

By Nicholas W. Gebelt

The Complexities of Suing Uncle Sam

The FTCA and the Tucker Act offer examples of the procedural hurdles that plaintiffs face

Many an attorney will never have an occasion to sue the United States. However, for those who do, it is important to have an understanding of the many issues that may be involved. Two critical examples are the Federal Tort Claims Act (FTCA) and the Tucker Act.¹ Unlike a private defendant, Uncle Sam may be sued only with his permission, or, more prosaically, a statutory waiver of sovereign immunity.² In a tort suit the enabling statute is the FTCA, which states: “The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.”³ In addition, “the only relief available under the FTCA is money damages.”⁴

The statutory language seems simple enough—if your client was harmed by an agency of the United States you can sue the agency as you would a private tortfeasor, with the only restriction being the types of damages that are available. However, the FTCA has a few additional hurdles, and if you do get into court you will face a federal judge rather than a jury.⁵

It is also worth noting that your cause of action will not be based on the FTCA, which is merely a jurisdictional statute. Once the FTCA has been satisfied, the actual suit must be based on either state tort law or “federal law that is analogous to a duty of care recognized by state law.”⁶

Getting Started

The first step is to file an administrative claim with the agency responsible for the tort. It is a jurisdictional requirement that the claim be for a “sum certain”⁷ and the amount requested serve as a cap to damages.⁸ If the agency decides to grant your client’s claim, your story has reached a happy ending. Otherwise, if either the agency has issued a final decision that is unfavorable to your client or more than six months have passed since the filing of the claim, you may file suit against the United States.⁹ If you need some time before filing suit, or if you want another try at the administrative claim process, you can file a request for reconsideration pursuant to Volume 14, Section 14.9 of the Code of Federal Regulations, and you can even include an amendment to the original claim pursuant to Section 14.2.

The next hurdle, which is a challenging one, is overcoming the many exceptions to the FTCA. The exception that the United States most frequently invokes is discretionary function, which insulates the government from suit over torts “based upon...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.”¹⁰

Courts use a two-part test developed by the Supreme Court—the *Berkovitz* test—to determine whether the discretionary function exception is implicated.¹¹ First is the question of whether the alleged tortious act involved an element of judgment or choice. If it did not, there is no discretionary function exception. If it did, the next part of the test is to examine whether that judgment is of the kind that the discretionary function exception was designed to shield.¹²

One way to overcome the exception is to show that the tortious activity involved a violation of the U.S. Constitution, a federal statute, or an agency regulation, because such conduct cannot be discretionary.¹³ Unfortunately, while state law usually provides the underlying tort theory for an FTCA suit, violations of state law by themselves are insufficient to overcome the discretionary function exception.¹⁴ However, some state law violations are simultaneously federal law violations. For example, certain federal regulations¹⁵ and statutes¹⁶ obligate federal agencies to comply with state environmental laws. Therefore, if you foresee difficulty in overcoming the discretionary function exception, try to connect the tort to a violation of a federal law, either directly, or indirectly through a state law violation.

The Tucker Act

The Tucker Act delineates the jurisdiction of the U.S. Court of Federal Claims and waives sovereign immunity in disputes with the United States over contracts, the U.S. Constitution, and certain acts of Congress.¹⁷ However, like the FTCA, the Tucker Act serves only as a jurisdictional device. The relief sought must be based not on the Tucker Act itself but on some other legal theory.¹⁸

For example, an attorney may file a claim for breach of contract, and, as every first-year law student should know, there are three ways to establish standing in a breach of contract suit: privity of contract, promissory estoppel, and intended direct third party beneficiary status. However, in contract disputes with the United States a litigant can never seek recovery that is based on promissory estoppel.¹⁹ Therefore, if your client was not a party to the contract in dispute, you must establish the client’s status as an intended direct third party beneficiary. The key elements are intent and directness. *Knight v. United States* and *National Leased Housing Association v. United States* offer a good starting point for research.²⁰



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If a single set of facts leads you to file causes of action under the FTCA and the Tucker Act, it is very important that you file the Tucker Act action first. If you fail to do so, your filing of the FTCA action in federal district court will deprive the Court of Federal Claims of jurisdiction over the Tucker Act action.²¹ In some cases (e.g., contract disputes) the Court of Federal Claims has exclusive Tucker Act jurisdiction, so the federal district court will have no jurisdiction over the Tucker Act action either.²² It is also a mistake to file the FTCA and Tucker Act actions simultaneously.²³

These details are only a tiny sliver of sovereign immunity jurisprudence. For this reason, no lawyer should consider wrestling Uncle Sam without the knowledge of what it takes to make him cry uncle. ■

¹ Federal Tort Claims Act, 28 U.S.C. §§2671-2680; Tucker Act, 28 U.S.C. §§1491-1509.

² *United States v. Mitchell*, 445 U.S. 535, 538 (1980).

³ 28 U.S.C. §2674.

⁴ *Walker v. United States*, 116 F.R.D. 149, 152 (S.D. N.Y. 1987).

⁵ 28 U.S.C. §2402.

⁶ *Medina v. United States*, 259 F. 3d 220, 223 (4th Cir. 2001) (quoting *Goldstar (Panama) S.A. v. United States*, 967 F. 2d 965, 969 (4th Cir. 1992)).

⁷ *See, e.g., Burns v. United States*, 764 F. 2d 722, 724 (9th Cir. 1985).

⁸ 28 U.S.C. §2675(b). There are two exceptions; *see* 28 U.S.C. §2675(b).

⁹ Suits against individual agencies are not authorized under the FTCA. *Denney v. United States Postal Serv.*, 916 F. Supp. 1081, 1083 (D. Kan. 1996).

¹⁰ 28 U.S.C. §2680(a).

¹¹ *Berkovitz v. United States*, 486 U.S. 531, 534-36 (1988).

¹² *OSI, Inc. v. United States*, 285 F. 3d 947, 950 (11th Cir. 2002).

¹³ *Koch v. United States*, 814 F. Supp. 1221, 1228 (M.D. Pa. 1993).

¹⁴ *Medina v. United States*, 259 F. 3d 220, 225-26 (4th Cir. 2001).

¹⁵ *See, e.g.,* 32 C.F.R. §650.110.

¹⁶ *See, e.g.,* 42 U.S.C. §6961(a).

¹⁷ Some acts of Congress—for example the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§9601-9675—specify that jurisdiction lies with the federal district courts. *See* 42 U.S.C. §9613(b). The Court of Federal Claims has no jurisdiction over disputes involving this act of Congress. *See, e.g., American Lifestyle Homes, Inc. v. United States*, 17 Cl. Ct. 711, 715 (1989).

¹⁸ *See, e.g., Terran v. Secretary of Health & Human Servs.*, 195 F. 3d 1302, 1309 (Fed. Cir. 1999).

¹⁹ *Sam Gray Enters. v. United States*, 43 Fed. Cl. 596, 605 (1999).

²⁰ *Knight v. United States*, No. 02-5124, 2003 U.S. App. LEXIS 8381 (Fed. Cir. May 1, 2003). This unpublished case has a good discussion and citations to published cases. *National Leased Housing Ass'n v. United States*, 32 Fed. Cl. 454 (1994), *aff'd*, 105 F. 3d 1423 (Fed. Cir. 1997).

²¹ *See* 28 U.S.C. §1491(a)(1) and 28 U.S.C. §1500.

²² *See, e.g., A. E. Finley & Assocs., Inc. v. United States*, 898 F. 2d 1165 (6th Cir. 1990).

²³ *United States v. County of Cook*, 170 F. 3d 1084, 1090-91 (Fed. Cir. 1999).