

Westfall Act Immunity, Its Jurisdictional Nuances, and Its Application to Contractors

A Practical Guidance® Article by Kristi Morgan Aronica, Weitz Morgan PLLC



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Federal employees who allegedly commit tortious acts while on the job may find themselves as a defendant in a lawsuit. But, if these employees were acting within the scope of their employment, not only are they immune from liability but also from the suit itself. At the outset of these cases, subtle, fact-specific threshold jurisdictional issues arise over whether the employee is actually immune as well as who will decide the merits of the case. And notably for government contractors, they too may exercise this defense, depending on the applicable jurisprudence.

Westfall Act Immunity

The Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, creates a legal framework that accords federal employees immunity from common-law tort claims as well as from being a defendant in a lawsuit. But the alleged wrongful acts must fall within the scope of their employment.

When an employee is sued, the Attorney General (AG) commences a review to certify, or not, that the employee was acting in the course of their official duties at the time of the incident. Should the AG's investigation result in a certification, the employee must be dismissed from the suit and the United States substituted as the defendant. On this

exchange, the litigation becomes governed by the Federal Tort Claims Act (FTCA), which allows individuals to sue the federal government for certain tort claims.

In essence, the Westfall Act delivers immunity and protection (absent exceptions) to federal employees from personal liability and suit when they are performing their official duties and instead directs the legal action toward the government as the responsible party.

Its Jurisdictional Nuances

Because the causes of action against the employee sound in common-law tort, plaintiffs typically file in state court. These local courts are often the preferred venue for plaintiffs because they tend to have less procedural formalities, to offer more opportunities for hearings, and to be more familiar to counsel.

However, the AG's certification that the employee was acting within the course of their employment mandates removal of the case from state court to a federal district court. And even if the federal court disagrees with the AG's certification, it cannot return the case to the state court, unless and until it undertakes an evidentiary examination of the certification.

In short, if the AG determines the employee was acting within the scope of employment, the Act conclusively vests federal jurisdiction over the matter. And, at least as stated by the Fifth Circuit Court of Appeals, a federal court's jurisdiction only arises as a result of the AG's certification. The employee cannot ask a federal court to determine a certification for purposes of removal because the Act does not confer independent jurisdiction.

As indicated above, the court may conduct an evidentiary hearing to determine whether the AG's certification should be reversed. And if it concludes the employee, in fact, was not acting with the scope of their employment, it will place the employee back in defendant status. In which case, no Westfall Act immunity protections exist.

Upon such a reversal, the court loses its basis for subject matter jurisdiction. When the United States is no longer a party and the litigation therefore cannot proceed under the FTCA, all that remains are the common law causes of action. Consequently, the court must determine if it can maintain supplemental jurisdiction or if it must remand the case back to the state court.

The Supreme Court has held that the district court may retain jurisdiction over the state law claims even if the FTCA no longer applies because a federal question was initially raised (whether the employee obtains Westfall Act immunity). Meaning, returning the case to state court is not mandatory. The federal court may exercise the discretion afforded to it under the Constitution to keep and adjudicate the case against the employee.

Government Contractors and Westfall Immunity

Some courts recognize that federal contractors possess a derivative Westfall immunity in certain instances, with each outlining varying standards for application. The Fifth Circuit affords contractors this type of immunity, but not founded on the Westfall Act. The court relies instead on the Supreme Court case that occasioned it.

In *Westfall v. Erwin*, 484 U.S. 292, 292 (1988), the Court created absolute immunity from state-law tort actions when the federal employee's conduct fell within their scope of official duties and was discretionary. When Congress codified this immunity via the Westfall Act, it removed the requirement that the activity giving rise to the claim be discretionary.

While the Fifth Circuit will consider a contractor's judicially-based Westfall defense, it still requires that the acts complained of be discretionary. What constitutes discretionary, of course, becomes the salient issue. And the Fifth Circuit has held that it means governmental policy-making activities.

The Takeaway

Under the Westfall Act, federal employees enjoy immunity from liability and suit provided the conduct that allegedly caused the plaintiff harm was within the scope of their employment, the Attorney General certifies such, and a federal court agrees with that decision.

Contractors may seek derivative immunity under the Supreme Court's Westfall decision. But its viability and character vary by jurisdiction and is generally of a limited nature.

And for plaintiffs' attorneys who file in state court, be prepared for a likely certification and removal to federal court. But consider moving to reverse the certification, thereby precluding substitution and the FTCA. Then, determine the likelihood of success on a jurisdictional challenge to return the proceeding to state court.

Related Content

Resource Kits

- [Federal Government Contracting Resource Kit](#)

Cases

- *Westfall v. Erwin*, 484 U.S. 292, 108 S. Ct. 580 (1988)

Treatises

- Jayson & Longstreth, *Handling Federal Tort Claims* § 6.01(2023)

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An experienced attorney with comprehensive capabilities in commercial litigation and government contracts, Kristi has an extensive track record of excellence in work product and client satisfaction. A graduate of the University of Miami School of Law, she is licensed to practice in Texas and in various federal jurisdictions.

Kristi represents government contractors and subcontractors in federal procurements, including advising on applicable laws and solicitation terms, bid protests, contract negotiations, conducting post-award training and compliance, REAs and claims, litigating disputes, drafting/reviewing teaming agreements and subcontracts, and providing counsel or assistance with mergers and acquisitions, organizational conflicts of interests, GSA Schedules, small business programs, suspension and debarment proceedings, grants, and cooperative agreements.

Providing reliable legal representation founded on strength of conviction, strategic decision making, and substantive knowledge, Kristi is driven in her commitment to clients and their matters. As a result, she has also had successful outcomes in both state and federal courts as counsel for prime contractors and subcontractors in commercial disputes arising from federal procurement contracts. Experienced on both sides of the docket, she serves as plaintiff's or defendant's counsel and has a unique skill set of combined proficiency in federal public contract law and the civil procedure and substantive law of state and federal jurisdictions in Texas.

Kristi represents a diverse set of clients working on government contracts and has particularly strong knowledge in the unique aspects of entities operating in the government marketplace in the industries of construction, parts supply, and tech.

In addition to practicing law, Kristi has published on subcontract terms and conditions and in the fields of American literature and U.S./Mexican immigration and has been quoted by Bloomberg Law on federal procurement cases. She also spent numerous years in a leadership position on the board of directors of The Arc of the Capital Area, a Texas non-profit focused on enhancing the lives of those with intellectual and developmental disabilities.

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