Federal Tort Claims Act: How medical providers fall under the Act, the expansion of individuals covered by the Act and curing a failure to exhaust administrative remedies prior to filing suit

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How medical providers fall under the Act

The Federal Tort Claims Act[1] (FTCA) is a sweeping waiver of sovereign immunity[2] for tort claims against the United States and provides the exclusive avenue for suits against the United States or its agents based upon tort law. The FTCA attaches conditions to the United States waiver of sovereign immunity, including its administrative exhaustion requirement.[3] If the exhaustion condition is not satisfied, then the Court lacks subject matter jurisdiction over the lawsuit.[4] Understanding how an employee of a particular health care center may be a federal employee will aid in assessing whether a potential case will fall under the FTCA.

It is easy to appreciate that your postman is an employee of the federal government and therefore covered under the FTCA. Yet, there are a vast number of medical professionals that fall under the FTCA even though not specifically enumerated in the definition contained in the Act.[5]

The FTCA defines an "employee of the government" as,

> (1) 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 §§115,315,502,503,504 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, and
>
> (2) Any officer or employee of a Federal public defender organization except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.[6]

There are a number of statutes that determine whether a physician providing services in a given entity is a federal employee and afforded coverage under the FTCA. Under §224 of the Public Services Health Act, as amended by the Federally Supported Health Centers Assistance Act, (FSHCAA) of 1992 and 1994, employees of eligible health centers may be "deemed" to be federal employees qualified for protection under the Act.[7] Generally, a medical entity will apply through Department of Health and Human Services (HHS), Health Resources and Services Administration (HRSA), Bureau of Primary Health Care (BPHC) to become a deemed facility.[8] If a physician works for an entity that is eligible to participate in the FTCA program and that entity has been through the application and/or annual renewal process, they will be covered by the FTCA in any underlying medical malpractice lawsuit arising from acts in the scope of employment. Currently, there are 956 deemed Health Centers covering in excess of 15,000 healthcare professionals.[9]

It is not enough that an entity receive federal funding or qualifies under a grant program, which is often a misconception for those evaluating the applicability of the FTCA.[10] If an entity desires coverage under the FTCA, it must take affirmative steps. The benefits of going through the deeming process as represented by HHS through the HRSA include, cost based reimbursement for services provided under Medicare; reimbursement under the Prospective Payment System or other State-approved Alternative Payment Methodology for services under Medicaid; medical malpractice coverage through the FTCA; eligibility to purchase prescription and non-prescription medications for outpatients at reduced cost through the 340B Drug Pricing Program; access to National Health Service Corp; access to the Vaccine for Children program; and eligibility for various grants.[11]

The expansion of individuals covered by the Act

The pool of individuals eligible for FTCA coverage has been growing for some time. In 1996 the Health Insurance Portability and Accountability Act extended the eligibility to volunteer health professionals at qualifying free clinics and more recently, the Affordable Care Act further expanded eligibility for "deeming" to include employees, officers, board members and contractors of qualifying free clinics.[12]

Further expansion of the pool covered under the FTCA includes the extension to certain non-health centers. The FSHCAA of 1992 and 1995 and 42 CFR §6.6(d) authorizes FTCA coverage to non-health center patients in certain situations.[13] FTCA eligible non-health centers specifically enumerated in the federal register includes, Community-Wide Intervention School Based-Clinics; School-Linked Clinics; Health Fairs; Immunization Campaigns; Migrant Camp Outreach; Homeless Outreach; Hospital Related Activities; and Coverage-Related Activities.[14] The above programs must also comply with the deeming process through HHS, HRSA and BPHC.

With the absorption of small medical facilities into large not-for-profits, the incentive of many smaller institutions to apply for the FTCA inclusion, the expansion of individuals afforded protection under the FTCA and the recent multi-billion dollar allocation to expand the Health Center Program, it is foreseeable that the number of deemed entities will sharply increase resulting in a corresponding rise in the number of medical malpractice cases covered by the FTCA.[15]

Curing a failure to exhaust administrative remedies prior to filing suit

In light of the growth in the FTCA, it is reasonable to assume that more lawsuits will be filed against individuals that are covered by the FTCA without knowledge that the defendants are employees of the federal government. The reporters are full of cases across the country where suit was filed against individuals not known to be employees of the federal government.[16] As a matter of procedure when that scenario occurs, the United States substitutes itself in as the defendant,

removes the case to federal court and subsequently files a motion to dismiss for lack of subject matter jurisdiction for failure to exhaust administrative remedies, specifically, failing to file a SF-95 with the appropriate agency.[17] At that point, the federal district court inevitably dismisses the case for want of subject matter jurisdiction.[18] If the statute of limitations has run at the time of the federal court's dismissal or the two-year period of time to tender the SF-95 to the appropriate agency elapsed since the lawsuit was filed in state court, it is not time to panic. There is still an opportunity to cure the error.[19]

Readers should be aware that in many situations federal courts have been reluctant to extend the statute of limitations by tolling or liberal application of the discovery rule.[20] In 1988, Congress provided a mechanism to address situations in which lawsuits are initiated against an individual or entity when they should have been filed against the United States and in doing so effectively overruled *Kelley v. United States,* 568 F.2d 259, 264 (2d Cir. 1978) and *Harris v. Burris Chem. Inc.,* 490 F.Supp. 968 (N.D. Ga. 1980)(holding that the exhaustion requirement set forth in §2675 is inapplicable when the plaintiff neither knew nor had reason to know that the defendant was a federal employee at the time the complaint was filed). In 1988, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988, P.L. 100-694, 102 Stat. 4564 which is commonly referred to as the Westfall Act.[21] The statute essentially states that once the United States is substituted for the individual employee, if the suit is dismissed for failure to file an administrative claim, the plaintiff will have 60 days after dismissal of the action to present an administrative claim to the appropriate agency. Once the SF-95 is properly filed the claim will be considered to be timely filed if it had been presented on the date the underlying civil action was commenced.[22]

In light of the courts' generally strict adherence to the two-year limitation set forth in the FTCA, arguing for tolling or any other extension of the statute of limitations under the FTCA is likely to be a fruitless endeavor and waste of time if compliance with 28 U.S.C. 2679(d)(5) is possible. Despite the passage of the Westfall Act in 1988, plaintiffs in the 21st century are still arguing for tolling or other relief following a dismissal for want of subject matter jurisdiction when the error could have been cured by simply filing a SF-95 with the appropriate agency within 60 days of dismissal for failure to exhaust administrative remedies.[23]

The "trap for the unwary"

If litigation is in a state with a statute of limitations in excess of two years or if suit will be filed in Illinois but after the two year statute of limitation relying on the application of tolling or the discovery rule, 28 U.S.C. §2679(d)(5) will not help. 28 U.S.C. §2679(d)(5) only helps if suit is filed within two years after the incident and you later learn your defendant was a federal employee. An example of the pitfall can be found in *Bryant v. United States,* 96 F. Supp. 2d 552 (N.D. Miss. 2000). In *Bryant,* the plaintiff's attorney filed suit against an individual that later turned out to be an employee of the federal government approximately 2 ½ years after the incident, but well within Mississippi's three (3) year statute of limitations. The government substituted into the case and filed a motion to dismiss for failing to exhaust administrative remedies (not filing a SF-95 prior to suit) consistent with 28 U.S.C. 2675(a). Unfortunately for the plaintiff, the relief provided in §2679(d)(5) requires that the original underlying lawsuit was commenced within the two year time period allowed for filing the SF-95 as mandated in the FTCA. Consequently, even though the underlying state statute of limitations had not been exhausted the attorney was unable to pursue the federal employee because the lawsuit was not commenced prior to the FTCA's two-year notice limitation period contemplated in the language of §2679(d)(5). The Mississippi District Court, stated, "[w]hile this may appear to be a trap for the unwary, in that Mississippi's statute of limitations for personal injury actions is three years instead of two, this court is not at liberty to rewrite or ignore the plain language contained in §2679(d)(5)."

In Illinois and in any other jurisdiction, if it is unknown whether your defendant is a federal employee, then initiating suit within two years is the best approach, even if you have a valid basis to toll the limitation period or it is clear the discovery rule should apply. By doing so the attorney ensures that any federal defendant will be able to stay in the case utilizing 28 U.S.C. 2679(d)(5). If you file suit after two years and subsequently learn your defendant is FTCA, there will be no basis to keep the federal defendant. By not filing suit an attorney risks, in the best case scenario, a strong empty chair defense or in the worst case scenario, potential legal malpractice. ■

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1. 28 U.S.C. §§ 1346(b), 1402(b), 2401(b) and 2671-80.

2. Article I, §9 reads in part "no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." Appropriations Clause of the Constitution. U.S. Const. art. I, §9, cl. 7.

3. 28 U.S.C. §2675(a) states,

> "An action shall not be instituted upon a claim against the United States for money damages for injury or loss of the 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."

4. *McNeil v. United States,* 508 U.S. 106, 112 (1993).

5. 28 U.S.C. §2671.

6. 28 U.S.C. §2671(1)(2).

7. 42 U.S.C. 233 (a)-(n)

8. U.S. Dep't of Health and Human Services Health Resources and Services Administration. <http://bphc.hrsa.gov/ftca/healthcenters/index.html> (Last visited October 8, 2014).

9. U.S. Dep't. of Health and Human Services Health Resources and Services Administration. <http://bphc.hrsa.gov/ftca/about/index.html>. (Last visited October 8, 2014).

10. You can check to see if an entity is registered through HRSA at the website below. This website should not be used as a dispositive avenue for determining if an entity is covered under the FTCA as it could be a lookalike facility. It is a starting place to investigate if your potential defendant is reregistered through HRSA <http://findahealthcenter.hrsa.gov/Search_HCC.aspx?byCounty=1&unbrand>.

11. U.S. Dep't of Health and Human Services Health Resources and Services Administration. <http://www.bphc.hrsa.gov/about/benefits/index.html> (Last visited October 8, 2014).

12. 42 U.S.C. 233(o), as amended.

13. U.S. Dep't of Health and Human Services, Health Resources and Services Administration. <http://bphc.hrsa.gov/ftca/healthcenters/particularizeddetermination.html> (Last visited October 8, 2014).

14. Id. *See also, Warren v. Joyner,* 996 F. Supp 581 (S.D. Miss. 1997)(Outreach program physician afforded coverage under the FTCA).

15. Expansions of the Health Center Program included $11 billion dollars under the Affordable Care Act and an additional $2 billion by the American Recovery and Reinvestment Act. Health Re-

sources and Service Admin, http://bphc.hrsa.gov/about/index.html (Last visited October 8, 2014)

16. *Filaski v. United States,* 776 F. Supp. 115 (E.D. N.Y. 1991).

17. 28 U.S.C. §2679(d)(4); 28 U.S.C. 2675(a).

18. *Gonzalez v. United States of America, et. al.,* 284 F.3d 281, (1st Cir. 2002) (An FTCA claim must be dismissed if a plaintiff fails to file a timely administrative claim. *See, e.g., United States v. Kubrick,* 444 U.S. 111, 113, 100 S.Ct. 352 (1979); *Attallah v. United States,* 955 F.2d 776, 779 (1st Cir.1992). This Court has repeatedly held that compliance with this statutory requirement is a jurisdictional prerequisite to suit that cannot be waived. *See, e.g., Coska v. United States, 114 F.3d 319,* 323 (1st Cir.1997); *Corte-Real v. United States, 949 F.2d 484,*485-486 (1st Cir.1991); *Gonzalez-Bernal,* 907 F.2d at 248).

19. *Filaski v. United States,* 776 F. Supp. 115 (E.D. N.Y. 1991).

20. *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 (10th Cir. 1976)(insanity does not toll the statute of limitations); *Smith v. United States,* 588 F.2d 1209 (8th Cir. 1978); *United States v. Kubrick,* 444 U.S. 111 (1979)(U.S. Supreme Court in rejecting application of the discovery rule under a set of facts overturned a judgment in favor of the plaintiff, which was previously upheld by the 3rd Circuit, for lack of subject matter jurisdiction as the time limit set forth in 28 U.S.C. §2401(b) had expired). Some federal courts have been reluctant to apply *Kubrick.* See, *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); *Celestine v. United States of America,* et. al., 403 F.3d 76 (2nd Cir. 2004)(refusing to equitably toll the statute of limitations where plaintiff failed to avail itself of the remedies set forth in 28 U.S.C. 2679(d)(5) following dismissal for want of subject matter jurisdiction).

21. The *Westfall* amendment included 28 U.S.C. 2679(d)(5).

22. 28 U.S.C. §2679(d)(5) states in relevant parts as follows:

> Whenever an action or proceeding in which the United States is substituted as the party defendant under this subjection is dismissed for failure first to present a [n administrative claim . . . such a claim shall be deemed to be timely presented . . . 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.

23. *Celestine v. United States of America,* et. al., 403 F.3d 76 (2nd Cir. 2004)(plaintiff argued for application of equitable tolling prior to the district court's dismissal for failing to exhaust administrative remedies and following dismissal appealed to the 2nd Circuit rather than simply curing the defect by filing a SF-95 within 60 days after dismissal).

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Thursday, 5/28/15- Chicago, ISBA Regional Office—Minding Data and Privacy: A Primer. Presented by the ISBA Intellectual Property Section. 8:30-12:30.

Thursday, 5/28/15- Live webcast—Minding Data and Privacy: A Primer. Presented by the ISBA Intellectual Property Section. 8:30-12:30.

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