 913 F. Supp.2d 1318 (M.D. Fla. 2012). This is because the subrogated carrier stands in the shoes of its insured. If a subrogated carrier files the Form 95 claim, the form should indicate that the insured's carrier is pursuing subrogation rights.

A subrogated carrier is included in its insured's administrative claim against the federal government under the FTCA if the original administrative claim filed by the insured was brought for the full amount of the insurer's claim. The insured's claim would then satisfy the claim filing requirement under § 2401(b) on behalf of the insurer and would not prejudice the government. *Interboro Mutual Indemnity Ins. Co. v. U.S.,* 431 F. Supp. 1243 (E.D. N.Y. 1977); *Severtson v. U.S.,* 806 F. Supp. 97 (E.D.

La. 1992). In *Cummings v. U.S.,* 704 F.2d 437 (9th Cir. 1983), the court considered an FTCA action for damages brought by an insured against the government in which the subrogated carrier filed a complaint in intervention. The government moved to dismiss the intervenor for failure to satisfy § 2401(b)'s limitation period. The court stated that the insurer as subrogee was the "real party in interest" to the extent of the subrogation. The court reasoned that the complaint in intervention had the same effect as substitution of the insurer as the real party in interest under FRCP 17(a), which relates back to the filing of the original complaint under FRCP 15(c). The 9th Circuit stated that the outcome under this analysis is consistent with the holdings of other courts which have considered the insurer/subrogee problem under the FTCA. See *Wadsworth v. U.S. Postal Serv.,* 511 F.2d 64 (7th Cir.1975) (amended complaint to substitute insurer as proper plaintiff related back to the filing of the original complaint by insured); *Executive Jet Aviation v. U.S.,* 507 F.2d 508 (6th Cir. 1974).

A no-fault insurer's subrogation action to recover basic reparation - personal injury protection (PIP) — benefits from reparation obligor of secured person is a tort action under the Kentucky No-Fault Act and, therefore, a no-fault insurer's subrogation action against the U.S. could be brought under the FTCA if the U.S. was a "reparation obligor" of the tortfeasor. *Lafferty v. U.S.*, 880 F. Supp. 1121 (E.D. Ky. 1995).

Section 2675(a) of Title 28 and 28 C.F.R. § 14.2(a) require two elements for sufficient presentment of a claim to an agency: (1) written notice sufficient to cause the agency to investigate, and (2) a sum-certain value on the claim. See *Adkins v. U.S.,* 896 F.2d at 1326. The sum-certain requirement is one of substantial importance, and even courts liberally construing the presentment requirement under the FTCA require that the claimant place a certain value on the claim. See*, e.g., Williams v. U.S.,* 693 F.2d 555 (5th Cir.1982) *("we have held that no particular form or manner of giving such notice is required as long as the agency is somehow informed of the fact of and amount of the claim within the two-year period prescribed by § 2401(b).")*. An insurer's request for reimbursement alone may not adequately perform those notice-giving functions. The claims of an injured party and his insurance carrier are not always coextensive. An insurer's claim will never exceed that of the injured party; the injured party, however, often seeks recovery for damages not encompassed in the insurer's claim. This distinction is inherent in 39 C.F.R. § 912.6(D) which permits subrogees to present wholly compensated claims, but requires both insurers and injured parties to participate, either jointly or individually, in filing partially compensated claims. *Shelton v. U.S.*, 615 F.2d 713 (6th Cir. 1980).

In *Interboro Mut. Indem. Ins. Co. v. U.S.*, 431 F. Supp. 1243 (E.D. N.Y. 1977), the insured filed a timely claim with the Coast Guard for both bodily injury and property damage arising from a car accident and filed suit within six months after it was denied, but only for personal injury. The insured's auto carrier filed a claim for property damage which was not acted on because the insured's claim was denied. The insurer intervened more than six months after the denial of the insured's claim. The court held that the subrogated insurer was not included in the claim filed by the insured without its consent and was not barred by the six-month limitation. In *Executive Jet Aviation, Inc. v. U.S.*, 507 F.2d 508 (6th Cir. 1974) and *Sky Harbor Air Service v. U.S.*, 348 F. Supp. 594 (D. Neb. 1972), the insured filed a claim without naming the insurance company. When the insured brought suit, the government moved to dismiss on the ground that the real party in interest did not file a claim as required by § 2401(b). In *Executive Jet Aviation, Inc.,* the court held that the insured's filing did cover the insurance company because the government was not prejudiced and because the purpose of the FTCA was not to make recovery from the government technically more difficult. The same result was reached in *Sky Harbor Air Service* where the court held that the insurance company was covered by the insured's filing.

State and Local Government Tort Claim Immunity

This chart concerns itself only with the FTCA and claims against the federal government. Matthiesen, Wickert & Lehrer, S.C. has prepared two charts which relate to and detail the specific law in all 50 states with regard to:

(1) State Sovereign Immunity and Tort Liability in All 50 States

(2) Municipal/County/Local Governmental Immunity and Tort Liability in All 50 States

The former chart covering state liability can be found **HERE**. The latter chart dealing with governmental immunity of local and municipal governmental entities can be found **HERE**. These charts present an overview of sovereign immunity and tort claims against government entities and municipalities under the laws of all 50 states.