

**A GUIDE TO SUING THE DEPARTMENT OF  
VETERANS AFFAIRS  
FOR MEDICAL MALPRACTICE**

INFORMATION CONTAINED IN THE DOCUMENT IS NOT MEANT TO CONSTITUTE LEGAL  
ADVICE OR THE CREATION OF AN ATTORNEY/CLIENT RELATIONSHIP

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## **I. WHAT IS MEDICAL MALPRACTICE?**

As defined by the American Bar Association, Medical Malpractice is negligence committed by a professional health-care provider – a doctor, a nurse, a dentist, a technician, a hospital, or a nursing facility – whose performance of duties departs from a standard of practice of those with similar training and experience, resulting in harm to a patient.<sup>1</sup> Most medical malpractice actions are filed against doctors who have failed to use reasonable care to treat a patient.

The goal of a medical malpractice lawsuit is to pay you back if a doctor injures you. Malpractice lawsuits are time consuming and costly for doctors, even if the doctor is insured or wins the case. The fear of malpractice is meant to keep doctors from making medical mistakes and from acting carelessly. Malpractice puts the responsibility on doctors to act in a way that will not result in an injury to you. If doctors are forced to pay for the costs of their medical mistakes, they will be more careful to make sure that mistakes do not happen in the first place.<sup>2</sup> The same is true for doctors and staff working in hospitals, clinics, and facilities under the control of the Department of Veterans Affairs (VA).

## **II. IS IT POSSIBLE TO SUE THE VA FOR MEDICAL MALPRACTICE?**

Ordinarily the federal government is immune to lawsuits under the legal doctrine of sovereign immunity,<sup>3</sup> the principle that prohibits a lawsuit against the U.S. government (and its agencies such as the VA) unless the government consents to be sued. The Federal Tort Claims Act (FTCA) provides an exception to this doctrine. Veterans and their dependants can sue the VA

for medical malpractice by its employees as long as the lawsuit complies with the requirements set by the FTCA.

### **III. WHAT IS THE FEDERAL TORT CLAIMS ACT?**

#### **A. HISTORY AND PURPOSE OF THE ACT**

Since its enactment in 1946, the Federal Torts Claims Act (FTCA) has been the legal mechanism for compensating people who have suffered personal injury by the negligent or wrongful action of employees of the US government.<sup>4</sup> The FTCA permits an individual to bring a lawsuit directly against the federal government for certain VA-caused injury or death, when that individual has suffered damage or loss to real or personal property, personal injury, or death due to the negligent actions of a federal government employee or agency acting within the scope of employment.<sup>5</sup>

#### **B. REQUIREMENTS FOR A CLAIM UNDER THE ACT**

There are several requirements that must be met for a medical malpractice claim against the VA to be successful. These requirements must be pleaded adequately in the initial stages of the claim for federal courts to confer jurisdiction over the matter and to award damages. The FTCA specifically mandates that federal courts will have:

exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after 1 January 1945, for injury or loss of property, personal injury or death caused by negligent or wrongful act or omission of any employee of the government while acting within the scope of his 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.<sup>6</sup>

Therefore, any claim under the FTCA must be specifically for (1) money damages, resulting from (2) “injury or loss of property, or personal injury or death” due to the (3) “negligent or wrongful act or omission” by (4) “any employee of the government “who was (4) “acting within the scope of his office or employment” and (5) “under circumstances where the United States, if a private person, would be liable” to the claimant (6) “in accordance with the law of the place where the act or omission occurred.”

### C. SCOPE AND AUTHORITY OF THE ACT

Two factors distinguish the FTCA from other governmental claims acts. First, there is no dollar limitation on liability, and so multi-million dollar judgments have been obtained against the government.<sup>7</sup> Second, the FTCA provides an administrative and a judicial remedy. A claimant must first present a claim to the federal agency whose activities gave rise to the injuries and allow the agency an opportunity to settle the claim.<sup>8</sup> If the agency denies the claim, takes no action on the claim, or offers an amount that is unsatisfactory, the claimant may bring suit against the United States in a federal district court.<sup>9</sup>

For a claim to qualify under the FTCA, the claimant must specifically prove that the injury or death resulted from a VA employee’s “negligent or wrongful act or omissions . . . 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.”<sup>10</sup> This language is important for two reasons. First, it provides that the law of the state where the injury (malpractice) occurred determines whether the act or omission is negligent and, therefore, there

is variation among jurisdictions regarding liability from the same acts. Second, the language mandates that the culpable party be strictly defined as a federal employee acting within the scope of his employment when the injury occurred. Therefore, under the FTCA, claims are brought in federal district courts, without a jury trial, and not in state courts.<sup>11</sup> Claims, however, must allege negligence as defined by state law, further compounding the interplay between federal and state law in such claims.

Several questions are key to determining whether you have a valid claim against the VA for medical malpractice, and these are listed below.

#### **IV. WHERE YOU INJURED BY THE VA'S MEDICAL MALPRACTICE?**

What constitutes injury or negligence is determined under the law of the state where the alleged malpractice took place while the determination of whether the perpetrator of the injury was a VA employee is guided by federal law. At the very least, what you will need to show is that you were a victim of negligence by a VA employee and that your current injuries are directly or proximately caused by that negligence.

##### **A. ACTIONABLE CAUSES AND DAMAGES UNDER FTCA**

The following are brief examples of what kind of injuries have resulted in lawsuits and damages for claimants:

- Metzen v. U.S. (failure to place hypertensive patient on cholesterol diet was basis for disability in death by heart attack);<sup>12</sup>
- Newmann v. U.S. (vestibular damage from gantamycin – judgment of \$1,674,495);<sup>13</sup>

- Dugger v. U.S. (delay in treatment resulted in amputation of leg of disabled veteran - \$369,000 judgment);<sup>14</sup>
- Epling v. U.S. (11 month delay in diagnosing Hodgkin's disease reduces life expectancy from 87 to 78 - award of \$201,000);<sup>15</sup>
- King v. Dept. of Army (failure to note perforation of duodenum prior to closure of cholecystectomy resulted in death - \$350,000 judgment for widower and three minor children);<sup>16</sup>
- 1st America Bank, Mid-Michigan NA v. U.S., (U.S. government liable for failure to incubate brain damaged baby following precipitous birth);<sup>17</sup>
- Kronbach v. U.S. (failure to conduct MRI of cerebellum permitted tumor to grow out of dura);<sup>18</sup>
- Randall v. U.S. (failure to perform C-section where mother has observable venereal warts was proximate cause of genital warts in throat of newborn);<sup>19</sup>
- MacDonald v. U.S. (failure to diagnose and treat high cholesterol was proximate cause of heart attack);<sup>20</sup>
- Logan v. U.S. (failure to treat intractable keratosis in a timely manner);<sup>21</sup>
- Szimonisz v. U.S. (undiagnosed operable brain tumor caused suicide);<sup>22</sup>
- James v. U.S. (failure to timely diagnose lung cancer resulted in \$60,000 to widow for reduced life expectancy);<sup>23</sup>
- Wilson v. U.S. (failure to timely diagnose breast cancer resulted in award of \$179,000 to two adult children for causing death by cancer);<sup>24</sup>
- Whittle v. U.S. (death due to synergistic effect of two psychotropic drugs);<sup>25</sup>
- Zuchowicz v. U.S. (overdose of Danocrine caused primary pulmonary hypertension and death 34.5 months later - U.S. liable);<sup>26</sup>
- Gaddis v. U.S. (death from throat cancer nine months after incorrect diagnosis - \$1 million plus award to daughter of 69 year old veteran);<sup>27</sup>



- Lamarca v. U.S. (\$400,000 award for death due to patient's fall from bed four months earlier);<sup>28</sup>
- Colburn v. U.S. (failure to administer tocolytics to mother bearing 24-week twins was basis for wrongful death claim);<sup>29</sup>
- Bueno v. U.S. (\$1.1 million verdict for wrongful death by heart attack where 49-year-old decedent visited military hospitals 27 times in less than one year);<sup>30</sup>
- Ingraham v. Bonds (\$500,000 to mother for experiencing negligent delivery which resulted in brain damaged child);<sup>31</sup>
- Shaw v. U.S. (\$2,000,000 award for parent's emotional injury for child brain damaged at birth);<sup>32</sup>
- Wade v. U.S. (mother awarded \$500,000 for emotional distress over loss of stillborn twins).<sup>33</sup>
- Villaflor v. U.S. (failure to perform spinal tap on 16 month old child led to \$844,394 judgment in H flu meningitis case);<sup>34</sup>
- O'Connor v. U.S. (uneven circumcision in 3 year old resulted in judgment of \$15,000 for constriction when child reached age 16);<sup>35</sup>
- Garcia v. U.S. (U.S. held liable for nurse's failure to place call to physician notwithstanding plaintiff's extreme condition resulting in plaintiff's serious neurological injuries);<sup>36</sup>
- Stevenson v. U.S. (court awarded \$500,000 for complications arising from Prednisone therapy utilized in treating asthmatic without determining whether patient would respond to favored treatment regime and without adequate medical records on which to base decision);<sup>37</sup>
- Wieder v. U.S. (court found Army psychiatrist negligent in giving large prescription of amphetamines to psychiatric patient known to be suicidal and who had attempted suicide in the past);<sup>38</sup>

- King v. U.S. (planned c-section resulted in delivery 4-5 weeks early due to miscalculation of dates).<sup>39</sup>

## B. DAMAGES AVAILABLE UNDER FTCA

The following are the kinds of damages that you may be entitled to if your medical malpractice claim against the VA is successful:

- i. Noneconomic or General Damages. These are losses which naturally or necessarily result from the tortious conduct in personal injury cases. General damages may include pain and suffering, loss of enjoyment of life, inability to engage in usual activities, emotional distress, disfigurement, and mental anguish of survivors or disruption of family community in wrongful death cases. Certain states have imposed a cap on these damages.<sup>40</sup>
- ii. Economic or Special Damages. These are losses that are particular to the specific claimant and injury as a result of the tortious conduct. They may include lost wages and services, cost of medical care, and disability.
- iii. Future Damages. Those economic and noneconomic damages that are reasonably certain to flow from the injury after claim is settled. In many jurisdictions, certain elements of future damages, e.g., lost earnings and lost services are subject to reduction to present value.

## V. WHO CAUSED THE INJURY?

There are two issues involved here that must be resolved before a claim under the FTCA will be successful in proving medical malpractice by the VA. The claimant must first prove that the person who committed the negligent act (medical malpractice) was an employee of the federal government (whether military or civilian personnel). The claimant must then prove that the person was acting within the scope of his employment when committing the injury.<sup>41</sup> The U.S. Attorney General, who defends the VA in such claims in federal court, is required to certify both these facts before the claim can move forward.<sup>42</sup>

### A. MUST BE GOVERNMENT EMPLOYEE (OF THE VA)

Federal law determines who is an "employee" but scope of employment issues under the FTCA are decided by state law of the place where the tort occurred. The FTCA defines "employee of the government" to include "officers or employees of any federal agency . . . and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation."<sup>43</sup> A "federal agency" includes: "the executive departments and independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States but does not include any contractor with the United States."<sup>44</sup>

Many VA hospitals and facilities currently hire independent contractors to perform medical procedures and provide health care. These individuals are not considered government employees and so their tortious conduct will not give rise to a claim under the FTCA,<sup>45</sup> unless the

government had authority to control “detailed physical performance of contractor and exercised substantial supervision over contractor’s day to day activities.”<sup>46</sup> The government often denies liability and contends that the alleged negligence was not caused by an employee but an independent contractor or the employee of an independent contractor. This legal defense is very effective unless dealt with adequately, as VA medical centers and military medical centers frequently contract with private universities or hospitals for physicians.<sup>47</sup>

Certain relationships between a private business and the government may involve dual capacity. One individual may be “employed” with separate responsibilities as an independent contractor and as an employee. A second situation might involve differing degrees of government control over separate aspects of the same job. In each situation, the claims officer must isolate the portion of work out of which the claim arose. If an employer-employee relationship is present, the government may be held liable. If the injury was caused by an independent contractor or his employee, the government is not liable. The independent contractor, and the employee, can still be sued in their private capacities but not under the FTCA.

Army medical residents who are receiving training in a civilian hospital are federal employees while in the civilian hospital.<sup>48</sup> The question of whether their performance of duties in the civilian hospital is within the scope of their military employment will depend upon the specific facts of each situation, including the provisions of the contract involved and the provisions of the state law.<sup>49</sup>

When a medical malpractice case is filed, the claimant typically presumes that all health care professionals working at a Military Treatment Facility (MTF) are federal employees; however, such is often not the case with civilian medical personnel that are working at the MTF under a variety of programs or contracts with the United States. Civilian Health Care Providers (HCP) at a military treatment facilities (MTF) are normally not federal employees unless they are Department of the Defense (DOD) civilians.

The Military-Civilian Health Services Partnership Program was created by DOD in 1987. The most common such program allows MTFs to enter into formal agreements (not contracts) whereby HCPs are allowed to use government facilities to treat CHAMPUS eligible patients. Such HCPs are neither federal employees nor technically, a contract employee, but they are treated similar to independent contractors as the United States does not exercise day-to-day supervision and control over them.<sup>50</sup>

Primary Care for the Uniformed Services (PRIMUS) program clinics are private, freestanding medical facilities that provide health care to beneficiaries under contractual agreements. The HCPs who work at PRIMUS clinics are considered employees of an independent contractor, not federal employees.<sup>51</sup>

Civilian residents training in United States government MTFs pose the question as to who is responsible for their tortious conduct. The same question is raised when DOD HCPs are doing their residency in a civilian facility. Whether the borrowing facility will be liable is based on how the state interprets the borrowed or loaned servant doctrine, which purports to shift

vicarious liability from the employing or lending master of a negligent servant to the borrowing master.<sup>52</sup>

31 U.S.C. § 1342 provides that no officer or employee of the United States shall accept voluntary service for the United States or employ personal services in excess of that authorized by law, except in case of emergency involving the safety of human life or the protection of property.

There are a few statutory exceptions who are considered Federal employees for purposes of the FTCA: Red Cross Volunteers who meet certain criteria; Student volunteers, employed pursuant to 5 U.S.C. § 3111(b); Health care services volunteers, as well as family support programs, educational, housing referral, and other morale, welfare and recreational programs can all be considered federal employees for purposes of the FTCA and MCA.<sup>53</sup> To be deemed a federal employee, the volunteer must be properly accepted by the Federal agency and be performing within the scope of the accepted voluntary services at the time of the incident.

#### B. ACTING WITHIN THE SCOPE OF HIS OFFICE OR EMPLOYMENT

Scope of employment is defined as “the range of reasonable and foreseeable activities that an employee engages in while carrying out the employer’s business.”<sup>54</sup> Under the FTCA, the question of whether a federal employee is acting within the scope of employment at the time of an accident so as to make the United States liable in tort is one to be decided by applying the law of the place where the incident occurred.<sup>55</sup> Consequently, the outcome of cases with similar facts may vary considerably from jurisdiction to jurisdiction but the issue usually turns on: (1) control exercised by the employer over its employee, and (2) the degree to which the employer’s

purposes are being served at the time of the incident. Thus, it is also possible to bring a lawsuit against the VA for negligent hiring or entrustment of the negligent employee.

Therefore, any employee of the VA is an employee of the government and as long as such an employee harmed you during the course of an approved treatment, you will have a valid medical malpractice claim against the VA.

## **VI. WHERE DID THE INJURY TAKE PLACE?**

### **A. MUST HAVE BEEN UNDER THE CONTROL OF THE U.S. GOVERNMENT**

The injury could have occurred any place under the control of the U.S. government as long as operated under the VA, for the purposes of analyzing medical malpractice claims. This includes military hospitals, military bases, and VA facilities and clinics. Any medical malpractice that takes place in a foreign country, however, cannot be sued upon, even if it occurs on a U.S. military base.<sup>56</sup>

### **B. EXCEPTION: FOREIGN COUNTRY CLAIMS ARE BARRED**

The United States has not waived its immunity from suit for claims arising in a “foreign country.” The exception applies regardless of the citizenship of the claimant. The dependent of a U.S. service member in Germany must, therefore, resort to other claims statutes to redress government negligence.<sup>57</sup>

A “foreign country” is any land area outside of the control of the United States. The Supreme Court clarified the scope of the exception in 1993 when it applied the foreign country exception to bar the FTCA suit by the widow of a construction worker killed in Antarctica.<sup>58</sup> The Court

considered, but rejected, the argument that the exception did not apply to claims arising in Antarctica because there is no sovereign government there. Similar cases have denied FTCA recovery for incidents occurring in United Nations trusteeships,<sup>59</sup> air space over foreign countries,<sup>60</sup> or on the grounds of an American embassy abroad.<sup>61</sup> The foreign country exception does not, however, bar torts occurring on the high seas or in aircraft flying over the high seas.<sup>62</sup> The exception also does not apply when the negligence occurs in the United States but has its effect in a foreign country.<sup>63</sup>

## **VII. HOW LONG AGO DID THE INJURY TAKE PLACE?**

While a claim for medical malpractice against the VA is brought pursuant to state substantive law in federal court, the statute of limitations is not determined per each state's own law. Instead, the FTCA provides for specific guidelines on how long one can wait before bringing action against the VA and unfortunately, this is a relatively short period of time. Furthermore, there are two steps involved in filing a successful claim; therefore, claimants are well-advised to file as soon as possible.

### **A. STATUTE OF LIMITATIONS**

A claim for medical malpractice under the FTCA must not have accrued more than two years ago.<sup>64</sup> The federal statute of limitations for claims under FTCA provides two timelines: (1) an administrative claim must be filed within two years of the date the claim accrues first; and (2) suit must be filed within six months of an agency's final denial of the claim. What constitutes accrual at each stage and how it is measured is a source of controversy and variation.



i. ADMINISTRATIVE CLAIM WITH THE VA

The FTCA requires that a claimant file an administrative claim with the VA, and receive an explicit or constructive denial of that claim before presenting the FTCA claim in federal district court.<sup>65</sup> This filing must take place within “two years after such claim accrues.”<sup>66</sup> This is generally defined as from the time the injury took place.<sup>67</sup> However, in many medical malpractice suits, the claimant is either unaware of the existence of the injury or the causal relation between the VA treatment and the injury till after two years have passed. There is good news for such claimants as several federal judicial circuits apply a “discovery rule” when a patient is misinformed about the reason for an unfavorable medical outcome. In such cases, the accrual begins to start from the time when the claimant discovered, or by reasonable diligence should have discovered, the injury and its connection to the VA treatment;<sup>68</sup> in short, from the time the injury and its cause should have been discovered by a reasonable person. This can often be a tricky factual inquiry.

ii. FEDERAL COURT CLAIM AGAINST THE VA

After the claimant has filed an administrative claim with the VA, the claimant must wait at least six months for a response from the VA. If in the six month period, the VA denies the claim, does not respond to the administrative filing, or offers an unsatisfactory settlement, then the claimant can file an FTCA claim for medical malpractice within 6 months from the actual or constructive denial by the VA. Therefore, in essence, these are two separate filing requirements and both must be met within two years from when the claim first accrued.

### iii. TOLLING PROVISIONS

It may be possible in some cases to toll or stall the running of the statute of limitations.

Infancy<sup>69</sup> or incompetence<sup>70</sup> generally will not toll the statute. In both situations, a guardian or next friend can initiate the claim and file suit in federal court. However, if the government's negligence has caused the claimant's incompetence, then courts may find that the claim did not accrue, because the plaintiff lacked the mental capacity to understand the significance of the relevant facts.<sup>71</sup>

Continuous medical treatment from government sources may also toll accrual of a plaintiff's claim.<sup>72</sup> Additionally, courts have found that reassurances by government physicians that medical complications are "normal" or of no concern may delay the plaintiff's knowledge of his injury and postpone the running of the statute of limitations.<sup>73</sup> Fraudulent concealment is another exception to the FTCA statute of limitations. While the government has no duty to admit fault or responsibility for a claimant's injury, the agency may not conceal the facts needed by the plaintiff to determine whether a cause of action exists.<sup>74</sup>

## **VIII. ARE YOU ELIGIBLE TO FILE AN ACTION FOR MEDICAL MALPRACTICE AGAINST THE VA?**

### **A. PROPER CLAIMANTS**

Individuals, private corporations, governmental entities, aliens, and insurance companies may all assert claims against the government under the FTCA. The proper claimant for property loss or damage is either the owner of the property, an authorized agent, or a legal representative.<sup>75</sup> An

individual is generally a proper FTCA claimant if state tort law provides a cause of action in negligence.

## B. RIGHTS OF OTHER PARTIES TO FILE ON BEHALF OF INJURED CLAIMANTS

An authorized agent or a legal representative may also present a claim for personal injury on behalf of the injured claimant.<sup>76</sup> When a minor is the injured person, two causes of action result under the laws of most states. One claim belongs to the child and another to the parents for medical expenses and loss of services. State law determines who may present the claim on behalf of the child. Derivative claims are separate and must be filed as such.<sup>77</sup> The executor or administrator of the decedent's estate or any other person legally entitled to assert such a claim under the applicable state law may present a claim based upon death.<sup>78</sup> The amount allowed will, to the extent practicable, be apportioned among the beneficiaries as required by the applicable law.

## C. CIVILIAN EMPLOYEES

Civilian employees of the United States, on the other hand, receive workers' compensation coverage under the Federal Employees' Compensation Act (FECA).<sup>79</sup> FECA provides compensation where the federal employee is killed or injured "while in the performance of . . . duty" and bars FTCA claims based on the initial injury and any medical treatment stemming from the injury.<sup>80</sup> Litigation involving FECA usually turns on whether the employee was "in the performance of . . . duty" at the time of the injury, and this issue will be elaborated on in the final

memo. Nonetheless, it is important to note that any “substantial question” of FECA coverage must be resolved before an FTCA claim may be litigated.<sup>81</sup>

#### D. MILITARY CLAIMANTS

Unfortunately, under the FTCA, active duty military personnel are barred from suing the U.S. government for injuries sustained as a result of negligent conduct. A seminal Supreme Court decision has held that such injuries are “incident to service,” under the *Feres* Doctrine.<sup>82</sup> In determining if an injury was incident to service, courts have usually considered three factors:

(1) the function or activity being performed at the time of the injury; i.e., whether the plaintiff was engaged in some military-related activity, using a facility, taking advantage of a privilege, or enjoying a benefit available because of his military status; (2) the situs of the injury; i.e., whether the plaintiff was on or off the military installation when the injury occurred; and (3) the duty status of the plaintiff at the time of the injury; i.e., whether on duty or on pass, leave, or furlough.<sup>83</sup>

Various courts dismiss FTCA claims by military personnel, citing any one of these factors as controlling in the “incident to service” analysis.<sup>84</sup> The *Feres* doctrine also extends to National Guardsmen when engaged in guard activities,<sup>85</sup> service academy cadets,<sup>86</sup> Public Health Service officers,<sup>87</sup> foreign military members in the United States training with U.S. forces,<sup>88</sup> and service members on the Temporary Disability Retired List.<sup>89</sup> The bar has also been applied to ROTC cadets.<sup>90</sup>

#### E. DERIVATIVE CLAIMS FOR SPOUSES AND DEPENDENTS

*Feres* does not bar claims by spouses or dependents who are personally injured by government negligence, regardless of the situs of the injury,<sup>91</sup> but will generally bar any claim arising out of a

soldier's injuries that are incident to service even if he was injured in the same car accident as his spouse.<sup>92</sup> Therefore, dependents of soldiers may file an FTCA claim for medical malpractice against the VA if they suffer any injuries due to the negligence of a VA employee. One of the more confusing and controversial applications of the *Feres* bar involves injuries to an unborn fetus. The circuits have split on whether a claim is *Feres* barred as a derivative claim for treatment of the service member mother<sup>93</sup> or valid as an independent right of action for the child.<sup>94</sup>

#### F. RETIREES' CLAIMS

*Feres* does not bar the tort claims of military veterans if the tortious act occurred after the claimant left military duty.<sup>95</sup> The key issue is whether the alleged injury is separate and distinct from any acts before retirement/discharge.<sup>96</sup> This exception allows retired and discharged veterans receiving treatment in a military medical facility to claim under the FTCA for medical malpractice but only for those injuries sustained not incident to service.

### **IX. WHAT IS THE PROCESS FOR FILING A MEDICAL MALPRACTICE CLAIM AGAINST THE VA?**

As mentioned above, a claimant's first requirement is to submit an administrative claim with the "agency whose activities gave rise to the claim."<sup>97</sup> This is a requirement (condition precedent) to any claim for medical malpractice against the U.S. government, and not subject to waiver or avoidance.<sup>98</sup> Thus, the claimant must file an administrative claim at the regional VA office. The agency must be given at least six months to respond to the claim. This allows the agency to

settle the claim with the injured party and avoids unnecessary litigation. If the agency has neither settled nor finally denied the claim within six months, the claimant may “deem the claim denied” and file suit in district court.<sup>99</sup>

Once filed in the appropriate regional district court, the U.S. Attorney General will defend the claim on behalf of the United States. After the Attorney General has certified that the named defendant was a government employee functioning within the scope of his or her employment at the time of the tortious act, the U.S. is substituted as the named defendant.<sup>100</sup>

Standard Form 95 (SF95) is used to file the claim in district court and it must specify, in block 12d, a sum certain that the claimant is suing for.<sup>101</sup> FTCA provides remedy for monetary damages only, and any amount listed in SF95 is considered a limit on the amount being sought. The “sum certain” requirement dictates the claims approval and denial authority, which is based on the dollar amount of the claim. Plaintiffs may recover an amount greater than that demanded in the administrative claim only upon a showing of “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.”<sup>102</sup> Claimants may also be required to submit evidence and other information to substantiate their claims.<sup>103</sup> Failure to document or substantiate a claim may invalidate an otherwise valid claim.<sup>104</sup> If litigation goes forward in district court, then claimants are entitled to a bench trial since jury trials are not available under the FTCA.

## **X. WHAT ARE ATTORNEY'S FEES FOR SUCH A CLAIM?**

For most individuals, litigation with the U.S. government can be intimidating for a variety of reasons, especially due to the financial burden of paying the costs of litigation and attorney's fees. In response to these concerns, the FTCA provides a cap on how much money successful claimants would have to pay their attorneys. If the VA settles your claim in the first step before litigation commences in federal district court, then your attorney is entitled to twenty percent of the award. If the claim goes to litigation and you prevail in district court against the United States, then your attorney is entitled to twenty-five percent of the final award. It is also possible to get the U.S. government to cover the cost of the attorney's fees if bad faith on behalf of the VA can be established at trial.<sup>105</sup>

## XI. ENDNOTES

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<sup>1</sup> ABA Family Legal Guide: Medical Malpractice, <http://public.findlaw.com/abafg/fg-17-3b-1.html> (*last visited* November 29, 2010).

<sup>2</sup> *Id.*

<sup>3</sup> 28 U.S.C. § 1346.

<sup>4</sup> U.S. Dep't of Health & Human Servs., Federal Tort Claims Act, <http://bphc.hrsa.gov/ftca/> (*last visited* November 29, 2010).

<sup>5</sup> 28 U.S.C. §§ 1346(b), 2671-2680.

<sup>6</sup> U.S.C. § 1346(b) (1994).

<sup>7</sup> *See, e.g.*, Elliott v. U.S., 13 F.3d 1555 (11th Cir. 1994) (\$14 million); Reilly v. U.S., 665 F. Supp. 976 (D.R.I. 1987) (\$11 million); Hull by Hull v. U.S., 971 F.2d 1499 (10th Cir. 1992) (\$8.1 million); Murphy v. U.S., 833 F. Supp. 1199 (E.D. Va. 1993) (\$3.5 million); Phillips v. U.S., 801 F. Supp. 337 (D. Idaho 1992) (\$7.7 million).

<sup>8</sup> 28 U.S.C. § 2675 (1994).

<sup>9</sup> 28 U.S.C. § 2401(b) (1994); 28 C.F.R. § 14.9(b) (1996).

<sup>10</sup> 28 U.S.C. § 1346(b)(1).

<sup>11</sup> 28 U.S.C. § 2402 (1994).

<sup>12</sup> 19 F.3d 795 (2d Cir. 1994).

<sup>13</sup> 938 F.2d 1258 (11th Cir. 1991).

<sup>14</sup> 936 F. Supp. 662 (E.D. Mo. 1996).

<sup>15</sup> 958 F. Supp. 312 (W.D. Ky. 1997).

<sup>16</sup> Civ. # 95cv241 (E.D. Va., Sept. 23, 1995).

<sup>17</sup> 752 F. Supp 764 (E.D. Mich. 1990).

<sup>18</sup> Civ. # 91-820-Civ-J-16 (M.D. Fla., 21 July 1993).

<sup>19</sup> 859 F. Supp. 22 (D.D.C. 1994).

<sup>20</sup> 853 F. Supp. 1430 (M.D. Ga. 1994).

<sup>21</sup> 742 F. Supp. 402 (W.D.Ky. 1990).

<sup>22</sup> 537 F. Supp. 147 (D. Or. 1982).

<sup>23</sup> 483 F. Supp. 581 (N.D. Cal. 1980).



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- <sup>24</sup> 637 F. Supp. 669 (E.D. Va. 1986).
- <sup>25</sup> 669 F. Supp. 501 (D.D.C. 1987).
- <sup>26</sup> 1998WL136193 (2d Cir. 1998).
- <sup>27</sup> 7 F. Supp. 2d 709 (D.S.C. 1997).
- <sup>28</sup> 1998WL887164 (E.D.N.Y. 1998).
- <sup>29</sup> 45 F. Supp. 2d 787 (S.D. Col. 1998).
- <sup>30</sup> Civ. # SA-97-CA-1383-FB (W.D. Tex., 25 May 1999).
- <sup>31</sup> 808 F.2d 1075 (5<sup>th</sup> Cir. 1987).
- <sup>32</sup> 741 F.2d 1202 (9th Cir. 1984).
- <sup>33</sup> Civ. #89-00226 HMF (D. Haw., 2 May 1991).
- <sup>34</sup> Civ. # 89-00911 ACK (D. Haw., 20 151 Apr. 1993).
- <sup>35</sup> Civ. # Cv-91-4009-SMI(Sx) (C.D. Cal., 27 Jan. 1993).
- <sup>36</sup> 697 F. Supp. 1570 (D. Colo. 1988).
- <sup>37</sup> Civ. # 84-2021-S (D. Kan. 1985).
- <sup>38</sup> Civ. # 183-76, 184-130 (S.D. Ga., 19 Sept. 1985).
- <sup>39</sup> Civ. # 80-2009 (W.D. La., 3 Aug. 1983).
- <sup>40</sup> *See, e.g.*, Bryant v. U.S., 126 F. Supp.2d 1227 (Dist. Az. 2002); Sterns v. U.S., 923 F.2d 34 (4th Cir. 1991).
- <sup>41</sup> Scope of employment is defined as “the range of reasonable and foreseeable activities that an employee engaged in while carrying out the employer’s business.” 28 U.S.C. § 2671. In the case of a member of the armed forces, scope of employment means “acting in the line of duty.” *Id.*
- <sup>42</sup> Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995).
- <sup>43</sup> 28 U.S.C. § 2671.
- <sup>44</sup> 28 U.S.C. § 2671.
- <sup>45</sup> 28 U.S.C. § 2671.
- <sup>46</sup> Logue v. U.S., 412 U.S. 521 (1973); Vallier v. Jet Propulsion Lab., 120 F. Supp. 887 (C.D. Cal. 2000); Tisdale v. U.S., 62 F.3d 1367 (11th Cir. 1995); Hines v. U.S., 60 F.3d 1442 (9th Cir. 1995).
- <sup>47</sup> BARTON F. STICHMAN & RONALD B. ABRAMS, VETERANS BENEFITS MANUAL 250 (2010).
- <sup>48</sup> Ward v. Children’s Orthopedic Hosp., No. 90-1419D (W.D. Wash. 1991).
- <sup>49</sup> *See, e.g.*, Palmer v. Flaggman, et. al., 93-CV-163-E (N.D. Tex. 1993).
- <sup>50</sup> Linkous v. U.S., 142 F.3d 271 (5th Cir. 1998) (physician providing service for CHAMPUS was an independent contractor).
- <sup>51</sup> *See, e.g.*, Leone v. U.S., 910 F.2d 46 (2d Cir. 1991) (Aviation Medical Examiners are not government employees).

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<sup>52</sup> See, e.g., *Ezekiel v. Michel*, 66 F.3d 894 (7th Cir. 1995) (resident at VA hospital, which did not pay him, held to be federal employee); *Starnes v. U.S.*, 139 F.3d 271 (5th Cir. 1998) (USAF resident was “borrowed servant” at private hospital).

<sup>53</sup> 10 U.S.C. § 1588.

<sup>54</sup> BARTON F. STICHMAN & RONALD B. ABRAMS, *VETERANS BENEFITS MANUAL* 250 (2010).

<sup>55</sup> 28 U.S.C. § 1346 (b); *Williams v. U.S.*, 350 U.S. 857 (1955); see also *Haddon v. U.S.*, 68 F.3d 1420 (D.C. Cir. 1995).

<sup>56</sup> 28 U.S.C. § 2680(k).

<sup>57</sup> The Military Claims Act, 10 U.S.C. §2733, may be used in these situations.

<sup>58</sup> *Smith v. U.S.*, 507 U.S. 197 (1993).

<sup>59</sup> *Callas v. U.S.*, 253 F.2d 838 (2d Cir. 1958).

<sup>60</sup> *Pignataro v. U.S.*, 172 F. Supp. 151 (E.D.N.Y. 1959).

<sup>61</sup> *Meredith v. U.S.*, 330 F.2d 9 (9th Cir. 1964).

<sup>62</sup> *Blumenthal v. U.S.*, 306 F.2d 16 (3d Cir. 1962).

<sup>63</sup> *Leaf v. U.S.*, 588 F.2d 733 (9th Cir. 1978); *In re Paris Air Crash*, 399 F. Supp. 732 (C.D. Calif. 1975).

<sup>64</sup> 28 U.S.C. § 2401(b).

<sup>65</sup> 28 U.S.C. § 2675(a); 38 C.F.R. § 14.600-605 (2010).

<sup>66</sup> 28 U.S.C. § 2401(b).

<sup>67</sup> *U.S. v. Kubrick*, 444 U.S. 111 (1979).

<sup>68</sup> See, e.g., *Nemmers v. U.S.*, 795 F.2d 628 (7th Cir. 1986) (where child born three weeks late, with difficult labor requiring C-section, test depends not on individual plaintiff's personal knowledge and reactions, but rather on reactions of objective reasonable man); *Stewart v. U.S.*, 713 F. Supp. 833 (E.D. Pa 1989) (claims for malpractice resulting in undescended testicle barred, but claim based on sterility resulting from undescended testicle allowed to continue because plaintiff not informed of this effect of undescended testicle); *Thompson v. U.S.*, 642 F. Supp. 762 (N.D. Ill. 1986) (SOL starts to run in survival action when surviving spouse receives autopsy report explaining cause of death); *Wehrman v. U.S.*, 648 F. Supp. 386 (D. Minn. 1986) (plaintiff treated by VA from 1962-1985, but filed claim in 1985—barred by lack of reasonable diligence in investigating legal remedies). See also *Smith v. American Red Cross*, 876 F. Supp. 64 (E.D. Pa. 1994) (accrual date is date HIV+ diagnosed, not when developed into AIDS as 95% of HIV patients develop AIDS).

<sup>69</sup> *Crawford v. U.S.*, 796 F.2d 924 (7th Cir. 1986); *Jastremski v. U.S.*, 737 F.2d 666 (7th Cir. 1984); *Leonhard v. U.S.*, 633 F.2d 599 (2d Cir. 1980).

<sup>70</sup> *Robbins v. U.S.*, 624 F.2d 971 (10th Cir. 1980); *Casias v. U.S.*, 532 F.2d 1339 (10th Cir. 1976).

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<sup>71</sup> *Washington v. U.S.*, 769 F.2d 1436 (9th Cir. 1985); *Clifford v. U.S.*, 738 F.2d 977 (8th Cir. 1984).

<sup>72</sup> *See Wehrman v. U.S.*, 830 F.2d 1480 (8th Cir. 1987) (doctrine applied even though different VA physicians failed to advise of surgical option over 22 year period); *McDonald v. U.S.*, 843 F.2d 247 (6th Cir. 1988) (surgeon's post-op assurances that healing may take 3-5 years tolled statute); *Tolliver v. U.S.*, 831 F. Supp. 558 (S.D. W.Va. 1993) (continuous treatment doctrine applied where original diagnosis reversed and treatment continued); *Santana v. U.S.*, 693 F. Supp. 1309 (D.P.R. 1988) (SOL tolled until last date of treatment of foot); *Moreno v. U.S.*, Civ. #86-0555 (D. Haw. 1987) (brain damaged at birth in 1977--claim filed in 1983--child still under Army care--continuing treatment doctrine applied); *Otto v. NIH*, 815 F.2d 985 (4th Cir. 1987) (injury occurred after all treatment options offered fail—continuous treatment doctrine did not apply to succeeding Government physicians).

<sup>73</sup> *Rosales v. U.S.*, 824 F.2d 799 (9th Cir. 1987); *Burgess v. U.S.*, 744 F.2d 771 (11th Cir. 1984).

<sup>74</sup> *Harrison v. U.S.*, 708 F.2d 1023 (5th Cir. 1983) (claim filed 10 years after medical malpractice was not barred by statute of limitations because the Air Force had actively concealed information and failed to provide the plaintiff with her medical records despite repeated requests).

<sup>75</sup> 28 C.F.R. § 14.3(a) (1996).

<sup>76</sup> 28 C.F.R. § 14.3(b) (1996).

<sup>77</sup> *Hunter v. U.S.*, 417 F. Supp. 272 (N.D. Cal. 1976); *Green v. U.S.*, 385 F. Supp. 641 (S.D. Cal. 1974); *Collazo v. U.S.*, 372 F. Supp. 61 (D. P.R. 1973).

<sup>78</sup> 28 C.F.R. § 14.3(c) (1996).

<sup>79</sup> 5 U.S.C. §§ 8101-8151 (1994).

<sup>80</sup> *Lance v. U.S.*, 70 F.3d 1093 (9th Cir. 1995).

<sup>81</sup> *Figueroa v. U.S.*, 7 F.3d 1405 (9th Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994); *Tarver v. U.S.*, 25 F.3d 900 (10th Cir. 1994); *Reep v. U.S.*, 557 F.2d 204 (9th Cir. 1977); *Joyce v. U.S.*, 474 F.2d 215 (3d Cir. 1973).

<sup>82</sup> *Feres v. U.S.*, 340 U.S. 135 (1950).

<sup>83</sup> *See, e.g., Thompson v. U.S.*, 8 F.3d 30 (9th Cir. 1993), *cert. denied*, 510 U.S. 1911 (1994); *Coltrain v. U.S.*, 999 F.2d 542 (9th Cir. 1993); *Shaw v. U.S.*, 854 F.2d 360 (10th Cir. 1988); *Pierce v. U.S.*, 813 F.2d 349 (11th Cir. 1987); *Bon v. U.S.*, 802 F.2d 1092 (9th Cir. 1986); *Flowers v. U.S.*, 764 F.2d 759 (11th Cir. 1985); *Parker v. U.S.*, 611 F.2d 1007 (5th Cir. 1980); *Uptegrove v. U.S.*, 600 F.2d 1248 (9th Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980).

<sup>84</sup> *See Flowers v. U.S.*, 764 F.2d 759, 762-63 (11th Cir. 1985).

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- <sup>85</sup> Quintana v. U.S., 997 F.2d 711 (10th Cir. 1993); Duffy v. U.S., 966 F.2d 307 (7th Cir. 1992); Loughney v. U.S., 839 F.2d 186 (3d Cir. 1988); Henry v. Textron, Inc., 577 F.2d 1163 (4th Cir.), *cert. denied*, 439 U.S. 1047 (1978); Misko v. U.S., 453 F. Supp. 513 (D. D.C. 1978).
- <sup>86</sup> Miller v. U.S., 42 F.3d 297 (5th Cir. 1995); Collins v. U.S., 642 F.2d 217 (7th Cir. 1981).
- <sup>87</sup> Scheppan v. U.S., 810 F. 2d 461 (4th Cir. 1987).
- <sup>88</sup> Doberkow v. U.S., 581 F.2d 785 (9th Cir. 1978).
- <sup>89</sup> Ricks v. U.S., 842 F.2d 300 (11th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1988). *Contra* Rinelli v. U.S., 706 F. Supp. 190 (E.D. N.Y. 1988).
- <sup>90</sup> *See, e.g.*, Wake v. U.S., 89 F.3d 53 (2d Cir. 1996) (noting that the *Feres* bar applies to individuals on reserve status, as well as to cadets in U.S. military academies, the court found that a member of the U.S. Navy Reserve Officers Training Corps (NROTC) was barred by *Feres* from pursuing a claim for injuries suffered when returning from a flight physical examination).
- <sup>91</sup> Phillips v. U.S., 508 F. Supp. 544 (D.S.C 1981).
- <sup>92</sup> Grosinsky v. U.S., 947 F.2d 417 (9th Cir. 1991).
- <sup>93</sup> Scales v. U.S., 685 F.2d 970 (5th Cir. 1982).
- <sup>94</sup> Del Rio v. U.S., 833 F.2d 282 (11th Cir. 1987); Romero by Romero v. U.S., 954 F.2d 223 (4th Cir. 1992).
- <sup>95</sup> U.S. v. Brown, 348 US. 110 (1954).
- <sup>96</sup> U.S. v. Stanley, 483 U.S. 669 (1987) *cf.* M.M.H. v. U.S., 966 F.2d 285 (7th Cir. 1992).
- <sup>97</sup> 28 C.F.R. § 14.2(b)(1) (1996).
- <sup>98</sup> Claremont Aircraft Inc. v. U.S., 420 F.2d 896 (9th Cir. 1970); Childers v. U.S., 442 F.2d 1299 (5th Cir. 1971).
- <sup>99</sup> 28 U.S.C. § 2675(a).
- <sup>100</sup> 28 U.S.C. § 2679(d)(1); *see also* Juide v. City of Ann Arbor, 839 F. Supp. 497 (E.D. Mich. 1993).
- <sup>101</sup> Suarez v. U.S., 22 F.3d 1064 (11th Cir. 1994) (“unliquidated” in damages block of SF95 does not satisfy sum certain requirement); Bradley v. U.S. by Veterans Admin., 951 F.2d 268 (10th Cir. 1991) (demand “in excess of \$100,000” does not meet requirement for sum certain); Montoya v. U.S., 841 F.2d 102 (5th Cir. 1988); Burns v. U.S., 764 F.2d 722 (9th Cir. 1985); Allen v. U.S., 517 F.2d 1328 (6th Cir. 1975); Molinar v. U.S., 515 F.2d 246 (5th Cir. 1975); Melo v. U.S., 505 F.2d 1026 (8th Cir. 1974); Caton v. U.S., 495 F.2d 635 (9th Cir. 1974) Bialowas v. U.S., 443 F.2d 1047 (3d Cir. 1971).
- <sup>102</sup> 28 U.S.C. § 2675(b) (1994); *See also* Spivey v. U.S., 912 F.2d 80 (4th Cir. 1990) (claimant’s tardive dyskensia could not have been discovered before filing, therefore, upward adjustment permitted).
- <sup>103</sup> 28 C.F.R. § 14.4 (1996).

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<sup>104</sup> Cook v. U.S., 978 F.2d 164 (5th Cir. 1992) (to constitute a proper claim, sufficient information must be submitted to permit investigation).

<sup>105</sup> See Equal Access to Justice Act, 28 U.S.C. § 2412(b).