



PROFESSIONAL LIABILITY ISSUES FOR DEEMED COMMUNITY HEALTH CENTERS AND MEDICAL STAFF

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June 2, 2017

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PRESENTATION OUTLINE

- FTCA Overview
- Limited Waiver of Sovereign Immunity
- Applicable Law
- Covered Employees
- Intentional Tort Exception, 28 U.S.C. § 2680(h), and Assault and Battery Coverage Under 42 U.S.C. § 233(e)
- Foreign Country Exception, 28 U.S.C. § 2680(k), Liability Insurance and Indemnification
- *Bivens* Constitutional Tort Claims, Immunity
- HHS Claims Processing
- Health Center's Role in FTCA Cases
- Other Legal Issues



WAIVER OF SOVEREIGN IMMUNITY

- The federal government is immune from suit unless immunity is waived.
- The Federal Tort Claims Act (FTCA), 28 U.S.C. §1346(b) waives sovereign immunity for:
 - Personal injury, loss of property or wrongful death
 - Caused by negligent or wrongful acts/omissions
 - Of Federal Employees
 - Acting within the scope of employment
- Waiver is “limited.”

FTCA COVERAGE UNDER FSHCAA

- Deemed federal entities, employees, and certain contractors are covered under the Federally Supported Health Centers Assistance Act (FSHCAA), 42 U.S.C. § 233(g)-(l), for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions.
- Also:
- Community health centers that receive grants through HRSA's Bureau of Primary Health Care.
- Deemed federal employees hired by health care entities that have FTCA coverage through other statutes.
- Free clinic providers, employees and contractors deemed by FSHCAA.
- Note: Volunteers are generally not covered though there are exceptions.



CONTRACTOR COVERAGE UNDER FSHCAA

- Qualified contractors qualify for FTCA coverage if work a minimum of 32.5 hours per week over the course of the contract.
- Contractors are exempt from 32.5 hours per week: family practice, internal medicine, pediatrics or ob/gyn providers.
- Contractors need a direct contract with the health center and direct payment, e.g., not payment to a corporation.
- 42 U.S.C. § 233(g)(5).



TYPES OF CLAIMS COVERED

- The FTCA is the exclusive remedy for claims arising from medical, surgical, dental, or related functions performed by PHS employees while acting within the scope of employment.
- Related functions may include those that occur while providing medical, surgical, or dental care, but may not include strictly administrative functions.
- For FTCA coverage to apply, the incident alleged must have occurred:
 - At and approved delivery site;
 - Within scope of services as set forth in the grant; and
 - While the provider was not caring for patient while moonlighting.



WHAT LAW APPLIES?

Substantive Issues:

- Apply the “law of the place” (state law) where the negligent/wrongful conduct occurred, e.g., provider’s standard of care, essential elements to prove a medical malpractice case, or comparative negligence.

Procedural Issues:

- Usually apply federal law, e.g., FTCA’s administrative exhaustion requirement, two-year statute of limitations. State law procedures may also apply, e.g., a plaintiff may need a certificate of merit from an expert.

FTCA COVERAGE FOR ASSAULT AND BATTERY

- Assault and Battery Exception
- Such claims are generally barred from FTCA coverage under 28 U.S.C. § 2680(h), **BUT**
 - Under the Public Health Service Act, 42 USC § 233(e), FTCA coverage extends to all PHS providers, including “deemed” providers covered by FSHCAA for assault and battery claims arising within the course of providing medical, surgical, dental or related functions.



FTCA COVERAGE FOR ASSAULT AND BATTERY

- **Examples:**
 - **1. Patient gives consent for surgery on right leg, but doctor mistakenly performs surgery on left. FTCA Coverage.**
 - **2. Patient is sexually assaulted during a dental examination. The dentist would not have FTCA coverage, though the facility may be covered for a claim of negligent hiring, credentialing, or supervision.**

FOREIGN COUNTY EXCEPTION

- The FTCA does not apply to injuries arising abroad and the location of the allegedly negligent act or omission is relevant because the “law of the place” under §1346(b) must be the law of a U.S. state or territory, or D.C.
- HOWEVER, 42 U.S.C. § 233(f) authorizes the Secretary to provide liability coverage to PHS employees working abroad and performing duties within the scope of employment.



BIVENS CONSTITUTIONAL LAW CLAIMS

- *Bivens v. Six Unknown Named Agents of Fed'l Bureau of Narcotics*, 403 U.S. 388 (1971) held that a federal employee could be sued in an individual capacity for alleged constitutional law violations.
- HOWEVER, a plaintiff may be unable to pursue a *Bivens* claim if Congress has provided an equally effective alternative remedy; or special factors counsel hesitation in recognizing a *Bivens* remedy.
- For example, PHS Act, 42 U.S.C. § 233(a), is a Congressionally-enacted alternative remedy. PHS providers have absolute immunity from *Bivens* suits for covered activities. *Castaneda v. United States*, 130 S. Ct. 1845 (2010).

ADMINISTRATIVE EXHAUSTION REQUIREMENT

- A claimant must:
 - File within 2 years of the accrual date; equitable tolling does apply. This issue was decided by the Supreme Court in *June v. United States* and *Wong v. United States*;
 - File a tort claim with HHS before filing an FTCA suit;
 - Request a sum certain; and
 - Wait 6 months after filing a claim before filing suit.
- If a claim is denied, a claimant may either file suit in federal court, or a request for reconsideration. Either must be filed within six months of the date of the denial.
- Failure to meet the above requirements is a defense to a subsequent lawsuit.



PROCESSING OF FTCA CLAIMS

Step 1: Receipt of a Tort Claim

- Tort Claim is “filed” when a valid claim is received by the Claims Office.
- A claim number is assigned.
- Note: Notices of Intent, Complaints filed in state court, and SF-95s/tort claims received by the health centers should be promptly forwarded to HHS.



PROCESSING OF FTCA CLAIMS

Step 2: Acknowledgment Letter

- The HHS OGC Claims Office sends an acknowledgement of receipt of the claim to Claimant providing the date the claim was received by the Agency and seeks additional information.
- The letter also explains that if the Agency fails to make a determination within 6 months, Claimant may deem the claim denied and file suit in U.S. District Court. This 6 month timeframe is what makes it so important to obtain complete scoping information in a timely manner.



PROCESSING OF FTCA CLAIMS

Step 3: Health Center Contacted

- HHS OGC Claims Office paralegals contact health centers when tort claims are filed and request copies of relevant documents:
 - Deeming/grant application, deeming and renewal letters, Notices of Grant Award for more recent CY's;
 - W-2s (or 1099s) or contracts for providers;
 - Practitioner Narrative(s);
 - 3 copies of medical records, wrap around insurance coverage; and
 - A declaration from provider that he or she was not moonlighting.



PROCESSING OF FTCA CLAIMS

Step 4: Litigation Hold Letters

- Sent when we first reasonably anticipate litigation.
- Includes suggested letter health center may send to its employees.

PROCESSING OF FTCA CLAIMS

Step 5: Attorney Review

- Once the Claims Office has compiled a tort file, it is assigned to an OGC attorney for a review of clinical and legal issues, and a recommendation for the claim to be denied or settled.
- Analysis and recommendation is privileged.

HEALTH CENTER'S ROLE IN FTCA CASES

- **Provides Records:** The health center provides scoping documents and other records and materials needed during the claim and litigation process, provides contact information for providers, and assists with discovery responses for litigation.
- **Obtains Status Updates:** The health center risk manager may contact the OGC paralegal for a general status update on the claim.
- **Works with AUSAs:** In FTCA litigation in federal court, Assistant U.S. Attorneys from DoJ are trial counsel for all federal agencies, including HHS. Their client, however, is the United States itself, not HHS or any other federal agency or the health center. DoJ trial counsel normally consults only HHS counsel on whether to settle, but often advises the health center provider of the decision as a courtesy. The health centers work with AUSAs on discovery.
- **Witnesses:** Federal agency employees, or deemed federal employees, may be called as witnesses in FTCA cases, but are not considered to be DoJ's clients.



OTHER LEGAL ISSUES

- HHS OGC cannot provide legal advice regarding National Practitioner Data Bank (NPDB), HHS Medical Claims Review Panel (MCRP), provider credentialing or state licensing board issues.
- Any requests for assistance with these issues must be referred to Michael Chellis with the HRSA Risk Management Office: mchellis@hrsa.gov.
- E-Mail address for litigation, subpoenas, claim forms that are served on a health center and/or practitioner: hhs-ftca-claims@hhs.gov.



OTHER LEGAL ISSUES

- **General Advice on issues unrelated to existing FTCA cases or claims, e.g., credentialing: Call BPHC helpline for general questions. 1-877-974-2742 Option #2 or BPHCHelpline@hrsa.gov**
- **Also refer to The FTCA Health Center Policy Manual found at: <http://bphc.hrsa.gov/policiesregulations/policies/ftcahcpolycym anual.html>**



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