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LEGAL BULLETIN 1.5

Federal Tort Claims Act (F.T.C.A.)

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I. Introduction to the Federal Tort Claims Act (F.T.C.A.)

A. What is the Federal Tort Claims Act?

The Federal Tort Claims Act (FTCA) is a statute that was passed by the United States Congress that allows certain claims to be brought against the United States for the negligent or wrongful acts of its employees. The FTCA says that lawsuits may be brought against the United States for property damage, 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.” 28 U.S.C. § 1346(b).

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. Also, the FTCA regulations can be found in Title 28 of the Code of Federal Regulations. 28 C.F.R. §§ 14.1 - 14.11, 543.30 - 543.32. Finally, if you are a federal prisoner, you should read the Program Statement on the FTCA. P.S. 1320.05.

1. Sovereign Immunity - The FTCA is such an important statute because you cannot sue the United States unless it consents to be sued. The government’s freedom from being sued is called **sovereign immunity**. United States v. Sherwood, 312 U.S. 584 (1941); Dalehite v. United States, 346 U.S. 15, 30-31 (1953). The United States can even define the terms and conditions under which it may be sued. Honda v. Clark, 386 U.S. 484, 501 (1967); Soriano v. United States, 352 U.S. 270 (1957). The FTCA waives the federal government’s sovereign immunity when its employees are negligent or wrongful within the scope of their employment. However, the waiver of sovereign immunity is limited and the terms of the FTCA define the boundaries of suits against the United States. United States v. Orleans, 425 U.S. 807, 814 (1976). These limits are discussed in more detail later on in this bulletin.

B. What is a Tort?

In general, a tort is a wrong or injury that is committed against someone for which the law provides a remedy. Torts are “civil.” The main purpose of a civil lawsuit is to compensate someone for wrongful injuries or damage that they received (this is different than a criminal case where the main purpose is to *punish* the wrongdoer).

While there are many kinds of torts, they can be generally classified into three groups: **intentional, negligent, or strict liability**. The focus of the Federal Tort Claims Act is on intentional torts and negligent torts. Each state has different laws (both in statutes and court

cases) that set forth what tort claims may be brought. Because the law of the state where the incident occurred will apply to your FTCA claim, you need to look at the law of your own state to find out exactly what is required in order to prove your claim.

1. Intentional Torts - An intentional tort is broadly defined as a deliberate act that causes harm to another. The person must **intend** to do the act that causes the harm. Examples of intentional torts are: assault, battery, false imprisonment, false arrest, and malicious prosecution.

2. Negligence - Someone has been negligent if they have not used the amount of care that a reasonable person would have used in the same situation. There are four **essential elements** of a negligence claim: (1) the defendant owed the plaintiff a **duty of care**; (2) the defendant **breached** (or violated) this duty; (3) the breach **caused** harm to the plaintiff; and (4) the plaintiff suffered **damage** as a result.

II. SCOPE OF THE FTCA

A. When can you bring an FTCA claim?

You can bring an FTCA claim if:

- (1) It is against the United States;
- (2) It is for money damages;
- (3) You have had personal injury, or death;
- (4) That was caused by a negligent or wrongful act or omission;
- (5) The negligent or wrongful act or omission was committed by a federal employee;
- (6) The federal employee was acting within the scope of his/her employment; and
- (7) The United States (if it was a private person) would be held responsible under the law of the place where the act occurred.

There are limits to bringing an FTCA claim. You cannot bring an FTCA claim in the following situations: certain named torts, due care, discretionary acts, constitutional violations, certain statutory violations, work related injuries, strict liability claims, and a few other exceptions.

1. Certain Named Torts - Under 28 U.S.C. § 2680(h), you cannot file an FTCA claim for the following torts: assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights. However, there is a very important exception to this rule when the act is committed by an investigative or law enforcement officer.

You CAN bring an FTCA claim when an investigative or law enforcement officer commits the torts of **assault, battery, false imprisonment, false arrest, malicious prosecution, and abuse of process**. Federal correctional officers are considered to be investigative or law enforcement officers. McCarthy v. Madigan, 503 U.S. 140 (1992).

No matter who the federal employee is, you can NEVER bring an FTCA claim for **libel, slander, misrepresentation, deceit, or interference with contract rights**.

Other torts that are not mentioned in the statute can also be pursued under the FTCA. For

example, one court allowed an FTCA claim for the torts of trespass and invasion of privacy. Black v. Sheraton Corp. of America, 564 F.2d 531 (D.C. Cir. 1977).

2. Due Care – You cannot bring an FTCA claim when the federal employee exercised due care in the execution of a statute or regulation (whether or not the statute or regulation is valid). 28 U.S.C. § 2680(a). When an employee acts with “due care,” he acts with at least minimal concern for the rights of others.

3. Discretionary Acts - The United States cannot be held responsible under the FTCA for a federal employee’s conduct if the employee was performing (or not performing) a **discretionary** function or duty. 28 U.S.C. § 2680(a). It does not matter whether the employee was acting with due care or not.

The discretionary act exception does not apply when a federal statute, regulation, or policy specifically sets forth a course of action for an employee to follow. Berkovitz v. United States, 486 U.S. 531, 536 (1988); Barton v. United States, 609 F.2d 977, 979 (10th Cir. 1979) (existence of a “fixed or readily ascertainable standard” of conduct means that the official’s actions are not discretionary). In other words, an act is discretionary only if it is a matter of choice for the acting employee.

Determining when an act is discretionary (when an act is a matter of choice for an acting employee) can sometimes be a difficult task. In order to determine whether conduct falls within the discretionary function exception, the courts apply a two-part test established in Berkovitz v. United States, 486 U.S. 531 (1988). See Kennewick Irrigation Dist. v. United States, 880 F.2d 1018, 1025 (9th Cir. 1989).

(1) First, the question must be asked whether the conduct involved “an element of judgment or choice.” United States v. Gaubert, 499 U.S. 315, 322 (1991). So, if there is a federal statute, regulation, or policy specifically setting forth a course of action for an employee to follow, it is not discretionary. Berkovitz, 486 U.S. at 536. But, if an acting employee performs a function using an element of judgment, it could be discretionary.

(2) Once an element of judgment or choice is established, the second question must be “whether that judgment is of the kind that the discretionary function exception was designed to shield” in that it involves considerations of public policy. Gaubert, 499 U.S. at 322-23. Simply put, even if an employee does exercise some choice in the performance of an act, the United States might still be held responsible for the employee’s actions if the employee did not exercise “policy judgment.”

The application of the discretionary principle is difficult to understand and apply, and it has often resulted in inconsistent decisions. The following are examples of different ways courts have handled the discretionary exception:

- **Discretionary Actions:**
 - In Payton v. United States, 679 F.2d 475 (5th Cir. 1982), the Government was sued because a federal prisoner murdered three people after being released on

parole. The court held that the decision to parole him without requiring continued treatment or supervision was discretionary because the parole statute permitted parole release in the Board's discretion and upon such terms and conditions as the Board shall prescribe. (However, the actions of the Bureau of Prisons, which had failed to provide the parole board with the prisoner's records, were not discretionary because a federal statute required it to provide these records).

- In Garza v. United States, 413 F.Supp. 23 (W.D. Okla. 1975), the court held that decisions concerning assignment of prison staff are discretionary.
- In Powell v. Lennon, 914 F.2d 1459 (11th Cir. 1990), the court held that prison officials' failure to remove the inmate from a dormitory containing an asbestos hazard was a discretionary decision.
- Ashley v. United States, 37 F.Supp.2d 1027 (W.D. Tenn. 1997), the court held that the manner in which the warden fulfills his duties with regard to inmate property in response to a riot situation is discretionary.

- **Non-discretionary actions:**

- In Jackson v. Kelly, 557 F.2d 735 (10th Cir. 1977), the court held that a doctor's exercise of medical judgment does not necessarily involve discretion for purposes of the discretion exception.
- Payton v. United States, 679 F.2d 475 (5th Cir. 1982) – case where federal prisoner murdered three people after being released on parole. The court held that the actions of the Bureau of Prisons, which had failed to provide the parole board with the prisoner's records, were not discretionary because a federal statute required it to provide these records.

While the application of the discretionary exclusion principle is difficult, in order to determine if an employee's actions were discretionary or non-discretionary, federal statutes and documents which govern specific employee actions are good places to begin research. Also, the **Bureau of Prisons'** Program Statements can be a helpful place to search.

4. Constitutional Violations – You cannot bring an FTCA claim against the United States for a violation of your constitutional rights. Carlson v. Green, 446 U.S. 14, 23 (1980); McCollum v. Bolger, 794 F.2d 602 (11th Cir. 1986). However, this doesn't mean that you can't bring a different kind of legal claim. You could still sue the individual federal employee for the acts or omissions that violated your constitutional rights. If you are a federal inmate, this is done in a Bivens action. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). It's possible that you could file one lawsuit where you had a claim against the United States under the FTCA for a tort and a Bivens claim against the individual federal employee for a violation of your constitutional rights.

5. Statutory Violations – In general, you cannot usually bring an FTCA claim just because a federal employee has violated a federal statute, regulation, or manual. Zabala Clemente v. United States, 567 F.2d 1140 (1st Cir. 1977); Leibowitz v. United States Department of Justice, 729 F.Supp. 556 (E.D. Mich. 1989), affirmed, 914 F.2d 256 (6th Cir. 1990). For example, if a prison employee violated your rights under the "Americans with Disabilities Act" or "Religious Land Use and Institutionalized Persons Act," you would file a lawsuit under those statutes, rather

than an FTCA claim.

However, if a federal employee violates a state or federal statute, it may help you to prove your FTCA claim for negligence. This can be done if you can show that the statute created a duty of care or if the violation of the statute would be considered negligence per se under state law. An example of this occurred in Yosuf v. United States, 642 F.Supp. 415 (M.D.Pa. 1986) where the court held that the violation of the Bureau of Prisons phone regulations breached a duty to prisoners.

Another example where a federal statute might help you to prove part of your FTCA claim is the duty of the Bureau of Prisons under federal statute to “provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise,” and “provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States....” 18 U.S.C. § 4042. See United States v. Muniz, 374 U.S. 150 (1963) (inmate assault claim).

6. Work Related Injuries – Personal injury claims by federal prisoners in the employment context are governed by the Inmate Accident Compensation System. 18 U.S.C. § 4126; 28 C.F.R. § 301.101 *et seq.* If an inmate is injured “in any industry or in any work activity in connection with the maintenance or operation of the institution where [he is] confined,” then he may not sue the United States under the FTCA. United States v. Demko, 385 U.S. 149 (1966); Sturgeon v. Federal Prison Industries, 608 F.2d 1153 (8th Cir. 1979). Under Aston v. United States, 625 F.2d 1210 (5th Cir. 1980), the Fifth Circuit Court of Appeals held that “the ‘**prison compensation law**’ is the exclusive remedy for a federal prisoner injured while working, regardless of allegations of governmental negligence; that statute is the sole remedy against the government where the injury is work related, and the cause of the injury is irrelevant so long as the injury itself occurred while the prisoner was on the job.” See also Wooten v. U.S., 437 F.2d 79 (5th Cir. 1971); U.S. v. Gomez, 378 F.2d 938 (10th Cir. 1967); Thompson v. U.S., 495 F.2d 192 (5th Cir. 1974).

7. Strict Liability Claims – You cannot bring an FTCA claim for a strict liability tort. Laird v. Nelms, 406 U.S. 797 (1972). A strict liability tort is one where it is not necessary to show that the person causing the harm was at fault. A common strict liability tort is a product liability action where a seller of a defective product is held responsible even if the seller wasn’t careless and didn’t know the product was defective.

8. Other Exclusions – There are several other situations where you are unable to bring an FTCA claim. Most of these will not apply to your situation. The FTCA does not allow you to bring a tort claim for claims arising from the following areas:

- loss, miscarriage, or negligent transmission of **postal matter** (28 U.S.C. § 2680(b));
- assessment of collection of **taxes or customs** (28 U.S.C. § 2680(c));
- **admiralty** (28 U.S.C. § 2680(d));
- arising from administration of the **war and national defense title of the U.S. Code** (28 U.S.C. § 2680(e));
- a **quarantine** by the United States (28 U.S.C. § 2680(f));

- **fiscal operations** of the Treasury or regulation of the monetary system (28 U.S.C. § 2680(i));
- **wartime combat activities** (28 U.S.C. § 2680(j));
- in a **foreign country** (28 U.S.C. § 2680(k));
- activities of the Tennessee Valley Authority or the Panama Canal Company (28 U.S.C. § 2680(l) and (m)); and
- activities of a **federal bank** (28 U.S.C. § 2680(n)).

B. Federal Employees

The United States is responsible under the FTCA for the behavior of a federal employee while acting within the scope of his or her employment. 28 U.S.C. § 2679(b)(1). Because the FTCA only makes the United States responsible for the actions of a federal employee acting within the scope of her employment, it is important to find out if the person who caused the damage or injury is a federal employee under the FTCA.

1. Who is a federal employee? – Federal employees are defined as “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 . . . , 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.” 28 U.S.C. § 2671.

2. Scope of Employment - Another important issue closely related to the existence of a legal duty is whether the acts of the federal employee were within the **scope of his/her employment**. In other words, a plaintiff must show that the federal employee performed a non-discretionary duty while acting within the scope of his/her employment. In general, an employee acts within the scope of his employment when he is doing something to further the duties he owes to his employer and the conduct is of the type that he was hired to perform. Whether an employee was acting within the scope of his employment will be determined by the law of the state where the conduct occurred so it is important to research the law of your own state. See Rodriguez v. Sarabyn, 129 F.3d 760 (5th Cir. 1997).

3. Can you ever bring an FTCA claim directly against the federal employee who caused the damage or injury? - When filing an FTCA claim, the only proper, named party defendant is the **United States**. Therefore, if an FTCA claim arises, liability is against the United States, not against individual defendants. However, it is possible to file different non-FTCA claims against individuals. This is discussed further below.

4. Are Independent Contractors federal employees? – No. The United States is not responsible under the FTCA for the negligent or wrongful acts or omissions of **private contractors**. A person is a contractor and not a federal employee if the United States does not exercise physical day-to-day control over her activities. This is true even if the person receives money and guidance from the United States. United States v. Orleans, 425 U.S. 807, 813 (1976); Logue v. United States, 412 U.S. 521, 527-28 (1973). This is also true even if the contractor uses government property. Borquez v. United States, 773 F.2d 1050 (9th Cir. 1985); Watson v. Marsh, 689 F.2d 604 (5th Cir. 1982). Federal law will decide whether an individual is an employee or independent contractor. United States v. Orleans, 425 U.S. 807 (1976).

5. What about a federal inmate in a non-federal facility? - A legal duty may also exist if an inmate sustains injuries in a **local jail** when placed in the local jail by federal officials. The United States has a duty to use reasonable care in providing for the safety of federal prisoners confined in non-federal prisons. It might be possible to hold the United States responsible if they negligently placed a federal prisoner in an unsafe non-federal prison. Logue v. United States, 412 U.S. 521 (1973); Cline v. United States Department of Justice, 525 F.Supp. 825 (D. S.D. 1981); Brown v. United States, 374 F.Supp. 723 (E.D. Ark. 1974). In Ross v. United States, 641 F.Supp. 368, 377 (D. D.C. 1986), the United States District Court for the District of Columbia held that the “United States has a duty to use reasonable care in providing for the safety of federal prisoners confined in non-federal institutions, and [an inmate] can recover if they are negligent in doing so.”

But bear in mind that proving that a federal official was negligent in this instance may be difficult, thus an inmate may also wish to consider bringing a § 1983 claim or state law tort suit against any local jail officials (not federal officials) who were directly responsible for any injury. If an inmate decides to file a § 1983 claim, it means the inmate is asserting that the local jail personnel, not the federal government, is liable for the negligent act.

One court held that the United States has no duty to inspect or supervise local jails. Harper v. United States, 515 F.2d 576 (5th Cir. 1975).

C. What law applies?

Under 28 U.S.C. § 1346(b), the law that applies to an FTCA claim is the law of the place where the negligent or wrongful act or omission occurred. What this means is that all FTCA claims are based on the **law of the state** where the tort occurred. Neither federal statutes nor the United States Constitution create a cause of action under the FTCA. Thus, even though a federal inmate is filing a Federal Tort Claim for actions committed by federal employees, the federal inmate must research the tort law of the state where the conduct took place. Molzof v. United States, 502 U.S. 301, 305 (1992); Kruchten v. United States, 914 F.2d 1106 (8th Cir. 1990). The only exception is 18 U.S.C. § 4042. Violations of duty under this federal statute are actionable under the FTCA even if state law would not permit suit. United States v. Muniz, 374 U.S. 150 (1963).

D. Are there time limits for bringing an FTCA claim?

Yes. A tort claim against the United States will 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” of the agency’s final notice of denial of the claim. 28 U.S.C. § 2401(b). These requirements will be discussed further below.

III. Administrative Claim Requirement

A. Do I have to bring an administrative claim?

Yes, you must first file an administrative claim if you plan to file a lawsuit under the FTCA. Before an FTCA lawsuit may be filed in federal court, you must file an administrative claim with the federal agency. 28 U.S.C. § 2675(a). The regulations governing administrative tort claims can be found at 28 C.F.R. §§ 14.1 *et seq.* A failure to present an administrative claim before filing a lawsuit will result in your lawsuit being dismissed. The dismissal will be “without

prejudice,” meaning that you can re-file the lawsuit once you have finished the administrative claim process (also called exhausting your administrative remedies). However, if the claim is untimely under 28 U.S.C. § 2401(b), you will not be able to re-file your lawsuit.

Furthermore, you cannot file a lawsuit until you have filed your administrative claim and the agency has either denied it or six months have passed without the agency acting on your claim. If you file the lawsuit before either one of these things has happened, the court cannot hold your case. Your lawsuit will be dismissed. McNeil v. United States, 508 U.S. 106 (1993).

Filing a lawsuit in state or federal court before you have exhausted your administrative remedies does not relieve you of your obligation to first file an administrative claim. Livera v. First National Bank of New Jersey, 879 F.2d 1186 (3d Cir. 1989).

B. How do I file an administrative claim?

1. What must be included in an administrative claim? - According to the Code of Federal Regulations (C.F.R.), an administrative claim must (a) be in **writing**, (b) state a claim for money damages in a **sum certain**, and (c) provide **sufficient information** to enable the agency to investigate. 28 U.S.C. § 2675; 28 C.F.R. §§ 14.2, 14.4.

If an inmate wishes to file an administrative claim, the first task is to put the claim in writing. The inmate can fill out a Standard Form 95, which can be provided by the prison (if you have difficulty in getting the form from prison staff, you can also get it from the Regional or Central Office of the Bureau of Prisons). 28 C.F.R. § 543.31(a). If an inmate cannot get a Form 95, then he can present “other written notification,” such as a letter. 28 C.F.R. § 14.2(a). See Crow v. United States, 631 F.2d 28 (5th Cir. 1980).

Second, the claim must ask for a specific amount of damages. 28 U.S.C. § 2675(b); 28 C.F.R. § 14.2(a). For example, avoid language such as “at least \$100.” Instead, use specific language such as “\$100.” Failure to ask for a specific amount of damages may result in your FTCA lawsuit being dismissed. Miles v. Bell, 621 F.Supp. 51 (D. Conn. 1985); Keene Corp. v. United States, 700 F.2d 863 (2d Cir. 1983) (claim dismissed for failure to state a sum certain in damages); Jordan v. United States, 333 F.Supp. 987, 990 (E.D. Pa. 1971), *affirmed*, 474 F.2d 1340 (3d Cir. 1973).

Finally, the information provided to the agency should include sufficient details or background about the injury and incident. You should be sure to claim that there has been a wrongful act or omission and that there has been property damage, personal injury, or death. For instance, the claim should state a date, time, place of injury, and the kind of injuries sustained. Remember, the investigative agency needs as much information as possible in order to determine whether a settlement is justified. See Tidd v. United States, 786 F.2d 1565 (11th Cir. 1986); Bialowas v. United States, 443 F.2d 1047 (3d Cir. 1971) (failure to state a sum certain is fatal).

2. Where and how do I file an administrative claim? – For federal prisoners, you will usually file your claim with the federal Bureau of Prisons. You should file your administrative claim with the regional office in the region where the injury happened. 28 C.F.R. § 543.31(c). Prison staff will not accept claims submitted at the institution.

In order for your claim to be properly filed, the agency actually must receive the claim. If the agency claims it never received your claim, it is not enough to say that you mailed the claim. 28 C.F.R. § 14.2(a).

What if the claim is filed with the wrong agency? That agency will transfer the claim to the appropriate agency (if the proper agency can be identified from the claim) and advise you of the transfer. 28 C.F.R. § 14.2(b)(1).

3. Who can file an administrative claim? – The administrative claim can be filed by the injured person, his authorized agent, or legal representative. 28 C.F.R. § 14.3(a), (b). If the claim is presented by someone other than the inmate, there should be evidence presented with the claim of that person’s authority to act on the inmate’s behalf. 28 C.F.R. § 14.2(a).

If the FTCA claim is for wrongful death, the claim can be presented by the executor or administrator of the decedent’s (dead person’s) estate or by any other person legally entitled to assert such a claim under applicable state law. 28 C.F.R. § 14.3(c).

C. Are there any time limits?

The FTCA includes time limits. You must present your administrative claim within two years after it accrues or else you will be forever barred from doing so. 28 U.S.C. § 2401(b). Remember, the agency must actually *receive* your claim in order for it to be properly filed.

1. When does a claim accrue? To **accrue** generally means to happen or to come into existence. In other words, at the time that a plaintiff is injured a claim accrues. Yet, what if the injured party is not aware of the injury at the time the injury occurs? In that situation, the claim will be said to accrue when the person knew or should have known of the existence of the wrongful act. United States v. Kubrick, 444 U.S. 111 (1979). For the purposes of an FTCA claim, federal law governs the determination of when a claim accrues. Zeleznik v. United States, 770 F.2d 20, 22 (3d Cir. 1985).

2. What law determines when a claim is timely filed? - Federal law will determine whether a claim is timely filed.

D. Can you amend your claim?

You may amend (or change) your claim in writing before the agency’s final action. 28 C.F.R. § 14.2(c). Amendments should be submitted in writing and signed by the claimant (or by his authorized agent or legal representative). If you choose to amend your claim, the agency has six months from the filing of the amended claim in order to make a final decision.

E. Agency Response

1. When is the agency required to reply? After filing a claim, the **agency has six months** to settle or deny the claim. 28 U.S.C. § 2675(a).

2. What if the agency doesn’t reply? If the agency does not make a final decision within six months, then you can consider the **non-response as a denial** and proceed to file an FTCA lawsuit in the federal district court. 28 U.S.C. § 2675(a). However, the claimant must remember

to wait for the end of the six-month period after the claim was filed. A federal district court may not hold the case pending until the six months expires. McNeil v. United States, 964 F.2d 647, 648 (7th Cir. 1992), affirmed, 508 U.S. 106 (1993).

3. What sort of investigation takes place & how much money can I get? – Once an administrative claim is filed, the regional office will usually refer the claim to the institution or office for investigation. In most cases, it will be the prison. 28 C.F.R. § 543.32. Also, the agency may request additional information about the claim. 28 C.F.R. § 14.4. Responding to a request for additional information is very important because a failure to respond might result in the dismissal of the claim. See Surratt v. United States, 582 F.Supp. 692, 696-99 (N.D. Ill. 1984).

The Regional Counsel will review the investigation and supporting evidence and make a decision. The Regional Counsel can deny the claim or propose that it be settled. The Regional Counsel can only offer a **settlement** up to a limited amount (currently \$2,500). To settle the claim for more than \$2,500, the Regional Counsel must get approval of the General Counsel's Office at the Bureau of Prisons' Central Office in Washington, D.C. The General Counsel can approve settlements up to a limited amount (currently \$10,000). Any higher amount requires the approval of the U.S. Attorney General. 28 C.F.R. §§ 14.6, 543.32.

If you accept a settlement of your claim, it will be final and act as a complete release of any claim you have against the United States or a federal employee as a result of the subject matter of your claim. 28 U.S.C. § 2672.

4. If my claim is denied, then what? – You can ask for reconsideration or file a lawsuit. If you choose to ask for reconsideration, you can file a written request with the agency for **reconsideration** of its final decision. 28 C.F.R. § 14.9(b). You should provide a reason that the claim should be reconsidered. For example, you could include additional evidence of injury or loss in order to support your request for reconsideration. If you choose to use this option, you must file the request within six months after your claim was denied. After the request for reconsideration, the agency has another six months from the filing of the request to make a final decision.

If your claim is denied and you do not want to file a request for reconsideration, you can also choose to file a lawsuit in a United States District Court within six months of the date the denial of your claim was mailed. This is explained further below.

IV. Filing a Lawsuit

A. Where do I file the lawsuit?

You can only file an FTCA claim in federal district court. 28 U.S.C. § 1346(b). If you attempt to file an FTCA suit in any other court, it will be dismissed or removed to federal court. Gleason v. United States, 458 F.2d 171, 173-74 (3d Cir. 1972). For example, if an FTCA action is filed in state court, then the case will be removed to federal court pursuant to 28 U.S.C. § 1441-1452.

As far as which federal district court to file in (this is referred to as which “venue” you will file the lawsuit), you can file the lawsuit in the federal district court where: (1) you (the plaintiff)

reside; or (2) where the act or omission occurred. 28 U.S.C. § 1402(b).

B. What should I include in the lawsuit?

It is a good idea to include a statement in your complaint that an administrative claim has been presented to the federal agency and that it either was denied or left without action by the agency for six months. Gillespie v. Civiletti, 629 F.2d 637 (9th Cir. 1980).

Also, in stating your claim, all that is required is a short and plain statement of the facts that show that you are entitled to relief. Fed. R. Civ. P. 8. It would be a good idea to include information similar to that in your administrative claim such as dates, names, the wrongful act, and damage and/or injuries.

See the discussion below about what sort of damages you can ask for.

C. Who do I sue?

You can only sue the United States, not individuals, under the FTCA. Mars v. Hanberry, 752 F.2d 254 (6th Cir. 1985). There are certain situations where you may be able to bring non-FTCA claims against individuals in the same lawsuit. In addition, you are generally not allowed to bring any other civil actions for money damages based on the same subject matter. 28 U.S.C. § 2679. This is why the FTCA is sometimes called an “exclusive” remedy. Two exceptions to this exclusive remedy are when you: (1) bring a claim for a violation of the United States Constitution; or (2) bring a claim for the violation of a federal statute (under which you are allowed to bring suit against an individual).

1. Constitutional Claims - While the United States has a limited waiver of sovereign immunity for FTCA claims, the United States does not waive sovereign immunity from suit for violations of constitutional rights. See Jaffee v. United States, 592 F.2d 712, 718 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979). In other words, if a federal employee violates the constitutional rights of an inmate, the United States cannot be held responsible in an FTCA lawsuit. However, a federal inmate can file a suit against federal employees in their individual capacity for acts or omissions that constitute constitutional deprivations. These suits, where an inmate names as a defendant a particular federal employee, may be pursued under 28 U.S.C. § 1331. See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 390-91 (1971). Inmates wishing to file a Bivens claim should also be aware that in addition to seeking compensatory damages, an inmate can also ask for punitive damages.

It is important to note that an inmate can bring both an **FTCA** suit and a **Bivens** suit at the same time. 28 U.S.C. § 2679. An FTCA claim would name the United States as the defendant, and a Bivens claim would name the specific federal employee who violated the inmate’s constitutional rights. See Carlson v. Green, 446 U.S. 14 (1980); Sanchez v. Rowe, 870 F.2d 291 (5th Cir. 1989). Even though an inmate may file both actions at the same time, an inmate must keep in mind that difficult legal issues are involved with respect to the effect that a judgment in a Bivens or FTCA action has on the other claim. For example, where the FTCA claim is tried first, a judgment on the FTCA claim may prevent any recovery under the Bivens claim. See 28 U.S.C. § 2676; Hoosier Bancorp of Indiana v. Rasmussen, 90 F.3d 180 (7th Cir. 1996).

Conversely, where the Bivens judgment comes first, or it is rendered at the same time as the FTCA judgment, there is some case law suggesting that the plaintiff can collect on the Bivens claim regardless of a contrary verdict or lower award in the FTCA claim. See Kreines v. United States, 959 F.2d 834 (9th Cir. 1992); Sanchez v. Rowe, 870 F.2d 291 (5th Cir. 1989). But see Serra v. Pichardo, 786 F.2d 237 (6th Cir. 1986), where the court held that an FTCA judgment against the United States barred plaintiff's constitutional claim against the individual federal employee. One court has held that if the court dismisses a Bivens claim, a separate action under the FTCA may still continue if based on a different legal theory. See Sterling v. United States, 85 F.3d 1225 (7th Cir. 1996).

2. Other Individual Claims – There may be situations where you can sue the United States under the FTCA and also sue individuals for violations of certain federal statutes. For example, you can bring claims against individuals for the violation of your rights under the “Americans with Disabilities Act.”

Also, you may be able to bring individuals into your lawsuit by suing them as “pendent parties” under 28 U.S.C. § 1367 if the claims are related to the primary suit against the United States. This is called “supplemental jurisdiction.” For example, you might be able to bring a state law claim against an individual. This may be a way to add an independent contractor to a lawsuit by suing the United States under the FTCA and the independent contractor under state law. See, for example, Hollman v. United States, 783 F.Supp. 221 (M.D. Pa. 1992).

D. Damages

1. Limit on the Amount of Damages – You cannot bring a lawsuit and ask for damages greater than the amount that you asked for in your administrative claim to the federal agency. 28 U.S.C. § 2675(b). The exception to this rule is where the increased amount of damages is based on newly discovered evidence that was not reasonably discoverable at the time that the administrative claim was presented; or where you allege and prove intervening facts relating to the claim. For examples, look at the following cases: Husovsky v. United States, 590 F.2d 944 (D.C. Cir. 1978); 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); Kielwien v. United States, 540 F.2d 676 (4th Cir. 1976).

2. Types of Available Damages

The FTCA provides only for the recovery of compensatory damages. See Molzof v. United States, 502 U.S. 301 (1992). Compensatory damages are meant to restore the injured party to the position he was in before the injury and nothing more (in other words, to compensate him). Moreover, how compensatory damages are calculated depends upon the state in which the tort occurred. 28 U.S.C. § 1346(b).

You cannot ask for or receive injunctive relief from the court. Moon v. Takisana, 501 F.2d 389 (9th Cir. 1974).

You cannot ask for or receive the expungement of your prison records. Walker v. United States, 116 F.R.D. 149 (S.D. N.Y. 1987).

Finally, you cannot ask for or receive punitive damages. 28 U.S.C. § 2674.

E. Injury: Mental or Emotional Injury

If an inmate wishes to file an FTCA claim for **emotional or mental injury**, then he must be prepared to prove physical injury as well. Under 28 U.S.C.A. § 1346(b)(2), “No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.” Thus, without proof of having suffered a physical injury, it will be almost impossible to support a mental injury claim under FTCA.

F. Time limits

1. If your claim was Denied - An FTCA claim must be filed in the federal district court within six months of the final denial of the administrative claim by the agency. 28 U.S.C. § 2401(b). The date from which the six months begins to run is the date of the mailing, by certified or registered mail, of the notice of the final denial of the claim. You are still required to file the lawsuit within six months even if the six month period expires before the end of the two year period you had for filing the administrative claim. Childers v. United States, 442 F.2d 1299 (5th Cir. 1971). If you do not file the lawsuit within this time period, you will be forever barred from bringing one for the incident.

2. If the Agency never responded to your claim – If the agency has not acted on your claim six months after it was filed, you can choose to treat the inaction as a final denial of your claim and bring a lawsuit at any time. You have an indefinite period of time in which to file your lawsuit. 28 U.S.C. § 2675(a).

G. What type of trial?

In an FTCA lawsuit, you are only allowed to have a non-jury trial. You are not entitled to a jury trial. 28 U.S.C. § 2402.

H. The Government’s Response

1. When is it Due? – the United States has 60 days to answer your complaint. Fed. R. Civ. P. 12(a)(3).

2. Defenses – Many courts have held that the United States cannot claim the defense of qualified immunity in an FTCA case. Ruffalo v. United States, 590 F.Supp. 706 (E.D. Mo. 1984); Townsend v. Carmel, 494 F.Supp. 30 (D. D.C. 1979); Picariello v. Fenton, 491 F.Supp. 1026, 1040 (M.D. Pa. 1980); Castro v. United States, 34 F.3d 106 (2d Cir. 1994) (no official immunities apply under the FTCA).

I. Costs

If the plaintiff wins the lawsuit, he is entitled to seek to recover his costs. 28 U.S.C. § 2412; 28 U.S.C. § 1920; Fed. R. Civ. P. 54(d). However, you should also be aware that if the United States wins the lawsuit, it can also seek to recover its costs under these same provisions.

V. Examples of FTCA claims

A. Negligence

As discussed earlier, negligence is generally when a person fails to exercise a degree of care which a reasonable person would do under the circumstances. The following cases are examples of different negligence claims brought under the FTCA:

- Lawrence v. United States, 193 F.Supp. 243 (D.C. Ala. 1961) – Plaintiff awarded \$1,000 where he was injured when he was a passenger in a government truck that stopped suddenly to avoid striking another government truck, causing Plaintiff to strike his head.
- Witt v. United States, 462 F.2d 1261 (2d Cir. 1972) – military prisoner who rode in a trailer pulled by a tractor could recover under the FTCA for injuries he received as a result of tractor driver’s negligence.
- Huggins v. United States, 302 F.Supp. 114 (D. Mo. 1969) – United States was liable for loss of three fingers by federal inmate when inmate was operating unguarded planer and state law required that such machinery be guarded.
- Logue v. United States, 412 U.S. 521 (1973) – no liability of the United States for negligence of employees of county jail in which federal prisoner was confined when he committed suicide (but the case was sent back to the lower court for a determination of negligence of the United States Marshall who arrested the prisoner).
- Thompson v. Smith, 719 F.2d 938 (8th Cir. 1983) – federal prisoner brought claim for being forced to perform prison work, for suffering involuntary psychiatric evaluation, and for deprivation of certain legal material. Court held that these should have been brought as negligence claims under the FTCA. Because the prisoner did not exhaust his administrative remedies under the FTCA, his lawsuit claims were dismissed.
- McNeal v. United States, 979 F.Supp. 431 (N.D. W.Va. 1997) – claim of negligent exposure to tuberculosis (TB) while in prison.

1. FTCA and Medical Treatment - Often times, a plaintiff will claim that medical personnel did not exercise reasonable care, thereby breaching a duty of care owed to the plaintiff. **Malpractice** is basically a form of professional negligence. Any medical malpractice tort claims will require that the plaintiff submit evidence of the type of care he should have received, which will be the standard of care applied by state law, and evidence of the specific nature of the injury suffered. In researching the duty of care owed to the plaintiff look to the law of the state where the tort occurred. Institutions should also have written regulations specifying **standards of care** for prisoners. Moreover, the U.S. Department of Justice has set forth “Federal Standards for Prisons and Jails,” and the American Correctional Association, which accredits institutions, also has standards that will be helpful for research. Keep in mind that very often, tort actions in medical treatment require expert testimony, which can be costly.

In addition, any FTCA claim alleging that a federal employee was negligent in exercising

reasonable care and meeting established professional standards in doing their work must show that the medical personnel is not an independent contractor, but rather a federal employee acting within the scope of his/her duty. See United States v. Orleans, 425 U.S. 807, 813 (1976).

The following are some cases in which medical claims were brought under the FTCA:

- Serra v. Pichardo, 786 F.2d 237 (6th Cir. 1986) – federal prisoner had cardiovascular disease and alleged that prison doctor’s mishandling of his condition caused his leg to be amputated.
- Yosuf v. United States, 642 F.Supp. 415 (M.D. Pa. 1986) – prisoner alleged medical malpractice by prison neglecting to give him adequate medical care for his injured hand.
- Jackson v. United States, 577 F.Supp. 1377 (E.D. Mo. 1983), affirmed, 750 F.2d 55 (8th Cir. 1984) – plaintiff prisoner died as a result of medical malpractice arising out of treatment of injuries from stab wounds prisoner received from a fellow prisoner. Court held that the plaintiff was entitled to recover.
- Jones v. United States, 91 F.3d 623 (3d Cir. 1996) – prisoner was prescribed medication to treat his condition. Prison officials withheld his medication and he therefore suffered a severe stroke. Court held that the government may have breached its legal duty of care under 18 U.S.C. § 4042.
- Winston v. United States, 305 F.2d 253 (2d Cir. 1962) – federal prisoner claimed that prison doctor incorrectly diagnosed his brain tumor as “borderline hypertension.”

B. Assaults by Other Inmates

It is sometimes possible to bring a negligence claim against the United States if the prison was so careless that it could be held responsible for inmate assaults on other inmates. However, these claims can be very difficult to prove. Courts look for evidence that the prison knew of the danger or should have known of the danger of inmate assault. The federal courts have interpreted the **minimum duty of care** in 18 U.S.C. § 4042 to require that federal employees exercise “ordinary diligence to keep prisoners free from harm.” The duty imposed on the prison is to exercise reasonable care and diligence to protect the prisoner from danger known to or which might reasonably be known by the prison. See Jones v. United States, 543 F.2d 53, 54 (5th Cir. 1976).

Remember though that courts have also stated that some antisocial behavior is to be expected in the prison environment. It is important to note that the government is not an insurer of inmate safety. See Fleishour v. United States, 244 F.Supp. 762, 766 (N.D. Ill. 1965). In other words, in a broad sense the government does not and cannot insure the safety of all inmates against all potential harms.

The following cases are examples of FTCA suits for assaults by other inmates:

Cases where Inmate Lost FTCA Claim:

- Walker v. United States, 437 F.Supp. 1081 (D.C. Or. 1977) – plaintiff was stabbed by another inmate. Court held in favor of the Government.
- Turner v. Miller, 679 F.Supp. 441 (M.D. Pa. 1987) – United States is not liable under FTCA for allowing assault against federal prisoner by fellow inmate. The Plaintiff only expressed concern in general terms that he might be assaulted.
- Hossic v. United States, 682 F.Supp. 23 (M.D. Pa. 1987) – assaulted prisoner claimed that overcrowded conditions and understaffing caused him to be injured and that the prison knew of previous violence in the area of the prison where the assault occurred. The court held in favor of the United States because the prisoner failed to show that the prison knew or should have known of a threat of violence or that the overcrowding and understaffing caused the injury.
- Artis v. Petrovsky, 638 F.Supp. 51 (W.D. Mo. 1986) – plaintiff alleged that he was assaulted by another inmate. Court held that he did not state a cause of action because prison officials were never notified of problems between the two inmates prior to the assault.
- Muniz v. United States, 280 F.Supp. 542 (S.D. N.Y. 1968) – federal prisoner assaulted by fellow prisoners could not recover under the FTCA where prison officials followed reasonable regulations and had no indication that assault was likely.
- Williams v. United States, 384 F.Supp. 579 (D. D.C. 1974) – prisoner injured when another prisoner threw gasoline on him and ignited it cannot recover under the FTCA.
- Jones v. United States, 534 F.2d 53 (5th Cir. 1976) – prisoner struck by unknown assailant. Prison authorities were not on notice of a real possibility of physical danger to inmates during the hours when the assault took place and therefore the government could not be held to be negligent.

Cases Where Inmate Won FTCA Claim or Outcome Unclear:

- Bourgeois v. United States, 375 F.Supp. 133 (N.D. Tex. 1974) – prisoner received \$40,000 for injuries he received as result of ignition of Molotov cocktail thrown into his cell by another inmate.
- Crump v. United States, 534 F.2d 72 (5th Cir. 1976) – federal prisoner attacked by fellow inmate claimed that prison officials should have segregated the assailant who had a history of violence. Court held that plaintiff did not notify the prison that his life was being threatened by another inmate. The court sent the case back to the lower court to consider the plaintiff's claim that the assailant should have been segregated from general population.
- Cline v. Herman, 601 F.2d 374 (8th Cir. 1979) – Plaintiff prisoner was incarcerated for

murdering a Native American and was therefore supposed to be separated from Native American inmates. The U.S. Marshalls did not tell the prison about this recommendation. Plaintiff prisoner was assaulted by Native American inmates.

C. Assault by Staff

The FTCA allows you to recover for assault and battery committed by correctional and law enforcement officers. Keep in mind, however, that some “incidental and necessary touchings by correctional officers of inmates in the performance of their duties are not batteries, but are privileged contacts.” Restatement (Second) of Torts s 132, Comment b (1965); see Kedra v. City of Philadelphia, 454 F.Supp. 652, 673 n.22 (E.D. Pa.1978). The following are a few case examples:

- Barber v. Grow, 929 F.Supp. 820 (E.D. Pa. 1996) – prison employee violently jerked chair out from under inmate. The court held that this could be an actionable claim under the FTCA if the employee was a federal correctional officer.
- Flechsig v. United States, 991 F.2d 300 (6th Cir. 1993) – federal correctional officer who sexually assaulted female while transporting her to doctor’s appointment was not acting within the scope of his employment and therefore inmate’s FTCA claim was barred.
- Sanchez v. Rowe, 651 F.Supp. 571 (N.D.Tex. 1986) – Immigration and Naturalization Service agent maliciously struck plaintiff alien.
- Picariello v. Fenton, 491 F.Supp. 1026 (M.D. Pa. 1980) – Plaintiffs alleged assault and battery by prison guards.

D. Property Loss

Under Ali v. Fed. Bureau of Prisons, 128 S. Ct. 831 (2008) the Supreme Court held that §2680© bars lawsuits against the United States for the unlawful detention of property by “any” law enforcement officer. This includes correctional officers. However, “there is an administrative remedy. Federal agencies have the authority under 31 U.S.C. § 3723(a)(1) to settle certain claims for not more than \$1,000 for damage to, or loss of privately owned property that is caused by the negligence of an officer or employee of the U.S. Government acting within the scope of employment.”

E. Intentional Infliction of Emotional Distress

The following is a case example where an FTCA claim was brought for the tort of Intentional Infliction of Emotional Distress:

- Ross v. United States, 641 F.Supp. 368 (D. D.C. 1986) – two inmates were killed by other inmates. The dead inmates’ parents brought an FTCA claim for intentional infliction of emotional distress.

VI. Conclusion

This bulletin is a guide for those intending to do further research in pursuing a claim under the Federal Tort Claims Act. While this is not exhaustive or comprehensive, the information contained in this bulletin will hopefully provide you with a starting point for further investigation of the process and procedure for bringing suit against the United States under the FTCA. Because the law frequently changes, be sure to check for any new cases or laws in this area as they relate to your claim.