



A MESSAGE FROM PETE GULLETT LAWYERS MUTUAL'S EXECUTIVE VICE PRESIDENT



As I look back on 2003 from the vantage point of January 15, 2004 the first feeling I have is gratitude for an interesting, rewarding, and challenging job. Working for Lawyers Mutual, and by definition its many policyholders, has taken me from one end of Kentucky to the other. During the year I attended KBA Law Updates, county bar meetings, the KBA and KATA conventions, and presented numerous risk

management CLE programs. It is always a pleasure to reacquaint myself with just what an outstanding bar we have that is committed to the best possible legal service for the public. Over the course of the year, however, I could not help but note the large number of Kentucky lawyers that are worried about the increasingly negative malpractice climate and the continued availability of insurance to protect them from this risk. Addressing these concerns is precisely the mission of Lawyers Mutual.

Overall, we as a company had a solid year in 2003 and continue to be strong and stable. We renewed over 93% of all lawyers we insure and added 230 new lawyers to our membership. Claims were up slightly in 2003 from 170 to 184. Fortunately, we closed 202 claims allowing us to start 2004 with a modest reduction in pending claims. Best of all we closed the year with net growth in the number of lawyers we insure, premiums collected, and assets under investment.

Lawyers Mutual is still what the Kentucky lawyer wants it to be – conservatively run, oriented to lawyer friendly service, and determined to be in the market for the long run. Our Board of Directors remains enthusiastic and energetic. We are blessed with a dedicated office staff ready to serve you at any time. Del O'Roark and Bob Breetz are still on board in a part-time capacity and we profit regularly from their experience. In conclusion, the Board, staff, and I thank each of our members for their continuing support. We invite other Kentucky lawyers to join us – the only lawyers liability insurance company founded by and exclusively for Kentucky lawyers.

AVOIDING MALPRACTICE WHEN MAKING CLAIMS AGAINST US GOVERNMENT AGENCIES

By: Colonel (Ret.) Dean Hamel

Editor's Note: Many Kentucky lawyers do not routinely engage in federal practice. As a result they have a greater risk of malpractice when handling a claim against a US government agency. Failing to file a claim under the proper authority with the appropriate agency, failing to exhaust administrative remedies before bringing suit, and missing agency deadlines are just some of the errors that convert a good claim against the agency to a good claim against the lawyer. We asked an experienced federal claims specialist, Colonel Dean Hamel, for his ideas on what every lawyer should know about the federal claims process. Dean is a retired Army Judge Advocate who over a long and distinguished career held every major claims adjudicatory position in the Army culminating in his service as the chief of the worldwide US Army Claims Service. We thank Dean for taking the time to share his thoughts with us – they are invaluable.

INTRODUCTION

In my many years of serving in the US Army Claims Service, it became evident that getting money for clients harmed by US government agencies was and continues to be a mystery to many lawyers who do not regularly engage in federal practice. Rather than knowledge of the law, it was common to find beliefs that ran from the ridiculous to the sublime. Myths not only live, they seem to proliferate. Examples are "you can't get money out of the government so why waste your time" and "one claim against the government and I can retire – they pay millions." My favorite myth concerns the Army tank commander who insisted that if his tank runs over a chicken while on maneuvers in Germany, the German farmer is paid not only for the chicken, but all eggs that the chicken would have laid in its lifetime and all the chickens that would have hatched out of those eggs.

As you no doubt realize, all three myths are just that. You can get money from the government when your client has a meritorious claim, but it will not be a windfall. A \$2.00 chicken is just that – a \$2.00 chicken. The purpose of this article, therefore, is to kill the myths. I will attempt to do this by describing some of the key considerations in making a claim against a US agency. Since a Federal Tort Claims Act (FTCA) claim is the most likely federal claim that most lawyers will ever file, I will focus on it. Knowing the key issues and potential malpractice traps of FTCA claims is not only good risk management, it also serves to inform you on similar issues under other claims theories. In this regard it is important to note that several other statutes permit claims against federal agencies in specified circumstances. Filing a claim under the wrong statute is usually fatal to a claim and often results in a malpractice suit against the erring lawyer.

LEGAL BASIS FOR GOVERNMENT TORT LIABILITY

We all learned in law school that the government is not inherently liable for its negligent acts. The doctrine of sovereign immunity prevents suit or other action against the government without its permission. In federal cases of damage suffered as a result of tortious acts of federal employees, sovereign immunity is waived by the FTCA (28 USC §§2671-2680). To avoid presenting a claim to the wrong agency or under the wrong authority it is essential to first determine what federal agency employs the tortfeasor. This can be more difficult than you might imagine because of the sheer number of federal agencies. Always contact the legal office of the agency you identify as responsible for the negligent act for verification that it is the correct agency. The agency's legal office is authorized to provide guidance on how to process a claim and should be cooperative in facilitating the initiation of a claim.

After confirming that you have identified the responsible agency and before filing a claim read the FTCA and any regulations that agency may have published regarding its rules and guidelines for implementing the FTCA. Agency regulations are available in the Code of Federal Regulations. These regulations tend to be very specific and helpful. For example, the Army regulations (AR 27-20, Claims) on the administrative handling of claims under the FTCA are at 32 CFR 536. Agency regulations typically provide detailed information on the procedures for filing a claim, where to file, contacts for obtaining claims information, and some substantive information such as incidents that are not cognizable under the FTCA. See 32 CFR 536.24, 536.25, and 536.50(j) for information on claims not cognizable under the FTCA and claims cognizable under other statutes such as the Maritime Claims Settlement Act. Even if your claim is not against the Army it is recommended that you research AR 27-20. It covers important FTCA substantive law issues as well as other statutory authority for filing a claim against a federal agency. Many other agency regulations are modeled on the

Army regulation. The Internet offers easy access to the CFRs making agency claims regulations readily available to all Kentucky lawyers. AR 27-20 is available as well at www.usapa.army.mil. Start your research there.

“There are two problems in my life: The political ones are insoluble, and the economic ones are incomprehensible.”

Alec Douglas-Home

THE ELEMENTS OF AN FTCA CLAIM

It is well to remember that not every perceived wrong has a remedy. Since the federal government may not be sued without a statutory waiver of sovereign immunity, it follows that any attempt to hold the government liable must comply with the waiver, *i.e.*, the applicable statute. The government is liable under the FTCA only for:

- Money damages for injury or loss of property or personal injury or death;
- Caused by the negligent or wrongful act of any employee of the government;
- While acting in the scope of his office or his employment.

The FTCA waiver is simple enough – only money damages resulting from the negligence of an employee causing the injury acting “in scope.” But as they say – the devil is in the details.

PROCEDURES FOR INITIATING A CLAIM

The FTCA in authorizing payment for negligent acts establishes specific prerequisites and procedures that must be observed to file a timely claim. The first and most misunderstood is the requirement for filing an administrative claim with the responsible government agency as the first step in the process. You may not go directly to court, state or federal. The administrative claim must be filed within the FTCA two-year statute of limitations. Since many states have a three-year statute of limitations for tort actions, lawyers in those states often carelessly miss the FTCA limitation

period. This simply converts the claim from one against the government to one against the lawyer for malpractice.

Although the subject of considerable litigation, the FTCA rule is that the limitations period begins to run when the claimant knew or should have known of the injury. Birth injuries cause the most problems because the injury may not become apparent for many years. The key point is that once the limitations period for filing an administrative claim is missed there are few ways to revive the claim in or out of court.

FTCA claims should be filed with the responsible government agency on standard government form SF 95, although any writing that meets the requirements of the FTCA and the agency regulations will suffice. A properly completed claim form must meet certain requirements:

- It must be signed by the claimant, or if signed by a lawyer, accompanied by a signed representation agreement.
- It must be in writing.
- It must demand specific monetary compensation.
- It must provide the factual basis for the claim in the form of written statements, documentary evidence, or other evidence to establish a reasonable basis for the claim.

An SF 95 can be obtained from any federal agency or downloaded from the Internet at a number of websites including www.usapa.army.mil.

THE TWO SIX-MONTH RULES

The first six-month rule is that once having submitted an administrative claim, you may not file suit in federal district court until the responsible agency has had six months to investigate the claim and to settle or deny it. The agency may also enter negotiations to establish liability or the value of the claim. Six months after filing a claim, a suit may be filed. In many cases, however, the agency needs additional time to investigate, to negotiate, and even in some cases to wait to determine the extent of the injury and what the prognosis for recovery might be. In short,

you may not sue for six months after filing a claim. Thereafter, if the claim is still pending, you are not required to file suit, but may do so.

The second six-month rule is more lethal. If the agency determines the claim not to be cognizable under the FTCA, unfounded, or not established by the evidence, the claim will be denied in writing. A written denial triggers a six-month period beginning from time of denial for suit to be filed or the claim is thereafter barred.

COMMON ERRORS IN INITIATING A CLAIM

I cannot stress too much that the general guidelines in this article are not a substitute for the thorough investigation of the facts and legal research that is necessary to support any successful claim. There are, however, some common errors that can be stressed here to help you avoid disaster in the early stages of the administrative claims process. Lawyers often:

- Fail to adequately investigate the facts to determine the proper statutory authority for a claim and the agency responsible for processing the claim.
- Send the claim to or otherwise communicate with the alleged tortfeasor, or send the claim to a non-specific address.
- Attempt to sue the individual employee or the agency first, without filing the mandatory administrative claim.
- Fail to have SF 95 signed by the claimant or, if signed by the lawyer, fail to include a signed representation agreement.
- Fail to include evidence to support the claim. The requirement to file an administrative claim also means full disclosure on both sides. The purpose is to settle meritorious claims. An

undocumented claim may be summarily denied. If time allows, the claim may yet be perfected. If not, the probable result is the running of the two-year statute of limitations leaving your client without a remedy other than legal malpractice.

- Fail to claim for specific money damages. This usually results from a failure to evaluate the claim in accordance with the applicable law. In FTCA claims the value of the claim and the establishment of damages is based on the evaluation of those compensable items of damage that are recognized by the state in which the injury occurred. You must ascertain what elements of damage are compensable in that state, and you must be able to establish the quantum of economic loss to the client under applicable state standards. Evaluating a claim for specific money damages is a chronic problem for the inexperienced lawyer.
- Fail to file an administrative claim within the two-year statute of limitations. Bear in mind that no government official has authority to waive the limitations period for filing an administrative claim.
- Fail to have proof that the claim was in fact submitted to the appropriate agency such as a return receipt for a mailed claim or a retained copy of the claim date stamped and initialed at the agency office where it was delivered.
- Include punitive damages in the claim. The FTCA does not authorize punitive damages except in cases of unique state law.

COMMON ERRORS IN INITIATING SUIT

Once an administrative claim is denied, or six months have passed since it was filed, suit may be initiated. Once suit is filed in US District Court, the responsibility for the claim passes from

the responsible agency to the US Attorney General's office covering the location where the claim was originally filed. See 28 CFR 14.1-14.11 for the Attorney General's regulations on defending these suits.

What follows are some of the common mistakes made at this point in the process:

- Filing suit in state court. The exclusive remedy for wrongs occurring under the purview of the FTCA is the federal court system. The delay resulting from erroneously filing a FTCA case in state court can result in missing applicable limitations periods. A malpractice action against the lawyer is then the client's only remedy.
- Filing suit in the wrong federal jurisdiction. The substantive law of the state in which the incident occurred will apply in any event.
- Suing the employee tortfeasor. Unless the negligent act was outside the government employee's scope of employment, relief may not be had from that employee. Government employees acting in scope of employment are immunized against personal civil liability. The exclusive remedy is suit against the government. If suit is filed against the employee, the US Attorney will remove the suit to federal court and have the government substituted as defendant. Wise lawyers do not waste their time by making this mistake because they know the government – not the employee – has money to pay settlements and judgments.
- Demanding jury trial.

OTHER MATTERS OF INTEREST

- The FTCA limits lawyer fees to 25% if suit is filed in district court and there is a settlement or if a judgment is received. If a claim is settled during the administrative claims phase, the limit

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on lawyer fees is 20%. Fees in excess of these limits are subject to criminal sanctions.

- Determining a claim's potential value involves an analysis of the law of the state in which the incident occurred and the facts showing which elements of compensation apply. There is greater possibility of a suitable settlement when the demand for compensation is based on the compensation elements recognized by applicable state law. For example, in personal injury cases a demand should include such facts as medical prognosis, future medical care required, and degree and duration of impairment.
- Military members may not claim under the FTCA. This rule, known as the "Feres Doctrine," is based on a US Supreme Court decision barring claims or suits by military members when the injury is sustained when the member was performing assigned duties. Military members most frequently encounter this rule when seeking damages for alleged medical malpractice at a military hospital. This doctrine is under constant attack, but still stands. Note that the Feres bar does not prohibit suit by retired military personnel or family members of both active duty and retired personnel.

- As previously noted, the substantive law applied in determining the merits of an FTCA claim is the law of the state where the alleged tort occurred. This also means that defenses and limitations in the state law are available to the government. The most common ones that are thorns in the side of claimants' lawyers are tort reform limitations in medical malpractice and other cases and the collateral source doctrine.

"Middle age is when your age starts to show around your middle."

Anonymous

SUMMING UP

The FTCA authorizes the administrative settlement of meritorious claims. Congress appropriates money to pay such claims and urges federal agencies to settle meritorious claims promptly. The level of effort to settle FTCA claims varies from agency to agency, but many like the Army, as a matter of policy, attempt to settle claims expeditiously in a fair manner and avoid litigation. It is my experience that the FTCA is an excellent law that, if followed carefully, provides a simple and effective means of compensating a person injured by the government. An additional advantage is that with an administrative settlement possible, it allows for the favorable

resolution of small claims with relatively little investment in time and effort. Finally, it is always important to remember that some claims that appear to fall under the FTCA are cognizable claims only under other statutory authority. AR 27-20 provides general information on many of these statutes – a good place to start your research. It is crucial that you proceed under the proper statute in a timely manner with any federal claim. Much of what you need to know to initiate your client's federal claim is available to you on the Internet. My hope is that this article will facilitate your research and lead to a fair and equitable result for your client.

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Malpractice Avoidance Update

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