

The Administrative Claims Process Under the Federal Tort Claims Act

James C. Anagnos

Assistant Deputy Associate General Counsel

OGC General Law Division

Claims & Employment Law Branch



Waiver of Sovereign Immunity

- The United States of America cannot be sued unless it has waived its immunity to be sued.
- The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2401(b), 2671-80, is a waiver of sovereign immunity of tort immunity.
- Specifically, 28 U.S.C. § 1346(b) waives sovereign immunity for damage or loss of property, personal injury, or death that is caused by the negligent or wrongful act/omission of a federal employee acting within the scope of employment.
- Coverage determinations are made on a case-by-case basis.

Who are Federal Employees?

- 28 U.S.C. § 2671 provides that federal employees include:
 - Officers or employees of any federal agency.
 - 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.



Other Covered Individuals

- Coverage under the FTCA is also extended to individuals who are not employed by the federal government but are afforded FTCA coverage by a specific statute.
- On January 5, 2021, Congress passed H.R. 6535, an Act “to deem an urban Indian organization and employees thereof to be part of the Public Health Service for the purposes of certain claims for personal injury, and for other purposes.” Pub. L. 116-313 (2021).
- Independent contractors and volunteers are not covered.

Administrative Exhaustion

- 28 U.S.C. § 2675(a) requires the exhaustion of administrative remedies—presenting an administrative claim to the appropriate federal agency—prior to filing suit against the United States.
- An administrative claim must be presented within two years of the date of the claimant knew or should have know of the injury.
 - For example, in a retained surgical instrument claim, the clock starts ticking when the object is discovered, not the date of the surgery.

The Claims Process at HHS

- Typically, a claimant will present his or her administrative claim by submitting a Standard Form 95 (SF-95) to the HHS Claims Office, although the SF-95 is not mandatory.
- What is required: (1) name(s) of claimant(s); (2) a description of the property damage, personal injury, and/or death, including the date of the incident; and (3) a sum certain, i.e., a firm dollar figure. Money is the only remedy allowed under the FTCA.
- If an administrative claim or lawsuit is presented to your office, please date stamp and immediately email it to hhs-ftca-claims@hhs.gov and mail the documents to the HHS Claims Office at 330 C Street, S.W., Suite 2100, Washington, D.C., 20201.

When a Claim is Received

- When the Claims Office receives an administrative claim (SF-95 or other correspondence) and accompanying documents, the documents are date stamped and a unique claim number is assigned to the claim.
- Additional administrative claims filed for the same underlying incident—e.g., wrongful death claims filed by surviving beneficiaries such as the children of a decedent—are assigned separate claim numbers.
- Why? Each claimant has a separate cause of action if the claim goes into litigation.

Date Stamp What You Receive

- If a claimant send the SF 95 and/or other documentation to your office, please date stamp the documents before forwarding them to the HHS Claims Office.
- Why? An administrative claim is received when it is presented to “the agency” and some courts have broadly interpreted this language to include IHS or tribally-operated facilities.
- The date stamp is important if we wish to preserve a potential statute of limitations defense.



What Does OGC Need?

- Once an administrative claim is submitted to OGC, a claims paralegal sends a letter requesting “scoping” information from the service unit involved in the claim.
- This information includes: (1) any correspondence pertaining to the claim; (2) pertinent medical records; (3) practitioner narratives and their “moonlighting” declarations; (4) proof of employment and license/certification for the practitioners who provided care—e.g., W-2 forms, employment contracts, etc.; (5) a copy of the contract between the UIO and IHS for the year in question, and any insurance policies; and (6) for motor vehicle or premises liability incidents, a copy of any reports, statements, or video of the incident.
- OGC also sends a litigation hold letter advising of the requirement to preserve all documents and any other evidence related to the administrative claim until the matter is resolved.

When Does OGC Need the Information

- As soon as possible!
- Why? We have only six months to investigate a claim. Once six months elapse, a claimant can file suit against the United States and OGC's opportunity to settle a meritorious claim is foreclosed. Once suit is filed, the Department of Justice (i.e., U.S. Attorney's Office) handles the litigation.

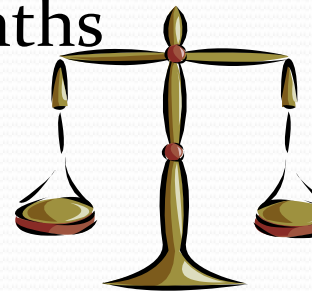


What Does OGC Do?

- In addition to the information obtained from the service unit, the OGC Claims Office requests documentation from the claimant, such as non-IHS medical records if applicable, lost wage documentation, and other proof of damages.
- The Claims Office then requests that Dr. Fowler have the matter reviewed by subject-matter expert(s) who opine on whether the standard of care was met.
- If the expert reviews are favorable, OGC denies the administrative claim. If not, OGC attorney will evaluate for settlement.

If the Claim is Denied...

- A claimant has two options if OGC denies the claim.
- A claimant can file suit in the United States District Court for the district that has jurisdiction over the matter. This is usually where the incident occurred. A claimant must file suit within six months of the date of the denial.
- In the alternative, within six months of the date of the denial, a claimant can request reconsideration of the denial. This postpones for an additional six months the requirement to file suit.



Premature Suits

- Suits filed in state court naming individual practitioners as defendants.
- The plaintiff (or the attorney) is unaware of the FTCA and the exhaustion requirement.
- The HHS Claims Office will request scoping information to confirm the employment status of the practitioner(s), and then ask the United States Attorney's Office to have the state court case removed to federal court and dismissed due to the plaintiff's failure to exhaust administrative remedies.

Questions or Comments?

