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FEDERAL TORT PITFALL

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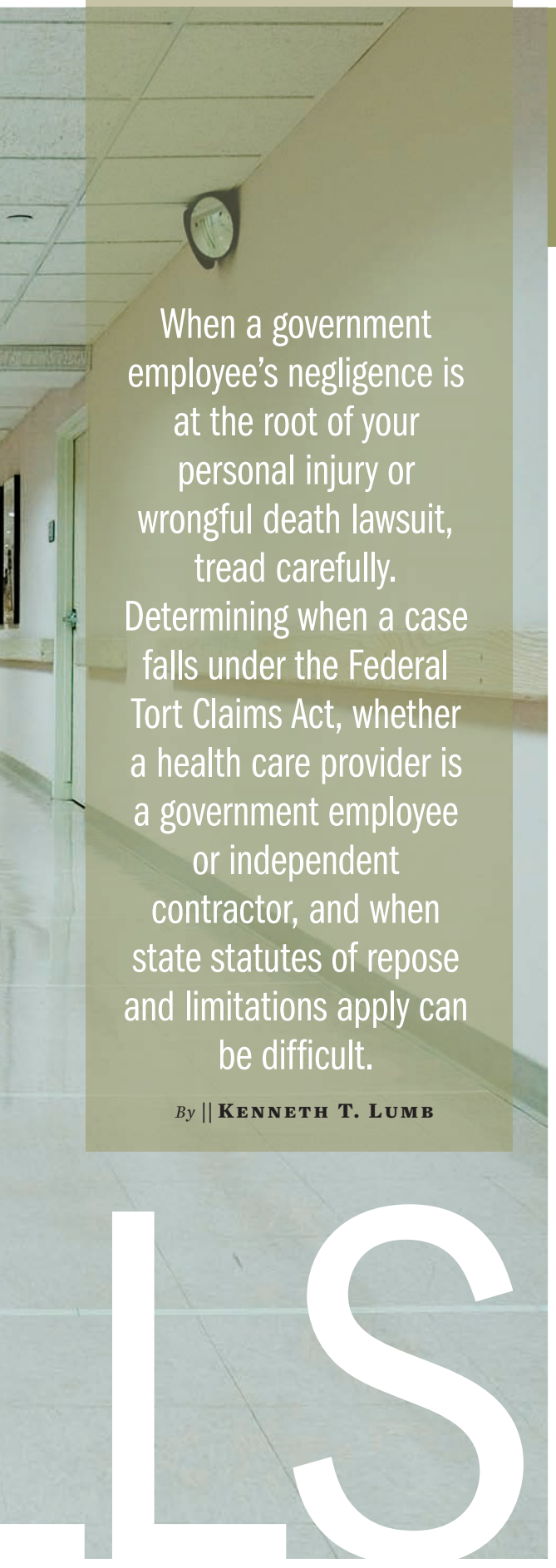

When a government employee's negligence is at the root of your personal injury or wrongful death lawsuit, tread carefully. Determining when a case falls under the Federal Tort Claims Act, whether a health care provider is a government employee or independent contractor, and when state statutes of repose and limitations apply can be difficult.

By || **Kenneth T. Lumb**

Representing injured servicemembers, veterans, and their families can be gratifying. Every trial lawyer should be familiar with the Federal Tort Claims Act (FTCA), but it presents many potential pitfalls that you need to be aware of if you take one of these cases.

In any type of case—particularly in medical negligence cases—FTCA-related hurdles may arise. So even a lawyer who never accepts an FTCA case must have at least a rudimentary knowledge of the statute and be prepared to deal with issues involving government employee status and conflicting filing deadlines.[1]

The FTCA is a limited waiver of sovereign immunity that provides a cause of action for death or injury caused by the negligence of a U.S. employee acting within the course and scope of that employment.[2] The FTCA offers the only available remedy for people killed or injured by a government employee's negligence, but the individual employees are personally immune from liability. The only appropriate defendant is the United States.[3]

Sometimes, the determination that someone is a government employee is straightforward. Active-duty military health care providers at military treatment facilities (MTFs) and uniformed letter carriers driving U.S. Postal Service vehicles are obvious. But what about the doctor in civilian clothes at an MTF or at a Veterans Administration (VA) hospital? Many of them are civilian employees, but others operate under government contracts. The United States contracts with a wide range of people and entities to provide services to the government and citizens. With the exception of relationships created by a "personal services" contract, contractors are *not* federal government employees, and the United States is not vicariously liable for their negligence. The federal government normally must obtain its employees by direct hire using competitive appointment procedures required by civil service laws. A personal services contract is characterized by the explicit creation of an employer-employee relationship. Because obtaining personal services via a contract circumvents civil service laws, the government can use the procedure only when specifically authorized by Congress.[4] Thus, a minority of "contractors" are employees by definition. Most contractor situations, however, involve documents that the government will claim create an independent contractor relationship.

Independent Contractors

A lawyer handling an FTCA case must determine whether independent contractors are involved before any state statute of limitations or repose period expires. But the government's assertion that a tortfeasor is an independent contractor is only the beginning of the inquiry. When faced with this claim, add the alleged contractor and his or her employer as individual defendants. You may wish to contest the government's claim even when a state cause of action is available, or you may be forced to contest the government's characterization when the state statute of limitations has run.

For the United States to escape liability for a contractor's negligence, it must show that the relevant contractual documents created

an independent contractor relationship and that both sides complied with those documents and agency law. The first step is to gather all the documents relevant to the contract's creation to confirm that they create an independent contractor relationship. Sometimes they fall short. Even if an independent contractor relationship exists, however, a contractor can be deemed an employee of the United States if the latter retained or exercised sufficient control over the contractor's daily activities.[5]

In *Logue v. United States*, the U.S. Supreme Court held that when the relationship between a contractor and the government is fixed by contract, the distinction between an employee and an independent contractor depends on the government's right to control the contractor's daily activities.[6]

The Tenth Circuit has articulated a "strict control" or day-to-day control test that applies to all types of contractors, including physicians and other health care providers, to determine the control necessary to conclude that a contractor is a government employee. Under this test, the court will review

- the parties' intent
- whether the United States controls the end result or also controls the manner and method of reaching the result
- whether the person uses his or her own equipment or the government's equipment
- who provides liability insurance
- who pays Social Security taxes
- whether federal regulations prevent federal employees from performing the tasks at issue
- whether the person has the authority to subcontract to others.[7]

There is some uncertainty whether the strict control test is always appropriate. The Seventh Circuit, for instance, has held that the strict control test does not apply to physicians, and it has applied a modified control test. Professionals such as doctors and lawyers cannot be "strictly controlled" by their employers, because their ethics codes require them to exercise independent judgment in their patients' or clients' best interests. Applying this test would render virtually every doctor an independent contractor. Many doctors become government employees as civilian W-2 employees or parties to personal services contracts without abrogating their professional responsibilities. The relevant inquiry is not whether the government has the right to tell a surgeon where to make an incision but rather whether other traditional measures of control exist.[8]

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Although the outcome is fact specific, courts often have held that physicians in private practice and those contracted to provide services to government facilities are independent contractors.[9] Whether a court uses the strict control test or some version of the modified control test is generally not determinative. In *Lilly v. Fieldstone*, for example, the Tenth Circuit declined to adopt the modified control test but ruled that a physician must have discretion to care for a patient and may not surrender control over certain medical details. Any control test is subject to a doctor's ethical obligation, and the relevant inquiry is "whether other evidence manifests an intent to make the professional an employee subject to other forms of control which are permissible."[10]

When the government argues that a negligent doctor was an independent contractor, most lawyers mistakenly allow the court to decide the issue on a summary judgment motion based only on the documents obtained from the local contracting office.[11] Relying solely on these documents is exactly what the government wants you to do, because it drafted those documents with the express purpose of forming an independent contractor relationship. So look beyond the contract file for other evidence of the right to control or for evidence of attitudes or practices at odds with the contractual description of the relationship.

In many cases, there is a disconnect between what the contract says should happen and what actually happens. Physicians who work with contractors may not know they are contractors or may think of them as coworkers. Take their depositions. If the alleged contractor is still in the case as an individual defendant, his or her attorney likely will help you by identifying promising witnesses.

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[1,2,3] Council for Disability Awareness, 2013, viewed 12/17/2014
http://www.disabilitycanhappen.org/chances_disability/disability_stats.asp

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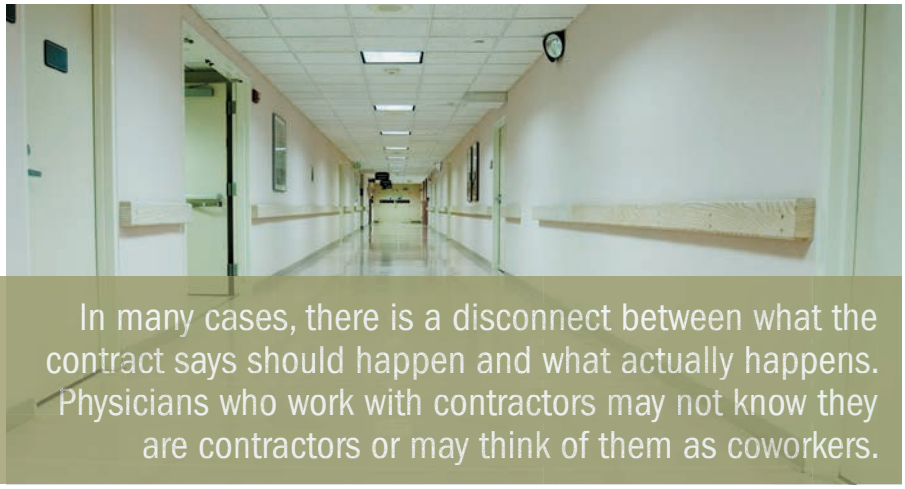
The medical records may also contain operative notes by government employees that say things such as: "I was present and supervised the entire operation." If the contractor was listed as an assistant in an operation controlled by a government employee, you have established the right to control.

Another good place to look for evidence is the physician's credentials file. In many VA facilities, the application for privileges at a medical facility includes descriptions for different types of employees or contractors, such as "part-time attending," "contractor," or "consultant." If the physician checked part-time attending instead of contractor, and the privileges were approved, you have strong evidence that the people who granted privileges to and worked with the contractor thought of and treated him or her as an employee.



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Next, push for an evidentiary hearing and call witnesses. A ruling on a summary judgment motion will be reviewed de novo on appeal and, historically, federal appellate courts generally have ruled in the government's favor, even if the plaintiff presented sufficient evidence to convince a trial judge that the contractor is an employee.[12] On the other hand, a ruling after an evidentiary hearing based on assessing the relative credibility of live witness testimony is reviewed for abuse of discretion, a more deferential standard. If you present testimony from the facility's chief of surgery that everyone who operates on a patient in the hospital has to report to him or her, and the trial court finds this credible, an appellate court will have a hard time reversing.

Statutes of Repose

In recent years, the government has persuaded some courts to apply state statutes of repose to FTCA lawsuits.[13] In those cases, the plaintiff is in the unenviable position of having his or her case dismissed for following the letter and the spirit of the FTCA.[14]

The FTCA requires a person to file a claim with the appropriate federal agency before commencing a lawsuit in federal court.[15] A lawsuit cannot be filed until the agency takes final action on the claim, thus tolling the time limit. If the agency fails to act within six months, however, the claimant can deem the claim denied and file suit.[16] If an agency does not deny a claim, the claimant can file suit at any time after six months from the claim filing.[17] The purpose of this administrative period is twofold: to ease court congestion by encouraging early and fair settlement of tort claims and to provide more fair and equitable treatment of private claimants when they deal with the government.[18]

The statute of limitations to file an FTCA action is two years from the date the "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."[19] In an FTCA case, state law governs the underlying cause of action, but federal law defines the statute of limitations period and determines when the cause of action accrues.[20] The FTCA does not contain a statute of repose, which would defeat the administrative claim process's purpose. Recently, the government has argued—with some success—that state statutes of repose are substantive law that apply to FTCA claims, even when the claimant complies with all federal requirements and time limits.[21]

A 2013 Seventh Circuit opinion illustrates the danger. In *Augutis v. United States,* a veteran filed a timely claim for medical negligence—a little less than two years—after his leg had to be amputated following botched foot surgery. The VA took more than two years to deny the claim and denied it in writing, telling Jerome Augutis he had six months to request reconsideration or file suit.[22] He timely filed his reconsideration request, which the VA denied seven months later. More than five years after his injury, but within six months of the agency's final action, Augutis filed suit in federal court. The district court dismissed the lawsuit based on the Illinois statute of repose for medical malpractice cases, which requires an action to be brought within four years of the alleged negligence.[23]

The Seventh Circuit affirmed, reasoning that Illinois courts treat the state's statute of repose as substantive, so it should apply to FTCA actions. The court relied heavily on 28 U.S.C. §1346(b)(1), which provides that the United States

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is liable in the same manner and to the same extent as a private individual in the same circumstances.

The problem with that argument is that in cases against private defendants, a plaintiff or claimant is not required to file an administrative claim and then prohibited from filing a lawsuit for six months or until the claim is denied. This administrative scheme is designed to give the parties the opportunity to investigate and resolve claims early and informally through an administrative process. Requiring the claimant to file suit within a state repose period clearly frustrates that scheme. In these instances, you would argue that the federal requirements preempt the state statute of repose, but in *Augutis*, the court rejected a preemption argument without fully examining it. It concluded that because it is *possible* to comply with both the FTCA's time limits and a state statute of repose, the former cannot preempt the latter.[24]

Fortunately, the Seventh Circuit is the only circuit to reject preemption after being squarely presented with the issue. The Supreme Court and most circuits have not ruled on the issue. But if you allow the administrative process to proceed beyond your state's repose period, you do so at your own peril. Instead, track all potentially applicable deadlines and file suit before the repose period expires, even if the agency's attorney assures you that he or she is close to getting settlement authority "from Washington."

Government Employees in Civilian Facilities

Another potential land mine for FTCA practitioners is a government employee hidden in a civilian facility. Under the Federally Supported Health Care Assistance Act, certain federally funded clinics, their employees, and certain contractors are "deemed" FTCA-covered employees and fall under the statute.[25] Because nothing tells a patient he or she is dealing with a "deemed" employee, the only way to determine which people or entities are covered by the FTCA is to search one of the U.S. Department of Health and Human Services (HHS) websites or submit a request under the Freedom of Information Act.[26]

A 2013 Seventh Circuit decision illustrates the peril. In *Arteaga v. United States*, the plaintiff consulted a lawyer regarding injuries her infant daughter sustained during birth in July 2004 at the Erie Family Health Center in Illinois.[27] That lawyer rejected the case in fall 2004. The plaintiff did not consult another lawyer for two years. The second lawyer accepted the case but withdrew in February 2008, informing the plaintiff that she had eight years from the date of injury to file a medical malpractice action under Illinois law. Another lawyer accepted the case and sued the health center in March 2010, almost six years after the injury but within the repose period. None of the plaintiff's attorneys or the defense attorney ever inquired whether "deemed" government employees were involved until April 2010.

The United States removed the lawsuit to federal court, and it was dismissed for failure to exhaust administrative remedies. When the claim was deemed denied, the plaintiff refiled suit, only to have it dismissed for failure to file the administrative claim within two years of accrual. The Seventh Circuit affirmed, noting that attorneys should "be aware of the existence of federally funded health centers that can be sued for malpractice only under the Federal Tort Claims Act."[28]

Several lessons can be learned from *Arteaga*. First, always search the HHS website, and memorialize your search. A search that fails to turn up a deemed government employee may allow you to make an equitable tolling argument, but the failure to search will not. Second, be aware of all potentially applicable statutes of limitations, and file suit before the earliest one expires. The FTCA's two-year limitations period is not tolled by disability or minority. When state limitations periods are longer than the FTCA's or are tolled under state law but not under the FTCA, it creates a trap.

You can avoid these problems if you file the initial state lawsuit within the two-year deadline to file an FTCA claim. If a lawsuit against a deemed entity is removed to federal court and dismissed for failure to file an administrative claim, the case will be remanded to state court and the statute of limitations will be deemed suspended during the pendency of the action.[29]

And if you decline to take a case, avoid misleading the potential client. Do not simply rattle off the usually applicable state statutes of limitations or repose periods. If you provide statute of limitations information in your rejection letter, to protect yourself and your clients, you should directly or indirectly inform them that, regardless of state deadlines, a shorter statute of limitations can apply if any defendant is deemed a federal employee.

MORE ON FEDERAL TORT CLAIMS

Visit the Web pages below for additional information.

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AAJ PRESS
Litigating Tort Cases, Roxanne Conlin and Gregory Cusimano, Eds.
www.justice.org/aajpress

While FTCA practice can be immensely rewarding, basic knowledge of several potential pitfalls, created by the unique interplay between federal and local law, is necessary to avoid sleepless nights.

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Notes

1. For more information on FTCA cases in federal court, *see* Laurie Higginbotham, *Bringing Your Med-Mal Case in Federal Court*, Trial 24 (Dec. 2013).
2. 28 U.S.C. §§1346(b), 2671, 2679(b) (2012).
3. *Id.*
4. 48 C.F.R. §37.104(a), (b) (2015).
5. *Logue v. U.S.*, 412 U.S. 521 (1973).
6. *Id.*
7. *Woodruff v. Covington*, 389 F.3d 1117, 1126 (10th Cir. 2004).
8. *See e.g. Quilico v. Kaplan*, 749 F.2d 480 (7th Cir. 1984).
9. *See e.g. Lilly v. Fieldstone*, 876 F.2d 857 (10th Cir. 1989); *see also Broussard v. U.S.*, 989 F.2d 171, 176 (5th Cir. 1993) (per curiam); *Bernie v. U.S.*, 712 F.2d 1271, 1273 (8th Cir. 1983); *Carrillo v. U.S.*, 5 F.3d 1302, 1304–05 (9th Cir. 1993).
10. *Lilly*, 876 F.2d at 859.
11. Every military installation or federal medical facility has an office responsible for contracting with outside people and entities. This is where the relevant contractual documents are stored.
12. *See e.g. Peacock v. U.S.*, 597 F.3d 654, 659–60 (5th Cir. 2010); *Palmer v. Flaggman*, 93 F.3d 196, 198–99 (5th Cir. 1996); *Carrillo*, 5 F.3d at 1304–05; *Tsosie v. U.S.*, 452 F.3d 1161, 1163–64 (10th Cir. 2006).
13. *See* Laurie Higginbotham, *Getting Past State Repose Laws in FTCA Cases*, Trial 14 (June 2014).
14. *See e.g. Augutis v. U.S.*, 732 F.3d 749 (7th Cir. 2013), *cert. denied*, 135 S. Ct. 53 (2014).
15. 28 U.S.C. §2675(a) (2012).
16. *Id.*
17. 28 U.S.C. §2401(b) (2012); *see Parker v. U.S.*, 935 F.2d 176, 177–78 (9th Cir. 1991).
18. *Tucker v. U.S. Postal Serv.*, 676 F.2d 954, 958 (3d Cir. 1982).
19. 28 U.S.C. §2401(b).
20. *See Kennedy v. U.S. Veterans Admin.*, 526 Fed. Appx. 450, 455–56 (6th Cir. 2013).
21. *See e.g. Augutis*, 732 F.3d 749; *Kennedy*, 526 Fed. Appx. at 455–56 (the statute of repose before it was not substantive, but a substantive statute may apply); *Bryant v. U.S.*, 2014 WL 1019301 at *2 (N.D. Ill. 2014).
22. *Augutis*, 732 F.3d at 751.
23. *Id.* at 752.
24. *Id.* at 754.
25. *See* 42 U.S.C. §233(g)(1)(A), (g)(4) (2012).
26. U.S. Dept. of Health & Human Servs., Health Resources & Servs. Admin., *Search Current Deemed Entities*, www.bphc.hrsa.gov/ftca/healthcenters/ftcahcdeemedentitysearch.html and *Find a Health Center*, http://findahealthcenter.hrsa.gov/search_HCC.aspx.
27. *Arteaga v. U.S.*, 711 F.3d 828 (7th Cir. 2013).
28. *Id.* at 834.
29. 42 U.S.C. §233(c).