May 2014
Chicago Lawyer®
Volume 37 Number 05 • chicagolawyermagazine.com

Don't wander into the minefield

Med-mal lawyers need to watch the clock in FTCA cases

MedMal Matters

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Aside from towns with large military installations or medical facilities, it is rare to find a lawyer with more than a passing familiarity with the Federal Tort Claims Act. But hidden dangers created by the interplay between state law and the FTCA and potential benefits available to certain defendants combine to require any medical-malpractice attorney to possess certain basic knowledge regarding the act.

The FTCA is a limited waiver of the sovereign immunity of the United States. The act provides a cause of action for injury or death caused by the negligence of employees of the U.S. The FTCA is the sole remedy available to people injured by government-employee negligence. The liable party is the U.S., and individual employees are personally immune from liability for actions taken within the scope and course of their employment with the government. "Employees" include the obvious: officers or civil service employees of any federal agency, members of the active component of the military and members of the National Guard while federalized, among others.

Government employees also include people and entities that are far from obvious. Under the Federally Supported Health Care Assistance Act, certain federally supported health centers, their employees and certain contractors are "deemed" employees of the Public Health Service and fall under FTCA coverage. For these "deemed" federal employees, a claim against the U.S. is the only remedy available. Though state substantive law generally governs liability and damages under the FTCA, the limitations period — two years to file a claim with the appropriate federal agency — is determined by federal law. Tolling for minority or disability does not apply. A recent decision by the 7th U.S. Circuit Court of Appeals illustrates the hidden dangers and the otherwise unexpected benefits inherent in this situation.

In *Arteaga v. United States*, 711 F. 3d 828 (7th Cir. 2013), the plaintiff consulted a lawyer regarding injuries sustained by her child during her birth in July 2004 at the Erie Family Health Center in Chicago. That lawyer rejected the case in the fall of 2004. In October 2006, the plaintiff consulted another lawyer who initially accepted the case but then withdrew in February 2008. That lawyer informed the plaintiff that she had eight years from the date of injury to file suit, the medical-negligence statute of limitations for a minor under Illinois law. The plaintiff eventually found a lawyer who filed suit in Cook County in March 2010.

According to the 7th Circuit opinion, not only did none of the lawyers who the plaintiff consulted discover that Erie was covered under FSHCAA, apparently neither did Erie's lawyer. In April 2010, an attorney from another firm told plaintiff's counsel that the case was in the wrong court, and the plaintiff finally filed a FTCA claim with the Department of Health and Human Services. The U.S. removed the suit, and the court dismissed it for failure to exhaust administrative remedies.

The plaintiff exhausted those remedies by filing a claim with HHS and then filing suit in U.S. District Court. The court then dismissed that action because the state court lawsuit and the administrative claim were filed after the FTCA's two-year limitations period has expired.

As the 7th Circuit pointed out in its opinion affirming the dismissal, the "peculiar" status of "deemed" health-care providers is no secret. The Public Health Service maintains a website that identifies all of the health centers receiving funds from HHS and that are thus "deemed" federal employees.

There are several ways that plaintiffs' medical-negligence lawyers can avoid this potential minefield. First, upon intake of a case, run a search to determine if any FTCA defendants are hiding in civilian sheep's clothing.

Second, diary every case for a two-year statute of limitations, whether or not any state tolling provisions apply. If you have any doubt whether a potential defendant may be a "deemed" employee, just file suit within two years. If a case against a "deemed" entity is removed from state court and dismissed for failure to file an FTCA claim, a subsequently filed claim will essentially relate back to the state court filing. 42 USC Section 233(c). Thus, a state court complaint filed within two years of the accrual of a plaintiff's claim will save a cause of action under the "deemed" employee scenario, even if the FTCA claim is filed after two years.

Third, when rejecting a case and discussing potential limitations periods relevant to minors or the disabled, explain that a two-year statute of limitations can apply if any defendant is deemed a federal employee, or simply explain that unknown circumstances can shorten or lengthen the statute of limitations so the client should seek the advice of another attorney immediately.

Defense attorneys, on the other hand, should also research whether their clients have received HHS funding and might be "deemed" employees. A lawsuit can potentially go on for months or years in state court before anyone figures out it belongs in federal court.

Imagine how pleased a defendant will be when presented with the timely news that the U.S. will be substituted as the defendant and the claim dismissed. Basic knowledge regarding the FTCA will allow medical-negligence attorneys to avoid its hidden dangers and take advantage of its benefits. ■

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