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Repository Citation
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol43/iss4/7
PRESENTING A CLAIM UNDER THE FEDERAL TORT CLAIMS ACT

Donald N. Zillman

The passage of the Federal Tort Claims Act in 1946 by the United States Congress was a landmark in the development of government tort law. The Act waived the sovereign immunity of the United States and allowed suit against the United States for the tortious actions of its officers and employees. Since its passage, the Act has largely fulfilled its dual objectives of providing justice to parties injured by government wrongdoing and freeing Congress from the burden of considering individual requests for waivers of sovereign immunity through the mechanism of the private bill.

Few pieces of legislation are so clear as to remove all doubt as to their meaning. The Federal Tort Claims Act (FTCA) is no exception. The Act is not precise in defining those government employees who can subject the United States to liability, and it does not spell out whether the government can be held liable under a theory of strict liability. Although a perplexing series of Supreme Court and lower court cases have created and refined the law of the government-employee plaintiff, the Act itself makes no mention of the eligibility of injured government employees as claimants against the government. Further, the Act’s exceptions to liability are imprecise. The refusal to waive immunity for government “discretionary functions” continues to be litigated after three decades of judicial decisions.

In these areas, Congress and the courts face difficult policy choices, for in passing the FTCA Congress did not intend that every injury that could be remotely tied to United States governmental activity would authorize recovery of damages. Indeed, Congress also desired to protect certain government decisions from being second-guessed through tort litigation. In any case, as the policies underlying the FTCA often conflict, litigation or legislative correction becomes necessary.

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2. 1 L. JAYSON, HANDLING FEDERAL TORT CLAIMS §§ 52, 58, 65.01 (1982).
One of the most litigated aspects of the Federal Tort Claims Act involves little policy content. There are over 250 cases considering the statutory and administrative procedures required for placing the merits of a claim before the proper federal administrative agency or court. In many of these cases, the claims-presentation requirements prevented the claimant from getting a hearing on the merits of his claim, because the Act's statute of limitations puts the claimant at risk of losing his chance to recover for government wrongdoing.

The rationale of the FTCA is that the party harmed by the alleged wrongdoing of the United States should have a hearing and determination on the merits of his claim. The volume of reported cases on both the claims-presentation and statute-of-limitations requirements suggests a failing somewhere in the system. Has Congress created a statutory obstacle course? Have the administrative agencies or the courts read complexity into the Act beyond that intended by Congress? Are claimants and their attorneys to blame?

This study of the presentation requirements will attempt to clarify the existing state of the law and suggest necessary changes in the law. The author proceeds from the belief that both the claimants and the United States have an interest in seeing that a claim under the FTCA is properly presented for an expeditious decision on its merits. Any case which must be taken to the federal courts to determine whether the presentation requirements have been satisfied is a loss for all parties concerned—the claimant, his attorney, government counsel, the judiciary, and the public interest. Clearly, the claimant bears the burden of making a proper presentation of his claim. However, the government attorney also should be aware of the claims-presentation requirements. The government attorney can prevent the well-meaning claimant, particularly the one not represented by an attorney, from presenting a claim in an improper fashion. In addition to advancing the congressional objective of fair consideration of claims on their merits, a word of advice at the proper time can save government officials from later having to spend time and money litigating presentation issues.

The claimant's attorney may face a presentation issue in several

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7. The author examined all reported cases since the passage of the 1966 legislation implementing the present administrative procedures of the FTCA. Cases included those in 367 F.2d through 685 F.2d (1966-1982) and 267 F. Supp. through 544 F. Supp. (1966-1982). One case was found in the Federal Rules Decisions and one in the Supreme Court Reporter. A total of 267 cases were discovered.

8. The phrase "presentation requirements" includes both the filing of a claim with the federal administrative agency charged with the negligent or wrongful act and the subsequent filing of a complaint in federal district court if administrative resolution of the claim is unsuccessful.
contexts. Ideally, the attorney has been retained immediately after occurrence of the tortious government conduct. Here the attorney's task is to know the presentation law and to comply with it in a way that causes no delay or disqualification of the client's claim. A less fortunate situation occurs when the attorney is first retained by the claimant at a time when errors in the presentation of the claim have already been made and the statute of limitations threatens to forever bar the claim. Here the attorney faces the unenviable double burden of finding a way to correct the prior presentation errors and, if successful, winning the case on the merits. A third burden that this attorney may have to face is the unpleasant issue of a prior attorney's malpractice in the unsatisfactory presentation of the claim.

The most unusual situation arises when the claimant or attorney consciously chooses to challenge some aspect of the presentation requirements. The claimant may feel a particular provision is unconstitutional or contrary to statute or regulation. The attorney also may feel that compliance with the requirement would harm the claimant's case (e.g., by disclosing more information to the government than is desirable or by delaying eventual resolution of the matter). In such cases the attorney must assess the risk of disqualifying the claim if the court does not agree with the challenge to the presentation requirements.

This article begins by examining the development of the FTCA claims-presentation requirements. The second section then discusses the method of compliance with these requirements. The sections following examine the failures in presentation practice, cases that at best forced the claimant to prove to a court that the presentation requirements had been satisfied and at worst have seen a possibly meritorious FTCA action dismissed with prejudice for failure to comply with the presentation requirements. The cases are divided into those examining the requirement of an administrative presentation of the claim (a statutory requirement of the FTCA since 1966) and those examining the requirements for the filing of a complaint in federal district court. Among the matters litigated have been the documentation required in the claim, the statement of a sum certain of damages, the claim brought on behalf of others, the accrual date of the claim, the amendment or reconsideration of a claim, and the administrative denial of a claim. The cases help to define the defect-free presentation procedure. They also suggest areas where amendment of the regulations or statute might improve FTCA practice.

**DEVELOPMENT OF THE PRESENTATION REQUIREMENT**

In 1946, suits against governments in tort were the exception rather than the rule in the United States. While some tort claims
were allowed at the federal, state, and local levels, it was hard to predict the consequences of subjecting the federal government to a general tort liability. Accordingly, Congress acted with considerable restraint. While the Federal Tort Claims Act called for the use of state law to resolve many substantive issues, all cases under the FTCA were to be tried in federal district court by a judge alone. The government could compromise or settle a claim with court approval "after institution of any suit." Prior to filing suit, however, settlement possibilities were limited. The original FTCA authorized an administrative agency head or his designee to settle "any claim against the United States for money only," up to $1,000. Once the administrative claim was filed with the wrongdoing agency, the claimant could not bring suit unless the agency made "final disposition" of the claim or the claimant, "upon 15 days notice given in writing, withdrew the claim." The suit could not ask for more damages than that presented in the administrative claim unless new evidence of increased damages was shown.

The presentation requirements of the 1946 Act were given teeth by the statute of limitations contained in section 420. That section distinguished between the administrative claim for under $1,000 presented to an agency and the claim brought directly by lawsuit. The claim taken directly to court had to be brought within one year "after such claim accrued." The claim for $1,000 or less that the claimant chose to first present to an administrative agency had to be presented within one year of accrual "in writing to the Federal agency out of whose activities it" arose. If no administrative settlement was reached, the claimant was given an extension on the statute of limitations "for a period of six months from the date of mailing of notice to the claimant by such federal agency as to the final disposition of the claim or from the date of withdrawal of the claim . . . if [the statute of limitations] would otherwise expire before the end of such period."

The 1946 version of the FTCA reflected the movement from legislative (private bill) to judicial settlement of tort claims against

9. 1 L. JAYSON, supra note 2, at § 55, reviews the tort remedies against the United States existing in 1946.
15. Id.
17. Id.
the United States. Administrative settlement was recognized but given only a narrow scope. Even in 1946, the $1,000 limit on administrative claims promised to send only some property damage and minor personal injury claims to the administrative process. Furthermore, the administrative process was voluntary for the claimant—he could still take the $50 tort claim directly to federal district court. Statutory amendments in 1959 and 1966 marked the growth of the administrative tort settlement process.\(^1\) The legislative history of both acts suggested the virtues of the administrative process.\(^2\) In the first place, it could remove work from the increasingly overburdened federal courts; the tort claim settled administratively would not occupy precious judicial time. Second, the administrative process, when handled properly, offered prompt and relatively uncomplicated settlement of claims. As the larger federal agencies, (e.g., the post office and the branches of the armed services) developed claims expertise, they became better able than the federal courts to do justice to injured persons.

In 1959, the administrative claims limit was raised from $1,000 to $2,500.\(^3\) The Senate Report on the legislation (which urged increasing the limit to $3,000) noted that a higher administrative claims limit would have allowed the settlement of many cases then pending in the courts.\(^4\) Unfortunately, the amendment still left a majority of claims outside the administrative process. The Senate Report discussed a 1958-1959 study that showed that three-quarters of all Federal Tort Claims Act suits were brought for over $5,000.\(^5\) Further, administrative presentation remained optional with the claimant; the government could not compel a claimant to first pursue an administrative remedy.

By 1966, Congress had become convinced of the virtues of the administrative process. In effect, Congress reversed the presumption of the 1946 Act that tort claims were to be settled by court action subject to a limited administrative procedure. As a result, subsequent to the effective date of the 1966 amendment, "[a]n action shall not be instituted upon a claim . . . unless the claimant shall have first presented the claim to the appropriate federal agency and his claim shall have been finally denied by the agency in writing and sent by

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22. Id.
certified or registered mail.”23 The failure of the agency to make “final
disposition of a claim within six months after it is filed shall” at the
claimant’s option “be deemed a final denial.”24 An exception to the
administrative presentation requirement was created for claims
“asserted under the Federal Rules of Civil Procedure by third party
complaint, cross claim or counterclaim.”25

A separate provision of the amendment authorizes the “head of
each Federal agency . . . , in accordance with regulations prescribed
by the Attorney General,” to consider and settle any claim. Justice
Department control is maintained by requiring “the prior written
approval of the Attorney General or his designee” for any award in
excess of $25,000.26 The fifteen day withdrawal period for an adminis-
trative claim created by the 1946 Act was repealed.27 The statute of
limitations was amended to bar a claim “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, by certified or registered mail of notice of final
denial.”28 The legislative history of the 1966 amendment noted the
dual objectives to “ease court congestion” and “expedite the fair set-
tlement of tort claims.”29 Justice Department officials had pointed out
that most FTCA cases were settled prior to trial. Since the agencies
had developed expertise in tort procedures and had the best access
to information about the tortious incident (their personnel were the
alleged wrongdoers), they were to be given a reasonable opportunity
to effect a settlement before the matter reached the Justice Depart-
ment and the courts. Worries over possible irresponsible handling of
federal monies were reduced by requiring the Attorney General’s of-
face to prescribe settlement regulations and to approve settlements
over $25,000.30

The 1966 amendments changed the role of the claimant and the
administrative agency. Prior to the amendments, the claimant could
ignore the agency. Even if the claimant wished to deal with the
agency, only claims of small value could be considered. All other claims

§ 2675(a) (1976)).
24. Id.
25. Id.
§ 2672 (1976)).
(1976 & Supp. II 1978)).
29. S. REP. No. 1327, supra note 19, reprinted in 1966 U.S. CODE CONG. & AD.
NEWS 2515, 2516.
were presented by filing suit in federal court. Now, as a result of the 1966 amendments, a claimant must deal with the administrative agency regardless of the amount of the claim or the claimant's preference for beginning in federal court. Congress was convinced that the administrative process worked and insisted that even those claimants hostile to the agency that had wronged them had to deal for a time with that agency. Fifteen years and hundreds of presentation cases later, it is accurate to say that a major reason claimants and their attorneys encounter procedural difficulties under the FTCA is their failure to appreciate that Congress was serious in requiring an honest effort to reach administrative settlement of FTCA claims.

**Proper Presentation of the Claim**

In all too many cases something has gone wrong in the claims filing process. Before examining the failures, however, it is helpful to examine how claims should be filed. While there are unusual features in the FTCA claims-presentation statutes and regulations, they should pose no significant problem to the attorney or the intelligent lay person proceeding without legal representation.  

The claimant unfamiliar with Federal Tort Claims Act practice should remember two essential facts. First, as mentioned, Congress, the administrative agencies, and the courts are serious about the administrative settlement of tort claims. The claimant who regards the administrative exhaustion process as an unfortunate impediment to the real business of bringing suit in federal district court will be prone to make errors in the presentation of the claim. Second, the claimant is well advised to forget all he has ever learned in other contexts about filing claims and statutes of limitation. The Federal Tort Claims Act procedures are different from private party tort litigation and actions against other government entity defendants. The claimant should not assume that state law rules or statutory provisions will carry over into FTCA practice.

An attorney who has been asked to represent a claimant with an apparently meritorious claim against the United States under the Federal Tort Claims Act should first consider whether he faces an immediate problem with the statute of limitations. If more than two years have passed since the "accrual" of the claim against the United States, it will be necessary to determine whether the claim is barred by the passage of time. Research should begin with the FTCA itself.

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The Act is relatively brief and deserves a reading in its entirety.\textsuperscript{32} Particular attention should be paid to the administrative claims\textsuperscript{33} and statute of limitations\textsuperscript{34} sections. Section 2672 authorizes “regulations prescribed by the Attorney General” for the settlement of claims by a federal agency.\textsuperscript{35} The regulations provide considerably more detail about the filing of claims than do the statutory sections. The Justice Department regulations authorize other federal agencies “to issue regulations and establish procedures”\textsuperscript{36} on their own, and most federal agencies have adopted specific regulations regarding the handling of claims.\textsuperscript{37} The combination of the agency and the Justice Department regulations gives detailed guidance for the filing of the claim. After digesting the claims filing procedure, the attorney is well advised to phone or write the agency general counsel or the regional counsel’s office. The call will allow the attorney to verify that the claim is directed to the proper agency and to double check the filing procedure with the agency expert. It will also allow the attorney to discover any new regulations and to learn matters of agency practice and procedure not discussed in the regulations. The attorney should pay attention to questions of settlement authority. The attorney may discover that a $4,000 claim can be settled promptly at an agency’s local or regional headquarters, while a $6,000 claim may require several additional layers of review. The safest way to file a claim with any agency is to follow all instructions when completing United States Government Standard Form 95 (SF95). While the Attorney General’s regulations do not require the use of SF95,\textsuperscript{38} all agencies are familiar with it. Use of SF95 calls attention to the fact that an FTCA claim is being filed. In addition, compliance with the instructions on SF95 will insure that the essential elements of the claim have been presented. In many contested FTCA cases where an SF95 was presented, government claims officers called attention to deficiencies in the original form of the claim, thus giving the claimant a second opportunity to present a satisfactory claim.\textsuperscript{39}

Section 14.2(a) of the Attorney General’s regulations identifies the essential elements of the claim. The claim is deemed presented when “a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other writ-

\begin{footnotes}
\item[33]  Id. §§ 2672, 2675.
\item[34]  Id. § 2401(b).
\item[35]  The regulations are in 28 C.F.R. § 14 (1982).
\item[36]  Id. § 14.11.
\item[37]  1 L. Jayson, supra note 2, at A-89-105 apps. 38-40.
\item[38]  28 C.F.R. § 14.2(a).
\item[39]  Id. § 14.2(a).
\end{footnotes}
ten notification of an incident, accompanied by a claim for money damages in a sum certain." Dispute has arisen over the required documentation that must be presented with a claim. The Federal Tort Claims Act itself does not specify documentation. The Attorney General's regulations, specific agency regulations, and SF95 do insist on supporting evidence. While some courts have supported the claimant's position that he need not disclose everything requested by the government in order to satisfy the claims-presentation requirement, some documentation must be required if the administrative presentation requirement is to have any meaning. Counsel should offer at least basic documentation supporting the elements of the client's claim. Satisfactory submission of an SF95 or its equivalent within two years of the accrual of the claim will satisfy the administrative presentation requirement and the first portion of the FTCA statute of limitations. Responsibility for proceeding then rests with the government agency. Ideally, the government will promptly assess the claim and make some response to the claimant's attorney. The intent of the statute is to require an assessment and negotiating period of at least six months after the filing of the claim and to encourage the continuance of negotiations as long as they are agreeable to both parties. To this end, the FTCA provides two very different six-month requirements. Section 2675(a) states:

An action [in court] shall not be instituted upon a claim ... unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial ....

This provision requires the claimant to give the government six months to make an administrative determination of the claim, while the second sentence provides the claimant with protection against agency delay. If the six-month period passes without a final denial of the claim, the claimant may elect to end the administrative process and file suit in federal district court. The claimant is not required to do so, however. Often administrative negotiations will continue for several years after the filing of the claim, with both claimant and government claims officer feeling that they are working towards an eventual settlement.

A second six-month requirement is triggered by the agency's final

40. See text at notes 81-88, infra.
41. 28 U.S.C. § 2675(a).
42. 28 U.S.C. § 2401(b).
denial of a claim. The second portion of the FTCA statute of limitations bars a claim from court “unless action is begun within six months after the date of mailing . . . of notice of final denial.” The most obvious final denial is the government’s refusal to recognize any liability on the claim. The legislative history of the 1966 amendment to the statute of limitations noted that a final denial may also include “instances where partial approval of a claim results in an offer unacceptable to the claimant and rejected by him.” The latter situation could cause difficulty for the claimant, as he may be uncertain as to whether his response to the partial settlement offer by the government agency has set the statute of limitations running. Fortunately, the Attorney General’s regulations require the final denial to include a statement that the claimant must bring suit within six months. Until this sentence appears in a certified or registered letter from the agency, the claimant may feel comfortable that no statutory “final denial” of his claim has taken place. By contrast, when “final denial” or “last offer” language does appear, coupled with the six-month notice, the claimant had better prepare to enter the judicial arena. The judicial action must be brought in federal district court in the district in which the plaintiff resides or in which the negligent or wrongful act occurred. The claimant should remember that the six-month statute of limitation runs from “the date of mailing” rather than the date of receipt of the notice of final denial.

LITIGATING PRESENTATION ISSUES: PRESENTING THE CLAIM TO THE ADMINISTRATIVE AGENCY

The preceding summary of “defect-free” claims presentation under the FTCA sets the stage for discussion of the cases in which some aspect of the presentation requirement has had to be litigated. As mentioned, the attorney involved in such a case should hope that he is attempting to straighten out the errors of the claimant or a previous attorney. If the attorney himself has made the error, he will be attempting to avoid a subsequent malpractice suit. Dozens of cases have made it clear that the administrative presentation of a claim is a jurisdictional requirement under the Federal Tort Claims Act. A federal court will dismiss an FTCA suit when it discovers that ad-

43. Id.
44. S. REP. NO. 1327, supra note 19, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2515, 2518.
45. 28 C.F.R. § 14.9(a).
47. 28 U.S.C. § 2401(b).
48. See, e.g., Bailey v. United States, 642 F.2d 344 (9th Cir. 1981). 1 L. JAYSON, supra note 2, § 315, at 17-10 n.11, compiles the cases.
administrative requirements have not been satisfied. The easy cases are the ones in which the plaintiff offers no evidence of any kind of administrative presentation. Often, these cases involve multiple causes of action against the United States and its employees. Even though jurisdiction may be satisfied for other theories of action, the FTCA claims will be dismissed for lack of administrative presentation.49

What: The Contents of the Claim

A number of litigated cases have involved attempts by claimants to resist dismissal by proving that they did present an administrative claim. Most of these cases suggest that the plaintiff actually was not intending compliance with the FTCA administrative presentation requirement at the time the alleged "administrative presentation" was made. Rather, the cases suggest that the plaintiff discovered the jurisdictional requirement of an administrative claim only after filing suit and was attempting to discover some previous action that would qualify as a presentation of an administrative claim. Courts generally have been unsympathetic to these creative presentation efforts. The language of the statute of limitations requiring presentation "in writing to the appropriate Federal agency"50 has proved fatal to a number of plaintiffs. Oral presentations of claims in the form of requests to the wrongdoer for restitution51 or requests for a meeting with the United States Attorney have been rejected as qualified presentations of administrative claims.52 A number of written presentations of claims have been disallowed because they were not addressed to a federal agency; examples include state court proceedings,53 worker's compensation proceedings under a state statute,54 state agency implementa-

49. See, e.g., Brady v. Smith, 656 F.2d 466 (9th Cir. 1981); Contemporary Mission, Inc. v. United States Postal Serv., 648 F.2d 97 (2d Cir. 1981); Leonhard v. United States, 633 F.2d 599 (2d Cir. 1980); Bruce v. United States, 621 F.2d 914 (8th Cir. 1980); Szyka v. United States Secretary of Defense, 525 F.2d 62 (2d Cir. 1975).

50. 28 U.S.C. § 2401(b). 28 U.S.C. § 2675, headed "Disposition by federal agency as prerequisite; evidence" requires that the "claimant shall have first presented the claim to the appropriate Federal agency," without mention that it be in writing. However, 28 U.S.C. § 2672 ("Administrative adjustment of claims") authorizes administrative consideration of claims "in accordance with regulations prescribed by the Attorney General." The regulations in 28 C.F.R. § 14.2(a) require use of SF95 or "other written notification."


54. Mendiola v. United States, 401 F.2d 695 (5th Cir. 1968).
tion of a federal project, notice to insurance companies, and notice under a state landlord-tenant law. Dealings with federal agencies have been held insufficient where they have either merely inquired about the availability of rights or benefits without actually presenting a claim or requested a different form of statutory benefit. A second category of cases involve the failure to supply a "sum certain" in the claim. Unlike the previous nonpresentation cases, the "sum certain" litigation typically involves a claimant who has alerted the federal agency in writing of an intent to seek FTCA recovery. The "sum certain" requirement appears nowhere in the Federal Tort Claims Act—it instead is found in the Attorney General's regulations. Despite harsh results, federal courts have treated the "sum certain" requirement as an essential element of the administrative claim. Indeed, some courts have argued that the "sum certain" requirement is inherent in the meaning of the word "claim." Other courts, however, have looked to provisions of the FTCA to indicate the necessity of a precise dollar figure in the claimant's presentation to the administrative agency. The first such provision looked to by the courts is the clause in section 2672 requiring any award in excess of $25,000 to be approved by the Attorney General or his designee. The second such provision is that which forbids the commencement of a suit for more


57. Three-M Enters. v. United States, 548 F.2d 293 (10th Cir. 1977).


60. 28 C.F.R. § 14.2(a) provides:

For purposes of the provisions of 28 U.S.C. 2401(b) and 2672, 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.

61. Avril v. United States, 461 F.2d 1090, 1091 (9th Cir. 1972) (unless "it is a claim for something, [it] is not a claim at all").

62. Caton v. United States, 495 F.2d 635 (9th Cir. 1974); Ianni v. United States, 457 F.2d 804 (6th Cir. 1972); Bialowas v. United States, 443 F.2d 1047 (3d Cir. 1971).
than the amount of the administrative claim in the absence of new facts.63

As a matter of legal logic, the courts' rulings are defensible. The
government claims officer does have his job made more difficult by
the claimant's failure to place a precise dollar amount on the damage
request. In theory, the requirement forces the claimant to make a
reasoned estimate of the harm done to him by the government. It
also provides the government officer with information about his set-
tlement authority.64 In fact, however, the logic of the "sum certain"
requirement provides significant inducement for considerably inflated
damage claims. The regulations and cases tell the claimant that he
must put some dollar figures in the blanks on the SF95; they also
suggest that it can be awkward to correct an underestimation. The
FTCA requires the claimant to present "newly discovered evidence
not reasonably discoverable at the time of presenting the claim to
the federal agency, or . . . intervening facts, relating to the amount
of the claim" in order to increase the damages requested in court
over the damages asked in the administrative complaint.65 Therefore,
why not just list the two broken bones and contusions as worth
$100,000 and start the bargaining from there? If the legislative in-
tent is to deal fairly, but not lavishly, with injured claimants, the pre-
sent process disserves this purpose. The "sum certain" requirement
is most clearly satisfied by placing an exact dollar figure in each of
the damage categories on SF95 or mentioning a precise amount in
any other written claim. Statements that the exact amounts are
unknown have caused claims to be rejected for lack of a sum certain;
such cases have included notations of "Unknown at this time,"66 "neck,
chest and right arm,"67 "on treatment,"68 and "Pending No Fault
Benefits."69 Cases also have rejected as uncertain the enclosure of some
bills or statements of expenses with imprecise claims.70 Some courts
have rejected dollar figures where they are qualified. Thus a claim
for "in excess of $50,000.00" failed to meet the "sum certain"

63. 28 U.S.C § 2675(b).
64. In addition to the statutory requirement that awards of over $25,000 receive
the approval of the Attorney General's office, individual agencies may grant settle-
ment authority to different offices within the agency, dependent on the amount re-
quested by the claimant.
65. 28 U.S.C. § 2675(b).
66. Caton v. United States, 495 F.2d 635 (9th Cir. 1974).
70. Bailey v. United States, 642 F.2d 344 (9th Cir. 1981); Schaefer v. Hills, 416
aff'd, 474 F.2d 1340 (3d Cir. 1971).
requirement, as did a claim for $2,135.45 plus personal injury. Other decisions have been more sympathetic to the claimant who has made some effort to identify the amount of damages. Qualified claims of "Approximately $15,000.00," "$149.42 presently," and "approximately $100,000.00" and a qualified reference to a $560 claim have been allowed by treating the qualifying language as surplusage. Other courts have allowed the "sum certain" requirement to be met by bills or repair costs or other statements of value mentioned in supporting documents. Further cases have excused clerical errors on the part of the plaintiff under circumstances where the government should have been aware of the actual sum requested.

The apparent harshness of the cases rejecting claims for lack of a sum certain is mitigated by the fact that government claims officers have often attempted to point out a claimant's errors in time to correct a deficiency. While government claims officers are not required to point out claimants' errors, their conduct does make rare the case in which the government knowingly allows the statute of limitations to run on a technically deficient complaint. Nevertheless, several of the sum certain cases decided against the claimant appear unjust. Claimants have asked for redress and provided sufficient information for the government to begin an assessment of their case. The fact that the dollar amount of damages is left open reflects honest uncertainty rather than an attempt to evade government investigation. The government is not in a substantially better position when they are given an obviously inflated "sum certain" than if the item is left blank at the time of filing a claim. Government investigation can proceed

74. Erxleben v. United States, 688 F.2d 268 (7th Cir. 1981).
in either case. At some point, the claimant must offer an exact dollar figure, but it is doubtful whether the failure to do so at the time of filing the claim should result in the heavy penalty of an expired statute of limitations.

A separate section of the Attorney General's regulations provides that the claimant "may be required to submit the following evidence or information" with the claim. The regulation and the instructions on Standard Form 95 elaborate on the type of information required. Several cases have addressed the question of whether failure to comply with documentation requirements can cause an otherwise valid claim to be treated as a nullity. Two courts of appeals cases suggest opposing positions. In Swift v. United States, the claimant's otherwise satisfactory SF95 did not offer documentation to support the personal injury claim. The government requested documentation several times without results. Nearly two years later the claimant filed suit. The court held that the suit was premature since the personal injury claim, although expressed in a sum certain, had not met the documentation requirement. The court did not address the fact that the statute of limitations had run on the plaintiff's claim if the undocumented claim was treated as a nullity.

In sharp contrast, in Adams v. United States, the claimant's attorney refused to comply with the government's request for medical bills and other evidence. The court supported the plaintiff's position that the notice required under section 2675 did not mandate a full disclosure of the plaintiff's case to the government. The court analogized the statutory notice required in section 2675 to that required in tort actions against municipalities. The requirement was designed to alert the government to a claim against it, not to specify all details of settlement negotiations. The court observed that the Attorney General's regulation on claims presentation, 28 C.F.R. § 14.2(a), referred to 28 U.S.C. §§ 2401(b) and 2671, not section 2675. The court found that the claimant had offered sufficient evidence to allow the government to proceed with its investigation. On reconsideration, the court sustained its decision but avoided deciding the effect of a claimant's refusal of an agency's "reasonable request for supplemental information to clarify an inadequate claim."

Several recent cases have adopted the Adams position. In Douglas...
v. United States,⁸⁶ the claimant failed to provide medical reports and insurance information required by the regulations. The court sided with the claimant when it was satisfied that the claimant was not trying to "evade" the administrative process.⁸⁷ District court decisions prior to Adams had generally taken a hard line on documentation.⁸⁸ Recent cases, however, have favored the claimant in documentation disputes. The Adams-Douglas compromise appears to be a sensible one. The government is entitled to ask for enough supporting documentation to allow an investigation to proceed. To allow less would preclude the meaningful attempt to achieve administrative settlement mandated by Congress in the 1966 FTCA amendments. Ideally, the claimant and the government will agree to a policy of mutual full disclosure of information. However, the government should not be able to threaten a claimant with the total invalidation of his claim for the failure to comply with its every discovery request. Such a dispute may destroy the possibility of an administrative settlement, but it should leave the claimant free to seek further relief in federal court.

Who: Persons Eligible to Present the Claim

Considerable confusion has surrounded the issue of who may present an administrative claim under the Federal Tort Claims Act. The statute itself is of little help. Section 2675 requires presentation by "the claimant." The Attorney General's regulations are more elaborate. The claim for property damage or personal injury may be presented by the victim or a "duly authorized agent or legal representative."⁹⁸ A claim for wrongful death shall be presented by the "executor or administrator" or by such other person authorized by state law.⁹⁰ A claim from the agent or legal representative shall "be accompanied by evidence of his authority to present a claim on behalf of the claimant."⁹¹ Finally, a lawfully subrogated insurer may present a claim.⁹² Litigation has arisen over these provisions of the Attorney

86. 658 F.2d 445 (6th Cir. 1981).
87. The claimant did supply some medical and employment information to the government.
89. 28 C.F.R. § 14.3(a) & (b).
90. Id. § 14.3(c).
91. Id. § 14.3(e).
92. Id. § 14.3(d).
General's regulations. The message for the attorney from these cases is to examine all possible causes of action by all possible claimants and make sure that an administrative claim is presented to cover each cause of action by a party eligible to make the presentation. While some courts have been willing to waive "technical defects," others have not. In the latter situation, the claim itself often has failed because the statute of limitations on the administrative presentation had run before a proper person presented the claim.

The cautious attorney beginning an FTCA case should secure a properly executed power of attorney from the client or clients. The power of attorney should authorize him to take all necessary administrative and judicial actions under the Federal Tort Claims Act and other provisions of law in regard to a described incident. The power of attorney should accompany the completed Standard Form 95 to the agency. In the alternative, the attorney should secure the claimant's signature on the Standard Form 95 to satisfy the presentation requirement. Depending on the claims officer, however, the attorney later may need to submit the power of attorney before beginning negotiations over the claim. Despite the language of the regulations, many government claims officers will assume that the attorney has authority to act for the claimant. Several court decisions have waived the necessity of a formal statement of authority. However, the occasional decisions that insist on proof of authority suggest that full compliance is the prudent path for the attorney.

Four categories of claims have raised problems concerning eligibility to present a claim for other parties. These are insurance claims, spousal claims, children's claims, and class claims. Judicial decisions concerning these claims have been inconsistent.

In 1949, the Supreme Court recognized that the United States could be liable for a subrogated claim under the Federal Tort Claims Act. The current Attorney General's regulations spell out the procedure for the insurance company claim. A claim wholly paid by a

93. "A claim presented by an agent or legal representative shall . . . be accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative." 28 C.F.R. § 14.3(e).
97. 28 C.F.R. § 14.3(d).
subrogated insurer “may be presented” by the insurer. A partially
subrogated claim “may be presented by the parties individually as
their respective interests appear, or jointly.” The litigated cases have
arisen in partial subrogation situations. The court decisions have
recognized that two claims exist against the United States and that
each claimant (insurance company and insured) should perfect its own
claim. A strict reading of the federal “real party in interest” rule for-
bids either insurer or insured from bringing suit for the entire amount
of the damages. Where either insurer or insured presents only its
own claim for damages, the other claimant may not be able to treat
that filing as satisfying its presentation of a claim. Courts have
recognized claims, however, where one party presents the total claim
with some mention of the other party’s interest. The government
agency will probably prefer to consider all claims arising out of one
incident at one time. One claimant, probably the insurance company,
should work with the other to coordinate the filing of the separate
claims.

The most litigated issue in the spousal area has involved claims
for loss of consortium by the spouse of the physically injured claim-
ant. Frequently, the administrative claim has been filed by or on behalf
of the physically injured party without mentioning a spousal claim
for loss of consortium. In other cases, the injured party has asserted
the consortium loss as part of the overall claim. In both situations,
the courts have held that the consortium claim has not been properly
presented.

In still other cases, courts have forgiven technical errors and
allowed one spouse to present the claim for the other. In Locke v.
United States, a husband was allowed to present a claim for his own
damages personally, his wife’s damages as his wife’s executor, and
his children’s damages as next friend of his children. The court found
that Standard Form 95 was unclear on the presentation requirement
and the government was fairly placed on notice as to the nature of the
family’s claim. The court in Estate of Santos v. United States

98. Id.
64 (7th Cir. 1975).
100. Shelton v. United States, 615 F.2d 713 (6th Cir. 1980).
871 (S.D. Ohio 1978); Ryan v. United States, 457 F. Supp. 400 (W.D. Pa. 1978); Collazo
103. Walker v. United States, 471 F. Supp. 38 (M.D. Fla. 1978); Santoni v. United
allowed a claim to be filed under the name of the deceased where an accompanying letter made it clear that his widow was the claimant. In *Campbell v. United States*, a husband was allowed to present a claim for his incapacitated wife as an "other representative," even though he had not been made guardian ad litem at the time of suit. The ability of parents to file claims for their children also has caused difficulty. The courts have consistently treated the adult child as no different from an unrelated claimant. The adult child must either perfect his own claim or the parent must show specific authority to act for him. Greater flexibility has been shown in the case of the minor child. In *House v. Mine Safety Appliances Co.*, the court cautioned that a parent has no inherent authority to file on behalf of his child, but the parent did have "inherent authority" to represent his minor children in a joint claim. Other cases have stretched the presentation regulations to preserve a claim for the living minor claimant. A claim for a deceased child in *Pringle v. United States* received a less generous interpretation. The court did not assume that the parents had qualified automatically as executor for their child's estate, and it dismissed their complaint. Where a conservator properly filed a claim for a child, the court, in *Green v. United States*, held that the mother would have to file a separate claim for the expenses she had paid. Her failure to do so resulted in dismissal of her claim.

In general, the cases suggest the need for close attention to state laws governing rights of representation. While courts are reluctant to deny a claim that will benefit a child, the regulations and judicial opinions governing claims by persons other than the injured party encourage careful attention to the correct assertion of the right to represent a child.

A 1978 study of class actions concluded that the Attorney General's regulations set an "unnecessary and often insurmountable barrier" to use of the class action device under the FTCA. Judicial

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108. 573 F.2d 609 (9th Cir. 1978).
decisions have taken the position that while a class action is possible, it must meet the administrative presentation requirement that "each claimant . . . submit an independent and separate claim." This involves individual authorization of a claim and the specification of a sum certain. The latter requirement is not satisfied by a single damage figure. Lunsford v. United States suggests that if claim authorization and a sum certain can be perfected for all claimants, a class may be certified. The facts of the FTCA class action cases reveal the frequent improbability of this approach. Among failed class action claims have been ones for all parties damaged by major flooding in the state of Pennsylvania, parties damaged by a forest fire, parties damaged by flooding caused by government cloud seeding, parties inconvenienced by government failure to police air travel charters, and persons damaged by government use of the chemical Agent Orange in Vietnam. One of the air charter cases alleged 40,000 claimants. The Agent Orange case alleged 2,400,000 claimants.

The reluctance to recognize an FTCA class action is consistent with statutory limitations on recovery and the Supreme Court decision in Dalehite v. United States. In Dalehite, the Supreme Court used a questionable interpretation of the "discretionary function" exemption to pass back to Congress the determination of United States responsibility for the series of explosions that destroyed much of Texas City, Texas. Congress did create an administrative board to evaluate and pay claims from the Texas City disaster. In mass disaster situations, Congress may deem it appropriate to examine the liability issue and make a judgment of its impact on individual claimants and the

117. 570 F.2d 221 (8th Cir. 1977).
119. Blain v. United States, 552 F.2d 289 (9th Cir. 1977).
120. Lunsford v. United States, 570 F.2d 221 (8th Cir. 1977).
124. See, e.g., 28 U.S.C. § 2678 (limits on attorney's fees in FTCA actions); § 2674 (prohibition of punitive damages and prejudgment interest in FTCA actions); § 2402 (prohibition of jury trials in FTCA actions).
general public interest. The FTCA recognizes one category of claimants who need not present an administrative claim. The statute's requirement of administrative presentation does not apply to "claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim." The logic of this provision is to excuse the administrative exhaustion requirement for the claimant who is pulled into litigation against his wishes. The cases have provided a narrow reading of the exemption. In every relevant reported case the government has been successful in its assertion that the claimant did not qualify for the exemption and first had to pursue his administrative remedies. Two different situations have been considered. In the first, the claimant initially has brought suit against a party other than the United States. When that defendant has attempted to add the United States to the litigation, the claimant (the original plaintiff) has asserted a complaint against the United States. The courts generally have denied the plaintiff's request to excuse the presentation of an administrative claim through application of the counterclaim, cross-claim, or third party claim exemption. Since the plaintiff began the entire litigation, the courts have felt that he did not fit within the exception to the administrative claim requirement.

The second type of case has involved the noncompulsory counterclaim. Here the government first brought suit against the claimant. The claimant's response has included a noncompulsory counterclaim. Despite a statutory lack of distinction between types of counterclaims in section 2675, courts have required claimants to pursue their administrative remedy on the noncompulsory counterclaim before being allowed to bring suit. Again, the courts focus on whether the claim was forced upon the claimant.

These cases provide one of the strongest judicial affirmations of the administrative presentation requirement. The statute itself does not make the distinctions that the courts make. The results of the cases (regularly favoring the government's view of the litigation) should make attorneys cautious about relying on the exception under circumstances where there is still time to present administrative claims. Why should the claimant risk the court's disagreement with his assessment that he really has a compulsory rather than a per-

128. West v. United States, 592 F.2d 487 (8th Cir. 1979); Rosario v. American Export-Ishbrandtsen Lines, Inc., 531 F.2d 1227 (3d Cir. 1976) (claim was not a third party complaint; plaintiff was not forced to bring suit against the United States).
missive counterclaim against the government? The result is to take away much of the impact of the statutory exemption.

To Whom: Presentation to the Right Agency

The Federal Tort Claims Act requires presentation of the claim “to the appropriate Federal agency.”[130] In most cases, only a single federal agency is involved and its identity is obvious to the claimant. Occasionally, however, claimants have had difficulty discovering the wrongdoing agency and have filed claims with a different federal agency. The Attorney General’s regulations have taken a sympathetic approach to these claimants. The regulations specify that if a claim is presented to the wrong agency, that agency “shall transfer it forthwith to the appropriate agency, if the proper agency can be identified from the claim, and advise the claimant of the transfer. If transfer is not feasible that claim shall be returned to the claimant.”[131] If the other requirements of the administrative claim are met,[132] courts have allowed the filing, even though with an incorrect agency, to satisfy the claimant’s administrative presentation obligations.[133] In some cases, this has preserved the claimant’s right of action just as the two-year statute of limitations was expiring.[134]

A recent amendment to the Attorney General’s regulations forces the claimant to pay more attention to the “appropriate agency.”[135] The amendment added a new sentence to the regulations to require: “A claim shall be presented as required by 28 USC 2401(b) as of the date it is received by the appropriate agency.”[136] The amendment still encourages the transfer of wrongly filed claims from one agency to the other. However, it now places the burden of the statute of limitations upon the claimant. The claimant’s attorney who discovers that the claim has been wrongly filed with one agency would be well advised to make a new filing with the proper agency. Reliance on the federal bureaucracy to transfer the claim risks the chance of the claim arriving at the appropriate agency after the statute of limitations has run.

130. 28 U.S.C. § 2675(c).
131. 28 C.F.R. § 14.2(b)(1).
132. See, e.g., Dancy v. United States, 668 F.2d 1224 (Ct. Cl. 1982) (Merit Systems Protection Board has no duty to pass on a document which did not mention FTCA and was not in the form of a claim).
136. Id. (emphasis added).
A related issue involves the claimant who has been wronged by more than one agency. Here, the claimant should perfect two or more administrative claims. In *Provanclal v. United States*, the claimant was injured by Interior Department police. He was then negligently treated by Public Health Service physicians. The single administrative claim was presented to the Department of the Interior and only addressed the police abuse. A court subsequently held that the claimant could not bring suit for medical malpractice without perfecting a complaint with the Public Health Service.

*When: Accrual of the Claim*

The statute of limitations of the Federal Tort Claims Act requires administrative presentation within two years "after such claim accrues." The term "accrual" is not further defined in the statute or in the Attorney General's regulations. For most claims (notably, automobile accident claims), the accrual date will be the date of the accident. A more difficult problem is posed by medical malpractice and similar claims. There the negligent or wrongful act may be unknown to the plaintiff at the time it occurs. Further, the injuries arising from the act may not be detected until months or years later. Most courts that considered the accrual issue in FTCA cases allowed the plaintiff's claims to accrue sometime after the date of the malpractice, but there was a split in opinion as to the exact accrual date.

In *United States v. Kubrick*, the Supreme Court clarified the accrual requirement. In April 1968, Kubrick was treated with neomycin by government physicians. Shortly thereafter he suffered hearing loss. In January 1969, another doctor informed Kubrick that the administration of the neomycin possibly had caused his hearing loss. In June 1971, a third doctor positively informed Kubrick that neomycin should not have been administered and advised him to see a lawyer about a possible malpractice claim. Kubrick promptly filed a proper administrative claim under the Federal Tort Claims Act. Argument in the case revolved around whether Kubrick's claim accrued in January 1969. Both sides recognized that the administration of neomycin, without more, did not start the statute of limitations running. However, the government claimed that the existence of the hearing loss

137. 454 F.2d 72 (8th Cir. 1972).
139. See, e.g., Caron v. United States, 548 F.2d 366 (1st Cir. 1976); Jordan v. United States, 503 F.2d 620 (6th Cir. 1974); Portis v. United States, 483 F.2d 670 (4th Cir. 1973); Tyminski v. United States, 481 F.2d 257 (3d Cir. 1973); Cooper v. United States, 442 F.2d 908 (7th Cir. 1971); Toal v. United States, 438 F.2d 222 (2d Cir. 1971).
coupled with the January 1969 indication that it may have been caused by the neomycin did constitute an accrual of Kubrick's claim. Kubrick pointed to the June 1971 date, which he contended was when the evidence of legal malpractice was first made clear to him.

The Supreme Court sided with the government's position. It held that a claim accrues at the time the plaintiff "knows both the existence and the cause of his injury." The Court found that Congress intended the statute of limitations to "require the reasonably diligent presentation of tort claims." A plaintiff is entitled to know of his injury and have some information about its cause before being required to protect his interests. Once that information is available, the responsibility shifts to the plaintiff to seek medical and legal advice about possible redress.

Appellate decisions since Kubrick generally have accepted the government's argument that the statute of limitations has run on the filing of the administrative claim. Two cases, United States v. Waits and Stoleson v. United States, have held in the plaintiff's favor on accrual questions. In Stoleson, the plaintiff's claim for harm from occupational exposure to nitroglycerin was held to accrue when medical opinion first showed a causal connection between nitroglycerin and the plaintiff's injury. The case appears to be an appropriate reading of the Kubrick doctrine. Waits is a more questionable reading of Kubrick. In Waits, the plaintiff's cause of action was found not to have accrued until the hospital released to him records which indicated medical malpractice.

How Often: Amendment and Reconsideration of Claims

The Federal Tort Claims Act provides that one consequence of the "sum certain" stated in the administrative claim is that it limits the damages in a subsequent court suit. The suit cannot be brought for a higher amount than the administrative claim in the absence of newly discovered facts. The statute does not address amendment of the sum certain in the administrative claim. The Attorney General's regulations provide that a claim "may be amended by the claimant.
at any time prior to final agency action or prior to the exercise of the
claimant’s option" to bring suit after six months. A consequence
of the amendment, however, is to give the agency an additional six
months to evaluate the administrative claim. During this period, the
claimant is forbidden to bring suit. Occasional cases have arisen in
which the government has accepted the initial claim in full. The claim-
ant’s subsequent attempts to bring suit for an additional amount have
been rejected. provides the most thorough study of the consequences of government acceptance of a claim. The
claimant filed a claim for $791 in doctor bills but emphasized to the
agency that his injuries were still being evaluated. The government
granted the claim in full. Claimant refused to accept the $791 and
enclosed an amended claim for $1,000,000. The government contended
that its acceptance of the initial claim precluded further amendment.
The court disagreed. It held that the FTCA vested the power of
acceptance in the claimant, rather than the agency. A footnote ob-
served that the facts of the Odin case did not suggest that the claim-
ant was abusing the administrative process by proposing a test set-
tlement in order to measure the government’s willingness to settle.

The Attorney General’s regulations also recognize the possibility
of reconsideration of a claim denied by an administrative agency.
A claimant who has received a final denial letter “may file a written
request with the agency for reconsideration” prior to filing suit
or the expiration of the statute of limitations on bringing suit. As
with the amendment of a claim, the request for reconsideration gives
the government six months from the date of the request to dispose
of the claim. It also prevents the claimant from filing suit for six
months.

LITIGATING PRESENTATION ISSUES: FILING SUIT UNDER THE FTCA

Nothing compels an FTCA claim to end in federal district court.
The government agency may reach a satisfactory settlement with the
claimant. The claimant may be persuaded that the reasons for the

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147. 28 C.F.R. § 14.2(c).
148. Ferreira v. United States, 389 F.2d 191 (9th Cir. 1968) (reliance on pre-1966
149. 656 F.2d 798 (D.C. Cir. 1981).
150. Id. at 806 n.30.
151. 28 C.F.R. § 14.9(b).
152. 28 U.S.C. § 2675(a).
153. 28 C.F.R. § 14.9(a).
154. Id. Litigation concerning the reconsideration provision has involved the effect
of the reconsideration request on the statute of limitations on bringing court actions. See the discussion in notes 160-164, supra.
government's denial of the claim are proper, and he may decide to drop the matter. For these reasons, the considerable majority of FTCA claims never reach the complaint stage in federal court. This validates Congress's decision in 1966 to remove business from the federal courts by making mandatory administrative presentation of FTCA claims.155

If the claimant chooses to go to federal court, he must be alert to additional provisions of statute and regulation. Certain decisions have emphasized that these provisions provide a further basis for barring a decision on the merits of a claim which has successfully negotiated the administrative requirements of the Act.

The Administrative Final Denial Letter

The final denial letter is the transitional stop between the administrative and the judicial portions of the FTCA, because the denial letter starts the second portion of the statute of limitations running against the claimant. A tort claim is "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."156

The FTCA itself requires the final denial to be in writing and sent by certified or registered mail.157 The Attorney General's regulations add the requirement that the final denial letter include a statement that the dissatisfied claimant may file suit "not later than 6 months after the date of mailing of the notification."158 The statute and regulation together provide the claimant with reasonable certainty as to when the statute of limitations is running. A government failure to comply with the precise requirements of the final denial letter will preserve a plaintiff's claim.159

Difficulties with the final denial letter have arisen in cases where the claimant seeks a reconsideration of the matter by the agency. As noted earlier, the reconsideration entitles the government to an additional six months to assess the claim.160 However, the claimant remains at risk that the government will regard the statute of limitations as still running. Claremont Aircraft, Inc. v. United States161 illustrates the difficulties. The plaintiff's letters and conversations

155. See text at notes 29-30, supra.
156. 28 U.S.C. § 2401(b).
157. 28 U.S.C. §§ 2401(b), 2675(a).
158. 28 C.F.R. § 14.9(a).
160. 28 C.F.R. § 14.9(b).
161. 420 F.2d 896 (9th Cir. 1970).
regarding reconsideration of the "finally denied" claim were received with some encouragement by government claims officials. Nevertheless, the government did not agree to reopen the claim. By the time the plaintiff filed suit, six months had run from the mailing of the final denial letter. The court held that the statute of limitations had run, and it dismissed the plaintiff's action. *Woirhaye v. United States* reached a similar result. There the court suggested that the running of the six-month statute of limitations could be prevented by either a timely amended claim in accordance with the Attorney General's regulations or by agency conduct that leads the claimant to believe the original claim was still being considered. Nothing in the *Woirhaye* facts suggested that the claimant had been told the six-month limitation period could be avoided.

The court's suggestion does provide some guidance in the area, but the suggestion is not clearly authorized by statute or regulation. The claimant must remember that it will be the federal court rather than the federal agency that will determine whether the judicial filing requirement has been met. The claimant with a legitimate hope for administrative reconsideration is thus placed in a difficult position. If six months from the mailing of the final denial letter approaches, the claimant may feel compelled to file suit in order to avoid the running of the statute of limitations. This action, however, invites a judicial dismissal because the agency has not had six months to act on the reconsideration. It also risks ending the agency's interest in the claim because of its transfer to federal court. The claimant's alternative, however, is to run the greater risk that administrative reconsideration will prove futile and that a court will subsequently find the statute of limitations has been exceeded.

An amendment of the statute or regulation could clarify matters. The amendment should state that a final denial letter is controlling unless and until the agency notifies the plaintiff in writing that it has agreed to reconsider the claim. The reconsideration letter also shall state that the previous final denial by the agency is revoked and the plaintiff is precluded from filing suit for six months. This procedure will allow the government to take a fresh look at the rare case where an error has been made in the original denial. These cases would be kept in the administrative process and might be settled, since both the claimant and the government find merit in the request for reconsideration. In the far larger class of cases where the agency is not about to change its first denial, the plaintiff is clearly on notice that the statute of limitations is running. Under this system, govern-

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162. 609 F.2d 1303 (9th Cir. 1979).
164. 28 C.F.R. § 14.9(b).
ment agents may encourage questions about the final denial or accept offers of new factual and legal information without worrying that they may be lulling the claimant into a false belief that the statute of limitations is tolled or that the final denial has somehow been revoked. This approach also would not penalize the claimant's written request for reconsideration by forbidding suit for six months. The claimant who feels the agency has acted wrongly in denying the claim should be entitled to state his position to the agency without penalty. If legitimate matters are raised, the objectives of the administrative settlement provisions are enhanced by having the agency rather than a court handle the matter. If the reconsideration request simply rehashes what has already been decided, the agency is not even required to respond; hence the burden on its time seems small. At this point, the objective of prompt claims disposition is best served by moving the claim into court.

Meeting the Six Months Judicial Filing Requirement

A previous section examined claims that were lost for failure to comply with the first part of the FTCA statute of limitations—presentation of the claim to the proper administrative agency within two years of its accrual. The failure to present any administrative claim or a satisfactory administrative claim has caused the largest number of dismissals under the FTCA statute of limitations. The second part of the statute of limitations and section 2675 provide additional hazards for the claimant who does file an administrative claim in proper fashion.

Premature judicial filing is of first concern. The FTCA gives the agency six months in which to assess a claim.\footnote{165. 28 U.S.C. § 2675(a); see also 28 C.F.R. §§ 14.2(c) & 14.9(b).} An agency's final denial within the six months starts the running of the statute of limitations and forces the claimant to enter federal court. However, the claimant may not treat government indecision as a "final denial" until six months have passed since filing. Any judicial action filed before then will be dismissed.\footnote{166. Gregory v. Mitchell, 634 F.2d 199 (5th Cir. 1981); National Sea Clammers Ass'n v. City of N.Y., 616 F.2d 1222 (3d Cir. 1980), vacated sub nom. Middlesex County Sewage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); Low v. United States, 463 F. Supp. 948 (E.D. Va. 1978); Wolfe v. Merrill Nat'l Laboratories, Inc., 433 F. Supp. 231 (M.D. Tenn. 1977); Walley v. United States, 366 F. Supp. 268 (E.D. Pa. 1973). But see McCormick v. Cooley, 458 F. Supp. 776 (W.D. Pa. 1978).} Once the six months expire or the agency sends a final denial, the claimant is eligible to refile the suit. A more serious problem is the claimant who complies with the administrative presentation requirement but does not meet the second part of the statute of limitations, which bars a claim "unless action is begun within six
months after the date of mailing . . . of notice of final denial." Court decisions have affirmed that this six-month requirement is in addition to the two-year requirement for presentation of the administrative claim. Even though suit may be filed within two years of the accrual of the claim, it may be dismissed if the court action is not brought within six months of the administrative final denial. Claimants also should remember that the six-month period runs from the date of mailing of the final denial rather than the date of receipt.

A number of cases involve suits brought right at the six-month deadline. The courts have not shown any particular sympathy to plaintiffs. The judicial feeling appears to be that the claimant who has prepared the administrative claim should not need six months after final denial to bring the claim to the federal courts. Requests by plaintiffs for a "slight extension" or a favorable interpretation of the statute have not been well received.

Several factual situations have been reviewed by the courts. Most courts that have considered the matter have adopted Rule 6 of the Federal Rules of Civil Procedure to govern the filing date. The court in Kollios v. United States stated the rule that the two-year and six-month FTCA statutes of limitation shall exclude the "initial or trigger day" and include the "last day." Dates on which government offices are closed are excluded. In United States v. Rodriguez, an administrative final denial was mailed on December 29. The plaintiff's suit filed on Monday, July 2, was held to meet the six-month requirement. Courts have treated the final date as the date of receipt by the court, rather than the date the complaint was stamped "filed" or the date process was served.

The cases also indicate the significance of delay in mailing. In presenting the administrative claim, the plaintiff must remember that merely putting the claim in the mail is not presentation to the ap-

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170. 512 F.2d 1316 (1st Cir. 1975).
173. But see Frey v. Woodard, 481 F. Supp. 1152 (E.D. Pa. 1979) (Marine Corps office was open on the Saturday which was the expiration date).
propriate federal agency.\textsuperscript{176} The postal service is the agent of the claimant, rather than the government, when the mail miscarries. Further, the postal service is not a federal agency to whom the claim may be presented in expectation that it will be delivered to the proper agency.\textsuperscript{177} Courts, however, have been willing to hear evidence on plaintiffs’ claims that a proof of mailing would provide evidence of receipt.\textsuperscript{178}

The government will use the mails in sending a final denial letter to the claimant. As noted, the statute clearly states that the six-month period for court filing begins “after the date of mailing.” While no cases have considered the matter, it is possible that a delay in postal channels could consume a considerable portion of the six months. The claimant is then faced with a considerably shorter period in which to file suit. If the delay poses a serious difficulty, the attorney should contact the agency, explain the problem, and request a second final denial letter which withdraws the first final denial and starts a new six-month period running. Should the agency be unwilling to do this, the claimant would be well advised to make all necessary efforts to comply with the statute of limitations. If this is impossible or, in the extreme case, if the final denial letter did not reach the plaintiff until six months after it was written, the claimant probably could persuade a court that he was entitled to a reasonable time for filing suit.

A related issue involves the tolling of the statute of limitations. In general, provisions of state law do not toll either portion of the FTCA statute of limitations.\textsuperscript{179} The one tolling statute that is recognized under the FTCA is the Soldiers and Sailors Civil Relief Act.\textsuperscript{180}

\textit{Increasing the Amount Claimed}

The FTCA limits the amount of damages in a judicial action to the amount claimed administratively from the federal agency unless “the increased amount is based upon newly discovered evidence not reasonably discoverable at the time [of] presenting the claim . . . or

\begin{itemize}
\item \textsuperscript{177} 28 C.F.R. \textsection 14.2(b)(1).
\item \textsuperscript{179} See 1 L. Jayson, \textit{supra} note 2, \textsection 279; Garrett v. United States, 640 F.2d 24 (6th Cir. 1981) (state court action); Robbins v. United States, 624 F.2d 971 (10th Cir. 1980); Casias v. United States, 532 F.2d 1339 (10th Cir. 1976) (insanity); Mann v. United States, 399 F.2d 672 (9th Cir. 1968) (minority and lack of education).
\end{itemize}
upon allegation and proof of intervening facts, relating to the amount of the claim.\textsuperscript{181}

Courts have insisted that plaintiffs show the “newly discovered evidence” or “intervening facts” to justify a higher damage request. Where new evidence is lacking, courts have reduced the damages sought to the amount stated in the administrative claim.\textsuperscript{182} Other decisions have suggested that a variety of factors will constitute sufficient “newly discovered evidence” or “intervening facts” so as to allow a higher damage request. Among such factors have been the development of psychological injuries,\textsuperscript{183} increased life expectancy of the claimant,\textsuperscript{184} and new state judicial decisions on damages.\textsuperscript{185} Other increased damages cases have stretched the language of section 2675(b) in order to overlook obvious clerical errors\textsuperscript{186} and consider the claimant’s lack of education.\textsuperscript{187}

The cases allowing amendment of the damages claimed do not reflect a very rigorous examination of whether new information did in fact surface after the administrative process ended. The courts resolved doubts in the claimant’s favor. An imaginative lawyer dealing with serious personal injury case should be able to offer plausible explanations for an increased damage request.

\textbf{GOVERNMENT EMPLOYEE IMMUNITY ACTS}

Some of the most questionable operations of the FTCA presentation requirements have occurred in cases involving government employees protected by statutory immunity. Often a plaintiff is injured by a government employee in a situation where government employment is not obvious. The employee operating his own vehicle in the scope of government employment is the most common example. The plaintiff, often not suspecting any government connection, sues the individual wrongdoer in state court. The United States then comes to the protection of its employee by invoking federal statutes which allow removal of the action from state to federal court and substitution of the United States for the individual employee defendant. At that point, the plaintiff learns that his exclusive remedy is against

\begin{itemize}
  \item \textsuperscript{181} 28 U.S.C. § 2675(b).
  \item \textsuperscript{182} Kielwin v. United States, 540 F.2d 676 (4th Cir. 1976); Schwartz v. United States, 446 F.2d 1380 (3d Cir. 1971); Cuddy v. United States, 490 F. Supp. 390 (D. Mont. 1980); DeGroot v. United States, 384 F. Supp. 1178 (N.D. Iowa 1974).
  \item \textsuperscript{183} Letoski v. United States, 488 F. Supp. 952 (M.D. Pa. 1979).
  \item \textsuperscript{184} Husovsky v. United States, 590 F.2d 944 (D.C. Cir. 1978).
  \item \textsuperscript{187} McCarter v. United States, 373 F. Supp. 1152 (E.D. Tenn. 1973).
\end{itemize}
the United States under the Federal Tort Claims Act. The plaintiff also discovers the administrative requirements of the FTCA. The government moves to dismiss the action for failure to file a claim with the government agency. Where more than two years have elapsed since the accrual of the claim, the motion will be to dismiss the action with prejudice for failure to comply with the statute of limitations. The unfortunate plaintiff is stymied on all fronts. The federal immunity statute forbids action in state or federal court against the government employee, and the FTCA statute of limitations eliminates the possibility of recovery against the United States.

Federal employee immunity statutes protect government vehicle drivers ("Drivers Act"188) and doctors and other medical personnel189 from any personal liability for acts within the scope of their government employment. These statutes have been held constitutional.190 The opinions have observed that Congress wished to protect certain categories of government employees from the threat of personal liability for their work for the United States. In most instances, the presence of an action against the United States under the FTCA has left the victim with an alternative remedy. However, in cases where the FTCA action is unavailable, the claimant is without remedy. Faced with a choice of leaving an injured plaintiff without remedy or protecting a government driver or medical employee from suit, the court has protected the government employee.

The cases suggest that the claimant must not wait for the government to invoke immunity. The claimant should be attentive to signs that the tort-feasor was a government employee and doing government business. Where a government vehicle is involved or where the driver is in uniform, the connection may be obvious. In other instances, after-the-accident comments or responses to discovery requests may disclose the government connection. In geographic areas with heavy concentrations of government employees, the claimant should seek out information regarding possible government connections. In some cases, the plaintiff may provide the tort-feasor with the good news that his defense will be handled by the United States and he is not personally liable for damages. Once the government connection is found, the case should be treated as an FTCA action and close attention should be paid to the presentation requirements. Even if it is not certain that

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the government employee is immune, an administrative claim should be filed. If the individual is immune, the claimant has preserved his action under the Federal Tort Claims Act. If it is determined that the individual is not immune (perhaps because he is not in the scope of government employment), the administrative complaint against the United States can be denied or withdrawn and the litigation can proceed in state court against the individual. The hard cases are those in which the government connection is discovered after the statute of limitations has run. A recurrent Drivers Act case has involved an accident situation in which nothing indicates a government employment relationship to the claimant. The case proceeds with the claimant assuming that a state statute of limitations of longer than two years applies. Then, near or beyond two years from the date of accident, the government connection is discovered. The action is removed from state to federal court, the United States is substituted for the government employee defendant, and the United States attorney moves that the case be dismissed for failure to file an administrative claim.

Despite the unfairness of the situation, the courts generally have denied relief to plaintiffs.\textsuperscript{191} Filing suit in state court has not been treated as an administrative claim under the FTCA,\textsuperscript{192} nor is the administrative claims requirement satisfied by insurance company\textsuperscript{193} or attorney\textsuperscript{194} letters to the government employee. Also, the claim does not “accrue” at the time government employment is determined.\textsuperscript{195}

\begin{itemize}
\item \textsuperscript{192} Melo v. United States, 505 F.2d 1026 (8th Cir. 1974); Meeker v. United States, 435 F.2d 1219 (8th Cir. 1970); Flickinger v. United States, 523 F. Supp. 1372 (W.D. Pa. 1981); Miller v. United States, 418 F. Supp. 373 (D. Minn. 1976).
\item \textsuperscript{194} Binn v. United States, 389 F. Supp. 988 (E.D. Wis. 1975).
\item \textsuperscript{195} Wollman v. Gross, 637 F.2d 544 (8th Cir. 1980), \textit{reh'g en banc denied}, 646 F.2d 1306 (8th Cir. 1981); Miller v. United States, 418 F. Supp. 373 (D. Minn. 1976).
\end{itemize}
Three courts of appeals decisions provide some hope for claimants. In *Henderson v. United States*,\(^\text{196}\) the Tenth Circuit treated the state court filing as tolling the statute of limitations. In *United States v. LePatourel*,\(^\text{197}\) the court allowed a claim to accrue at the date that an unsettled question of law regarding government employment was determined. The most notable pro-plaintiff decision is *Kelley v. United States*.\(^\text{198}\) There the court interpreted the Drivers Act as not requiring an administrative presentation of a claim. The case recognizes the unfairness of many of the Drivers Act cases. *Kelley* and other cases have suggested in dicta that a claim may be preserved where it can be shown that the government has lulled the claimant into a false sense of security.\(^\text{199}\) The exact contours of the “false sense of security” exception have not been spelled out. Certainly, a strong case would be present where the government knew that a state court action could be removed under an immunity statute and consciously delayed removal or notification to the plaintiff until after the running of the FTCA statute of limitations.

The dismissal with prejudice of actions arising out of the negligence of immunized government employees is the most unjust aspect of the operation of the FTCA administrative procedures. The presence of over twenty such cases suggests the significance of the problem.\(^\text{200}\) A number of these cases suggest that the claimant was unaware of the government connection until after the running of the statute of limitations.\(^\text{201}\)

A recent study of government employee immunity cases has concluded that the legislative history of the Drivers Act is unclear about the necessity of administrative exhaustion.\(^\text{202}\) Congress should take

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197. 593 F.2d 827 (8th Cir. 1979). The case determined that a federal judge was to be treated as a federal employee for purposes of the FTCA and the Drivers Act, 28 U.S.C. § 2679.
200. See note 191, *supra*.
action either to correct the judicial decisions requiring presentation or to emphasize that exhaustion is essential to the government employee immunity statutes. Any proposed amendment (or judicial interpretation of present statutes) should address four objectives: (1) giving an absolute immunity to the favored government employee, (2) requiring claims under the FTCA to be submitted through the administrative claims process, (3) requiring the prompt examination of claims against the government, and (4) doing justice to parties harmed by government wrongdoing. The present approach does not satisfy the fourth objective. Suggestions to protect the claimant can undercut each of the first three objectives. A blanket exclusion of immunity statute claims from FTCA administrative presentation could undercut administrative settlements. At worst, it would provide a claimant with an option to avoid administrative processing by beginning suit in state court against the government employee. This would add to the harassment of the government employee. Even where the bypass was not a knowing one on the claimant’s part, the government would lose the opportunity to expedite claims settlement and reduce the burden on the federal courts through the administrative process. An alternative amendment could require administrative presentation but toll the statute of limitations until the claim first reaches either state or federal court or the federal government first asserts the employee’s immunity. This would prevent the loss of a valid claim by an unsuspecting claimant. It would also preserve the use of the FTCA administrative process and protect the immunity of the government employee. However, it risks a considerable delay in the presentation of claims against the United States. A claimant, for example, might not file suit against the government employee in state court until the end of a three-year state statute of limitations. It may be several more months before the United States’ interest is asserted and the case is removed to federal court. Only then would the statute of limitations begin to run against the claimant. Even if the claimant were given only six months (rather than two years) to present a proper FTCA administrative claim, the government still might be forced to investigate four year old facts. The most satisfactory solution to the immunized government employee problem would rely on the Kubrick standard used to determine the accrual of claims. The statute of limitations for filing an administrative claim should begin to run when the claimant first knows or should know that he was injured by a federal employee. At the latest, this would be the date that the United States seeks removal of the state court action against the individual government employee. More likely, it would be a date much closer to the accident. The claimant may discover the government connection on

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the date of the accident. The claimant who is struck by a government sedan or is negligently treated in a government hospital should be on notice as to the existence of United States liability. Claimant knowledge might be found if a letter from the government or an insurance company investigation reveals the possibility that the injury was caused by a government employee acting in the scope of his employment. At such time, the claimant has the factual knowledge on which to investigate a claim against the United States. The Kubrick test requires no more. This test also encourages the government to notify potential claimants of their exclusive right to sue the United States. If a government employee has been involved in circumstances indicating both his negligence and the existence of a statutory immunity, the agency involved may inform the claimant that his exclusive action is under the FTCA with its administrative claims requirement. Such an approach has value for all parties concerned. It frees the government employee of the burdens of a lawsuit—an objective of the immunity statutes. It provides the injured claimant with clear directions as to how to pursue a claim for redress—an objective of the FTCA. It allows the government to start the running of the statute of limitations and provides proof of its commencement—an objective of the FTCA statute of limitations.

CONCLUSION

The number of failed claims resulting from the FTCA presentation requirements is depressing. Much time and money has been wasted. Many meritorious claims have never received a hearing, no doubt leaving their proponents to wonder how sincere is Congress's pledge to recompense victims of negligent or wrongful acts of government employees. While the mandatory administrative procedures of the FTCA have removed some work from the federal courts, added court time has been spent interpreting the meaning of the administrative procedures.

How can matters be improved? Quite possibly abolition of the administrative presentation requirement would prevent many presentation errors. However, the benefits of administrative settlement are considerable and should not be undercut by removing the requirement that the claimant first seek administrative relief. While major revision is not appropriate, Congress could amend the FTCA and related statutes to clarify the presentation requirements and remove some of the unneeded traps for claimants. Alternatively, the Attorney General's regulations could be amended to reflect the desired approach. Finally, the federal courts could interpret the existing law to achieve

204. *Id.* at 123.
the same result. To recapitulate suggestions made in this article: The "sum certain" requirement and the requirement of thorough documentation of claims should not be used to classify claims as not having met the presentation requirement. The "sum certain" is often the product of an exaggerated guess early in the negotiating process. Documentation requests may suggest that the government is seeking an added advantage in the negotiating process. Certainly, the government agency should be free to ask for information, including at some point, a specification of damages. If the agency feels the claimant is uncooperative, it can either ignore the claimant or issue a final denial letter. The administrative reconsideration procedure should be corrected as suggested earlier. The proposed correction would provide certainty for claimants and speed overall handling of claims for the government. The individual immunity statutes should be amended to end the unfairness of disqualifying claimants who never knew they had been wronged by a federal employee until the statute of limitations had run. These proposals can correct the few serious deficiencies in the administrative presentation statutes and regulations. The greater problem of attorney and claimant ignorance of the presentation requirements will remain. This article may be some aid in solving that problem.

205. See text at notes 160-164, supra.