LEGAL BULLETIN 1.5
Federal Tort Claims Act (FTCA)

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I. INTRODUCTION

The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, is a statute that was passed by the United States Congress in 1946. Although the United States is generally immune from suit under a doctrine called "sovereign immunity," the FTCA allows certain claims, based on tort law, to be brought against the United States for the negligent or wrongful acts of its employees. The FTCA confers jurisdiction on the federal district courts to adjudicate claims for damages "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b).

Sovereign Immunity

The ability to sue the government is rare – usually, the government is protected from being sued by a legal doctrine called "sovereign immunity." Sovereign immunity means that no suit can be brought against the sovereign (the government) without its consent. This concept was inherited from England and has existed in the United States since its beginning. The FTCA waives the federal government's sovereign immunity in certain circumstances and enables people to sue the federal government for wrongful conduct by a federal government employee which results in injury.

II. WHAT IS A TORT?

In general, a tort is a wrong or injury that is committed against someone for which the law provides a remedy. Torts are "civil," not criminal, in nature. The purpose of a civil lawsuit is to compensate someone for wrongful injuries or damage they received. This is different from a criminal case, where the main purpose is to punish the wrongdoer.

While there are many kinds of torts, they can generally be classified into three groups: intentional, negligent, and strict liability. The focus of the Federal Tort Claims Act is on negligent and intentional torts. Each state has different laws (both statutes and court cases) that set forth which tort claims may be brought. Because the law of the state where the incident occurred will apply to your FTCA claim, you need to look at the law of that state to find out which tort claims are recognized and exactly what is required in order to prove your claim.

Intentional torts – an intentional tort is broadly defined as a deliberate act that causes harm to another. The person must intend to do the act that causes the harm. Examples of intentional torts are: assault, battery, false imprisonment, false arrest, and malicious prosecution.

Negligence – Someone has been negligent if they have not used the amount of care that a reasonable person would have used in the same situation. There are four essential elements of a negligence claim: (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached (or violated) this duty; (3) the breach of duty caused harm to the plaintiff; and, (4) the plaintiff suffered injury as a result.

III. SCOPE OF THE FTCA

A. When Can You Bring an FTCA Claim?

You can bring an FTCA claim if:

(1) It is against the United States;
(2) It is for money damages;
(3) You have had personal injury or death;
(4) The personal injury or death was caused by a negligent or wrongful act or omission;
(5) The negligent or wrongful act or omission was committed by a federal employee;
(6) The federal employee was acting within the scope of his or her employment;
(7) Certain exclusions stated in the FTCA do not apply; and,
(8) The United States (if it was a private person) would be held responsible under the law of the place where the act occurred.

B. When Can't You Bring an FTCA Claim?

There are limits to bringing an FTCA claim. You cannot bring an FTCA claim in the following situations: certain named torts; if the actor was exercising "due care" when carrying out duties under a statute or regulation; discretionary acts, constitutional violations; certain statutory violations; work-related injuries; strict liability claims; property claims (if you are incarcerated); and a few other exceptions.

1. Certain named torts are excluded by the FTCA.

Under 28 U.S.C. § 2680(h), you generally cannot bring an FTCA claim for the following torts: assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

However, there is a very important exception (called "the law enforcement proviso") when certain acts are committed by an investigative or law enforcement officer.

The law enforcement proviso states:

> ". . . with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of **assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.** For the purposes of this subsection, "investigative or law enforcement officer" means 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."
> 28 U.S.C. § 2680(h).

Officers and employees of the Bureau of Prisons are considered investigative or law enforcement officers based on the duties assigned to them by statute. *See* 18 U.S.C. § 3050 (authorizing BOP officers to make arrests without warrants in certain circumstances).

In *Millbrook v. United States*, 569 U.S. 50 (2013), the Supreme Court held that the law enforcement proviso applied to acts and omissions of BOP employees that are done within the scope of their employment. *Millbrook*, 569 U.S. at 57. Therefore, the FTCA waived the United States' immunity from claims based on such acts. *Id.* The *Millbrook* case overturned *Pooler v. United States*, 787 F.2d 868 (3d Cir. 1986) which had held that the officer needed to be engaged in the specific law enforcement activities identified in the proviso (executing a search, making an arrest, or seizing evidence) in order for the proviso to apply. Thanks to *Millbrook*, cases that imposed this restrictive view of the law enforcement proviso based on *Pooler* are no longer good law.

Keep in mind that the law enforcement proviso only applies to the six torts specifically listed within the proviso - it does not change the fact that you can NEVER bring an FTCA claim for libel, slander, misrepresentation, deceit, or interference with contract rights.

2. The "Due Care" exception

Section 2680(a) contains two more exceptions which prohibit certain claims from being asserted under the FTCA. The first is called the "due care exception." This exception applies when a federal employee was carrying out his or her duties under a statute or regulation and was exercising "due care" while doing so. "Due care" is a term in negligence law that means "the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances." Black's Law Dictionary, Abridged 7th Edition at 167.

Courts employ a two-part test to determine whether the "due care" exception applies:

1) whether the statute or regulation specifically mandates the course of action that the employee must follow; and,
2) whether the employee deviated from the requirements of the statute or regulation or otherwise failed to act with due care.
Welch v. United States, 409 F.3d 646, 652 (4th Cir. 2005).

3. Discretionary Acts – the "Discretionary Function Exception"

The FTCA's discretionary function exception ("DFE") provides that the United States does not consent to suit for claims which are ". . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

The Supreme Court has held that the discretionary function exception applies only to those governmental actions and decisions that involve an element of judgment or choice and that are based on public policy considerations. *See Berkowitz v. United States*, 486 U.S. 531 (1988). When a federal statute, regulation or policy specifically prescribes a course of action for an employee to follow, the discretionary function exception will not apply because the employee has no rightful option but to adhere to the directive. *See id.* at 536.

Under the discretionary function exception, the United States cannot be held responsible for a federal

employee's conduct if the employee was performing (or not performing) a discretionary function or duty. 28 U.S.C. § 2680(a). If the statute, regulation, or policy governing the employee's conduct gave them some leeway to decide how to do the job, then it does not matter whether the employee was acting with due care or not.

How does a court determine if the Discretionary Function Exception applies?

Determining when an act is discretionary (when an act is a matter of choice for an acting employee) can sometimes be a difficult task, both for you as the Plaintiff in a lawsuit, and for the court. The first step is to identify the specific conduct that is at issue. *S.R.P. v. United States*, 676 F.3d 329, 332-33 (3d Cir. 2012) (citation omitted). Then, the court engages in a two-part test set forth by the Supreme Court in *United States v. Gaubert*, 499 U.S. 315 (1991). *Id.* at 333.

(1) First, the court must determine whether the conduct involved "an element of judgment or choice." *United States v. Gaubert*, 499 U.S. 315, 322 (1991). If there is a federal statute, regulation, or policy specifically setting forth a course of action for an employee to follow and the employee "has no rightful option but to adhere to the directive," then the conduct is not discretionary and the discretionary function exception does not apply. *See Berkovitz*, 486 U.S. at 536.

(2) If the conduct involves an element of judgment or choice, the court moves on to the second part of the test and determines "whether that judgment is of the kind that the discretionary function exception was designed to shield." *See Berkovitz* at 536. "The [discretionary function] exception protects only governmental actions and decisions based on considerations of public policy." *Gaubert*, 499 U.S. at 322-23.

Which side has the burden to prove that the DFE applies or does not apply?

Circuit courts are divided on the question whether it is the Government's burden to prove that the DFE applies or the plaintiff's burden to prove that it does not. *Compare Terbush v. United States*, 517 F.3d 1125, 1128 (9th Cir. 2008) (government has the burden to prove that the discretionary function exception applies); *S.R.P. v. United States*, 676 F.3d 329, 333 (3d Cir. 2012) (same); *with Aragon v. United States*, 146 F.3d 819, 823 (10th Cir. 1998) (plaintiff must prove that the DFE does not apply); *Seaside Farm, Inc. v. United States*, 842 F.3d 853, 857 (4th Cir. 2016) (same). Some courts have declined to decide this issue. *See, e.g., Sharp v. United States*, 401 F.3d 440, 443 n.1 (6th Cir. 2005).

Regardless of who has the burden to prove or disprove the DFE in the federal circuit you are in, you will need to think carefully about how you can show that the discretionary function exception does not shield the Government from liability in your case. Even if you do not have the burden to prove that the DFE does not apply, you will need to respond to the Government's arguments that it does apply.

How have courts ruled on the DFE question with regard to various types of conduct?

As the application of the discretionary function exception can be difficult to sort out, and the analysis is fact-intensive, court decisions are sometimes conflicting (and confusing). Below are some examples of cases (both prison-related and not) involving the DFE.

<u>Prisoner violence stemming from violation of a mandatory duty:</u>

Parrott v. United States, 536 F.3d 629, 638 (7th Cir. 2008) (discretionary function exception not

applicable where BOP failed to adhere to mandatory prisoner separation order as required by 28 C.F.R. § 524.72 (f)).

Gray v. United States, 486 F.App'x. 976, 978, (3d Cir. 2012) (not precedential) (discretionary function exception not applicable in case where plaintiff's cellmate slashed him with a razor that was not collected by staff after shower time, in violation of directive in the Inmate Handbook stating that razors must be collected after shower time).

Rivera v. United States, Civ. No. 12-1339, 2013 WL 5492483 at *5-6 (M.D. Pa. Oct. 2, 2013) (DFE not applicable to negligence claim based on staff's failure to search inmate before placing him in rec cage, because post orders required that both a pat search and a hand-held metal detector be used to screen inmates).

Prisoner violence stemming from negligent classification, housing, and cellmate assignments:

Many courts have held, generally, that decisions relating to transfers, classification, housing placement, and cellmate assignments are discretionary and based on "policy considerations" and therefore, any claims arising from cellmate violence resulting from those decisions are barred by the discretionary function exception. *See Santana-Rosa v. United States*, 335 F.3d 39, 44 (1st Cir. 2003) (decisions related to "classification of prisoners, assignment to particular institutions or units, and allocation of guards and other correctional staff must be viewed as falling within the discretionary function exception of the FTCA, if penal institutions are to have flexibility to operate.").

But see Keller v. United States, 771 F.3d 1021, 1024-1026 (7th Cir. 2014) (rejecting Government's argument that the DFE automatically applies to all prisoner violence cases and reversing the District Court's dismissal of plaintiff's negligence claims because there was insufficient evidence in the record to support the Government's arguments that the DFE applied to the conduct of the intake psychologist and the compound guards.).

Violence stemming from negligence in making prisoner work assignments:

Claims stemming from negligence in assigning jobs to prisoners are often barred by the DFE. *See, e.g., Santana-Rosa,* 335 F.3d at 43-44 (negligent work assignment claim barred by discretionary function exception because BOP had "room for choice" in deciding to assign plaintiff's attacker to a kitchen orderly position and such decisions were grounded in "policy-based analysis."); *Middleton v. United States*, 658 F.App'x 167, 170 (3d Cir. 2016) (not precedential) (same).

Threat investigation:

Courts have held that prison officials' decisions on how to investigate and respond to inmates' threats of violence are discretionary and based on policy considerations and therefore are protected by the DFE. *See Calderon v. United States*, 123 F.3d 947, 949-951 (7th Cir. 1997) (DFE applied to claim arising from cellmate's attack on plaintiff after plaintiff informed prison officials of threat); *Alfrey v. United States*, 276 F.3d 557, 564-565 (9th Cir. 2002) (BOP officers had discretion on how to respond to threat reported by decedent). *But see Montez ex rel. Estate of Hearlson v. United States*, 359 F.3d 392, 398 (6th Cir. 2004) (opining that ". . . decisions by prison officials to ignore specific and immediate threats against inmates are less likely to be the type of decision that can be said to be grounded in the underlying policy of the BOP, which requires prison officials to provide for the safekeeping and protection of inmates. *See* 18 U.S.C. § 4042(a).")

Negligence claims involving employee supervision, monitoring, and assignment:

Supervision and monitoring of BOP staff have frequently been found to be discretionary conduct, triggering the application of the DFE. *See Nurse v. United States*, 226 F.3d 996, 1001 (9th Cir. 2000) ("allegedly negligent and reckless employment, supervision and training" of government employees "fall squarely within the discretionary function exception."). *But see Riascos-Hurtado v. United States*, Civ. No. 09-003 (RJD)(VMS), 2015 WL 3603965, at *6-7 (E.D. N.Y. June 5, 2015) (careless and inattentive failure of BOP employees to report sexual abuse of plaintiff by BOP counselor was not plausibly based on public policy considerations and negligent supervision claim was therefore not barred by DFE).

In *Garza v. United States*, 413 F. Supp. 23 (W.D. Okla. 1975), the court held that decisions concerning assignment of prison staff are discretionary.

Negligent application of restraints:

BOP staff's decisions on how to apply restraints have been found by some courts to be discretionary. *See Smith v. United States*, No. 7: 20-CV-94-DCR, 2021 WL 206355, at *5 (E.D. Ky. Jan. 20, 2021) (holding that decisions by BOP officials regarding restraint of an inmate "relate to their exercise of discretion regarding prisoner safety. Accordingly, these decisions fall within the discretionary function exception."), *appeal dismissed*, No. 21-5187, 2021 WL 2222846 (6th Cir. Apr. 2, 2021); *Hatten v. Bledsoe*, No. 1: 13-CV-00209, 2018 WL 6985205, at *11-12 (M.D. Pa. Dec. 21, 2018) (inmate's claims that officers applied restraints in a "negligent, careless, and harmful manner" and of the alleged "lack of supervision concerning the imposition of restraints" fell within the discretionary function exception), *report and recommendation adopted*, No. 1:13-CV-0209, 2019 WL 144962 (M.D. Pa. Jan. 9, 2019), *aff'd*, 782 F.Appx. 91 (3d Cir. 2019).

Negligent pat-downs and body searches:

Courts have reached opposite conclusions on the discretionary function exception question in cases involving negligent pat-down searches of inmates. *Compare Rich v. United States*, 811 F.3d 140, 147 (4th Cir. 2015) (Although prison officials had discretion in implementing a pat-down policy, the way that the pat-downs were conducted was not discretionary and could have been completed negligently) with *Hooker v. United States*, No. 11-cv-2840, 2013 WL 3491089, at *7 (S.D.N.Y. July 12, 2013) (DFE applied to negligence claims stemming from pat-down and wand searches because the manner and speed of search were discretionary).

The specific facts giving rise to the claim matter in the DFE analysis.

The discretionary function exception analysis required by *Gaubert* is highly fact-specific. *See Prescott v. United States*, 973 F.2d 696, 700 (9th Cir. 1992) (discretionary function exception analysis requires "a particularized and fact-specific inquiry to determine whether the acts or omissions in question flowed from a choice based on social, economic and political policy"); *Mitchell v. United States*, 225 F.3d 361, 365 (3d Cir. 2000). In cases where there was not enough evidence in the record to support the application of the DFE, courts have denied the Government's motion to dismiss and, in some instances, permitted the parties to engage in limited discovery to develop the necessary facts. *See, e.g., Sledge v. United States*, 723 F. Supp. 2d 87 (D.D.C. 2010); *Palay v. United States*, 349 F.3d 418, 431 (7th Cir. 2003); *Martin v. United States*, 2022 WL 2274706, at *10-11, Civ. No. 21-02107-NYW (D. Colo. 2022); *McIntosh v. United States*, 845 F.App'x.88, 92 (3d Cir. Feb 4, 2021) (not precedential).

How do I find out if a mandatory duty exists that pertains to my claim?

To determine if an employee's actions in your case were discretionary or non-discretionary, as required by the first prong of the *Gaubert* test, federal statutes, federal regulations (the "Code of Federal Regulations," or "C.F.R."), and Bureau of Prisons program statements can be a good place to begin your research.[1] Some of these sources are publicly available and should be available for you to review in your institution's law library. Other types of documents may also contain relevant information, such as inmate handbooks, institution supplements, post orders, employee handbooks, and executive memoranda pertaining to the issues in your case. Some of these are not publicly available, so you will likely have a more difficult time obtaining them. If you believe that a document exists which may contain useful and relevant information pertaining to federal employees' duties, and that document is not available in your institution's law library, you may need to conduct discovery in order to obtain it. Courts have granted motions for "jurisdictional discovery" in situations where plaintiffs need additional facts to show that the discretionary function exception does not apply to their claims. *See Martin v. United States*, 2022 WL 2274706, at *11, Civil Action No. 21-02107-NYW (D. Colo. June 23, 2015) (ordering limited jurisdictional discovery on the question whether there was a valid BOP separation order in place which mandated that the attacker and plaintiff be kept apart).

If there was no mandatory duty that was violated, can I still argue that the DFE does not apply to my claim?

Yes. If there are no "mandatory duties" that were violated in your case, you will need to demonstrate to the court that the conduct you are complaining about does not fall within the protection of the DFE because it does not fulfill the requirements of the second prong of the *Gaubert* test. That prong requires the Government to establish that the challenged conduct is "grounded in the policy of the regulatory regime" - meaning the overall policy goals of the agency. The Government must show that the challenged conduct was "based on the purposes that the . . . regime seeks to accomplish." *Gaubert*, 499 U.S. at 325 & n.7. There must be a "rational nexus" between the Government's decision and "social, economic, and political concerns." *Cestonaro v. United States,* 211 F.3d 748, 759 (3d Cir. 2000).

The Supreme Court has stated that if a statute, regulation, or policy gives a government official discretion on how to act, there is a presumption that the official's actions are grounded in policy when exercising that discretion. *See Gaubert* at 324. This presumption, however, is rebuttable, meaning that you can overcome it by providing facts that show that the DFE does not apply. *See Cestonaro,* 211 F.3d at 755 n.4. This can be very difficult to do, but not impossible. For example, in *Sandoval v. United States*, 2019 WL 7188574, at *5-7, Civ. No. 17-3092 DMG (C.D. Cal. Nov. 15, 2019), after conducting a thorough factual analysis, the court held that the prison's failure to provide readily available protective face masks to inmate orderlies exposed to hazardous dust was not outweighed by policy considerations presented by the Government and therefore, the DFE did not apply.

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1 18 U.S.C. § 4042 provides, generally, that the BOP ". . . shall (2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise; (3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States. . ." Although the language of this statute may seem to set forth "mandatory duties," courts have regularly held that Section 4042 does not establish a "mandatory duty" under *Gaubert*, because it does not provide specific guidance for the BOP on how to perform these general duties of providing safekeeping, care, subsistence, etc. *See, e.g., Cohen v. United States*, 151 F.3d 1338, 1343 (11th Cir. 1998) (The provisions of Section 4042 "do not mandate a specific, non-discretionary course of conduct," but instead grant BOP "ample room for judgment.").

As mentioned above, the DFE analysis is fact-specific. *See Mitchell*, 225 F.3d at 365. Your task, when addressing the second prong of the *Gaubert* test, is to present facts that show that the specific conduct at issue in your case was not based on any type of policy consideration.[2] If you have facts that would tend to show that the conduct at issue falls outside the discretionary function exception **you need to include those facts in your complaint** to avoid dismissal. *See Gaubert*, 499 U.S. at 324-25 ("Overcoming the presumption requires a plaintiff to 'allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime.'")

Conduct falling within the following categories has been held by some courts to be outside the scope of the DFE:

"Garden Variety" torts

Courts have held that if the challenged conduct involves "garden variety" torts, the DFE does not apply. *See, e.g., Gotha v. United States,* 115 F.3d 176, 181–82 (3d Cir. 1997) ("garden variety" decisions ". . . about routine property maintenance, decisions with which any private landowner would be concerned, are not susceptible to the kind of policy analysis shielded by the discretionary function exception."); *Gibson v. United States*, 809 F.3d 807, 816 (5th Cir. 2016) (DFE did not apply because FEMA employees' decisions as to how to provide customers invited onto the premises of an auction site with reasonably safe access to the trailers being auctioned was not a "policy-laden" decision but was a garden-variety decision far removed from FEMA's mission); *Menkin v. United States*, 99 F. Supp. 3d 577 (E.D. Pa. 2015) (DFE did not bar "slip and fall" claim based on failure of TSA employees to offer an elderly passenger assistance in moving through the security screening area after taking away her cane).

Medical negligence claims

Courts have held that the DFE does not apply to claims involving only medical negligence. *See, e.g., Fang v. United States,* 140 F.3d 1238, 1241-1242 (9th Cir. 1998) (National Park EMT's medical treatment of car accident patient was not covered by DFE because treatment decisions made by medical professionals do not implicate social, economic, or political policy considerations); *Collazo v. United States*, 850 F.2d 1, 3 (1st Cir. 1988) ("where only professional, nongovernmental discretion is at issue, the [DFE] does not apply").

Negligent guard theory of liability

Some courts have recognized a "negligent guard" theory of liability and held that the DFE does not apply in situations where the conduct complained of is "marked by individual carelessness or laziness" and cannot be said to be related to any plausible policy goals. *See, e.g., Coulthurst v. United States*, 214 F.3d 106, 111 (2d Cir. 2000) (opining that a prison employee's decision to take a smoke break instead of inspecting faulty gym equipment would not be protected by the DFE, because such a decision could not be said to be based on considerations of public policy); *Palay v. United States*, 349 F.3d 418, 432 (7th Cir. 2003) (observing that if a guard was merely asleep when a gang fight broke out, this type of conduct would not be shielded by the DFE because it involves no element of choice which is grounded in public policy considerations); *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 475-

2 For example, in BOP cases, the Government often raises "institutional safety and security" as policy considerations which, they argue, supported the staff conduct at issue. Therefore, if you are aware of facts that show that "safety and security" concerns were not the basis for the actions taken by staff in your case, you need to assert those facts in your complaint.

76 (2d Cir. 2006) (if a correctional officer failed to patrol or respond diligently to an emergency out of laziness or inattentiveness the discretionary function exception would not apply); *Hartman v. Holder*, No. 100-CV-6107-ENV-JMA, 2009 WL 792185, at *8-10 (E.D.N.Y. Mar. 23, 2009) (CO's failure to report threats made to inmate and careless and inattentive manner of conducting rounds and responding to assault were not rooted in policy considerations and therefore did not trigger the DFE); *Mansa v. United States*, Docket No. 3:16-cv-00644-VAB, 2017 WL 1239142, at *4 (D. Conn. Mar 30, 2017) (DFE not applicable to claim arising from negligent administration of drug test by RRC personnel, which was a claim of "ordinary negligence" which did not implicate any policy objectives); *Padilla v. United States*, No. LACV 09-05651, 2012 WL 12882367, at *6-8 (C.D. Cal. Oct. 9, 2012) (applying negligent guard theory, because officers disregarded fact that assailant had previously attacked plaintiff causing visible injuries when assigning assailant and plaintiff to same cell).

Unconstitutional conduct

Courts in some circuits have held that unconstitutional conduct by the government automatically falls outside the scope of the discretionary function exception, because a government employee does not have discretion to violate the Constitution. *See Nieves Martinez v. United States*, 997 F.3d 867, 877 (9th Cir. 2021); *Loumiet v. United States*, 828 F3d 935, 943 (D.C. Cir. 2016) ("The FTCA's discretionary function exception does not provide a blanket immunity against tortious conduct that a plaintiff plausibly alleges also flouts a constitutional prescription."); *Limone v. United States*, 579 F.3d 79, 101 (1st Cir. 2009) ("It is elementary that the discretionary function exception does not immunize the government from liability for actions proscribed by federal statute or regulation. . . Nor does it shield conduct that transgresses the Constitution."); *Raz v. United States*, 343 F.3 945, 948 (8th Cir. 2003) ("We must also conclude that the FBI's alleged surveillance activities fall outside the FTCA's discretionary function exception because Raz alleged they were conducted in violation of his First and Fourth Amendment rights."); *Myers & Myers, Inc. v. USPS*, 527 F.2d 1252, 1261 (2d Cir. 1975) (a federal official cannot have discretion to behave unconstitutionally or outside the scope of the delegated authority); *Xi v. Haugen*, 68 F.4th 824, 839-840 (3d Cir. 2023) (noting that "[a]t the motion-to-dismiss stage, all a plaintiff must do to negate the discretionary function exception is plausibly allege a constitutional violation.").

By contrast, the Seventh and Eleventh Circuits have held that the DFE may be applicable even if the alleged conduct is unconstitutional. *See Shivers v. United States*, 1 F.4th 924 (11th Cir. 2021); *Linder v. United States*, 937 F.3d 1087 (7th Cir. 2019).

Does the DFE apply to intentional torts such as assault and battery committed by law enforcement officers?

Courts are split on this issue. The Fifth and Eleventh Circuits have held that if a law enforcement officer commits an intentional tort while performing a discretionary function, the DFE does not apply and the government's immunity to suit is waived under the FTCA. *See Sutton v. United States*, 819 F.2d 1289, 1297 (5th Cir. 1987); *Nguyuen v. United States*, 556 F.3d 1244, 1252-57 (11th Cir. 2009).

On the other hand, the Fourth, Ninth, and D.C. Circuits have held that in some circumstances, the DFE can preclude suit even if the discretionary actions of the law enforcement official constitute an intentional tort under state law. *See Medina v. United States*, 259 F.3d 220, 224-226 (4th Cir. 2001) (internal citations omitted); *Gasho v. United States*, 39 F.3d 1420, 1435-1436 (9th Cir. 1994) (the intentional tort remedy provided by the FTCA's law enforcement proviso did not apply to conduct that the government had shown was exempt from liability under the "Customs exception" in Section 2680(c) or the discretionary function exception in Section 2680(h)); *Gray v. Bell*, 712 F.2d 490, 507-508 (D.C.

Cir. 1983) (plaintiff could not pursue an intentional tort claim under the law enforcement proviso in Section 2680(h) for tortious conduct that was protected by the discretionary function exception).

4. Constitutional violations

You cannot bring an FTCA claim against the United States for a violation of your constitutional rights.[3] *See F.D.I.C. v. Meyer*, 510 U.S. 471, 477 (1994) (Section 1346(b) does not provide a cause of action for a constitutional claim); *McCollum v. Bolger*, 794 F.2d 602, 608 (11th Cir. 1986).

In rare circumstances you may be able to file one lawsuit where you assert both a claim against the United States under the FTCA for a tort and a *Bivens* claim against the individual federal employee for a violation of your constitutional rights. But there are many obstacles to bringing such a suit, and there are pitfalls once you have done so. See the discussion on page 20 for more information about this.

5. Statutory violations

In general, you cannot bring an FTCA claim just because a federal employee has violated a federal statute, regulation, or manual provision. FTCA claims are based on state law, not federal law, and the FTCA only waives the Government's immunity from suit in circumstances where a private person would be liable under the law of the place where the action occurred. *See Zabala Clemente v. United States*, 567 F.2d 1140, 1149 (1st Cir. 1977) (". . . even where specific behavior of federal employees is required by federal statute, liability to the beneficiaries of that statute may not be founded on the FTCA if state law recognizes no comparable private liability."); *Leibowitz v. United States Dep't of Justice, Bureau of Prisons*, 729 F.Supp. 556, 560 (E.D. Mich. 1989), *aff'd* 914 F.2d 256 (6th Cir. 1990) ("As the language of the Tort Act makes clear . . . an action against the government must be grounded in state law and federal statutes cannot provide a basis of liability.")

Your recourse if a federal prison employee violated your rights under a federal statute, would be to assert a claim under that statute if the statute includes a provision for you to do so. For example, if BOP employees violated your rights to accommodations for a disability under the Rehabilitation Act (RA) or violated your rights under the Religious Freedom Restoration Act (RFRA), you would assert a claim under those statutes - not under the FTCA.

Even if the violation of a state or federal statute or regulation cannot be the basis for your FTCA claim, such a violation may help you prove your FTCA claim. For example, if you are asserting an FTCA claim for negligence, you might be able to show that the statute or regulation created a duty of care owed to prisoners. An example of a regulation creating a duty of care is found in *Yosuf v. United States*, 642 F.Supp. 415 (M.D. Pa. 1986), where the court held that the violation of the Bureau of Prisons' phone regulations breached a duty to prisoners. *See* 28 C.F.R. § 540.100. You may also be able to argue that the violation of the statute or regulation would be considered "negligence *per se*" under state law. Negligence *per se* is a doctrine under which "the adoption of a legislative enactment can be recognized as the standard of conduct of a reasonable person." *See Boles v. United States*, 3 F.Supp.3d 491, 507 (M.D. N.C. 2014) (internal citation omitted). If you assert a "negligence *per se*" claim, you are asking the court to find that a violation of the statute or regulation would be considered a breach of duty under state negligence law. You would still need to prove that this breach of duty caused your injury in order to prevail on your negligence claim.

3 If you include allegations of unconstitutional conduct solely in order to argue that the DFE is not applicable to your FTCA claim (as discussed above), you may want to explain to the court that this is your purpose and that you are not asserting a constitutional *claim* under the FTCA.

Another example where a federal statute might provide support for your FTCA claim are the general duties of the Bureau of Prisons set forth in 18 U.S.C. § 4042 to "provide suitable quarters and provide for the safekeeping, care and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise," and to "provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States . . ." 18 U.S.C. § 4042(a)(2) and (a)(3). However, although this statute can be cited, generally, as a source of a duty owed to you by the BOP, the breach of this duty in and of itself cannot be the basis of your FTCA claim. Courts have regularly held that the discretionary function exception (discussed above) shields the Government from liability for FTCA claims based solely on this statute. *See Cohen v. United States*, 151 F.3d 1338, 1342 (11th Cir. 1998) ("Even if Section 4042 imposes on the BOP a general duty of care to safeguard prisoners, the BOP retains sufficient discretion in the means it may use to fulfill that duty to trigger the discretionary function exception."). Therefore, your FTCA negligence claim will not succeed if it is based solely on the violation of Section 4042.

6. Work-related injuries

If you are injured while working in your institution, you cannot sue for your injuries under the FTCA. Personal injury claims by federal prisoners in the employment context are governed by the Inmate Accident Compensation Act (IACA), 18 U.S.C. § 4126; 28 C.F.R. § 301.101, *et seq.* If an inmate is injured "in any industry [or] . . . in any work activity in connection with the maintenance or operation of the institution where [they] are confined," then they may not sue the United States under the FTCA. *United States v. Demko*, 385 U.S. 149, 153, n.7 (1966) (internal quotations omitted).

7. Strict liability claims

You cannot bring an FTCA claim for a strict liability tort. *Laird v. Nelms*, 406 U.S. 797, 799 (1972); *Lively v.. United States*, 870 F.2d 296, 300 (5th Cir. 1989). A strict liability tort is one where it is not necessary to show that the person causing the harm was at fault. A common strict liability tort is a product liability action where a seller of a defective product is held responsible even if the seller wasn't careless and didn't know that the product was defective.

8. Property claims

You cannot sue under the FTCA for property loss or damage that occurred while you were incarcerated. The United States Supreme Court has held that 28 U.S.C. § 2680(c) bars lawsuits against the United States for the unlawful detention of property by "any" law enforcement officer, including correctional officers and other prison officials. *See Ali v. Fed. Bureau of Prison*, 552 U.S. 214, 220-21 (2008); *Kosak v. United States*, 465 U.S. 848, 854 (1984) (the exception in Section 2680(c) applies to negligent handling or storage of detained property). Even though you cannot file an FTCA claim in court about property loss or damage, you can submit an administrative claim to either the BOP or the Attorney General seeking monetary relief. If you choose to do this, there are time limits and other restrictions you should be aware of. Under 31 U.S.C. § 3723 (the "Small Claims Act"), you must file an administrative claim with the BOP within one year of the date of the property loss or damage if that loss or damage is based on the negligence of a BOP officer or employee acting within the scope of his or her employment. To file an administrative claim, a BP-A0943 form must be submitted to the BOP Regional Office, not the institution. The BOP is authorized to settle such claims for up to $1,000. The statute does not provide for judicial review of the BOP's decision on an administrative claim, so you cannot file a lawsuit if you are not satisfied with the BOP's response. BOP program statement 5580.09, "Inmate Property Claims" provides more information on the administrative claim process.

9. Other exceptions – There are several other situations where you are unable to bring an FTCA claim. Most of these will not apply to your situation as a federal inmate. The FTCA does not allow for tort claims arising from the following areas:

- loss, miscarriage, or negligent transmission of postal matter (28 U.S.C. § 2680(b));
- assessment or collection of taxes or customs, under most circumstances (28 U.S.C. § 2680(c));
- admiralty (28 U.S.C. § 2680(d));
- arising from administration of the war and national defense title of the U.S. Code (28 U.S.C. § 2680(e));
- a quarantine by the United States (28 U.S.C. § 2680(f));
- fiscal operations of the Treasury or regulation of the monetary system (28 U.S.C. § 2680(i));
- wartime combat activities (28 U.S.C. § 2680(j));
- claims arising in a foreign country (28 U.S.C. § 2680(k));
- activities of the Tennessee Valley Authority or the Panama Canal Company (28 U.S.C. § 2680(l) and (m)); and,
- activities of a federal bank (28 U.S.C. § 2680(n)).

C. Federal Employees

The United States is liable for harm done by a **federal employee** while acting within the scope of their employment. 28 U.S.C. § 2679(b)(1).

1. Who is a federal employee? Federal employees are defined in the FTCA as "officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty . . . and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States whether with or without compensation." 28 U.S.C. § 2671. Also included is "any officer or employee of a federal public defender organization except when such officer or employee performs professional services in the course of providing representation under Section 3006A of Title 18." 28 U.S.C. § 2671.

2. Scope of employment – Whether an employee's conduct falls within the scope of their employment is determined by the law of the state where the conduct occurred. *See Flechsig v. United States*, 991 F.2 300, 302 (6th Cir. 1993). State law can vary significantly as to what falls within an actor's scope of employment. The general rule is that an employee acts within the scope of their employment when the conduct "(a) is the kind [the employee] is employed to perform; (b) it occurs substantially within the authorized time and space limits [and] (c) it is actuated, at least in part, by a purpose to serve the master . . ." *See* Restatement (Second) Agency § 228. Some states follow this general rule and some do not. *Compare Greene v. United States*, 2023 WL 309320, at *3, Civ. No. 6:22-120-WOB (E.D. Ky. 2023) (dismissing FTCA sexual assault claim because under Kentucky law a sexual assault is not within the scope of employment because "there is no conceivable way that intentionally committing sexual assault can be motivated by a desire to serve the employer.") (internal citations omitted) *with Peralta v. United States*, 475 F.Supp.3d 1086, 1094-1096 (C.D. Cal. 2020) (observing that "California does not follow the traditional rule that an employee's actions are within the scope of employment only if motivated by a desire to serve the employer's interests," and holding that the scope of employment question in an FTCA sexual assault case could not be resolved at the motion to dismiss phase of the case). Some courts have held that just because a federal employee abused his authority, this does not necessarily mean that his conduct was outside the scope of his employment.

See, e.g., Brumfield v. Sanders, 232 F.3d 376, 381 (3d Cir. 2000) (applying Pennsylvania law which provides that even unauthorized acts may be within the scope of employment "if they are clearly incidental to the master's business") (citation omitted). Suffice it to say, you should research the "scope of employment" law of the state where your incident occurred when researching possible claims to bring under the FTCA. Under the FTCA, the Attorney General can certify that the challenged action was within the scope of employment. 28 U.S.C. § 2679(d)(1); *Hui v. Castenada*, 559 U.S. 799 (2010).

3. Can you ever bring an FTCA claim directly against the federal employee who caused the damage or injury? **No.** When filing an FTCA claim, the only proper, named party defendant is the United States. Therefore, if an FTCA claim arises, the liability is against the United States, not against individual defendants. However, it may be possible to file non-FTCA claims against individuals. This is discussed further below.

4. Are independent contractors federal employees? **No.** The United States is not responsible under the FTCA for the negligent or wrongful acts or omissions of private contractors. Federal law determines whether an individual is an employee or an independent contractor. *United States v. Orleans*, 425 U.S. 807 (1976). A person is an independent contractor (and is not a federal employee) if the United States does not exercise physical day-to-day control over their activities. This is true even if the person receives money and guidance from the United States. *Orleans*, 425 U.S. at 814; *Logue v. United States*, 412 U.S. 521, 527-28 (1973).

5. Can I file an FTCA claim based on injuries suffered in a non-federal facility, such as a state prison, county jail, or privately run prison? **Maybe.** Although the independent contractor exception bars claims based on the conduct of independent contractors, it might be possible to hold the United States responsible if it negligently placed a federal prisoner in an unsafe non-federal facility. *See Logue*, 412 U.S. at 532-533 (suggesting liability because a federal officer chose the unsafe prison placement); *Sandoval v. United States*, 980 F.2d 1057 (5th Cir. 1993) (permitting claim to proceed against U.S. Marshals Service for placing federal prisoner in privately operated prison where he was assaulted by another prisoner). *But see Harper v. United States*, 515 F.2d 576, 578-79 (5th Cir. 1975) (the United States has no duty to inspect or supervise local jails with regard to safety and compentence of jail staff).

In sorting out whether tortious conduct at non-federal institutions is subject to the independent contractor exception, courts have focused on whether the conduct implicates either a non-delegable or an undelegated duty of the federal government. *See, e.g., Edison v. United States*, 822 F.3d 510, 518 (9th Cir. 2016) (the independent contractor exception is not a complete bar to liablity any time the United States contracts with an independent contractor. . . "some duties of care are nondelegable; others are retained by the government if not delegated."). Courts have also examined the extent of the government's involvement in day-to-day operations. *See Greenland v. United States*, 661 F.Appx. 210, 214-215, C.A. No. 15-1846, (3d Cir. Aug. 22, 2016) (not precedential) (reversing dismissal of FTCA claims based on plaintiff's allegations of BOP involvement in the day-to-day operations and decision making of the private contractor (GEO Group) with regard to prisoners' medical care).

If your claim overcomes the hurdle posed by the FTCA's independent contractor exception, you may face the additional hurdle of the discretionary function exception. Some courts have held that decisions by federal employees to place inmates in non-federal facilities are covered by the DFE, because such decisions are "subject to public policy analysis." *See, e.g., Bethae v. United States*, 465 F.Supp.2d 575, 538 (D.S.C. 2006). Other courts have declined to apply the discretionary function exception in such circumtances. *See Brown v. United States*, 374 F.Supp. 723 (E.D. Ark. 1974) (function of Government in placing federal prisoners in local jails is not a discretionary function).

As described above, avoiding the FTCA's independent contractor and discretionary function exceptions in cases involving non-federal institutions may be quite difficult. Thus, if your incident occurred in a state or county jail, you may also wish to consider bringing a § 1983 claim or state law tort claim against any local jail officials (not federal officials) who were directly responsible for any injury. In such a claim, you are asserting that the state or county jail personnel, not the federal government, are liable for the negligent or wrongful act. If your incident occurred in a private prison, you may wish to consider bringing a state law tort claim against the private prison's employees who caused the injury.[4]

D. What law applies to FTCA claims?

Under 28 U.S.C. § 1346(b), the substantive law that applies to an FTCA claim is the law of the place where the negligent or wrongful act or omission occurred. This means that all FTCA claims are based on the law of the state where the tort occurred. Neither federal statutes nor the United States Constitution create a cause of action under the FTCA. Thus, even though you are filing a Federal Tort Claim for actions committed by federal employees, you must research the tort law of the state where the conduct took place. *See Molzof v. United States*, 502 U.S. 301, 305 (1992); *Kruchten v. United States*, 914 F.2d 1106, 1107-08 (8th Cir. 1990). The only exception to the requirement that liability for FTCA claims be based on state tort law is 18 U.S.C. § 4042 (setting forth the general duties of the Bureau of Prisons). This statute comes into play when a state's tort law does not recognize a duty of care owed by a jailor to an inmate. In that circumstance, violations of the duties imposed by Section 4042 are actionable under the FTCA even if state law would not permit suit. *See United States v. Muniz*, 374 U.S. 150, 164-65 (1963) ("The duty of care owed by the Bureau of Prisons to federal prisoners is fixed by 18 U.S.C. § 4042, independent of an inconsistent state rule.") Keep in mind, however, that courts have regularly held that the FTCA's discretionary function exception (DFE) shields the United States from liability for claims that are based **solely** on this statute. Therefore, in addition to asserting the existence of a general duty of care under Section 4042, you must also allege facts that will permit your claim to overcome the DFE defense if it is asserted by the Government (and it likely will be asserted). See the discussion above in section III.B.3, pages 3-10, for more information on the DFE.

E. Are there time limits for filing an FTCA claim in federal court?

Yes. A tort claim against the United States "shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing" of the agency's notice of final denial of the claim. 28 U.S.C. § 2401(b). These time limits, which depend in part on the timing and resolution of your administrative claim, are subject to the doctrine of equitable tolling and are discussed further below.

IV. ADMINISTRATIVE CLAIM REQUIREMENT

A. Do I have to file an administrative claim?

Yes. Before an FTCA lawsuit may be filed in federal court, you must file an administrative claim with

4 You will not be able to bring a constitutional claim for money damages in such circumstances. In *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 70-73 (2001), the Supreme Court held that there is no *Bivens* remedy for constitutional violations involving private corporations that are under contract with the BOP to operate prisons or half-way houses. In *Minneci v. Pollard*, 565 U.S. 118, 131 (2012), the Court similarly held that federal prisoners could not bring *Bivens* claims against individual employees of private prison corporations, reasoning that a *Bivens* remedy was not necessary if the challenged conduct can be addressed by state tort law.

the federal agency and your claim must be finally denied, in writing, by the agency.[5] 28 U.S.C. § 2675(a); *McNeil v. United States*, 508 U.S. 106 (1993). The regulations governing administrative claims can be found at 28 C.F.R. §§ 14.1 to 14.11. The Bureau of Prisons has a program statement which describes the administrative tort claim process, P.S. 1320.07 (Federal Tort Claims Act, eff. 08/01/2024). A failure to present an administrative claim before filing a lawsuit will result in your lawsuit being dismissed. Many courts have held that such a dismissal should be "without prejudice," meaning that you can re-file the lawsuit once you have finished the administrative claim process. However, if you are given permission by the court to re-file your lawsuit after exhausting administrative remedies and your re-filed lawsuit is untimely under 28 U.S.C. § 2401(b), your lawsuit will be dismissed unless certain very rare exceptions apply.

B. How do I file an Administrative Claim?

1. What must be included in an administrative claim?

According to the Code of Federal Regulations ("C.F.R.") an administrative claim must (a) be in writing, (b) state a claim for money damages in a sum certain, and (c) provide sufficient information to enable the agency to investigate. 28 C.F.R. §§ 14.2, 14.4; *see also* 28 U.S.C. § 2675.

If you wish to file an administrative claim, the first task is to put the claim in writing. You can fill out a Standard Form 95 (also called an "SF-95" form – see attached blank form), which can be provided by the prison. According to the BOP's program statement P.S. 1320.07, inmates should obtain SF-95 forms from staff at the institution where they are incarcerated. If you are not able to get a Form SF-95 from staff, you can present "other written notification," such as a letter that contains the same information you would have included on the SF-95 form.

Second, the claim must ask for a specific amount of damages – a "sum certain." 28 C.F.R. § 14.2(a). A "sum certain" is a specific amount – not an approximation. Do not use imprecise language such as "at least $100." Instead, use specific language, such as "$100.00." Failure to supply specific information about the injury you sustained or to ask for a specific amount of damages may result in your lawsuit being dismissed. *Keene Corp. v. United States*, 700 F.2d 836, 841-842 (2d Cir. 1983) (claim dismissed for failure to state a sum certain in damages).

> ***Important note:*** If you file an FTCA lawsuit after your administrative claim is denied by the agency, generally, you cannot ask for more money in your lawsuit than you stated in your "sum certain" on form SF-95.[6] *See* 28 U.S.C. § 2675(b). Keep this in mind when you are filling out your Form SF-95, so that you do not insert a number in the "sum certain" field that may be too low.

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5 This process is called "exhausting" your administrative remedies. Exhaustion of administrative remedies before filing a lawsuit is required by both the FTCA and, for plaintiffs who file their FTCA lawsuit while they are incarcerated, by the Prison Litigation Reform Act (PLRA). If you are going to file non-FTCA claims in your lawsuit, such as *Bivens* claims based on constitutional violations, you will need to "exhaust" your administrative remedies separately for those claims by using the BOP's administrative remedy system. That procedure is set forth in the BOP program statement 1330.18 (effective Jan. 6, 2014) and involves completing Forms BP-8, BP-9, BP-10, and BP-11. Doing all of this paperwork is appropriately called "exhausting," but there is no way around it! If you fail to exhaust your remedies your lawsuit will almost certainly be dismissed by the court.

6 There are some limited exceptions to this rule, which are discussed below in the "Damages" section.

Finally, the information provided to the agency in your Form 95 should include sufficient details or background about the injury and incident. You should be sure to claim that there has been a negligent or wrongful act or omission and that there has been personal injury, or death. The Form 95 claim should contain details such as the date, time, place of injury, who was involved, and the kind of injuries sustained. Remember, the federal agency needs as much information as necessary in order to investigate and then determine whether a settlement is justified. *See Tidd v. United States*, 786 F.2d 1565 (11th Cir. 1986) (Form 95 with incorrect date and location of incident was insufficient to enable agency to investigate claim). This is called the FTCA's "presentment requirement." You do not need to provide supporting evidence along with your Form 95 to fulfill the "presentment requirement."[7] *See Collins v. United States* 996 F.3d 102, 117-119 (2d Cir. 2021) (*citing Adams v. United States*, 615 F.2d 284 (5th Cir. 1980)). You do not need to include "every possible theory of liability" in your administrative claim, but you do need to provide enough facts to give the BOP notice of the claim. *See Roma v. United States*, 344 F.3d 352 (3d Cir. 2005). For example, if you include facts in your administrative claim about being injured in an incident (a fight, assault, etc.) but do not include facts about being denied medical care after the injury, then you have not provided enough facts for the BOP to investigate a denial of medical care claim. Any denial of medical care claim you assert in a later FTCA lawsuit will likely be dismissed because of this.

2. Where and how do I submit an administrative claim? For federal prisoners, you will usually file your claim with the federal Bureau of Prisons. You should file your administrative claim with the regional office in the region where the injury happened. 28 C.F.R. § 543.31 (c). Prison staff will not accept claims submitted at the institution.

3. Who can file an administrative claim? The administrative claim can be filed by the injured person, his or her duly authorized agent, or legal representative. 28 C.F.R. § 14.3(a), (b). If the claim is presented by someone other than the inmate, there should be evidence presented along with the claim form of that person's authority to act on the inmate's behalf. 28 C.F.R. § 14.2(a). BOP program statement 1320.07 states that a person can file a claim on your behalf if that person provides a written statement signed by you giving that person permission to act for you. *See* P.S. 1320.07, # 7a.; *see also* 28 C.F.R. § 543.31(a) (BOP's supplemental regulation on presenting administrative tort claims).

If the FTCA claim is for wrongful death, the claim can be presented by the executor or administrator of the decedent's (dead person's) estate or by any other person legally authorized to assert such a claim under applicable state law. 28 C.F.R. § 14.3(c).

C. Are there time limits for filing an administrative claim?

Yes. The FTCA requires you to present your administrative claim to the appropriate federal agency within two years after it accrues or else you will be forever barred from doing so[8]. 28 U.S.C. § 2401(b). Remember, the agency must actually receive your claim in order for it to be properly filed. Federal law determines whether an administrative claim is timely filed.

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7 At the same time, if the agency asks you for more information about your claim after you have submitted your Form 95, you should comply with its request. The agency is entitled to ask for this information from you so that it can evaluate the claim for possible settlement.

8 In *United States v. Kwai Fun Wong*, 575 U.S. 402 (2015), the Supreme Court held that both the two-year limitation period for filing an administrative claim and the six month time period for filing an FTCA lawsuit in court are subject to equitable tolling. "Equitable tolling" is a doctrine that permits a court to "toll," or pause, the limitations period if a litigant can demonstrate a good reason for having missed their filing deadline. See the discussion in "Time Limits For Filing An FTCA Lawsuit" below for more information.

When does a claim accrue? To "accrue" generally means to happen or to come into existence. Usually, this is the date of the event or incident that caused the injury. But there are some exceptions to this rule. For example, in *United States v. Kubrick*, the Supreme Court held that a medical malpractice claim under the FTCA accrues when the plaintiff knows of both the existence and the cause of his injury. *United States v. Kubrick*, 444 U.S. 111, 122-23 (1979).

D. Can I amend my administrative claim?

Yes. You may amend (or change) your claim in writing before the agency's final action. 28 C.F.R. § 14.2(c). Amendments should be submitted in writing and signed by the claimant (or the authorized agent or legal representative). If you choose to amend your claim, the agency has six months from the date it receives your amended claim to make a final decision on your claim.

E. Agency Response to the administrative claim.

1. When is the agency required to respond to my administrative claim? After you submit a claim along with all necessary information and signatures, the agency has six months to offer a settlement or deny the claim. 28 U.S.C. § 2675(a).

2. What sort of investigation takes place? According to BOP Program Statement 1320.07, once an administrative claim is filed, the regional office of the BOP will usually refer the claim to the institution for investigation. In most cases, this will be the prison where the incident occurred. 28 C.F.R. § 543.32(c). Also, the agency may request additional information about the claim from you. 28 C.F.R. § 14.4. Responding to a request for additional information is very important, because a failure to respond might result in the denial of the claim by the agency. *See* 28 C.F.R. § 543.32 (c). The Regional Counsel will review the investigation in determining whether to deny the claim or offer a settlement.

3. What if the agency doesn't respond? If the agency does not make a final decision within six months of the date your claim is received, you can consider the non-response to be a denial of your administrative claim and proceed to file an FTCA lawsuit in the federal district court. 28 U.S.C. § 2675(a). However, you must wait to file your lawsuit until the end of the full six-month period following the date the claim was presented to the agency. A federal district court may not hold the case pending until this six month period ends. *McNeil v. United States*, 508 U.S. 106 (1993).

4. What happens if the agency's final decision does not address all of the issues or claims I included in my Form SF-95? You cannot control how thorough or competent the agency is when conducting its investigation into your claims. If you raise issues (and provide facts) that the agency fails to address, you have fulfilled your responsibility in the administrative claim part of the process. You can include the claims that the agency overlooked in your lawsuit in federal court. This is yet another reason it is so important to keep copies of everything you submit to or receive from the agency during the administrative claim process. If you do so, you will be able to show the court that you did present your claims to the agency but the agency chose to ignore them.

5. How much money can I get if my claim is settled by the agency? The Regional Counsel will review the investigation and supporting evidence and will make a decision on your claim. The Regional Counsel can either deny the claim or offer to settle the claim. Regional Counsel can offer a settlement up to $50,000. *See* BOP Program Statement 1320.07, #4(e); 28 C.F.R. § 0.172. To engage in settlement negotiations for an amount over $50,000, the Regional Counsel must obtain settlement authority from the General Counsel. *See* P.S. 1320.07, #4(e). If a settlement agreement is reached for

more than $50,000, the Torts Branch, Civil Division of the Department of Justice must give final approval of the settlement agreement. *See id.*

If you accept a settlement offer on your claim, it will be final and act as a complete release of any claims you have against the United States and any federal employees as a result of the subject matter of your claim. 28 U.S.C. § 2672; 28 C.F.R. § 543.32(g).

6. What happens if my administrative claim is denied by the agency? If your administrative claim is denied by the agency, you can ask the agency for reconsideration of your claim by filing a written request for reconsideration with the BOP's Regional Counsel. 28 C.F.R. § 14.9(b). You should provide a reason that the claim should be reconsidered. For example, you could include additional evidence of injury or loss in order to support your reconsideration request. If you choose this option, you must file the request for reconsideration within six months of the agency's denial of your claim. If you file a request for reconsideration, the agency has another six months to make a final decision. You cannot file a lawsuit during this time.

If your claim is denied and you do not want to file a request for reconsideration, and your claim does not involve property damage or loss, you can file a lawsuit in a United States District Court. **You must do so within six months of the date the denial of your claim was mailed to you.** This is explained further below.

7. What happens if the agency offers to settle my claim but I reject the settlement offer as too low? Can I file an FTCA lawsuit in this circumstance? You are not required to accept the agency's offer of settlement. If the agency's offer is not satisfactory to you, you can request reconsideration and seek a higher amount. Then, if the agency denies your reconsideration request and issues a final denial, you can file a lawsuit in federal court within six months of the date the notice of final denial was mailed to you. **Whether this is a good strategy is another matter entirely.** If you choose to reject a settlement offer at the administrative claim stage, you run the risk of not obtaining *any* money if you file a lawsuit and do not prevail in court. You should carefully evaluate the risks and benefits if you are offered a settlement by the agency.

V. FILING A LAWSUIT

A. Where Do I File the Lawsuit?

You can file an FTCA lawsuit only in federal district court. 28 U.S.C. § 1346(b) (federal district courts have exclusive jurisdiction over FTCA claims). If you file an FTCA suit in a state court it will be dismissed, because the state court does not have subject matter jurisdiction over FTCA claims.

As far as which federal district court to file in (this is known as the "venue" for the lawsuit), you can file in the federal district court where (1) you (the plaintiff) reside; or (2) where the act or omission occurred. 28 U.S.C. § 1402(b). Some courts have held that for venue purposes an incarcerated plaintiff "resides" in the district where he is incarcerated. *See, e.g., Jones v. United States*, 820 F. Supp. 2d 58 (D.D.C. 2011) (citing *In re Pope*, 580 F.2d 620 (D.C. Cir. 1978)). Other courts have held that an incarcerated plaintiff's "residence" is the judicial district he lived in before his arrest. *See, e.g., Ellingburg v. Connett,* 457 F.2d 240, 241 (5th Cir. 1971); *Urban Indus. v. Thevis,* 670 F.2d 981, 986 (11th Cir. 1982). Even if you file the complaint in a district other than where the incident happened, the court has discretion to transfer your case to that district. Courts routinely order such transfers for the convenience of the parties and witnesses and because most of the evidence is usually located in the district where the incident occurred.

B. What should I include in the complaint?

Your complaint must include the following three statements: the jurisdiction of the court (why does this specific court have authority to decide your claims?); the claim(s) you are asserting; and the demand for relief. As part of the statement of jurisdiction, you must state that an administrative claim has been presented to the federal agency and that it was either denied or was left without action by the agency for six months. *Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980). It is also a good idea to include a statement that the federal employee was acting within the scope of their employment when committing the act or omission, as this is an element of jurisdiction for an FTCA claim. Finally, as discussed in the Discretionary Function Exception section (III.B.3) above, you also need to include facts that show that your claim is not barred by the DFE and therefore the court has jurisdiction to decide the claim.

To state your claim, you must set forth facts that satisfy all of the elements of the particular tort(s) you are asserting. It can be negligence, or "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution," if done by a law enforcement officer, including a prison guard. 28 U.S.C. §2680(h). However, the elements that must be proved for each of those torts are determined by the law of the place (the state) where the injury occurred – not by federal law. 28 U.S.C. § 1346(b)(1).

Your complaint must include facts establishing all of the elements of the torts you allege, as viewed by state courts. While the elements of any tort are roughly similar in every state, the courts of each state have defined the elements that you must fulfill. So, while you can start with the elements listed in the last section of this bulletin, you must also research the law of the state where the injury occurred. Otherwise, you might leave out some detail that is required for "stating a claim" for that tort in the relevant state.

You must make a short and plain statement of facts that show that you are entitled to relief. Fed. R. Civ. P. 8(a). Include the same information you put in your administrative claim, including names, dates, the wrongful act, and the damage or injury you sustained and if you have additional details to include, you can include those as well. Your account must be plausible, in that it must "contain sufficient factual matter . . . to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (internal quotations omitted). Plausibility requires "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly* at 556).

C. Whom do I sue?

You can only sue the United States, not individuals, under the FTCA. *Mars v. Hanberry*, 752 F.2d 254, 255 (6th Cir. 1985). Generally, when you sue the federal government, you are not allowed to bring any other civil action for money damages based on the same subject matter against the individual federal employees involved. 28 U.S.C. § 2679(b)(1). However, there may be exceptions in certain circumstances, as desribed below.

1. FTCA claims and Constitutional Claims ("Bivens" claims) brought in the same lawsuit

While the FTCA is a limited waiver of sovereign immunity from suit for common-law torts, the United States does not waive sovereign immunity from suit for violations of constitutional rights. *See FDIC v. Meyer*, 510 U.S. 471, 483-86 (1994) (a *Bivens* action for constitutional violations may not be brought against the United States). In other words, if a federal employee violates the constitutional rights of a

prisoner, the United States cannot be held responsible for the constitutional violations under the FTCA. However, in certain very limited circumstances, a federal prisoner can file a claim against a federal employee in their individual capacity for acts or omissions that constitute constitutional violations. These claims are called "Bivens" claims and are named after the Supreme Court case where this type of claim was first recognized: *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). A *Bivens* claim, unlike a claim brought under 42 U.S.C. § 1983 or the FTCA, is not based on a federal statute – it is a constitutional claim based on the *Bivens* case.

Since *Bivens* was decided, the Supreme Court has significantly narrowed the scope of such claims, almost to the point of non-existence.[9] At this point, the only *Bivens* claim available to a federal prisoner that has been universally recognized by the federal courts is a claim for the unconstitutional denial of medical care, which the Supreme Court recognized in *Carlson v. Green,* 446 U.S. 14 (1980).

If the facts of your incident permit you to bring *Bivens* claims based on an unconstitutional denial of medical care as well as FTCA claims, you can do so in the same lawsuit. The United States would be named as the sole defendant for the FTCA claims, and the specific federal employee(s) who violated your constitutional rights would be named as the defendants for the *Bivens* claims.

If you proceed with both FTCA and *Bivens* claims in one lawsuit, you will face a significant obstacle called the "judgment bar" provision of the FTCA. The "judgment bar" requires a court to dismiss any non-FTCA claim for money damages (including a *Bivens* claim) brought against an individual federal employee if that claim is based on the same subject matter as the FTCA claim and judgment has been granted on the FTCA claim. 28 U.S.C. § 2676. If you bring FTCA and *Bivens* claims based on the same conduct of government employees, you run a very serious risk of your *Bivens* claims being dismissed if a judgment is entered on your FTCA claims – whether the judgment is in your favor or not. It may not be worth the risk of dismissal to bring both types of claims.[10]

2. FTCA claims and state law claims against state actors or private contractors

As discussed above in section III.C.4 and 5 (pages 13-14), there may be instances where your injuries were caused by both federal employees and non-federal actors, such as independent contractors or employees of state or local governments. If you bring state law claims against the non-federal actors in your lawsuit in federal court, you will be asking the court to exercise supplemental jurisdiction over those claims, under 28 U.S.C. § 1367. This statute authorizes a federal court to exercise jurisdiction over state law claims if they are so related to the federal claims that they form "part of the same case or controversy under Article III of the United States Constitution." *See* 28 U.S.C. § 1367(a). It is within the District Court's discretion whether to exercise supplemental jurisdiction over the state law claims in certain circumstances, including if the court has dismissed the federal claim. 28 U.S.C. § 1367(c)(3). It may be very difficult to assert non-FTCA claims in the same lawsuit as your FTCA claims. Even if you are, technically, able to do this, for the reasons discussed above you should give serious thought as

9 For further discussion on this please see the *Bivens* Fact Sheet.

10 The judgment bar should not come into play if the underlying conduct supporting each type of claim are different, because the "subject matter" of each claim would be different. *See Simmons v. Himmelreich*, 578 U.S. 621, 625 (2016) ("Under the judgment bar provision, once a plaintiff receives a judgment (favorable or not) in an FTCA suit, he generally cannot proceed with a suit against an individual employee based on the same underlying facts."); 28 U.S.C. § 2676. For example, if you assert an FTCA claim against the United States based on an attack you suffered by other inmates due to the negligence of prison staff, and you bring a *Bivens* claim against individual federal employees for denying you medical care for your injuries after the attack, the judgment bar should not come into play. The reason is that the conduct (the "subject matter") of these claims is not the same. Even if the individuals involved in both incidents are the same, the conduct that serves as the basis for each claim is different.

to whether you should do so.

D. Damages

1. Limit on the amount of damages

In a lawsuit under the FTCA, you generally cannot ask for damages greater than the amount you asked for in your administrative claim submitted to the federal agency (your "sum certain" amount on your form SF-95). 28 U.S.C. § 2675(b). There are two exceptions to this rule: you may seek a larger amount if the increase is based on newly discovered evidence that was not reasonably discoverable at the time that the administrative claim was presented; or if you allege and prove intervening facts relating to the amount of the claim. *See Husovsky v. United States*, 590 F.2d 944, 954 (D.C. Cir. 1978) (allowing increased damages because improved health increased life expectancy).

2. Type of damages available

The FTCA provides for recovery of compensatory damages only. *See Molzof*, 502 U.S. at 306. Compensatory damages are meant to restore the injured party to the position she was in before the injury and nothing more. (In other words, this type of damages compensates the plaintiff for the injuries she sustained.) How compensatory damages are calculated depends upon the law of the state in which the tort occurred. 28 U.S.C. § 1346(b)(1).

You cannot ask for or receive injunctive relief under the FTCA. *See Hatahley v. United States*, 351 U.S. 173, 182 (1956). You cannot ask for or receive the expungement of your prison records, because such relief is not available under the FTCA. *Walker v. United States*, 116 F.R.D. 149, 152 (S.D. N.Y. 1987). Finally, you cannot ask for or receive punitive damages. 28 U.S.C. § 2674.

Keep in mind that if you do receive monetary damages in your FTCA suit, either through a judgment entered by the court or through a settlement, your judgment is subject to administrative offset to pay any restitution you owe as a result of your criminal judgment. *See* 31 U.S.C. § 3728(a) ("The Secretary of the Treasury shall withhold paying that part of a judgment against the United States Government presented to the Secretary that is equal to a debt the plaintiff owes the Government . . .")

E. Claims Based on Mental or Emotional Injury

If an incarcerated person wishes to file an FTCA claim based on **mental or emotional injury**, they must be able to prove either physical injury or "the commission of a sexual act" in addition to mental or emotional injury.[11] Under 28 U.S.C. § 1346(b)(2), "[n]o person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18)."

"Sexual act" has a very specific definition in 18 U.S.C. § 2246, and courts have strictly interpreted this statutory language since this amendment was made to the FTCA in 2013. *See, e.g., Johnson v. White*, 989 F.3d 913, 917-19 (11th Cir. 2021) (upholding dismissal of plaintiff's claim for mental or emotional injury because the allegations constituted only "sexual contact" rather than a "sexual act" under 18 U.S.C. § 2246 and because plaintiff had not alleged any physical injury). You should carefully review

11 This requirement stems from the Prison Litigation Reform Act (PLRA) which was passed by Congress in 1996 and which imposes many restrictions and requirements on plaintiffs who file their lawsuits while they are incarcerated. The "physical injury" requirement of the PLRA does not apply to lawsuits filed by someone who is no longer incarcerated. For more information about the PLRA, see the PLRA Fact Sheet.

the definition of "sexual act" in Section 2246 if you believe your claim might fall within this exception to the ban on claims for "mental or emotional injury." Also, keep in mind that some courts have interpreted the "physical injury" requirement to mean that the injury must be more than "de minimus." In other words, a minor injury will not fulfill the "physical injury" requirement.

F. Time Limits for Filing an FTCA lawsuit

1. If your administrative claim (Form 95) was denied by the BOP, the FTCA requires your lawsuit to be filed in federal district court within six months of the final denial of your administrative claim. 28 U.S.C. § 2401(b). The date from which the six months begins to run is the date that the agency mailed you (by certified or registered mail) the notice of its final denial of the claim. You are required to file the lawsuit within six months of that date, even if the six month period expires before the end of the two year period you originally had for filing the administrative claim. *Childers v. United States*, 442 F2d 1299, 1303 (5th Cir. 1971).

If you do not file your complaint within this time period, you may be barred from bringing a lawsuit for the incident. The statute provides: "A tort claim against the United States shall be forever barred . . . unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b). It is this limitations period, not state statutes of limitations, which governs FTCA cases.[12] *See, e.g.*, *Kossick v. United States*, 330 F.2d 933, 935 (2d Cir. 1964).

For decades following the enactment of the FTCA, this language was interpreted by most federal courts to be "jurisdictional," meaning that there was no opportunity for a plaintiff to argue for an exception to the time limitation based on the specific circumstances of her case. In 2015, however, the Supreme Court held that the six-month limitation period for filing an FTCA lawsuit is subject to equitable tolling. *See United States v. Kwai Fun Wong*, 575 U.S. 402, 420 (2015).[13] "Equitable tolling" is a doctrine that permits a court to "toll," or pause, the limitations period if a litigant can demonstrate a good reason for having missed their filing deadline. Generally, in order to show that equitable tolling should be applied, a plaintiff must show that they pursued their rights diligently and that some extraordinary circumstance prevented them from complying with their filing deadline. Equitable tolling is extremely difficult to obtain. The Supreme Court has held that a litigant is entitled to equitable tolling of a statute of limitations only if they establish two elements: 1) that the litigant has been pursuing their rights diligently, and 2) that some extraordinary circumstance stood in the way and prevented timely filing. *Holland v. Florida*, 560 US. 631, 649 (2010). The circumstances that caused the delay must be both extraordinary *and* beyond the litigant's control. *Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 256-257 (2016). Even though you are permitted to argue for equitable tolling if you miss the filing deadline, given the difficulty in prevailing in this argument, you should do everything in your power to get your FTCA complaint filed in court on time.

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12 In cases where the conduct causing the injury happened long before the plaintiff became aware of the injury, another timing issue may come into play based on a state statute of repose. A "statute of repose" is "a statute that bars a suit at a fixed number of years after the defendant acts in some way . . . even if this period ends before the plaintiff has suffered any injury." *Blacks Law Dictionary*, Seventh Abridged Ed. at 1143. Statutes of repose issues may arise in the context of medical malpractice claims – where there can be a significant delay in the plaintiff becoming aware of his or her injury. The law surrounding state statutes of repose is too complicated to cover in this bulletin. If the act or omission that caused your injury happened long before you became aware of your injury, we suggest that you research FTCA cases involving statutes of repose in the state where your incident occurred in order to understand how this issue has been addressed in the federal courts in your Circuit.

13 The Supreme Court also held that the FTCA's two-year limitations period for filing an administrative claim is subject to equitable tolling. *See Wong*, 575 U.S. at 420.

2. If the agency has not acted on your claim six months after it was filed, you can treat this inaction as a final denial of your claim. You may then sue.[14] There is a conflict of authority among the federal courts about whether, in these circumstances, there is a time limit for you to file a complaint to initiate your lawsuit. Some courts have held that if the agency has not issued a final decision on the administrative claim this creates a situation where there is no deadline for the plaintiff to file her lawsuit. *See e.g., Reo v. United States Postal Serv.*, 98 F.3d 73, 78 (3d Cir. 1996); *Conn v. United States*, 867 F.2d 916, 920 (6th Cir. 1989) (citations omitted). Other courts have held that the plaintiff must file a lawsuit within a "reasonable time" after the agency's six-month period has expired. *See, e.g., Miller v. United States*, 741 F.2d 148, 150 (7th Cir. 1984). Given the varying holdings among the courts on this issue, if you are faced with a situation where the BOP has failed to respond to your administrative claim, it would probably be best to deem your administrative claim "denied" on the date that the agency *should have* notified you of a decision and then file your lawsuit within six months of that date.

G. What Type of Trial?

In an FTCA lawsuit, you are allowed to have only a non-jury trial. Your trial will be a "bench trial" - before a judge. 28 U.S.C. § 2402.

VI. EXAMPLES OF TORTS FOR FTCA CLAIMS

A. Negligence, in General

The elements of negligence are: duty, breach of duty, causation, and injury. In other words, your Complaint must allege facts that show that someone owed you a duty, they failed to fulfill that duty (they "breached" their duty), and the breach of duty caused you injury. The courts of each state have developed case law around each of these four elements. You must research the case law of negligence of the state where your injury occurred to make sure that your Complaint alleges sufficient facts to touch on all of the points that the courts require. This is because, as explained above, the FTCA requires claims to be adjudicated under the prevailing state law – not under federal law.

B. Medical Malpractice

Malpractice is basically negligence by a licensed professional practitioner. Your medical tort Complaint must describe the nature of the injury to your health. You must state that an employee of the federal government had a duty to provide you with adequate care (medical, dental, psychiatric, nursing, etc.) and that their failure to do so is what caused the injury.

In researching the duty of care owed by a medical practitioner to a patient, you should first look to the law of the state where the tort occurred. In addition, the Bureau of Prisons has a series of Program Statements (policies) on various aspects of medical care which may provide information about the duty of care. Individual BOP institutions may also have regulations (such as "Institution Supplements") that specify the standards of care for prisoners.

To succeed with a medical malpractice tort claim, a plaintiff must be prepared to submit evidence of the specific nature of the injury suffered and evidence of the type of care that should have been provided, which depends on the standard of care applied by state law. You will need to request copies of your medical records both from the prison and from any outside health care providers who treated you. There will be a fee to obtain those records.

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14 You cannot file your lawsuit before the six-month period ends. If you do, your lawsuit will be dismissed as prematurely filed.

Some federal courts require the plaintiff bringing an FTCA medical malpractice claim to adhere to a state law requirement of filing a "certificate of merit" ("COM") or other document at the same time a complaint is filed in court stating that a medical expert has reviewed the malpractice claim and has determined that it is well founded. Other courts no longer require a certificate of merit, holding that to impose such a requirement as a pre-requisite to filing an FTCA medical malpractice action conflicts with the Federal Rules of Civil Procedure. *See, e.g., Gallivan v. United States*, 943 F.3d 291, 293-94 (6th Cir. 2019) (Ohio's certificate of merit requirement not applicable in FTCA case); *Young v. United States*, 942 F.3d 349, 351-52 (7th Cir. 2019) (same - Illinois's expert affidavit requirement); *Pledger v. Lynch*, 5 F.4th 511, 518 (4th Cir. 2021) (same - West Virginia's expert certificate requirement); *Corley v. United States*, 11 F.4th 79, 85 (2d Cir. 2021) (same - Connecticut COM requirement); *Wilson v. United States*, 79 F.4th 312 (3d Cir. 2023) (same -Pennsylania COM requirement). You will need to research the law in the federal district where your case will be filed to determine if the state "certificate of merit" requirement applies. **Note: Even if a certificate of merit is not required at the time you file your Complaint, virtually all medical tort claims will eventually require expert testimony.** Thus, this type of claim can be very expensive to pursue, as medical experts usually charge fees for their time.

A medical FTCA claim, in additional to alleging that a federal employee was negligent in exercising reasonable care and meeting established professional standards in doing their work, must also show that the medical worker is not an independent contractor but is a federal employee acting within the scope of his or her duty. *United States v. Orleans*, 425 U.S. 807, 813-14 (1976).

C. Assaults by Other Prisoners

It may be possible to bring a negligence claim against the United States if prison employees were so careless that they could be held responsible for inmate assaults on other inmates. However, it is very difficult to prevail on such claims. Even if there was some obvious lapse of prison procedures on the part of a BOP employee that enabled another prisoner to hurt you, the claim will likely fail unless you can show that the procedure was mandatory, not discretionary. (This is because of the "discretionary function exception" discussed above.) If you plan to assert a negligence claim based on inmate violence, we strongly suggest that you review the DFE section (Section III.B.3) of this bulletin and then research similar cases in your federal district and determine how the courts have addressed the discretionary function exception in those cases.

If you are able to overcome the DFE hurdle, you will then need to prove the elements of a negligence claim based on the relevant state law. This includes the element of foreseeability. In evaluating this element of negligence, courts look for evidence that the prison employee knew (or should have known) of the danger of inmate assault. The federal courts have intepreted the minimum duty of care in 18 U.S.C. § 4042 to require that federal employees exercise "ordinary diligence to keep prisoners free from harm." *See Jones v. United States*, 534 F.2d 53, 54 (5th Cir.), *cert. denied*, 429 U.S. 978 (1976). However, many courts have also stated that some antisocial behavior is to be expected in the prison environment and that the government is not an insurer of prisoner safety. *See id.*

D. Assaults by Staff

The FTCA enables you to recover damages for assault and battery committed by correctional and law enforcement officers. Generally, the tort of assault is defined as "the threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact; the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery." *See* Black's Law Dictionary, Abridged Seventh Ed., at 87. Battery is generally defined in tort law as "an intentional and offensive

touching of another without lawful justification." *Id.* at 119. However, there can be variations in these definitions in the tort law of the states, and the elements required to state a claim may differ from state to state. Therefore, you need to research the specific elements of both torts in the state where the incident occurred. You should also keep in mind that in the prison context, some "incidental and necessary touchings by correctional officers of inmates in the performance of their duties are not batteries but are privileged contacts." *See Picariello v. Fenton*, 491 F. Supp. 1026, 1038 (M.D. Pa. 1980) (citing Restatement (Second) of Torts § 132, Comment (b) 1965; *Kedra v. City of Philadelphia*, 454 F. Supp. 652, 673 n.11 (E.D. Pa. 1978)). You should review the BOP's program statement regarding use of force, which outline how much force an officer may use on a prisoner and under what circumstances. *See, e.g.*, Program Statement P5566.07 (eff. July 17, 2024), "Use of Force and Application of Restraints."

E. Intentional Infliction of Emotional Distress

Most, if not all, states recognize the tort of intentional infliction of emotional distress. In order to prevail on a claim of intentional infliction of emotional distress, a plaintiff must establish that: 1) extreme and outrageous conduct; 2) intentional or reckless conuct; 3) the conduct caused emotional distress; and, 4) the distress must be severe. *See* Restatement (Second) of Torts § 46 (1965). If you file your FTCA lawsuit while you are still incarcerated, you cannot recover for intentional infliction of emotional distress under the FTCA *unless* you have also suffered physical harm (or the commission of a sexual act) and you allege this in your complaint. 28 U.S.C. § 1346(b)(2). This requirement stems from the Prison Litigation Reform Act (PLRA)'s physical injury requirement, which applies to lawsuits filed by people who are incarcerated.

F. Other tort claims ("causes of action") may be available under state law.

When you are determining which tort claims you may be able to bring, be sure to research the possible tort claims available in the state where the incident occurred. There may be additional tort claims (also referred to as "causes of action") available than those mentioned here that might be applicable to the facts in your case.

VII. CONCLUSION

This bulletin is a guide for prisoners intending to do further research in pursuing a claim under the Federal Tort Claims Act. While it is not exhaustive or comprehensive, the information contained in this bulletin should provide a starting point for further investigation of the process and procedure for bringing suit against the United States under the FTCA. Because the law frequently changes, be sure to check for any new cases or statute as they relate to your claim.

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED
OMB NO. 1105-0008

1. Submit to Appropriate Federal Agency:	2. Name, address of claimant, and claimant's personal representative if any. (See instructions on reverse). Number, Street, City, State and Zip code.

3. TYPE OF EMPLOYMENT ☐ MILITARY ☐ CIVILIAN	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)

8. BASIS OF CLAIM (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof. Use additional pages if necessary).

9. **PROPERTY DAMAGE**

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, Street, City, State, and Zip Code).

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF THE DAMAGE AND THE LOCATION OF WHERE THE PROPERTY MAY BE INSPECTED. (See instructions on reverse side).

10. **PERSONAL INJURY/WRONGFUL DEATH**

STATE THE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE THE NAME OF THE INJURED PERSON OR DECEDENT.

11. **WITNESSES**

NAME	ADDRESS (Number, Street, City, State, and Zip Code)

12. (See instructions on reverse). **AMOUNT OF CLAIM** (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights).

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side).	13b. PHONE NUMBER OF PERSON SIGNING FORM	14. DATE OF SIGNATURE

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM	CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS
The claimant is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages sustained by the Government. (See 31 U.S.C. 3729).	Fine, imprisonment, or both. (See 18 U.S.C. 287, 1001.)

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of the vehicle or property.

15. Do you carry accident Insurance? ☐ Yes If yes, give name and address of insurance company (Number, Street, City, State, and Zip Code) and policy number. ☐ No

16. Have you filed a claim with your insurance carrier in this instance, and if so, is it full coverage or deductible? ☐ Yes ☐ No

17. If deductible, state amount.

18. If a claim has been filed with your carrier, what action has your insurer taken or proposed to take with reference to your claim? (It is necessary that you ascertain these facts).

19. Do you carry public liability and property damage insurance? ☐ Yes If yes, give name and address of insurance carrier (Number, Street, City, State, and Zip Code). ☐ No

INSTRUCTIONS

Claims presented under the Federal Tort Claims Act should be submitted directly to the "appropriate Federal agency" whose employee(s) was involved in the incident. If the incident involves more than one claimant, each claimant should submit a separate claim form.

Complete all items - Insert the word NONE where applicable.

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE, AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A **SUM CERTAIN** FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN **TWO YEARS** AFTER THE CLAIM ACCRUES.

Failure to completely execute this form or to supply the requested material within two years from the date the claim accrued may render your claim invalid. A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

If instruction is needed in completing this form, the agency listed in item #1 on the reverse side may be contacted. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplementing regulations. If more than one agency is involved, please state each agency.

The claim may be filled by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with the claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file for both personal injury and property damage, the amount for each must be shown in item number 12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of the injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property, which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) **Failure to specify a sum certain will render your claim invalid and may result in forfeiture of your rights.**

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Use:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid."

PAPERWORK REDUCTION ACT NOTICE

This notice is solely for the purpose of the Paperwork Reduction Act, 44 U.S.C. 3501. Public reporting burden for this collection of information is estimated to average 6 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Director, Torts Branch, Attention: Paperwork Reduction Staff, Civil Division, U.S. Department of Justice, Washington, DC 20530 or to the Office of Management and Budget. Do not mail completed form(s) to these addresses.