HYBRID ACTIONS UNDER THE FEDERAL TORT CLAIMS ACT (FTCA)

Michael Archuleta, J.D., M.D., M.B.A.
Archuleta, Alsaffar & Higginbotham
Austin, Texas
Email: marchuleta@govtclaim.com
Website: http://www.govtclaim.com

Introduction

It is common in Federal Tort Claims Act (FTCA) practice to encounter cases whose facts require expanding the claim beyond the confines of the FTCA. Combining a FTCA action with other federal and state actions can immensely complicate the claim. Depending upon the circumstances, combining the FTCA with other causes of action can tremendously strengthen or fatally weaken the claim. Recognition of such hybrid claims is a crucial skill required of attorneys practicing under the FTCA.

This paper is the first in a series on hybrid FTCA actions. In the series we will explore the types of hybrid FTCA actions and identify practical strategies to deal with the complexities inherent in hybrid actions.

The most common hybrid FTCA actions are cases where a FTCA action is mandatory due to a government employee tortfeasor and a state law action is also mandatory due to a non-government employee tortfeasor. The scope of this paper will be limited to this situation.

Other categories of hybrid FTCA actions are claims that call for presenting the administrative claim under both the FTCA and the Military Claims Act (MCA). A third category is when two nonexclusive federal laws act to provide remedies for the same tort such as claims made under the FTCA and CERCLA. There are numerous situations where the FTCA and another law, be it state or federal, may be combined. To make matters even more complicated, there may be hybrids of hybrids. Attorneys should be aware of the types of hybrid cases that may exist and learn to recognize them.

The failure to timely recognize the hybrid FTCA case is a potentially huge pitfall for the unwary. It is the single greatest reason why attorneys with expertise in government claims and multidistrict litigation should evaluate potential claims against the government. The biggest risk is failing to appreciate the existence of a hybrid action and allowing the statute of limitations to run on one or more valid cause of action. Unfortunately, this is exceedingly easy to do due to the multitude of laws that may apply, lack of uniform statute of limitations periods, and the fact that many times hybrid actions involve multidistrict and multistate application of law.

The next largest risk is to unknowingly plead the case or limit the claim in such a way that excludes or waives one or more valid cause of action. Other risks include being unaware of potential sources of recovery through insurance policies or otherwise. In the case of the FTCA/MCA hybrid there is the risk of not taking advantage of the provision that does not require proof of negligence or scope of employment by the government (more on this in a subsequent paper). Thorough evaluation of the case by experienced

counsel and early recognition of hybrid actions is the best way to prevent the pitfalls that lie in wait for the unwary.

The Hybrid FTCA Action Involving a Non-Government Employee Tortfeasor

This category is the most common hybrid action. It is also the most complicated of the hybrid actions. Unfortunately, it also presents the largest exposure to the numerous pitfalls inherent in hybrid actions. Attorneys should analyze every potential FTCA claim for non-government employee tortfeasors.

Employee of the Government, Or Not?

Such a simple question. Such a complicated answer. The analysis of whether an individual tortfeasor is an employee of the government is one of perspective. The first perspective is that of the claimant and the claimant's attorney. Their perspective should be the same. There are situations when the claimant and the claimant's attorney should hope the tortfeasor is a government employee and there are situations when they should hope the tortfeasor is not. The second perspective is that of the tortfeasor. Frequently, the tortfeasor wishes to be an employee of the government. Next is the perspective of the government agency. Since the Department of Defense generates more FTCA claims than any other agency it is used as the example agency throughout this paper. The fourth perspective is that of the Department of Justice (DOJ). One would surmise that the DOD and DOJ would be synchronized in their perspectives since both represent the government on the same issues and in the same cases. However, there are numerous differences and unreconciled issues between the DOD and DOJ. The fifth and most important perspective is that of the Federal District Court judge, himself/herself a government employee. The sixth perspective is that of the federal appellate courts. The claimant's attorney should be aware of each of these perspectives and make case decisions taking into account the differences in perspective.

Often the claimant and the claimant's attorney want the tortfeasor to be an employee of the government to take advantage of the provisions and procedure of the FTCA. Advantages of FTCA actions include administrative procedures to resolve the cases, no insurance limits, and litigation with one defendant.

Sometimes however, the claimant and the claimant's attorney may not want the tortfeasor to be an employee of the government. One reason to take this position is when the two year statute of limitations under the FTCA has expired while the statute of limitations for an action under state or other federal law remains intact. This situation occurs most frequently in cases involving children (although it can occur in any type of case) since the FTCA has no provision for extending the statute of limitations for the disability of minority and virtually every state has such a provision for extending the statute of limitations of minors.

It is unethical and a clear conflict of interest for an attorney to take the position that a tortfeasor is not a government employee solely to escape the FTCA cap on attorney's fees or to "keep the case" rather than referring it to more specialized attorneys. One of the worst of all circumstances is to take the position that a tortfeasor is not an employee of the government because the statute of limitations has expired on the FTCA

action due to ignorance of the FTCA provisions requiring presentation of a claim in writing.

Usually, the tortfeasor will want to be deemed a government employee for reasons which include unlimited coverage for damages, no personal exposure to excess damages, no punitive damage, the fact that the tortfeasor cannot be a named defendant in the case, and free legal representation. The tortfeasor who is no longer associated with the government also has the option of not cooperating with the government defense attorneys.

The Analysis

The first step is to make a list of each person that may be a tortfeasor in the case you are evaluating. Next, take the information available and ascertain whether each tortfeasor is clearly a government employee. You are searching for individuals who were government employees at the time of the negligence. Earlier or later employment by the government is irrelevant in this analysis.

The FTCA states that an "employee of the Government" *includes* 1) officers or employees of any federal agency, 2) members of the military or naval forces of the United States, 3) members of the national Guard while engaged in specific training or duty, and 4) 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.

The government employee tortfeasor must be "acting within the scope of his office or employment" for the FTCA to take effect. The bureaucratic vernacular for this requirement is frequently referred to as "scoping" the individual.

The FTCA states that "federal agency" *includes* 1) the executive departments, 2) the judicial and legislative branches, 3) the military departments, 4) the independent establishments of the United States, and 5) corporations primarily acting as intrumentalities or agencies of the United States, but 6) does *not* include any contractor with the United States.

While a detailed analysis is beyond the scope of this paper, there is much law on the meaning of the key words and phrases of the FTCA, i.e. "an employee of the Government", "acting within the scope of his office or employment means", and "federal agency." Most often the analysis is simple and straightforward. But when it is not, creative research the issue may be productive as courts have rendered expansive meanings to these key words and phrases.

There are a few quick and simple ways to verify government employment. In cases involving the military look for evidence of rank. In cases involving civil service employees look for the GS designation. The idea is to be certain that an individual is or is not clearly a government employee. If you are unable to identify tortfeasors in the case you are evaluating, it stands to reason that you cannot safely assume they are government employees. Under the FTCA, entities are not government employees. Individuals run entities. United States government employees are always individuals.

Once you have identified the government employee tortfeasors the difficult part of the analysis begins. Concentrate your analysis on each of the individuals that are not clearly and employee of the government. Generally they fall into one of several categories.

1. They work for the U.S. government as personal service contractor (PSC).
2. They work for the U.S. as a non-personal service contractor (NPSC).
3. They work for an organization contracted by the U.S. government.
4. They work for an organization not contracted by the U.S. government.
5. They are a U.S. government employee.
6. They are a combination of the above.

Under the FTCA the government may be held liable for the negligence of an employee under the *respondeat superior* law of the state where the wrongful conduct took place.

For those persons that are not clearly government employees, it is crucial to obtain the contracts that pinpoint the status of the individual on the date and time of the negligent conduct. It is not uncommon to have a contractor working under two or more different contracts, each with vastly different provisions. For example, an emergency room physician may be an independent contractor (NPSC), not covered by the FTCA, until midnight and a PSC, covered by the FTCA, after midnight.

Ask the agency to identify the employment status of all the potential tortfeasors in the cover letter presenting the Form 95 administrative claim. Follow up with a letter requesting the contracts of all potential tortfeasors acting under contract together with a request that the government admit which tortfeasors are employees of the government. What is troubling about this approach is that it requires the cooperation of the agency. The agency is not required to cooperate, although most do. As a safety measure, keep in mind that, at any time, you may send Freedom of Information Act (FOIA) Requests for unprivileged information, including contract agreements. The strength of the FOIA is that it is non-discretionary.

Generally, both the Department of Defense and the Department of Justice will state that non-personal service contractors (NPSC) are not employees of the government. However, do not just take their word for it. Look at the facts of the case, look at the applicable law. If, after careful analysis, you believe that *respondeat superior* applies, it may be worth your while to file your case and have the court decide the issue. Often the contractor prefers to be a government employee and will cooperate with you in your pursuit on that issue.

Generally, personal service contractors (PSC) are employees of the government. PSC contracts often state that the contractor "shall be treated as a Government employee for the purposes of the FTCA." The Department of Defense and the Department of Justice have taken positions that are contrary to one another regarding whether PSCs are government employees. Their contrary positions immeasurably complicate the administrative process, particularly of those claims arising before November 18, 1997. Below is an edited excerpt of their respective positions as outlined in the December 2000 edition of Army Lawyer:

> The issue of whether or not a PSC Health Care Provider (HCP) is an employee of the United States for FTCA purposes is very complicated. In the early 1980s, when Congress first authorized DOD to hire PSC HCPs, DOD considered PSC HCPs to be independent contractors and required them to carry their own medical malpractice liability

> coverage. However, in 1995, DOD changed its position and revised the personal services contracts, stating that PSC HCPs were federal employees entitled to the immunities provided military and DOD civilian HCPs. The effect of DOD's policy was that PSC HCPs hired by the Department of the Army were not required to carry personal malpractice insurance, nor did Department of the Army purchase an overall malpractice insurance policy for its PSC HCPs.
>
> Unfortunately, prior to 18 November 1997, the Department of Justice's (DOJ) position on PSC HCPs differed from that of DOD. The DOJ believed that a PSC, or any other contract for that matter, could not, by its terms, expand the Government's waiver of sovereign immunity under the FTCA, nor expand the scope of its liability for the tortious acts of a contract employee. Therefore, even though a PSC contained language to the effect that a Government contract physician "shall" be treated as a Government employee for the purposes of the FTCA, a PSC physician was not treated as such by DOJ unless the physician was, in fact, an "employee of the Government" as determined by factual investigation and research of applicable federal case law. If investigation indicated that a PSC HCP was not an "employee of the Government," then DOJ would not represent the PSC HCP, and would assert the independent contractor defense.
>
> The positions of the DOD and DOJ were reconciled, at least prospectively, after President Clinton signed the National Defense Authorization Act for Fiscal Year 1998, on 18 November 1997. Section 736 of that law amended the Gonzalez Act, to add PSC contract physicians described in 10 U.S.C. § 1091. The effect of this amendment was to make PSC HCP "employees of the United States."
>
> However, DOJ does not believe that the 1997 amendment is retroactive. Therefore, different procedures apply to claims arising before and after 18 November 1997.

The article goes on to state:

> Therefore, even though a PSC contained language to the effect that a Government contract physician "shall" be treated as a Government employee for the purposes of the FTCA, a PSC physician was not treated as such by DOJ unless the physician was, in fact, an "employee of the Government" as determined by factual investigation and research of applicable federal case law. If investigation indicated that a PSC HCP was not an "employee of the Government," then DOJ would not represent the PSC HCP, and would assert the independent contractor defense if suit were brought against the United States.

It all seems very complicated. This author has developed a bottom line personal opinion on this issue. It really does not matter to me what DOD or DOJ think about PSC contracts, because an attorney should never be afraid to go to court on the issue of whether a PSC is a government employee for the purposes of the FTCA when his or her

contract states exactly that. There are no published cases where a court has held a PSC to be a non-government employee with such a contract provision. The only reason the DOD and DOJ can pontificate about these issues is because attorneys fail to challenge their conclusions in court.

There is some tremendously helpful legislative history on the personal service contract issue that would be helpful to those dealing with a PSC in which the DOD or DOJ is asserting the independent contractor defense. The details are beyond the scope of this paper, but be aware that it exists.

For those individuals that work for an organization contracted by the government the first step is to get the contract between the agency and the organization. Usually the government will not be able to provide you with a copy of the contract, if any, between the individual and the organization. If the contract is a PSC contract between the agency and the organization then another complicated analysis begins. Below is an edited excerpt of the DOJ position on this issue as outlined in the December 2000 edition of Army Lawyer:

> The 1997 amendment to the Gonzalez Act states that the exclusive remedy for suits for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician "serving under a personal services contract entered into under section 1091" is the Federal Tort Claims Act. Section 1091(c)(1) states that the service secretary "shall establish by regulation procedures for entering into personal services contracts with individuals under subsection (a)." The Federal Acquisition Regulations (FARS) allow PSCs to be made between an agency and a corporation that will provide the physician rather than requiring the contract be made directly with the physician. The Gonzalez Act does not expressly require that a PSC be made directly with the agency and the physician in order for the exclusive remedy to lie under the FTCA. Instead, it states that the PSC physician must be "serving under" a PSC contract in order to be covered. While 10 U.S.C. § 1091(c)(1) uses the term "individuals" when referring to establishing PSCs, the statute directs the Secretary of Defense to establish by regulations procedures for entering into PSCs. The regulations that have been established allow PSCs between the agency and corporations.
>
> Be aware that DOJ still questions the employee status of individual HCPs hired by a corporation under a PSC between the United States and the corporation because "personal services" contracts, by their nature, cannot be made with a corporation. However, DOJ has recognized the employee status of such HCPs, on a case-by-case basis only, based upon its interpretation of subsection (f) of the Gonzalez Act: that individual PSC HCPs should be held harmless because they were not required to have any liability insurance of their own."

Again, do not necessarily take the decision of DOD or DOJ as the final answer on governmental employment. Also, it is important to realize that for various internally generated reasons DOD and DOJ sometimes disagree on whether an individual is a government employee. What is frustrating, and absolutely contrary to the interests of

justice, is the scenario where DOD steadfastly holds that an individual is not a government employee during the administrative process, then once the case is filed in federal court the DOJ will admit employment.

Basically, when the individual is serving under a contract between a government agency and an organization, and not between the agency and the individual, a careful analysis of the contract provisions should be undertaken, followed by a *respondeat superior* analysis under state law. There is no substitute to filing and litigating an issue with the government. The plaintiffs bar has frequently been remiss in failing to take on the government to properly represent their FTCA clients before the courts.

Some individuals don't appear to work for the U.S. government and do not work for an organization contracted by the U.S. government. Sometimes these individuals are in fact "employees of the government" under certain rules, quirks, or rulings concerning the FTCA. The best argument in this situation is to assert that the agency clause of the FTCA is clearly expansive and that the government has the authority to supervise and control the day to day activities of the individual. For various reasons numerous strange bedfellows have been held in specific situations to be "employees of the government" for the purposes of the FTCA, i.e. FBI informants, a county deputy sheriff, a city police officer, civilian employees of post exchanges, and in the ultimate bureaucratic oxymoron, Peace Corps volunteers *except* for acts occurring on foreign soil.

Taking the Case to Trial

Because of some inflexibility of the various government agencies and the DOJ regarding whether an individual is a government employee a federal judge's ruling may be needed to decide the issue. One way to handle this situation economically is to agree (and ask the court to grant permission) to first litigate the issue of employment only, and take an interlocutory appeal if necessary, prior to litigating the remainder of the case on the merits. Winning on the employment issue may make a recalcitrant DOJ more likely to resolve a case prior to trial.

Going to trial with both FTCA covered and non-FTCA covered tortfeasors is more complicated than trying a FTCA action alone. The attorney should decide whether he or she wants to combine the actions or try the separately. The FTCA action is always tried in federal court. The non-FTCA action is usually tried in state court.

If the attorney chooses to combine the actions, they can both be tried in the same federal court case under the supplemental jurisdiction of the federal court 28 U.S.C. §1367. The FTCA defendants are tried to the bench while the non-FTCA defendants are entitled to a jury. The attorney must present the case to the judge and the jury, because both will be finders of fact. Although it is not a frequently occurrence, a court may on its own, or upon motion by the parties seat an advisory jury in any FTCA action. The law applied to the FTCA and state action may be different. The court has the right on its own or on the motion by any party to make the sitting jury an advisory jury for the FTCA action. This is one way to have a quasi-jury over a FTCA action, although its function regarding the FTCA defendants is advisory only.

Please send requests for reprints to
Michael Archuleta, J.D., M.D., M.B.A.
Archuleta, Alsaffar & Higginbotham
P.O. Box 340639
1100 Lakeway Drive, Suite 101
Austin, TX 78734
512-266-7676
Email: marchuleta@govtclaim.com
Website: http://www.govtclaim.com