

Federal Torts Claims Act

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verdict attributable to his negligence.³⁵⁹ Since the Court of Appeals has seen fit to ignore this possibility and to follow a restrictive statutory interpretation, the burden now rests with the legislature to liberalize the law.

DOLE V. DOW CHEMICAL CO.

Federal Tort Claims Act

By virtue of the Federal Tort Claims Act,³⁶⁰ the United States has agreed to waive its sovereign immunity³⁶¹ in certain instances³⁶² involving suits based on personal injury or property loss caused by the negligent or wrongful act of a federal government employee. Congress, however, conditioned consent to suit on the requirement that the liability of the United States be determined in a federal district court.³⁶³ The legislative history of the Act indicates that the denial of state court jurisdiction over such suits was designed to protect the Government from overly generous verdicts on the part of state court juries.³⁶⁴

Pursuant to this statutory design, the United States, as third-party defendant in *Gerardi v. Brady*,³⁶⁵ moved for an order dismissing the complaint filed against it in the New York Supreme Court.³⁶⁶ The parent action was brought by plaintiffs, injured as a result of a colli-

³⁵⁹ See, e.g., *Stone v. Agricultural Ins. Co.*, 76 Misc. 2d 1021, 1023, 351 N.Y.S.2d 496, 499 (Sup. Ct. Albany County 1973).

³⁶⁰ 28 U.S.C. §§ 1346(b), 2671 *et seq.* (1970). For a detailed explanation of the purpose of the Federal Tort Claims Act, see *Feres v. United States*, 340 U.S. 135 (1950).

³⁶¹ For a discussion of the concept of sovereign immunity, see Pound, *The Tort Claims Act: Reason or History?* 30 NACCA L.J. 404 (1964).

³⁶² Immunity is waived by the United States where, in accordance with the law of the state where the act or omission occurred, an individual would be liable. See 28 U.S.C. §§ 1346(b), 2674 (1970).

³⁶³ See *id.* § 1346(b), which provides:

[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, 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

See also *United States v. Sherwood*, 312 U.S. 584 (1941), wherein the Supreme Court stated: The United States, as sovereign, is immune from suit save as it consents to be sued, . . . and the terms of its consent to be sued in any court define the court's jurisdiction to entertain the suit.

Id. at 586 (citations omitted). The United States' consent is also conditioned on the timely commencement of the suit as provided in 28 U.S.C. § 2401 (1970).

³⁶⁴ See, e.g., H.R. REP. NO. 1287, 79th Cong., 1st Sess. 1, 4, 12 (1945) (Minority Objections). In fact, actions against the United States under section 1346(b) must be tried in the federal district courts without juries. See 28 U.S.C. § 2402 (1970).

³⁶⁵ 78 Misc. 2d 11, 355 N.Y.S.2d 281 (Sup. Ct. Kings County 1974) (mem.).

³⁶⁶ The motion was made pursuant to CPLR 3211(a)(2) and (7) upon the ground that the court had no jurisdiction of the subject matter of the third-party complaint against the United States.

sion between two automobiles, one owned and operated by the third-party plaintiffs, the other by the United States. Notwithstanding settlement between plaintiffs and the United States, plaintiffs initiated suit against the defendants, who then sought to implead the Government³⁶⁷ for a *Dole* contribution. Inasmuch as the Federal Tort Claims Act has been held to vest *exclusive* jurisdiction under the Act in the United States district courts,³⁶⁸ the Supreme Court, Kings County, granted the motion to dismiss the third-party complaint.

In reaching its conclusion, the court rejected the applicability of *United States v. Yellow Cab Co.*,³⁶⁹ relied upon by the third-party plaintiffs. Pursuant to the Federal Rules of Civil Procedure,³⁷⁰ the United States Supreme Court, in *Yellow Cab*, permitted the Government to be impleaded in a United States district court action under the Federal Tort Claims Act,³⁷¹ even though liability was to be determined under state law.³⁷² The *Gerardi* court conceded that local substantive law governs all claims arising under the Act.³⁷³ However, it further stated that "the law to be applied as to liability is a far cry from the law with respect to jurisdiction"³⁷⁴ Therefore, the application of local law and the practical use of third-party practice

³⁶⁷ Jurisdiction was alleged under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.* (1970).

³⁶⁸ Since section 1346(b) vests exclusive jurisdiction in the district courts, consent to suit does not extend to actions instituted against the Government in a state court. *See* *Richards v. United States*, 369 U.S. 1, 6-15 (1961); *Small v. United States*, 219 F. Supp. 659, 663-64 (D. Del. 1963), *aff'd*, 333 F.2d 702 (3d Cir. 1964). Furthermore, the United States will not be bound by a state court's judgment. *City of Pittsburgh v. United States*, 359 F.2d 564 (3d Cir. 1966). It has also been held that where the action was originally brought in a state court, the district court did not acquire jurisdiction upon removal. *See* *Gleason v. United States*, 458 F.2d 171 (3d Cir. 1972); *Martinez v. Seaton*, 285 F.2d 587 (10th Cir. 1961); *McCracken v. Brown & Root, Inc.*, 101 F. Supp. 180 (W.D. Ark. 1951).

³⁶⁹ 340 U.S. 543 (1951).

³⁷⁰ FED. R. CIV. P. 14. *See* 6 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 1450 (1971), for a discussion of impleaders by or against the United States under rule 14.

³⁷¹ Case law has sustained the right to implead the United States in a federal district court as to a claim under the Federal Tort Claims Act. *See, e.g., United States v. Acord*, 209 F.2d 709 (10th Cir.), *cert. denied*, 347 U.S. 975 (1954); *Skupski v. Western Nav. Corp.*, 113 F. Supp. 726 (S.D.N.Y. 1953); *Newsum v. Pennsylvania R.R.*, 97 F. Supp. 500 (S.D.N.Y. 1951).

³⁷² *See* note 362 *supra*.

³⁷³ 78 Misc. 2d at 12, 355 N.Y.S.2d at 283. The third-party plaintiffs cited *Cardillo v. Marble Bldg., Inc.*, 142 N.Y.S.2d 721 (Sup. Ct. Queens County 1955), for the proposition that the law of liability of the state of the occurrence applies; therefore, they urged, a state court has jurisdiction over the instant impleader because of substantive rights created by *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

³⁷⁴ 78 Misc. 2d at 12, 355 N.Y.S.2d at 283. The court additionally commented:

[T]here is no jurisdiction in a State court over any claim asserted against the United States under the Federal Tort Claims Act, because Congress did not consent that the United States may be bound by a State court's judgment

Id. at 13, 355 N.Y.S.2d at 283.

in actions brought under the Federal Tort Claims Act cannot abrogate the doctrine of sovereign immunity. The court thus held that an action in which the Government is a third-party defendant must be litigated in a federal district court with jurisdiction conferred by the Federal Tort Claims Act.³⁷⁵

The availability of third-party pleading is intended to facilitate the consolidation of multiple claims otherwise triable only in separate proceedings.³⁷⁶ Given the holding in *Gerardi*, a third-party plaintiff, seeking initially to implead the United States, would be relegated to a separate proceeding brought in a federal district court for contribution from the Government. The United States, however, cannot be bound in the federal court by the state court judgment.³⁷⁷ To do so would deprive it of its statutory right to litigate such issues as negligence and contributory negligence. Thus, a trial de novo in the federal district court would be mandated, thereby resulting in a needless sacrifice of additional judicial time and effort.

Perhaps the solution to this dilemma lies in an amendment to the Federal Tort Claims Act providing for a simpler procedure for state court removal of tort actions³⁷⁸ wherein the defendants intend to implead the Government.³⁷⁹ This would allow simultaneous disposition by the federal court of all claims arising out of one incident while at the same time providing the United States with an opportunity to defend itself in the forum contemplated by the Federal Tort Claims Act. In view of the burden on both state and federal court calendars, such an amendment would certainly be a welcome step toward promoting judicial economy.

³⁷⁵ *Id.*, 355 N.Y.S.2d at 283. Proper venue for section 1346(b) claims lies in the federal judicial district where the plaintiff resides or where the alleged act occurred. 28 U.S.C. § 1402(b) (1970).

³⁷⁶ See *City of Pittsburgh v. United States*, 359 F.2d 564, 568 (3d Cir. 1966).

³⁷⁷ *Id.* at 568-69. In *City of Pittsburgh*, the city, having been held liable in a state court for a tortious act, sued the United States for indemnification in a federal district court alleging its inability to implead the United States in a state court action. The Court of Appeals for the Third Circuit vacated the order of the District Court for the Western District of Pennsylvania, which had granted the city's motion for summary judgment. The Third Circuit held that under the Federal Tort Claims Act, the United States could not be bound by a verdict of a state court jury in an action in which the Government had never been joined as a defendant.

³⁷⁸ Only limited provisions for removal of actions under the Federal Tort Claims Act are available. See, e.g., 28 U.S.C. § 2679(d) (1970) (tort actions against government employees arising out of motor vehicle accidents are removable upon the Attorney General's certification).

³⁷⁹ See Note, *United States as Third-Party Defendant Under Federal Tort Claims Act: The Problem of Multiple Litigation and a Call for Statutory Reform*, 115 U. PA. L. REV. 439, 450 (1967).