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THE FEDERALLY SUPPORTED HEALTH CENTERS ASSISTANCE ACT: NATIONAL MALPRACTICE INSURANCE AND HOW IT WORKS

Don A. Dennis*

Two of the biggest issues facing the American legal system today are tort reform and the medical malpractice crisis. The Federally Supported Health Centers Assistance Act (Act) is an example of how Congress has attempted to address these two issues in the context of providing health services to the underserved. Under these auspices, the Act allows the United States to "deem" actors, agencies, and employees to be part of the Public Health Service (PHS). Such "deemed" actors qualify for a type of limited insulation from suit, as outlined by the Federal Tort Claims Act (FTCA). The Act demarcates the exclusive remedy for medical malpractice committed by "deemed" actors acting within the scope of both their employment and agency mission.

While Congress has made a serious attempt to tackle this problem, the legislation and its subsequent iterations raise many new issues and questions that will confront Congress, the judiciary, and legal practitioners in the future. This Article attempts to address the questions raised by the Act and provide a practical guide for courts, practitioners, facilities, and insurers to use when confronted with


3. See id. § 233(g)(1)(D)-(E).
4. See id. § 233 (g)(1)(A); see also 28 U.S.C. §§ 1346, 2671-2780 (1982).
6. See infra Part IV.
conflicting scenarios of potential medical malpractice and statutory governmental immunity.

I. PURPOSE OF THE ACT

The federal government provides primary health care services through four federal programs to populations that are unable to obtain them from private sources: 1) the Migrant Health Program; 2) the Community Health Center Program; 3) the Health Care for the Homeless Program; and 4) the Health Care for Residents of Public Housing Program. The federal government, through the Department of Health and Human Services (HHS), provides grants to public or private nonprofit entities to provide health care services to the respective underserved populations. Congress designed the Act to help these health care facilities provide additional medical services to underserved populations by providing de facto medical malpractice insurance for acts or omissions relating to federal funding.

In 1995, the House of Representatives projected that $756.5 million would be spent to provide primary health care services to 7.6 million people. In 1992, the House Commerce Committee had found that health care facilities receiving federal funds spent over $50

8. Id. (codified at 42 U.S.C. § 254(b) (Supp. IV 1998)).
million for medical malpractice insurance premiums in 1989.\textsuperscript{14} The Act sought to help facilities provide more services to the targeted populations not by providing additional funds, but by reducing the expenses the facilities incurred to obtain medical malpractice insurance.\textsuperscript{15} The Act seeks to further this goal by outlining that the sole remedy available to a plaintiff for damages arising out of personal injury or death resulting from services provided by one of the covered facilities lies against the United States.\textsuperscript{16}

The facility, called an "entity" under the Act, and its employees enjoy the Act's protection by being "deemed" employees of the Public Health Service (PHS).\textsuperscript{17} To take advantage of the Act's safe harbor, it is crucial for all parties involved in the process—including health care facilities, individual physicians working for such facilities, and insurers of these health care providers—to understand the process by which a health care facility becomes eligible for protection.\textsuperscript{18}

II. BECOMING ELIGIBLE FOR PROTECTION UNDER THE ACT

A facility does not enjoy immunity simply by virtue of receiving federal funds.\textsuperscript{19} It must take affirmative steps to "obtain" immunity.\textsuperscript{20}

\begin{itemize}
\item \textsuperscript{14} See id.
\item \textsuperscript{15} See id.; see also PIN 99-8, supra note 12, §§ I-II.
\item \textsuperscript{16} 42 U.S.C. § 233(a) (Supp. IV 1998). The scope of the protection is not comprehensive, but limited to the scope of the federal funding; thus, a health care facility will still need other kinds of insurance besides medical malpractice insurance. See PIN 96-7, supra note 12, § VI.
\item \textsuperscript{17} 42 U.S.C. § 233(g)(1)(A).
\item \textsuperscript{18} See infra Part II.
\item \textsuperscript{19} See 42 U.S.C. § 233(g)(1)(D) (Supp. IV 1998); see also PIN 99-8, supra note 12, §§ 3-4 (discussing requirements and the actions the facilities must take to enjoy immunity).
\item \textsuperscript{20} See 42 U.S.C. § 233(g)(1)(D).
\end{itemize}
This is done by applying to the Secretary of Health and Human Services, who makes the determination of whether the entity meets the requirements for being "deemed" a PHS employee.21 The application aims to provide the Secretary with the statutory requirements for deeming, which include verification of a risk management plan implemented by the health center to reduce the possibility of malpractice as well as evidence of the health center's credentials, claims history, and the license status of its physicians and health care practitioners.22

The facility must submit an application providing information outlining, inter alia, how the facility operates and the scope of its operations.23 Upon proper submission by an erstwhile entity, the Secretary has thirty days to determine whether the facility is deemed.24

The relevant code sections specifically delineate four requirements for proper entity deeming.25 First, the Secretary must find that the entity has implemented appropriate policies and procedures for reducing the risk of malpractice.26 Second, the entity must have reviewed and checked the credentials of its physicians and other health care practitioners.27 Third, the entity must have no claims filed

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21.  Id. § 233(g)(1)(D)-(E); see also 42 C.F.R. § 6.5 (1999). The Bureau of Primary Health Care (BPHC), a subdivision of the Department of Health and Human Services, is the agency that handles the "deeming" process. See PIN 99-8, supra note 12, § VIII.

22.  42 U.S.C. § 233(h). The qualifications outlined in section 233(h) are mandatory if an entity is to be deemed an employee of the Public Health Service. See id.

23.  Id. § 233(g)(1)(D); see also PIN 99-8, supra note 12, § XII. The deeming application must include: a proposed effective date; a list of the Health Center's practitioner staff including a start work date, initial credentialing date, and re-credentialing date; a list of claims brought against the Health Center within the past twelve months; and a statement identifying procedures taken to prevent future claims. See PIN 99-8, supra note 12, § XII.

24.  42 U.S.C. § 233(g)(1)(E). Those entities potentially qualifying for protection under the Act include: "any officer, governing board member, or employee of such entity, and any contractor who is a physician or other licensed or certified health care practitioner." See id. § 233(g)(1)(A).

25.  Id. § 233(h)(1)-(4).

26.  Id. § 233(h)(1).

27.  Id. § 233(h)(2). The Act requires that the entity "has reviewed and verified the professional credentials, references, claims history, fitness, professional review organization findings, and license status of its physicians and other licensed or certified health care practitioners, and, where necessary, has obtained the permission from these individuals to gain access to this information." Id. § 233(h)(2).
against the United States as a result of this Act, or if so, the entity must have cooperated fully with the Attorney General and taken corrective steps to assure that such claims will not arise in the future.\(^{28}\) Finally, the entity must cooperate with the Attorney General and provide information that will help the Attorney General estimate the amount of claims that will arise during the year.\(^{29}\)

Congress designed these requirements to prevent health care facilities from abusing federal protection.\(^{30}\) The requirements allow the government some degree of risk management control by imposing conditions on health care facilities so that the entities actually delivering medical services have incentives to prevent claims from arising. There are no deductibles or coverage limits under the Act; absent these government-insulation requirements, a health care provider would have no incentive to take precautions to reduce the risk of malpractice claims.\(^{31}\)

\(\begin{align*}
28. & \textit{Id.} \ § 233(h)(3). \\
29. & \textit{Id.} \ § 233(h)(4). \text{ The statute requires that, each fiscal year, the Attorney General estimate the amount of all claims, including fees and expenses, that are expected to arise under the Act. } \textit{Id.} \ § 233(k). \\
30. & \text{See generally PIN 99-8, supra note 12, } \S \text{ IX (describing the purpose of the Act as an effort to help facilities increase available funds by saving money on insurance and, without statutory limitations, there would be no incentive for Health Centers to lower the risk of malpractice).} \\
31. & \text{The Act provides that the sole remedy for a plaintiff is against the United States pursuant to the Federal Tort Claims Act (FTCA). 42 U.S.C. } \ § 233(a) \text{ (Supp. IV 1998). The FTCA states that in tort actions the United States will be liable “in the same manner and to the same extent as a private individual.” } 28 \text{ U.S.C. } \ § 2674 \text{ (Supp. IV 1998). This means there is no universal cap on damages; however, the United States can claim a cap if one exists under state substantive law. } \text{See Lozada v. United States, 974 F.2d 986, 989 (8th Cir. 1992) (holding that in an FTCA action, the United States is entitled to the medical malpractice cap under Nebraska law); Carter v. United States, 982 F.2d 1141, 1145 (7th Cir. 1992) (extending Indiana state law limitation on private liability to the United States). However, state law limits will not absolve the United States’ responsibility for any amount a plaintiff is legally able to obtain in a judgment. } \text{See BUREAU OF PRIMARY HEALTH CARE, POLICY INFORMATION NOTICE 97-6, CLARIFICATION OF CERTAIN POLICIES AND PROCEDURES FOR HEALTH CENTERS DEEMED COVERED UNDER THE FEDERAL TORT CLAIMS ACT FOR MEDICAL/DENTAL MALPRACTICE LIABILITY (1997) [hereinafter PIN 97-6].}
\end{align*}\)
A. What Should an Insurer Do to Get Protection for Its Insured?

In determining what action to take when handling a file that might involve FTCA protection, the insurer should make two initial determinations. First, the insurer needs to consider whether the file involves a facility or an individual, and second, whether the issue involved is a claim being filed or a simple evaluation of the insured’s coverage. The answers to these two questions will in large part determine what action the insurer should take.

The insurer should also realize how the FTCA affects the relationship between the insurer and its insured. The purpose of the Act is to eliminate the facility’s need for private medical malpractice insurance.32 However, facilities will still need “gap” insurance to cover those acts or omissions outside the rubric of the FTCA.33 Where an insured fails to properly obtain FTCA protection, a claim that could have been covered by the FTCA would then have to be handled by the insurer under any “gap” coverage.34 Additionally, any procedural miscue on the part of the facility, should it disqualify an entity’s application, will preclude FTCA coverage for the facility and its employees.35 Therefore, the insurer has an incentive to make sure that the facility follows all the proper procedures for obtaining FTCA protection.

B. Qualifying as an FTCA-Eligible Health Care Facility

Insurers especially should be on notice for claims implicating health care facilities. Once an insurer handles a claim involving a health care facility, it is too late to seek immunity for a facility that

33. See PIN 99-8, supra note 12, § IX (stating facilities can purchase gap coverage, which is private insurance covering activities outside the scope of FTCA insulation); PIN 96-7, supra note 12, § VI (noting that facilities will still need other types of insurance).
34. See PIN 99-8, supra note 12, § IX. The Act allows for the combined use of FTCA and gap coverage; however such dual coverage can not protect the same activities. See id. Rather, private insurance can be purchased to cover activities not subject to FTCA coverage. See id.
has not been deemed by the Department of Health and Human Services. The insurer should contact the facility to determine whether it has been through the deeming process. If the facility has not been deemed, it of course will not receive FTCA protection. If the facility has been deemed, the insurer should make certain that the insured facility notifies the federal government of the adverse suit or claim. This should be done regardless of whether the claim is an actual suit or simply a notice of intent; the prudent insurer will cover all procedural bases at the earliest opportunity.

If the insurer is not handling a pending claim or lawsuit but rather is evaluating coverage, the insurer should find out if the facility receives federal funding that would qualify it for protection under the Act. If the facility meets the Act’s statutory requirements, the insurer should make sure the facility begins and completes the deeming process as quickly as possible. There is no statutory protection until the deeming process has been completed. The insurer should further determine the portion of the facility’s services that will be devoted to federal health care and accordingly covered by federal funding. Such a determination allows the insurer to give the facility the appropriate discount on its premiums since a certain portion of medical services will be excluded from coverage under the policy.

36. See infra Part III.A.
37. 42 C.F.R. § 6.5 (1999); see also PIN 99-8, supra note 12, §§ 3-4.
39. See PIN 99-8, supra note 12, § V (identifying FTCA covered activities).
40. For a detailed discussion of the ramifications of not providing the appropriate discount, see infra Part IV.F.
C. Individual Qualification Under the Act

Just as an insurer dealing with a claim must determine whether the facility is deemed, an insurer that covers an individual physician must also assess whether the physician’s facility has been deemed.\textsuperscript{41} If the physician’s facility has not been deemed, then it is unlikely that the physician will have FTCA protection.\textsuperscript{42}

When evaluating coverage absent a claim or lawsuit, the insurer should determine how much of the physician’s services will be rendered under circumstances that would qualify him for protection under the Act.\textsuperscript{43} However, if certain steps are not implemented by the facility, the physician may not receive the protection that normally would be provided under the FTCA.\textsuperscript{44}

Even when a facility fails to follow procedures necessary for FTCA protection, an insurer can limit liability through other means. An insurer may incorporate two types of exclusionary clauses in its insurance contract. An insurer may try to limit its policy coverage by excluding all acts that \textit{could} have been protected by the FTCA. This type of policy might result in the physician having a “gap” in his insurance coverage—for example, acts may theoretically qualify for FTCA protection but be dismissed on procedural application grounds. Consequently, the insurer should explain any use of an exclusionary clause that excludes acts that \textit{could} have been covered. Additionally, an insurer could exclude from coverage only those acts that fall under the FTCA.

Even if a physician secures his own insurance, an insurer would not violate the FTCA if it charged the physician for coverage that is

\textsuperscript{41} See 42 U.S.C. § 233(g)(1)(A) (Supp. IV 1998). If the facility is deemed, the United States government will substitute itself for the facility; if the facility is not deemed, the insurer may have to defend the facility.

\textsuperscript{42} See PIN 99-8, supra note 12, § IV. The Act does not cover individuals except as employees of covered facilities, unless the licensed physician is a qualified contractor of the entity. 42 U.S.C. 233(g)(1)(A), (g)(5).

\textsuperscript{43} 42 U.S.C. § 233(g)(5).

\textsuperscript{44} Id. § 233(g). For example, if the facility fails to send in a deeming application, the individual would not be covered. Id.
provided by the Act, because any savings he realizes would not be redirected towards providing services.\textsuperscript{45} However, such a strategy could open the insurer to a possible subrogation suit by the United States if the insured physician is paying for coverage.\textsuperscript{46} Moreover, it would be unethical for insurers to charge the same premium for a policy that excludes various actions as for one that is comprehensive; state insurance departments could take umbrage with such a practice. Logically, then, the insured should receive a discount for the reduction in coverage resulting from FTCA protection.

III. THE ACT'S COVERAGE

The Act covers acts or omissions, relating to the grant-supported activity, occurring after the date the entity becomes a deemed facility and related to the grant-supported activity.\textsuperscript{47} Therefore, the determination of two key elements is essential to establishing facility coverage under the Act: first, the date the facility was deemed an employee under the Act, and second, whether the alleged act or omission that forms the basis of the claim is related to the scope of services funded by the grant.\textsuperscript{48}

\begin{footnotesize}
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\begin{enumerate}
\item See PIN 99-8, \textit{supra} note 12, § II (describing the purpose of the FTCA as a way to help Health Centers increase the funds toward additional services).
\item See, e.g., Ritchie v. United States, 732 F. Supp. 1125, 1128 (W.D. Okla. 1990). In \textit{Ritchie}, the United States was brought in to defend a malpractice action against a physician because the court considered the doctor, who worked under contract for a military hospital, as an employee covered by the FTCA. \textit{id.} at 1126. The United States then brought in the physician's medical malpractice insurance carrier as a third party defendant. \textit{id.} The court allowed the indemnification action, holding that if the insurance carrier wanted to exclude any government-related liability, it should have done so through an expressed provision in the insurance contract. See \textit{id.} at 1128; see also infra Part IV.E.
\item See 42 C.F.R. § 6.6(a), (d) (1999).
\item See \textit{id.} § 6.6(a), (d); PIN 99-8, \textit{supra} note 12, § V.
\end{enumerate}
\end{footnotesize}
A. Facility Classification at the Time of the Complained-Of Act

The Act does not protect an entity simply by virtue of its receipt of federal funding. Any statutory protection is not retroactive and only applies to acts or omissions occurring on or after the date the Secretary deemed the facility to be an employee of the PHS. Hence, it is possible for a facility to be “eligible” for protection, yet not be covered because it failed to send the Secretary its application.

In Metcalf v. West Suburban Hospital, the plaintiff brought a claim for negligent diagnosis against a hospital, the plaintiff’s treating physician, and the physician’s clinic employer. The plaintiff saw her doctor from December 1989 to November 1993. The court held the clinic was not protected by the FTCA because the letter deeming the clinic an employee of the PHS was dated May 3, 1994, several months after the alleged negligence. Had the deeming process been completed earlier, the FTCA could have protected the clinic and its employees.

Metcalf reiterates the need for any entity believing itself eligible for protection under the Act to notify the government promptly and then complete the deeming process. Any entity that receives federal

49. See 42 U.S.C. § 233(g), (h) (Supp. IV 1998) (setting forth limits on a facility covered under the FTCA, including the deeming process).
50. 42 C.F.R. § 6.6(a) (1999).
52. Id. at 383.
53. Id.
54. See id. at 387 (noting the date to focus on is the date of the unlawful act or omission, and not the date the injury is discovered).
55. At the time of the alleged negligence, the Act did not provide coverage for patients enrolled in a managed care plan. See id. at 388. Therefore, the court noted that since the plaintiff was being treated pursuant to her insurance coverage, the claims would not be covered under the FTCA because the care would not be related to the grant-supported activity. See id. However, later legislation expanded the Act’s coverage to include managed care plans. See 42 U.S.C. § 233(m) (Supp. IV 1998). The new version of the legislation reads:

An entity or officer, governing board member, employee, or contractor of an entity . . . shall, for purposes of this section, be deemed to be an employee of the Public Health Service with respect to services provided to individuals who are enrollees of a managed care plan if the entity contracts with such managed care plan for the provision of services.

42 U.S.C. § 233(m)(1).
funding under the Public Health Service Act may qualify for protection and should contact the Department of Health and Human Services about completing a deeming application.\textsuperscript{56} As is, many facilities may be purchasing private malpractice insurance when they are eligible for protection under the Act.\textsuperscript{57}

\textbf{B. Only Acts Within the Scope of the Project Are Covered}

Even after a health care facility is deemed an employee of the PHS, the health care facility is not protected under the FTCA from all suits brought against it. The protection only extends to services related to the grant-supported activity.\textsuperscript{58} This is known as being within the "Scope of Project."\textsuperscript{59} The limitation on the scope of protection is consistent with the Act's purpose.\textsuperscript{60} When the health care facility faces a cause of action, it must notify the Attorney General of the

\textsuperscript{56} See 42 U.S.C. § 233.

\textsuperscript{57} Most facilities will still need to maintain some type of private insurance for acts and omissions not covered under the Act. See supra notes 32-34 and accompanying text. These "wrap-around" or "gap" policies usually consist of general liability, premises liability, and liability for acts not related to federal funding. See id.

\textsuperscript{58} 42 C.F.R. § 6.6(d) (1999).

\textsuperscript{59} See PIN 99-8, supra note 12, § V.A.

\textsuperscript{60} The purpose of the Act is to alleviate the costs of obtaining medical malpractice insurance covering health care services to underserved segments of the population. See supra Part I. The health care facilities may then redirect those expenses in order to provide additional health care services to the underserved populations. See supra text accompanying notes 15-16. Since the Act's purpose is to provide more services to underserved populations, it may at first seem consistent with the Act to provide comprehensive coverage for all acts so that health care providers will save additional expenses and be able to provide a greater amount of services to the targeted populations. However, such an analytical approach fails to take into consideration that such a scheme would provide disproportionate coverage for the services provided. Under such a scheme, where 10\% of a health care facility's services are related to federal funding, the facility would receive a windfall of coverage as compared to a similar facility where 80\% of its services are federally funded. The protection afforded under the FTCA should be proportionate to the services provided by the health care facility. The present scheme accomplishes this by extending coverage only to those acts that relate to the federal funding.
claim or lawsuit so that the Attorney General can determine whether the Act covers the particular incident.\textsuperscript{61} If a health care facility is unsure whether particular acts are within the scope of project, the facility should make a request for determination as soon as possible.\textsuperscript{62} The Director of the Bureau of Primary Health Care can then determine whether such activity is within the scope of project.\textsuperscript{63}

The scope of project describes the project and identifies five core elements that help the project effectuate its designated goal.\textsuperscript{64} The scope of project details the approved budget and its allocation to corresponding services.\textsuperscript{65} The five elements are:

1. Whom the project will serve (i.e., the users);
2. Where the project will be provided (i.e., the site);
3. What area the project will serve (i.e., the service area);
4. What the project will provide (i.e., the services);
5. Who will provide services (i.e., the providers).\textsuperscript{66}

Deemed facilities may provide services through contractors, referrals, or other means.\textsuperscript{67} Referral arrangements become part of the scope of project if the facility pays the services with project budget funds.\textsuperscript{68}

Once the Attorney General receives notification of a lawsuit filed against any entity or one of its employees, the Attorney General has

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\textsuperscript{62} See PIN 99-8, supra note 12, § VIII.
\textsuperscript{63} See id.
\textsuperscript{64} See Bureau of Primary Health Care, Policy Information Notice 96-14, Scope of Project Policy (1996) [hereinafter PIN 96-14].
\textsuperscript{65} See id.
\textsuperscript{66} See id. § IV.
\textsuperscript{67} See id. § V.
\textsuperscript{68} See id.
fifteen days to make an appearance in court to advise the court whether the entity or its employees are deemed PHS employees for purposes of the acts or omissions at issue in the suit. If the Attorney General finds that the entity or its employees are PHS employees, such finding will satisfy the Act's requirement that the Attorney General certify that the entity and its employees were acting within their scope of employment. Thus, the PHS employees would receive the Act's protection. If the acts are not related to the federal funding, then neither the entity nor the individual will receive protection from the federal government; consequently the case may proceed as a typical medical malpractice claim.

1. Individual Physicians Are Not Guaranteed Protection

It is possible for the Act to protect an entity and not cover a physician performing services at the health care facility. The Act provides that an individual may be considered a contractor of the entity if the individual meets certain criteria, such as performing an average of thirty-two and one half hours of service a week. Conceivably, a physician who is not an employee of the health care facility may perform services related to the facility's federal funding. If the facility has completed the deeming process, it should be covered by the Act; however, the physician would not be covered.

70. See id.
71. See id. § 233(a).
72. See PIN 99-8, supra note 12, § V.
because he is neither an actual employee nor meets the requirements to be considered a contractor. 74

A finding that the entity or physician is an employee allows the Attorney General to remove the case to federal district court, with the substitution of the United States as the defendant. 75 At this point the United States will take over the case and the entity or individual’s involvement will be limited to cooperating with the United States in defending the lawsuit. 76

2. Attorney General’s Certification: Is It Conclusive?

Another important issue is whether the Attorney General’s certification that an individual is an employee is conclusive upon the court. The Supreme Court in Gutierrez de Martinez v. Lamagno 77 reviewed a United States Attorney’s certification that a federal employee’s actions are within the scope of his or her employment. 78 The Court held that for purposes of substitution under the FTCA, any Attorney General or subordinate determination is not conclusive and is subject to judicial review. 79 However, Lamagno involved legislation that did not list criteria for when an individual is an employee. 80 A distinguishing characteristic between the Act and other legislation is that Congress provided explicit criteria detailing who is

74. Under this situation, the facility would have a strong argument that even without the Act’s protection, it cannot be held liable for the physician’s negligence because there is no basis for vicarious liability. However, the Act protects the deemed facility from even having to go to court and defend itself on this ground. Under this hypothetical, the plaintiff, even if he alleged vicarious liability, would have to sue the United States. Of course, the individual physician could also face liability because he would not be covered under the Act. See 42 U.S.C. § 233(g)(1)(A).

75. See id. § 233(c).

76. See generally id. § 233(b) (outlining role of Attorney General in removed cases).


78. See id. at 421.

79. See id. at 425. Plaintiffs contested the Attorney General’s certification because it left them without a remedy; the United States asserted sovereign immunity under an FTCA exception that removes the government’s sovereign immunity waiver for claims arising in a foreign country. See id. at 422; see also S.J. & W. Ranch, Inc. v. Lehtinen, 913 F.2d 1538, 1541 (11th Cir. 1990) (relying on the legislative history of the Federal Employee’s Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679, to hold that the Attorney General’s certification is only dispositive for removal purposes).

and who is not an employee under the Public Health Service Act.\textsuperscript{81} Thus, some argue that under the Act, the Attorney General's finding regarding whether or not an entity qualifies as an employee is conclusive.\textsuperscript{82}

In \textit{Brown v. Health Service, Inc.},\textsuperscript{83} where the plaintiffs brought a medical malpractice action against the health care center and the physician, the court held the Attorney General's finding conclusive.\textsuperscript{84} There, the plaintiff went to the health care facility suffering from a swollen wrist.\textsuperscript{85} A physician prescribed a penicillin derivative to the plaintiff, despite a notation of the plaintiff's allergy to penicillin in medical records.\textsuperscript{86} The patient subsequently died due to an allergic reaction to the prescribed medication.\textsuperscript{87} The United States Attorney moved for substitution of the United States as defendant and for removal from State court.\textsuperscript{88}

The plaintiffs challenged the removal, arguing that the defendants were not entitled to protection under the Act as PHS employees.\textsuperscript{89} The court rejected the plaintiff's argument, refusing to even review administrative decisions during the deeming process.\textsuperscript{90} Judge DeMent outlined that "[t]he court will not examine each administrative

\begin{footnotesize}
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\item See infra notes 83-91 and accompanying text.
\item 971 F. Supp. 518 (M.D. Ala. 1997).
\item See \textit{id}. at 519.
\item See \textit{id}.
\item See \textit{id}.
\item See \textit{id}.
\item See \textit{id}.
\item See \textit{id}.
\item See \textit{id}.
\item See Brown v. Health Serv., Inc., 971 F. Supp. 518, 520 (M.D. Ala. 1997). The plaintiff argued that the facility's negligent actions occurred within an FTCA coverage gap. \textit{Id}.
\item See \textit{id}. at 521.
\end{enumerate}
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decision made during the grant and deeming process which ultimately resulted in [the defendants’] FTCA protection . . . . The statute does not provide for judicial review of the individual administrative decisions which culminate in FTCA protection.\textsuperscript{91}

Judge De Ment’s position is fundamentally sound. Allowing judicial review of the Attorney General’s administrative decision would eviscerate the ability of the federal government to manage the application of the Act.\textsuperscript{92}

IV. HOW DOES THE FTCA WORK?

The Act protects health care facilities and their employees by deeming them PHS employees, which means that the sole remedy against them is to bring suit against the United States pursuant to the FTCA.\textsuperscript{93} In cases involving deemed entities, even though the United States is substituted as the defendant, it is vital for a health care facility to understand how the FTCA works because the facility and its employees will often remain involved in the suit.

In cases where the United States substitutes itself for an entity or employee of the entity, the original defendant will be expected to cooperate fully so that the United States can adequately defend the case.\textsuperscript{94} Moreover, in cases where a health care facility maintains dual coverage, the private insurer will have an additional interest in the outcome of the case because the United States may seek payment from the insurer for any judgment against the United States pursuant to a statutory right of subrogation.\textsuperscript{95}

The FTCA allows a person to sue the United States for the tortious acts of its employees.\textsuperscript{96} The FTCA is a limited waiver of the federal

\textsuperscript{91} Id.

\textsuperscript{92} See Rendon v. United States, 91 F. Supp. 2d 817, 819 (E.D. Pa. 2000). In fact, “the statute itself suggests that this decision [to deem a facility] is unreviewable.” Id.


\textsuperscript{94} See PIN 99-8, supra note 12, § III.

\textsuperscript{95} See 42 U.S.C. § 233(g)(2).

government's sovereign immunity.\textsuperscript{97} Originally, the FTCA did not bar suits against the employee individually.\textsuperscript{98} However, the plaintiff could only recover from either the employee or the government.\textsuperscript{99} Under this scheme, most plaintiffs sue the federal government because it has the "deepest pockets" of any potential defendant and always pays any judgment levied against it.\textsuperscript{100} However, suing the federal government under the FTCA has its disadvantages as well.\textsuperscript{101}

\textit{A. Procedure for Bringing an FTCA Claim}

Before any suit can be filed against the federal government, the plaintiff must file an administrative claim.\textsuperscript{102} All claims brought against the federal government are subject to a two-year federal statute of limitations.\textsuperscript{103} The statute of limitations does not begin to run until the cause of action accrues.\textsuperscript{104} In cases where the United States is substituted as the defendant, the plaintiff may be unaware that the only claim is against the United States and that the claim

\begin{itemize}
\item \textsuperscript{97} See Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 422 (1995).
\item \textsuperscript{98} See 28 U.S.C. § 2676; Henderson v. Bluemink, 511 F.2d 399, 403-04 (D.C. Cir. 1974) (stating that with "the exception of a provision in the Act and others found elsewhere, there is no statutory protection for federal employees from personal liability arising out of their own negligent conduct while acting within the scope of their employment").
\item \textsuperscript{99} See 28 U.S.C. § 2676 ("The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim."); see also Bluemink, 511 F.2d at 404 (clarifying that the Act provides that a judgment against the United States bars a subsequent action against the negligent employee but does not bar a suit against the employee in the first instance).
\item \textsuperscript{100} Bruce G. Hart, Note, \textit{Medical Malpractice Protection Under the Federal Tort Claims Act: Protecting Both Physicians and Claimants}, 58 FORDHAM L. REV. 1107, 1110 (1990) (positing that the United States is "the world's largest self insurer").
\item \textsuperscript{101} See id. (noting that the FTCA prohibits punitive damages, jury trials, and sets a mandatory two-year statute of limitations on all tort claims against the United States).
\item \textsuperscript{102} See 28 U.S.C. § 2675(a) (Supp. IV 1998).
\item \textsuperscript{103} See id. § 2401(b).
\item \textsuperscript{104} See id.
\end{itemize}
must be filed within two years. Ignorance regarding the proper party to sue will not toll the statute of limitations and failure to file a claim within the allotted time will bar recovery.

_Flickinger v. United States_,\(^{105}\) one of few cases dealing with the Act, demonstrates the harsh results that can occur when a plaintiff fails to comply with the FTCA’s strict requirements.\(^{106}\) The plaintiff brought suit in February 1981 against a nurse and health clinic that negligently treated the plaintiff in February 1979.\(^{107}\) In June 1981, the United States Attorney filed a petition to have the United States substituted for the defendants and to remove the case to district court.\(^{108}\) The district court granted both petitions.\(^{109}\) The United States then moved to dismiss the suit based on the plaintiff's failure to file an administrative claim.\(^{110}\)

The plaintiff argued that she should not have to file an administrative claim within two years since she filed her claim in state court well before the statutory deadline.\(^{111}\) She argued alternatively that the two years had not run because she had no knowledge of the nurse’s relationship as a federal employee.\(^{112}\) The court rejected the first argument outright, holding that the administrative filing requirement under the FTCA was an absolute jurisdictional hurdle.\(^{113}\) The court similarly disposed of the “ignorance” argument, finding that the “United States, as sovereign, is immune from suit save as it consents to be sued.”\(^{114}\) The court narrowly construed the exceptions to immunity outlined in the statute,

\(^{106}\) See id. at 1373.
\(^{107}\) See id.
\(^{108}\) See id. Simultaneously, the United States Attorney filed a certification that as of February 1981, the allegedly negligent nurse was a PHS employee. Id.
\(^{109}\) Id. at 1374.
\(^{111}\) See id.
\(^{112}\) See id.
\(^{113}\) See id. at 1377.
\(^{114}\) Id. at 1375 (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)).
and held that ignorance of the defendant’s status as a federal employee did not toll the statute of limitations.\textsuperscript{115}

The harsh results mandated by these cases should put plaintiffs’ attorneys on notice that anytime a client has a case against a health care facility, or any other entity for that matter, they should investigate whether there is a possibility that the individual is a federal employee. If such an individual is or might be a federal employee, the lawyer should file an administrative claim \textquoteright with the appropriate agency.\textsuperscript{116} If the statute of limitations is a concern for a plaintiff, then as a precautionary measure, a practitioner should file an administrative claim and a complaint in state court to insure that the plaintiff’s claim is timely regardless of the employee’s status. If it is determined that the individual is a federal employee, then the state court action can be dismissed.\textsuperscript{117} However, if it is determined that the individual is not a federal employee, then the filing of the state claim will have preserved the plaintiff’s cause of action.\textsuperscript{118}

\textsuperscript{115} See id. at 1377; see also Gould v. United States Dep’t of Health and Human Servs., 905 F.2d 738, 741 (4th Cir. 1990) (noting that strong equitable considerations notwithstanding, the two-year limitation period of 28 U.S.C. \textsection 2401(b) cannot be tolled or waived); Wilkinson v. United States, 677 F.2d 998, 1001 (4th Cir. 1982) (holding that the two-year requirement had not been met, thus forever barring the federal tort claim); Santiago Rosario v. Estado Libre Asociado de Puerto Rico, 52 F. Supp. 2d 301, 304 (D.P.R. 1999) (holding that under \textsection 2675, a claimant must first file a claim with the appropriate federal agency and this administrative requirement is a \textquoteright non-waivable jurisdictional requirement\textquoteright ); United Mo. Bank S. v. United States, 423 F. Supp. 571, 577 (W.D. Mo. 1976) (stating that time for filing administrative claim is not to be extended by equitable considerations).

\textsuperscript{116} See 28 C.F.R. \textsection 14.2 (1999); Frank Hanley Santoro, \textit{A Practical Guide to the Federal Tort Claims Act}, 63 CONN. B.J. 224, 225 (1989); see also cases cited supra note 115.

\textsuperscript{117} And of course, should the employee be deemed under the statute, the Attorney General will remove the case to federal court. 42 U.S.C. \textsection 233(c) (Supp. IV 1998).

\textsuperscript{118} If the individual is not a federal employee, then the Act does not apply and the FTCA does not come into play. The plaintiff must proceed and file a complaint within the statute of limitations. See generally id. \textsection 233(a).
The claimant should file an administrative claim using Form 95, which is entitled "Claim For Damage, Injury, Or Death." The claim must specify the claimant's damages. Failure to specify a set amount will result in dismissal of any suit brought by the claimant.

In *Suarez v. United States*, the claimant did not submit a sum certain for damages with his Form 95, but rather sought "unliquidated" damages. The United States denied his claim, and after Suarez filed suit, the United States moved to dismiss for failure to properly file his claim in accordance with 28 U.S.C. § 2675(a). The appeals court affirmed dismissal, stating that it did not have the ability to create an exception to the sum certain requirement, even when the damages are unliquidated within the two-year statute of limitations.

If the agency denies a plaintiff's claim, the plaintiff must file an action in United States district court within six months of the denial. The plaintiff may also file a suit in district court if the agency does not take action within six months. Once the action is properly in district court, a practitioner must be aware of certain rules that are unique to an FTCA claim. For example, the FTCA does not allow an award of punitive damages against the United States, nor does it allow for jury trials.

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120. See 28 C.F.R. 14.2 (1998); Santoro, *supra* note 116, at 225 (noting that if the claim is later pursued in a lawsuit, the damages are limited to the amount specified in the administrative action unless new evidence is discovered).
122. 22 F.3d 1064 (11th Cir. 1994).
123. *See id.* at 1065.
124. *See id.*
125. *See id.* at 1066.
129. *See* id. § 2402.
B. What If the Plaintiff Has Filed the Claim Against a Health Care Facility?

If the plaintiff files suit against either the facility or individual physician, then the facility or physician should notify the government.\textsuperscript{130} The plaintiff must file a claim against the federal government within two years or her claim is forever barred.\textsuperscript{131} If the two-year statute of limitations for filing with the federal government is about to expire, then the facility may want to delay informing the government of the plaintiff's suit and let the statute lapse. It is still debatable whether the filing of a lawsuit against an individual will satisfy the administrative claim requirement against the United States. Some case law, however, suggests that the individual suit will not satisfy the notice requirement and the plaintiff's claim will be subsequently barred.\textsuperscript{132}

C. Which Law Applies?

Under the FTCA, the district court must determine liability by applying the law of the forum state.\textsuperscript{133} The federal government may

\textsuperscript{130} See PIN 99-8, supra note 12, § XIX.
\textsuperscript{131} See 28 U.S.C. § 2401(b) (setting out the two-year statute of limitations for claims under the FTCA).
\textsuperscript{132} See, e.g., Burns v. United States, 764 F.2d 722, 724 (9th Cir. 1985) (noting that equity will not toll the FTCA statute of limitations because the claim requirement is jurisdictional); Lacen-Renigio v. United States, 787 F. Supp. 34, 39 (D.P.R. 1992) (filing of premature suit does not toll six-month time frame for commencing civil suit).
\textsuperscript{133} See 28 U.S.C. § 1346(b); Carlson v. Green, 446 U.S. 14, 23 (1980) (commenting that an action under the FTCA exists only if the state where the alleged wrongdoing occurred allows the cause of action); Massey v. United States, 733 F.2d 760, 763 (11th Cir. 1984) (noting that under the FTCA, the United States is liable to suit to the extent a private individual is liable according to the laws where the tortious act occurred); Watkins v. United States, 789 F. Supp. 1141, 1144 (M.D. Ala. 1992) (noting that in an FTCA action, a federal district court must apply the tort law of the state within which it sits).
be liable only to the extent that a private individual under like circumstances would be liable. Accordingly, the government is liable to the same extent the employee would have been liable without FTCA immunity. If an employee can assert a particular defense, then the United States can as well.

1. What Types of Damages Are Recoverable?

A related issue involves the types of damages a plaintiff may recover against the United States. The FTCA precludes any recovery of punitive damages. However, there is the possibility under the Equal Access to Justice Act (EAJA) that the United States may be liable for attorneys’ fees.

In Joe v. United States, the plaintiff argued that she was entitled to attorneys’ fees pursuant to a state statute which authorized such an award to the prevailing party in a medical malpractice action. The Eleventh Circuit Court of Appeals held that the term “statute” in the

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135. See, e.g., Knowles v. United States, 91 F.3d 1147, 1150 (8th Cir. 1996).
136. The United States is also subject to statutory caps on liability. See Owen v. United States, 935 F.2d 734, 739 (5th Cir. 1991) (applying Louisiana’s malpractice cap to United States); Starns v. United States, 923 F.2d 34, 38 (4th Cir. 1991) (holding Virginia’s $750,000 cap on medical malpractice actions applicable to United States); Taylor v. United States, 821 F.2d 1428, 1431 (9th Cir. 1987) (finding California statutory limitation amount of recovery is available to the United States). Collateral source statutes are also available to the United States. See Reilly v. United States, 863 F.2d 149, 162 (1st Cir. 1988) (holding that in an FTCA case, the United States could use Rhode Island’s collateral source rule to reduce the award); Scheib v. Fla. Sanitarium & Benevolent Ass’n, 759 F.2d 859, 863 (11th Cir. 1985) (applying Florida’s collateral source statute to United States).
138. See id. § 2412(b). The EAJA provides that the United States shall be liable to the same extent as any other party under the common law or terms of any statute which provides for attorneys’ fees, unless awarding attorneys’ fees is expressly prohibited by statute. See id. But see Anderson v. United States, 127 F.3d 1190, 1191-92 (9th Cir. 1997) (noting that Congress has not waived the government’s sovereign immunity for attorneys’ fees and expenses under the FTCA); Joe v. United States, 772 F.2d 1535, 1536-37 (11th Cir. 1985) (finding that the FTCA does not have an express waiver of sovereign immunity that allows a court to award attorneys’ fees against the United States).
139. See Joe, 772 F.2d at 1536. The statute the plaintiff relied upon, section 768.56, Florida Statutes, was repealed in 1985. See 1985 Fla. Laws ch. 85-175, § 43.
EAJA referred only to federal statutes.\textsuperscript{140} Thus, the plaintiff was not entitled to attorneys' fees.\textsuperscript{141}

2. Is There a Cap on Damages?

Since the Act only covers medical malpractice actions, there are issues that are unique to cases brought under the FTCA. One such issue is the application of state statutory caps on liability for certain health care providers. If the individual for whom the United States substituted itself could have availed himself of the cap, then so too may the United States.\textsuperscript{142}

Many statutes capping damages against health care providers define health care providers to include only state-licensed persons or facilities.\textsuperscript{143} In \textit{Lucas v. United States},\textsuperscript{144} the plaintiffs tried to avoid a state statutory cap on damages for health care providers by claiming that the United States did not qualify under the statute's definition of

\textsuperscript{140} See \textit{Joe}, 772 F.2d at 1537.

\textsuperscript{141} See \textit{id.} A few other courts have also denied plaintiffs recovery of attorneys' fees from the federal government. See \textit{Anderson}, 127 F.3d at 1191-92 ("Congress has not waived the government's sovereign immunity for attorneys' fees and expenses under the FTCA."); \textit{Bergman v. United States}, 844 F.2d 353, 357-58 (6th Cir. 1988) (affirming District Court's ruling that plaintiffs, who succeed on a claim under the FTCA, may not recover attorneys' fees from the United States under the Equal Access to Justice Act absent proof of bad-faith on behalf of the government); \textit{Olson v. Norman}, 830 F.2d 811, 822 (8th Cir. 1987) (holding, "[w]e do not read [section] 2412(b) to subject the United States to liability for attorneys' fees based on state laws, be they statutory or common").

\textsuperscript{142} See \textit{Lozada v. United States}, 974 F.2d 986, 989 (8th Cir. 1992) (ruling that the United States, when sued under the FTCA, is entitled to the medical malpractice cap under Nebraska law); \textit{Carter v. United States}, 982 F.2d 1141, 1143 (7th Cir. 1992) (holding that limitation on private liability under Indiana law applies to the United States); \textit{Aguilar v. United States}, 920 F.2d 1475, 1479 (9th Cir. 1990) (concluding that the FTCA incorporates Nevada statutory law imposing a damages cap); \textit{Louis v. United States}, 54 F. Supp. 2d 1207, 1212 (D.N.M. 1999) (holding that the limitation of damages under New Mexico law applies to FTCA claims for medical malpractice against the United States).

\textsuperscript{143} See \textit{Owen v. United States}, 935 F.2d 734, 736-37 (5th Cir. 1991) (discussing Texas statute art. 4590i, § 11.02; Louisiana statute § 40:1299.42, and a similar California statute).

\textsuperscript{144} 807 F.2d 414 (5th Cir. 1986).
a "health care provider." The Fifth Circuit rejected the plaintiff's argument, stating that Texas could not make the United States liable. Under the FTCA, the United States is treated as a "private individual under like circumstances," meaning that where the United States substitutes itself for a state-licensed individual, then the United States is treated as if it were a state-licensed individual as well.

3. State Presuit Schemes

Another issue that will arise in FTCA cases will involve how the FTCA will affect the various state presuit schemes dealing with medical malpractice claims. Arguably, presuit schemes, such as conditions or actions required by statute of a plaintiff before filing in court, promote the weeding out of meritless claims and encourage settlement of meritorious claims. Although limited, case law exists that suggests the United States enjoys the benefits of such presuit schemes. For example, in Hill v. United States, the court held that a Colorado certificate of review requirement in medical malpractice actions applied to FTCA malpractice actions. Judge Babcock followed the rule that federal procedural law and state substantive law applied in FTCA cases and found that the Colorado presuit statute was substantive and was applicable. However, the judge did not dismiss the plaintiff's case for failure to file the required certificate, as the plaintiffs moved to file the certificate of review, which the judge can grant for "good cause."

145. See id. at 417. The statute defined "health care provider" to encompass only state-licensed entities. See id.
146. See id. The court noted that Texas law does not have the authority to determine when the federal government has waived its sovereign immunity. See id.
149. See id. at 910.
150. See id.; see also Oslund v. United States, 701 F. Supp. 710, 714 (D. Minn. 1988) (holding that the Minnesota affidavit requirement in medical malpractice cases was substantive and applicable in FTCA cases).
because the statute's application to a FTCA medical malpractice action is a novel issue in this District and the Tenth Circuit." 152

Application of a presuit scheme in most FTCA cases would not be overly complicated except where the plaintiff does not comply with the FTCA and files a notice of intent to sue individual employees pursuant to the state presuit scheme. 153 In Hill, the plaintiff complied with the federal administrative claim procedure but failed to comply with the state presuit scheme. 154 What should the result be if the plaintiff fails to comply with the federal claims process but follows the state presuit process?

The Act allows the Attorney General to substitute itself where a "civil action or proceeding" has been brought. 155 Under many presuit schemes, the presuit process is a condition precedent to bringing a civil action. 156 Does the Act allow the United States to substitute itself in a presuit proceeding where no formal action has been filed in court?

152. Id.
153. Such application is relatively straightforward, since the requirement that a party must first file an administrative claim with the United States government prior to filing suit is itself a presuit scheme. In many situations the FTCA presuit scheme and the state scheme could be complied with simultaneously. However, if the state scheme differs from the FTCA scheme and the plaintiff does not comply with the FTCA procedures, then the suit should be barred.
156. See, e.g., Fla. Stat. Ann. § 766.106 (West 1997). Florida requires that a plaintiff send a notice to the health care provider along with a corroborating affidavit by another health care provider that notifies the potential defendant of the plaintiff's claim of negligence. See id. § 766.106(2). This notice is a condition precedent to filing a medical malpractice claim, and a plaintiff cannot file an action in court without first following the presuit process. See id. The health care provider then has ninety days to either reject the notice of intent, offer a settlement, or do nothing. See id. § 766.106(3). During the ninety-day period each side has a good faith obligation to conduct discovery—which is inadmissible in any subsequent suit—to evaluate the merits of the claim. See id. § 766.106(5). Upon expiration of the ninety-day period or when the plaintiff has received notice of a denial, a complaint may be filed. See id. § 766.106(3)(a), (b).
The Act's purpose is to relieve health care facilities from having to procure medical malpractice liability insurance so that they can redirect funds to provide more services to underserved populations.\footnote{See supra Part I.} To accomplish this goal, facilities must be able to avoid litigation costs and similar expenses, including presuit negotiations and discovery, and redirect these costs to additional health care services. Even if a health care facility is ultimately removed from litigation after presuit action and replaced by the United States, the very filing of a formal complaint produces unavoidable costs in presuit negotiations and discovery. Hence, the Act's purpose is defeated.\footnote{See id.}

Upon receiving a notice of intent from a plaintiff, the health care provider should notify the Bureau of Primary Health Care of the action against the facility.\footnote{See PIN 99-B, supra note 12, § XIX.} The United States should then determine whether the alleged negligence falls within the scope of employment; if so, the United States would substitute itself for the health care facility or individual.\footnote{See 42 U.S.C. § 233(0)(1) (Supp. IV 1998).} Consequently, during the fifteen days that the Attorney General has to determine whether the acts are within the scope of employment, the time for conducting the presuit process should be tolled.\footnote{See id.} However, a strict reading of the Act does not immediately make apparent such an interpretation. Therefore, a court may be reluctant to toll the time period.

If the Attorney General determines that the acts are within the scope of employment, will the United States be subject to a statutory scheme that requires presuit discovery and negotiations before litigation? Both \textit{Hill} and \textit{Oslund v. United States} dealt with statutory requirements that ran concurrently with the filing of litigation.\footnote{See \textit{Hill v. United States}, 751 F. Supp. 909 (D. Colo. 1990); \textit{Oslund v. United States}, 701 F. Supp. 710 (D. Minn. 1988).}
Florida’s presuit scheme requires negotiations and discovery ninety days before a suit can be brought.\textsuperscript{163} Is the United States bound by such a scheme? The answer should be no. The FTCA requires a plaintiff to file an administrative claim with the government before bringing a suit.\textsuperscript{164} Florida’s presuit period only requires a plaintiff to wait ninety days before filing a claim against a health care provider, whereas the FTCA requires a plaintiff to wait six months before filing a complaint.\textsuperscript{165} Under the rules of preemption, state presuit schemes that conflict with federal procedure are trumped by the federal rule.\textsuperscript{166}

Most importantly, all parties involved—health care facilities, individual physicians, plaintiffs, and attorneys—should be aware that limited case law exists on this issue. Parties should communicate with each other and, if possible, stipulate to toll timing periods when confronted with issues that have no clear guidance.

\textbf{D. Can a Health Care Provider Waive the Protection?}

Sovereign immunity belongs to the sovereign—the United States government—and only that sovereign can waive its immunity.\textsuperscript{167} The circumstances of any waiver must be scrupulously observed and not expanded by the courts.\textsuperscript{168} The court’s decision in \textit{Perry v. United

\begin{footnotesize}
\textsuperscript{163} See FLA. STAT. ANN. § 706.106 (West 1997).
\textsuperscript{165} Compare FLA. STAT. ANN. § 766.106(5), with 28 U.S.C. § 2675(a).
\textsuperscript{167} See United States v. Kubrick, 444 U.S. 111, 117-18 (1979) (noting that Congress waived the United States’ immunity under certain circumstances proscribed in § 2401(b) of the FTCA and the Court should not extend the waiver beyond Congress’ intent); Suarez v. United States, 22 F.3d 1064, 1066 (11th Cir. 1994) (finding “no indication that Congress intended to waive its sovereign immunity under conditions other than those expressly provided in the FTCA”).
\textsuperscript{168} See Kubrick, 444 U.S. at 117-18.
\end{footnotesize}
States illustrates this strict application and how such an issue may arise in a case involving the Act.

In Perry, a young child was burned and received treatment at a local university hospital. There, a military physician, Captain Kenneth Moore, treated the child. The plaintiff filed suit against Moore individually. When the United States tried to remove the case and substitute itself for Moore, the plaintiff objected, claiming that Moore waived his immunity when he filed an answer in state court and failed to assert the affirmative defense of lack of personal jurisdiction under state law.

The court soundly rejected the plaintiff’s argument, stating that sovereign immunity belonged to the United States, and not Captain Moore. Specifically, the court outlined:

Not only could Captain Moore not have waived an immunity defense in his answer to Plaintiff’s complaint, Captain Moore’s answer and the content thereof are irrelevant since the immunity provisions of the FTCA do not exist for the protection of individual federal employees but exist instead for the protection of the federal government.

A health care facility that is sued individually by a plaintiff in violation of the Act cannot waive the United States’ immunity. The health care facility maintains its protection under the Act and the

170. See infra notes 171-78 and accompanying text.
171. See Perry, 936 F. Supp. at 870.
172. See id. Captain Moore was on a surgical rotation at the hospital pursuant to temporary duty orders designed to give military personnel experience in the management of burn patients. See id. at 871.
173. See id. at 870.
174. See id. at 879.
176. Id. at 879-80.
177. See Presidential Gardens Assoc. v. United States, 175 F.3d 132, 139 (2d Cir. 1999); Perry, 936 F. Supp. at 872.
FTCA regardless of what it does, so long as the Attorney General certifies that the alleged acts are within the scope of the project.\textsuperscript{178}

\textbf{E. Can the United States Seek Indemnification?}

Once a health care facility successfully notifies the United States and is removed from the case, what involvement, if any, will the facility have in the case? The facility and any individuals will need to cooperate with the United States in the handling of the case because the subject matter still revolves around the facility and its employees’ actions.\textsuperscript{179} However, the more interesting question is whether the facility has any real interest in the outcome of the case. Although the facility and the individual may not have any financial stakes in the outcome of the case,\textsuperscript{180} the facility’s or individual’s insurer may have a real interest in the resolution.

The Act contains a section that gives the United States subrogation rights to insurance proceeds of any entity or person who is deemed an employee of the Public Health Service.\textsuperscript{181} This section states that: “If, with respect to an entity or person deemed to be an employee . . . any claim of the entity or person for benefits under an insurance policy with respect to medical malpractice relating to such cause of action shall be subrogated to the United States.”\textsuperscript{182}

\begin{flushleft}
\textsuperscript{178} This occurs because FTCA immunity precludes any action against a covered health care facility and, as discussed above, cannot be waived. See Perry, 936 F. Supp. at 879.

\textsuperscript{179} See PIN 97-6, supra note 31, § IX.

\textsuperscript{180} However, the facility can be adversely affected by a negative verdict, because the Secretary of Health and Human Services can deny an entity’s application based on previous claims; thus, a verdict in favor of the plaintiff could lead to an entity losing its deemed status the next time it applies under the Act. See 42 U.S.C. § 233(h) (Supp. IV 1998) (listing requirements to approve a deeming application). The same scenario applies to an individual physician. See id.

\textsuperscript{181} See 42 U.S.C. § 233(g)(2).

\textsuperscript{182} Id.
\end{flushleft}
This section would seem to allow the United States to bring a suit against a carrier for benefits that, notwithstanding the FTCA, would have been available to the insured.\(^{183}\) From an insurer's point of view, a crucial question arises as to whether it can include a clause that excludes coverage for acts covered under the FTCA.

*Wilson v. United States*\(^ {184}\) is the only case directly addressing this concern. In *Wilson*, the United States filed a third-party complaint against Picom Insurance Company alleging that Picom, which insured an individual physician whom the United States replaced as defendant, had not fulfilled its duty to indemnify the United States.\(^ {185}\) The physician's insurance policy contained an exclusion for acts "arising out of the rendering or failure to render PROFESSIONAL SERVICES as an employee of any government agency, institution or facility."\(^ {186}\)

The court granted the insurer's motion to dismiss, agreeing that the United States had no cause of action against the insurer because the policy provision specifically excluded coverage for acts performed for a federal agency or facility.\(^ {187}\) When the United States substituted itself for the physician pursuant to the Act, the court held that the certification that the physician was an "employee" for purposes of triggering the substitution was a conclusive determination that the physician was an "employee" for all purposes.\(^ {188}\) Because the policy excluded acts committed by a United States employee, no benefits were available to the insured nor to the United States.\(^ {189}\)

\(^{183}\) See id.

\(^{184}\) 976 F. Supp. 1157 (N.D. Ill.), vacated, 17 F. Supp. 2d 1018 (1998). After the initial ruling, the plaintiff voluntarily dismissed the cause of action. See *Wilson v. United States* (1997), 17 F. Supp. 2d 1018, 1018 (N.D. Ill. 1998). Consequently, the court granted the United States' request to vacate the court's previous order that granted the third-party defendant's motion to dismiss. See id.

\(^{185}\) See *Wilson*, 976 F. Supp. at 1158.

\(^{186}\) Id. at 1159.

\(^{187}\) See id. at 1160.

\(^{188}\) See id. at 1161.

Additionally, *Ritchie v. United States* supports this position. In *Ritchie*, as in *Wilson*, the United States sought indemnification from the physician’s insurer. Although *Ritchie* was not brought pursuant to the Act, the basis for the court’s holding is equally applicable because it involved the FTCA and the United States’ attempt for subrogation. Unlike in *Wilson*, where the court dismissed the third-party defendant insurer, the *Ritchie* court held that the United States had the right to seek indemnification against the physician’s insurer.

The insurance policy in *Ritchie* did not contain an exclusion. The court stated that “[i]f [the insurer] wished to exempt from its policy the potential liability from an insured’s practice at a military installation, then it had that choice.” The court went so far as to remark that “[i]f [the insurer] wished to exclude any government-related liability, it could have and *should have* done so.”

**F. Excluding Coverage for FTCA Acts**

By reading *Wilson* and *Ritchie* along with the regulations promulgated by Bureau of Primary Health Care, it appears that an insurer can exclude coverage for acts that would otherwise be

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192. *See Ritchie*, 732 F. Supp. at 1126. The case arose under the Medical Malpractice Immunity Act, which is analogous to the Federally Supported Health Centers Assistance Act, but confers immunity upon military personnel in the medical field. *See 10 U.S.C. § 1089 (Supp. IV 1998)*.
194. *See Ritchie*, 732 F.2d at 1128.
195. *Id.* at 1127.
196. *Id.* at 1128 (emphasis added).
covered by the FTCA. There is also an indication that the health care facility should receive a discount from a private insurer when obtaining liability coverage since many acts and omissions are now covered by the FTCA.

The purpose of FTCA coverage is to allow health care facilities to redirect funds, previously spent obtaining insurance, to additional health care services. However, the government is aware that because the FTCA does not cover all actions or services of the health care facility, there is still a need to obtain “wrap-around” liability insurance from private sources. A policy that excludes acts or omissions covered by the FTCA is consistent with the overall purpose of the Act when such a policy is obtained at a lower rate than a comprehensive policy that a health care facility would have needed to obtain prior to FTCA coverage. If an insurer opts to exclude FTCA-covered acts, but still charges a premium equal to or similar to that of a comprehensive policy, then the insurer would open itself up to attack.

First, such a policy would thwart the Act’s purpose because, even though a facility received FTCA immunity, that facility could not redirect funds towards providing additional health services as it would still be purchasing de facto comprehensive insurance. Second, the facility may be entitled to a refund of insurance premiums that the insurer did not provide. If an insurer does not change its premiums to reflect the FTCA coverage, then the insured is paying for coverage that the insurer knows it will not have to pay because the federal government will step in under the FTCA. This may also lead to potential problems with insurance agencies in the states where these policies are written.

197. See supra notes 185-96 and accompanying text; PIN 99-8, supra note 12, § XVII.
199. See PIN 99-8, supra note 12, § IX; PIN 96-7, supra note 12, § VI.
200. See generally PIN 99-8, supra note 12.
201. See generally id.
CONCLUSION

This article is unable to address all of the questions that the Act raises or will raise in the future. However, all parties involved in such cases should have a working knowledge of the Act’s purpose and relation to the Federal Tort Claims Act. Due to the Act’s recent origin, there is scant case law interpreting its application. In the future, as more attorneys realize that the Act applies to their respective cases, a body of case law will develop that will help steer practitioners through these uncharted waters.