

n a t i o n a l
IMMIGRATION
p r o j e c t
of the National Lawyers Guild

PRACTICE ADVISORY¹

January 24, 2013

Federal Tort Claims Act: Frequently Asked Questions for Immigration Attorneys

By Priya Patel²

What is the Federal Tort Claims Act?

The Federal Tort Claims Act (FTCA) waives the United States' sovereign immunity and authorizes suits for money damages based on the negligent acts or omissions of federal employees, and, in some instances, intentional misconduct of such employees.³ FTCA actions proceed in two steps. First, the claimant files an administrative complaint with the relevant federal agency or agencies.⁴ If the agency does not elect to settle the claim, and, instead, makes a "final denial" of the claim (i.e., denies the claim or fails to act on it within six months), the claimant then may file a complaint in federal district court.⁵

Why should immigration attorneys file FTCA claims?

A claim under the FTCA enables recovery of damages from the United States. In the immigration context, the FTCA authorizes money damages to noncitizen and citizen victims of misconduct by employees of federal agencies, including the Department of Homeland Security (DHS).

Bringing an FTCA claim may improve a noncitizen's immigration options. Within DHS, U.S. Immigration and Customs Enforcement (ICE) is responsible for the enforcement of the Immigration and Nationality Act. ICE policy provides that "officers, special agents, and

¹ Copyright (c) 2013, National Immigration Project of the National Lawyers Guild. This advisory should not be used as a substitute for independent legal advice and decision-making by a lawyer familiar with a client's case. Readers are cautioned to check for new legal developments.

² Priya Patel is a third-year student at Harvard Law School. She authored this advisory under the supervision of Staff Attorney Trina Realmuto. Special thanks to National Immigration Project and National Police Accountability Project member Jonathan Feinberg for his guidance and review.

³ See 28 U.S.C. §§ 1346(b), 2671 *et seq.*; 28 C.F.R. §§ 14.1-14.11.

⁴ 28 U.S.C. §§ 2672, 2675; 28 C.F.R. §§ 14.2-14.4.

⁵ 28 U.S.C. § 2675; 28 C.F.R. § 14.9.

attorneys should exercise all appropriate prosecutorial discretion to minimize any effect that immigration enforcement may have on the willingness and ability of . . . [plaintiffs pursuing litigation to protect their civil rights and liberties] to call police and pursue justice.”⁶ This includes declining to deport “individuals in the midst of a legitimate effort to protect their civil rights or civil liberties.”⁷

Thus, under ICE policy, because an FTCA claim seeks vindication of a non-citizens’ civil rights and liberties, filing such a claim provides a basis to ask ICE to stay or defer removal, release from detention, withdraw a detainer, issue a Notice to Appear, seek termination of proceedings, or join a motion to administratively close a case.⁸ Practitioners should explore this avenue whenever possible.

Additionally, like other types of damages actions, an FTCA claim may increase a person’s chances of obtaining certification for a U visa. The federal agency whose conduct the FTCA claim implicates may sign the certification as part of a settlement agreement. Alternatively, if the FTCA claim succeeds in federal court, the noncitizen could file a motion asking the district court judge to sign the certification.⁹

Theoretically, FTCA litigation promotes accountability among immigration officers for misconduct and impacts decisions on agency-wide practices as well as promotion decisions concerning employees found to have acted improperly. Practitioners should focus discovery requests on such accountability issues to determine whether prior misconduct by defendants has been addressed.

How is an FTCA action different from a *Bivens* action?

In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court recognized the availability of damages and injunctive relief for constitutional violations committed by individual federal defendants acting under color of federal law or authority. Unlike the FTCA, which explicitly provides a statutory cause of action, *Bivens* actions arise directly under Constitution. District courts have jurisdiction over *Bivens* actions pursuant to 28 U.S.C. § 1331 (federal question statute). Notably, *Bivens* suits are filed against individual federal officers, not the United States. While certain aspects of FTCA and *Bivens* litigation overlap, constitutional claims brought against individual defendants in a *Bivens* action are beyond the scope of this advisory. Claims against state and local entities and officials under 42 U.S.C. § 1983 or state law also are not covered in this advisory.

//
//

⁶ Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to All Field Officers, All Special Agents in Charge and All Chief Counsel, p. 1 (Jun. 17, 2011).

⁷ *Id.* at p. 2.

⁸ *Id.*

⁹ *See, e.g., Villegas v. Metro. Gov’t of Nashville and Davidson Co.*, No. 3:09-00219 (M.D. Tenn. Sept. 20, 2012) (granting plaintiff’s motion for a U visa certification in damages action under 42 U.S.C. § 1983).

What immigration officers may be liable under the FTCA?

The FTCA covers negligent conduct by federal employees and intentional torts committed by “investigative or law enforcement officers.”¹⁰ This includes most immigration officers employed by the Department of Homeland Security (DHS), including its component agencies U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Patrol (CBP) and U.S. Citizenship and Immigration Services (USCIS).¹¹ In addition, immigration-related FTCA claims may involve misconduct by employees of other federal agencies, such as the U.S. Marshal’s Service, the Public Health Service or the Federal Bureau of Investigation. FTCA claims may implicate the misconduct of employees of more than one federal agency.¹²

The FTCA does not authorize actions against contractors with the United States.¹³ However, the United States still may be liable under the FTCA if a federal employee fails to prevent tortious conduct by contract employees acting under federal supervision,¹⁴ negligently places a detainee in the care of a contract employee or contract facility,¹⁵ or fails to fire or reassign contract employees in violation of the governing contract. These distinctions are most relevant in the immigration context when suing the United States for abuse and medical malpractice in a contracted detention center.

What types of claims *can* be brought under the FTCA?

Under the FTCA, the United States only is liable for the negligent torts of its employees and for intentional torts committed by investigative and law enforcement officers.¹⁶ Such acts must be within the scope of the employee’s or law enforcement officer’s employment or office. Claims

¹⁰ 28 U.S.C. § 2680(h) (defining “investigative or law enforcement officer” as “any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law”). In February 2013, the Supreme Court will hear argument on whether the FTCA authorizes intentional tort claims against federal officers acting within the scope of their employment but not exercising authority “to execute searches, seize evidence, or make arrests for violations of Federal law.” *Millbrook v. United States*, 2012 U.S. App. LEXIS 8089 (3d Cir. 2012) (unpublished), *cert. granted*, 133 S. Ct. 98 (U.S. Sept. 25, 2012) (No. 11-10362). The Court’s decision likely will impact the scope of claims brought against investigative or law enforcement officers.

¹¹ Immigration and Nationality Act § 287(a)(2), 8 U.S.C. § 1357(a)(2) (authorizing warrantless arrests by DHS officers); 8 C.F.R. § 103.1(b) (defining immigration officers); 8 C.F.R. §§ 287.5(c)&(d) (addressing power and authority of immigration officers to arrest and conduct searches).

¹² See 28 C.F.R. § 14.2(b)(2).

¹³ 28 U.S.C. § 2671. For example, the Supreme Court has held that the United States is not liable under the FTCA for an independent contractor’s negligence in operating a jail. *Logue v. United States*, 412 U.S. 521, 532-33 (1973).

¹⁴ See *United States v. Shearer*, 473 U.S. 52, 55 (1985) (plurality opinion); *Bodin v. Vagshenian*, 462 F.3d 481, 488 (5th Cir. 2006).

¹⁵ *Sandoval v. United States*, 980 F.2d 1057, 1059 (5th Cir. 1993).

¹⁶ 28 U.S.C. § 1346(b)(1) (negligent torts); 28 U.S.C. § 2680(h) (intentional torts).

under a state's constitution may also be brought, so long as the underlying action also gives rise to a state tort claim.¹⁷

Intentional torts that may be brought against investigative law enforcement officers, *see* n.10, *supra*, include assault, battery, false imprisonment, false arrest, malicious prosecution, and abuse of process.¹⁸ However, law enforcement officers are not liable for tort claims concerning the unlawful seizure of property.¹⁹

Where a noncitizen alleges medical negligence by employees of the United States Public Health Services (PHS), the FTCA is the only available remedy. In *Hui v. Castaneda*, the Supreme Court held that *Bivens* suits for the constitutional wrongdoing of government employees could not be brought against individual PHS employees, where the noncitizen plaintiff alleged deprivation of medical services in a detention facility.²⁰ Instead, only FTCA claims were authorized.²¹

Immigration-based FTCA claims often involve, but are not limited to, claims related to unlawful detention, wrongful deportation, unlawful arrest, physical abuse, wrongful death, denial of medical services, unlawful search, and denial of religious freedom.²² In analyzing which claims to bring, practitioners consider both intentional and negligence tort claims. For example, where ICE unlawfully detains a person, practitioners should consider a claim for false imprisonment under state law (an intentional tort) and a claim for negligent infliction of emotional distress (a negligence tort). Similarly, if a federal officer physically injures a person, practitioners should in addition to claims for negligent infliction of emotional distress consider claims for assault and battery under state law (intentional torts) as well as emotional distress claims (negligence claims).

¹⁷ *See Castro v. United States*, 560 F.3d 381, 390 (5th Cir. 2009).

¹⁸ 28 U.S.C. § 2680(h).

¹⁹ 28 U.S.C. § 2680(c).

²⁰ 130 S. Ct. 1845, 1854-55 (2010).

²¹ Although a *Bivens* remedy is not available for medical negligence committed by U.S. Public Health Service employees, it may be available if the negligence was committed by another medical care provider.

²² *See, e.g., Liranzo v. United States*, 690 F.3d 78 (2d Cir. 2012) (false arrest and imprisonment of U.S. citizen); *Caban v. United States*, 671 F.2d 1230 (2d Cir. 1982) (detention of U.S. citizen at port of entry); *Castro v. United States*, 608 F.3d 266 (5th Cir. 2010) *cert. denied*, 131 S. Ct. 902 (2011) (deportation of U.S. citizen child); *Rhoden v. United States*, 55 F.3d 428 (9th Cir. 1995) (six-day detention of lawful permanent resident at port of entry); *Garcia v. United States*, 826 F.2d 806 (9th Cir. 1987) (shooting by border patrol agent); *Arevalo v. Woods*, 811 F.2d 487 (9th Cir. 1987) (detention and mistreatment of U.S. citizen by INS investigator); *Badrawi v. DHS*, 579 F. Supp. 2d 249 (D. Conn. 2008) (unlawful arrest and detention of immigrant who was also denied religious freedom and access to medical treatment); *Araujo v. United States*, 301 F. Supp. 2d 1095 (N.D. Cal. 2004) (unlawful arrest and removal); *Adedeji v. United States*, 782 F. Supp. 688 (D. Mass. 1992) (false imprisonment and strip search by customs officials); *Sanchez v. Rowe*, 651 F. Supp. 571 (N.D. Tex. 1986) (arrest, detention and beating of immigrant by border patrol agent).

As further explained below, the United States may raise defenses or exemptions to liability, and it often does. Understanding these defenses and exemptions is critical to FTCA litigation.

What types of claims *cannot* be brought under the FTCA?

As mentioned above, certain claims are expressly excluded from the FTCA unless they arise from the misconduct of investigative and law enforcement officers. These include: assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.²³ Other federal or state statutes may provide a basis to recover damages for violations of these torts.

Additionally, claims arising in foreign countries may not be brought under the FTCA.²⁴

What law applies to FTCA claims?

Under the FTCA, the United States is liable for certain torts to the same extent that a private individual would be liable under similar circumstances.²⁵ As such, courts must apply the law of the state where the misconduct occurred, looking to state tort law. To the extent that state constitutional torts are covered by the FTCA, a court may also look to state constitutional law. As is common in immigration-related FTCA cases, federal law also may be consulted to determine liability for the misconduct of a federal agency.²⁶

Because FTCA claims implicate state tort and constitutional law, immigration attorneys may wish to consult with an attorney specializing in these areas.

What types of compensation are available under the FTCA?

Monetary damages are available under the FTCA.²⁷ The extent of liability is assessed “in accordance with the law of the place where the act or omission occurred.”²⁸ In evaluating the claimant’s damages, the agency and/or the court may consider relevant evidence, including, but not limited to, medical reports and expenses and/or a statement of expected future expenses.²⁹

Significantly, the amount of damages recoverable in a federal lawsuit is limited by the amount stated in the FTCA administrative complaint.³⁰ Further, a judgment on an FTCA claim is a complete bar to recovery against the employee for other claims based on the same conduct.³¹ Judgment on an FTCA claim, therefore, bars recovery on *Bivens* claims.³²

²³ 28 U.S.C. § 2680(h).

²⁴ 28 U.S.C. § 2680(k).

²⁵ 28 U.S.C. § 2674; 28 U.S.C. § 1346(b)(1).

²⁶ See, e.g., *Liranzo v. United States*, 690 F.3d 78 (2d Cir. 2012).

²⁷ 28 U.S.C. § 2674.

²⁸ 28 U.S.C. § 1346(b); 28 U.S.C. § 2672.

²⁹ 28 C.F.R. § 14.4.

³⁰ 28 U.S.C. § 2675(b).

³¹ 28 U.S.C. § 2676; 28 C.F.R. § 14.10(b).

³² See, e.g., *Arevalo v. Woods*, 811 F.2d 487 (9th Cir. 1987); *Sanchez v. Rowe*, 870 F.2d 291 (5th Cir. 1989); *Engle v. Mecke*, 24 F.3d 133 (10th Cir. 1994).

Punitive damages are not available under the FTCA.³³ In addition, the FTCA does not authorize a court to issue injunctive relief.

What is the deadline for filing an FTCA administrative claim?

Before filing an FTCA lawsuit, the claimant must exhaust administrative remedies by filing an administrative claim.³⁴ FTCA administrative claims must be filed within two years after the claim accrues.³⁵ A district court lacks jurisdiction over FTCA claims that have not been exhausted.³⁶

Can a claimant amend an administrative claim?

Yes, a claimant may amend an administrative claim at any time before the agency's final denial or disposition.³⁷

How is an FTCA administrative claim presented?

A claim may be filed in writing, using Form SF-95 or a letter.³⁸ The form or letter must provide written notification of the incident and the specific amount of monetary damages claimed.³⁹ Practitioners should carefully consider the damages demand because the agency's liability generally cannot exceed the amount stated in the administrative complaint.⁴⁰

³³ 28 U.S.C. § 2674.

³⁴ 28 U.S.C. § 2675(a); 28 C.F.R. § 14.2.

³⁵ 28 U.S.C. § 2401(b).

³⁶ *See, e.g., Barrett v. United States*, 462 F.3d 28, 36-38 (1st Cir. 2006) (dismissing FTCA claim where plaintiff filed "the complaint in the absence of agency action and in less than six months of filing her administrative tort claim").

³⁷ 28 C.F.R. § 14.2(c).

³⁸ 28 U.S.C. § 2401(b); 28 C.F.R. § 14.2(a). Form SF-95 is available at:

<http://www.gsa.gov/portal/forms/download/116418>.

³⁹ *Id. See also Adams v. United States*, 615 F.2d 284 (5th Cir. 1980) (finding presentation of claim satisfied provided the agency has sufficient notice of the incident to investigate and the claim states a sum of certain damages).

⁴⁰ 28 U.S.C. § 2675(b). To assess the amount of damages, consult one of the legal databases on Jury Verdicts and Settlements. If using Westlaw, (JV-ALL) combines verdicts and settlements, while individual states may be searched by checking Westlaw Directory > Litigation > Verdicts. A Westlaw guide on using Jury Verdicts to assess damages can be found at: <http://west.thomson.com/documentation/westlaw/wlawdoc/wlres/verdqr06.pdf>. If using Lexis Legal, see Area of Law – By Topic > Litigation > Jury Verdicts. A Lexis Legal guide to searching verdicts and settlements can be found at: <http://law.lexisnexis.com/communityportal/articles/articles.aspx?g=QfsTyLJ1USs=&c=id7twaN0z8w=&a=7Jo1bKSzlhY=>. Prison Legal News also has a searchable database of articles on verdicts and settlements. It is available at: <https://www.prisonlegalnews.org/Search.aspx>.

If an attorney prepares the claim, it must be presented in the claimant's name, be signed by the attorney, and show the attorney's title or legal capacity with evidence of his or her authority to bring the claim on the claimant's behalf.⁴¹

For sample FTCA administrative claims, please contact Trina Realmuto at trina@nipnlg.org.

Where is an FTCA administrative claim filed?

An FTCA administrative claim must be filed with the federal agency "whose activities gave rise to the claim."⁴² Although there are currently no specific regulations or written guidance for public distribution regarding where to send immigration-related FTCA administrative claims, such claims arguably fall under the regulations governing service of summonses and complaints in litigation against DHS and its subdivision agencies.⁴³ Litigation is defined to include administrative actions,⁴⁴ which presumably includes an administrative FTCA claim. These regulations provide for service on the Office of General Counsel.⁴⁵

Because compliance with the statute of limitations is jurisdictional, however, it is advisable to serve the administrative complaint on all appropriate offices. Therefore, we suggest also sending a copy of the administrative claim to the DHS agency employing the officer at the time of the act or omission that forms the basis of the claim and to the agency's regional or local counsel. If the claim is related to medical care, we suggest also sending a copy of the claim to the Department of Health and Human Services (if the medical care was or is believed to have been provided by the U.S. Public Health Service) and to the local medical provider (if the care was *not* provided by the U.S. Public Health Service and the medical care provider's identity is known).

For service addresses, *see* the National Immigration Project and American Immigration Council's practice advisory, entitled "Whom to Sue and Whom to Serve in Immigration-Related District Court Litigation."⁴⁶

What is the deadline for filing an FTCA lawsuit in federal court?

Federal lawsuits may be filed within six months of the agency's written denial of the claim.⁴⁷ The agency's failure to act, or to "make a final disposition of the claim," within six months after filing (or, if applicable, amended filing) is considered a final denial.⁴⁸ If an agency requests additional documentation of a claim, such as medical reports, at least two courts have held that the failure to provide the requested documentation does not bar the claimant from bringing the claim in federal court.⁴⁹

⁴¹ 28 C.F.R. § 14.2(a).

⁴² 28 C.F.R. § 14.2(b)(1).

⁴³ 6 C.F.R. §§ 5.41 and 5.42.

⁴⁴ 6 C.F.R. § 5.41(d).

⁴⁵ 6 C.F.R. § 5.42.

⁴⁶ *Available at:* http://nationalimmigrationproject.org/legalresources/Sue_Servie_PA5-13-10.pdf.

⁴⁷ 28 U.S.C. § 2675(a); 28 C.F.R. §§ 14.2(c) and 14.9(a).

⁴⁸ 28 U.S.C. § 2675(a).

⁴⁹ *Adams v. United States*, 615 F.2d 284 (5th Cir. 1980); *Deloria v. Veterans Admin.*, 927 F.2d 1009, 1011 (7th Cir. 1991).

Who is the defendant in a federal FTCA lawsuit and on whom is the complaint served?

The United States is always the defendant in FTCA actions.⁵⁰ If an FTCA claim is brought against individuals or federal agencies, the court will dismiss them.

In lawsuits against the United States, counsel must serve the local U.S. Attorney's Office, the U.S. Attorney General, and the U.S. agency or officer whose actions are implicated by the complaint.⁵¹ To serve the DHS or a DHS officer, the complaint and summons must be sent to the DHS Office of the General Counsel.

For more information on serving a federal complaint, *see* the National Immigration Project and American Immigration Council's practice advisory on this topic.⁵²

Where is a federal FTCA lawsuit filed?

FTCA lawsuits are filed in the U.S. district court where the plaintiff resides or where the act occurred.⁵³

Are defenses available to the United States?

Yes. The United States may assert any defense that otherwise would have been entitled to the employee whose act gave rise to the claim.⁵⁴ This includes any defense based on legislative or judicial immunity. For example, in a negligence claim, the United States would be able to assert any defense of comparative or contributory negligence that would have been available if the employee had been sued in that jurisdiction.

Are there any exemptions to liability?

Yes. The United States is not liable for claims based on the agency or employee's exercise or failure to exercise a discretionary function or duty, even if the discretion was abused.⁵⁵ To invoke this "Discretionary Function Exception," the government must prove: (1) the alleged conduct was not governed by mandatory law, but rather involved an element of judgment or choice; and (2) the judgment exercised was based on public policy considerations.⁵⁶ Courts examine whether the judgment was the kind of discretionary function that the exception was designed to protect.⁵⁷

⁵⁰ *See* 28 U.S.C. § 1346(b).

⁵¹ Federal Rules of Civil Procedure 4(i)(1)(A)-(C).

⁵² *See* n. 46, *supra*.

⁵³ 28 U.S.C. § 1402(b) (setting forth venue requirements for FTCA claims); 28 U.S.C. § 1346(b) (conferring exclusive jurisdiction over FTCA claims on U.S. District Courts).

⁵⁴ 28 U.S.C. § 2674.

⁵⁵ 28 U.S.C. § 2680(a).

⁵⁶ *United States v. Gaubert*, 499 U.S. 315, 322-27 (1991); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813-14 (1984). *See also Garcia v. United States*, 826 F.2d 806, 809 (5th Cir. 1987) ("[Law enforcement] decisions do not involve the sort of social, economic, and political policy choices that Congress intended to exempt from tort liability.").

⁵⁷ *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

The exception does not apply if a statute, regulation, or policy prescribes a course of action and does not permit an employee's exercise of discretion.⁵⁸ While several courts have found that the exception does not apply if the alleged conduct violates the Constitution, the Fifth and Seventh Circuits have ruled otherwise.⁵⁹

Several courts have applied the exception to bar immigration-related claims.⁶⁰ Other courts have rejected its application to certain claims.⁶¹ It is advisable to research the exception's applicability before filing an FTCA claim.

Can I bring other claims with an FTCA claim?

Yes. Although the FTCA bars recovery for other claims against the employee for monetary damages arising from the same conduct, it explicitly permits additionally bringing actions for constitutional violations committed by federal officers.⁶²

In the immigration context, FTCA and *Bivens* claims often are brought together. An essential point to keep in mind is that while both claims may be brought, a judgment in an FTCA action bars recovery in the *Bivens* action.⁶³ Accordingly, counsel must elect which claim to pursue before trial. There are two key points to consider when making this decision. First, FTCA

⁵⁸ *Id.*

⁵⁹ Compare *Limone v. United States*, 579 F.3d 79, 82-83 (1st Cir. 2009); *Myers & Myers, Inc. v. U.S. Postal Service*, 527 F.2d 1252, 1261 (2d Cir. 1975); *U.S. Fidelity & Guar. Co. v. United States*, 837 F.2d 116 (3d Cir. 1988), *cert. denied*, 487 U.S. 1235 (1988); *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001); *Raz v. United States*, 343 F.3d 945 (8th Cir. 2003) (per curiam); *Nurse v. United States*, 226 F.3d 996 (9th Cir. 2000); *Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1196 (D.C. Cir. 1986) with *Castro v. United States*, 608 F.3d 266 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 902 (2011); *Kiiskila v. United States*, 466 F.2d 626, 627-28 (7th Cir. 1972) (per curiam).

⁶⁰ See, e.g., *Medina v. United States*, 259 F.3d 220 (4th Cir. 2001) (barring claims for assault, battery, malicious prosecution and false arrest based on finding that ICE agents' arrest and detention decisions were discretionary); *Castro v. United States*, 608 F.3d 266 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 902 (2011) (barring claim for negligent deportation claim of U.S. citizen child where allowing citizen child to "accompany" father was a policy choice not governed by regulation or law); *Xue Lu v. Powell*, 621 F.3d 944 (9th Cir. 2010) (applying discretionary function exception to supervisor's failure to discipline where discipline not required); *Adras v. Nelson*, 917 F.2d 1552 (11th Cir. 1990) (barring claim by Haitian refugees for unlawful detention based on INS's discretion to detain).

⁶¹ See, e.g., *Vickers v. United States*, 228 F.3d 944 (9th Cir. 2000) (claim against INS investigators for failure to investigate and report officer misuse of firearm); *Mancha v. ICE*, No. 1:06-CV-2650, 2007 WL 4287766 (N.D. Ga. Mar. 31, 2009) (claim against law enforcement officers for committing intentional torts); *El Badrawi v. DHS*, 579 F. Supp. 2d 249 (D. Conn. 2008) (false arrest claim).

⁶² 28 U.S.C. § 2679(b); 28 C.F.R. § 14.10(b).

⁶³ 28 U.S.C. § 2676. See also *Rodriguez v. Handy*, 873 F.2d 814, 816 (5th Cir. 1989); *Arevalo v. Woods*, 811 F.2d 487, 490 (9th Cir. 1987).

damages are paid by the United States, not the individual employee, and thus, as a practical matter, are more likely to result in payment of damages. Second, FTCA claims are heard before a district court judge while *Bivens* claims have a jury-trial right.

Claims under other remedial statutes, such as the Torture Victim Protection Act and Section 1983, also may be brought with an FTCA claim. It is important to remember, however, that a claimant must first file an administrative claim before filing an FTCA claim in federal court. If the statute of limitations for other additional claims is of concern, it is advisable to timely file the complaint containing the non-FTCA claims and later move to amend the complaint to add the ripe FTCA claim or to file a separate action asserting the FTCA claims and move to consolidate the actions.

How can an attorney receive payment?

The FTCA is not a fee-shifting statute. However, the FTCA specifically authorizes collection of contingent fee payments. If the claim is resolved administratively, recovery may not exceed 20% of the settlement. If the claim is settled after district court litigation is initiated, the attorney may recover up to 25% of the settlement or judgment.⁶⁴ Retainer agreements with clients should reflect these contingencies.⁶⁵ Failure to abide by these contingencies rules could result in a fine of not more than \$2,000 or up to a year of imprisonment.

⁶⁴ 28 U.S.C. § 2678.

⁶⁵ For sample fee agreements, please contact Trina Realmuto at trina@nipnl.org.