UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

In Re:	KATRINA CANAL BREACHES CONSOLIDATED LITIGATION	§	CIVIL ACTION
		§	NO. 05-4182 "K" (2)
		§	JUDGE DUVAL
	PERTAINS TO: MRGO	§	MAG. WILKINSON
		§	

SUPPLEMENTAL BRIEF IN SUPPORT OF DISMISSAL

At the hearing on the United States' motion to dismiss, the Court suggested that the Fifth Circuit's decision in *Williams v. United States*[1] might require it to hold that Ethel Mae Coates, Kenneth P. Armstrong, Sr., and Jeannine B. Armstrong ("Plaintiffs") had satisfied the presentment and exhaustion requirements of section 2675(a). Although the Court reiterated its belief that Plaintiffs' SF-95s failed to give the Army Corps adequate notice of their EBIA claims, the Court suggested that their SF-95s, *read in conjunction with their complaint (Doc. 3415)*, might provide sufficient notice. But applying *Williams* in this way would go far beyond the holding of that case, and would conflict with the language and purpose of the FTCA's presentment and exhaustion requirements. The Court should therefore find *Williams* inapplicable and dismiss Plaintiffs' EBIA claims with prejudice, in accordance with its previous ruling in *Robinson*.

[1] 693 F.2d 555 (5th Cir. 1982).

In *Williams,* the plaintiff initially filed a state-court complaint against a government employee.[2] The plaintiff later dismissed his state-court complaint, submitted an incomplete SF-95, and, after his claim had been denied, filed a complaint in federal court against the United States based on the same conduct.[3] The Fifth Circuit held that the plaintiff's state-court complaint could be considered in conjunction with his otherwise defective SF-95 to satisfy section 2675(a). In so holding, however, the Fifth Circuit did *not* consider the question presented by this case—whether plaintiffs may supplement an otherwise defective administrative claim with information contained in the very complaint that commenced the FTCA action against the United States in federal court. At least one court to consider *that* question has held that plaintiffs may not rely on their pleadings to comply with section 2675(a).[4]

In *Schaffer v. United States*, the Sixth Circuit was confronted with a situation *exactly* like the one here (and *unlike* the one in *Williams*), where the plaintiffs sought to rely on their FTCA complaint to supplement their otherwise

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[2] *Id.* at 556.

[3] *Id.*

[4] *Schaffer v. United States*, No 93-3764, 1994 WL 520853, at *2-3 (6th Cir. Sept. 21, 1994).

defective administrative claim.[5] The court acknowledged the Fifth Circuit's holding in *Williams*—"that the defect in a preliminary claim, filed with the appropriate federal agency, which failed to state a sum certain, was cured by reference to a complaint filed by the plaintiff in state court, which included the necessary information"—but declined to apply that holding to the facts before it.[6]

First, the court noted that what the plaintiffs sought—"to allow federal tort complaints to supplement defective agency claims"—directly violated the FTCA's presentment requirement.[7] As the court recognized, section 2675(a) requires that a claim be presented "in *advance* of the federal tort suit, not merely in conjunction with it."[8] Indeed, section 2675(a) specifically provides that "[a]n action shall not be instituted upon a claim against the United States . . . unless the claimant *shall have first* presented the claim to the appropriate Federal agency and his claim shall have been denied by the agency . . . ."[9] "[A]llowing the federal suit to satisfy its

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[5] *Id.* at *1 ("On appeal, the Schaffers allege that the district court erred by finding that the defective claim filed with the Department of Agriculture was not cured by their complaint, filed in the district court. . . .").

[6] *Id.* at *2 ("The Schaffers urge this court to apply the holding in *Williams* to the instant case. We decline their invitation.").

[7] *Id.*

[8] *Id*. (emphasis added).

[9] 28 U.S.C. 2675(a) (emphasis added).

own condition precedent," the court observed, "not only puts the cart before the horse, but flatly ignores the plain language of the statute."[10]

Second, the court held that "allowing an incomplete administrative claim to be cured by a federal complaint directly contradicts the *purpose* of administrative exhaustion."[11] The exhaustion requirement, the court noted, was "intended to reduce the number of suits that ever actually proceed to the federal courts."[12] Indeed, as the Supreme Court recognized in *McNeil v. United States*, "Congress intended to require complete exhaustion of Executive remedies *before* invocation of the judicial process."[13] Accordingly, the *Schaffer* court held that "[t]o allow information filed in connection with the federal suit to satisfy various elements of the exhaustion requirement is necessarily inconsistent with this central purpose."[14]

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[10] *Schaffer*, 1994 WL 520853, at *2. Furthermore, allowing claimants to supplement their claims with their complaints would violate the pertinent federal regulation, which provides that "[a] claim . . . may be amended by the claimant at any time prior to final agency action or *prior to* the exercise of the claimant's option under 28 U.S.C. 2675(a)." 28 C.F.R. 14.2(c) (emphasis added). Once claimants exercise that option by filing suit, their claims may no longer be amended.

[11] *Id.* at *3.

[12] *Id.*

[13] 508 U.S. 106, 112 (1993) (emphasis added).

[14] *Schaffer*, 1994 WL 520853, at *3.

The facts that distinguish *Williams* demonstrate why the claim in that case could have been supplemented by a complaint but the claims in this case cannot. Most significantly, the "supplementing" complaint in *Williams* was filed in state court against a government employee, not in federal court against the United States. This matters for four reasons.

First, the state-court *Williams* complaint, unlike Plaintiffs' complaint in this case, did not violate the presentment requirement of section 2675(a), which prohibits the commencement of actions *against the United States* (but not government employees) prior to the claim being presented.

Second, the filing of the state-court *Williams* complaint did not frustrate the FTCA's exhaustion requirement, which was intended to give the appropriate agency an opportunity to settle the claim. Once a complaint is filed against the United States, the agency is deprived of its authority to settle the claim, as that authority is instead vested exclusively with the Attorney General.[15] In *Williams*,

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[15] *See* 28 U.S.C. 2677 ("The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon."); *see also United States v. Reilly*, 385 F.2d 225, 229 (10th Cir. 1967) ("We take it to be settled that where Congress has set out a statutory procedure for the compromise of matters involving the United States, it implicitly negatives the use of any other procedure."); *Hearings before Judiciary Committee on H.R. 5373 and H.R. 6463*, 77th Cong., 2d Sess. 28 (1942) ("Settlement of claims before suit is left to the Federal agency. If suit has been instituted, however, only the Attorney General may compromise the claim in question."); *id.* at 32 ("The Attorney General has exclusive power to compromise or settle claims after suit has been brought."); *id.* at 44 ("Once suit has been started on a claim[,] only the Attorney General

the supplementing complaint did not frustrate the exhaustion requirement because it was filed against an employee, not the United States, and so the agency was still free to compromise the claim. In this case, however, once Plaintiffs filed the Master Complaint (Doc. 3415), the agency lost its settlement authority, and exhaustion became impossible.

Third, regulations promulgated by the Attorney General pursuant to 28 U.S.C. § 2672 did not prohibit the state-court *Williams* complaint from supplementing the plaintiff's claim, but those regulations do prohibit the federal complaint in this case from doing the same. Those regulations permit claimants to amend their claims, but only "prior to" exercising their option, under section 2675(a), to deem their claims denied.[16] By filing their federal complaint, Plaintiffs cut off their right to amend their claims.[17] The filing of the state-court complaint in *Williams* did not have the same effect because it was filed in state court and not

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would have the authority to compromise or settle that claim, and the Federal Agency concerned could no longer adjust or determine it[.]").

[16] *See* 28 C.F.R. § 14.2(c) ("A claim . . . may be amended by the claimant at any time *prior to* final agency action or prior to the exercise of the claimant's option under 28 U.S.C. 2675(a).") (emphasis added).

[17] *See Stokes v. U.S. Postal Serv.*, 937 F. Supp. 11, 16 (D.D.C. 1996) ("By filing suit [against the Postal Service] claimant exercised her option under Section 2675(a) to treat the claim as denied and she was therefore foreclosed from amending the claim.").

against the United States, and thus did not constitute an exercise of the plaintiff's option under section 2675(a).

Finally, this Court's reading of *Williams*—which would permit a claimant to simultaneously present an amended claim and commence an action against the United States—is foreclosed by the Supreme Court's holding in *McNeil*. There, the Court held that "[t]he FTCA bars claimants from bringing suit in federal court *until* they have exhausted their administrative remedies."[18] This holding would not have precluded the result in *Williams*, because the state-court complaint obviously did not constitute "bringing suit in federal court." But it would plainly violate the holding of *McNeil* to permit Plaintiffs in this case to bring suit in federal court while *at the same time* exhausting their administrative remedies.

Simply put, applying *Williams* as the Court suggested would violate the language and purpose of the FTCA, federal regulations, and Supreme Court precedent. Instead, the Court should find *Williams* distinguishable on its facts and inapplicable to this case, and should dismiss Plaintiffs' EBIA claims, just as it did the EBIA claims in *Robinson*.

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[18] *McNeil*, 508 U.S. at 513 (emphasis added).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Jeffrey Paul Ehrlich, hereby certify that on December 22, 2009, I served a true copy of the foregoing upon all Parties by ECF.

s/ Jeffrey Paul Ehrlich