LITIGATING TOXIC AND ENVIRONMENTAL CASES AGAINST THE FEDERAL GOVERNMENT: Is it Okay With You if I Sue You?

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INTRODUCTORY COMMENTS

Litigating cases against the Federal Government is tricky under most circumstances. But litigating a toxic or environmental case is even more so than most. In any case against the Government there are stringent notice requirements, statute of limitations issues, and of course, the sovereign immunity defenses. A central issue in environmental litigation is the discretionary function doctrine.

The Federal Tort Claims Act[1] provides that under certain circumstances, private persons may make claims against the government if those claims were caused by the wrongful acts of its employees acting within the scope of their employment. It all sounds easy, but procedurally, this is very difficult litigation, and the US Attorneys who defend these claims know the law better than you do! But they are acting as defense lawyers, and even though they carry a lofty title, they are not above a certain level of chicanery. Always check the veracity of any contention made by the Government's attorney, just as you would in any litigation. They get promoted on the basis of wins, not losses.

[1] 28 USC § 1346 (b)(1) provides:

> "Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, 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, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

There are specific "carve outs," which exempt the Government from liability in those instances[2]. Those will not be dealt with in this paper, beyond this one mention. Counsel should be well advised to study the law very closely before undertaking representation. In this paper, I will touch on the notice issue briefly, but will concentrate upon the more central issues of sovereign immunity/FTCA/and what is a discretionary function, and how to circumvent this defense effectively.

NOTICE UNDER THE FTCA

To initiate a claim under the FTCA, the plaintiff must first present their claim to the appropriate federal agency. This administrative claim must be filed within two years of the incident giving rise to the claim. One pitfall is that each agency has its own regulations governing the filing of the notice of claim. However, there is a standard claim form, known as SF-95[3] that is adequate for properly filing any of these claims. By carefully filling out this form *completely and accurately*, a claimant will be meeting the notice requirements of the FTCA.

It is crucial that the form is correctly filled out. You must include all the required information and attachments and then send it to the appropriate person at the appropriate agency. This can be tricky, and is a stumbling block in some cases. No harm in sending the form to multiple persons, to assure that you have at least hit the right one, if you are in total doubt. **Untimely or improper service, or a failure to include the required information can lead to the**

[2] 28 U.S.C. S 2680(h) provides that the government is not liable when any of its agents commits the torts of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. However, it also provides an exception. The government *is liable* if a law enforcement officer commits assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. The government *is not liable* if the claim against law enforcement officers is for libel, slander, misrepresentation, deceit, or interference with contract. Congress has not waived the government's sovereign immunity against all law enforcement acts or omissions.

[3] A writable pdf of the SF-95 can be filled out and downloaded at http://www.justice.gov/civil/docs_forms/SF-95.pdf as a 2 sided document.

judicial dismissal of the claim. Each claimant must file this notice of claim. If a family is affected, the claim must be presented for each family member, individually. If it is a military family, living on a contaminated base, then each person must present a claim, but be careful of filing a claim for the family member(s) on "active duty" in the military. The *Feres* Doctrine bars claims against the government by active duty military personnel.[4] In the case of "active duty personnel, an issue could be raised questioning whether a member of the armed services who is residing on a base, but is on leave, off duty or otherwise not "active," on a 24/7 basis has an exception of some sort from the *Feres* Doctrine. This is also not being discussed in this paper, but is a worthy question to ponder.

It is equally important that a sufficient amount of damages are alleged when the administrative claim is filed. A tort action filed in court may not exceed the damages in the claim presented to the federal agency unless the increase is based upon some newly discovered evidence or there is proof of intervening facts relating to the amount of the claim.

Once the claim is filed, the Government has 6 months to respond. If the claim is denied by the agency or if six months pass without a response, then the plaintiff may file the claim. While there is a window of six months from the date of denial to file the lawsuit, the law is silent as to what the time constraints are in the event of no denial and no action by the

[4] In *Feres v. United States,* 340 U.S. 135 (1950), the Supreme Court unanimously held that, although the FTCA contains no explicit exclusion for injuries sustained by military personnel incident to service, such an exclusion results from construing the act "to fit, so far as will comport with its words, into the entire statutory scheme of remedies against the Government to make a workable, consistent and equitable whole." 340 U.S. at 139. One reason the Court found that to prohibit recovery for injuries sustained incident to service would fit the entire statutory scheme was that the act, at 28 U.S.C. § 2674, makes the United States liable only "to the same extent as a private individual under like circumstances." This limitation could be construed to exclude service-connected injuries because, the Court found, that plaintiffs can point to no liability of a "private individual" even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving. Nor is there any liability "under like circumstances," for no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command. Cong Research Service, *Federal Tort Claims Act* (2007).

Government. There is precedent for an unlimited amount of time for filing suit, if the Government defaults in its responsibility to respond.[5]

STATUTE OF LIMITATIONS IN A FEDERAL TOXIC ACTION

Since the filing of a case against the Federal Government is most likely going to arise out of living on or near a military installation, and having in mind the proliferation of such cases in recent years, we will use these cases as our example in this paper.[6]

The crucial fact in the determination of statute of limitations in any toxic case is the applicability of the discovery rule. The Government has a habit of invoking the case of *US v. Kubrick*[7] in support of their contention that toxic cases are not entitled to a discovery rule extension of the statute of limitations. In *Kubrick,* the Court held that the two year statute under FTCA begins to run not from the time of the injury, but at a time the plaintiff had reason to make an inquiry as to the cause of the illness. *Kubrick* was dealing with a malpractice case, and it is well settled that malpractice actions are a type of case to which the discovery rule applies. However, the Supreme Court in no manner held or even suggested that this discovery rule is or should be restricted to medical malpractice cases.

To show how devious the Government lawyers can be in these cases, let us look at the Camp Lejeune litigation. The Government challenged many cases on the Statute of limitations claiming that the *Kubrick* case was limited to medical malpractice cases against government

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[5] *Pascale v. United States*, 998 F.2d 186 (3d Cir. 1993).

[6] Several cases may need to be considered and distinguished in making an argument for jurisdiction in a Federal Government toxic case involving a military base. *Snyder v. United States*, 504 F.Supp.2d 136 (S.D. Miss. 2007), *aff'd*, 296 Fed. Appx. 399 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 2763 (2009) (involving the water at Camp Lejeune) and *Aragon v. United States*, 146 F.3d 819 (10th Cir. 1998) (involving the water at the Walker Air Force Base in Roswell) and *Ross v. United States*, No. 04-6146, 129 Fed. Appx. 449 (5th Cir. 2005) (disposal of hazardous waste at Tinker Air Force Base), may be significantly different than the your case.

[7] 444 U.S. 111 (1979).

doctors. They represented that in their briefs, yet when the Department of the Navy was called before an angry Congressional panel to discuss why and how it was that they withheld vital information from the public, and when investigators were beginning to catch on about the toxic drinking supply at the base, the Navy concocted lies to cover it all up, they testified as follows: "The claim must be presented in writing within two years after the claim "accrues" (i.e. knew or should reasonably have known they were injured as a result of government negligence) or the claim is forever barred."[8]

That statement is precisely the rule in *Kubrick*. For whatever reason, the DON apparently saw fit to state one position in one public forum and then state the opposite in its pleadings in the Camp Lejeune litigation. The DON also declared publicly that: "…It is the Navy's intention to wait for the ATSDR [Agency for Toxic Substances and Diseases Registry] to be completed in order to insure that we have the best possible scientific research available so we may thoroughly evaluate **each and every claim on its own merits**… (emphasis added).[9]

The bottom line is that there *is* a discovery rule, and it should be used, and defended if the Government makes an attack on it. In a classic groundwater contamination case, the signature or other disease related to the given VOC, probably has a latency period beyond the two year FTCA statute of limitations.

DISCRETIONARY FUNCTION EXCEPTION

As stated above, the FTCA makes the United States liable for the torts of its employees to the same degree that private employers are liable under state common law for the torts of

[8] *Poisoned Patriots: Contaminated Drinking Water at Camp Lejeune Before the Subcommittee on Oversight and Investigations of the Committee of Energy and Commerce*, 110th Cong., 1st Sess. 49 (2007) [hereinafter *Hearings*] (statement of Pat Leonard, Director, Office of the Judge Advocate General).

[9] *Hearings, supra* at 48 (statement of Pat Leonard, Director, Office of the Judge Advocate General).

their employees. The fact that state law would make a state or municipal entity, as opposed to a *private* person, liable under like circumstances is not sufficient to make the United States liable under the FTCA. The Federal Government has a sovereign immunity that may exceed traditional state immunities in some cases. As discussed above, relative to the *Feres* Doctrine, The FTCA contains exceptions under which the United States may not be held liable even though a private employer could be held liable under state law. In addition to the *Feres* doctrine, which prohibits suits by military personnel for injuries sustained incident to service; the Government raises a discretionary function exception in most toxic cases, and may even invoke the intentional tort exception, should there be intentional acts pled. There are other exceptions to the FTCA, but those are not germane to this discussion.[10]

Once the plaintiff facially alleges matters not excepted from the FTCA, it becomes the government's burden to demonstrate the applicability of the discretionary function exception. *Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005). The actions alleged by the plaintiff in a toxic action complaint are violations of mandates and not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. There is simply no legitimate element of choice in subjecting military families to water known to be highly contaminated with carcinogens.

The discretionary function exception bars a claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of

[10] Among the other exceptions, the United States may not be held liable in accordance with state law imposing strict liability; it may not be held liable for interest prior to judgment or for punitive damages (28 U.S.C. § 2674); for the act or omission of an employee exercising due care in the execution of an invalid statute or regulation (28 U.S.C. § 2680); for claims "arising out of the loss, miscarriage, or negligent transmission of letters or postal matter;" for claims arising in respect of the assessment or collection of any tax or customs duty; for claims caused by the fiscal operations of the Treasury or by the regulation of the monetary system; for claims arising out of combatant activities; or for claims arising in a foreign country.

a federal agency or an employee of the Government, whether or not the discretion involved be abused."[11]

In order to determine whether conduct falls within the discretionary function exception, the courts must apply a two-part test established in *Berkovitz v. U.S.*,[12] The first inquiry is whether the conduct involved "an element of judgment or choice."[13] Was the act of the employee discretionary or mandatory? This requirement is not satisfied if a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. *Berkovitz*, 486 U.S. at 536. Once the element of judgment is established, the next inquiry must be 'whether that judgment is of the kind that the discretionary function exception was designed to shield' in that it involves considerations of 'social, economic, and political policy.' *Gaubert*, 499 U.S. at 322-23. That is to say, if the act was discretionary, then it must be determined if the employee's discretion was based on consideration of government policy.

Absent specific statutes or regulations, where the particular conduct is discretionary, the failure of the government properly to train its employees who engage in that conduct is also discretionary. See, e.g., *Flynn v. U.S.,* 902 F.2d 1524 (10th Cir.'90) (failure of National Park Service to train its employees as to proper use of emergency equipment was discretionary).

In a military base sited toxic case, there are Bureau of Medicine & Surgery (BUMED) standards. The BUMED is quite clear in both its stated policy determined in Washington, DC, and in its mandates to the commands below. It leaves no room for modifications or

[11] 28 U.S.C. S 2680(a).

[12] 486 U.S. 531, 536 (1988), See Kennewick Irrigation Dist. v. U.S., 880 F.2d 1018, 1025 (9th Cir. 1989).

[13] *U.S. v. Gaubert*, 499 U.S. 315, 322 (1991)

discretionary application of the stated policy by base personnel. The BUMED states that "frequent sanitary surveys **shall** be made of the water supply system…6(b) approval of water supplies **shall** be dependent in part upon…" "Chemical Characteristics (Limits)," 6(c) "Drinking water **shall not** contain impurities in concentrations which may be hazardous to the health of the consumers…" "Chemical Characteristics (Limits)," 7(a)(3)(d), and "Substances which may have harmful physiological effects or for which physiological effects are not known, **shall not** be introduced into the system in a manner which would permit them to reach the consumer." "Chemical Characteristics (Limits)," 7(a)(3)(d) (emphasis supplied). It then goes on to state that: The presence of the following substances in excess of the concentrations listed shall, constitute grounds for rejection of the supply: …chlorinated hydrocarbons… 0.003-0.1[ppm] (emphasis supplied). TCE and PCE are chlorinated hydrocarbons.

In the Camp Lejeune litigation, it was disingenuous of the Federal Government to suggest to the court that there were no specific and mandatory provisions regarding monitoring and disposing of chemicals in the Camp Lejeune water supply. We argued successfully that when the term "shall" is used it stresses the mandatory nature of the duty required of the government employees that is not subject to a policy analysis. See, e.g. *Hurst v. United States*, 882 F.2d 306, 309 (8th Cir. 1989) (a claim that the Army Corps of Engineers was mandated by the use of the "shall" to stop an unauthorized activity before further violations occurred).[14]

Carrying out health and safety duties are hardly ever matters of discretion. The discretionary function exception simply does not apply when a policy specifically prescribes a course of conduct or action for a government employee to follow and the government

[14] Compare *Fortney v. United States*, 714 F.Supp. 207 (W.D. VA 1989) (in contrast, the word "should" is used when discretionary judgment is intended).

employee deviates from that policy. Where challenged governmental activities involve safety considerations under established policy, rather than balancing of competing policy considerations, the rationale of the discretionary function defense falls away and the government will be liable for the negligent acts and omissions of its employees. *ARA Leisure Services v. United States*, 831F.2d 193 (9th Cir. 1987).[15] In fact, it has been held that matters of scientific and professional judgments, particularly judgments concerning safety, are rarely considered susceptible to social, economic or political policy.[16]

CONCLUSION

Clearly, providing non-contaminated water in and around a military base is not a matter of social and political policy. Failure to obey the mandates and exercise due care for the consumers of the drinking water at bases such as Camp Lejeune was not a protected military defense and security decision. It was in fact a violation of mandatory standards that were already set in place by the military for the protection of innocent people. As in a private suit under state common law, such actions can be brought under the FTCA, if properly pled and if the Rule 12 and Rule 56 motions are properly briefed and argued.

[15] See also: *Bolt v. United States*, 509 F.3d 1028, 1034-5 (9th Cir. 2007) (snow removal at an Army base is not a matter of a policy judgment but rather a safety consideration under established policy).

[16] *Soldano v. United States*, 453 F.3d 1140, 1147-48 (9th Cir. 2006).