Recommendation 84-7

Administrative Settlement of Tort and Other Monetary Claims Against the Government

(Adopted December 7, 1984)

In the Federal Tort Claims Act and dozens of other statutes,[1] Congress has authorized agencies to provide compensation for losses occasioned by a variety of agency actions. The FTCA, the centerpiece of this array, essentially waives the government's sovereign immunity to damage actions arising out of the negligent or otherwise wrongful acts committed by Federal employees while acting within the scope of their employment. Previously Congress had been burdened by numerous private bills to redress government torts. The FTCA sought initially to shift to the courts primary responsibility for determining whether redress was warranted. In 1966 the FTCA was amended to transfer much of that load to agencies. At that time, Congress required claimants to present claims to the responsible agency as a prerequisite to suit and gave the agency a minimum of six months in which to act upon them. The agencies were also given an unprecedented degree of settlement autonomy. The FTCA requires that the exercise of this authority be "in accordance with regulations prescribed by the Attorney General," but does not subject it to detailed procedural mandates apart from the requirement that the Department of Justice approve large settlements.

This relatively inconspicuous administrative process has taken on considerable significance in dealings between agencies and individual claimants, and could gain even more if Congress acts to displace suits against individual Federal officials by an expansion of the government's liability under the FTCA.[2] Available information suggests the administrative process resolves a high proportion of claims worth paying at the same time as it exposes the unmeritorious character of many of the thousands of claims filed annually. In both ways, it effectively replaces litigation with a largely informal, relatively open, and potentially nonadversarial means of dispute resolution.

[1] "Meritorious claims" statutes allowing agencies to entertain some kinds of claims even where no fault can be shown, include the Military and Foreign Claims Acts and statutes covering certain actions of the Departments of Agriculture and Justice, NASA, the NRC, the Peace Corps, and the Postal Service. Other ancillary statutes, like the Suits in Admiralty Act, Public Vessels Act, Copyright Infringement Act, Trading with the Enemy Act, and Swine Flu Immunization Act, complement the FTCA, for instance by addressing claims likely to be exempt from that Act.

[2] See ACUS Recommendation 82-6, Federal Officials' Liability for Constitutional Violations.

Although the present system seems generally to be serving Congress' purposes, it has not been without difficulties. In particular, the extent to which administrative settlement should be taken as an autonomous dispute resolution process is unclear. In some agencies the claims officer approximates a neutral decisionmaker, objectively appraising something in the nature of an inchoate entitlement. Other agencies view their claims officers as adversaries of the claimant engaged in tactical maneuvers that are preludes to litigation or to bargaining for a financially advantageous settlement of sustainable claims.

The Conference, though not recommending any radical restructuring of the agency claims process, believes that this ambiguity has sometimes produced undesirable results. Inappropriately adversarial responses to technical deficiencies, restrictive policies on information disclosure in connection with pending claim, and less than fully fair and objective approaches to determining the merits and monetary value of a claim do not serve the purposes of the FTCA, nor do they enhance confidence in claims officers' determinations. Claimants, who may obtain a trial *de novo* before a Federal judge after a wait of only six months, are finding the judiciary to be increasingly sympathetic, perhaps in part because some of the judges doubt the fairness and efficiency of some of the agencies' claims handling. To further administrative effectiveness, the Conference recommends the following fine-tuning of the FTCA, of certain agency practices, and of the Department of Justice's regulations.

Recommendations

A. Agency Exercise of Settlement Authority

1. *Providing Guidance to Claimants*

(a) Agency claims officers, as part of their duties, should take reasonable steps to save a claimant who has come forward with a potentially deserving claim from innocently failing to perfect a valid statutory demand, committing technical error, or running afoul of a statute of limitations. Among other things, claims officers should promptly advise claimants of formal deficiencies so as to give claimants an opportunity to cure them. Further, in the case of deficiencies relating solely to the requirements of the Attorney General's or agency's regulations, as opposed to jurisdictional requirements of the FTCA itself, the agency should consider extending the claimant an opportunity to cure such deficiencies for a reasonable time beyond the ordinary limitations period.

(b) Each agency General Counsel's office should compile and publish in the CFR a list briefly describing statutes under which the agency is authorized to entertain monetary claims and the name and telephone number of the agency personnel in charge of each program. In appropriate circumstances, claims officers should make a copy of the list available to claimants.

2. Filing the Claim

(a) The Attorney General should amend his regulations to treat an FTCA administrative claim as still timely though received after expiration of the statute of limitations, provided that the claimant can demonstrate that he or she sent it by an ordinarily effective means of delivery before expiration of that period.

(b) Agencies should require claims officers to advise claimants that the absence of a sum certain for all categories of claims may preclude their consideration by both agency and court, and that, subject to timely amendment and the existing statutory exceptions, the amount of the administrative claim constitutes a ceiling on the damages that may later be sought in court.

3. *Substantiation of Claims*

Where exchanges with a claimant reveal an insufficiency of information submitted in support of the claim, agency claims officers should promptly and clearly advise the claimant whether the continued nonproduction of designated information will, in the officer's view, warrant dismissal of the claim as invalid because of incomplete documentation.

4. *Access to Information*

Agencies should endeavor, particularly when a claimant seeks access to his or her claim file or to other information relating to a pending claim, to promote a mutually free and open exchange of relevant information. Agencies should consider release even when applicable statutes would not require it if more extensive disclosure might advance settlement. Specifically, agency claims officers should not routinely regard the information they assemble in connection with an administrative tort claim as falling within the government's executive privilege for deliberative materials, or the attorney-client, expert witness, or qualified attorney work product privileges, and in appropriate circumstances claims officers should be prepared to disclose information falling within those privileges.

5. *Claims Decisions*

(a) Agencies should give a brief statement of the grounds for denial whenever an FTCA or other claim is rejected.

(b) An agency claims officer's ultimate goal should be a fair and objective assessment of the merits of a claim and of its monetary worth. In addition, the Department of Justice should not exercise its statutory approval authority over large administrative settlements in a manner that would tend to discourage claims officers from making serious efforts to reach a fair and objective settlement with a deserving claimant.

6. *Reconsideration*

(a) Claim denial letters should inform claimants that they may request the agency's reconsideration of its denial, and that such a request extends the six month waiting period before suit may be filed in federal district court.

(b) In cases where the claimant communicates with the claims officer following final denial, the officer should promptly indicate whether or not, in his or her view, the communication constitutes a request for reconsideration and state specifically the procedural implications of that determination.

B. Statutory Changes

1. Congress should conduct a comprehensive reexamination of the meritorious and other ancillary claims statutes in force to ensure that each is warranted and that, together, they form a coherent whole both on their own terms and in relation to the FTCA. Congress should systematically raise ceilings on all agency authority to settle claims where inflation has rendered obsolete the present levels.

2. Congress should amend 28 U.S.C. 2401(b) to provide that, where a claim has been filed with the wrong agency in a timely manner and transferred to the appropriate agency, the original date of filing will be used for determining timeliness. To help ensure that agencies have an adequate and predictable length of time to investigate and consider claims, Congress should provide that the six-month period given the agencies for that purpose not commence until the claim has been received by the appropriate agency.

3. Congress should further amend 28 U.S.C. 2401(b) to provide that, where an otherwise timely damage action against a person for whose tortious conduct Congress has made the

federal government exclusively liable is converted into a suit against the government under the FTCA and then dismissed for failure to file a prior administrative claim, the plaintiff shall have 60 days from the date of such dismissal or two years from the date the claim arose, whichever is later, in which to file such a prior claim.

Citations:

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