The FTCA vs. Nevada's Statutes of Limitations (and "Repose"?)

by Brett Carter

So, here's a scenario for you. A civil worker, we'll call her Ms. Johnson, employed by the United States at the Mike O'Callaghan Federal Hospital (MOFH) is severely injured when she undergoes an on-base operative procedure by a U.S. military physician in June of 2005. Complying with the Federal Torts Claims Act's administrative process, Ms. Johnson's attorney submits her claims for medical malpractice via a Standard Form 95 to the Department of the Air Force on May 9, 2006, more than a year before the two-year FTCA limitations period. A month later, the Air Force acknowledges receipt of the SF 95. Included in the acknowledgement is a request for pertinent information, as well as the following:

> Under the Federal Tort Claims Act we have at least six months to conduct an administrative investigation of these claims from the time they are received. Note that your filing of the claims with this office *tolls the running of the statute of limitations until such time as the Air Force makes a final decision on the claim.* The authority to settle or deny medical malpractice claims rests with the Medical Law Section of the Air Force Tort Claims and Litigation Division in Arlington, VA.

During the next two and one-half years, counsel for Ms. Johnson and the Air Force communicate by phone and in writing on a regular basis. Further information and documentation (e.g., expert reports, ongoing medical records) are requested and supplemented due to treatment and expert assessments of prognosis and future damages. Eventually the parties reach an impasse. The Air Force denies Ms. Johnson's claim via letter in February 2009, specifically advising Ms. Johnson as follows:

> After several discussions on the settlement value of this claim, it is apparent that we have reached an impasse and thus, I must deny her claim.
>
> This is the final denial of Ms. Johnson's claim. I am required to inform you that if she is dissatisfied with this decision, *she may file suit in an appropriate United States District Court not later than six months after the date of mailing this letter.*

Ms. Johnson's attorney files the Complaint in the United States District Court on July 24, 2009, within six months of the "final denial" letter with the supporting expert affidavit. The United States files its Answer on October 8, 2009. More than a year in litigation, the defendant files a motion to dismiss for lack of jurisdiction. The United States argues that Ms. Johnson's claims should be extinguished because she failed to comply with Nevada's three year "statute of repose." The defense points out that more than three years accrued from the date of injury before the filing of her complaint.

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Who needs coffee when you find one of these motions on your desk at 8 a.m.? Notably, the motion followed a publication circulated to the U.S. Attorneys titled, "An Underutilized Defense: State Statutes of Repose as a Bar to FTCA." The United States' motion is silent as to the administrative process in which both parties participated, the tolling of the federal statute of limitations, and the issue of federal preemption.

Background: What the FTCA?

Serving as a limited waiver of sovereign immunity, the FTCA provides the exclusive remedy for recovery against the United States for common law torts committed by federal employees acting within the scope of their employment. The FTCA requires a plaintiff to follow certain procedures such that a plaintiff "seeking money damages may not file a tort claim for injury caused by the negligence, wrongful acts, omission of any government employee in the scope of his employment against the United States unless the claimant shall first have presented the claim to the appropriate Federal agency and his claim shall have been *finally denied* by the agency."[1] This requirement, known as "presentment," obligates a plaintiff to exhaust all administrative remedies prior to resorting to the courts for relief. *Id.*

In defining presentment, Congress requires that "a claim shall be deemed to have been presented when a federal agency receives from a claimant...an executed Standard Form 95 or other written notification of an incident."[2] A plaintiff tortiously injured by a government employee may not bring a lawsuit against the United States until the plaintiff has exhausted all available administrative remedies through this process.[3]

28 U.S.C.A. § 2401 is the federal statute of limitations for FTCA claims and reads, in pertinent part, as follows:

> 28 U.S.C.A. § 2401
>
> Time for commencing action against the United States.
>
> (b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such 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.

The statute is clear and unambiguous on its face. The claimant has two ways in which to comply with the federal statute of limitations: 1) file within two years, and 2) file within six months of "the date of mailing" of the final denial notice.

28 U.S.C.A. § 2675 regards the prerequisite of the federal agency disposition prior to suit being filed. The statute provides in part as follows:

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency *and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.* The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

Id. While 28 U.S.C.A. § 2401 provides the time limitations and tolling periods for commencing an action, 28 U.S.C.A. § 2675 gives the claimant the option of filing suit after the six months without a written denial. The claimant can file, but is not required to do so. § 2401 is clear that the claimant is granted "six months after the date of mailing, by certified or registered mail, of notice of final denial" without regard to whether she can earlier.

The courts are consistent in their interpretation of the interplay between 28 U.S.C.A. § 2401(b) and 28 U.S.C.A. § 2675(a). "The six month period does not begin to run until the agency has notified the claimant of a final denial in accordance with section 2401(b)." *Parker v. United States*, 935 F.2d 176, 177 (9th Cir. 1991) (citing to *Conn v. United States*, 867 F.2d 916, 920 (6th Cir. 1989). Noting that both provisions were amended in 1966, courts have determined it was not the Congressional intent to require a claimant to file suit simply because he may after six months from filing the SF 95, or else it would have added those words to section 2401(b). *See Pascale v. United States*, 998 F.2d 186 (3rd Cir. 1993), and *see also McCallister v. United States*, 925 F.2d 841 (5th Cir. 1991), and *Douglas v. United States*, 658 F.2d 445 (6th Cir. 1981).

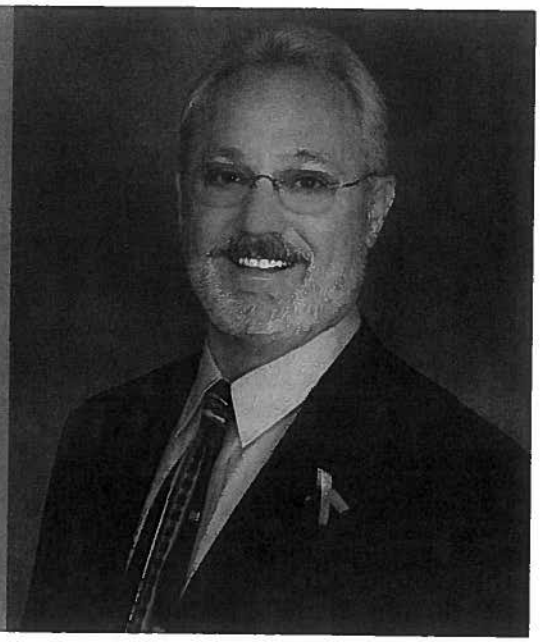
In our case, Ms. Johnson presented her claim to the Department of the Air Force in writing within two years after the cause of action accrued. The Air Force confirmed in writing that her SF 95 filing "tolls the running of the statute of limitations until such time as the Air Force makes a final decision on the claim. In its final denial letter, the Air Force stated, "she may file suit in an appropriate United States District Court not later than six months after the date of mailing this letter." Plaintiff filed suit before the six month expiration. The federal statute of limitations therefore never expired.

The FTCA Preempts NRS 41A.097

NRS 41A.097 sets forth the applicable periods of limitation for medical malpractice cases in Nevada:

2. Except as otherwise provided in subsection 3, an action for injury or death against a provider of health care may not be commenced more than 3 years after the date of injury or 1 year after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs first...

Notably, the title of the statute is "Limitation of actions; toll-



ing of limitations." Whether the three years is a statute of repose or limitations may be debatable, but 28 U.S.C.A. § 2401(b), the FTCA's two-year (and six month) statute of limitations, would appear to clearly preempt NRS 41A.097's one and three year period of limitations.

In cases involving healthcare providers employed by the United States, a state's limitations periods must be understood in the context of the Federal Tort Claims Act. The FTCA provides several unique features:

- First, the FTCA is the sole and exclusive remedy for bringing such an action. The plaintiff does not have the option of filing a case under any other authority – indeed, no case exists except by virtue of the subject matter jurisdiction granted by the FTCA.

- Secondly, all such actions must be brought only in the United States District Court. There is no option to file in another court, and there is no jurisdiction in any other court.

- Third, any such claim must first be initiated by the filing of an administrative claim with the government before suit can be filed. Suit is not permitted prior to the submission of the claim of administrative review, and can be filed only after the government has reviewed the claim administratively and issued a denial. These requirements are jurisdictional and unless they are complied with there is no subject matter jurisdiction for any suit that might be filed.

- Finally, if the claim is administratively denied, then and only then may suit be filed, within 6 months following such denial.

In *Independent Energy Producers Ass'n, Inc. v. California Public*, 157 P.U.R.4th 263, 36 F.3d 848 C.A.9 (Cal.) (1994), the court noted that the Supremacy Clause of Article VI of the Constitution provides Congress with the power to preempt state law. "Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69, 106 S.Ct. 1890, 1898, 90 L.Ed.2d 369 (1986) (internal citations omitted). Thus, preemption "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95, 103 S.Ct. 2890, 2899, 77 L.Ed.2d 490 (1983) (internal citations and quotations omitted).

"Preemption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation." *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 369, 106 S.Ct. at 1898-99. "State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367, 97 S.Ct. 2447, 2455, 53 L.Ed.2d 402 (1977) (cited to by *Oneida County, N.Y. v. Oneida Indian Nation of New York State* 470 U.S. 226, 105 S.Ct. 1245 (U.S.N.Y. 1985)).

The Ninth Circuit has unambiguously held that the FTCA's statute of limitations, 28 U.S.C. § 2401, preempts any "state period of limitation." *Poindexter v. U.S.*, 647 F.2d 34, 36 (9th Cir. 1981). Nevada has acknowledged that federal law may preempt state law in any of three ways: (1) a statute by its express terms preempts state law; (2) Congress indicates an intent to occupy an entire field of regulation; or (3) the state law actually conflicts with federal law, either (a) because compliance with both state and federal law is impossible, or (b) because the state law stands as an obstacle to congressional pur-

pose. *See National R.R. Passenger Corp. v. State of Nev., Dept.* 776 F.Supp. 528 (D.Nev. 1991) (citation omitted).

Here, the FTCA established a two-year limitations period with a tolling provision once the SF 95 was submitted, preempting any state limitations period, whether that be a statute of limitations or a statute of repose. For example, should State X have a one year statute of limitations and a two year statute of repose, the FTCA administrative mandate would be irreconcilable with the state statute. One would be unable to comply with the state's requirement to file suit to protect the state statute of repose while at the same time file the SF 95 with the two year federal statute of limitations and wait at least six months for a final denial before filing a complaint. The purpose and intent of the FTCA would be frustrated, requiring preemption.

It is important to point out that the SF 95 administrative filing is a "tolling" act, rather than the filing of an action (i.e., complaint) and then the statute of limitation expires, as is normally the situation. The limitations period is then extended six months after the federal agency mails the notice of final denial, in effect creating a six month statute of limitations.

The United States confirmed these two distinct time limitations in letters to Ms. Johnson's counsel. Upon receipt of the SF 95 within that two year period, the United States wrote a letter to advise her that they "have *at least* six months to conduct an administrative investigation" and that "your filing of the claims with this office *tolls* the running of the statute of limitations until such time as the Air Force makes a final decision on the claim." The United States' denial letter to Ms. Johnson confirmed that she had six months to file suit.

The federal government chose to create and mandate the FTCA administrative process with the intent of reviewing, evaluating and hopefully resolving claims in an effort to minimize or otherwise avoid altogether the negative aspects of the litigation process. The United States' motion insisted that the federal government bow to a state statute that, when applied, would frustrate that precise purpose to which the United States itself has legislated.

In support of its Motion, the United States cited to *Anderson v. United States*, 2010 WL 1346409 (D.Md. Mar. 30, 2010). In that case, the state statute of repose ran after the final denial letter was mailed but before the six month expiration. Mrs. Anderson argued equitable estoppel. The court could not conclude that the extremely high burden of establishing equitable estoppel against the United States had been met.

Interestingly, however, defendant failed to point out that the same court effectively overruled its own decision in *Anderson* just a few months later in *Zander v. United States*, 2011 WL 345884 (D.Md. Feb. 2, 2011). The court pointed out that the issue of federal preemption had not been raised in the *Anderson* case. The *Zander* court held that 1) the FTCA preempts a state's statute of repose, and 2) a federal statute of limitations is tolled until six months after the final denial letter. *Id.*

Justice was done when the Court denied the United State's motion to dismiss. In eight-page decision, the Court concluded that 28 U.S.C. § 2401(b) did preempt the limitations period of NRS 41A.097, while quoting *Poindexter*, 647 F.2d at 36,

> '...[A] court must look to state law for purpose of defining the actionable wrong for which the United States shall be liable, but to federal law for the limitations of time within which the action must be brought. (Citation omitted)' While a statute of repose may be different than a statute of limitations, it certainly is a 'limitation of time within which an action must be brought.'

The Court also determined that whether a state's statute of repose is a substantive right versus procedural is immaterial. Congress intended FTCA suits to proceed that were otherwise barred by a state's statute of limitations, even though a statute of limitations is substantive law under *Erie* principles.

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1. *Medina v. City of Philadelphia*, 219 Fed. Appx. 169,172,2007 WL 29447 (3rd Cir 2007) (emphasis added) (quoting 28 U.SC. § 2675(a)).
2. 28 C.F.R. § 14.2(a).
3. 28 U.S.C. § 2675(a).

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