



ADMINISTRATIVE CLAIMS UNDER THE FEDERAL TORT CLAIMS ACT

National Immigration Litigation Alliance
in collaboration with Children's Immigration Law Academy
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CILA-NILA Partnership



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Some emphasis on matters originating within Fifth Circuit



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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)
- Equitable tolling available, *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015)

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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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](#)