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## Federal Torts Claims Act

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verdict attributable to his negligence.<sup>359</sup> 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,<sup>360</sup> the United States has agreed to waive its sovereign immunity<sup>361</sup> in certain instances<sup>362</sup> 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.<sup>363</sup> 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.<sup>364</sup>

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

<sup>359</sup> 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).

<sup>360</sup> 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).

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

<sup>362</sup> 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).

<sup>363</sup> 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).

<sup>364</sup> 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).

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

<sup>366</sup> 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 Government<sup>367</sup> 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,<sup>368</sup> 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.*,<sup>369</sup> relied upon by the third-party plaintiffs. Pursuant to the Federal Rules of Civil Procedure,<sup>370</sup> 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,<sup>371</sup> even though liability was to be determined under state law.<sup>372</sup> The *Gerardi* court conceded that local substantive law governs all claims arising under the Act.<sup>373</sup> However, it further stated that "the law to be applied as to liability is a far cry from the law with respect to jurisdiction . . . ."<sup>374</sup> Therefore, the application of local law and the practical use of third-party practice

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

<sup>368</sup> 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).

<sup>369</sup> 340 U.S. 543 (1951).

<sup>370</sup> 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.

<sup>371</sup> 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).

<sup>372</sup> *See* note 362 *supra*.

<sup>373</sup> 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).

<sup>374</sup> 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.<sup>375</sup>

The availability of third-party pleading is intended to facilitate the consolidation of multiple claims otherwise triable only in separate proceedings.<sup>376</sup> 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.<sup>377</sup> 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 actions<sup>378</sup> wherein the defendants intend to implead the Government.<sup>379</sup> 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.

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<sup>375</sup> *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).

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

<sup>377</sup> *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.

<sup>378</sup> 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).

<sup>379</sup> 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).