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Federal Tort Claims Act

In This Issue

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Introduction

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Welcome to this edition of the *Department of Justice Journal of Federal Law and Practice* focusing on the Federal Tort Claims Act (FTCA). As this year marks the 77th anniversary of the enactment of the FTCA, which became law on August 2, 1946, it seems especially appropriate that this edition will provide an overview of both the history of the FTCA as well as recent developments in the law. This edition focuses on topics such as jurisdictional defenses, administrative exhaustion, expert examination, and challenges frequently encountered in litigation under the FTCA, with articles that are both academically engaging and practically useful. Many of these articles address recurring questions in the field. The authors serve a variety of roles, including FTCA Litigation Section attorneys from the Civil Division and Assistant U.S. Attorneys (AUSAs) from around the country. Therefore, this edition includes a range of perspectives and experiences illuminating some of the more complex facets of the FTCA.

The articles are loosely organized based on the issues that one might encounter during the phases of an FTCA case. The first article traces the evolution of the statutes through which Congress has made the FTCA's remedy exclusive and provides guidance for when the Westfall Act should not be invoked. The second discusses the FTCA's statute of limitations and exhaustion requirements following the Supreme Court's ruling in *United States v. Wong*. Next, we introduce the reader to the exclusive remedy provision in the Federal Employees' Compensation Act, which bars FTCA actions brought by federal employees alleging a work-related injury. The following article illustrates why corporate negligence claims are barred under the FTCA. Next, a survey of the various circuit courts' approaches to administrative exhaustion provides insights to inform the defense of an FTCA case. Two articles then serve as practical guides on presenting the most effective direct examination of an expert and preparing a powerful cross-examination of an expert. Finally, we offer strategies for effective arguments against a civil conspiracy claim asserted under the FTCA, as well as when to use those arguments.

In addition to thanking the authors for their exceptional contributions, I would also like to thank those who worked behind the scenes

with editing, reviewing, publishing, and disseminating this edition of the Journal. I hope all readers find the articles engaging and supportive.

About the Author

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From Novelty to Commonplace: The FTCA's Exclusive Remedy —Beyond the Westfall Act

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I. Introduction

The Federal Tort Claims Act (FTCA) effects a limited waiver of the United States' sovereign immunity for the negligent or wrongful acts of federal employees acting within the scope of their official duties.[2] The FTCA cognizes suit only against the United States, and when first enacted, the FTCA conferred no immunity for government employees facing individual liability for acts committed in the course of performing their official duties.[3] Before the FTCA's enactment, a federal employee's protections were limited to the doctrine of federal common-law official immunity, when applicable, or the FTCA's judgment bar, which applied only if an FTCA action was brought against the United States and resulted in a judgment.[4]

It was not until 1961, with the enactment of the Federal Drivers Act,[5] that a federal statutory immunity became available for federal employees sued in their individual capacities for injuries caused in the discharge of their official duties. As its name suggests, the Federal Drivers Act limited its scope to injuries caused by the operation of motor vehicles within the scope of the driver's federal employment.

Before the Federal Drivers Act, the Department of Justice's typical practice was to authorize personal representation and dispatch attorneys to defend employees when they were sued in their individual capaci-

[1] With gratitude to Conor Kells, Senior Trial Counsel, FTCA Section, Torts Branch, Civil Division, for his tutelage and guidance throughout the drafting and editing of this article.

[2] 28 U.S.C. § 1346(b)(1).

[3] Levin v. United States, 568 U.S. 503, 507 (2013).

[4] 28 U.S.C. § 2676.

[5] Federal Drivers Act, Pub. L. No. 87-258, 75 Stat. 539 (1961).

ties for actions or omissions within the scope of employment.[6] For suits filed in state court, as almost all were, a defense would include invoking 28 U.S.C. § 1442 to remove the case, asserting that federal common law official immunity protected the federal employee.[7] These removals and invocations of official immunity had varying levels of success but were frequently denied in cases involving motor vehicle accidents, which comprised the largest number of suits against federal employees.[8] This trend significantly burdened the entire workforce of career drivers employed by the federal government who were then pressured to carry liability insurance to avoid personal exposure.[9]

In response, Congress enacted the Federal Drivers Act.[10] The Federal Drivers Act was a first-of-its-kind statute making the FTCA's remedy exclusive of any action against a federal employee for injuries resulting from motor vehicle accidents, provided that the employee was acting within the scope of employment at the time of the incident.[11]

In subsequent years, Congress drew upon the success of the Federal Drivers Act to extend similar statutory immunity to certain agency personnel for specific classes of claims, most commonly medical malpractice claims.[12] These enactments were necessary because, just as had occurred with motor vehicle accident claims, courts had begun to reject the argument that federal common law official immunity afforded protection against medical malpractice by federal employees, impelling Congress to act.[13]

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6 Kelley v. United States, 568 F.2d 259, 264 n.3 (2d Cir. 1978).

7 *See id.*

8 *See id.* Courts ruled that removal was not proper because driving a motor vehicle was not sufficiently within the scope of an employee's official duties. *E.g.*, Goldfarb v. Muller, 181 F. Supp. 41 (D.N.J. 1959) (holding that the U.S. Postal Service driver was not entitled to removal because the driver's actions bore no causal relationship to official employment duties and that driving his mail truck did not present a federal question or defense under federal law).

9 *See Kelley*, 568 F.2d at 265.

10 Federal Drivers Act, Pub. L. No. 87-258, 75 Stat. 539 (1961).

11 *See id.*

12 *See, e.g.*, 38 U.S.C. § 7316 (making FTCA's remedy exclusive for malpractice actions brought against Veteran's Affairs medical personnel); 42 U.S.C. § 233 (making FTCA's remedy exclusive for malpractice actions brought against Public Health Services officers and employees); 10 U.S.C. § 1089 (making FTCA's remedy exclusive for malpractice actions brought against Department of Defense personnel and certain personal services contractors).

13 *See* Henderson v. Bluemink, 511 F.2d 399, 403–04 (D.C. Cir. 1974) (holding that a doctor's employment with the U.S. Army did not clothe him with official immunity for acts performed while practicing medicine in line with his official duties and noting the need for legislative action protecting government doctors from

Despite these enactments, there remained many categories of claims for which federal employees enjoyed no statutory immunity defense. For the categories of claims that were not directly covered by a statute patterned upon the Federal Driver's Act, federal common law official immunity typically remained the only viable immunity defense. Eventually, a circuit split emerged on the scope and applicability of official immunity in common law tort suits against federal employees.[14] The United States Supreme Court resolved the split in *Westfall v. Erwin* in 1988, holding that official immunity applied only to discretionary acts or omissions within the outer perimeter of a federal official's or employee's duties, a far narrower interpretation than the government had sought, and one which portended leaving many federal employees without any immunity from suit.[15]

In response, Congress enacted the Westfall Act, making the FTCA's remedy exclusive (with two exceptions) for claims of money damages for injuries or loss of property, personal injury, or death resulting from negligent or wrongful acts or omissions by federal employees, provided that the employee was acting within the scope of employment at the time of the incident giving rise to suit.[16] Rather than enacting a completely new regime, the Westfall Act amended the Federal Drivers Act in several key ways. But the Westfall Act did not repeal the numerous predecessor statutes that Congress had enacted, each patterned upon the Federal Drivers Act. These predecessor statutes, although occasionally overlooked, remain applicable and in effect today.

This article endeavors to trace the evolution of the statutes through which Congress has made the FTCA's remedy exclusive and, more importantly, to provide guidance on circumstances and cases where the Westfall

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personal liability for malpractice); *see, e.g.*, Bates v. Carlow, 430 F.2d 1331, 1332 (10th Cir. 1970); Brenner v. Kelly, 201 F. Supp. 871, 873–74 (D. Minn. 1962); *see also*, United States v. Smith, 499 U.S. 160, 170 n.11 (1991) (discussing *Henderson*, 511 F.2d at 737); *see also* Jackson v. Kelly, 557 F.2d 735, 737 (10th Cir. 1977) (overruling *Bates*, 430 F.2d 1331) (holding that doctor's treatment of patient was not covered under the doctrine of official immunity because medical treatment did not involve governmental discretion).

14 Westfall v. Erwin, 484 U.S. 292, 298 (1988).

15 *Id.* at 300.

16 28 U.S.C. § 2679(b) ("The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee.").

Act should not be invoked. As commonplace as reliance on the Westfall Act has become, there remain circumstances in which the Westfall Act's statutory mechanisms are not applicable and a different statute must be invoked. The differences between the Westfall Act and these prior statutes patterned on the Federal Drivers Act are real and consequential. It is, therefore, incumbent upon the United States to invoke the proper statutory authorities when intervening in actions brought against federal employees or covered persons.[17]

Moreover, because these predecessor statutes were patterned upon the Federal Drivers Act, the practices of the pre-Westfall Act world remain relevant today. Much of that prior practice and the reasons for it have been lost to the annals of history given the breadth and scope of the Westfall Act's scheme. But the Federal Drivers Act's quirks remain relevant in some cases, and its quirks also help illuminate what makes the Westfall Act different in the cases to which it applies. This article, therefore, begins with a discussion of the Federal Drivers Act, the statute that birthed the now-ubiquitous scope of employment, removal, and substitution procedures found in other statutes, including the Westfall Act.

II. The Federal Drivers Act

Until 1961, federal drivers faced possible lawsuits and personal liability exposure following every accident, a not-infrequent occurrence.[18] Courts ruled that negligent driving was not sufficiently related to the employees' official functions to warrant removal under 28 U.S.C. § 1442 or to invoke federal common law official immunity.[19] Though the burden on federal drivers was obvious,[20] the optimal solution was subject to debate. The House of Representatives and Senate considered a variety of legislative

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[17] Generally, "any person other than a Federal employee . . . as to whom Congress has provided by statute that the remedy provided by 28 U.S.C. [§§] 1346(b) and 2672 is made exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against such person." 28 C.F.R. 15.1(b)(3).

[18] *See* 87 Cong. Rec. S18489, S18500 (daily ed. Sept. 7, 1961) (statement of Sen. Kenneth Keating) (explaining how the failure to protect federal personnel causes federal drivers to "foot the bill for an expense which the Government should reasonably be expected to absorb") [hereinafter Daily Edition: September 7th].

[19] Kelley v. United States, 568 F.2d 259, 264 n.3 (2d Cir. 1978); *e.g.*, Goldfarb v. Muller, 181 F. Supp. 41 (D.N.J. 1959).

[20] S. Rep. No. 87-736, 87th Cong., 1st Sess. 1961, *reprinted in* 1961 U.S.C.C.A.N. 2784, 2789 (articulating how the "increasing use of motor transport by the Federal Government as a part of its day-to-day operations, coupled with the augmented costs of public liability and property damage insurance coverage available to Federal employees to protect themselves in the operation of vehicles on Government business, has imposed a heavy financial burden on the large number of such employees").

solutions before settling upon the bill that became the Federal Drivers Act.[21]

One proposed solution, rejected for a variety of reasons, was for the government to directly indemnify federal drivers against liability arising from their operation of motor vehicles in the performance of their duties as a federal employee.[22]

A second proposal, rejected at the urging of interested agencies, was for the government to procure insurance covering its officers and employees for liability incurred for damage to property or for personal injury, including death, resulting from using motor vehicles within the scope of employment.[23]

In 1960, Congress sent H.R. 7577 for President Dwight D. Eisenhower's approval. This bill was designed to provide for the defense of suits against federal employees arising out of their operation of motor vehicles in the scope of their employment and for other purposes.[24] The original bill's solution was to make the FTCA's remedy exclusive of any other action against federal employees sued for injuries resulting from the operation of motor vehicles while acting within the scope of employment.[25] President Eisenhower vetoed the bill because it required the consent of the plaintiff before any such action against a federal driver could be removed to federal court[26] and proceed as an action against the United States, permitting any plaintiff to thwart the primary intent and purpose of the bill.[27]

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21 *Id.* at 2785.

22 *Id.* at 2785–2865; Daily Edition: September 7th, *supra* note 18, at S18500 ("One approach has been to provide indemnity to the employee for his damages or to pay the cost of his insurance.").

23 S. Rep. No. 87-736, at 2786 (1961).

24 House of Representatives, 86th Cong., 2d sess., Doc. No. 415, "Message from the President of the United States Returning without Approval, the Bill (H.R. 7577) . . . " (June 11, 1960).

25 *Id.*; *see e.g.*, Daily Edition: September 7th, *supra* note 18, at S18499 ("Under the original language of the present bill, which was virtually identical to S. 202, which I introduced on January 6, 1961, suits against the United States would be the exclusive remedy for damages resulting from the operation by any Government employee of any motor vehicle while acting within the scope of his employment.").

26 S. Rep. No. 87-736, at 2788–89 (1961) ("[A] civil action or proceeding commenced in a State court against an employee of the Government may not be removed to a district court of the United States without the consent of the plaintiff. The committee believes that the bill, as amended, may provide a method to achieve the desirable results which are sought by the proponents of the legislation while preserving the right of a plaintiff, if he so desires, to pursue an action against the individual driver in a State court to a final adjudication in that court.").

27 "Message from the President of the United States Returning without Approval, the

Following President Eisenhower's veto of H.R. 7577, the next Congress drafted a bill adapting a General Services Administration (GSA) proposed amendment designed to fit into the existing mechanism afforded by the FTCA.[28] That bill, however, was a near-identical copy to the previously vetoed H.R. 7577 containing the same objectionable provisions that prompted the President's veto.[29]

To avoid a second near-certain veto, as well as to forge a compromise between those solicitous of protecting plaintiffs' and states' rights and those seeking to vindicate protections for federal employees, Senator Johnston of South Carolina and Senator Ervin of North Carolina introduced an amendment, now commonly known as the scope of employment certification.[30] The purpose of this amendment was explained on the Senate floor:

> This amendment would not require the plaintiff's consent to removal of suits against individual employees, but it would require the Attorney General—as a condition for removal—to certify that the employee was acting within the scope of his employment at the time of the incident out of which the suit arose. This amendment avoids all of the objections to the committee's amendment and at the same time gives full protection to the plaintiff's interests. It makes certain that suits will not be removed improperly, but protects the employee from any personal liability where it is conceded that he was acting within the scope of his employment. Since the bill also provides that a suit will be remanded to the State court upon

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Bill (H.R. 7577) . . . ", *supra* note 24.

[28] *Id.*

[29] *See* Daily Edition: September 7th, *supra* note 18, at S18500 ("As originally introduced, H.R. 2883, like S. 202, provided that when a Government driver is sued in a State court on a claim resulting from his operation of a motor vehicle while acting within the scope of his employment, such action would be subject to removal to an appropriate Federal court on the motion of the United States. There it would become an action against the United States under the Federal Tort Claims Act and be the plaintiff's exclusive judicial remedy. The committee's amendment, however, would allow such removal only with the plaintiff's consent.*")*.

[30] *See* Daily Edition: September 7th, *supra* note 18, at S18499 (proposing the amendment of subsection (d) to read, "Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto . . .").

> a determination after removal that the United States is not liable under the Federal Tort Claims Act, the plaintiff will be effectively spared any disadvantage under the proposed amendment.
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> . . .
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> The first interest with which we have been concerned is the interest of parties injured by Government employees. These parties are entitled to have their cases adjudicated, and they are entitled to be protected against unnecessary removals of the cases to Federal courts, where there is no liability on the part of the Government under the Federal Tort Claims Act. The second interest with which we are concerned is that of the Federal employee, whether he be a postal employee or an employee in some other Federal activity, who causes injury unintentionally in the performance of his duties as an employee of the Federal Government. He is certainly entitled, under modern theories, to have liability for the act which he does for the Government borne by the Government, and he is entitled to have his cause defended by the Attorney General.
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> . . .
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> The amendment, which would take care of the interests of the injured party and the Government employee and respect the tradition that actions against the Federal Government shall be tried in the Federal court is about as fine a solution as could be devised.[31]

As its proponents explained, the certification provision balanced the interests between plaintiffs and federal employees, while additionally satisfying the competing interests of states' rights and the federal interest in ensuring a federal forum wherein the United States could defend suits against its employees.[32]

As the foregoing makes clear, Congress envisioned the Attorney General's certification as a mechanism to ensure that the United States had a sufficient federal interest to justify depriving plaintiffs of their preferred state court venue, divesting state courts of jurisdiction over actions otherwise within their purview to adjudicate and substituting the United States in place of the federal employee-defendant.[33] By explicitly providing a

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[31] Daily Edition: September 7th, *supra* note 18, at S18500–01.

[32] *Id.*

[33] *See id.* at 18499 (statement from Senator Olin D. Johnston) (articulating the de-

mechanism for remand, Congress ensured plaintiffs' rights were protected if a district court otherwise found that the Attorney General's certification, removal, or the United States' substitution had been made in error.[34] The resulting bill, known as the Federal Drivers Act, made the FTCA's remedy exclusive of any action against a federal employee for injuries and loss of property, personal injury, or death arising out of operation of motor vehicles while acting within their scope of employment.[35]

To facilitate the Federal Drivers Act's core purpose, as well as to ensure continuity of suits improperly brought against federal employees, Congress authorized the Attorney General to defend actions meeting the statutory criteria in any court.[36] Once the Attorney General issued a scope of employment certification, the case could be removed to federal court and the action would be deemed one against the United States under the FTCA.[37] If, however, the federal court determined upon motion that the case was one "in which a remedy by suit within the meaning of" the Federal Drivers Act's operative clause was available against the United States, the case would be remanded to state court.[38]

At the time, the Federal Drivers Act was a novel enactment. Congress's decision to require that the Attorney General certify scope of employment as a condition to removing cases to federal court and converting the action into one against the United States was unprecedented. As both the legislative reports and debates bear out, the final bill reflected a compromise that attempted to balance several competing interests.[39]

Soon after the Federal Drivers Act became law, the United States effectuated its purpose and began issuing scope of employment certifications to protect federal employees sued for injuries resulting from motor vehicle accidents, and the bill largely accomplished its desired end.[40]

Despite its overall success, the Federal Drivers Act left some matters unresolved. Notably, there was no provision in it addressing cases orig-

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sired balance between the interests of the plaintiff and the interests of the government employee).

34 *See id.* ("Since the bill also provides that a suit will be remanded to the State court upon a determination after removal that the United States is not liable under the Federal Tort Claims Act, the plaintiff will be effectively spared any disadvantage under the proposed amendment.").

35 Federal Drivers Act, Pub. L. No. 87-258, 75 Stat. 539 (1961).

36 28 U.S.C. § 2679(c).

37 Kelley v. United States, 568 F.2d 259, 261 (2d Cir. 1978).

38 *See id.* (quoting 28 U.S.C. § 2679(d)).

39 S. Rep. No. 87-736, at 2788-89 (1961).

40 *See* Vantrease v. United States, 400 F.2d 853, 856 (6th Cir. 1968) (common law negligence action that United States mail carrier brought against post office employee wherein defendant successfully sought certification).

inally filed in federal court. Further, there was no statutory mechanism through which employees could challenge the Attorney General's refusal to issue a scope certification or substitute the United States in place of a federal employee.

Under the Federal Drivers Act, when the Attorney General refused to issue a scope certification or otherwise cause the United States' intervention into a case on the employee's behalf, the federal employee had no right to petition a court to compel the Attorney General to act or to have the United States substituted in his stead. Rather, a federal employee's recourse was to put on his own evidence to the court in which the case was then-pending—state or federal—and attempt to secure his own dismissal on the grounds that he satisfied the Federal Drivers Act's statutory conditions for immunity.

For example, in *Lemley v. Mitchell*, the court denied a mandamus action seeking to compel the Attorney General to certify that the plaintiff (the federal driver named as a defendant in a separate state court action) was operating a motor vehicle within the scope of his employment at the time of the accident.[41] The court refused to override the Attorney General's discretion to issue or refuse to issue a scope of employment certification.[42] In denying the mandamus petition, the court explained that no provision of the Federal Drivers Act required the Attorney General to issue certifications in all cases, leaving it to the Attorney General's "sound discretion" whether to do so.[43]

As important, *Lemley* concluded that the aggrieved employee had another avenue open to him for relief: "[H]e may offer evidence [in the state court action] that he was, in fact, acting within the scope of his employment with the United States at the time of the accident."[44] The court explained—

> Congress did not contemplate, as plaintiff contends, that there must be a certification by the Attorney General before one acting within the scope of government employment may become immune from suit. By its terms, Section 2679(b) declares that the exclusive action shall be against the United States where it is shown that the employee was acting within the scope of his government employment when the incident in question occurred.
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> Subsection (d), which authorizes certification by the Attorney

41 304 F. Supp. 1271, 1273–74 (D.D.C. 1969).
42 *Id.*
43 *Id.* at 1273.
44 *Id.*

> General, was designed to facilitate removal to a federal court when it appeared that the United States would be the only proper party defendant. That provision in no way restricts the ability of a defendant employee to obtain immunity from suit, provided he is able to demonstrate that he falls within the scope of subsection (b). If the Court of General Sessions agrees with the defendant (plaintiff in this action) that he was acting within the scope of his employment with the Coast Guard when the accident occurred, the court should declare him immune from suit under subsection (b).
>
> It is true that if plaintiff in this action is forced as a defendant in the Court of General Sessions to establish his immunity from suit, he must undergo the expenses of defending a suit which might have been unnecessary had the Attorney General issued a certification. In the Court's view, however, that possibility is not sufficient to constitute the irreparable injury that is required before an action for mandamus will lie. Section 2679(d) clearly indicates that even after the Attorney General has issued a certification and the case has been removed to the District Court, that court, upon a motion for remand, may consider whether the defendant employee was acting within the scope of his government employment. If the Court determines that the certification was improper, it may grant the motion and remand the cause to the Court of General Sessions.
>
> Thus, the failure of the Attorney General to issue a certification may result in no more cost to the plaintiff than an agreement of certification. Because the certification by the Attorney General is simply an administrative determination, not conclusive as to the issue of scope of employment, it cannot be validly maintained that there will be irreparable injury if the Attorney General does not grant the certification.[45]

Consistent with *Lemley*, the Sixth Circuit likewise dismissed a petition for mandamus to direct the Attorney General to issue a certification and remove to federal district court a state court action brought against the administratrix of a federal employee sued for injuries resulting from a motor vehicle accident.[46] *Seiden*, citing favorably to *Lemley*, concluded that the Attorney General retains the discretion to decide whether claims

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[45] *Id.* at 1273–74 (footnote omitted).

[46] Seiden v. United States, 537 F.2d 867, 870 (6th Cir. 1976).

against federal employees fall within the statutory scope of the Federal Drivers Act.[47] *Seiden* further agreed with *Lemley* that "denial of mandamus does not prevent the government employee from attempting to establish in the state court where he has been sued that he was in fact within the scope of his employment at the time of the collision out of which the claims against him arose. If he does establish this fact the provisions of subsection (b) grant him personal immunity."[48] Finally, *Seiden* observed that the Attorney General's issuance of a certification is not binding on anyone, and an action might still be remanded despite the Attorney General's certification.[49] For all of these reasons, mandamus was not available to compel the Attorney General to certify or to compel the United States to substitute as a defendant.[50]

III. Building upon the Federal Drivers Act's success: 1965–1988

Exposure to personal liability was not unique to federal drivers, and federal agencies felt pressure to secure protections for employees on other types of claims. Over time, Congress enacted a series of agency-specific statutes patterned after the Federal Drivers Act and designed to shield specific classes of employees from the threat of personal liability on certain categories of claims.[51] This lineage of protections covered a variety of federal agency employees, including but not limited to Department of Veterans Affairs Health-Care Providers, Public Health Service officers and employees, Department of Defense medical personnel, and State Department medical personnel.

As had occurred in the run-up to the passage of the Federal Drivers Act, the federal health care workforce began to face personal exposure on account of courts rejecting invocations of official immunity in malpractice cases, prompting Congress to act.[52] From 1965 to 1988, Congress

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47 *Id.* at 869.

48 *Id.*

49 *Id.* at 870.

50 *Seiden* also found persuasive that the Ninth Circuit in Proietti v. Levi, 530 F.2d 836 (1976), had held that the Administrative Procedure Act (APA) furnished jurisdiction to review the Attorney General's refusal to certify scope of employment under the Federal Drivers Act. For reasons set forth in the dissent, however, *Proietti*'s logic is dubious at best and has never been relied upon in any other case. The United States should not suggest that the APA supplies jurisdiction to review the Attorney General's refusal to issue a scope of employment certification.

51 *See* Levin v. United States, 568 U.S. 503, 509 (2013).

52 *See* 38 U.S.C. § 7316 (extending FTCA coverage to Department of Veterans Affairs medical personnel); 42 U.S.C. § 233 (extending FTCA coverage to Public Health

instituted numerous medical malpractice statutes to supply similar protections as those available on motor vehicle accident claims under the Federal Drivers Act.[53] While patterned upon the Federal Drivers Act in most respects, the medical malpractice statutes differed in a few ways: (1) The operative scope of the statutes was limited to actions for money damages resulting from personal injury, including death, but not property claims; and (2) most contained a provision that abrogated the FTCA's intentional tort exception[54] for claims of "medical battery" to ensure coverage for informed consent violations.[55] By abrogating the United States' sovereign immunity for informed consent violations, Congress ensured that the individual would not face liability due to the absence of a remedy against the United States. This development was a necessary addition because district courts were empowered to remand actions back to state court and deny substitution of the United States if the case was one "in which a remedy by suit within the meaning" of the operative clause was "not available against the United States."[56]

Until 1988, the mosaic approach to making the FTCA's remedy exclusive persisted, with each statute and its operative mechanisms and limitations patterned exclusively on the Federal Drivers Act.[57] These statutes each followed a pattern: When courts ruled or threatened to imperil federal common law official immunity for certain employees on certain claims, Congress acted to establish the immunity by statutory enactment, making the FTCA's remedy exclusive of any other action against the employee for certain claims.

IV. The Westfall Act

In 1988, the Supreme Court held in *Westfall v. Erwin* that official immunity applied only to discretionary acts or omissions within the outer perimeter of a federal official's or employee's duties, resolving a circuit split on the scope and applicability of official immunity in common law tort suits against federal employees.[58] Nonetheless, the Supreme Court's

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Services officers and employees); 22 U.S.C. § 2702 (extending FTCA coverage to State Department medical personnel); 51 U.S.C. § 20137 (extending FTCA coverage to National Aeronautics and Space Administration Personnel); *see also* Henderson v. Bluemink, 511 F.2d 399, 402 (D.C. Cir. 1974) (holding that official immunity was not available).

53 *See* 38 U.S.C. § 7316; 22 U.S.C. § 2702; 51 U.S.C. § 20137.

54 *E.g.*, 28 U.S.C. § 2680(h).

55 *See supra* note 52.

56 *Id.* at 869 n.1.

57 *See* 38 U.S.C. § 7316, 42 U.S.C. § 233, 22 U.S.C. § 2702, and 42 U.S.C. § 233(g)–(m).

58 Westfall v. Erwin, 484 U.S. 292, 300 (1988).

resolution to have official immunity determined on a case-by-case basis, limited only to discretionary acts or omissions, troubled Congress and prompted swift action to address the overwhelming personal tort liability that *Westfall v. Erwin* portended for numerous federal employees.[59] Effectively overturning *Westfall v. Erwin*, Congress enacted the Westfall Act, amending the Federal Drivers Act to cover any monetary claim for injury, loss of property, personal injury, or death resulting from negligent or wrongful acts or omissions by employees acting within the scope of their federal employment.[60]

In addition to expanding the scope of claims for which federal employees would enjoy statutory immunity, Congress made several other notable changes that differentiate the Westfall Act both from the Federal Drivers Act and the statutes patterned upon the Federal Drivers Act.

First, Congress added a new subsection (d)(1), which expressly authorizes the Attorney General to issue a certification and obtain substitution of the United States in actions pending in federal court.

Second, Congress, via subsection (d)(2), eliminated the provision of the Federal Drivers Act that required remand in the event a motion to remand successfully challenged the Attorney General's certification. In its place, Congress directed that whenever the Attorney General affirmatively certifies scope of employment, the case shall be removed to federal court, the United States shall be substituted as the defendant, and the Attorney General's certification shall "conclusively establish scope of office or employment for purposes of removal."[61]

Third, Congress enacted a specific statutory provision, subsection (d)(3), to deal with circumstances where the Attorney General refuses to certify scope of employment. Whereas the Federal Drivers Act contained no such mechanism, thereby forcing employees to raise their defense on their own, the Westfall Act provides that, if the Attorney General refuses to certify scope of employment, the employee may petition the court any time before trial to find and certify scope of employment.[62] If granted, the United States shall be substituted as the defendant. Notably, petitions must be filed in whatever court the action is pending, including state court. Only the Attorney General, upon being properly served, is authorized in his discretion to remove such petitions to federal court for

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[59] United States v. Smith, 499 U.S. 160, 163 (1991) ("Congress took this action in response to our ruling in *Westfall v. Erwin* . . . which held that the judicially created doctrine of official immunity does not provide absolute immunity to Government employees for torts committed in the scope of their employment.").

[60] 28 U.S.C. § 2679(d)(1).

[61] 28 U.S.C. § 2679(d)(2).

[62] 28 U.S.C. § 2679(d)(3).

a decision. Notable too is that, if the district court upholds the Attorney General's refusal to certify, the action must be remanded back to state court.

Fourth, Congress added a provision, subsection (d)(4), not found in the Federal Drivers Act to clarify that the substitution of the United States does not turn on whether a remedy against the United States is available.[63]

Finally, in subsection (d)(5), Congress added a statutory tolling provision to protect those who file timely suits but do so against the wrong individual or in the wrong forum without having first presented the administrative claim necessary to pursue an action against the United States.[64] This provision requires that the United States be substituted "under this subsection," referring to the Westfall Act, and it further contains several elements that must be satisfied before a plaintiff can seek to avail himself of the benefit of the statutory tolling.[65]

In practice, the Westfall Act makes the FTCA's remedy exclusive for claims of money damages for injuries or loss of property, personal injury, or death brought against federal employees acting within their scope of employment at the time of the incident giving rise to suit.[66] The Westfall Act therefore grants a statutory absolute immunity to "employees of the government," a term defined in 28 U.S.C. § 2671 of the FTCA, when acting within the scope of their employment at the time of the incident giving rise to suit.[67] The Westfall Act applies exclusively to natural persons, that is, individual employees and not entities or federal agencies.[68] Once the Attorney General certifies scope of employment, a case may be removed from state courts "before trial."[69] Following certification and

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63 28 U.S.C. § 2679(d)(4); *see Smith*, 499 U.S. at 166 ("The 'limitations and exceptions' language in § 6 of the Liability Reform Act persuades us that Congress recognized that the required substitution of the United States as the defendant in tort suits filed against Government employees would sometimes foreclose a tort plaintiff's recovery altogether.").

64 28 U.S.C. § 2679(d)(5).

65 Those elements include proof that (1) substitution of the United States occurred under some provision of the Westfall Act; (2) the action into which the United States was substituted was dismissed "for failure first to present a claim pursuant to [28 U.S.C. § 2675(a)]; (3) an administrative claim under section 2675(a) "would have been timely had it been filed on the date the underlying civil action was commenced"; and (4) an administrative "claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action." *Id.*

66 28 U.S.C. § 2679(b).

67 *See* 28 U.S.C. § 2671.

68 Adams v. United States, 420 F.3d 1049, 1053 (9th Cir. 2005).

69 28 U.S.C. § 2679(d)(2).

removal, the United States is substituted as the defendant and the action is deemed one brought against the United States subject to the FTCA's limitations and exceptions.[70]

28 U.S.C. § 2679(b)(2), however, explicitly provides that section (b)(1) "does not extend or apply to a civil action against an employee of the Government which is brought for a violation of the Constitution of the United States, or which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized."[71] When a plaintiff alleges a constitutional violation, the case proceeds under the legal framework established by *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[72] If a federal statute authorizes suit against an individual employee for violating that statute, the case likewise proceeds against the employee in his or her individual capacity.

The Westfall Act, like the Federal Drivers Act and the statutes patterned upon it, is not self-executing. An employee seeking to have the United States assume the defense must comply with the requirements to reap its protection. Failing to do so can waive any protections that might otherwise have been afforded.[73] When an employee or, in some cases, a covered person is sued, the employee or covered person must "promptly" deliver process and pleadings concerning the suit to the appropriate agency head and request defense.[74] The "prompt" delivery re-

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[70] 28 U.S.C. § 2679(d)(4) ("Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.").

[71] 28 U.S.C. § 2679(b)(2)(B) does exempt certain cases arising pursuant to violations of federal statutes. *See, e.g.*, Lacen-Remigio v. United States, 787 F. Supp. 34, 38–39 (D.P.R. 1992) (holding FTCA as exclusive remedy for suit where no constitutional or statutory exception applied). Claims brought for violations of the Racketeer Influenced and Corrupt Organizations (RICO) Act (42 U.S.C. § 1983) and the Privacy Act have, on occasion, been allowed to proceed against employees in their individual capacities. *E.g.*, Wilhite v. Littlelight, No. 21-35693, 2022 WL 3282262 (9th Cir. Aug. 9, 2022) (RICO); Melo v. Hafer, 912 F.2d 628 (3d Cir. 1990) (permitted section 1983 claims if there is proof of conspiracy with state officials to violate constitutional rights); Henson v. NASA, 14 F.3d 1143 (6th Cir. 1994) (Privacy Act claim against supervisor allowed to proceed).

[72] 403 U.S. 388 (1971).

[73] *See* United Servs. Auto Ass'n v. United States, 105 F.3d 185 (4th Cir. 1997).

[74] 28 U.S.C. § 2679(c) ("The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies

quirement is for the benefit of the government alone, and the Attorney General alone determines when the employee must deliver papers.[75] The interested agency then furnishes the same materials, along with a report and recommendation on whether the United States should intervene, to the United States Attorney's office for the district wherein the action is pending and the responsible director of the Torts Branch.[76]

Following an investigation of the alleged facts to establish grounds for certification, the Attorney General or his designee is exclusively authorized to determine whether the accused federal employee was acting within his or her scope of employment.[77] The same authority extends to cases involving "covered persons," defined as "any person other than a Federal employee or the estate of a Federal employee as to whom Congress has provided by statute that the remedy provided by 28 U.S.C. §§ 1346(b) and 2672 is made exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against such person."[78] The United States Attorney for the district wherein the suit was brought or a Torts Branch director is authorized to issue a scope certification. A scope of certification "may be withdrawn if further evaluation of the relevant facts or the consideration of new or additional evidence calls for such action."[79]

V. The Westfall Act superseded the Federal Drivers Act but did not repeal statutes patterned on the Federal Drivers Act

Although one might assume that the Westfall Act's breadth and scope rendered prior statutes patterned upon the Federal Drivers Act irrelevant or superfluous, it has been conclusively held that the Westfall Act did not affect a repeal of these prior statutes.[80] The importance of these prior statutes persists today, as a couple Supreme Court cases have underscored.

In *Hui v. Castaneda*, the Supreme Court addressed whether 42 U.S.C. §

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of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency."); 28 C.F.R. § 15.2(a)–(b).

75 *See* McLaurin v. United States, 392 F.3d 774 (5th Cir. 2004).

76 28 U.S.C. § 2679(c); 28 C.F.R. § 15.3(a)–(b).

77 28 U.S.C. § 2679(d); 28 C.F.R. § 15.4.

78 28 CFR § 15.1(b)(3).

79 *See* 28 C.F.R. § 15.4(c).

80 Levin v. United States, 568 U.S. 503, 507 (2013).

233(a) of the Public Health Service (PHS) Act immunizes PHS officers and employees against Eighth Amendment constitutional claims of deliberate indifference, in addition to state law negligence claims.[81] The Court determined that 42 U.S.C. § 233(a) does immunize against constitutional claims where the underlying conduct giving rise to an alleged constitutional violation results from the same "subject matter" as a state law malpractice claim. The Court reasoned that misfeasance in the performance of medical functions, whether characterized as a state law tort or constitutional violation, is protected by 42 U.S.C. § 233(a)'s operative scope, provided that the conduct occurred within the scope of official duties.[82]

In so holding, the Court rejected the argument that a series of cross-references incorporated the Westfall Act, or that the later-enacted Westfall Act repealed the PHS Act.[83] *Hui* therefore rejected the notion that the PHS Act's failure to include a specific provision for effectuating an employee's immunity or obtaining substitution of the United States in cases originally filed in federal court was of consequence. But *Hui* also underscores that there are certain cases in which the United States *must* invoke 42 U.S.C. §§ 233(a) and 233(c), when applicable. Whereas constitutional tort claims are expressly *excepted* from the Westfall Act—precluding certification and substitution altogether—PHS officers and employees are *immune* from such claims under 42 U.S.C. § 233(a), provided that the conduct giving rise to suit involved medical care rendered in the scope of official duties. A certification that relied upon only 28 U.S.C. § 2679(d) would not protect the employee or officer from such claims.

In a subsequent case *Levin v. United States*, the Supreme Court considered the import and effect of the Gonzalez Act, another of the later-enacted statutes patterned upon the Federal Drivers Act, making the remedy against the United States under the FTCA exclusive of any malpractice action against armed forces medical personnel.[84] The Gonzalez Act, similar to other malpractice-specific statutes, further provided that the intentional tort exception to the FTCA[85] would not apply to causes of action arising from negligent or wrongful acts or omissions committed

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81 Hui v. Castaneda, 559 U.S. 799, 801–02 (2010).

82 *Id.* at 806.

83 *Id.* at 808.

84 *Levin*, 568 U.S. at 518 (holding that the Gonzalez Act "abrogates the FTCA's intentional tort exception and therefore permits Levin's suit against the United States alleging medical battery by a Navy doctor acting within the scope of his employment"); 10 U.S.C. § 1089(a).

85 28 U.S.C. § 2680(h).

in the performance of medical or related functions.[86] This provision of the Gonzalez Act arguably conflicted with Congress's subsequent enactment of the Westfall Act, which made the FTCA's remedy against the United States exclusive for torts committed by federal employees acting within the scope of their federal employment without considering whether an exception like 28 U.S.C. § 2680(h) bars suit against the United States.[87] Though the Liability Reform Act did divert from the agency-specific approach, it did not repeal the Gonzalez Act.[88]

In holding that the aforementioned provision of the Gonzalez Act abrogates the FTCA's intentional tort exception,[89] the Supreme Court found that "Section § 1089(e)'s operative clause states, in no uncertain terms, that the intentional tort exception to the FTCA, § 2680(h), 'shall not apply,' and § 1089(e)'s introductory clause confines the abrogation of § 2680(h) to medical personnel employed by the agencies listed in the Gonzalez Act."[90]

In reaching this decision, the Court explicitly noted that the Westfall Act did not repeal the Gonzalez Act or any other law covering medical personnel employed at any particular agency.[91] If, on the other hand, the Court had found that the Westfall Act exclusively applied to Levin's suit, the United States would have been substituted and subsequently dismissed under 28 U.S.C. § 2680(h). The suit instead remained *cognizable* against the United States because the Gonzalez Act's provisions, including the intentional tort exception unique to the Gonzalez Act, also remained applicable.[92] In sum, notwithstanding the Westfall Act, these statutes contain unique provisions with no analog in the Westfall Act yet remain in effect and purposeful today.

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86 10 U.S.C. § 1089(e).

87 *Levin*, 568 U.S. at 509; 28 U.S.C. § 2679(b)(1).

88 *Levin*, 568 U.S. at 510.

89 The Westfall Act contains no comparable tort exception.

90 *Levin*, 568 U.S. at 514.

91 *Id.* at 509 ("The comprehensive enactment, however, did not repeal the Gonzalez Act, . . . or, presumably, any of the other laws covering medical personnel employed at particular agencies.").

92 *Id.* at 518.

VI. Where special statutes make the FTCA's remedy exclusive of actions against non-federal actors, those statutes do not incorporate the Westfall Act absent a clear textual basis

On several occasions, Congress has made the FTCA's remedy exclusive of any other action against non-federal actors. These statutes effectively create a legal fiction to provide immunity to private parties who would not be considered federal employees under the FTCA. When Congress enacts federal statutes to create these legal fictions, the statutes themselves must be scrutinized in order to understand the purpose and scope of the legal fiction, the claims to which that fiction applies, and the statutory mechanisms applicable to effectuate them. Whether the Westfall Act or a different statute (one patterned upon the Federal Drivers Act) is applicable can be ascertained only by closely scrutinizing the statutory text.

Two examples of these legal fictions are the Indian Self-Determination and Education Assistance Act (ISDEAA)[93] and the Federally Supported Health Care Assistance Act (FSHCAA).[94] These two examples provide a useful foil. In the ISDEAA, Congress has, at least in part, made the Westfall Act's protections applicable. Conversely, in the FSHCAA, Congress did not make the Westfall Act applicable, choosing instead to incorporate only those mechanisms applicable under the PHS Act, a legislative decision with significant consequence both for the United States and litigants.

A. The ISDEAA

The ISDEAA was enacted in 1975.[95] It "created a system by which tribes could take over the administration of programs operated by the [Bureau of Indian Affairs]."[96] To accomplish this goal, tribes wishing to assume responsibility for programs that the Department of Interior or the Department of Health and Human Services (then the Department of Health, Education, and Welfare) carried out to benefit American Indians or Alaska Natives due to their status as American Indians or Alaska Na-

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93 Pub. L. No. 93-638, 88 Stat. 2203 (1975); 25 U.S.C. § 5321.

94 Pub. L. No. 91-623, 84 Stat. 1870 (1970); 42 U.S.C. § 233.

95 Pub. L. No. 93-638, 88 Stat. 2203 (1975).

96 Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell, 729 F.3d 1025, 1033 (9th Cir. 2013).

tives could enter into "self-determination" act contracts with the involved agency. These contracts became known as "638 contracts" owing to the Public Law (93-638) that engendered them. They permitted participating tribes to assume responsibility for the functions or services and receive the federal funding that the involved federal agency would have otherwise expended to carry out the function or service itself. In furtherance of the idea that the ISDEAA would promote self-governance and self-determination, each tribal participant was required to privately insure against torts that might occur in carrying out the functions or services contracted.

In the late 1980s, tribes reported that the costs of malpractice insurance were draining federal funds that would otherwise be spent on providing health services to tribal members under 638 contracts with the Indian Health Service (IHS).[97] In response, Congress elected to make the FTCA's remedy exclusive for malpractice claims by making 42 U.S.C. § 233(a)—the statutory malpractice protection available to PHS officers and employees—applicable to tribal contractors and their employees carrying out 638 contracts entered into with the IHS for provision of health services.[98] Congress later amended this provision to make 28 U.S.C. § 2679 applicable, but only to the extent that a claim resulted from the operation of an emergency motor vehicle.[99] Thus, the provisions of the PHS Act[100] apply for malpractice cases where 25 U.S.C. § 5321(d) covers an ISDEAA contractor. Only where an injury resulted from operation of an emergency vehicle, such as ambulatory transport, was 28 U.S.C. § 2679 made applicable.

In 1990, however, Congress enacted an appropriations rider, Public Law Number 101-512, Title III, Section 314, that expanded the FTCA's protections for tribal contractors beyond mere medical malpractice protections.[101] This provision, known colloquially as "Section 314," purports to apply to all claims resulting from the performance of functions under a 638 contract or self-governance compact.[102] It accomplishes this by

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97 *See* S. Rep. No. 100-274, 100th Cong., 1st Sess., 1988 U.S.C.C.A.N. 2620, 2627–28, 2645–47.

98 *See* 25 U.S.C. § 5321(d).

99 *Id.*

100 42 U.S.C. § 233.

101 Shirk v. United States *ex rel.* U.S. Dep't. of Interior, 773 F.3d 999, 1003 (9th Cir. 2014) ("Congress extended the FTCA's waiver of sovereign immunity to claims 'resulting from the performance of functions . . . under a contract, grant agreement, or cooperative agreement authorized by the [ISDEAA] of 1975, as amended.'" (alterations in original)).

102 *See id.* It should be noted, however, that the Office of Legal Counsel has published

"deeming" an "Indian tribe, tribal organization, or Indian contractor" to be a part of either the Bureau of Indian Affairs (BIA) or the Department of Health and Human Services (HHS), depending on which federal agency contracted the functions in question.[103] The tribal contractor's employees are further "deemed" to be employees of either the BIA or the HHS while acting within the scope of their employment in carrying out a contract with either the BIA or the HHS.[104] To effectuate this provision, Congress provided that "any civil action or proceeding" involving a tort claim resulting from the performance of functions under a qualifying ISDEAA contract or compact would be "deemed to be an action against the United States and will be . . . afforded the full protection and coverage of the Federal Tort Claims Act."[105] Because the "full protection and coverage of the Federal Tort Claims Act" would include, as appropriate, the Westfall Act's protections, claims covered by Section 314 are within the purview of the Westfall Act.

Notably, Congress further provided that "nothing in [Section 314] shall in any way affect the provisions of section 102(d) [codified at 25 U.S.C. § 5321(d)] of the [ISDEAA]."[106] Thus, despite this appropriations rider, there remain instances where Congress clearly contemplated that certain contracts with the IHS (that is, those involving the transfer of health services that the IHS otherwise provided) would remain covered only by the more limited protections of 25 U.S.C. § 5321(d) unless the claim resulted from operation of an emergency vehicle. It should not be assumed that, in all cases involving an IHS contract, the broader protections of Section 314 automatically apply.

More recently, Congress enacted a provision purporting to extend FTCA protections to Urban Indian Organizations providing health services to "urban Indians."[107] In doing so, however, Congress cross-referenced only 25 U.S.C. § 5321(d) of the ISDEAA, which in turn incorporates only the protections of 42 U.S.C. § 233(a) for malpractice claims, not

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a formal opinion concluding that this provision is limited to common law or other torts otherwise cognizable under the FTCA. *See* Coverage Issues Under the Indian Self-Determination Act, 22 Op. O.L.C. 65 (1998).

103 *See Shirk*, 773 F.3d at 1003–04, 1004 n.2 (cleaned up); *see also* Department of Interior and Related Agencies Appropriation Act, Pub. L. No. 101-512, § 314, 104 Stat 1915 (1990).

104 Department of Interior and Related Agencies Appropriation Act, Pub. L. No. 101-512, § 314, 104 Stat 1915 (1990).

105 *Id.*

106 *Id.*

107 25 U.S.C. § 1660i.

those of the Westfall Act.[108] These clear textual references suffice to render the Westfall Act inapplicable to Urban Indian Organizations seeking FTCA coverage under 25 U.S.C. § 1660i.[109]

When determining whether a tribe or its employee is covered under the protections of the FTCA, a two-step inquiry is required.[110] First, a plaintiff must identify the specific contractual provision that the alleged tortfeasor was carrying out when the tort was committed.[111] The court must then determine whether the alleged tort falls within the scope of the tortfeasor's employment under state law.[112] If both prongs of the inquiry are proven, then subject-matter jurisdiction under the FTCA is appropriate. But "[i]f a court determines that the relevant federal contract does not encompass the activity that the plaintiff ascribes to the employee, or if the agreement covers that conduct, but not with respect to the employee in question, there is no subject matter jurisdiction [under the FTCA]."[113]

B. The FSHCAA

First enacted in 1992[114] and amended and made permanent in 1995,[115] the FSHCAA's purpose was to relieve certain federal grant recipients—those receiving grants under 42 U.S.C. § 254b to subsidize primary health services provided to medically underserved communities—of the costs of medical malpractice insurance.[116] To accomplish this purpose, Congress

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108 *Id.*

109 By contrast, where Congress seeks to cross-reference the broader protections of Section 314, which include the FTCA's protections, it says so expressly. *See* 25 U.S.C. § 5396(a).

110 Shirk v. United States *ex rel.* U.S. Dep't. of Interior, 773 F.3d 999, 1007 (9th Cir. 2014).

111 *Id.*

112 *Id.*

113 *Id.*

114 *See* Federally Supported Health Centers Assistance Act of 1992, Pub. L. No. 102-501, §§ 2–4, 6, 106 Stat. 3268 (formerly codified at 42 U.S.C. § 233 (g)–(k) (1994 ed.)).

115 *See* Federally Supported Health Centers Assistance Act of 1995, Pub. L. No. 104-73, §§ 2–11, 109 Stat. 777 (codified as amended at 42 U.S.C. § 233 (g)–(n)).

116 Congress purported to justify the FSHCAA, in part, on how it had relieved certain tribal contractors under the ISDEAA of the costs of malpractice insurance. *See* H.R. Rep. No. 102-823, pt. II, at 5–6 (Sept. 14, 1992). That was a poor analogy and precedent to choose. Congress extended malpractice protections to tribal contractors under the ISDEAA because, but for the tribe assuming the responsibility for the care, IHS employees would have been required to provide it and protected against malpractice by 42 U.S.C. § 233(a). The same was not and is not true of the care provided by local community health centers. Community health centers receive grants to subsidize the care they provide, but the HHS has no obligation to provide the care

amended the PHS Act to extend to certain grantees the malpractice protections afforded to PHS officers and employees under 42 U.S.C. § 233(a) when certain statutory preconditions are satisfied.

A full analysis of the FSHCAA and its complexities are beyond the scope of this article.[117] It suffices to observe that the mechanism that Congress chose to extend malpractice protections to certain grantees and their officers, governing board members, employees, and statutorily defined contractors, was a legal fiction that "deemed" these entities and their personnel to be PHS employees for limited purposes. Whether the FTCA's remedy is exclusive, therefore, turns not just on whether an entity or covered individual acted within the scope of employment under state law, or even on whether an entity or covered individual was "deemed" to be a PHS employee in the sense that the Secretary had once approved an application. Rather, it is often necessary, even if an entity or covered individual was "deemed" to be a PHS employee, to ask whether that "deemed" status extended and applied to the services or incident that gave rise to suit.[118] It is entirely possible for an individual to be within the scope of employment with his actual employer—the private health center—and still not be "deemed" to be a PHS employee for purposes of the conduct that gave rise to suit. The scope and extent of the legal fiction in these circumstances is a question of federal law and statutory interpretation, not one of state law scope of employment.

Of particular relevance to this article is the statutory language that Congress enacted under the FSHCAA and how it impacts the manner in which the United States intervenes in covered cases. Subject to the Secretary of HHS's approval of an application, qualifying entities are "deemed" to be employees of the PHS "[f]or purposes of this section," that is, for purposes of 42 U.S.C. § 233.[119] By statute, the "legal fiction" is not created for purposes of, nor does it extend to, other titles or sections of the United States Code. Thus, if a suit for malpractice is brought against a "deemed" entity or one of its officers, governing board members, employ-

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itself.

117 The Torts Branch remains available to assist with questions as they arise.

118 *See* 42 U.S.C. § 233(g)(1)(B)–(C); 42 C.F.R. § 6.6.

119 Although not specifically addressed in this article, note that a similar textual analysis would apply to certain individuals who serve under personal services contractors authorized under the Gonzalez Act, 10 U.S.C. § 1089(a), 1091. As section 1089(a) makes clear, its malpractice protections for certain health-care personnel of the Department of Defense also apply to certain persons who serve under personal services contracts entered into under 10 U.S.C. § 1091. But the operative language is that "[t]his subsection shall also apply," meaning 10 U.S.C. § 1089(a). That textual limitation forecloses reliance on the Westfall Act, found in an altogether different title and section of the United States Code.

ees, or qualifying contractors, and the entity or individual subject to suit otherwise qualifies as a "covered person," the FTCA's remedy is made exclusive under only 42 U.S.C. § 233(a).

This plain language compels the conclusion that, when dealing with a case where the FSHCAA is the only plausible basis for the FTCA's remedy against the United States to be implicated, the Westfall Act has no applicability. The relevant and applicable protections and procedures are those found in 42 U.S.C. § 233(a)–(n), not 28 U.S.C. § 2679(b)–(d).[120]

The differences between the Westfall Act's statutory language and that of the PHS Act as amended by FSHCAA are "real, not simply technical."[121] Many of these differences are catalogued and explained above, and result from 42 U.S.C. § 233 being patterned on the Federal Drivers Act before the Westfall Act amended and superseded it. There are still other provisions of the FSHCAA that have no analog of any kind under the Westfall Act, such as 42 U.S.C. § 233(*l*)(1)–(2), which Congress enacted to prevent default judgments in FSHCAA-covered cases.[122]

To recap some of the important differences: The Westfall Act covers virtually any claim for money damages against an actual employee of the government, including claims for injury to property, personal injury, or death, excluding constitutional tort claims or other federal law violations for which a private action is authorized against individual employees. Under 42 U.S.C. § 233(a), claims are limited to those for personal injury, including death, and exclude property damage claims, and those claims must result only from the performance of medical, surgical, dental, or related functions.[123] Constitutional or other claims are barred against an employee if the claim resulted from conduct covered by the statute.

Under 28 U.S.C. § 2679(d)(2) and 42 U.S.C. §233(c), if the Attorney General certifies scope of employment, the case "shall be removed" to federal district court.[124] However, under 42 U.S.C. § 233(c), there is a provision that requires the district court to remand the case back to state court if the district court determines on motion that there is no remedy available against the United States, a provision that no longer exists

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120 Thomas v. Phoebe Putney Health Sys., 972 F.3d 1195, 1198 (11th Cir. 2020); *see also* Patel v. United States, No. CV-20-1864, 2021 WL 2454048 (D. Ariz. June 16, 2021).

121 O'Brien v. United States, 56 F.4th 139, 146 (1st Cir. 2022).

122 *See* El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. U.S. Dep't of Health and Human Servs., 396 F.3d 1265, 1271–72 (D.C. Cir. 2005).

123 As noted above, the scope and proper interpretation of the class of claims covered by 42 U.S.C. § 233(a) is beyond the scope of this article.

124 28 U.S.C. § 2679(d)(2); *see Thomas*, 972 F.3d at 1197.

under the Westfall Act.[125] Rather, the Attorney General's certification under the Westfall Act is "conclusive[ ] . . . for purposes of removal," and substituting the United States occurs under the Westfall Act without considering whether a remedy against the United States will be available.[126]

Another critical distinction is that 28 U.S.C. § 2679(d) specifically authorizes petitions for certification if the Attorney General refuses to issue a certification and grants the remedy of substitution if the petition is granted.[127] By contrast, 42 U.S.C. § 233 offers no statutory mechanism for a defendant-employee either to petition a court for a certification or to seek substitution of the United States.[128] These matters are instead governed in the same way they would have been handled under the Federal Drivers Act: An employee can seek his own dismissal upon evidentiary proof and motion, but cannot move to compel the United States to substitute as the party-defendant.[129]

Further illustrating the relevant statutory differences, 42 U.S.C. § 233 specifically requires remand in the event "the case so removed is one in which a remedy by suit within the meaning of subsection (a) . . . is not available against the United States."[130] This provision may very well require remand in the event, for example, 28 U.S.C. § 2680 would bar suit against the United States.[131] By contrast, 28 U.S.C. § 2679(d)(4) provides for substitution without considering whether section 2680 bars suit.

Finally, section 2679(d)(5) provides a savings clause for certain time-barred claims that would have been timely if an administrative claim had

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125 *See Thomas,* 972 F.3d at 1198.

126 *See id.* (alterations in original); *see also* 28 U.S.C. § 2679(d)(2), (d)(4).

127 28 U.S.C. § 2679(d)(3).

128 *See* Hinds v. Cmty. Med. Ctrs., Inc., No. 2:22-CV-1207, 2022 WL 17555525 (E.D. Cal. Dec. 9, 2022) (noting that Congress did not modify 42 U.S.C. § 233 or the FSHCAA with language that allows federal employees to petition a court to find that the employee was acting within the scope of employment).

129 *Id.*; *see, e.g.*, Lemley v. Mitchell, 304 F. Supp. 1271, 1274 (D.D.C. 1969); Seiden v. United States, 537 F.2d 867, 870 (6th Cir. 1976).

130 42 U.S.C. § 233(c).

131 United States v. Smith, 499 U.S. 160, 165 n.6 (1991) (leaving open the possibility for a different outcome where a different statute provides the only basis for certification and substitution); *see, e.g.*, Wilson v. Cagle, 694 F. Supp. 713, 717 (N.D. Cal. 1988) (Federal Drivers Act did not shield federal employee from liability when employee deliberately injured protestor because 28 U.S.C. § 2680(h) made remedy against the United States unavailable for claims arising from assault and battery); Smith v. DiCara, 329 F. Supp. 439, 442 (E.D.N.Y. 1971) (28 U.S.C. § 2680(h) would disqualify plaintiff as a claimant under 28 U.S.C. § 1346(b) if federal driver intentionally injured plaintiff); Adams v. Jackel, 220 F. Supp. 764, 766 (E.D.N.Y. 1963) (28 U.S.C. § 2680 must be inapplicable for a remedy to be "available" against the United States).

been presented instead of a plaintiff filing suit. But this provision applies only to "an action or proceeding in which the United States is substituted as the party defendant under this subsection," that is, under some provision of the Westfall Act, 28 U.S.C. § 2679(d)(1)–(3).[132] 42 U.S.C. § 233 does not contain a parallel or analogous provision,[133] meaning that when the United States is substituted under 42 U.S.C. § 233(a)–(c)—as it should be in *all* FSHCAA cases—there is no "savings clause" available to save an otherwise time-barred claim.[134]

C. The Atomic Testing Liability Act and contractors

One final example of the importance of statutory language in this context can be found in the Atomic Testing Liability Act (ATLA) and the protections extended to contractors assisting the United States in carrying out atomic weapons testing programs.[135] The ATLA is another example of a circumstance where Congress, for policy reasons, chose to immunize a class of private entities and individuals who, but for a statutory enactment, could not and would not be covered for any purpose under the FTCA.

Rather than opting for creating a legal fiction, the ATLA simply declares that the remedy against the United States under the FTCA shall apply to certain civil actions due to radiation exposure stemming from acts or omissions by a contractor carrying out an atomic weapons program under contract with the United States.[136] The ATLA defines the applicable contractors and goes on to specifically declare that employees of qualifying contractors "shall be considered to be employees of the

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[132] *See* 28 U.S.C. § 2679(d)(5).

[133] Patel v. United States, No. CV-20-1864, 2021 WL 2454048 (D. Ariz. June 16, 2021) (savings clause does not apply when the United States is substituted as defendant under 28 U.S.C. § 233 rather than 28 U.S.C. § 2679); *see also* Evans v. United States, 22-CV-1627, 2022 WL 17976165, at *4 (N.D. Ill. Dec. 28, 2022) ("It is not the court's role to question Congress's choice to make the Westfall Act's savings provision available only when the United States is substituted as the party defendant under Section 2679(d) and not when it is substituted under Section 233."); Washington v. United States, 22-CV-4416, 2023 WL 2757212 (N.D. Ill. Apr. 3, 2023).

[134] To the extent that this omission appears to be a legislative oversight or anomaly, it is Congress's prerogative to fix it. As the Supreme Court has time and again reminded, courts have no "roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that . . . Congress 'must have intended' something broader." Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 794 (2014). In any event, as discussed in the next subsection, Congress knows how to incorporate a provision like the Westfall Act's savings clause when it intends for one to apply.

[135] 50 U.S.C. § 2783.

[136] *Id.* § 2783(b)(1).

Federal Government, as provided in [28 U.S.C. § 2671]."[137] While that language would have sufficed to trigger the Westfall Act's protections, the ATLA specifies its own certification procedure, including a provision stating that the Attorney General's certification under "this subsection establishes contractor status conclusively."[138] Because the ATLA provides its own specific certification procedures, the Westfall Act should not be invoked.

Also notable about the ATLA is that it contains its own version of what might be considered an analog to the Westfall Act's "savings clause" in 28 U.S.C. § 2679(d)(5).[139] In cases governed by the ATLA, a special statutory scheme applies to the exclusion of the Westfall Act.

VII. Conclusion

In all tort cases referred to a United States Attorney's office for issuance of a certification or substitution of the United States, the basis for immunity, certification, removal, and substitution must be scrutinized. Each case requires a close review of the complaint to determine the nature of the alleged acts and whether a specialized statute other than the Westfall Act is implicated. There may be reason in a case to rely upon both the Westfall Act and another statute and still other cases where the Westfall Act is simply not applicable.

It is critically important to invoke the correct statutes when issuing certifications, removing cases, and seeking substitution of the United States. Invoking the wrong statute leads litigants and courts astray about the critical differences between and among these statutes. Moreover, invoking the wrong statute could, in some circumstances, waive a defense that the United States might otherwise possess or fail to secure for a federal employee the full statutory protections that Congress intended.

About the Author

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137 *Id.* § 2783(b)(2).
138 *Id.* § 2783(c).
139 *See id.* § 2783(d).

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Nicked but Not Kicked: The FTCA's Statute of Limitations and Exhaustion Requirements After *United States v. Wong*

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I. Introduction

The Federal Tort Claims Act (FTCA) waives the United States' sovereign immunity for certain tort claims arising out of the acts of government employees, but this waiver is not unlimited.[2] Indeed, it is subject to several important conditions, exceptions, and limitations.[3] Two such conditions are found in 28 U.S.C. § 2401(b), generally referred to as the FTCA's statute of limitations. Section 2401(b) provides—

> A tort claim against the United States shall 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, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.[4]

For decades, compliance with section 2401(b)'s limitations provisions was considered a jurisdictional prerequisite subject to no equitable ex-

[1] With thanks to Conor Kells, Senior Trial Counsel, FTCA Section, Torts Branch, Civil Division, for significant contributions and ideas to include in this article.

[2] *See* United States v. Gaubert, 499 U.S. 315, 318 n.4 (1991) ("The FTCA, subject to various exceptions, waives sovereign immunity from suits for negligent or wrongful acts of Government employees.").

[3] *Id.*

[4] 28 U.S.C. § 2401(b).

ceptions.[5] But that changed in 2015 when the Supreme Court ruled in *United States v. Wong* that the FTCA's statute of limitations in section 2401(b) is non-jurisdictional and therefore subject to equitable tolling.[6]

This article principally addresses two common misconceptions about the scope of *Wong*'s holding. First, *Wong* does not authorize the United States to waive or agree to toll the FTCA's statute of limitations. Second, *Wong* furnishes no basis for concluding that the FTCA's separate administrative exhaustion requirement, 28 U.S.C. § 2675(a), is non-jurisdictional or otherwise subject to equitable exceptions.[7]

II. *United States v. Wong*

For the first 44 years of the FTCA's existence, every court to consider the question ruled that compliance with the FTCA's statute of limitations was a jurisdictional prerequisite to an FTCA action against the United States. During that time, the FTCA's statute of limitations came before the Supreme Court only once in *United States v. Kubrick*.[8] *Kubrick* did not involve whether the FTCA's limitations periods imposed jurisdictional requirements, but the Supreme Court emphasized that compliance with the statute of limitations on a suit against the United States is a "condition of [the] waiver" of immunity under the FTCA.[9]

Then in 1990, the Supreme Court handed down *Irwin v. Department of Veterans Affairs*.[10] *Irwin* held that a 30-day limitations period for filing suit after receiving a notice of final action taken by the Equal Employment Opportunity Commission was subject to equitable tolling, notwithstanding that this limitations period applied to suits against the federal government.[11]

Irwin reasoned that, although time-bars on suits against the United States are conditions on the waiver of sovereign immunity, once Congress has effected a waiver of immunity,

> making the rule of equitable tolling applicable to suits against

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[5] *See, e.g.*, *In re* Franklin Sav. Corp., 385 F.3d 1279, 1289 (10th Cir. 2004); Houston v. U.S. Postal Serv., 823 F.2d 896, 902 (5th Cir. 1987); Zander v. United States, 843 F. Supp. 2d 598, 609 (D. Md. 2012) ("It is well-established that § 2401(b)'s limitations period is jurisdictional and, hence, nonwaivable." (citing Gould v. U.S. Dep't of Health & Hum. Servs., 905 F.2d 738, 741 (4th Cir. 1990))).

[6] 575 U.S. 402, 412 (2015).

[7] *See* 28 U.S.C. § 2675(a).

[8] 444 U.S. 111, 113–15 (1979).

[9] *Id.* at 117–18.

[10] 498 U.S. 89 (1990).

[11] *Id.* at 94–96.

> the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver. Such a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation. We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so.[12]

Despite this language in *Irwin*, most courts for the next 25 years continued to hold that the FTCA's statute of limitations retained jurisdictional character, foreclosing equitable tolling. A few courts, however, seized upon *Irwin* to conclude that the FTCA's limitations periods were not jurisdictional, permitting plaintiffs to argue for the limitations periods to be equitably tolled in FTCA actions. The Supreme Court eventually granted a petition for writ of certiorari to resolve the split, holding in a 5-4 decision that the FTCA's statute of limitations was not a jurisdictional limitation, and that the limitations periods in section 2401(b) may be equitably tolled in appropriate circumstances.

The Supreme Court's holding in *Wong* rested almost exclusively on *Irwin*'s "rebuttable presumption" that equitable tolling applies to limitations periods on suits against the United States, which in the majority's view the United States failed to rebut adequately.[13] Emphasizing the "high bar" that *Irwin* created, the Court explained that "Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it."[14]

Based on its review of the text, context, and structure of section 2401, the Court concluded that the statute did not indicate that Congress intended to make the time-bars jurisdictional.[15] The Court first explained that section 2401(b)'s text—stating that "[a] tort claim against the United States shall be forever barred" unless filed within the limitations period—is "mundane statute-of-limitations language" that "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts."[16] In the Court's view, it was insufficient that the Tucker Act's statute of limitations, which the Court acknowledged is jurisdic-

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12 *Id.* at 95–96.
13 United States v. Wong, 575 U.S. 402, 412 (2015).
14 *Id.* at 409–10.
15 *Id.*
16 *Id.* at 410–11 (alteration in original).

tional, contains the same "shall be forever barred" language as section 2401 because that language was "not meaningfully different from [that] in a nonjurisdictional statute of limitations."[17]

Second, looking to the context of section 2401(b), the Court emphasized that the statute was separated from the FTCA's jurisdictional grant, and thus "[n]othing conditions the jurisdictional grant on the limitations periods, or otherwise links those separate provisions."[18] Finally, the Court noted that the legislative history accompanying the FTCA and its amendments did not discuss whether section 2401(b) is jurisdictional.[19]

Based on the foregoing, we can distill the following conclusions from *Wong*'s holding and its impact on the FTCA's statute of limitations. First, *Wong* is an application of *Irwin*'s rebuttable presumption. Because *Irwin* itself did not change the cardinal rule that statutes of limitations on suits against the United States are conditions on Congress's waiver of sovereign immunity, the FTCA's statute of limitations remains a condition on the FTCA's limited waiver of immunity. Second, the Court concluded that the United States failed to persuasively rebut *Irwin's* presumption with its argument that the FTCA's limitations provisions are jurisdictional. Third, because the FTCA's statute of limitations is not jurisdictional, equitable tolling may excuse a plaintiff's literal noncompliance with the statute of limitations if that plaintiff can prove the high standards required to warrant the rare application of equitable tolling.

Nothing else can, or should, be extrapolated from *Wong*'s holding. *Wong* does not address, let alone impact, tolling based on minority or disability, which is uniquely legislative.[20] Nor does *Wong* alter the rule that a plaintiff must prove that the conditions on the waiver of sovereign immunity—including timeliness—have been satisfied. *Wong* simply held that a plaintiff can now prove compliance with the FTCA's statute of limitations by invoking and satisfying the rigorous proof required for equitable tolling.

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[17] *Id.* at 415. The United States' argument to the Court was that Congress, when it enacted the FTCA, adopted the same language for the limitations period as had been used to establish the limitations periods for claims cognizable under the Tucker Act. From inception, the Court has held that the Tucker Act's limitations period is a jurisdictional limitation. Thus, the United States argued that Congress, by employing language that the Supreme Court had long recognized as a jurisdictional bar to suit against the United States, clearly manifested its intent that the FTCA's limitations periods also rank as jurisdictional. As is evident, the majority opinion in *Wong* did not view this historical perspective as persuasive, whereas the dissent did.

[18] *Id.* at 412.

[19] *Id.*

[20] *See* Booth v. United States, 914 F.3d 1199, 1204–05 (9th Cir. 2019).

III. *Wong*'s holding does not authorize the United States to waive or agree to toll the FTCA's statute of limitations

The sovereign immunity doctrine requires courts and litigants alike to adhere strictly to congressional conditions and limitations on waivers of immunity, a rule that applies with equal force in FTCA cases.[21] Mindful of history and precedent, counsel for the United States should oppose attempts to misinterpret or extend *Wong* beyond its two limited holdings.

Subsection A below explains why *Wong* did not abrogate the long-standing view that a plaintiff must comply with section 2401(b)'s time limits to satisfy one condition on the United States' waiver of sovereign immunity and obtain a judgment. Subsection B discusses why *Wong* does not authorize the United States to waive or agree to toll the congressionally imposed time limits in section 2401(b). Subsection C offers advice on how to litigate the section 2401(b) defense.

A. *Wong* did not abrogate the bedrock principle that compliance with section 2401(b) is a condition precedent to recovery on a claim or suit against the United States

Absent consent, the United States is immune from suit.[22] Neither the judicial branch nor the executive branch may waive the United States' immunity.[23] That authority resides exclusively with Congress, which remains free to attach conditions, limitations, and exceptions as it sees fit.[24]

Congress set the bounds of the United States' waiver under the FTCA

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21 Helen Hershkoff, *Statutory Exceptions to Sovereign Immunity—Actions Under the Federal Tort Claims Act—Background Observations, Procedural Requirements, and the Feres Doctrine*, *in* 14 Fed. Prac. & Proc. § 3658 (Charles Alan Wright & Arthur R. Miller eds., 4th ed. Apr. 2023 update) ("In construing the [FTCA], federal courts should effectuate its remedial purpose, taking care neither to expand nor to narrow the Government's waiver of sovereign immunity."); *see also* Sconiers v. United States, 896 F.3d 595, 598 (3d Cir. 2018) ("Because the Federal Tort Claims Act constitutes a waiver of sovereign immunity, the Act's established procedures have been strictly construed." (cleaned up) (quoting White-Squire v. U.S. Postal Serv., 592 F.3d 453, 456 (3d Cir. 2010))).

22 *See* United States v. Mottaz, 476 U.S. 834, 841 (1986); United States v. Mitchell, 445 U.S. 535, 538 (1980).

23 Off. of Pers. Mgmt. v. Richmond, 496 U.S. 414, 434 (1990).

24 Finn v. United States, 123 U.S. 227, 231 (1887).

in numerous ways, such as by defining the actionable claim,[25] its exceptions,[26] and, importantly here, its conditions.[27] Congress's creation of section 2401(b)'s time limits in conjunction with a cause of action created either a *condition precedent* to suit, as some courts conclude,[28] or as built-in substantive time limits, as other courts conclude.[29] Regardless of how characterized, Congress waived the United States' sovereign immunity under the FTCA only for plaintiffs who prove they complied with section 2401(b)'s timing requirement.[30]

As detailed above, *Wong* did not abrogate the bedrock principle that "the time limits imposed by Congress in a suit against the Government involve a waiver of sovereign immunity" or that the congressional imposition of a limitations period is a "condition to the waiver of sovereign immunity."[31] Under *Wong*, just like under *Irwin*, if a claimant satisfies section 2401(b) by virtue of equitable tolling, then one condition precedent on Congress's consent to suit has been proven timeliness.[32]

A correct understanding of *Wong* and its doctrinal underpinnings is crucial for several reasons. As discussed more fully below, plaintiffs remain obligated to prove compliance with the FTCA's time-bars, and the

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[25] The FTCA provides that the United States may be held liable only to the extent that a private party would be liable under like circumstances based on the law of the place where the alleged act or omission occurred. 28 U.S.C. §§ 1346(b)(l), 2674.

[26] *See, e.g.*, 28 U.S.C. § 2680 (listing 13 exceptions in which the United States retains sovereign immunity including, for example, any claim arising out of assault or battery).

[27] Hershkoff, *supra* note 21, § 3654 ("Government's waiver of immunity not only was claim specific, but also procedurally specific.").

[28] Paul M. Coltoff & Rachel M. Kane, *Manner and Time of Presentation of Claim Under Federal Tort Claims Act*, *in* 31 Fed. Proc., Law.'s Edition § 73:5 (June 2023 update) ("As a threshold matter, timeliness is one of the conditions of the Government's waiver of sovereign immunity under the FTCA.").

[29] In *Maahs v. United States*, the Eleventh Circuit found that section 2401(b) prescribed substantive time limits built into the cause of action that Congress created. 840 F.2d 863, 866 n.4 (11th Cir. 1988). Whether viewed as a condition precedent to congressional consent to suit against the United States, or a built-in substantive limit on the United States' liability created with the cause of action, the burden of demonstrating compliance falls on the plaintiff. *Cf. Developments in the Law: Statutes of Limitations,* 63 Harv. L. Rev. 1177, 1199 (1950).

[30] Finn v. United States, 8 S. Ct. 82, 83–84 (1887) (synopsis); *see also* Waiver of Statutes of Limitations in Connection with Claims Against the Dep't of Agric., 22 Op. O.L.C. 127, 136—37 (1998) [hereinafter Waiver of Statutes of Limitations].

[31] *See* Irwin v. Dep't of Veterans Affs., 498 U.S. 89, 94, 96 (1990); *see also* Block v. North Dakota, 461 U.S. 273, 287 (1983); United States v. Dalm, 494 U.S. 596, 608 (1990); United States v. Kubrick, 444 U.S. 111, 117–18 (1979) (holding that the FTCA's statute of limitations is a condition of the waiver of sovereign immunity).

[32] *Cf.* Wilkins v. United States, 13 F.4th 791, 795 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 870 (2023) (finding *Irwin* and *Wong* had "significant analytical overlap").

United States should insist that the plaintiffs carry that burden from filing through trial, if necessary.[33] Moreover, and equally as important, *Wong*'s two holdings neither render section 2401(b) a waivable defense nor one that the United States can agree to toll.

B. *Wong*'s two holdings did not render section 2401(b) a waivable affirmative defense

Before *Wong*, most circuits, relying upon the view that the FTCA's limitations periods imposed jurisdictional bars, agreed that the United States could not waive the section 2401(b) defense.[34] *Wong* removed the jurisdictional label attached to section 2401(b), but it did not alter section 2401(b)'s character as a condition that Congress imposed on the FTCA's waiver of immunity. Removing the jurisdictional label does not mean compliance is not mandatory in order to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6)—a point the Supreme Court has itself made when discarding other "jurisdictional" labels improperly attached to requirements that instead go to the substantive adequacy of a claim.[35]

To be sure, the Federal Rules of Civil Procedure may impose some requirement on the party asserting a statute of limitations defense to raise it—akin to a burden of production that the plaintiff has not shown compliance with a mandatory condition on the waiver of sovereign immunity. But it is quite a leap from procedural burdens of production to the novel conclusion that the executive branch can waive or forfeit a condition that Congress imposed on the FTCA's waiver of sovereign immunity.[36] As explained below, *Wong*'s limited holdings do not support a conclusion that section 2401(b) was suddenly transformed into a waivable defense.

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[33] Perhaps confusingly, the same word "waive" is used in two different contexts here: whether Congress intended to "waive" sovereign immunity when the defense is not timely raised, and, if so, whether the United States Attorney's Office may "waive" the statute of limitations defense during litigation.

[34] Skwira v. United States, 344 F.3d 64, 71 (1st Cir. 2003); Gould v. U.S. Dept. of Health & Hum. Servs., 905 F.2d 738, 745–46 (4th Cir. 1990); McCall *ex rel.* Estate of Bess v. United States, 310 F.3d 984, 987 (7th Cir. 2002) ("[T]he plaintiff[] has the burden of establishing an exception to the statute."). Even before *Wong*, however, at least one circuit held that section 2401(b) was an affirmative defense. *See, e.g.*, Hughes v. United States, 263 F.3d 272, 278 (3d Cir. 2001) (citing Schmidt v. United States, 933 F.2d 639, 640 (8th Cir. 1991)).

[35] *See, e.g.*, Arbaugh v. Y&H Corp., 546 U.S. 500, 504, 506–07 (2006).

[36] *See* Waiver of Statutes of Limitations, *supra* note 30, at 136.

1. *Wong*'s holding that section 2401(b) is not jurisdictional does not mean that the section 2401(b) defense is waivable

In the past eight years, several courts have summarily implied that section 2401(b) is a waivable affirmative defense. The First Circuit, for example, has noted that because of "the nonjurisdictional nature of § 2401(b), we must now view the FTCA's statute of limitations as an affirmative defense to be asserted by the defendant."[37] On its face, this terse conclusion suggests that a statute of limitations must either be jurisdictional or a waivable affirmative defense.

But even before *Wong*, courts often required the United States to carry some burden of production on the defense—some proof, typically in the government's possession via administrative claims files—showing that the plaintiff had failed to comply with one or both of section 2401(b)'s requirements. The difference between then and now is the deference granted to a plaintiff's pleadings and alleged facts. Under Federal Rule of Civil Procedure 12(b)(1), a district court did not have to accept anything a plaintiff presented as true; it could conduct its own review and make factual findings in aid of ascertaining its jurisdiction. Today, section 2401(b) must be raised as a Rule 12(b)(6) motion or on summary judgment, and the plaintiff is given every leeway and benefit of the doubt until trial, at which point competent, admissible proof must finally support presumptions.

Procedural rules concerning burdens of production, proof, and standards of review do not, however, inform or govern the substantive character of section 2401(b).

A close reading of *Wong* casts doubt on the assertion that section 2401(b) is a mere "affirmative defense" subject to waiver or forfeiture. *Wong*, after holding that section 2401(b)'s time limits were non-jurisdictional, recognized in a footnote that "Congress may preclude equitable tolling of even a nonjurisdictional statute of limitations."[38] Although the United States in *Wong* exclusively argued that the FTCA's statute of limitations was jurisdictional rather than separately arguing that it could not be equitably tolled, the footnote nevertheless reaffirmed that theories such as estoppel, waiver, and equitable tolling are not automatically available to a plaintiff who fails to meet non-jurisdictional statutes of lim-

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[37] Morales-Melecio v. United States (U.S. Dep't of Health & Hum. Servs.), 890 F.3d 361, 367 (1st Cir. 2018); *see also* Badon v. United States, No. 22-CV-10907, 2022 WL 4359543, at *2 (E.D. Mich. Sept. 20, 2022).

[38] United States v. Wong, 575 U.S. 402, 409 n.2 (2015).

itations. Like for the availability of equitable tolling, congressional intent dictates whether section 2401(b) is subject to waiver.

As explained above, Congress's creation of section 2401(b)'s time limits in conjunction with a cause of action created a *condition precedent* on the FTCA's waiver of sovereign immunity. Nothing in *Wong* abrogated or altered the cardinal principle that time-bars on suits against the United States remain conditions on the waiver of sovereign immunity. That means, as a practical matter, that it remains incumbent on the plaintiffs to plead and prove compliance in order to state a claim for relief. Courts that fail to recognize this aspect of *Wong* are failing to adhere to Supreme Court precedent dating back to *Irwin* and before. Calling section 2401(b) "non-jurisdictional" does not strip it of its substantive character.

As such, section 2401(b)'s time limits are best viewed not as an affirmative defense under Federal Rule of Civil Procedure 8(c)(1) but instead as a negative defense under Federal Rule of Civil Procedure 8(b). A negative defense "denies or directly contradict[s] elements of the plaintiff's claim for relief."[39] Unlike an affirmative defense that the United States must raise in an answer to avoid waiver, the United States may raise the negative defense at any point through trial.[40]

2. *Wong*'s equitable-tolling holding did not authorize the United States to waive the section 2401(b) defense or enter into a tolling agreement

Wong's other holding—that a court may equitably toll section 2401(b)'s time limits—also does not authorize the United States to waive the defense.

Equitable tolling and waiver are distinct legal doctrines that, although often conflated, serve different purposes.[41] Case law concerning one doctrine has "nothing to do with" the other.[42] Equitable tolling, on the one hand, "pauses the running of, or 'tolls,' a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circum-

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39 A. Benjamin Spencer, *Affirmative Defenses—In General*, *in* 5 Fed. Prac. & Proc. § 1270 (Charles Alan Wright & Arthur R. Miller eds., 4th ed. Apr. 2023 update) (alteration in original) (cleaned up) (quoting Hunt Valley Baptist Church, Inc. v. Baltimore Cnty., No. 17-cv-804, 2019 WL 3238950, at *8 (D. Md. July 17, 2019)).

40 *Arbaugh*, 546 U.S. at 506–07; *see also* Fed. R. Civ. P. 12(h)(2)(C) (permitting a defendant to raise "at trial" the defense that a plaintiff "fail[ed] to state a claim upon which relief can be granted").

41 Sec'y, U.S. Dep't of Lab. v. Preston, 873 F.3d 877, 881 (11th Cir. 2017).

42 *Id.*

stance prevents him from bringing a timely action."[43] Equitable tolling is an "extraordinary" remedy that courts rarely grant in any context.[44] In cases against the United States though, courts remain particularly reticent to equitably toll time limits to ensure "little, if any, broadening of the congressional waiver [of sovereign immunity]."[45]

Where equitable tolling principally concerns the plaintiff's conduct, waiver concerns the defendant's conduct.[46] Waiver occurs when a defendant intentionally relinquishes or abandons the defense.[47] The waiver doctrine is meant to "prevent a defendant from ambushing a plaintiff during litigation either through delay in asserting a defense or misdirecting the plaintiff away from a defense for tactical advantage."[48] As noted above, that justification has no merit when a plaintiff must prove compliance with the statute of limitations in order to state a claim for relief.

Importantly, waiver's application is not limited by any standard, let alone one akin to equitable tolling's onerous standard. Without such a limitation, Congress would confer on the executive branch the authority to pay otherwise time-barred claims at its choosing, overriding Congress's plenary authority over how federal funds may be paid.[49] Congress did not intend to relinquish unconditionally its exclusive authority, and neither *Wong*, nor *Irwin*, nor any other Supreme Court decision can be read to so hold. Where Congress has imposed a condition or limitation on a suit against the United States, the executive branch has no authority to waive that condition or limitation absent specific statutory authority for the waiver.[50] Therefore, *Wong* does not authorize the United States to waive the section 2401(b) defense.

Litigants may be tempted to conclude that, even if waiver is prohibited, *Wong* authorizes the executive branch to enter into tolling agreements. After all, *Wong* permitted another means of tolling: *equitable tolling*.[51] The executive branch, however, has no more authority to en-

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[43] Arellano v. McDonough, 143 S. Ct. 543, 547 (2023) (cleaned up); *see also* Lozano v. Montoya Alvarez, 572 U.S. 1, 10 (2014) (explaining that equitable tolling "effectively extends an otherwise discrete limitations period set by Congress").

[44] *See, e.g.*, *Lozano*, 572 U.S. at 10.

[45] Irwin v. Dep't of Veterans Affs., 498 U.S. 89, 95 (1990).

[46] *Preston*, 873 F.3d at 881.

[47] Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1713 (2022) (citing United States v. Olano, 507 U.S. 725, 733 (1993)).

[48] Noah J. Gordon et al., *Waiver of Affirmative Defenses by Failure to Plead Them*, *in* 61A Am. Jur. § 232 (2d ed. May 2023 update).

[49] *See* Waiver of Statutes of Limitations, *supra* note 30, at 128–34.

[50] *See* Munro v. United States, 303 U.S. 36, 41 (1938).

[51] United States v. Wong, 575 U.S. 402, 420 (2015).

ter into a tolling agreement before litigation than it does to waive section 2401(b)'s time limits after litigation commences.[52] Consequently, counsel for the United States should never enter into an agreement to toll section 2401(b)'s time limits.

3. *Wong* did not suggest any other doctrine was available to plaintiffs to avoid section 2401(b)'s time limits

Plaintiffs may also aver that, under *Wong*, a court may apply other equitable doctrines (such as equitable estoppel) to allow a plaintiff to avoid section 2401(b)'s time limits. The Court's reasoning, however, does not support this argument. *Wong*, after holding that section 2401(b)'s time limits were non-jurisdictional, recognized in a footnote that "Congress may preclude equitable tolling of even a nonjurisdictional statute of limitations."[53] Although the United States did not press the argument that section 2401(b) was not amenable to equitable tolling even if not jurisdictional, the footnote nevertheless reaffirmed that theories such as estoppel, waiver, and equitable tolling are not automatically available to a plaintiff who fails to meet non-jurisdictional statute of limitations. Like for the availability of equitable tolling, congressional intent dictates whether section 2401(b) is subject to other potential equitable doctrines. Counsel should maintain that Congress did not intend to apply other doctrines to section 2401(b) nor did it intend to expand the waiver of sovereign immunity.

C. Litigating the section 2401(b) defense after *Wong*

Although the Supreme Court decided *Wong* eight years ago, the issues above are not well-developed across most circuits. Given that broad uncertainty, below is some general advice on how to litigate the section 2401(b) defense.

First, and as discussed above, counsel for the United States should continue to advocate that compliance with section 2401(b)'s time limits remains a statutory condition precedent to recovery of a judgment. *Wong* did not disturb this principle.

Second, counsel should refuse to enter into agreements with claimants

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[52] Waiver of Statutes of Limitations, *supra* note 30, at 130–31; *see also* Lomax v. United States, 155 F. Supp. 354, 358–59 (E.D. Pa. 1957) (holding that a tolling agreement "would subject the United States to suit at the discretion of its officers, thus consenting, in fact, to actions not contemplated by Congress. Obviously, such a result was not intended. This is well settled").

[53] *Wong*, 575 U.S. at 409 n.2.

or plaintiffs to toll section 2401(b)'s timing requirements. The executive branch lacks authority to waive sovereign immunity or to alter the conditions that Congress imposed on a waiver of immunity. Therefore, a tolling agreement is impermissible and void.[54]

Third, counsel should argue that because compliance with section 2401(b)'s time limits is a condition precedent to a claim upon which relief can be granted, the issue may always be raised up to and throughout trial.[55] Of course, the most prudent course is to raise the defense as soon as practicable in an answer, an amended answer, or a motion. Depending on the circumstances, counsel may move to dismiss for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6), move for judgment on the pleadings under Rule 12(c), or move for summary judgment under Rule 56 if materials outside the complaint are required.

Fourth, counsel should maintain that the plaintiff carries the burden of proof in all events. Even if a court views section 2401(b)'s time limits as something akin to an affirmative defense in the procedural sense, once the United States raises the defense, the burden is on the party proving compliance to show how that compliance was met. If compliance depends upon any exception to section 2401(b)'s time limits, to include delayed accrual or equitable tolling, the party seeking the benefit of that exception must prove entitlement.[56]

IV. *Wong*'s holding does not apply to the FTCA's exhaustion requirement

The FTCA's administrative exhaustion requirement, contained in 28 U.S.C. § 2675, sets forth two prerequisites for bringing suit under the FTCA. In contrast to 28 U.S.C. § 2401(b), which deals with claims and actions that are too late, 28 U.S.C. § 2675(a) is concerned with a different question: whether an FTCA action was brought too early.[57]

First, under section 2675(a), "[a]n action shall not be instituted upon a claim against the United States" under the FTCA "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

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[54] Waiver of Statutes of Limitations, *supra* note 30, at 130–31.

[55] *See* Fed. R. Civ. P. 12(h)(2)(C).

[56] *See, e.g.*, Drazan v. United States, 762 F.2d 56, 60 (7th Cir. 1985) ("[T]he burden of establishing an exception to the statute of limitations is on the plaintiff.").

[57] Lehman v. United States, 154 F.3d 1010, 1013 (9th Cir. 1998).

and sent by certified or registered mail."[58] Second, under section 2675(b), "[a]ction shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where" the excess amount is supported by newly discovered evidence not reasonably discoverable at the time the administrative claim was filed, or upon proof of intervening facts.[59] These two provisions are commonly referred to as the FTCA's "presentment" and "sum certain" requirements.[60]

Upon a cursory reading of *Wong*, some litigants and courts may be tempted to graft the Court's holding that the time limitations in section 2401 are not jurisdictional onto the FTCA's exhaustion requirement in section 2675(a). But a closer examination quickly reveals that the Court's reasoning in *Wong*, which principally relied upon a "rebuttable presumption" in favor of equitable tolling, cannot be applied to section 2675. Unlike the limitations set forth in section 2401, the text, structure, and context of the provisions in section 2675 demonstrate that the FTCA's exhaustion requirements are jurisdictional.

Indeed, in the wake of *Wong*, most circuits continue to hold, as they did before *Wong*, that compliance with section 2675 is jurisdictional. The Sixth and Seventh Circuits have held that section 2675 is not jurisdictional, and care must be taken in these jurisdictions to preserve arguments related to exhaustion. But even the decisions in these outlier circuits do not rely on *Wong* for their rationale. Accordingly, extending *Wong* to the FTCA's exhaustion requirements is not only contrary to the text and structure of section 2675, but also unsupported by lower-court precedent.

A. *Wong* did not address the FTCA's exhaustion requirement

As explained above, *Wong* held only that the FTCA's statute of limitations in 28 U.S.C. § 2401(b) is non-jurisdictional and subject to equitable tolling.[61] *Wong* did not address whether the requirements in section 2675 are jurisdictional prerequisites to suit, foreclosing any notion that *Wong* controls the issue.[62]

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[58] 28 U.S.C. § 2675(a).

[59] 28 U.S.C. § 2675(b).

[60] Mader v. United States, 654 F.3d 794, 798 (8th Cir. 2011) (describing "§ 2675(a)'s jurisdictional presentment requirement"); White-Squire v. U.S. Postal Serv., 592 F.3d 453, 457–58 (3d Cir. 2010) ("[W]e hold that the sum certain requirement contained in § 2675(b) is jurisdictional.").

[61] United States v. Wong, 575 U.S. 402, 420 (2015).

[62] Webster v. Fall, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."); *see also*

Nor does *Wong*'s reasoning apply to section 2675(a). *Wong* focused on (1) the framework for determining how equitable tolling applies to statutes of limitations, announced in *Irwin*; (2) the specific language of the FTCA's limitations statute, which provides that claims "shall be forever barred" if not brought within the limitations period; and (3) the separation within the FTCA of the limitations periods under section 2401(b) from the FTCA's jurisdictional grant.[63] The first two factors are plainly inapplicable to determining whether section 2675 is jurisdictional. And the last factor, as explained below, *supports* the position that section 2675(a) is a jurisdictional prerequisite.

B. The text, structure, and context of section 2675 reflect that exhaustion under the FTCA is jurisdictional

Examining three features of the text, structure, and context of section 2675 makes clear that the FTCA's exhaustion requirement is jurisdictional. First, unlike the statute of limitations addressed in *Wong*, the exhaustion requirement in section 2675 is explicitly linked to the FTCA's jurisdictional grant. Second, the plain text of section 2675 reflects the jurisdictional nature of the exhaustion requirement. Third, congressional history regarding the purposes of the exhaustion requirement further indicates that section 2675 is jurisdictional.

1. The exhaustion requirement is textually tethered to the FTCA's jurisdictional grant

Perhaps the most significant distinction between section 2401 and section 2675 is their relation to the FTCA's grant of jurisdiction. The FTCA's jurisdictional grant, contained in 28 U.S.C. § 1346(b)(1), provides in relevant part that—

> *Subject to the provisions of chapter 171 of this title*, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his

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United States v. Johnson, 921 F.3d 991 (11th Cir. 2019) (en banc) ("As binding authority, [a] judicial decision[] is inherently limited to the facts of the case then before the court and the questions presented to the court in the light of those facts." (alterations in original) (quoting New Port Largo, Inc. v. Monroe Cnty., 985 F.2d 1488, 1499 (11th Cir. 1993) (Edmondson, J., concurring))).

63 *See Wong*, 575 U.S. at 407–17.

> office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[64]

In *Wong*, the Supreme Court emphasized that section 2401(b) is located in chapter 161 rather than chapter 171, thereby separating it from the jurisdictional grant in section 1346(b)(1).[65] As the Court explained, "Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional."[66]

By contrast, because section 2675 *is* contained in chapter 171, jurisdiction under the FTCA is "subject to the provisions" in section 2675.[67] Accordingly, the "structural divide" that the Supreme Court identified in *Wong* between the FTCA's jurisdictional grant and section 2401(b) simply does not exist between the jurisdictional grant and section 2675.[68]

2. The text of section 2675 confirms that it is jurisdictional

In addition to the direct link between section 1346 and section 2675, the plain text of section 2675, which directly implicates a court's authority to adjudicate a case, reveals that the FTCA's exhaustion requirement is jurisdictional. This characteristic also distinguishes section 2675 from the "mundane" statute of limitations language at issue in *Wong*.

In *Wong*, the Court underscored that Congress need not "incant magic words" for a statute to rank as jurisdictional, but "traditional tools of

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64 28 U.S.C. § 1346(b)(1) (emphasis added).

65 *Wong*, 575 U.S. at 412 ("Nothing conditions the jurisdictional grant on the limitations periods, or otherwise links those separate provisions. Treating § 2401(b)'s time bars as jurisdictional would thus disregard the structural divide built into the statute.").

66 *Id.* at 411.

67 *See* Wong v. Beebe, 732 F.3d 1030, 1047 (9th Cir. 2013) ("The [FTCA's] exhaustion requirement, unlike the § 2401(b) limitations period, *is* tied by explicit statutory language to jurisdiction, and was deemed 'jurisdictional' in *Brady v. U.S.*, 211 F.3d 499, 502 (9th Cir. 2000)."), *aff'd on other grounds by Wong*, 575 U.S. 402; *see also* White-Squire v. U.S. Postal Serv., 592 F.3d 453, 457 (3d Cir. 2010); Mader v. United States, 654 F.3d 794, 807 (8th Cir. 2011) (emphasizing that "the jurisdiction-conferring language of § 1346(b)(1) indicates that an FTCA claim perfected under § 2675(a) is within the 'exclusive jurisdiction' of the federal district courts").

68 Moreover, the FTCA's jurisdictional grant, 28 U.S.C. § 1346(b)(1), specifically refers to jurisdiction over actions on claims establishing liability to "the claimant." The FTCA's exhaustion requirement correspondingly directs that no action shall be instituted unless "the claimant" has first presented a claim and had the claim finally denied.

statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences."[69] Analyzing the text of section 2401(b), the Court concluded that the statute's requirement that "[a] tort claim against the United States shall be forever barred unless it is presented" within the limitations period did not satisfy this standard.[70] Although acknowledging that the language in section 2401 is "mandatory" and "emphatic," the Court emphasized that the statute's text does not address a court's power or "define a federal court's jurisdiction over tort claims generally."[71] The Supreme Court's focus in *Wong* on whether a statute speaks "to a court's power" aligns with the Court's earlier statement in *Henderson v. Shinseki* that "a rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity."[72]

The language of section 2675 is materially different from that of section 2401(b). Though section 2675 does not specifically mention jurisdiction, its pronouncement that "[a]n action shall not be instituted . . . unless" its requirements are satisfied speaks to a court's adjudicatory authority, reflecting its jurisdictional nature in a way that the words "forever barred" do not.[73]

Further confirmation that section 2675(a) is directed to a court's adjudicatory authority may be found in *McNeil v. United States*, which, as of this writing, remains the only Supreme Court case to address the text of section 2675.[74] In *McNeil*, the Court held that the "most natural reading" of section 2675 is that "Congress intended to require complete exhaustion of Executive remedies *before invocation of the judicial process*."[75] Invocation of the judicial process under a statute authorizing it is how a court acquires its adjudicatory authority. *McNeil*'s holding underscores that the requirements of section 2675 are not mere claims-processing rules, but jurisdictional prerequisites to "invocation" of a court's adjudicatory authority.

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69 *Wong*, 575 U.S. at 409 (2015).

70 *Id.* at 410–11.

71 *Id.* at 410 ("Most important, § 2401(b)'s text speaks only to a claim's timeliness, not to a court's power.").

72 *See* Henderson v. Shinseki, 562 U.S. 428, 435 (2011).

73 *See* 28 U.S.C. § 2675.

74 McNeil v. United States, 508 U.S. 106 (1993).

75 *Id.* at 112 (emphasis added).

3. The context and structure of section 2675 further indicate that it is jurisdictional

The Supreme Court in *Wong*, employing traditional tools of statutory construction, looked to the context and legislative history of section 2401 to determine whether it was subject to equitable tolling.[76] The Court determined that "[s]tatutory context confirms" that section 2401 is a "run-of-the-mill statute of limitations," and that no legislative history provided a "clear statement" that section 2401 is jurisdictional.[77]

On the other hand, the statutory context and legislative history concerning section 2675 suggest that administrative exhaustion under the FTCA is a jurisdictional prerequisite to filing suit. The exhaustion requirement in section 2675 was the product of a series of amendments to the FTCA that Congress enacted in 1966 to establish "a new framework for the administrative consideration and settlement of claims."[78] In *McNeil*, the Supreme Court analyzed the legislative history of section 2675 and identified two purposes of the exhaustion requirement.[79] First, the Court explained that the administrative exhaustion requirement arose out of the concern that the vast majority of claims were settled before trial, and the exhaustion requirement "would make it possible for the claim first to be considered by the agency whose employee's activity allegedly caused the damage."[80] Commencing an FTCA action derails the agency's ability to investigate and consider settlement by foisting the claim into a court and shifting responsibility to the Department of Justice to defend and compromise the suit.[81]

Second, the Court explained that the 1966 amendments were also in-

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76 *Wong*, 575 U.S. at 410–11.

77 *Id.* at 411.

78 *See* Mader v. United States, 654 F.3d 794, 797 (8th Cir. 2011) (citing *McNeil*, 508 U.S. at 112 n.7).

79 *McNeil*, 508 U.S. at 111–12.

80 *Id.* at 112 n.7 (quoting S. Rep. No. 1327, at 2515, 2517 (1966)); *see Mader*, 654 F.3d at 803 ("[T]he legislative history of § 2672 suggests that Congress intended to 'grant[] the agencies of Government sufficient authority to make the administrative settlements a meaningful thing. Such history supports our conclusion that, by enacting §§ 2675)(a) and 2672, Congress intended to give agencies the first opportunity to meaningfully consider and settle FTCA claims.'" (second alteration in original) (citation omitted)).

81 *Cf.* McNeil v. United States, 964 F.2d 647, 648 (7th Cir. 1992) (observing that the language "[a]n action shall not be instituted" means that an action shall not be commenced, not just that the action shall not be prosecuted, in part because settlement negotiations may be more effective without the pall of a lawsuit on file).

tended to "reduce unnecessary congestion in the courts."[82] Recognizing that "[e]very premature filing of an action under the FTCA imposes some burden on the judicial system," the Court found that "[t]he interest in orderly administration of [FTCA] litigation is best served by adherence to the straightforward statutory command."[83] Accordingly, the Court concluded that section 2675 requires complete exhaustion "before invocation of the judicial process."[84] Based on this reasoning, the Court affirmed the district court's dismissal of the plaintiff's action for lack of jurisdiction for failure to completely exhaust his administrative remedy before filing suit.[85]

Finally, evidence that Congress intended section 2675 to be jurisdictional can be found in the legislative history of the Westfall Act, which accords federal employees absolute immunity from tort claims arising out of acts they undertake in the course of their official duties and provides a mechanism for substituting the United States as the defendant in place of the employee in such cases.[86] When Congress enacted the Westfall Act in 1988, it added 28 U.S.C. § 2679(d)(5), a provision that permits a plaintiff to have an otherwise untimely administrative claim treated as timely presented under 28 U.S.C. § 2401(b) if certain statutory conditions are met. In the House Report addressing the Westfall Act and the purpose of section 2675(d)(5), Congress described the requirement that a plaintiff submit an administrative claim to the government as a "jurisdictional requirement under the FTCA."[87]

Thus, in contrast to section 2401, the structure, context, and legislative history of section 2675 suggest that Congress intended administrative

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82 *McNeil*, 508 U.S. at 112 n.8 (quoting S. Rep. No. 1327, at 2518 (1966)).

83 *Id.* at 112.

84 *Id.*

85 *Id.* at 113.

86 *See* Osborn v. Haley, 549 U.S. 225, 229–30 (2007) (citing 28 U.S.C. § 2679(b)(1)).

87 *See* H.R. Rep. No. 100-700, at *8 n.3 (1988). The language of section 2679(d)(5) itself reflects the jurisdictional import of section 2675. First, Congress required that the underlying FTCA action be *dismissed*—language that describes what occurs when there is a lack of jurisdiction—before the remaining provisions of section 2679(d)(5) can have any effect. Second, Congress contemplated that an administrative claim would be presented to the appropriate agency within 60 days of *dismissal* for *failure first to present*, giving the agency the full allotment of time that section 2675 would otherwise afford to investigate and potentially settle without resort to litigation. If an action remains pending, the agency cannot consider and settle a claim. Moreover, if a claim has already been presented to the agency, then dismissal often will not be for "failure first to present a claim," but for some other reason, such as failure to *exhaust* the administrative process or failure to file suit within six months of the agency's denial of the claim.

exhaustion under the FTCA to be a jurisdictional requirement. None of the reasoning in *Wong* suggests differently, and *Wong* did not disturb the Court's earlier ruling in *McNeil* affirming the dismissal of a claim for lack of subject-matter jurisdiction where the claim was not properly exhausted.

C. Lower courts' treatment of section 2675 further suggests that exhaustion is jurisdictional

As explained above, *McNeil* remains the only Supreme Court decision to address the textual import of the FTCA's exhaustion requirement, and *McNeil*'s reasoning strongly supports a jurisdictional view of section 2675. The decisions of lower courts, both before and after the issuance of *Wong*, overwhelmingly hold that the requirements set forth in section 2675 are jurisdictional. Only the Sixth and Seventh Circuits have diverged to hold that exhaustion is not a jurisdictional requirement. Even in these circuits, however, exhaustion remains mandatory.

1. The rulings of most lower courts support the view that section 2675 is jurisdictional

In the years between the addition of section 2675 to the FTCA in 1966 and the ruling in *Wong* in 2015, courts with rare exception held that administrative exhaustion was a jurisdictional prerequisite to suit.[88] In several of these cases, the courts elaborated on the reasons that the exhaustion requirement must be considered jurisdictional, including that the requirement is tethered to the grant of jurisdiction in section 1346[89] and that the legislative history supports a jurisdictional view of the statute.[90]

In the years since *Wong*, little has changed regarding interpreting section 2675 as containing jurisdictional requirements. Almost every circuit to address the issue has held that exhaustion under the FTCA is jurisdictional.[91] Most of these courts have reaffirmed their pre-*Wong* rulings

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88 *See, e.g.*, Corte-Real v. United States, 949 F.2d 484, 485–86 (1st Cir. 1991); Celestine v. Mount Vernon Neighborhood Health Ctr., 403 F.3d 76, 82 (2d Cir. 2005); White-Squire v. U.S. Postal Serv., 592 F.3d 453, 457–58 (3d Cir. 2010); Kokotis v. U.S. Postal Serv., 223 F.3d 275, 278–79 (4th Cir. 2000); Mader v. United States, 654 F.3d 794, 808 (8th Cir. 2011); Vacek v. U.S. Postal Serv., 447 F.3d 1248, 1253 (9th Cir. 2006); Duplan v. Harper, 188 F.3d 1195, 1199 (10th Cir. 1999); Simpkins v. Dist. of Columbia, 108 F.3d 366, 371 (D.C. Cir. 1997).

89 *See White-Squire*, 592 F.3d at 457.

90 *See Mader*, 654 F.3d at 803.

91 *See, e.g.*, Collins v. United States, 996 F.3d 102, 109 (2d Cir. 2021); Bakhtiari v. Spaulding, 779 F. App'x 129, 132 (3d Cir. 2019) (not precedential) (explaining that FTCA's "exhaustion requirement 'is jurisdictional and cannot be

without great fanfare, reflecting that the courts view the jurisdictional nature of section 2675 as a straightforward and settled issue.[92] Notably, none of these cases mention *Wong*, reinforcing that the Court's ruling in *Wong* concerning 28 U.S.C. § 2401(b) has no bearing on whether section 2675 is jurisdictional.

2. The rulings of the Sixth and Seventh Circuits are outliers

Swimming against the strong current of decisions holding that section 2675 is jurisdictional, the Sixth and Seventh Circuits have held that the FTCA's exhaustion requirement is a non-jurisdictional claims-processing rule.[93] The Seventh Circuit was the first to so hold in *Glade ex rel. Lundskow v. United States*, a case that predates *Wong* by three years.[94] The Seventh Circuit's holding in *Glade* was in line with its outlier view that the FTCA provisions in chapter 171 of Title 28 of the United States Code are non-jurisdictional even though the jurisdictional grant in section 1346(b) is expressly "subject to" the provisions in chapter 171.[95]

This reasoning, grounded in the Seventh Circuit's view that the United States' sovereign immunity does not implicate the competence of a court to render a binding judgment,[96] is difficult to square with the Supreme Court's explanation that "sovereign immunity is jurisdictional in nature."[97] In subsequent cases, both before and after *Wong*, the Seventh

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waived'" (quoting Roma v. United States, 344 F.3d 352, 362 (3d Cir. 2003))); Barber v. United States, 642 F. App'x 411, 413 (5th Cir. 2016) (not precedential); D.L. *ex rel.* Junio v. Vassilev, 858 F.3d 1242, 1244 (9th Cir. 2017); Lopez v. United States, 823 F.3d 970, 976 (10th Cir. 2016); *see also* Norton v. United States, 530 F. Supp. 3d 1, 6–7 (D.D.C. 2021) (quoting *Simpkins*, 108 F.3d at 371).

92 *See*, *e.g.*, Cooke v. United States, 918 F.3d 77, 81 (2d Cir. 2019); *Lopez*, 823 F.3d at 976.

93 Glade *ex rel.* Lundskow v. United States, 692 F.3d 718, 723 (7th Cir. 2012); Copen v. United States, 3 F.4th 875, 882 (6th Cir. 2021) (holding that sum certain requirement under section 2675(b) is non-jurisdictional); Kellom v. Quinn, Nos. 20-1003/1222, 2021 WL 4026789, at *2–3 (6th Cir. Sept. 3, 2021) (holding that presentment requirement under section 2675(a) is non-jurisdictional).

94 *Glade*, 692 F.3d at 723.

95 *See* Parrott v. United States, 536 F.3d 629, 634–35 (7th Cir. 2008) (holding that statutory exceptions to the FTCA's waiver of sovereign immunity in 28 U.S.C. § 2680 are non-jurisdictional).

96 *Id.* at 634.

97 Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 476 (1994) ("[T]he 'terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit.'" (second alteration in original) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941))); *see* Brownback v. King, 141 S. Ct. 740, 749–50 (2021) (holding that because plaintiff's FTCA claims "failed to survive a Rule 12(b)(6) motion

Circuit has reaffirmed its view that the requirements of section 2675 are not jurisdictional.[98]

The Sixth Circuit took a more winding path to its conclusion that the requirements of section 2675 are non-jurisdictional. "Under long-standing Sixth Circuit precedent," the court held that the FTCA's exhaustion requirement was jurisdictional.[99] The understanding of section 2675 as jurisdictional continued after *Wong*.[100] But in *Copen v. United States*, the Sixth Circuit reversed course, holding that the sum certain requirement in section 2675(b) is a mandatory claims-processing rule, not a jurisdictional prerequisite to suit.[101] In an unpublished decision, a panel of the Sixth Circuit extended *Copen*'s reasoning to section 2675(a), holding that administrative presentment is not a jurisdictional prerequisite to suit.[102]

The court's analysis in *Copen* rested on three conclusions. First, the court emphasized that the "jurisdictional nature of § 2675(a) was simply assumed by the Supreme Court in *McNeil*—it did not 'explicitly consider[] whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim.'"[103] Second, the court determined that the text of section 2675 "does not speak in jurisdictional terms," and thus the "content and language of this provision does not evidence clear Congressional intent to designate § 2675 a jurisdictional rule."[104] Finally, the court explained that the "reference to chapter 171 in § 1346(b) is simply not clear enough" to turn a facially non-jurisdictional rule into a jurisdictional one.[105]

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to dismiss, the United States necessarily retained sovereign immunity, also depriving the court of subject-matter jurisdiction").

98 Smoke Shop, LLC v. United States, 761 F.3d 779, 786 (7th Cir. 2014) (citing *Glade*, 692 F.3d at 723); *see* Chronis v. United States, 932 F.3d 544, 547 (7th Cir. 2019) (holding that failure to include a sum certain in an FTCA administrative claim "is not necessarily fatal," and is "only fatal if it can be said to have hindered or thwarted the settlement process that Congress created as a prelude to litigation" (cleaned up)).

99 Kellom v. Quinn, Nos. 20-1003/1222, 2021 WL 4026789, at *3 (6th Cir. Sept. 3, 2021) (citing Exec. Jet Aviation, Inc. v. United States, 507 F.2d 508, 514–15 (6th Cir. 1974)); *see* Allen v. United States, 517 F.2d 1328, 1329 (6th Cir. 1975) ("28 U.S.C. § 2675(a) deprives the federal courts of jurisdiction over any such cause of action unless the claim has been properly presented to the appropriate federal agency and denied by that agency." (footnote omitted)).

100 Petrovic v. United States, No. 17-6186, 2018 WL 4959031, at *1 (6th Cir. June 8, 2018) ("In [the FTCA] context, exhaustion is a jurisdictional requirement.").

101 Copen v. United States, 3 F.4th 875, 882 (6th Cir. 2021).

102 *Kellom*, 2021 WL 4026789, at *3.

103 *Copen*, 3 F.4th at 881 (quoting Arbaugh v. Y&H Corp., 546 U.S. 500, 511 (2006)).

104 *Id.* at 881–82.

105 *Id.* at 882.

As explained above, the text, context, and structure of section 2675 cast doubt on the Sixth and Seventh Circuit's conclusions that exhaustion under the FTCA is a non-jurisdictional claims-processing rule.[106] But determining that exhaustion is non-jurisdictional has concrete impacts on FTCA litigation in these circuits. If section 2675's requirements are non-jurisdictional claims-processing rules, then they may be waived or forfeited.[107] Counsel for the United States in these jurisdictions should guard against waiver or forfeiture by raising exhaustion arguments by motion or in an answer early in a case.[108]

In any event, the decisions of the Sixth and Seventh Circuits do not rely on *Wong*.[109] Indeed, the only mention of *Wong* in *Copen* is in a footnote in the concurrence, in which Judge Rodgers distinguished *Wong* from *Copen* on the basis that section 2401 is separated from the jurisdictional grant in section 1346(b)(1), whereas section 1346(b) references chapter 171 of Title 28, which contains section 2675(a).[110] Accordingly, *Wong* does not appear to have caused courts to reconsider their views on whether section 2675 is jurisdictional. If, however, more courts decide to follow the path of the Sixth and Seventh Circuits, a more defined circuit split would arise, and Supreme Court review of the jurisdictional nature of section 2675 may be warranted.

In sum, the decision in *Wong* cannot be applied to the FTCA's exhaustion requirement because the text, context, and structure of section 2675, unlike that of section 2401, reflect that administrative exhaustion is jurisdictional. The decisions of a large majority of circuits are in accord. And even in circuits that have held otherwise, those decisions do

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106 *See supra* Part IV, Section B.

107 Glade *ex rel.* Lundskow v. United States, 692 F.3d 718, 723 (7th Cir. 2012) ("Since the requirement of exhaustion is not jurisdictional, it can be waived or forfeited, or otherwise forgiven.").

108 The Sixth Circuit's reliance in *Copen* on the Supreme Court's decision in *Arbaugh* leaves open the argument that compliance with section 2675 must be pleaded and proven as an element of any claim seeking money damages under the FTCA, reducing the risk of waiver or forfeiture. *Arbaugh* emphasized the distinction between arguments that are jurisdictional and those that go to failure to state a claim. *See Arbaugh*, 546 U.S. at 511. In *Copen*, the court explained that "[b]ecause we hold that the sum certain requirement in § 2675 is not jurisdictional," the district court on remand "should consider any arguments the parties may have under Fed. R. Civ. P. 12(b)(6) rather than 12(b)(1)." *Copen*, 3 F.4th at 884. As the Sixth Circuit has explained, "The defense of failure to state a claim upon which relief can be granted is protected from waiver through trial." Romstadt v. Allstate Ins. Co., 59 F.3d 608, 610–11 (6th Cir. 1995).

109 *See generally Copen*, 3 F.4th 875; Kellom v. Quinn, Nos. 20-1003/1222, 2021 WL 4026789 (6th Cir. Sept. 3, 2021); Chronis v. United States, 932 F.3d 544 (7th Cir. 2019).

110 *Copen*, 3 F.4th at 887 n.3 (Rodgers, J., concurring).

not support extrapolating *Wong*'s holding to section 2675.

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Spotlight on a Jurisdictional Defense: FECA as a Bar to FTCA Actions Brought by Federal Employees Alleging a Work-Related Injury

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Consider the below cases, which shared similar outcomes for reasons that this article will reveal below:

- A plaintiff brings an action under the Federal Tort Claims Act (FTCA) against the United States, alleging that he injured his back while on the job and seeks to recover damages for the back injury.[1]
- A plaintiff brings an FTCA action against the United States for an automobile accident in which the plaintiff was struck by a truck driven by an enlisted serviceman. The accident occurred on a military base, approximately 35 minutes before the plaintiff was to report to work.[2]
- A widow brings a wrongful death action against the Tennessee Valley Authority (TVA) for the death of her husband, who drowned while working as a deckhand at the TVA's plant on the Tennessee River.[3]

In each of these cases, the court dismissed the action. In the first case, the plaintiff was an employee of the U.S. Postal Service, and the injury occurred when he was at work. The court held that because the injury occurred in the performance of his duties as a federal employee, the plaintiff's sole remedy was the Federal Employees' Compensation Act (FECA), and the action was dismissed.[4]

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[1] Griffin v. United States, 703 F.2d 321, 322 (8th Cir. 1983).
[2] Reep v. United States, 557 F.2d 204, 206 (9th Cir. 1977).
[3] Hutchins v. Tennessee Valley Auth., 98 F.3d 602, 603 (11th Cir. 1996).
[4] *Griffin*, 703 F.2d at 322.

In the second case, the plaintiff was a civilian federal employee who was struck while crossing the street to go to work. The court affirmed the district court's grant of summary judgment in favor of the United States because "[a]n injured federal employee may not bring an action under the FTCA if there is a substantial question as to whether his injuries are covered under FECA."[5]

In the last case, the deckhand was an employee of the TVA, a federal agency, and his death occurred while he was on the job. The court held that the plaintiff's recovery was limited to the benefits provided under FECA, and that the dismissal of the wrongful death action was proper.[6]

Initially passed in 1916, FECA is the workers' compensation program for federal employees. FECA pays disability, survivors, and medical benefits without regard to fault and without the need for litigation.

In exchange, covered employees may *not* sue the U.S. government for employment-related injuries, including in the form of tort suits under the FTCA. The U.S. Department of Labor (DOL) administers the FECA program, and each employee's host agency pays for the costs of benefits. Further, FECA provides that any DOL determination regarding FECA benefits is final and conclusive to all questions of law and fact, and is not subject to any court's review.

For every attorney who is defending a tort suit that a federal employee brings against the U.S. government, it is critical to consider—as early in the process as possible—the facts of that case within the statutory and regulatory provisions of FECA and the FTCA. To that end, this article will describe some of the relevant statutory framework of FECA, a summary of the FECA claims process, and important considerations to assist you in litigating an FTCA action in which FECA may apply.[7]

I. The origin of FECA's exclusive remedy provision

Initially enacted by Congress in 1916, FECA was amended in 1949 to protect the government from suits under subsequently passed statutes such as the FTCA. As the Supreme Court noted in *Lockheed Aircraft*

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[5] *Reep*, 557 F.2d at 207.

[6] *Hutchins*, 98 F.3d at 603–04.

[7] This article assumes that the reader is familiar with the FTCA. In brief, Congress enacted the FTCA to waive the sovereign immunity of the United States from suits in tort in limited circumstances. *See* 28 U.S.C. § 1346(b)(1); *see also* Paul F. Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 Tort Trial & Ins. Prac. L.J. 1105 (2009) (setting out a useful framework for interpreting the FTCA).

Corp. v. United States, in enacting this provision, "Congress adopted the principal compromise—the 'quid pro quo'—commonly found in workers' compensation legislation: employees are guaranteed the right to receive immediate, fixed benefits, regardless of fault and without need for litigation, but in return they lose the right to sue the Government."[8]

II. Administering the FECA program and filing FECA claims

Central to FECA's statutory scheme is the Secretary of the DOL, who is tasked with administering the FECA program, deciding all questions arising under FECA,[9] and prescribing the rules and regulations necessary for its administration and enforcement.[10]

The Secretary delegates that authority to the Director of the Office of Workers' Compensation Programs (OWCP), who is responsible for reviewing claims, determining whether FECA covers a claimant's injury, and ultimately deciding whether a claimant is entitled to benefits.[11]

To pursue benefits under FECA, a claim must first be submitted to OWCP.[12] To submit such a claim, a claimant is required to complete and sign either a "Form CA–1" for a traumatic injury or a "Form CA–2" for an occupational disease claim.[13] These forms request information relating to a claimant's federal employment status; the circumstances of the injury, such as when and where it occurred; how the injury was caused; and the extent of the injury.

After receiving the claim, OWCP makes final findings of fact, deciding whether the employee sustained the injury in the performance of his duties and ultimately whether the employee is eligible for compensation under FECA.[14]

The claimant must meet five basic requirements for a claim to be

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[8] Lockheed Aircraft Corp. v. United States, 460 U.S. 190, 193–94 (1983).
[9] 5 U.S.C. § 8145.
[10] 5 U.S.C. § 8149.
[11] 5 U.S.C. §§ 8102, 8103, 8124, 8128(a), 8145, 8149; *see also* 20 C.F.R. § 10.1.
[12] 5 U.S.C. § 8121.
[13] *See* 20 C.F.R. §§ 10.5(q), (ee) (defining traumatic injury and occupational disease); 20 C.F.R. § 10.100(a) ("To claim benefits under the FECA, an employee who sustains a work-related traumatic injury must give notice of the injury in writing on Form CA–1, which may be obtained from the employer or from the Internet at www.dol.gov under forms."); 20 C.F.R. § 10.101(a) (containing similar language related to the filing of a Form CA–2 for an occupational disease).
[14] *See* 5 U.S.C. §§ 8102(a), 8124.

accepted.[15] They are as follows:

1. The claim must be *timely.*[16] A claim for compensation, disability, or death must be filed within three years of the date of injury. In the case of a traumatic injury, that date is when the injury occurred; in the case of an occupational disease claim, the date is generally when the claimant became aware of the relationship of the disease to his employment.[17]

   If the claimant does not file within that time frame, the claim can still be allowed if written notice of injury or death was given within 30 days, or if it can be proven that the immediate supervisor had actual knowledge, including verbal notification, of the injury or death within 30 days of the occurrence.[18]

2. The next requirement is that the claimant be a *civil employee* for purposes of FECA.[19]

   All civilian employees of the United States, except those paid from non-appropriated funds, are eligible. Special legislation provides coverage to Volunteers in Service to America and Peace Corps volunteers; federal petit or grand jurors; volunteer members of the Civil Air Patrol; Reserve Officer Training Corps Cadets; Job Corps, Neighborhood Youth Corps, and Youth Conservation Corps enrollees.[20]

3. The next requirement is *fact of injury.*[21]

   This requirement has a factual and medical component. Factually, the injury or accident alleged must have occurred. Medically, a medical condition must be diagnosed in connection with the injury or event.

4. Another requirement is *performance of duty.*[22]

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15 *See* 20 C.F.R. § 10.115.

16 20 C.F.R. § 10.115(a).

17 5 U.S.C. § 8122; 20 C.F.R. § 10.100(b); 20 C.F.R. § 10.101; *see also* Ass'n of Trial Laws. of Am., 2 Annual Convention Reference Materials: Workers' Compensation and Workplace Injury 2 (2001).

18 20 C.F.R. § 10.100(b)(1).

19 *See* 5 U.S.C. §§ 8101(1); 20 C.F.R. § 10.5(h); 20 C.F.R. § 10.115(b).

20 *See* 20 C.F.R. § 10.0(a); U.S. Dep't of Lab., Information Sheet: Questions and Answers About the Federal Employees' Compensation Act (FECA) 5 (2002) [hereinafter Questions and Answers].

21 *See* 20 C.F.R. § 10.115(c).

22 *See* 20 C.F.R. § 10.115(d).

Typically, in claims for physical injury, the claim must demonstrate that the individual was performing duties expected of her by her employer at the time the injury occurred, though performance of duty is a fact-specific inquiry. Some other activities with a sufficiently close connection to employment can also be covered.

5. The fifth and final requirement is *causal relationship*.[23]

   The medical condition(s) or diagnoses for which benefits are claimed must be shown to have been causally related to employment factors, a requirement that a well-reasoned medical opinion from a physician usually satisfies.[24]

III. Appeals of the Secretary's decisions on FECA claims

If OWCP denies a claim in whole or in part, a formal decision is issued. OWCP encloses with each formal decision a description of appeal rights.[25]

There are three ways to appeal an OWCP denial. First, a claimant may seek review by an OWCP representative in one of two ways: The claim may either request that an OWCP representative review the written record[26] or request an oral hearing before an OWCP representative.[27] In the oral hearing, the individual who is claiming benefits can testify and present written evidence.[28]

Second, a claimant may request reconsideration by district office staff who were not involved in making the contested decision.[29]

Finally, the claimant may seek review by the Employees' Compensation Appeals Board (ECAB).[30] The ECAB is part of the DOL but separate from OWCP.[31] The ECAB's review is limited to the evidence in the record, and no parties may submit new evidence.[32]

In addition, and interestingly, the Secretary of Labor retains the authority to "review an award for or against payment of compensation at

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[23] *See* 20 C.F.R. § 10.115(e).
[24] *See* 20 C.F.R. § 10.115(f).
[25] *See* Questions and Answers, *supra* note 20, at 15.
[26] *Id.*; 20 C.F.R. § 10.618.
[27] Questions and Answers, *supra* note 20, at 15; 20 C.F.R. § 10.615.
[28] Questions and Answers, *supra* note 20, at 15; 20 C.F.R. § 10.617(c)–(d).
[29] Questions and Answers, *supra* note 20, at 15; 20 C.F.R. § 10.605.
[30] Questions and Answers, *supra* note 20, at 15; 20 C.F.R. § 10.625.
[31] Questions and Answers, *supra* note 20, at 15.
[32] *Id.*; 20 C.F.R. § 501.2(c)(1).

any time on his own motion or on application."[33] This authorizes the DOL to reopen and adjust its decision at any time in the process.

IV. The Secretary's decisions are final

Congress has made clear that the Secretary's—and by delegation OWCP's—determination of "allowing or denying a payment" is *both* "final and conclusive for all purposes and with respect to all questions of law and fact[,]" and is "not subject to review by another official of the United States or by a court by mandamus or otherwise."[34]

In fact, the United States Supreme Court has characterized FECA—specifically section 8128(b)—as "an 'unambiguous and comprehensive' provision barring any judicial review of the Secretary of Labor's determination of FECA coverage."[35] The Supreme Court has explained that federal courts have "no jurisdiction over FTCA claims where the Secretary determines that FECA applies."[36]

Notably, section 8128(b)'s bar to judicial review can apply even where the Secretary denies the claim. Specifically, if the Secretary determines that the facts alleged by the individual constitute coverage under FECA, a court cannot review that decision—even if it finds that the person did not meet their burden of proof in establishing those facts under FECA.[37] Upon denial, that individual cannot turn to the courts and claim a remedy under a different statute because FECA is their exclusive remedy under 5 U.S.C. § 8116(c). Otherwise, an individual could circumvent FECA's exclusivity clause by merely failing to submit the documentation required under FECA to make their claim. Moreover, section 8128(b)'s bar to judicial review is not limited to those damages sought in the FECA claim; it applies to claims arising out of the same incident, even if the damages sought are not identical or compensable.[38]

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[33] 5 U.S.C. § 8128(a).

[34] 5 U.S.C. § 8128(b).

[35] Sw. Marine, Inc. v. Gizoni, 502 U.S. 81, 90 (1991) (citing Lindahl v. Off. of Pers. Mgmt., 470 U.S. 768, 780, 780 n.13 (1985)); 5 U.S.C. § 8128(b).

[36] *Gizoni*, 502 U.S. at 90.

[37] 20 C.F.R. § 10.115.

[38] Sullivan v. United States, No. 5-cv-1418, 2006 WL 8451987, at *2 (D.D.C. June 22, 2006) ("As such, if FECA applies to a particular claim for injuries, a tort action brought against the United States arising out of the same injuries is preempted, and a federal court may not hear the case for lack of jurisdiction." (citing *Gizoni*, 502 U.S. at 90)).

V. Practical considerations for FTCA litigation

For attorneys who are defending the United States in an FTCA action, the issue of FECA coverage is of paramount importance because if there is FECA coverage, or even a substantial question of coverage, then the court lacks jurisdiction over the FTCA action. Attorneys for the United States should consider the following to ensure that proper steps are taken in defending the FTCA action. First, one should examine early in the case whether the plaintiff in the FTCA action was a federal employee engaged in work-related activities at the time of the injury. Second, if there is a "substantial question" of FECA coverage, attorneys for the United States should seek the appropriate relief—whether in the form of a motion to stay or dismiss—as early in the litigation as possible.

A. Was the plaintiff a federal employee at the time of the injury?

At the outset, one should determine whether the plaintiff was a federal employee who, at the time of injury, was engaged in work duties or other activities arising out of the claimant's federal employment. This situation might not be obvious upon reading the complaint. For example, the plaintiff may have been working for or volunteering on behalf of one of the entities that has been given FECA coverage, as described in Part II above, including the Peace Corps, Civil Air Patrol, Reserve Officer Training Corps Cadets, or Job Corps. Attorneys for the United States should consult the relevant agency to obtain information on whether the plaintiff was a federal employee who was within the performance of duty at the time of injury. The Division of Federal Employees' and Energy Workers' Compensation within the DOL's Office of the Solicitor will also be a helpful resource on this issue.

B. If there is a "substantial question of coverage," then courts must defer to the Secretary of Labor's determination.

Because of the comprehensive prohibition on judicial review of the Secretary of Labor's determination of FECA coverage, if there is a substantial question whether FECA covers a plaintiff's injuries, then courts must defer to the Secretary of Labor's determination.[39] "[A] substan-

[39] Mathirampuzha v. Potter, 548 F.3d 70, 81–82 (2d Cir. 2008) (holding that Congress has vested the Secretary of Labor or her delegate with exclusive authority to administer

tial question exists unless it is *certain* that the Secretary would not find coverage."[40] "If there is a substantial question of FECA coverage, only the Secretary of Labor or her delegate may decide whether the FECA applies."[41]

As a result, when a substantial question of FECA coverage exists, the district court is left with only two options. The district court must either (1) stay the FTCA claim until the plaintiff obtains a definitive determination from the Secretary of Labor that FECA does not cover his injury; or (2) dismiss the action for lack of subject-matter jurisdiction if OWCP determines that coverage applies.[42]

For this reason, counsel who is defending the United States in the litigation should make the appropriate motion for relief—whether to stay or dismiss—as early in the litigation as possible.

VI. Conclusion

It is imperative that attorneys who are defending an FTCA action brought by a federal employee against the U.S. government consider as early as possible whether the plaintiff has submitted, or should have submitted, a FECA claim with the DOL, and whether the agency has made any determination on coverage.

Until such determination is made, the United States should move in the district court either to stay the FTCA action until the plaintiff obtains a definitive determination from the Secretary of Labor, or dismiss the action for lack of subject-matter jurisdiction if the agency has ruled that coverage applies.

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and decide all questions arising under FECA).

[40] Gill v. United States, 471 F.3d 204, 206 (1st Cir. 2006).

[41] *Mathirampuzha,* 548 F.3d at 81 (citing numerous decisions).

[42] *Id.* at 84.

Holding the Line: Challenging Corporate Negligence Claims Under the Federal Tort Claims Act

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I. Introduction

While mowing the lawn, a man accidently cuts his toe. He goes to a hospital to be seen in the emergency room. It is flu season, and the emergency room is overwhelmed with patients. The man is examined by a physician who determines the wound is largely superficial and can be sutured. The physician, overwhelmed with the volume in the emergency room that day, reaches for a set of forceps. Distracted, the physician grabs a used set rather than a clean set. The physician closes the wound and sends the man on his way, assuring him that he will be as good as new in a few days. Indeed, for a superficial wound, that is the expected outcome.

Instead, the man's condition declines. He experiences significant pain. The wound begins to leak pus. He spikes a fever. The man returns to the emergency room. Upon inspection, doctors discover that he has developed a massive infection in his toe. The toe must now be amputated.

After recovering from the amputation, the man seeks the advice of counsel. Counsel discovers that the hospital had no policy in place governing the proper storage of clean forceps. Counsel believes that not only was the physician negligent due to distraction, but also the hospital should be liable for its own independent failings under a theory of corporate negligence.

Whether such a corporate negligence claim is viable will depend on whether the hospital was federally owned, operated, or funded. If it was any of the above, the only avenue for a negligence suit would be the Federal Tort Claims Act (FTCA).[1] The FTCA bars corporate negligence claims.

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[1] Federal Tort Claims Act, Pub. L. No. 79-601, 60 Stat. 812 (1946).

As this article explains, the FTCA is premised on the theory of respondeat superior, a doctrine that holds an employer legally responsible for the tortious acts of an employee. The theory of corporate negligence, in contrast, is predicated on independent duties that a corporate entity owes separate from any liability that it has for the actions of its employees. Courts that permit corporate negligence claims to proceed under the FTCA violate Congress's intent in enacting the FTCA. For this reason, it is incumbent on counsel defending FTCA cases to "hold the line" and move to dismiss corporate negligence claims whenever they are alleged.

To illustrate why corporate negligence claims are barred under the FTCA, this article first explores the history of corporate negligence claims against hospitals. With that history in mind, the article then discusses the history, purpose, and statutory scheme of the FTCA. Finally, the article advocates that counsel defending FTCA claims rigorously defend against corporate negligence claims, lest the bright line barring them under the FTCA become blurred.

II. The history of corporate negligence claims against hospitals

Outside the FTCA context, corporate negligence claims are routinely asserted in medical malpractice cases.[2] This practice was not always true. For nearly a century, hospitals were entirely immune from tort suit under the doctrine of charitable immunity.[3] This doctrine operates to shield charitable organizations from suit.[4] Charitable immunity is justified by the belief that because non-profit organizations have limited financial resources, those resources should not be diverted to litigation but instead should be fully available to support the charitable mission.[5]

In its early days, the practice of medicine was viewed as intrinsically altruistic and non-commercial.[6] By extension, hospitals were consid-

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[2] *See generally* Arthur F. Southwick, *The Hospital as an Institution—Expanding Responsibilities Change Its Relationship with the Staff Physician*, 9 Cal. W.L. Rev. 429 (1973).

[3] Jeannie Pinkston, *Negligence: Strubhart v. Perry Memorial Hospital: Taming the Monster of Corporate Negligence or Creating an Unpredictable Form of Hospital Liability?*, 48 Okla. L. Rev. 797, 798 (1995).

[4] David H. Rutchik, *The Emerging Trend of Corporate Liability: Courts' Uneven Treatment of Hospital Standards Leaves Hospitals Uncertain and Exposed*, 47 Vand. L. Rev. 535, 551–52 (1994).

[5] Ryan Montefusco, *Hospital Liability for the Right Reasons: A Non-Delegable Duty to Provide Support Services*, 42 Seton Hall L. Rev. 1337, 1339 (2012).

[6] Lori B. Andrews, *Is There a Right to Clone? Constitutional Challenges to Bans on Human Cloning*, 11 Harv. J.L. & Tech. 643, 671 (1998).

ered charitable institutions whose mission was to aid the disadvantaged.[7] Shielding hospitals from suit meant hospitals could instead spend their limited funds caring for the poor.[8] New York was the first state to apply charitable immunity to bar a tort suit against a hospital in the landmark decision *Schloendorff v. Society of New York Hospital*.[9] Other states followed this decision, extending charitable immunity to hospitals in their state.[10]

Over time, the societal view of hospitals as charitable organizations has evolved.[11] No longer focused on exclusively the indigent, hospitals began charging for services and treating both wealthy and poor patients.[12] As the mission of hospitals changed, so too did the views of the states that had previously immunized those same hospitals from suit. Forty years after deciding *Schloendorff*, New York reversed course in *Bing v. Thunig*, holding that a hospital could be vicariously liable for the acts of its employees.[13] Other states soon followed.[14]

Today, hospitals are not viewed as charities; rather, they are sophisticated entities that often function as profit-making enterprises.[15] Indeed, a large percentage of hospitals, both privately and publicly owned, are profitable.[16] Medicine has become a major commercial industry.[17]

The first major case endorsing the theory of corporate negligence in a medical malpractice context was the Illinois case *Darling v. Charleston*

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[7] Timothy Stoltzfus Jost, *The Joint Commission on Accreditation of Hospitals: Private Regulation of Health Care and the Public Interest*, 24 B.C. L. Rev. 835, 846 (1983) (discussing the divergent roles of hospitals over time).

[8] Ponder v. Fulton-DeKalb Hosp. Auth., 353 S.E.2d 515 (Ga. 1987), *cert. denied*, 484 U.S. 863 (1987).

[9] 105 N.E. 92 (N.Y. 1914).

[10] Hall v. Roberts, 548 F. Supp. 498 (W.D. Va. 1982); George v. Jefferson Hosp. Ass'n, Inc., 987 S.W.2d 710, 714 (Ark. 1999); Thompson v. Druid City Hosp. Bd., 184 So.2d 825 (Ala. 1966); Thompson v. Mercy Hosp., 483 A.2d 706 (Me. 1984).

[11] *See, e.g.*, Haynes v. Presbyterian Hosp. Ass'n, 45 N.W.2d 151 (Iowa 1950).

[12] Craig W. Dallon, *Understanding Judicial Review of Hospitals' Physician Credentialing and Peer Review Decisions*, 73 Temp. L. Rev. 597, 601 (2000).

[13] 143 N.E.2d 3 (N.Y. 1957).

[14] *See, e.g.*, President and Dirs. of Geo. Coll. v. Hughes, 130 F.2d 810 (D.C. Cir. 1942); Gable v. Salvation Army, 100 P.2d 244 (Okla. 1940).

[15] *See* Susan Ward, *Corporate Negligence Actions Against Hospitals–Can the Plaintiff Prove a Case?*, 59 Wash. L. Rev. 913, 916 (1984).

[16] Doyle Slifer, *Grey Area Anatomy: Tax Exemptions for Nonprofit Hospitals*, 8 Ill. Bus. L.J. 59, 59 (2009).

[17] Donald L. Bartlett & James B. Steele, Critical Condition: How Health Care in America Became Big Business and Bad Medicine 76 (2006).

Community Hospital.[18] In *Darling*, a patient's fractured leg was improperly set in the emergency room, ultimately requiring a below-the-knee amputation after the fracture failed to heal properly.[19] Rather than blame the physician who set the fracture, the patient blamed the hospital for failure to ensure the nursing staff regularly monitored the leg once the physician had set the fracture.[20] In essence, rather than identifying a single individual who breached the standard of care, the patient blamed the hospital for its systemic failure to provide adequate care.

The Illinois Supreme Court endorsed the patient's theory, agreeing that the inadequate care leading to the amputation was the hospital's failure, not any single hospital employee's.[21] As the court noted, the patient did not go to the emergency room to see a specific physician acting independently but rather for a combined package of care that the hospital oversaw.[22] Because the hospital promised the patient comprehensive care, the hospital was responsible for ensuring that care was provided. In endorsing the patient's theory of negligence, the *Darling* court became the first to recognize corporate negligence in a medical malpractice case, holding that a hospital has an independent duty to supervise its staff.[23]

Other courts followed, applying the *Darling* reasoning to different fact patterns. The next major case was *Purcell v. Zimbelman*, which the Arizona Court of Appeals decided.[24] After a physician botched a colon surgery, the patient discovered that the hospital had continued to employ the physician even after two prior adverse surgical outcomes.[25] The patient blamed the hospital for employing a physician whom the patient claimed the hospital knew was negligent.

Although the hospital tried to factually shift blame by arguing that it was not directly responsible for hiring and firing decisions, the *Purcell* court rejected this defense.[26] The *Purcell* court reasoned that the hospital had an independent duty to patients to ensure there was no negligence in hiring or firing hospital staff.[27]

Perhaps the most sweeping recognition of corporate duties appeared

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18 211 N.E.2d 253 (Ill. 1965).
19 *Id.* at 256.
20 *Id.*
21 *Id.* at 267.
22 *Id.*
23 Mitchell J. Nathanson, *Hospital Corporate Negligence: Enforcing the Hospital's Role of Administrator*, 28 Tort & Ins. L.J. 575, 575 (1993).
24 500 P.2d 335 (Ariz. App. 1972).
25 *Id.* at 341.
26 *Id.*
27 *Id.*

in *Thompson v. Nason Hospital*.[28] After a serious motor vehicle accident, the patient in *Thompson* was transported to the emergency department of Nason Hospital.[29] In the emergency room, a general practitioner treated her. Despite being warned that the patient was on blood thinners for a cardiac condition, and despite noting evidence of neurological impacts, the general practitioner failed to timely diagnose the patient's massive brain bleed. Despite recognizing the possibility of cardiac complications, the general practitioner also failed to consult with a cardiologist.

By the time the patient's brain bleed was discovered and treated, she had experienced permanent brain damage. She filed suit, alleging, *inter alia*, corporate negligence against Nason Hospital.[30] According to the complaint, Nason Hospital should have had better policies in place to require a cardiac consultation for emergency department patients on blood thinners.[31] She alleged that Nason Hospital breached its corporate duty of care by failing to implement and enforce proper policies and procedures.[32]

The Pennsylvania Supreme Court agreed that such a duty existed, recognizing a duty flowing from the hospital to the patient, irrespective of any respondeat superior liability for the actions of physicians in the hospital.[33] As the *Thompson* court noted,

> Corporate negligence is a doctrine under which the hospital is liable if it fails to uphold the proper standard of care owed the patient, which is to ensure the patient's safety and well-being while at the hospital. This theory of liability creates a nondelegable duty which the hospital owes directly to a patient.[34]

The *Thompson* court then identified four duties that any hospital owed to its patients: a duty to use reasonable care in maintaining safe and adequate facilities and equipment; a duty to select and retain only competent physicians; a duty to oversee all persons who practice medicine in the hospital; and a duty to formulate, adopt, and enforce adequate and appropriate rules, policies, and procedures to ensure quality care for the patients.[35]

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28 591 A.2d 703 (Pa. 1991).
29 *Id.* at 704.
30 *Id.* at 705.
31 *Id.*
32 *Id.*
33 *Id.*
34 *Id.* at 707.
35 *Id.*

Since the *Thompson* decision, courts across the country have recognized a variety of corporate duties that hospitals owed to patients, including the duties to select and retain only competent physicians,[36] oversee the care provided,[37] properly credential staff,[38] and effectively train staff.[39] Today, there is an emerging trend in favor of recognizing corporate liability claims against hospitals by patients.[40]

When corporate negligence was first being recognized as a state-law tort theory applicable to medical malpractice cases, the FTCA had already existed for several decades. Nonetheless, because most medical malpractice cases are litigated against private physicians and hospitals, often in state court, a robust body of case law developed to support corporate negligence as a theory against hospitals without regard for the implications of the FTCA. The FTCA can drastically alter the landscape of a medical malpractice case, especially where corporate negligence claims are alleged.

III. Medical malpractice claims under the FTCA

As a general matter, a patient injured by medical malpractice may sue physicians or hospitals for damages under tort law. There are thousands of hospitals across the country, many that corporations or non-profit entities operate. Where alleged malpractice occurs in a privately owned hospital or medical facility, applicable state law usually permits the patient to sue the physician as well as the hospital.

Before the FTCA's passage, the same could not be said for malpractice cases arising from care provided in federally owned, operated, or funded hospitals. Before the FTCA's enactment, the United States could not be sued in tort because sovereign immunity foreclosed any suit. This bar to suit applied to medical malpractice suits arising from care provided in federally run or federally funded hospitals. In 1946, Congress enacted the FTCA, partially waiving sovereign immunity to allow certain tort suits against the United States.[41] This waiver included medical malpractice

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[36] *E.g.*, Strubhart v. Perry Memorial Hosp. Trust Auth., 903 P.2d 263, 266 (Okla. 1995); Johnson v. Misericordia Cmty Hosp., 301 N.W.2d 156, 167 (Wis. 1981).

[37] *E.g.*, Johnson v. St. Bernard Hosp., 399 N.E.2d 198, 716–17 (Ill. App. 1979).

[38] *E.g.*, Larson v. Wasemiller, 738 N.W.2d 300, 303–07 (Minn. 2007); *Strubhart*, 903 P.2d at 276.

[39] *E.g.*, Thompson v. Nason Hosp., 591 A.2d 703, 708 (Pa. 1991).

[40] Cassandra P. Priestley, *Hospital Liability for the Negligence of Independent Contractors: A Summary of Trends*, 50 J. Mo. Bar 263, 263 (1994).

[41] 28 U.S.C. § 1346(b); 28 U.S.C. §§ 2671–80.

suits. Although the FTCA enabled medical malpractice suits against the United States, these suits proceed differently than against private hospitals in several critical ways.

A. The FTCA's narrow waiver of sovereign immunity

Congress was deliberate in its language, narrowly waiving sovereign immunity. Rather than permit any tort suit, Congress permitted only suits based on a theory of respondeat superior.[42] Under section 1346(b) of the FTCA, with some exceptions, the United States may be held liable in tort for the actions of "any employee of the Government while acting within the scope of his office or employment" in "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[43] The United States waives its sovereign immunity only for claims meeting this definition.[44]

Therefore, if a private person under similar circumstances would not be liable to the plaintiff for the alleged conduct, a court does not have jurisdiction to adjudicate an FTCA claim.[45] If state law would permit suit against an actual or deemed federal employee, the FTCA will instead permit suit against the United States substituted for that individual. The United States must certify that the employee was acting within the scope of employment, and if the employee was, the United States becomes liable for the employee's acts and omissions.

The United States Supreme Court has recognized that the government's liability under the FTCA is predicated on respondeat superior. The Court has observed that where the United States certifies, in response to an FTCA claim, that an employee was acting within the scope of employment, "the United States, by certifying, is acting *against* its financial interest, exposing itself to liability as would any other employer at common law who admits that an employee acted within the scope of his employment."[46] Noting that the plain text of the FTCA precisely tracks the vicarious liability scheme of respondeat superior, the Court concluded that the FTCA creates a remedial scheme under which the United States would be liable as an employer in like circumstances.[47]

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[42] James E. Pfander & Neil Aggarwal, *Bivens, the Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. St. Thomas L.J. 417, 424–28 (2011).

[43] 28 U.S.C. § 1346(b).

[44] F.D.I.C. v. Meyer, 510 U.S. 471, 477 (1994) (citing 28 U.S.C. § 1346(b)).

[45] *See* United States v. Olson, 546 U.S. 43, 44 (2005).

[46] De Martinez v. Lamagno, 515 U.S. 417, 427 (1995) (citing Restatement (Second) of Agency § 219 (1958)).

[47] Laird v. Nelms, 406 U.S. 797, 801 (1972) ("Congress intended to permit liability

As originally enacted, the FTCA did not preclude suit against individual government employees.[48] In 1988, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act, which makes claims against the United States under the FTCA the exclusive remedy for torts committed by federal employees acting within the scope of their employment.[49] The congressional intent motivating this legislation was "to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States."[50] The purpose was not to permit suit against the United States for any tort, but rather to allow limited tort suits while protecting federal employees.

Today, one major upshot of the FTCA is that no actual or deemed federal employee acting in the scope of his or her employment may be sued personally. The only proper defendant under the FTCA is the United States.[51] In enacting the FTCA, Congress intentionally shielded federal officers and employees from personal liability for torts committed within the scope of their employment.[52] As a result, an individual physician, facility, or federal agency is generally immune from liability for medical malpractice.[53] The only proper defendant in such a suit is the United States.

B. Exceptions to the waiver of sovereign immunity

There are several major exceptions to the FTCA's waiver of sovereign immunity.[54] Many would not apply in a medical malpractice setting, but one significant exception can apply. That exception is the discretionary function to the FTCA's waiver of sovereign immunity.

Under the discretionary function exception, no liability shall lie for

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essentially based on the intentionally wrongful or careless conduct of Government employees, for which the Government was to be made liable according to state law under the doctrine of respondeat superior . . . .").

48 *See* Smith v. United States, 507 U.S. 197, 215 n.15 (1993) (Stevens, J., dissenting).

49 28 U.S.C. § 2679(b)(1).

50 *See Smith*, 507 U.S. at 215 n.15 (Stevens, J., dissenting).

51 *Id.*

52 28 U.S.C. §§ 1346(b)(1), 2679(a).

53 28 U.S.C. § 2679(a); *see also* Continental Cablevision of St. Paul, Inc. v. U.S. Postal Serv., 945 F.2d 1434, 1440 (8th Cir. 1991); Evans v. U. S. Veterans Admin. Hosp., 391 F.2d 261, 262 (2d Cir. 1968) (per curiam).

54 Inapplicable exceptions include, *inter alia*, claims related to tax collection, claims for certain intentional torts such as false arrest or malicious prosecution, and claims for lost mail. *See* 28 U.S.C. § 2680.

"[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[55]

A two-part test determines when the exception applies.[56] First, the act or omission at issue must involve an "element of judgment or choice."[57] Second, the judgment must involve social, economic, or political policy considerations rather than administrative housekeeping.[58]

The discretionary function exception reveals Congress's careful balance in enacting the FTCA. Congress recognized that certain governmental activities should be shielded from exposure to suit by private individuals.[59] Congress did not intend for courts to second-guess legislative and administrative decisions grounded in social, economic, and political policy.[60] Congress was willing to allow the United States to be responsible for individual actions by individuals whom it controlled, but Congress did not intend for broader government decision-making to be subject to challenge in tort.

Accordingly, the United States is not liable for policy-based discretionary decision-making. Where plaintiffs allege that the United States is liable for hospital staffing or resource allocation decisions, for example, the discretionary function exception may be implicated. Before raising the discretionary function exception in any suit, the Torts Branch must be consulted.[61]

C. The FTCA's exhaustion requirements

In addition to these limitations, the FTCA also requires exhausting administrative remedies.[62] No plaintiff may sue the United States in tort unless the plaintiff has first "presented the claim to the appropriate Federal agency" whose employees are responsible for the plaintiff's alleged injury, and that agency has "finally denied" the plaintiff's claim.[63] The purpose of this exhaustion requirement is to allow the United States, through its agencies, the opportunity to settle disputes before engaging

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55 *Id.*

56 United States v. Gaubert, 499 U.S. 315, 322 (1991).

57 *Id.* (quoting Berkovitz by Berkovitz v. United States, 486 U.S. 531, 536 (1988)).

58 *Id.* at 322–23.

59 United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984).

60 *Gaubert*, 499 U.S. at 323; *Berkovitz*, 486 U.S. at 536–37.

61 *Gaubert*, 499 U.S. at 324–25.

62 28 U.S.C. § 2675.

63 *Id.*

in costly litigation in court.

The content and timeliness of the administrative claim matter. With few exceptions, a plaintiff may not recover any damages in court that exceed those set forth in the administrative claim.[64] With limited exceptions, if the plaintiff fails to tender an administrative claim within two years, any tort claim in court is forever barred.[65]

As a result of these exceptions and limitations, medical malpractice suits arising from care in federally funded or federally run hospitals are different than those suits asserted against non-governmental hospitals. Nowhere is that more apparent than in the context of corporate negligence claims, which are permissible against non-governmental hospitals but barred against federally owned, operated, or funded hospitals.

IV. Corporate negligence claims and the FTCA

The FTCA simply contains no waiver of sovereign immunity for corporate negligence claims. The FTCA permits suit for tort claims arising out of the conduct of a government employee acting within the scope of his or her employment "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[66] In other words, the plaintiff must prove that a private individual, not an entity like a hospital, would be liable under applicable state law.[67] Only then will the United States substitute itself for the federal employee under a theory of respondeat superior. Medical malpractice claims against the United States must be grounded in the duty that an individual actor owed to the plaintiff.

Therein lies the fatal flaw in alleging corporate negligence claims against the United States under the FTCA. Corporate negligence claims flow from the duties an entity (like a hospital) owes to a patient, not from duties owed by an individual (like a physician). The FTCA's language is clear: The United States may only be sued where an individual person would be liable under state tort law. Thus, the United States will not be liable under the FTCA when a plaintiff's claim is based on state law that would only hold a hospital—and not an individual physician—liable.

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64 *Id.*

65 McNeil v. United States, 508 U.S. 106, 107–13 (1993).

66 28 U.S.C. 1346(b)(1).

67 *See* Molzof v. United States, 502 U.S. 301, 305 (1992).

A. In a non-medical malpractice context, the United States Supreme Court bars corporate negligence claims under the FTCA

Although the United States Supreme Court has yet to address this specific issue in the context of a medical malpractice claim, its reasoning in *Rayonier Inc. v. United States* supports this conclusion.[68] In *Rayonier*, the plaintiff property owners sued the United States in tort after a controlled fire set by the U.S. Forest Service spread to and destroyed timber, buildings, and other property of the plaintiffs.[69] On motion by the United States, the district court had dismissed the case, finding that the United States was immune from suit.[70] The circuit court agreed, affirming the district court.[71]

On appeal, the Supreme Court reversed, holding that the FTCA makes the United States liable for the negligence of its employees "in the same manner and to the same extent as a private individual under like circumstances."[72] The Supreme Court held that the United States could be sued under the FTCA for the actions of its Forest Service employees. The acts of its employees—themselves shielded from liability—could be imputed to the United States as the only proper defendant.

The *Rayonier* Court had based its holding on the FTCA's language providing that the United States could be held liable for the act or omission of "any *employee*."[73] Under this reading, the United States was only liable in *Rayonier* because the plaintiffs identified specific acts by individual Forest Service employees as the basis for negligence. The plaintiffs had not identified some larger duty owed by the Forest Service itself; rather, the United States stood in for the individual Forest Service employees who would otherwise have been held liable individually.

Decades later, the Court reinforced its *Rayonier* decision in *United States v. Olson*.[74] The *Olson* Court considered the tort claims of miners who alleged that they were injured due to negligence by Mine Safety and Health Administration inspectors.[75] The *Olson* Court held that FTCA liability against the United States had to be grounded in acts or omissions

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68 352 U.S. 315 (1957).
69 *Id.* at 316–17.
70 *Id.* at 317–18.
71 *Id.*
72 *Id.* (quoting 28 U.S.C. § 2674).
73 Daniels v. United States, No. 20-3893, 2021 WL 2327856, at *2 (E.D. Pa. June 1, 2021) (emphasis added) (citing 28 U.S.C. § 1346(b)(1)).
74 546 U.S. 43, 44 (2005).
75 *Id.*

that would give rise to liability if committed by a private person, not a state or municipal entity.[76] Even where acts were purely governmental in function, like the inspection of mines, FTCA liability still required the acts or omissions of an individual person, not the government writ large.

B. The Ninth Circuit follows the Supreme Court's reasoning while engaging in its own in-depth statutory analysis

One circuit court has similarly analyzed the FTCA in detail and reached a conclusion aligned with the Supreme Court's reasoning in *Rayonier* and *Olson*. In *Adams v. United States*, the Ninth Circuit held that the United States could not be held liable under the FTCA for property damage arising from the acts of two corporations that it hired to spray herbicide.[77]

In so holding, the *Adams* court engaged in a detailed statutory interpretation of the FTCA, focusing on the fact that the FTCA allows the United States to be a substitute for its employees. The *Adams* court then analyzed whether an "employee" could be a corporate entity, concluding that it could not.[78]

The *Adams* court first noted that section 2679(c), which describes FTCA coverage, refers to actions brought against "any employee of the Government or his estate . . . ."[79] The *Adams* court also noted that an individual can have an estate, but a corporation cannot.[80] As such, the term "employee" had to refer to an individual; if not, the reference to an employee's estate was nonsensical.

The *Adams* court then analyzed section 2679(b)(2) of the FTCA.[81] This section excludes certain suits from FTCA coverage. There are specific circumstances where a government employee can be personally sued. In particular, a government employee can be sued where a statute so provides. In section 2679(b)(2) of the FTCA, Congress used the term "individual" when referring to these statutes, noting that immunity does not extend to a civil action "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized."[82] The *Adams* court reasoned that including the term "indi-

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76 *Id.* at 45.
77 420 F.3d 1049, 1050 (9th Cir. 2005).
78 *Id.*
79 28 U.S.C. § 2679(c).
80 *Adams*, 420 F.3d at 1053–54.
81 *See* 28 U.S.C. § 2679(b)(2)(B).
82 *Id.*

vidual" here suggested that the FTCA generally applied to the acts and omissions of individuals, not corporate entities.[83]

Finally, the *Adams* court noted that Congress had provided a list of types of employees in the FTCA when defining the term "employee."[84] The definition of "[e]mployee of the government" is textually divided into two groups, but actually lists five categories of employees.[85] Each category, save the one referring to "persons acting on behalf of a federal agency," explicitly refers to employees who can only be human beings, including "officers" or "members" of the armed forces.[86] A corporation cannot be an officer or member of the armed forces; an individual can.

The *Adams* court extended the reasoning from *Rayonier*. In so doing, the *Adams* court provided specific textual support for the conclusion that because the FTCA is a respondeat superior scheme, it excludes claims for corporate negligence.

V. Holding the line in future cases

To date, the *Adams* case has been cited sparingly in medical malpractice cases to dismiss corporate negligence claims.[87] Although most courts presented with a motion to dismiss corporate negligence claims agree that the FTCA bars these claims,[88] some courts allow them to proceed. Determining why is the key to ensuring that Congress's careful balance is properly respected.

These claims sometimes proceed because courts fail to consider all the ramifications of the FTCA. For example, in *Crenshaw v. United States*, the court denied a motion seeking dismissal of corporate negligence claims because the court reasoned that underlying Illinois law permitted such a

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83 *See Adams*, 420 F.3d at 1053; *see also* 28 U.S.C. § 2679(b)(2)(B).

84 *Adams*, 420 F.3d at 1053-54.

85 *See* 28 U.S.C. § 2671 (officers or employees of federal agencies; members of the military or naval forces; members of the National Guard while engaged in training or duty; persons acting on behalf of a federal agency in an official capacity; and some officers or employees of a federal public defender organization).

86 *Adams*, 420 F.3d at 1053–54.

87 *See, e.g.*, Jones v. United States, No. 20-02145, 2021 WL 5505787, at *4 (D. Ariz. Nov. 24, 2021); Watchman-Moore v. United States, No. 17-08187, 2018 U.S. Dist. LEXIS 63671, at *20–21 (D. Ariz. Apr. 13, 2018); Meier v. United States, No. 05-04404, 2006 WL 3798160, at *9 (N.D. Cal. Dec. 22, 2006).

88 *See, e.g.*, Meier v. United States, 310 F. App'x 976, 979 (9th Cir. 2009) (not precedential); Lewis v. Holbrook, No. 08-3357, 2008 U.S. App. LEXIS 28426, at *2 (6th Cir. Aug. 13, 2008); Daniels v. United States, No. 20-3893, 2021 WL 2327856, at *5 (E.D. Pa. June 1, 2021); *Meier*, 2006 WL 3798160, at *10–11.

claim.[89] This reasoning misses the point. Indeed, for a claim to proceed under the FTCA, it must be viable under applicable state law. But that is not the end of the analysis. The claim must also be alleged against a person. That Illinois law recognizes corporate negligence claims is not sufficient. Illinois law must also recognize corporate negligence claims against individuals, and the plaintiff's complaint must describe acts or omissions by an actual or deemed federal employee for whom the United States will be liable in respondeat superior.

In other cases where these claims proceed past the dismissal stage, it is typically because the argument is either not timely raised or is raised without being fully briefed. For example, in *Mennecke v. Saint Vincent Health Center*, the district court concluded that Pennsylvania law embraced the theory of corporate liability and therefore such a theory was viable against a federally qualified health center.[90] Litigation strategy focused on other arguments. As a result, the district court did not consider this specific argument. The entire issue of sovereign immunity had been sidestepped because it was never squarely raised in *Mennecke*.

Therein lies a problem that can be addressed in future cases. The FTCA creates numerous hurdles to a plaintiff asserting a medical malpractice case against the United States. Each of these hurdles can provide grounds for dismissal of a claim. The incompatibility of corporate negligence claims under the FTCA often gets lost in the shuffle of raising other, more common grounds for dismissal.

Indeed, many FTCA malpractice claims are dismissed for failure to timely exhaust administrative remedies. Many plaintiffs fail to exhaust administrative remedies altogether. Rather than address the propriety of corporate negligence claims, motions to dismiss in these cases argue the broader failure to exhaust. When plaintiffs do exhaust administrative remedies, they often fail to include necessary facts to support corporate negligence claims later. Again, motions to dismiss in these cases are unlikely to litigate the nuances of corporate negligence claims. They instead argue that the government was not given notice or an opportunity to settle these claims relating to the hospital's action when the administrative claim only detailed the negligence of a physician.

Other FTCA malpractice claims, particularly those raising corporate negligence claims, are dismissed based on the discretionary function exception. Corporate negligence claims typically involve some degree of discretionary action based on social, economic, or political policy considerations. The sorts of acts and omissions that give rise to corporate negli-

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[89] No. 17-2304, 2020 WL 5579180, at *12–13 (C.D. Ill. Mar. 24, 2020).
[90] No. Civ. Ap. 98-50, 1998 WL 1753663, at *6 (W.D. Pa. Apr. 14, 2000).

gence claims nearly always involve policy decisions.[91] The government's decisions in these instances require balancing numerous factors, such as budgetary constraints, patient needs, available staff, the available pool of qualified job candidates, and equipment availability. Federal courts across the country have found that the Department of Veterans Affairs' (VA) actions in hiring, retaining, entrusting, training, supervising, and equipping its employees are precisely the kinds of decisions that Congress intended to shield from liability with the discretionary function exception and are therefore immune from suit.[92]

Because other grounds to challenge a corporate negligence claim often exist under the FTCA, counsel may fail to argue robustly that these claims are simply barred. In many instances, corporate negligence claims

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91 Nurse v. United States, 226 F.3d 996, 1001 (9th Cir. 2000) ("allegedly negligent and reckless employment, supervision and training" of government employees "fall squarely within the [FTCA's] discretionary function exception"); Vickers v. United States, 228 F.3d 944, 950 (9th Cir. 2000) ("decisions relating to the hiring, training, and supervision of employees usually involve policy judgments of the type Congress intended the discretionary function exception to shield"); Tonelli v. United States, 60 F.3d 492, 496 (8th Cir. 1995) (permitting negligent hiring, supervision, and retention claims "would require . . . the type of judicial second-guessing that Congress intended to avoid"); Burkhart v. Wash. Metro. Area Transit Auth., 112 F.3d 1207, 1217 (D.C. Cir. 1997) (the hiring, training, and supervision of employees "are surely among those involving the exercise of political, social, or economic judgment"); Fang v. United States, 140 F.3d 1238, 1243 (9th Cir. 1998) (government exercises a discretionary function when deciding the amount and quality of medical equipment it needs to maintain); C.R.S. by D.B.S. v. United States, 11 F.3d 791, 797 (8th Cir. 1993) (decisions regarding which procedures to employ in a hospital are "susceptible to a balancing of social, economic, and political policy factors" and "implicate[] a host of complex policy issues, [including] the need to keep costs in check given the budget constraints under which government operates").

92 *See, e.g.*, Tolbert v. United States, No. 17-10273, 2017 WL 6539254, at *3 (E.D. Mich. Dec. 21, 2017) (dismissing claims implicating VA's employment decisions as to hiring, firing, training, and supervising its staff under FTCA's discretionary function exemption because plaintiff "points to no specific regulations that would constrain the judgment exercised in making these decisions"); French v. United States, 195 F. Supp. 3d 947, 954 (N.D. Ohio 2016) (allegations relating to VA's conduct in hiring, retaining, entrusting, training, and supervising medical center employees falls within discretionary function exception); Neal v. United States, No. 19-1033, 2019 U.S. Dist. LEXIS 206028, at *30 (D. Md. Nov. 27, 2019) (FTCA's discretionary function exception bars plaintiff's claims against VA medical center for negligent hiring, retention, and supervision of technician); Smith v. United States, No. 2:11-cv-616, 2014 WL 4638918, at *3–5 (S.D. Ohio Sept. 16, 2014) (dismissing FTCA claims relating to VA medical center's radiology system with prejudice under discretionary function exception; decisions regarding design, maintenance, and use of radiology system were susceptible policy analysis); Cruz v. United States, 684 F. Supp. 2d 217, 222–25 (D.P.R. 2010) (allegations of negligence arising from selection, design, and operation of VA medical center's computer system dismissed under discretionary function exception).

will be dismissed for other reasons without any need to press this point. Yet it is a critical point to press. This is the only way to hold the line. Otherwise, as more and more of these claims proceed, a body of law develops at odds with the FTCA's intent.

Where claims fall outside the scope of the FTCA's waiver of sovereign immunity, a challenge to those claims is a challenge to subject-matter jurisdiction. Such challenges can be raised any time by the litigants or sua sponte by the court.[93]

Such a challenge requires the court's careful review. Judicial restraint requires federal courts to avoid liberal interpretation of any federal or state law that expands the government's waiver of sovereign immunity without congressional approval.[94] A court entertaining a challenge to jurisdiction must start with the presumption that a cause lies outside the limited jurisdiction of the federal courts.[95] This is a threshold issue.[96] It is the plaintiff, not the United States, who bears the burden of proving that subject-matter jurisdiction exists.[97]

The FTCA provides powerful arguments to the government in medical malpractice cases. One such powerful argument is that corporate negligence claims are barred. The government should raise this argument whenever appropriate, should litigate it fully, and should not be reticent to file a serial motion to dismiss if these claims persist after other arguments have been raised and rejected.

Corporate negligence claims are inherently incompatible with the FTCA. Consistently raising this argument will give courts the opportunity to develop robust case law on this issue to fill the current deficit. A failure to carefully hold the line could result in the development of contrary case law. This argument should be carefully evaluated and raised as appropriate in any FTCA malpractice case.

About the Author

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93 Fed. R. Civ. P. 12(b)(1).

94 *See* U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992).

95 *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).

96 *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998).

97 *See Kokkonen*, 511 U.S. at 377; McNutt v. Gen. Motors Acceptance Corp. of Ind., 298 U.S. 178, 182–83, 189 (1936).

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Narrowing in on Notice: Varying Approaches to Administrative Exhaustion

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I. Introduction

Any attorney defending Federal Tort Claims Act (FTCA) cases has probably experienced some variation of the following scenario. When the federal agency refers the case, the agency provides the administrative investigative file. Within that file is the administrative claim itself, typically set forth on a Standard Form 95 (SF-95). The claimant, now suing as the plaintiff in federal court, purports to have tripped and fallen on the sidewalk adjacent to a federally owned building. According to the claim form, the accident injured the claimant's knee. The claimant seeks damages of "at least $50,000" from the injury. Based on the allegations in the administrative claim, the agency treated this incident as a relatively minor tort but elected not to settle the claim administratively.

Through the discovery process in federal court, additional information emerges about the trip and fall. During a deposition, the plaintiff admits that despite what is written on the claim form, the accident actually happened in the parking lot behind the federal building, not on the sidewalk. This change complicates issues of liability because the parking lot is only partially maintained by the agency. In fact, discovery reveals that the parking lot is jointly maintained by an adjacent, non-federal property owner. Now this property owner may need to be added as a co-defendant in the federal court case.

By the time the parties and their counsel appear for the final pretrial conference, the plaintiff's injuries have also morphed significantly. Now the plaintiff is claiming back and neck pain in addition to the knee pain disclosed on the administrative claim. The plaintiff's expert witness claims the plaintiff will never be able to work again due to these injuries.

Plaintiff's counsel now seeks $500,000 based on the plaintiff's alleged ongoing medical problems.

In its current form, the case looks and feels materially different than the administrative claim that the agency considered. What was a straightforward dispute with limited damages has become exponentially more complex. Had the agency anticipated this change, perhaps it would have settled during the administrative phase. The litigation risk has changed significantly since that time.

This scenario, in which a case dramatically transforms after administrative exhaustion ends, was precisely what the FTCA's notice requirement was designed to prevent. The requirement does not always prevent this scenario, however, because the FTCA's language is open to interpretation. Over time, courts have diverged as to the degree to which they allow a plaintiff to expand a claim beyond the four corners of what is set forth on the administrative claim form. Understanding both the approach currently utilized in your circuit as well as the general trend across the circuits can help you strategically defend an FTCA case.

II. Administrative exhaustion and the notice requirement

A. The history of the FTCA

As a general matter, the doctrine of sovereign immunity immunizes the United States from suit.[1] This doctrine was imported into the American legal system from its roots in Great Britain.[2] In the British system, because the King was infallible, he could only be sued by consent.[3]

Before the FTCA's enactment, the United States generally could not be sued for negligence.[4] Like the British king, the United States too was an infallible sovereign.[5] Absent a specific congressional authorization permitting suit for negligence, any such suit was barred.[6]

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1 United States v. Testan, 424 U.S. 392, 399 (1976).

2 *See generally* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 Stan. L. Rev. 1201 (2001) (discussing the origins of sovereign immunity); United States v. Horn, 29 F.3d 754, 761–62 (1st Cir. 1994).

3 *See generally* Chemerinsky, *supra* note 2.

4 Paul F. Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 Tort Trial & Ins. L.J. 1105, 1107 (2009) (discussing applying doctrine of sovereign immunity in American jurisprudence); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 303 (1821).

5 *Horn*, 29 F.3d at 762.

6 *See Testan*, 424 U.S. at 399 (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)); *see also* United States v. Dalm, 494 U.S. 596, 610 (1990) ("If any principle is

In 1946, Congress enacted the FTCA, creating a judicial remedy for tort victims seeking to recover for negligence attributable to the United States.[7] Under section 1346(b) of the FTCA, with some exceptions, the United States may be held liable in tort in "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[8] This provision created an avenue for suits for ordinary torts, including negligence claims.

In its original form, the FTCA required no administrative exhaustion. With no prerequisite to suit, litigants flooded the courts with tort actions.[9]

In response, in 1996, Congress amended the FTCA to require administrative exhaustion as a prerequisite to suit.[10] The intent of this requirement was not to reduce claims entirely, but instead to give federal agencies an opportunity to resolve claims informally.[11] To enable resolution, Congress required that notice be given to the agency.[12] Congress's hope was that some meritorious claims could be settled informally, without needing judicial intervention.[13] Informal settlement would clear the backlog of cases and permit courts to resolve only those disputes that required judicial intervention.[14]

Following the FTCA's amendment, the Department of Justice pro-

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central to our understanding of sovereign immunity, it is that the power to consent to such suits is reserved to Congress."); United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 514 (1940) ("Consent alone gives jurisdiction to adjudge against a sovereign. . . . Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body.").

[7] Congress adopted the 1946 version of the FTCA as Title IV of the Legislative Reorganization Act of 1946, but later modified and incorporated the FTCA into the United States Code.

[8] 28 U.S.C. § 1346(b).

[9] *See generally* George A. Bermann, *Federal Tort Claims at the Agency Level: The FTCA Administrative Process*, 35 Case W. Rsrv. L. Rev. 509 (1984–1985).

[10] *See generally* S. Comm. on the Judiciary, Increased Agency Consideration of Tort Claims Against the Government, S. Rep. No. 89-1327, at 1 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2515, 2515 (discussing dual purposes of 1966 amendment).

[11] *See generally* Erxleben v. United States, 668 F.2d 268 (7th Cir. 1981), *abrogated on other grounds by* Kanar v. United States, 118 F.3d 527 (7th Cir. 1997); Adams v. United States, 615 F.2d 284 (5th Cir. 1980).

[12] 28 U.S.C. § 2675(a).

[13] *See generally* Daniel Shane Read, *The Courts' Difficult Balancing Act to Be Fair to Both Plaintiff and Government Under the FTCA's Administrative Claims Process*, 57 Baylor L. Rev. 785, 805–06 (2005).

[14] Douglas v. United States, 658 F.2d 445, 447 (6th Cir. 1981).

mulgated regulations under section 2672.[15] These regulations describe the settlement procedures that agencies and claimants must follow. These regulations are informed by Congress's belief that notice was necessary to enable an agency to properly evaluate, and potentially settle, a claim.

B. Administrative exhaustion under the FTCA

The FTCA requires the exhausting of administrative remedies as a prerequisite to suit.[16] With one outlier circuit as the exception, courts have consistently deemed proper administrative exhaustion to be a jurisdictional requirement.[17] No plaintiff may sue the United States in tort unless the plaintiff has first "presented the claim to the appropriate Federal agency" whose employees are responsible for the plaintiff's alleged injury and the agency has "final[ly] deni[ed]" the plaintiff's claim.[18]

The content and timeliness of the administrative claim matters. In theory, a plaintiff may not recover any damages in court other than those described in the administrative claim.[19] With limited exceptions, if the plaintiff fails to tender an administrative claim within two years, any tort claim in court is forever barred.[20] Although the FTCA clearly requires presentment of a claim and imposes consequences for untimely or absent presentment, it is much less specific about the contents of such a claim. Therein lies the problem for the agency attempting to value the claim and counsel who will later defend an FTCA action in federal court if the claim is not settled.

C. The FTCA's notice requirement

Because the FTCA constitutes a limited waiver of sovereign immunity, its provisions, including its notice requirement, are to be construed strictly.[21] On its face, the FTCA provides scant detail about the notice requirement.

Some details are expressly stated. For example, the FTCA does contemplate that a claim should expressly contain a valuation of the claim:

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15 Bermann, *supra* note 9, at 530–35.

16 28 U.S.C. § 2675(b).

17 *Compare* Jenkins v. TriWest Healthcare All., No. 22-30429, 2023 WL 1814885, at *2 (5th Cir. Feb. 8, 2023) (holding the requirement to be jurisdictional), Cooke v. United States, 918 F.3d 77, 81 (2d Cir. 2019) (same), *and* D.L. v. Vassilev, 858 F.3d 1242, 1247 (9th Cir. 2017) (same), *with* Copen v. United States, 3 F.4th 875, 884 (6th Cir. 2021) (holding that the requirement is non-jurisdictional).

18 28 U.S.C. § 2675(a).

19 28 U.S.C. § 2675(b).

20 28 U.S.C. § 2401(b); McNeil v. United States, 508 U.S. 106, 107–13 (1993).

21 United States v. Kubrick, 444 U.S. 111, 117–18 (1979).

> *Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency*, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.[22]

This provision is generally known as the "sum certain" requirement.

Not only must the claim contain a sum certain demand for damages, but also the plain language of the FTCA suggests that the administrative demand generally limits the damages recoverable in federal court. Damages exceeding the sum certain may be recovered in court, but only where there is "newly discovered evidence" after administrative exhaustion.[23]

In contrast to the express sum certain requirement, the FTCA contains no express requirement as to what substantive detail of allegations or damages must be provided. In fact, the FTCA itself contains no specific language articulating whether a claim must even contain a factual description of the basis for the claim.

The regulations interpreting the FTCA do address this requirement, noting that a claim must contain "written notification of an incident."[24] Specifically, the regulations provide that—

> *a claim shall be deemed to have been presented when a Federal agency receives* from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or *other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident . . . .*[25]

Under to the regulation, the administrative claim must be in writing.[26] It must also describe the underlying "incident."[27] But neither the FTCA itself nor the regulations describe what form this description must take. Nor do they specify how detailed the description must be. Because neither the FTCA nor the regulations provide clear requirements for how specific or detailed the description must be, courts have had to develop

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[22] 28 U.S.C. § 2675(b) (emphasis added).
[23] *Id.*
[24] 28 C.F.R. § 14.2(a).
[25] *Id.* (emphases added).
[26] 28 U.S.C. § 2401(b).
[27] 28 C.F.R. § 14.2(a).

requirements themselves. The lack of clarity in the FTCA and its regulations has resulted in a circuit split as different courts impose different requirements.

III. The circuit split interpreting the administrative notice requirement

Circuit courts adopt one of two different approaches to interpreting the administrative notice requirement. A minority of circuits interpret the notice requirement narrowly, finding that a federal court complaint must hew closely to the administrative claim. In the view of these circuits, the claim is the endpoint for what may be litigated in federal court.

In contrast, a majority of circuits adopt a broader approach, finding that a federal court complaint is not limited only to the details in the administrative claim, but also anything the agency can infer or learn through its own investigation of the claim. In the view of these circuits, the claim is simply the starting point for what may be litigated in federal court.

A. The narrow interpretation

The Fourth and Tenth Circuits take the narrow approach.[28] Under this approach, only the specific sum certain and factual allegations set forth in the administrative claim can later be the basis of a federal court complaint. Under the narrow approach, any deficiency in an administrative claim can limit or entirely bar subsequent federal litigation.

This narrow approach is well illustrated in the Fourth Circuit case of *Kokotis v. United States Postal Service*.[29] In this case, the Fourth Circuit narrowly interpreted the FTCA's sum certain requirement. Following a motor vehicle collision involving a United States Postal Service (USPS) employee, a driver presented an SF-95 to the USPS that contained no sum certain.[30] Along with the form, the driver included a cover letter enclosing her itemized medical bills to date and explaining that her medical care was ongoing.[31] Over the next year and 11 months, the driver provided 5

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[28] *See* Kokotis v. U.S. Postal Serv., 223 F.3d 275, 280 (4th Cir. 2000); Staggs v. United States *ex rel.* U.S. Dep't of Health & Hum. Servs., 425 F.3d 881, 884–85 (10th Cir. 2005); *see also* Gladden v. U.S. Dep't of Just., 18 F. App'x. 756, 758 (10th Cir. 2001) (not precedential) (finding that a sum certain demanded without a ceiling did not provide the agency sufficient information to determine whether the claim was settleable).

[29] *Kokotis*, 223 F.3d at 275.

[30] *Id.* at 278.

[31] *Id.*

additional letters updating the USPS on her medical treatment and enclosing medical bills totaling $4,546.79.[32] Although the driver completed medical treatment earlier, she waited until after the statute of limitations had run to provide an amended SF-95 containing a sum certain demand for $19,000.[33] After the USPS denied the administrative claim, the driver filed suit in district court.[34]

The district court dismissed the driver's federal court complaint, holding both that the letters and bills failed to state a demand for a sum certain and that the amended SF-95 did not relate back to the driver's initial SF-95 and was therefore untimely.[35] The district court narrowly interpreted the FTCA's notice requirement, finding that the driver had failed to provide adequate notice of the value of her claim.

On appeal, the Fourth Circuit affirmed the district court's decision.[36] Like the district court, it concluded that the driver failed to meet the FTCA's requirement to provide notice of the value of her claim during the statute of limitations period. Rejecting the argument that the USPS could have divined the general value of the claim from the tendered medical bills, the Fourth Circuit reasoned that the FTCA contained no exception to the sum certain requirement where "the agency might have been able to estimate the value of a claim, and courts cannot insert into the FTCA administrative process special provisions that the statute does not contain."[37]

In short, the driver was limited to recovering in federal court what she had expressly written in her administrative claim. The driver's administrative claim was the endpoint for what she could litigate in federal court. Anything outside that claim was unrecoverable.

Joining the Fourth Circuit in this narrow interpretation is the Tenth Circuit. In *Staggs v. United States ex rel. United States Department of Health and Human Services*, the Tenth Circuit narrowly construed the description requirement.[38] Following the complicated delivery of her child, a mother presented an SF-95 detailing 10 reasons that she believed a cesarian section should have been attempted earlier in the delivery.[39] In her SF-95, the mother did not mention any failure by the hospital to ob-

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32 *Id.*
33 *Id.*
34 *Id.*
35 *Id.*
36 *Id.* at 281; *see also* 28 C.F.R. § 14.2(a) (1999).
37 *Kokotis*, 223 F.3d at 279.
38 Staggs v. United States *ex rel.* U.S. Dep't of Health & Hum. Servs., 425 F.3d 881, 883 (10th Cir. 2005).
39 *Id.* at 883.

tain her informed consent to performing medical procedures.[40] After the Department of Health and Human Services (HHS) denied the mother's administrative claim, she filed suit in district court.[41]

The district court granted the government's motion to exclude any evidence relating to informed consent.[42] The district court scoured the administrative claim for any mention of consent and found none.[43] As a result, the district court found that the mother had provided no notice to HHS of these facts and was therefore barred from raising them for the first time at trial.

On appeal, the Tenth Circuit affirmed the district court's decision.[44] It too reviewed the lengthy administrative claim looking for even the most oblique reference to informed consent.[45] Finding none, the court concluded that HHS had not been put on notice of a claim relating to lack of informed consent, and therefore that the mother was jurisdictionally barred from litigating such a claim in federal court.[46]

In short, the mother was limited to recovering in federal court what she had expressly included in her administrative claim. Her administrative claim was the endpoint for what she could subsequently litigate. Anything outside that claim was unrecoverable.

As illustrated by *Kokotis* and *Staggs*, the Fourth and Tenth Circuits narrowly interpret the FTCA's notice requirement. In these circuits, any deficiency in an administrative claim can limit or entirely bar subsequent federal litigation.

B. The broad interpretation

In contrast, a majority of circuits, including the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits, have taken a broad approach.[47] Under this approach, any sum certain or allegations

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40 *Id.*
41 *Id.*
42 *Id.*
43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.*
47 *See* Dynamic Image Techs., Inc. v. United States, 221 F.3d 34 (1st Cir. 2000); Collins v. United States, 996 F.3d 102 (2d Cir. 2021); Hause v. United States, 378 F. App'x. 158 (3d Cir. 2010) (not precedential); Roma v. United States, 344 F.3d 352 (3d Cir. 2003); Adams v. United States, 615 F.2d 284 (5th Cir. 1980); Pleasant v. United States *ex rel.* Overton Brooks Veterans Admin. Hosp., 764 F.3d 445 (5th Cir. 2014) (per curiam); Copen v. United States, 3 F.4th 875 (6th Cir. 2021); Chronis v. United States, 932 F.3d 544 (7th Cir. 2019); Palay v. United States, 349 F.3d 418 (7th Cir. 2003); A.M.L. *ex rel.* Losie v. United States, 61 F.4th 561

are either expressly stated or that can reasonably be inferred from the administrative claim can be later litigated in court. Under this broad approach, a strict deficiency in the administrative claim need not limit or entirely bar subsequent federal litigation. The administrative claim itself is the starting point, not the endpoint, of what has been administratively exhausted.

The Fifth Circuit case *Adams v. United States* illustrates the broad approach well.[48] Two parents tendered an SF-95 to the Air Force after their child was born with permanent brain damage at an Air Force hospital.[49] The SF-95 alleged improper medical care by Air Force physicians, and it contained a sum certain demand for damages.[50] In response, the Air Force demanded written reports, itemized bills and expenses, and a statement of future expenses.[51] The parents provided some, but not all, of the requested documentation.[52]

After more than six months passed without a settlement of their administrative claim, the parents filed suit in federal court. The district court found that the parents had failed to provide proper administrative notice. In support thereof, the district court reasoned that even if the Air Force had information from which it could infer the specifics of the parents' claim, the parents were nonetheless required to provide additional detail.[53] The district court adopted a narrow approach to the FTCA's notice requirement.

On appeal, the Fifth Circuit reversed.[54] It reasoned that the FTCA's notice requirement required only a "written and signed statement setting out the manner in which the injury was received . . . [containing] enough details to enable the agency to begin its own investigation and a claim for money damages."[55] As the court reasoned, anything more is "unwarranted and unauthorized."[56]

In so holding, the Fifth Circuit interpreted the administrative claim as a starting point for the agency's understanding of the allegations therein. So long as the administrative claim allowed the agency to infer or discover

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(8th Cir. 2023); Chavez v. United States, 226 F. App'x 732 (9th Cir. 2007) (not precedential); Motta *ex rel.* A.M. v. United States, 717 F.3d 840 (11th Cir. 2013).

48 *Adams*, 615 F.2d at 285.

49 *Id.*

50 *Id.* at 292.

51 *Id.* at 287.

52 *Id.* at 285–87.

53 *Id.* at 286.

54 *Id.* at 293.

55 *Id.* at 292.

56 *Id.*

information about a claim, a claimant could expand upon the express language of the administrative claim in federal court. The Fifth Circuit court rejected the narrow approach that the Fourth and Tenth Circuits utilized. In the majority of circuits that follow this view, details omitted from an administrative claim may still be litigated in a subsequent federal court case.

Courts in circuits adopting the majority approach have authorized other changes between the administrative claim and the federal court complaint that followed. In these circuits, claims generally detailing injuries can put the agency on notice of damages likely to flow from those injuries. For example, in *Collins v. United States*, the Second Circuit permitted claims to proceed in court where a driver's injuries were outlined in his administrative claim but subsequent detail was added about his allegations of injuries in his federal court complaint.[57] The court reasoned that any investigation of the claim would have put the USPS on notice of the nature of the driver's damages.[58] What mattered less was what the driver wrote in his claim and more what the USPS did once it learned of the claim.

In these circuits, factual allegations that could support various legal theories are sufficient to exhaust any of these theories. Take, for example, *Palay v. United States*.[59] There, an inmate filed an administrative claim with the Federal Bureau of Prisons (BOP) when he was injured in a fight after being left on a floor with other inmates who had threatened him.[60] The administrative claim outlined his belief that the facility was on notice that he was at risk of attack and failed to timely intervene.[61] On appeal, the Seventh Circuit found that these factual allegations put the BOP on notice of both failure to protect claims and negligent re-assignment claims because either could be derived from the factual allegations in the administrative claim.[62]

In majority circuits adopting the broad approach, a claim filed on behalf of one potential claimant can even put an agency on notice of claims by other claimants. For example, in *Pleasant v. United States ex rel. Overton Brooks Veterans Administration Hospital*, the Fifth Circuit permitted claims to proceed where an estate filed a claim and two children

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[57] Collins v. United States, 996 F.3d 102, 106–08 (2d Cir. 2021).
[58] *Id.* at 114.
[59] Palay v. United States, 349 F.3d 418 (7th Cir. 2003).
[60] *Id.* at 422, 426.
[61] *Id.* at 421.
[62] *Id.* at 427.

of the decedent filed a complaint in federal court.[63] There, the estate of a deceased veteran tendered an administrative claim to the Department of Veterans Affairs (VA).[64] Although the claim was purported to be presented on behalf of the estate, it mentioned the decedent's two children.[65] The Fifth Circuit found this sufficient to put the VA on notice of individual wrongful death claims brought by the children.[66]

Under the broad approach, the administrative claim is a mere starting point. Anything that actually arises or that would naturally arise during an administrative investigation of that claim may be fair game if subsequently raised in a federal court complaint. The administrative claim is viewed less as a matter of actual notice of what is in the claim itself and more as a matter of constructive notice that a tort has been alleged and should be thoroughly investigated.

Although the broad approach permits significant changes between the administrative claim and a subsequent federal court complaint, it does not justify all deviation from that claim. Even circuits adopting the broad approach recognize some limits on expanding claims.

A claimant cannot add wholly new allegations in federal court. For example, in *Dynamic Image Technologies, Inc. v. United States*, the First Circuit endorsed the broad approach while barring entirely new allegations that the agency could not have inferred or learned from investigating the administrative claim.[67] There, a software processing company and its principal filed an administrative claim alleging that the USPS had defamed the company.[68] When the president added a claim for false imprisonment at trial, the district court dismissed this claim.[69] The appellate court affirmed the dismissal.[70]

Nor does this approach justify gross errors on an administrative claim that the claimant attempts to erase in a federal court complaint. For example, the Third Circuit found in *Hause v. United States* that a pedestrian was barred from litigating a slip and fall in federal court.[71] On his administrative claim, he had listed the address of a USPS facility in a

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63 Pleasant v. United States *ex rel.* Overton Brooks Veterans Admin. Hosp., 764 F.3d 445, 447 (5th Cir. 2014) (per curiam).
64 *Id.*
65 *Id.*
66 *Id.* at 449.
67 Dynamic Image Techs., Inc. v. United States, 221 F.3d 34, 40 (1st Cir. 2000).
68 *Id.* at 36.
69 *Id.* at 40.
70 *Id.*
71 Hause v. United States, 378 F. App'x. 158, 159 (3d Cir. 2010) (not precedential).

different town than where his slip and fall occurred.[72] The USPS investigated this claim, found no evidence of any slip and fall, and denied the claim.[73] When he sued in federal court, the district court dismissed the complaint for failure to exhaust administrative remedies.[74]

The Third Circuit affirmed the dismissal. Citing *Roma v. United States*,[75] the court explained that "a plaintiff cannot present one claim to the agency and then maintain suit on the basis of a different set of facts."[76] Holding that the error in the administrative claim denied the USPS any meaningful ability to truly understand the contours of the pedestrian's claim before trial, the Third Circuit affirmed the district court's dismissal of the pedestrian's complaint.[77]

Nor can a claimant simply ignore the notice requirements. Failure to include any sum certain is as fatal in a circuit endorsing the broad approach as in a circuit endorsing the narrow approach.[78] Courts adopting the broad approach distinguish between providing a sum certain in the form of bills or estimates and a wholesale failure to put any quantum of damages on a claim.[79] The former is permissible, but the latter is not.

In addressing this very issue, the Eighth Circuit recently joined the litany of circuits utilizing the broad approach. In *A.M.L. ex rel. Losie v. United States*, the court concluded that an administrative claim contained a sufficient sum certain where an agency could infer the amount demanded. After a USPS vehicle ran over a minor's foot, the minor's parent presented a claim seeking damages "in excess of $50,000."[80] The parent later revised the claim to seek an amount between $250,000 and $275,000.[81] The USPS did not settle the claim administratively, and the parent filed on her child's behalf in federal court.[82]

Before the district court, the USPS successfully argued for dismissal of the federal court complaint for failure to exhaust administrative reme-

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72 *Id.* at 158.

73 *Id.* at 159.

74 *Id.*

75 Roma v. United States, 344 F.3d 352 (3d Cir. 2003) (holding that a plaintiff need not exhaust every theory of liability in his or her claim, but that the notice must sufficiently enable the agency to investigate the claim).

76 *See id.* at 362 (quoting Deloria v. Veterans Admin., 927 F.2d 1009, 1011–12 (7th Cir. 1991)).

77 *Hause*, 378 F. App'x. at 159

78 *See, e.g.*, Motta *ex rel.* A.M. v. United States, 717 F.3d 840, 845 (11th Cir. 2013).

79 *See, e,g.*, Molinar v. United States, 515 F.2d 246, 249 (5th Cir. 1975).

80 A.M.L. *ex rel.* Losie v. United States, 61 F.4th 561, 564 (8th Cir. 2023).

81 *Id.*

82 *Id.* at 563.

dies.[83] On appeal, the Eighth Circuit reversed, holding that the expression of a range complies with the sum certain requirement.[84] Before deciding *A.M.L.*, the Eighth Circuit had interpreted the notice requirement more narrowly.[85] In deciding *A.M.L.*, the Eighth Circuit joined those circuits that instead utilized the broad approach.

As *Adams*, *Collins*, *Palay*, *Pleasant, Dynamic Image Technologies*, *Hause*, and *A.M.L.* illustrate, a majority of circuits have taken a broad approach to the notice requirement. Under this approach, any sum certain or allegations that are expressly stated or that can be reasonably inferred from the administrative claim can be later litigated in court. Under this approach, a strict deficiency in the administrative claim need not limit or entirely bar subsequent federal litigation.

IV. Conclusion

The first step to successfully defending an FTCA case in federal court involves understanding the approach of your circuit to interpreting the notice requirement. When litigating in the Fourth and Tenth Circuits, the first step in assessing any FTCA case should be closely comparing the administrative claim and the federal court complaint. In these circuits, the plaintiff is meaningfully constrained by what was administratively exhausted. Any failure to provide a sum certain should be met with a motion to dismiss the entirety of the complaint. Where the factual details are scant or missing, a motion either to dismiss or to strike any newly added factual allegations should be considered. Given that these circuits view the administrative claim as an endpoint, any efforts to cabin federal court litigation should be closely grounded in the administrative claim itself.

Outside these circuits, a different approach is likely to be more effective. As illustrated herein, most circuits have taken a broad approach to interpreting the FTCA's notice requirement, finding that exhaustion requires something more than a simple conclusory statement, but something less than precise monetary calculation to the penny or an exhaustive list of all possibly relevant facts.

Since the early 2000s, many circuits have moved toward the broader approach. Most recent to join the majority approach is the Eighth Circuit.

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83 *Id.*

84 *Id. But cf.* Bradley v. United States *in re* Veterans Admin., 951 F.2d 268, 271 (10th Cir. 1991) (declining to find that claim satisfied sum certain requirement "[b]ecause there [was] no ceiling on the amount").

85 *See* Mader v. United States, 654 F.3d 794, 800–01 (8th Cir. 2011); Rollo-Carlson *ex rel.* Flackus-Carlson v. United States, 971 F.3d 768, 771 (8th Cir. 2020).

As the Eighth Circuit's move to join the majority demonstrates, courts have found this approach appealing.

In circuits applying the majority approach, the same strategy that may succeed in the Fourth Circuit and Tenth Circuit is unlikely to yield desired results. Because these circuits view the administrative claim as a mere starting point for notice, hyper-technical focus on the parameters of the administrative claim is unlikely to convince a court to dismiss a claim or limit a civil action.

When litigating in one of the majority circuits, efforts to limit the federal court claims cannot be predicated on comparing the administrative claim and the federal court complaint. That does not mean that motion practice is futile. To the contrary, even in these circuits, limiting or dismissing claims is possible.

The approach must simply change. Instead of comparing the administrative *claim* with the federal court complaint, the comparison should focus on the entirety of the agency *investigation* and the allegations in the federal court complaint. Counsel should delve into what the agency did with the information that the claimant provided and whether the agency did learn or could have learned the new information now adduced in federal court litigation while investigating the administrative claim.

Although motions to dismiss or strike are generally less likely to succeed in these circuits, there are instances where such a motion is viable. Where the administrative claim omits critical facts, contains material errors, or is missing anything resembling a sum certain claim for damages, early motion practice remains a good option.

Even if early motion practice is unsuccessful, a later summary judgment motion may be viable. The more the plaintiff diverges from the administrative allegations, the more likely a court is to rein in the plaintiff's expansion. In circuits adopting the majority view, there may be wisdom in waiting until after the close of discovery to attempt to limit any expansion of the case through summary judgment or a motion in limine. The plaintiff may expand more, and that expansion may look more egregious to the court, if given an opportunity to do so during discovery. The same court that may have been lenient when a federal court complaint slightly deviates from an SF-95 may feel less charitable when the litigation post-discovery looks drastically different than at the close of the administrative investigation.

Returning to the trip and fall case at the beginning of this article, there are arguments to be made even in a circuit adopting the broader approach. Finding evidence that the plaintiff anticipated back and neck injuries but withheld or obfuscated these injuries from the USPS may provide grounds to limit the federal court action. Arguing that misidentifying the location

of the fall was a material error that entirely changed the character of the administrative claim may be an appealing argument. Whatever the approach of your circuit, understanding its reasoning and tailoring your strategy accordingly is a best practice for successful defense of an FTCA claim.

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Demystifying Direct Examination of the Expert Witness

Eve A. Piemonte
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You have retained an expert in your case who will be called to testify at trial. You have worked with the expert, he has authored an opinion that you have disclosed, and now it is time to present the expert's testimony. Direct examination of your expert can make the difference between winning or losing at trial. You are not only telling your story to the judge or jury and having your expert opine on the ultimate issue in the case, but also your expert is responsible for educating the finder of fact, boiling down the most difficult concepts to laymen's terms in an understandable way. Direct examination may have the reputation of being tedious or predictable, but some of the most important and compelling evidence will be elicited through direct examination of your expert. If done right, the most effective direct examination of an expert will tie your case together—the facts, the theory of the case, and the conclusions that the finder of fact should reach.

I. Federal Rule of Evidence 702 is your foundation

Before you prepare the direct examination of your expert, refresh your knowledge of Federal Rule of Evidence 702, which provides that "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion" if "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue."[2] The expert's opinion must be "based on sufficient facts or data," be "the product of reliable principles and methods," and the expert must have "reliably ap-

[1] The author gratefully acknowledges Emma Spero, a third-year law student and legal intern at the U.S. Attorney's Office, for her contributions to this article.
[2] Fed. R. Evid. 702(a).

plied the principles and methods to the facts of the case."[3] Generally, courts will allow expert testimony more often than they will reject it.[4]

Expert testimony will address matters that are beyond the understanding of an average lay person.[5] Before your expert will be permitted to testify at trial, you must demonstrate that the expert's opinion will assist the trier of fact. You must also establish that the expert's testimony is relevant, probative, and otherwise meets the requirements of Federal Rule of Evidence 403.[6] Although the qualifications of your witness and the admissibility of his opinion will likely be resolved before trial, your direct examination should include this evidentiary foundation so that there is no question in the evidentiary record that your witness is qualified to render an opinion in the case.

Using Rule 702 as your guide, broadly outline the direct examination of the expert. The extent of the final outline you use for trial will depend on your personal practice and preference. There is no required formula by which to outline a direct examination of an expert witness, but most follow a similar pattern. First, establish that the witness is qualified to testify as an expert at trial. Second, establish the basis for the expert's opinion. Third, elicit the expert's opinion. Finally, the expert will testify about and explain his opinion.[7]

II. Qualifying the expert

Before eliciting an opinion from your expert, you must demonstrate that he is qualified to render an opinion in the case.[8] Your expert must possess the skills or knowledge that qualify him to opine on a particular topic. The court will exercise its discretion as it preliminarily determines whether the expert is qualified to testify in your case.[9]

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[3] Fed. R. Evid. 702(b)–(d).

[4] Victor J. Gold, *Rule 702. Testimony by Expert Witnesses*, *in* 29 Fed. Prac. & Proc. ch. 8 (Charles Alan Wright & Arthur R. Miller eds., 2d ed. Aug. 2023 update).

[5] 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence: Commentary on Rules of Evidence for the United States Courts § 702.03[2][a] (Joseph M. McLaughlin ed., Matthew Bender. 2d ed. 1997).

[6] Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

[7] 2 Joseph M. McLaughlin, Federal Evidence Practice Guide § 11.12 (Matthew Bender 2023).

[8] 3 George E. Golomb et al., Federal Trial Guide § 60.30 (Matthew Bender 2012).

[9] *See* Fed. R. Evid. 104(a).

Qualifying the witness as an expert may be accomplished in any number of ways.[10] Begin by asking introductory questions. For example:

Q: What is your current occupation?

Q: How long have you worked at the University?

Q: Are you a licensed medical doctor?

Q: Please describe your educational background for the court.

Q: Are you board certified?

Q: Are you affiliated with any professional associations?

Q: Have you received any honors or awards?

If your expert is nervous about testifying in court, or has never testified in court before, asking him to answer introductory questions about his professional background will help the expert shake off any nerves before he is asked to testify about more difficult concepts or about his opinion. This introductory line of questioning will also help you get into the rhythm of the direct examination, and it affords you the opportunity to work out any "technical difficulties" with the expert's testimony in the courtroom, such as ensuring he is not answering your question before you finish asking it, is close enough to the microphone at the witness stand to be heard, or is answering the questions you ask. One thing is for certain: Do not rush this process. By eliciting testimony on the expert's background and qualifications, you will satisfy the court that your witness has the required qualifications to provide opinion testimony in the case, and demonstrate to the finder of fact that your expert's judgment is credible and sound.[11] Ultimately, your main goals are (1) to persuade the finder of fact by the close of trial that your expert is more credible than your opponent's (that is, that your expert's opinion is the more persuasive and credible); and (2) to convince the finder of fact to adopt your expert's opinion.[12]

With trial comes strategy. Your opponent, having the same goal in mind for her expert, may announce to the court that she stipulates to your expert's qualifications. Cloaked under the guise of "judicial efficiency," your adversary's stipulation to your expert's qualifications prevents you from detailing the expert's impressive education, training, and experience, or from highlighting your expert's superior qualifications as

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[10] *See* McLaughlin, *supra* note 7, § 11.12.

[11] Kenneth M. Mogill & Lia N. Ernst, Examination of Witnesses § 12:24 (2d. ed. Dec. 2022 update).

[12] Neil G. Galatz, *Qualifying the Expert*, *in* 4 Litigating Tort Cases § 41:5 (Roxanne Barton Conlin & Gregory S. Cusimano eds., Sept. 2022 update); 3 Howard S. Suskin et al., Federal Litigation Guide § 33.16[9] (Matthew Bender 2013).

compared with your adversary's expert. A request to stipulate to the expert's qualifications may occur pre-trial, or your opponent may stand up in court as you are conducting your direct examination on background matters contained in his *curriculum vitae* (CV). More likely than not, the court will ask you if you agree to stipulate to the expert's qualifications. While stipulating that your expert is qualified gets you over the hurdle of a later challenge to the expert's qualifications, do not feel pressured to concede and abandon your line of questioning about his professional credentials. It is not always in your best interest.[13] Methodically taking your expert through his education, training and experience assures the finder of fact that you have retained a highly qualified expert, and it ensures that his qualifications are on the record, which may be important if there is a later appeal. Conducting a direct examination on your expert's qualifications brings your expert's qualifications to life and establishes his standing as an expert in his profession. Although the process may be extensive (and tedious), an expert testifying about his qualifications bolsters his credibility.[14] If permitted, and you have a choice, do not stipulate that your expert is qualified at the expense of a direct examination establishing a record of your expert's qualifications or highlighting the expert's accomplishments.

If, however, you are pressed to stipulate to the expert's qualifications, or the court signals that it has heard enough of the expert's background and you should move the direct examination along, establish a foundation for introducing the CV into evidence and offer the expert's CV for admission as a trial exhibit. Then, abbreviate your direct examination on background questions and highlight the most impressive or relevant portions of your expert's qualifications.[15] Choose portions of the expert's background, training, and experience that are most relevant to your case. As you conclude the background portion of the expert's direct examination, refer the finder of fact back to the CV:

Q: I am showing you your CV, which has now been marked as Exhibit 1 in this case. Does this CV more fully set forth your professional experience that you have summarized here today?

Once the expert's CV has been admitted into evidence, you will have established his qualifications on the record, and you also will be able to reference the expert's credentials in your submission of findings of fact and conclusions of law at the end of the case.

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[13] Suskin et al., *supra* note 12, § 33.16[9].

[14] Paul B. Bergman, Trial Advocacy in a Nutshell 383 (West Academic, 6th ed. 2017).

[15] McLaughlin, *supra* note 7, § 11.12[2][a].

However your direct examination proceeds, you must establish on the trial record that your expert is qualified to render an opinion in the case. Depending on the facts of your case, direct examination may include qualification questions that elicit testimony on the expert's education, training, employment, any specialty training the expert received, clinical experience, board certification, teaching experience or academic appointments, licensing or certifications, and the expert's experience with the issues in the case being tried (for example, treatment of patients with the medical condition at issue). Your expert may be a member of a prestigious professional board, have authored publications, or have received awards.[16] In addition to his own written work, ask the expert to testify about any literature he has relied upon in forming his opinion in the case and to summarize the literature upon which he relied.[17] Addressing each of these areas of the expert's background during direct examination will further bolster the credibility of your expert and will establish him as an expert in his field. Find interesting points in the expert's background and alter the way in which you ask questions to keep the finder of fact interested.

Q: You testified that you are a member of Alpha Omega Alpha. What does that mean?

Q: What leadership positions have you held, if any, at those institutions?

Q: Have you held any national leadership positions?

Not every expert you retain will have an extensive academic background, but instead may be qualified by his substantial practical experience.[18] For example, if an issue in your case relates to which party is at fault in an accident, a former police officer with years of experience responding to accident scenes who has substantial experience and training as an accident reconstructionist may be qualified as an expert.[19] To qualify an expert on his lengthy practical experience, ask as many questions as you are able about the expert's professional experience, and any training, licensing, or certifications that he has received.[20] You must demonstrate

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16 Suskin et al., *supra* note 12, § 33.16[9]; Mogill & Ernst, *supra* note 11, § 12:27.

17 Fed. R. Evid. 803(18) does not permit introducing the literature as an exhibit at trial, but under certain circumstances, allows a statement contained in a treatise, periodical, or pamphlet to be read into evidence.

18 David H. Kaye et al., *Expert Evidence*, *in* The New Wigmore: A Treatise on Evidence § 3.1.1 (Aspen Publishing, 3d ed. 2021).

19 Bergman, *supra* note 14, at 384.

20 Edward J. Imwinkelried, Evidentiary Foundations § 9.03[3] (Matthew Bender, 6th ed. 2005).

that your expert has years of relevant experience, is recognized as an expert in his field, and has arrived at his conclusions using a generally accepted method. Your direct examination must thoroughly detail the substantial experience and training your expert has acquired.

Focusing on the expert's experience during direct examination also serves a purpose for the highly credentialed and scholarly expert: It allows you to demonstrate that your expert is not someone who is hypothesizing, and reinforces that, in addition to academic experience, the expert is a practicing professional on the matter for which he is providing an opinion. Consider the direct examination of a medical doctor, for example. After reviewing the doctor's education and his academic or institutional appointments, inquire about his experience. Elicit testimony that the doctor continues to treat patients and have him describe his practice. If you have retained a medical expert who is also a practicing physician and is treating patients in the same medical field as the medicine at issue in the case, your expert cannot be painted as a "professional testifier" who is "out of touch" with the practice of medicine, or as someone who is a "hired gun."

Q: You testified that you are a professor. Are you currently engaged in the practice of medicine?

Q: What, if any, continuing involvement do you have with the detection and treatment of prostate cancer?

Q: Do you diagnose and treat patients with coronary artery disease as part of your practice?

In all cases, your direct examination should aim to humanize your expert. He must not only be knowledgeable but also likeable. If the finder of fact likes the expert and is persuaded that he is educated and well-informed, it may be more influenced by the expert's opinion and more likely to give his opinion greater weight. On the other hand, you may have the best qualified expert, but if he loses his professional demeanor, goes "off script," appears self-important, or comes across as too polished, the results may be catastrophic. Your expert cannot be condescending and must not alienate the finder of fact by something he says during his testimony.[21] All of this may be avoided by careful pre-trial preparation.

[21] Suskin et al., *supra* note 12, § 33.16[8]; Mogill & Ernst, *supra* note 11, § 12:27.

III. Establishing the basis for the expert's opinion

After you have successfully qualified your expert, elicit testimony explaining the basis of his opinion. As a practical point, before establishing the basis, it may be helpful to preview a summary of the opinion your expert will offer. This may be accomplished by asking your expert if he is prepared to offer his opinion to a reasonable degree of medical or scientific certainty.[22] Once he testifies that he is prepared to do so, ask the expert to summarize his opinion.[23]

Q: Doctor, you have testified that you are prepared today to state your expert opinion to a reasonable degree of medical certainty about whether the failure to administer a PSA screening test caused the patient's death. Would you summarize that opinion?

Q: After a review of this case and the materials presented to you, have you formed an opinion to a reasonable degree of medical certainty as to whether the medical provider met the standard of care in their care and treatment of [the plaintiff]?

By asking the expert to summarize his opinion at the beginning of his testimony, your expert's opinion will be heard at the outset, when the finder of fact is most alert and interested in what the expert has to say. Later, you will have the expert testify as to the details of his opinion. If your expert will testify about more than one opinion in the case, consider asking one introductory question about all of the opinions that the expert has formed before you ask for the bases for each of them.[24] Asking these questions during direct examination will alert the judge or jury to the points they should be listening for, as well as provide the finder of fact with a roadmap of where your direct examination will lead.

After the expert has testified to a summary of his opinion, next elicit its factual or scientific basis. An expert may state the reason for his opinion without first testifying to the underlying facts or data,[25] but asking the expert for the basis of his opinion will be clearer for the finder of fact and present a more compelling case. This sequence also provides

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[22] Neil G. Galatz, *Presenting the Expert's Opinion*, *in* 4 Litigating Tort Cases § 41:8 (Roxanne Barton Conlin & Gregory S. Cusimano eds., Sept. 2022 update).

[23] Paul J. Zwier & David M. Malone, Expert Rules: 100 (and More) Points You Need to Know About Your Expert Witnesses 50 (4th ed. 2018).

[24] *Id.*

[25] Fed. R. Evid. 705.

you with the opportunity to position your expert as a teacher and someone whose opinion the judge or jury can trust.

To accomplish this, ask questions to establish that your expert is familiar with the facts of the case, highlight his careful review of the matter, and establish that the expert's opinion is based on facts and data and not his personal beliefs:

Q: What materials have you reviewed in this case?

Q: Please describe your understanding of [the plaintiff's] medical history?

Q: What is your understanding of [the medical provider's] practice regarding routine PSA screening?

Once you establish that the expert has reviewed the voluminous records and information in the case, it is critical that you ask the expert to explain how the facts, data, or tests that he conducted support the conclusion he reached; the expert's responses will ensure that he appears reliable.[26]

For preliminary matters, you may use leading questions.[27] This will get you to the point more quickly. But mainly, you should ask open-ended questions so that it is the expert who is testifying; he should be free to provide detailed and thorough answers to your questions, assume the role of a teacher, and provide credible, thoughtful testimony to the finder of fact. While the principles of direct examination should apply—asking who, what, when, where, and why questions[28]—do not begin every question this way. The more you can make your direct exam seem less like a scripted and rehearsed exchange and more like a dialogue, the more effective the expert's testimony will be. Keep your direct exam conversational.[29]

Q: Did [the plaintiff] have a CT angiogram of his chest on [date]?

Q: What were the findings?

Q: Can you please explain what that means?

Q: I'm showing you a medical record that has been admitted into evidence as Exhibit 1. What, if anything, occurred on that date?

Q: With regard to that surgery, what was [the plaintiff's] preoperative diagnosis?

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[26] Weinstein & Berger, *supra* note 5, § 702.05[2][d].

[27] Fed. R. Evid. 611 (stating that leading questions may be used on direct examination "as necessary to develop the witness's testimony").

[28] McLaughlin, *supra* note 7, § 12.03[2][c][ii].

[29] *Id.* § 12.03[1][b].

As you structure the direct examination, consider asking your expert questions that put the facts of the case, or upon which he relied, into chronological order.[30] This sequence serves two purposes: (1) You are presenting your theory of the case to the judge or jury in a sequence of events as you want them to be understood and in a way that makes sense; and (2) you establish that there is a basis for your expert's opinion. You may also consider structuring your direct examination into discrete topics, using transitional phrases in your questions to alert the finder of fact that you are ending one topic and beginning another. This method also organizes the expert's testimony into categories that your finder of fact may more easily remember and that you are able to highlight by topic in your closing argument or in written findings of fact that you later submit to the court.

As you conduct your direct examination, and as the expert details his analysis, ask follow-up questions. Do not be so committed to your direct examination outline that you are not listening to the expert's testimony. Inevitably, your expert will fall into the language of his profession and use highly technical or medical terms. He may begin to answer one of your questions with a long-winded response replete with medical jargon, for example, and his testimony will be indecipherable to the finder of fact. By actively listening to the testimony and allowing your examination to have room for spontaneity, you will be able to pause the expert's testimony and clarify. Remember, the trier of fact must be able to understand and follow what the expert is saying. Ask simple, clarifying questions. Politely interrupt your expert and ask follow-up questions to ensure that you are not losing the finder of fact during the expert's testimony.[31]

Q: Excuse me, Doctor, if I might stop you there. You just used the term "hyperbilirubinemia." What does that mean?

Q: You just testified about a PSA screening test. Why, if at all, did you consider that test in this case?

Q: What was the result?

Once you ask a clarifying question, do not ask the expert to clarify the same point twice. The finder of fact will become impatient if your direct examination is drawn out and repetitive, and you run the risk of insulting the judge or jury by insinuating that it was not able to understand the concept the first time it was clarified. You will have an opportunity later—whether in closing argument, or when you submit findings of fact

30 *Id.* § 12.03[2][a].

31 Zwier & Malone, *supra* note 23, at 50–51.

to the court—to repeat key terms and definitions that are in the trial record.

IV. Eliciting the opinion

Once the facts that form the basis of the expert's opinion have been established, the expert has testified preliminarily about his opinion in the case, and you have established that there is a basis for the expert's opinion, ask the expert to opine on the relevant issue in the case, such as the standard of care or causation. There are several ways to accomplish this, and you must find the one that works best for you and for your case.

The simplest way is to ask the expert if he formed an opinion in the case. Alternatively, you may ask a more complex question in the form of a hypothetical: Assuming the facts the expert relied upon to be true, does the expert have an opinion in this case?

Q: "Based on your examination of the patient, including [specify details of examination], and your reading of the X-rays that revealed [describe], and your discussions with the consulting neurologist who told you [describe discussion], and based on your more than twenty years as a specialist in orthopedic surgery together with your experience as a Professor of Medicine at the University of California Medical School, do you have an opinion, based on a reasonable degree of medical probability, as to whether the plaintiff will ever play the violin again?"[32]

Q: Doctor, assume facts A, B, and C. Assuming those facts, can you form an opinion about [the plaintiff's] prognosis to a reasonable degree of medical certainty?[33]

Q: Based on your education, training, and experience and these facts and the materials that you considered, have you formed an opinion to a reasonable degree of medical certainty as to whether [the medical provider] met the standard of care by not obtaining routine PSA screening for [the plaintiff]?

Most jurisdictions require that "magic words" be included both in the expert report and in the expert's trial testimony: The expert's testimony "is formed to a reasonable degree of medical or scientific certainty" or words to that effect. If there are several opinions that your expert has

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[32] Mogill & Ernst, *supra* note 11, § 12:62.

[33] Kenneth S. Broun et al., *Reliability: The Case-Specific Facts Analyzed; Personal Knowledge; Hypothetical Questions; Secondhand Reports*, *in* 1 McCormick on Evidence ch. 3, § 14 (Robert P. Mosteller ed., 8th ed. July 2022 update).

rendered, you may consider asking the expert, before he testifies as to any of his opinions, if all the opinions he formed in the case were made to a reasonable degree of medical or scientific certainty, rather than repeating that question before each opinion.

V. Explaining the basis of the expert's opinion

Having an expert explain the basis of his opinion on direct examination will lend it credibility.[34] The finder of fact will know that your expert did not fabricate this opinion, nor is it a hypothesis; the opinion is based on the facts and circumstances of the case before the court and is reliable. During direct examination, you must establish that your expert is not speculating; he cannot base an opinion on his own subjective beliefs. Instead, the expert's testimony must be based on his knowledge, using a reliable methodology he employed.[35] This establishes a sense of evidentiary reliability for the finder of fact[36] and avoids the risk of a highly qualified expert's opinion being excluded at trial because the methodology he employed in arriving at his opinion was flawed and unreliable.[37]

Methodology may be technical or theoretical.[38] If your expert is offering an opinion based on science, inquire on topics such as whether the technique or theory the expert used to form an opinion in the case has been, or can be, tested.[39] Establishing that the scientific methodology your expert employed has been tested assures that his opinion is grounded in science and cannot be falsified.[40] Depending on the basis of the expert's opinion, it may be appropriate to ask whether the expert's theory, technique, or methodology has been subjected to peer review and

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34 Imwinkelried, *supra* note 20, § 9.03[6].

35 Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 153 (1999); Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 590 (1993).

36 *Daubert,* 509 U.S. at 590.

37 *Kumho Tire Co., Ltd.*, 526 U.S. at 153; United States v. Frazier, 387 F.3d 1244, 1261 (11th Cir. 2004).

38 Kenneth S. Broun et al., *Reliability: The Validity of the Expert's Methodology*, *in* 1 McCormick on Evidence ch. 3, § 13 (Robert P. Mosteller ed., 8th ed. July 2022 update).

39 *Id.*; *see also Daubert,* 509 U.S. at 591.

40 *Daubert*, 509 U.S. at 593 (citing Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of* Agent Orange *and Bendectin*, 86 Nw. U.L. Rev. 643, 645 (1992)); *see also* Carl G. Hempel, Philosophy of Natural Science 49 (Prentice-Hall 1966); Karl Popper, Conjectures and Refutations: The Growth of Scientific Knowledge 37 (London: Routledge, 5th ed. 1989).

publication,[41] or what the potential error rate of a particular scientific technique your expert employed is.[42] Again, this tactic provides a basis for the finder of fact to understand that your expert is testifying to "good science"[43]—science that has been tested and subjected to scrutiny in the field and is an established basis for the expert's opinion. You may ask your expert whether the technique he employed is generally accepted in the scientific community.[44] Once again, knowing that others rely upon this methodology will lend credibility to your expert's opinion.

For non-scientific opinions, such as a vocational expert or a law enforcement officer, the same principles apply. You must establish that your expert arrived at his opinion by a methodology or process that he can describe, and that the methodology or process is known, recognized, and generally accepted by his profession.[45] For example, after summarizing his experience in his field or trade, your expert may testify that a term carries a specialized meaning in that field or trade, such as the terms that a criminal in a drug trafficking organization may use, or the process of drawing inferences based on a series of facts or a medical diagnosis. You may ask whether the methodology your expert used to reach his conclusions is one that is employed and generally accepted in the expert's profession. Are there any peer-reviewed articles, papers, or trade journals that validate your expert's approach?[46]

Again, when your expert explains the basis of his opinion, your direct examination should draw out testimony that his opinion is based on his education, training, and experience in consideration of the facts known or assumed in the case. Your expert should explain the methodology he used in arriving at his opinion and testify that the methodology is one that is accepted and reliable.

Q: Based on your education, training, and experience, and the facts you reviewed in this case, were you able to form an opinion to a reasonable degree of medical certainty as to whether the nursing home's failure to administer medication caused [the plaintiff's] death?

Q: In arriving at your opinion, what methodology did you employ?

Q: Is this methodology reasonably accepted in the medical community?

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[41] Broun et al., *supra* note 38, ch. 3, § 13; *Daubert*, 509 U.S. at 593.
[42] Broun et al., *supra* note 38, ch. 3, § 13; *Daubert*, 509 U.S. at 594.
[43] *Daubert,* 509 U.S. at 593.
[44] Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 156–57 (1999).
[45] Broun et al., *supra* note 38, ch. 3, § 13.
[46] *Id.*; *see also Kumho Tire Co., Ltd.*, 526 U.S. at 156–57.

As you take your expert through his opinion, it is important to keep the judge or jury interested, even for the most monotonous or mundane topics. Demonstratives help.[47]

If your expert brings in a model of the human anatomy, or the type of device used in a medical procedure, the finder of fact has something more than words to focus on, and this prop helps your expert visually assist the finder of fact in understanding his opinion and the basis therefor. If the expert's opinion follows a sequence of events, consider preparing a demonstrative timeline of events for the judge or jury, highlighting the dates of important events in the timeline. Maybe your case involves an accident at an intersection: Enlarge a map of the area where the incident occurred to present a realistic and accurate visualization of events for the finder of fact, rather than leaving the scene to the fact finder's imagination. The expert's use of a visual aid will assist him in explaining the facts and basis of his opinion, will help keep the finder of fact engaged in his testimony, and further assure that his opinion is reliable and credible.

On a practical note, before attempting to use a visual aid at trial, confer with the other side, especially if you think your adversary will object to the demonstrative, or if you are concerned in any way that using a demonstrative may be problematic. The effectiveness of your visual aid will be diminished if, as you attempt to use it at trial, there is a sideshow of objections that question its reliability and may result in exclusion of the demonstrative if your adversary claims surprise or suggests that the visual aid is not accurate.

Additionally, if you are using a PowerPoint slide deck, less is more. Too much information on a slide will be difficult to read and will be less effective. The judge or jury will be so distracted trying to discern the contents of the slide that the testimony you are trying to highlight instead will be lost as background noise. Be aware of sightlines to ensure that all parties can see whatever you are presenting. Once again, consider and plan for this contingency before you are in the middle of your direct examination. If the finder of fact has difficulty seeing or reading the visual aid, it will cause distraction rather than enhance the direct examination or boost the expert's credibility.

If you are using a demonstrative during your direct examination, incorporate it into your questioning so that the visual aid enhances the testimony and validates the point your expert is trying to make without being cumbersome:

Q: Doctor, I am showing you a model of the human heart.

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[47] Suskin et al., *supra* note 12, § 33.16[8].

Q: Using this model, can you explain, in general terms, the anatomy of the human heart?

Q: What is coronary heart disease?

Apart from demonstratives, as you conduct a direct examination of your expert and ask him to state the basis for his opinion, ask questions that demonstrate the reasonableness of your expert's opinion. Perhaps your expert is opining on the lifespan of a deceased person in a case alleging wrongful death. Professional literature and life tables may place the person's lifespan at one to three years at the time of the alleged medical malpractice. Yet, in forming his opinion, your expert opines that the decedent's lifespan was three years at the time of the incident. Highlighting through direct examination that your expert chose the most conservative approach based on practice and literature not only establishes the basis for the expert's opinion, but also adds credibility to your expert, who chose a reasonable, conservative path in arriving at his opinion. It should follow, then, that because you have established the reliability and credibility of your expert's opinion, the finder of fact will rely upon and adopt your expert's position when deciding the case.

VI. The best direct examination anticipates the cross

Do not avoid bad facts or problems that you anticipate will come up in cross-examination. Incorporate potential issues into the direct exam. It is better for the finder of fact to hear everything—good and bad—from you. This approach lends credibility to you as an attorney as well as to the expert. Weave the weaknesses of your expert's opinion into your direct and allow your expert to explain these potential weaknesses, but begin the direct examination of your expert strong and conclude with your strongest points.

One area of cross-examination that opposing counsel almost always raises is the suggestion that your expert is a "hired gun" who is being paid for his testimony. This line of questioning may be more effective before a jury than it is during a bench trial. But to avoid appearing like you are dodging the issue, you can generally ask a few questions to establish the amount of work the expert has done, as well as the expert's hourly rate. Retaining an expert who is still practicing in his field and who is not a full-time, paid expert is also helpful and should be included in the examination. Questions such as how often the expert reviews cases and testifies in court will demonstrate that the expert's life work or main source of income is not paid expert testimony.

Oftentimes, experts work more for one party than the other. Anticipate these bias questions.[48] Ask your expert about the expert testimony he has given and how much he has done for plaintiffs as opposed to defendants. If he does more work for one party than the other, ask questions to clarify the reason rather than leaving the finder of fact with an assumption that he will always testify in favor of one particular side. Similarly, if your expert is someone who testifies regularly for the government, bring that fact out in direct examination and ask questions to reassure the finder of fact that it did not affect the expert's opinion in the case.

Q: Have you previously testified as an expert in medical malpractice lawsuits, offering your professional opinion?

Q: In which courts?

Q: How often do you testify as an expert witness?

Q: How many times have you reviewed cases at the request of attorneys where you didn't have to testify?

Q: For which side have you testified?

In the end, weaknesses in your case are better raised by you during direct than brought out for the first time by opposing counsel.

VII. Wrapping it up

End the examination with the opinions you want the jury to remember. Prepare summary questions that draw out a few major points. Leave the finder of fact with your strongest points and the opinion that supports your case.

Q: Do you have an opinion with a reasonable degree of medical certainty as to whether anything that [the medical provider] did or did not do on [date] caused or contributed to the death of [the plaintiff]?

Q: What is that opinion?

VIII. An opportunity to re-direct

After cross-examination, the court will provide you with an opportunity to re-direct the expert. Take this opportunity. The goal here is to allow the expert to restate his main opinion and to demonstrate that whatever points were made on cross-examination were either incorrect

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[48] Joseph J. Ortego & Paul M. Dewey, *Ligation's Unsung Hero: Glory to the Direct Examination of the Expert Witness*, The Brief, Winter 2019, at 41–45.

or of no import. A re-direct should reinforce that, even after cross, the expert's opinion is solid and reliable.

Do not waste the opportunity to re-direct your expert. Treading the same ground you covered in direct will be ineffective, bore the fact finder, and likely cause the court to reprimand you or ask you to move on. Instead, there will be answers or explanations that your expert tried to give during cross, but were interrupted or cut short by your adversary (for example, "Doctor, yes or no?"). Remind the expert of the question your opponent would not let him answer and ask him what he was going to say or repeat the question. During re-direct, ask the expert a series of short questions that you think may have resulted in confusion or uncertainty for the fact finder during cross-examination and clarify those points.

Be efficient, effective, and concise. Only ask your expert questions regarding issues that your opponent raised on cross-examination and avoid the temptation to ask your expert about anything that is not in his report just because you think it will help your case. End your re-direct examination strong and unwavering after cross. Reinforce your expert's opinion.

IX. A few practice tips

- Map out your expert's direct testimony in advance. Use citations to the report or the record in your outline so that the reference is readily available if there is an objection or if you need to refer the expert to a record or particular place in his report.
- Use plain language. Your expert will use technical and scientific terms. Ask him to explain what these terms mean. Try to limit the amount of scientific, technical, or medical jargon he uses at trial so that the fact finder can easily understand the expert's testimony.[49]
- Use demonstratives. Having your expert demonstrate how a medical device was used during a medical procedure or having a visual aid to explain the timeline of events will be persuasive and keep the finder of fact engaged in the expert's testimony.
- Prepare short questions at the end of the expert's direct examination to highlight his conclusion and the conclusion you want the finder of fact to reach.
- Know your case and do not be slavishly devoted to your outline. Listen to your expert's testimony. Be ready to leave the safety of your outline if something needs to be explained, or if the expert

[49] Suskin et al., *supra* note 12, § 33.16[8].

missed a point that you needed him to make; ask the questions that need to be asked.

- If this is your expert's first time testifying in a courtroom, take him to the courtroom in advance of trial if you can. Letting him sit in the witness stand before he testifies in front of a judge or jury can help reduce the expert's nerves and make him appear more comfortable and conversational during direct examination.
- You cannot over-prepare your expert. Meet with your expert more than once to review his direct examination and the facts of the case before he testifies. Prepare and conduct a mock cross-examination and discuss the potential strengths and weaknesses of the expert's opinion so that he is prepared to testify on both direct and cross-examinations.

About the Author

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Cross-Examining Expert Witnesses: You've Got This!

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Cross-examining an expert witness at trial can be intimidating. As lawyers, we are experts on the law and the courtroom. But we are not medical doctors, economists, engineers, or any other individual qualified by knowledge, skill, experience, training, or education to offer opinion testimony on scientific or technical matters. Understanding how to prepare to cross-examine an expert and how to question the witness on the stand can go a long way to make you comfortable and confident. It can also reduce the tension of facing someone who clearly knows more about the subject matter.

The Art of War, Sun Tzu

To quote Sun Tzu, "[e]very battle is won before it's ever fought."[1] Put another way, when the time to perform arrives, the time to prepare has passed. This is particularly true regarding the cross-examination of expert witnesses at trial. Preparing the thorough cross-examination of a witness offering expert opinion testimony begins well in advance of trial. The cross-examination of every expert is unique. The opportunities to challenge an expert's testimony depend on the opinions being offered, the reasons and basis for the expert's opinions, the facts and data considered by the opposing expert, and the expert's unique background—all of which are distinct to the case and the expert. There is no standard outline you can follow, but through discovery you can thoroughly prepare to cross the opposing expert.

Do you want to take the opposing expert's deposition?

Federal Rule of Civil Procedure 26(a)(2)(B)(i) and (ii) provide that a retained expert must disclose "a complete statement of all opinions the witness will express and the basis and reasons for them" and "the facts or data considered by the witness in forming" their opinions.[2] When contemplating the decision to take the deposition of an opposing expert,

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[1] *Sun Tzu: Quotes*, Goodreads, https://www.goodreads.com/quotes/720920-every-battle-is-won-before-it-s-ever-fought (last visited July 25, 2023).
[2] Fed. R. Civ. P. 26(a)(2)(B)(i), (ii).

consider whether the report is thorough and complete. If the expert prepared a comprehensive report, consider taking their deposition to flesh out details not clearly set forth. If the expert prepared a poor-quality report that does not explain the opinions well, does not set forth a thorough explanation of the reasons and basis for the opinions, or does not lay out all the facts and data considered, then you might err on the side of not deposing the expert. Deciding against deposing the expert keeps him boxed into his meager report. Should you choose to depose an expert who produced a poor-quality report, consider whether you can be adequately prepared. Without much to go on, unless you work closely with your expert, you could encounter an expert who may intentionally talk over your head. One of the troublesome outcomes of deposing an expert who submitted a scant report is that it enables the witness to supplement his report in response to your questions. Should you decide against taking the deposition of an expert that produced a marginal report, be prepared to object at trial if the expert attempts to offer opinions or reasons for opinions that are beyond the scope of the report.

Consult your expert

If you decide to depose the opposing expert, you must consult your expert in advance. Provide your expert with the complete disclosure of the opposing expert. Ask your expert to identify weaknesses in the opposing report, as well as lines of inquiry about which you should probe. Ask your expert what she would like to learn from the opposing expert. You retained an expert to help defend the case, and you should rely on your expert to help you prepare for the opposing expert's deposition.

The most important takeaway

Whether you are deposing an expert who prepared an excellent report or a marginally sufficient report, your goal is to pin the expert down as to the opinions she will offer at trial. While you need to understand the expert's opinions, you must drill down with your questions so that you know exactly what the expert will say at trial. During the deposition, go through the expert's report line-by-line until you understand what the expert wrote. Keep asking questions on every word, phrase, sentence, or subject until you are entirely comfortable that the opposing expert will have no wiggle room at trial. With that thought in mind, the specific answers of the expert during the deposition are of little concern because you will take the testimony as offered and use it to the best advantage at trial. You can't force the opposing expert to testify in a particular manner, but you can identify opportunities for cross-examination questions at trial. And those opportunities will be there.

Plagiarism

Consider serving a subpoena for the opposing expert's entire file well in advance of the deposition. Search the subpoena return to see if it includes any summaries of the facts, medical or other records, or depositions that were not entirely prepared by the expert. If you come across such a gold mine, you can (1) challenge the expert at trial by questioning how much he relied on the judgment of others who prepared the summaries; and (2) determine whether any aspect of the expert's report was copied verbatim from the summary.

Summaries prepared by attorneys, paralegals, or anyone other than the expert include details that the individual who prepared the summary thought was important. Those summaries may also fail to include information that the expert, if he had prepared the summary, would have considered important. Prove up that point by asking your expert on direct examination whether any facts that were absent from the summaries were significant. Either way, the expert is attempting to offer the court opinions founded on only those facts that someone else did or did not deem important. When an opposing expert relies on summaries that someone else prepared, it reveals a degree of laziness and clouds the expert's opinions with the views of the individual who prepared the summary. For these same reasons, never provide your expert with a summary you prepared.

To critique or not to critique, that is the question

Consider whether you want your expert to critique the opposing expert's opinions in your report or in a rebuttal report. When your expert offers direct criticism of the opposing expert's opinions, you alert the opposing expert as to how you will cross-examine her at trial, for which she will now be well-prepared.

Federal Rule of Civil Procedure 26(a)(2)(D) addresses the disclosure of rebuttal testimony.[3] If you anticipate depending on your expert to rebut the testimony of the opposing expert, you may need to make a rebuttal disclosure. The question you need to ask yourself is whether you can rebut the opposing expert's opinions without directly relying on your expert. Will the testimony of your expert, absent direct attack on the opposing expert's opinions, be sufficient to call into question the opposing expert's opinions?

Expert in the field of what?

After voir dire, did opposing counsel "tender" the witness? If the expert was not tendered as an expert in a particular field, how will you and the court know if he is testifying beyond the scope of his so-called expertise? Don't forget, you must tender your expert as well.

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[3] Fed. R. Civ. P. 26(a)(2)(D).

Objection, Your Honor. The witness's answer is non-responsive

During cross-examination, when you back the opposing expert into a corner, forcing her to answer a question she does not want to answer, anticipate that the expert will offer non-responsive answers and talk about anything else. Getting non-responsive answers to your *leading questions* can initially be frustrating, but that's when you know you are getting to the good stuff! Persist with leading questions, preferably ones that call for "yes" or "no" answers, and remember that the judge and jury will note obstinate, evasive responses. You should also know when to move on to your next question before the fact finder begins to think the witness is getting the best of you.

They are called experts for a reason

Expert witnesses are called "experts" for a reason. Whether or not you agree with their opinions, they have the education, training, experience, and background to offer expert opinions in addition to being able to talk circles around most attorneys regarding their area of specialty. Professional experts have frequently testified in court many more times than you have been in court. Their experience as an expert positions them to know your next three questions before you even ask them. For these reasons, don't argue with the opposing expert and don't get tricked into bantering. You will lose, and the expert will come out ahead.

Like Admiral William H. McRaven, be a leader!

Repeat after me, "I promise, on my honor as Counsel for the United States, that I will ask only leading questions on cross-examination." Of course, there may be an exception or two when you may ask an open-ended question, particularly in a bench trial, but you better know the answer you will get. This is cross-examination, and you can and must lead the opposing expert. If you do not lead, you open the door for the opposing expert to testify during your cross-examination about pretty much anything. Now, go make your bed.[4]

Simultaneous or sequential expert disclosure

Federal Rule of Civil Procedure 26(a)(2)(D) provides that a party must make expert disclosure at the time and in the sequence in which the court orders.[5] Suppose the court orders simultaneous or concurrent disclosure of experts rather than sequential? If you are the defense and confront a scheduling order that calls for simultaneous expert disclosure,

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[4] Goalcast, *Navy Seal William McRaven: If You Want to Change the World, Make Your Bed!*, YouTube (Aug. 17, 2017), https://www.youtube.com/watch?v=3sK3wJAxGfs.

[5] Fed. R. Civ. P. 26(a)(2)(D).

how can your expert prepare his report without knowing the case being made by the opposing expert? The 1993 notes to Federal Rule 26 state that "in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue."[6] When confronted with concurrent disclosure and the other party has the burden of proof, consider moving the court for sequential disclosure and, while you are at it, ask for four weeks so that your expert can properly prepare.

Pigs get fat; hogs get slaughtered

It is beyond unlikely that the opposing expert will break down on the witness stand and cry "uncle." If you can make two or three points on cross-examination, you are golden. Do not try to force a weak issue. The opposing expert will confuse you and bolster his case. Be the pig; don't get slaughtered being the hog. Remember, you will make your case with your expert on direct examination!

Conclusion

Cross-examining an expert at trial can be daunting. You can make it less so by preparing well. Use cross-examination of the opposing expert to weaken their case. Use direct examination of your expert to win the case!

About the Author

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[6] Fed. R. Civ. P. 26(a)(2)(D) advisory committee's note to 1993 amendment.

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Strategies for Responding to Civil Conspiracy Claims Under the Federal Tort Claims Act

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I. Introduction

Civil lawsuits alleging tortious behavior commonly also include the defendants' claims of "conspiracy."[1] This practice often includes suits against the government under the Federal Tort Claims Act (FTCA).[2] Plaintiffs (or their attorneys) may be adding conspiracy claims to their lawsuits largely "out of instinct" without considering whether it can be supported in a particular case.[3] But the addition of a conspiracy claim may help persuade a fact finder of the outrageous nature of a defendant's conduct and increase an inclination to award damages.[4] Therefore, an effective response to a civil conspiracy claim asserted under the FTCA may help limit the government's liability and resulting damages. This article suggests some potential arguments against a civil conspiracy claim and when to raise them.

II. Arguments against civil conspiracy claims under the FTCA

The most effective arguments against a conspiracy claim under the FTCA will likely differ from case-to-case and court-to-court, depending on the nature of the claims and the law of the jurisdiction. This article

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[1] The federal courts apparently do not track how many civil cases include a claim of conspiracy. But a Westlaw database search of federal district court decisions during a one-year period (January 1, 2022, through December 31, 2022) results in 472 separate documents that include the term "civil conspiracy."

[2] A Westlaw database search of federal district court decisions during a one-year period (January 1, 2022, through December 31, 2022) results in 167 separate documents that include the term "conspiracy" and either "FTCA" or "Federal Tort Claims Act."

[3] Thomas J. Leach, *Civil Conspiracy: What's the Use?*, 54 U. Miami L. Rev. 1, 11 (1999).

[4] *Id.* at 5.

therefore presents several potential arguments that—together or separately—may defeat a conspiracy claim.

A. The FTCA does not waive sovereign immunity for claims of civil conspiracy against the United States

The strongest (and most aggressive) argument against a conspiracy claim under the FTCA is that the United States has not waived its sovereign immunity from suit to permit it. Because while some federal courts have simply permitted a conspiracy claim under the FTCA to proceed without substantive discussion,[5] a strong argument that engages the statutory text and explains its jurisdictional limits will demonstrate that the FTCA does not extend to claims of conspiracy.

Generally, the United States has sovereign immunity from suit except to the extent that it consents to be sued.[6] Any waiver of the government's sovereign immunity must be unequivocally expressed in statutory text and will not be implied.[7] Moreover, any waiver will be strictly construed, in terms of its scope, in favor of the government.[8] Therefore, to sustain a claim that the government is liable for monetary damages, the applicable statutory waiver of sovereign immunity must extend unambiguously to such claims.[9]

Through the FTCA, the government has waived its sovereign immunity and rendered itself liable specifically for claims (1) against the United States, (2) for money damages, (3) for injury or loss of property, or personal injury or death, (4) caused by the negligent or wrongful act or omission of any employee of the government, (5) while acting within the scope of his office or employment, (6) under circumstances where the United States, if a private person, would be liable to the claimant in ac-

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[5] Some courts have simply stated that the FTCA waives the United States' sovereign immunity from suit for a civil conspiracy claim. *See, e.g.*, Taylor v. Brentwood Postal Servs., Civ. No. 10-233, 2010 WL 1812730, at *1 (D.D.C. May 5, 2010). Others have simply assumed that a civil conspiracy claim is cognizable under the FTCA. *See, e.g.*, Ruddy v. United States, Civ. No. 11-1100, 2011 WL 5834953, at *7 (M.D. Pa. Nov. 21, 2011); Cannon v. Forest Pres. Dist. of Cook Cnty., Civ. No. 13-6589, 2014 WL 1758475, at *2 (N.D. Ill. May 2, 2014); Foodcomm Int'l v. Barry, 463 F. Supp. 2d 818, 830 (N.D. Ill. 2006); Martinez v. United States, 812 F. Supp. 2d 1052, 1061 (C.D. Cal. 2010); Urban v. Henderson, Civ. No. 99-4244, 2001 WL 484119, at *5 (E.D. Pa. Apr. 5, 2001).

[6] *See* F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994); United States v. Sherwood, 312 U.S. 584, 586 (1941).

[7] Lane v. Pena, 518 U.S. 187, 192 (1996) (citations omitted); Irwin v. Dep't of Veterans Affs., 498 U.S. 89, 95, 111 (1990).

[8] *Lane*, 518 U.S. at 192; United States v. Nordic Vill., Inc., 503 U.S. 30, 33–34 (1992).

[9] *See Lane*, 518 U.S. at 192; *Nordic Vill., Inc.*, 503 U.S. at 33–34.

cordance with the law of the place where the act or omission occurred.[10] Therefore, even before considering the potential impact of the FTCA's various exclusions and exceptions,[11] a court must first decide whether a plaintiff's claims fall within the FTCA's basic waiver of immunity.[12]

One important limit of the FTCA's basic waiver of sovereign immunity is that it extends only to claims where the government is sued, and may be held liable, as "a private person"[13] or as a "private individual"[14] under the relevant state law.[15] In other words, if a private person under similar circumstances would not be liable to the plaintiff for the alleged conduct, a court does not have jurisdiction to adjudicate the FTCA claim against the government.[16]

Because under the FTCA, a court must treat the United States as an individual—and not as a collection of employees or entities—it is impossible for the United States to engage in a civil conspiracy with itself.[17] Any "civil conspiracy" claim asserted against the government for the acts of its employees would be duplicitous and redundant.[18]

Therefore, any civil conspiracy claim against the United States is not actionable and must be dismissed for lack of subject-matter jurisdiction because the FTCA does not waive the government's sovereign immunity to permit it.[19]

Finally, some FTCA cases may name as defendants not only the United States, but also federal agencies or employees, and include a claim of a conspiracy among them. But only the United States—and not any federal agency or official—is a proper defendant under the FTCA.[20]

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10 28 U.S.C. § 1346(b)(1); *see also Meyer*, 510 U.S. at 476.

11 *See, e.g.*, 28 U.S.C. § 2680; *see also* Section II.D, *infra*.

12 *See* Sheridan v. United States, 487 U.S. 392, 400 (1988).

13 *See* 28 U.S.C. § 1346(b)(1).

14 *See* 28 U.S.C. § 2674.

15 *See* Miree v. DeKalb Cnty., Ga., 433 U.S. 25, 29 n.4 (1977); United States v. Muniz, 374 U.S. 150, 153 (1963).

16 *See* United States v. Olson, 546 U.S. 43, 44 (2005).

17 *See, e.g.*, Radford v. United States, 264 F.2d 709, 710 (5th Cir. 1959); Bowling v. United States, 740 F. Supp. 2d 1240, 1250–51 (D. Kan. 2010); Fishman v. United States, Civ. No. 14-222, 2015 WL 13919103, at *9 (C.D. Cal. Mar. 4, 2015), *report & recommendation adopted*, 2016 WL 777874 (C.D. Cal. Feb. 29, 2016); Vaupel v. United States, Civ. No. 07-1443, 2011 WL 2144612, at *16 (D. Colo. May 12, 2011), *report & recommendation adopted*, 2011 WL 2144608 (D. Colo. May 31, 2011).

18 *See Bowling*, 740 F. Supp. 2d at 1250–51; Limone v. United States, 497 F. Supp. 2d 143, 224 n.182 (D. Mass. 2007).

19 *See, e.g.*, *Bowling*, 740 F. Supp. 2d at 1251.

20 *See* F.D.I.C. v. Meyer, 510 U.S. 471, 476–77 (1994); CNA v. United States, 535 F.3d 132, 138 n.2 (3d Cir. 2008).

Moreover, under the Westfall Act,[21] federal employees acting within the scope of their employment have absolute immunity from common law tort claims.[22] As a result, a suit under the FTCA is the only potential remedy for those claims, and following certification by the Department of Justice, the United States should be substituted in their place as the sole defendant.[23]

B. The intra-corporate conspiracy doctrine bars a claim for civil conspiracy by the United States under the FTCA

Related to (but separate from) the FTCA's limited waiver of sovereign immunity is the "intra-corporate conspiracy"[24] doctrine that should, in most cases and jurisdictions, apply to bar a claim of civil conspiracy against the United States.

Specifically, the statutory requirement that the United States be treated the same as a private "person" or "individual" also means that the government's liability under the FTCA is co-extensive with that of a private entity or corporation (and not, for example, that of a state or municipal entity).[25]

Therefore, if the government is properly treated as a private entity, the intra-corporate conspiracy doctrine that would bar a conspiracy claim against a corporation and its agents or employees should likewise bar any conspiracy claim against the United States under the FTCA. In other words, because the government, its agents, and its employees are all considered the same entity, a plaintiff cannot show a multiplicity of actors, which is an essential element of a conspiracy claim.[26]

The intra-corporate conspiracy doctrine is well established in federal case law, especially in antitrust matters,[27] and federal courts have adopted the "single entity" view in a variety of other civil settings.[28] And while the Supreme Court has not decided whether, in general, the doctrine bars

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[21] Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (codified at 28 U.S.C §§ 2674, 2679).

[22] *See* Osborn v. Haley, 549 U.S. 225, 229 (2007); Brumfield v. Sanders, 232 F.3d 376, 379 (3d Cir. 2000); Melo v. Hafer, 13 F.3d 736, 739 (3d Cir. 1994).

[23] *See* 28 U.S.C. §§ 2679(b)(1), 2679(d)(1).

[24] Sometimes called the "intra-enterprise conspiracy" doctrine.

[25] United States v. Olson, 546 U.S. 43, 45–46 (2005).

[26] *See, e.g.,* McAndrew v. Lockheed Martin Corp., 206 F.3d 1031, 1036 (11th Cir. 2000).

[27] *See* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769–74 (1984).

[28] *See* Shaun P. Martin, *Intracorporate Conspiracies*, 50 Stan. L. Rev. 399, 411 (1998).

alleged conspiracies to violate a plaintiff's civil rights,[29] it has nonetheless suggested it would apply to claims against federal officials within the same branch or department of the government.[30]

Moreover, in responding to a claim asserted under the FTCA, the United States can assert any substantive limitation on liability under state law that a private person could assert in the same circumstances.[31] Because most states recognize some form of the intra-corporate conspiracy doctrine that would bar claims against a private entity,[32] the doctrine should also bar most civil conspiracy claims against the government under the FTCA.[33]

Finally, a plaintiff cannot avoid the intra-corporate conspiracy doctrine by naming federal agencies or employees as defendants and then asserting a conspiracy among them. As noted above, only the United States is a proper defendant under the FTCA; any federal agencies, officials, or employees acting within the scope of their employment should therefore be dismissed, leaving only the United States as the unitary defendant.[34]

C. Conspiracy is not an actionable tort under the FTCA

A claim of conspiracy under the FTCA must also fail because "the statute requires a negligent act."[35] In other words, the waiver of sovereign immunity is uniformly limited to a claimed "negligent or wrongful act or omission,"[36] and regardless of any state law characterization, the FTCA precludes imposing liability if there has been no negligence—or other form of "misfeasance or nonfeasance"—by the government.[37]

A civil conspiracy is not a free-standing wrong; it is a derivative theory of liability under which a plaintiff attempts to establish that a defendant is vicariously liable for some underlying tortious act.[38] It is merely the

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29 42 U.S.C. § 1985(3).

30 *See* Ziglar v. Abbasi, 582 U.S. 120, 152–53 (2017).

31 *See* Ludwig v. United States, 21 F.4th 929, 931 (7th Cir. 2021); Ewell v. United States, 776 F.2d 246, 249 (10th Cir. 1985); *see also* United States v. Olson, 546 U.S. 43, 45–46 (2005).

32 *See* Robin Miller, Construction and Application of "Intracorporate Conspiracy Doctrine" as Applied to Corporation and Its Employees—State Cases, 2 A.L.R. 6th 387 (2005 & Supp. 2023) (collecting cases from over 30 states).

33 *See* Bowling v. United States, 740 F. Supp. 2d 1240, 1252 (D. Kan. 2010).

34 *See* Section II.A, *supra*.

35 Dalehite v. United States, 346 U.S. 15, 45 (1953).

36 *Id.* at 44; 28 U.S.C. § 1346(b)(1).

37 Laird v. Nelms, 406 U.S. 797, 799 (1972).

38 *See, e.g.*, Beck v. Prupis, 529 U.S. 494, 504 (2000); SFM Holdings, Ltd. v. Banc

"meeting of the minds" on a course of action, which, once performed, becomes an actionable wrong.[39]

Moreover, a plaintiff "cannot sue a group of defendants for conspiring to engage in conduct that would not be actionable against an individual defendant."[40] "Instead, an actionable civil conspiracy must be based on an existing[,] independent wrong or tort that would constitute a valid cause of action if committed by one actor."[41] It is not the conspiracy itself, but rather the underlying wrong that must be actionable, even without the alleged conspiracy.[42]

In other words, the FTCA only permits suits predicated on a "negligent or wrongful act or omission."[43] But a conspiracy to commit a tort is not itself an "act or omission" actionable under the FTCA.[44] Therefore, any claim for a civil conspiracy under the FTCA should be dismissed.

D. Where the FTCA excludes otherwise available claims, any related civil conspiracy claim should also be barred

The FTCA does not extend the government's liability to the full scope of a state's tort law.[45] Among other things, the statute bars any claims for the "intentional" torts of libel, slander, misrepresentation, deceit, interference with contract rights, and (if not involving law enforcement activities) assault, battery, false imprisonment, false arrest, malicious prosecution, and abuse of process.[46]

An FTCA plaintiff may therefore attempt to avoid the exceptions to

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of Am. Sec., LLC, 764 F.3d 1327, 1339 (11th Cir. 2014); Prairie Field Servs., LLC v. Welsh, 497 F. Supp. 3d 381, 402 (D. Minn. 2020); Zaccari v. Apprio, Inc., 390 F. Supp. 3d 103, 112 (D.D.C. 2019).

39 *See, e.g.*, *In re* Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig., 113 F.3d 1484, 1498 (8th Cir. 1997); Halberstam v. Welch, 705 F.2d 472, 479 (D.C. Cir. 1983).

40 *In re* Orthopedic Bone Screw Prods. Liab. Litig., 193 F.3d 781, 789 (3d Cir. 1999).

41 *Id.* (cleaned up) (quoting Posner v. Essex Ins. Co., 178 F.3d 1209, 1218 (11th Cir. 1999)); *Halberstam*, 705 F.2d at 479.

42 *See, e.g.*, *Beck*, 529 U.S. at 501–03 (citing cases).

43 28 U.S.C. § 1346(b)(1).

44 *See* Bowling v. United States, 740 F. Supp. 2d 1240, 1251 (D. Kan. 2010); Fishman v. United States, Civ. No. 14-222, 2015 WL 13919103, at *10 (C.D. Cal. Mar. 4, 2015); Boling v. U.S. Parole Comm'n, 290 F. Supp. 3d 37, 47 (D.D.C. 2017).

45 *See* Molzof v. United States, 502 U.S. 301, 310–11 (1992).

46 28 U.S.C. § 2680(h).

the waiver of sovereign immunity through "artful pleading,"[47] such as by asserting a conspiracy claim related to the excepted torts.[48] Where the FTCA's exclusions from jurisdiction apply, however, they extend not only to the enumerated torts or wrongs themselves, but also to any claims "arising out of" them.[49] And a plaintiff may not avoid an exception to the FTCA's waiver of sovereign immunity by using different labels to disguise the substantive similarity of the allegations.[50]

Nor may a plaintiff rely on a state-law cause of action for civil conspiracy to avoid a related FTCA exception that would otherwise bar it. Although state law generally controls the availability of claims under the FTCA,[51] its application is limited by the specific terms of the federal statute,[52] and it is a matter of federal, not state, law whether the FTCA exceptions apply to a plaintiff's claims.[53] In other words, because federal courts have subject-matter jurisdiction over FTCA claims "subject to" the statute's broader provisions,[54] the FTCA's exceptions define the limits of that jurisdiction.[55]

Therefore, whenever an alleged "civil conspiracy" claim relates to a claim that is barred by the FTCA, the conspiracy claim must also be dismissed.[56]

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47 *See, e.g.*, Seaside Farm, Inc. v. United States, Civ. No. 11–1199, 2012 WL 12946751, at *4 (D.S.C. Mar. 6, 2012) (citing cases).

48 *See, e.g.*, Robles v. United States, 703 F. App'x 652, 655 (10th Cir. 2017) (not precedential).

49 *See* 28 U.S.C. § 2680(h); *see also* United States v. Shearer, 473 U.S. 52, 54–55 (1985); Kosak v. United States, 465 U.S. 848, 854 (1984).

50 *See, e.g.*, Brumfield v. Sanders, 232 F.3d 376, 382–83 (3d Cir. 2000); Snow-Erlin v. United States, 470 F.3d 804, 808 (9th Cir. 2006); Johnson v. Sawyer, 47 F.3d 716, 725 (5th Cir. 1995); Talbert v. United States, 932 F.2d 1064, 1066–67 (4th Cir. 1991); Chen v. United States, 854 F.2d 622, 628, 628 n.2 (2d Cir. 1988); Art Metal U.S.A., Inc. v. United States, 753 F.2d 1151, 1154–55 (D.C. Cir. 1985); Anderson v. United States, 548 F.2d 249, 252 (8th Cir. 1977).

51 *See* 28 U.S.C. § 1346(b)(1).

52 *See id.*; Leleux v. United States, 178 F.3d 750, 755 n.2 (5th Cir. 1999).

53 *See* United States v. Neustadt, 366 U.S. 696, 705–06 (1961); *Leleux*, 178 F.3d at 755 n.2; Johnson v. United States, 788 F.2d 845, 851 (2d Cir. 1986); *see, e.g.*, Levrie v. Dep't of Army, 810 F.2d 1311, 1314 (5th Cir. 1987).

54 28 U.S.C. § 1346(b)(1).

55 *See* Hydrogen Tech. Corp. v. United States, 831 F.2d 1155, 1161 (1st Cir. 1987).

56 *See, e.g.*, Boling v. U.S. Parole Comm'n, 290 F. Supp. 3d 37, 47 (D.D.C. 2017); Daisley v. Riggs Bank, 372 F. Supp. 2d 61, 77–78 (D.D.C. 2005); Downie v. City of Middleburg Hts., 76 F. Supp. 2d 794, 800 (N.D. Ohio 1999).

III. When to raise arguments against conspiracy claims under the FTCA

An effective procedural response to a claim of conspiracy under the FTCA may also differ from case-to-case and court-to-court. But the best strategy is to raise the arguments above at the beginning of the case and at every later opportunity.

At all stages of litigation, the party asserting subject-matter jurisdiction has the burden of showing that it exists.[57] Moreover, federal courts always have an obligation to determine whether subject-matter jurisdiction exists,[58] and they must decide jurisdictional issues before any determination on the merits.[59]

Consequently, the most effective time to attack a civil conspiracy claim may be at the beginning of the case, through a pre-answer motion to dismiss the claim for lack of subject-matter jurisdiction on sovereign immunity grounds.[60] Moreover, depending on the jurisdiction, a partial motion to dismiss just the civil conspiracy claim may also suspend the time to answer claims not subject to the motion.[61]

The beginning may also be the most efficient time because "sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits."[62] And while a motion to dismiss for lack of subject-matter jurisdiction (especially one based on sovereign immunity) is pending, any discovery or discovery-related practice would be inappropriate.[63]

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57 *See* Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1045 (3d Cir. 1993).

58 *See* Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006).

59 *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–95 (1998); Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982); Guerra v. Consol. Rail Corp., 936 F.3d 124, 131 (3d Cir. 2019); *In re* Hechinger Inv. Co. of Del., Inc., 335 F.3d 243, 251 (3d Cir. 2003).

60 Fed. R. Civ. P. 12(b)(1).

61 *See* Fed. R. Civ. P. 12(a)(4); *see, e.g.*, Gamble v. Boyd Gaming Corp., Civ. No. 13-1009, 2014 WL 1331034, at *3 (D. Nev. Apr. 1, 2014) (citing cases).

62 Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 443 (D.C. Cir. 1990); *see also* Brown v. Grabowski, 922 F.2d 1097, 1105 (3d Cir. 1990); Fed. Ins. Co. v. Richard I. Rubin & Co., 12 F.3d 1270, 1281 (3d Cir. 1993).

63 *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (instructing that until a threshold immunity question is resolved, discovery should not be allowed); Preble-Rish Haiti, S.A. v. BB Energy USA, LLC, No. 21-20534, 2021 WL 5143757, at *2 (5th Cir. Nov. 4, 2021) (observing that one purpose of an immunity defense "is to protect the defendant from the burden of litigation itself[,] including discovery"); Liverman v. Comm. on the Judiciary, U.S. House of Reps., 51 F. App'x 825, 827–28 (10th Cir. 2002) (not precedential) (holding that the same standard applies to

But even if not raised in a pre-answer motion to dismiss, a civil conspiracy claim under the FTCA may still be attacked—at least on sovereign immunity grounds—in later proceedings, including in a motion for summary judgment,[64] a motion in limine before trial,[65] and post-judgment proceedings.[66] That is because "a claim of sovereign immunity advances a jurisdictional bar" that a party may raise at any time, even for the first time on appeal.[67] Moreover, a lack of subject-matter jurisdiction cannot be waived or forfeited, and federal courts are obliged to address the issue whenever it is raised.[68]

IV. Conclusion

FTCA lawsuits commonly include claims for civil conspiracy. But depending on the nature of the claims and the law of the jurisdiction, the government has several strong arguments for why conspiracy claims should not be permitted in an individual case, if at all. And a strong response to a claim of a conspiracy under the FTCA—at the beginning and throughout the life of the lawsuit—may help to limit the government's liability and any resulting damages.

About the Author

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sovereign immunity and qualified immunity in shielding a defendant from the burdens of litigation and discovery pending the resolution of a motion to dismiss).

64 *See, e.g.*, Sandle v. Principi, 201 F. App'x 579, 582 (10th Cir. 2006) (not precedential).

65 Although an FTCA claim is tried to the court without a jury, *see* 28 U.S.C. § 2402, the purpose of a motion in limine is to narrow the evidentiary issues for trial. Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064, 1069 (3d Cir. 1990). And "courts frequently address motions in limine in non-jury trials." Velez v. Reading Health Sys., Civ. No. 15–1543, 2016 WL 9776079, at *2 (E.D. Pa. Feb. 24, 2016).

66 *See, e.g.*, Bank One, Tex., N.A. v. Taylor, 970 F.2d 16, 34 (5th Cir. 1992).

67 United States v. Bein, 214 F.3d 408, 412 (3d Cir. 2000); *see, e.g.*, Kontrick v. Ryan, 540 U.S. 443, 455 (2004); Dewitt Bank & Tr. Co. v. United States, 878 F.2d 246, 246 (8th Cir. 1989); United States v. $4,480,466.16 in Funds Seized from Bank of Am. Acct. Ending in 2653, 942 F.3d 655, 665 (5th Cir. 2019); Sac & Fox Nation v. Hanson, 47 F.3d 1061, 1063 (10th Cir. 1995).

68 *See* Gonzalez v. Thaler, 565 U.S. 134, 141 (2012); *see also* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

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Note from the Editor-in-Chief

We changed things up with this "all civil" issue of the *Department of Justice Journal of Federal Law and Practice* dealing with the Federal Tort Claims Act. As a career prosecutor, I admire my civil colleagues who are knowledgeable in so many different areas of law. I couldn't do the things that they do. The Federal Tort Claims Act, or "FTCA" to those in the know, has a myriad of nuances and complexities. Our articles, all written by subject-matter experts, give those in the field practical advice on litigating tort cases against the government. I especially like how our authors take a step-by-step approach to the phases of an FTCA trial. I'm sure you'll find something useful within these pages.

I'd like to acknowledge Sabrina Underwood and Veronica Finkelstein, who served as points of contact for this issue, set the topics, and recruited the authors. Special thanks go out to Associate Editor Kari Risher. With the departure of our managing editor, Kari stepped in to complete this issue. She did a great job. And finally, thanks to our new University of South Carolina law clerks who learned the ropes and did a lot of the heavy editorial work.

Thanks to you, loyal readers. Enjoy the fall weather. We'll catch you soon for our next issue.

Chris Fisanick
Columbia, South Carolina
October 2023