# Suing the Government

# Learning Objectives

## Learn how the Federal Tort Claims Act (FTCA) creates a limited exception to sovereign immunity to allow administrative compensation for tort claims.

## Learn the rationale for the exemptions to the FTCA.

## Learn how the discretionary function defense fits with judicial deference to agencies and the Mathews case.

## Learn what steps must be satisfied to get jurisdiction to appeal of an administrative determination under the FTCA.

## Learn how the absence of sovereign immunity in Louisiana changes the nature of the LA-TCA.

## Learn how the courts construe the LA-TCA in light of the FTCA.

# Readings

## FTCA Reader and Text

## *Gregor v. Argenot Great Central Insurance Co.*, 851 So.2d 959 (La. 2003)

# Issues

## Federal sovereign immunity

### What is federal sovereign immunity?

### What is the constitutional provision that is seen as the basis of sovereign immunity under the U.S. constitution?

### Prior to the FTCA, what did you have to do to get compensation for a tort by a federal government employee?

## What is the Court of Claims and what type of claims does it deal with?

## FTCA

### Causes of actions

#### What sort of actions does the FTCA cover?

#### What causes of action are excluded under the FTCA?

#### Can you collect pre-judgment interest or punitive damages under the FTCA? (Forget about the section on old death cases.)

#### Where do you look for law to apply in a FTCA case?

### *Bivens*

#### How does *Bivens* plug a hole in the original FTCA? (What actions does it cover that were excluded in the original FTCA?)

#### *Bivens* was decided in 1971. Why is it the logical extension of the Warren Court’s individual liberties decisions?

#### How was the FTCA amended after *Bivens*?

#### Who can you now sue under the FTCA for intentional torts such as battery and assault?

### Filing an FTCA claim

#### What is the procedural prerequisite before going to court under the FTCA?

#### What is the prescription/statute of limitations period for an FTCA claim?

#### When can you go to court after filing your claim under the FTCA?

#### What is the legal effect if you go to court without exhausting these requirements?

### What is the discretionary function exception?

#### Why is the discretionary function exception necessary to protect the other political and judicial controls on agencies?

#### What would be the consequences for agency political control if the only defenses were those ordinarily available in state tort claims, i.e., standard of care rather than the discretionary function defense?

### *Allen v. United States,* 816 F.2d 1417 (10th Cir. 1987)

#### Were the plaintiffs intentionally exposed to radioactive fallout?

##### Based on these facts, if this were an ordinary tort case, say against a private party, would plaintiffs have won?

##### Why does the discretionary function defense force a different result from a private tort claim?

#### How does the shift from ordinary negligence to discretionary function potentially confuse plaintiffs' attorneys, i.e., why is showing the defendant acted knowingly a problem in FTCA claims but great in most private tort claims?

### What were the lessons of *Berkowitz* and *Varig Airlines*?

#### On following regulations?

#### On drafting regulations to allow flexibility?

## Louisiana sovereign immunity

### How is sovereign immunity different in Louisiana from the federal model?

### How does the LA-FCA modify this rule?

### How does this difference affect the construction of the federal versus state tort claims act, i.e., how is a statute in dereliction of immunity construed differently from a statute creating immunity?

#### Key construction canon – when possible, construe statutes as consistently with the constitutional purpose as possible.

## LA-FCA v FTCA

### *Gregor*

#### What was the alleged negligence by the DHH inspector?

#### How did DHH try to defend this with the discretionary function defense?

#### Why did the court reject this defense?

#### Looking at the inspector’s testimony, what did the court find was the real negligence by DHH?

#### Does this follow *Berkowitz*?

### How does the discretionary function defense in the LA-TCA compare to that in the FTCA?

### Does the Court in Gregor say it should be read the same way as the FTCA?

### Can you determine if the Court treats it differently, without regard to what the courts about whether it is different?

## Louisiana Governmental Claims Act – LA RS 13:5101, et. seq.

### There is no administrative compensation system in Louisiana.

### You file a tort claim against the state or political subdivision exactly the same way as against a private party.

### There are no special notice periods or short prescription periods, other than those in the tort law.

### There is no right to a jury trial, nor can the state or political subdivision waive the prohibition on a jury trial in individual cases.

### §5106.  Limitations

#### A.  No suit against the state or a state agency or political subdivision shall be instituted in any court other than a Louisiana state court.

#### B.(1)  The total liability of the state and political subdivisions for all damages for personal injury to any one person, including all claims and derivative claims, exclusive of property damages, medical care and related benefits and loss of earnings, and loss of future earnings, as provided in this Section, shall not exceed five hundred thousand dollars, regardless of the number of suits filed or claims made for the personal injury to that person.

##### (2)  The total liability of the state and political subdivisions for all damages for wrongful death of any one person, including all claims and derivative claims, exclusive of property damages, medical care and related benefits and loss of earnings or loss of support, and loss of future support, as provided in this Section, shall not exceed five hundred thousand dollars, regardless of the number of suits filed or claims made for the wrongful death of that person.

##### (3)(a)   In any suit for personal injury against a political subdivision wherein the court, pursuant to judgment, determines that the claimant is entitled to medical care and related benefits that may be incurred subsequent to judgment, the court shall order that a reversionary trust be established for the benefit of the claimant and that all medical care and related benefits incurred subsequent to judgment be paid pursuant to the reversionary trust instrument.  The reversionary trust instrument shall provide that such medical care and related benefits be paid directly to the provider as they are incurred.  Nothing in this Paragraph shall be construed to prevent the parties from entering into a settlement or compromise at any time whereby medical care and related benefits shall be provided, but with the requirement of establishing a reversionary trust.

### §5108.1.  Indemnification of officers and employees of the state; civil rights; representation by attorney general

#### A.  Indemnification.

##### (1)  The state shall defend and indemnify a covered individual against any claim, demand, suit, complaint, or petition seeking damages filed in any court over alleged negligence or other act by the individual, including any demand under any federal statute when the act that forms the basis of the cause of action took place while the individual was engaged in the performance of the duties of the individual's office, employment with the state, or engaged in the provision of services on behalf of the state or any of its departments pursuant to Paragraph (E)(2) of this Section.

##### (2)  Upon the death of the covered individual, the benefits of this Section shall inure to the covered individual's legal, instituted, or irregular heirs, subject to the community rights of surviving spouse, which, however, shall not enlarge or diminish the rights of any other person.

#### B.  Coverage process.

##### (1)  Within ten days of the time the covered individual is served with any summons, complaint, process, notice, demand, or pleading, he shall deliver the original or a copy thereof to the attorney general.  Delivery of such a summons, complaint, process, notice, demand, or pleading constitutes a request for representation under this Section and constitutes a prerequisite to indemnification by the state. Upon delivery to the attorney general, the attorney general shall, within five days, furnish a copy of the summons, complaint, process, notice, demand, or pleading to the office of risk management.

##### (2)  Upon such delivery the attorney general shall investigate, by examining the face of the complaint, process, notice, demand, or pleading, and any other information available to the attorney general, whether the covered individual was engaged in the performance of the duties of his office or employment with the state at the time the events that form the basis of the cause of action happened.

##### (3)  If the attorney general concludes that the covered individual was engaged in the performance of the duties of his office or employment with the state at the time the events that form the basis of the cause of action happened and that the covered individual was free of criminal conduct, then the attorney general shall provide a defense to the covered individual.  If the attorney general concludes that the covered individual was not engaged in the performance of the duties of his office or employment with the state at the time the events that form the basis of the cause of action happened or that the employee was engaged in criminal conduct, then the attorney general shall not provide a defense to the covered individual.  Such a decision shall be communicated in writing to the covered individual and the head of the department of the state in which the individual is employed within ten working days of delivery of the petition to the attorney general.  It is sufficient notice if the communication is sent properly addressed to the covered individual either at his place of work, his home, or any other place where he may be found by United States Postal Service, third party commercial carrier for no more than three day delivery, facsimile, or electronic mail and to his departmental employer.

#### In contrast with the FTCA, where the government is substituted for the individual in the lawsuit, in LA the lawsuit proceeds against the individual. The state provides indemnification and defense if the AG thinks the person is within course and scope and has not done anything criminal. This is a political decision, subject to abuse, especially as the AG and Governor are often at odds in the state. It is a further deterant to getting good people in state government.

### The Louisiana Office of Risk Management runs an insurance plan for the state and political subdivisions: <http://www.doa.la.gov/Pages/orm/Index.aspx>

# End