ADMINISTRATIVE CLAIMS UNDER THE FEDERAL TORT CLAIMS ACT

National Immigration Litigation Alliance in collaboration with Children’s Immigration Law Academy
November 2021
CILA-NILA Partnership

Provide trainings, resources and technical assistance (Texas) related to appellate and litigation practice

Some emphasis on matters originating within Fifth Circuit

Posted trainings include:

- Ready to Win—Moving Beyond Trying Cases at the IJ Level
- Introduction to Federal Court Practice Parts I and II
- Advanced Immigration Legal Research
- Legal Writing
- Litigating SIJS Delay Cases: Mandamus and APA
- Attorneys Fees Under the Equal Access to Justice Act
- Winning at the BIA
- Niz-Chavez, Pereira, and Notices to Appear
- Habeas Petitions 101
- Administrative Procedures Act (APA) Actions after SIJS Denials
- Petitions for Review and Judicial Stays of Removal to the Fifth Circuit Court of Appeals
CILA NILA Partnership

- Trainings – Live and Recorded
- Resources – Practice Advisories & Templates
- Texas – Technical Assistance, Legal Writing Technical Assistance
Federal Tort Claims Act (FTCA)

• **Tort** law claims brought against the **United States**
  • Standards of proof substantially less than constitutional violations

• Authority: 28 U.S.C. §§ 1346(b), 2671-80; 28 C.F.R. §§ 14.2-14.4
FTCA Basics

• No jury trial right; bench trial only
• Monetary damages only (no punitive damages)
  • Some FTCA claims have settled for monetary damages and/or immigration relief
• Contingent Attorneys’ Fees
  • Limited to 20% if settled in administrative process
  • Limited to 25% if settled after filing in court or upon judgment
Tort Review

• **Negligent Torts** – including negligence, negligent infliction of emotional distress, wrongful deportation, deprivation of adequate medical care

• **Intentional Torts by Investigative or Law Enforcement Officers** – i.e., assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution
  • Definition of investigative or law enforcement officer: U.S. officer empowered by law to execute searches, seize evidence, or make arrests, 28 U.S. § 2680(h).
  • Most DHS (CBP, ICE, USCIS), FBI, Marshal’s Service officers meet the definition of law enforcement officer.
  • BUT: FTCA expressly prohibits claims against these officers for libel, slander, misrepresentation, deceit, or interference with contractual rights
Why File an Administrative Claim?

• Prerequisite to any lawsuit raising an FTCA claim
• Potential benefits are:
  • Compensation for Client
  • Improve Immigration Options?
  • Accountability
  • Deterrence
  • Attorneys’ Fees
2 Steps to Filing FTCA Actions

• **STEP 1** – Administrative claim before the agency (this webinar)

• **STEP 2** – U.S. district court complaint (not this webinar)

• Cannot reach step 2 without first taking step 1
Step 1 – Exhaustion Requirement

- FTCA claims *cannot* be litigated in federal court unless and until an administrative claim is submitted to the relevant federal agency, 28 U.S.C. § 2675(a)
- Administrative claim must be filed within 2 years of the claim accruing, 28 U.S.C. § 2401(b)
What to File

- Cover letter (suggested)
- Claim authorization (discussed on next slide)
- Written notification of the incident, using (a) Form SF 95 or (b) a letter, or both (discussed on next slide)
  - Must include a sum certain as to the damages amount requested
  - Each claimant must have his/her/their own Form SF 95
- Index of exhibits and supporting exhibits (optional)

See FTCA Packet – Sample Materials (Oct. 2021) on CILA and NILA’s websites
Claim Authorization – 8 C.F.R. § 14.2(a)

• Administrative claim is deemed to have been presented when:
  • The agency receives SF 95 or written notification with sum certain
  • From a claimant, his duly authorized agent or legal representative
  • Which includes the title or legal capacity of the person signing, and is accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative

• Possible signatories may include children over 14; ORR sponsors; officially appointed guardians; lawyers with evidence of representation

• Claimant need not be in the United States
Notification of Incident

• Preferable to use Standard Form 95

• Must contain basic facts “sufficient to enable [the agency] thoroughly to investigate its potential liability and to conduct settlement negotiations with the claimant.” *Rise v. United States*, 630 F.2d 1068, 1071 (5th Cir. 1994)

• Basic Facts: “general description of the time, place, cause and general nature of the injury and the amount of compensation demanded.” *Goodman v. U.S.*, 298 F.3d 1048, 1055 (9th Cir. 2002)
Sum Certain

• 28 U.S.C. § 2675(b): Damages claimed in administrative claim will cap the amount of damages available in later federal litigation unless:
  • New evidence reveals damages that were not reasonably discoverable; or
  • Demonstration of intervening facts relating to amount of the claim

• Practice pointer: Aim high in the administrative claim so as to avoid unnecessarily capping your client’s recovery.
Where to File

• Filed with agency(ies) employing the officer(s) giving rise to the claim
• Special rules governing medical care claims
• If more than one agency, the receiving agency will designate a lead agency after receipt
• **Practice pointer:** Err on the side of sending the claim to:
  • DHS Office of General Counsel, 6 C.F.R. § 5.41(d) and
  • General counsel for agency(ies) that employs the offending officer(s)
  • NOTE: Even if an agency has a service email addresses, mail the claim via overnight/certified/registered mail to have proof of compliance with the 2-year statute of limitations
• *See FTCA Packet – Sample Materials, for list of common agency service addresses for immigration FTCA administrative claims*
After Filing

• *Should* receive acknowledgment of claim. Attorneys report that acknowledgement receipts are extremely delayed or never arrive

• Agency has 6 months to review claim; claim may be amended within that 6-month period, which then adds 6 months to the review process, 28 C.F.R. § 14.2(c)

• Under 28 U.S.C. § 2675(a), if claim not settled during the administrative review process, the claim:
  • Is denied when the agency issues a formal written denial, or
  • May be treated as constructively denied, at the election of the claimant, if 6 months has passed without agency action
After Filing

• Agency may request more evidence
• Counsel may reach out and engage in negotiations
• Agency may make a settlement offer (counter offer possible)
• Agency may do nothing. If there is no response in 6 months:
  • Can treat as a constructive denial and file complaint in district court
  • Can wait for agency to act and/or engage with the agency
• Agency may deny the claim. If there is a formal denial, any complaint in district court must be filed within 6 months of the denial

• **Practice pointer**: If interested in settling, contact agency counsel during the administrative review process
Settlement Considerations

- Settlement should serve the client’s best interest (not always monetary in immigration cases)
- Promptly bring settlement offers to the client
- Keep client informed of negotiations
- Settlement decision belongs to client (attorneys have NO authority to settle administrative claims without client authorization and consent)
- Explain settlement terms in plain English (most settlements bar future claims arising from same action)
- Review state law regarding approval of settlements on behalf of minors
District Court Basics

• Complaint must be filed within six months of date on which administrative claim was denied. 28 U.S.C. § 2401(b)
• May file with a Bivens claim (beyond the scope of this webinar, see practice advisory on NILA’s website)
• Defendant is always only the United States. 28 U.S.C. § 2679(b)(1)
• Venue: 28 U.S.C. § 1402(b). In the district in which:
  • The act or omission complained of occurred, OR
  • Where the plaintiff resides
• Gov’t motion to dismiss may argue lack of jurisdiction, no private analogue, discretionary function exception, due care exception
Helpful Resources

• FTCA Packet – Sample Materials: Includes filing checklist, sample cover letter, service addresses, sample claim authorization form, guide to completing SF 95, sample attachment to SF 95

• NILA & NIPNLG Practice Advisory – Federal Tort Claims Act: Frequently Asked Questions for Immigration Attorneys

• NILA-CILA Technical Assistance
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Please complete the Feedback survey. Fill out the CLE Credit survey for Texas CLE credit or a letter of attendance.

Texas Folks – Reach out to CILA for CILA/NILA technical assistance.

Related Resource Administrative FTCA Claim Packet Checklist with Samples

CILA - NILA Trainings Available Here