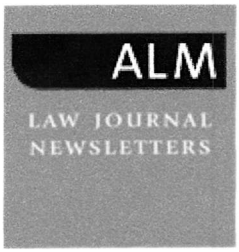

The FTCA and the Payment of Tort Damages

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By Janice G. Inman

Law Won't Stretch to Accommodate Government Preference for Reversionary Trust

Federal government attorneys recently unsuccessfully attempted to convince a Federal District Court and the U.S. Court of Appeals for the Fifth Circuit to rewrite the terms of the Federal Tort Claims Act ("FTCA") to allow the creation of a reversionary trust rather than give a lump-sum award to pay for a medical malpractice plaintiff's future medical expenses. For its argument, the government relied on the FTCA and Louisiana state law, claiming that the federal
government should be treated in a like manner to state and private insurers — which, in Louisiana, are allowed to pay for future medical expenses as they
come due.

In holding that no law authorized the creation of a reversionary trust absent the plaintiff's acquiescence, the Fifth Circuit fell into line with two other circuits' appellate courts in saying that Congress will have to change the FTCA before federal courts can order the creation of such a trust.

A Hospital Stay and a Bad Outcome

In October 1999, Teddy J. Vanhoy was operated on at the Veterans Affairs Medical Center in New Orleans. His coronary bypass surgery was successful, but trouble developed when Vanhoy was in recovery in the hospital's intensive care unit. While being slowly weaned off his ventilator support two days after his surgery, he was left unattended for several hours by the nursing staff. During this time his endotracheal tube became dislodged, sending Vanhoy into respiratory and cardiac arrest. It appeared from the evidence that he had been extubated for more than 21 minutes before the situation was remedied. Vanhoy suffered anoxic brain injury, which left him permanently disabled. He and his wife brought suit against the federal government under the FTCA.

The government, wanting to limit its potential liability, pleaded La. R.S. § 40:1299.42 of the Louisiana Medical Malpractice Act ("MMA") in its answer as an affirmative defense. Section 40:1299.42B(1) states that the total amount recoverable through a private medical malpractice claim may not exceed $500,000, exclusive of future medical care and related benefits. A companion provision, found in § 40:1299.43 of the MMA, states, *inter alia*, that private malpractice awards for future medical care expenses are to be paid from the State's Patients' Compensation Fund (PCF), not by the negligent health care provider. These payments for future care, however, are to be paid out only as charges accrue, with payment ceasing when the plaintiff dies.

As the federal government is not one of Louisiana's private health care providers — which pay into the PCF fund in order to receive coverage under the scheme — it did not plead § 40:1299.43 of the MMA as an affirmative defense. Instead, the government moved for partial summary judgment on the issue of future medical expenses, arguing that La. R.S. § 13:5106(B) — which allows certain state and other entities that don't contribute funds into the PCF to deposit future medical expenses awarded into a reversionary trust — authorizes the federal government to do the same thing. In other words, since the State of Louisiana can pay for the future medical care of a successful plaintiff out of a reversionary trust, the United States should be afforded the same treatment.

When the district court denied the government's motion for partial summary judgment, the government made a motion *in limine* on the subject, further backing its assertion that it was entitled to be treated as the state

government would be by pointing to 28 U.S.C. § 2674 of the FTCA. Section 2674 states, in pertinent part, that "the [federal] government is entitled to be treated in the same manner and to the same extent as a private health care provider under like circumstances." Based on this, the government insisted that a reversionary trust should be created, as it would most closely approximate the Louisiana Legislature's treatment of future medical expenses under § 40:1299.43. The district court, however, was not convinced, and denied the motion, ruling that any future medical expenses awarded would have to be paid in the form of a lump sum payment. The Vanhoys were awarded a total amount of $4,591,300. Of this amount, $3,500,000 was awarded for Mr. Vanhoy's future medical care and related services.

The Appeal

On appeal, the government again asserted that it is entitled to be treated in the same fashion as a private defendant in a Louisiana malpractice action, based upon the "like circumstances" test of the FTCA. It claimed that a reversionary trust would most closely approximate § 40:1299.43's treatment of future medical expenses by ensuring that the damages would be used only for medical and related services that Vanhoy would need throughout his lifetime. From the government's standpoint, this set-up would negate the possibility of its overpaying the plaintiff and of his survivors' reaping a windfall if he died before the lump sum fund was exhausted.

To support its claim that the federal government should be treated in a like manner to a private defendant, the United States pointed to the case of *Owen v. United States*, 935 F2d 734 (5th Cir. 1991), in which the Fifth Circuit had held that the MMA's $500,000 damages cap (which applies to tort damages only, and not future medical costs) may be invoked in favor of the federal government as defendant despite the fact that the federal government had neither filed with nor contributed to the PCF. The Fifth Circuit was unconvinced, stating: "In *Owen*, we held that the government was in 'like circumstances' with private individuals who had contributed to the fund because the government had met the objectives of § 40:1299.42 by virtue of its 'certain and perpetual' solvency. [*Owen*, 935 F.2d at 737-38.] And, in reaching this conclusion, we noted that the liability of state health care providers for basic tort damages is limited to $500,000, even though, like the U.S. government, state providers do not contribute to the PCF. [*Id.* at 737.] In that case, the government and the victim could be placed on a 'footing of equality as between private parties' under Louisiana law: The victim could be assured of receiving the same amount of damages that he otherwise would, and the government could benefit from the same limited liability enjoyed by qualified health care providers."

Unlike in the situation of the $500,000 cap with the PCF taking over if expenses ran over that amount, the imposition of the reversionary trust scheme advocated by the government would not give the Vanhoys the same amount for future medical expenses as they would otherwise have gotten under the terms of the FTCA. In addition, because the FTCA does not contain any provision authorizing damage awards that require the United States to perform continuing obligations, there was no mechanism in place either to force the government to comply or to keep the need for continued administration of the case by the court to a minimum. Stated the court, "[I]t is helpful to observe that the [$500,000] cap is a passive, one-time line drawn in the dust whereas payment for future care is an active, continuing, and indeterminable obligation for the lifetime of the victim. Simply put, § 40:1299.43's treatment of future medicals for private individuals cannot be replicated-by a reversionary trust or other such mechanism-whereas § 0:1299.42's treatment of basic damages for professional negligence and its statutory cap thereon are susceptible of replication."

Similarly, the federal government was unsuccessful in its argument that it should be given like treatment to that which the State receives under La. R.S. § 13:5106B. Section 13:5106B(3)(a) provides for the establishment of a reversionary trust for the payment of future medical damages awarded in ordinary personal injury suits brought against political subdivisions of the State. This statute was inapplicable in this case, the court determined, because the FTCA makes the federal government liable in the same manner and to the same extent as a *private* defendant, not a State entity. The Louisiana scheme of payment of future damages, set up for its own subdivisions, has nothing to do with the federal government and its duty to provide for the future medical care of successful plaintiffs.

Other Circuits Had Set the Stage

The court in *Vanhoy* took as persuasive authority holdings in the cases of *Frankel v. Haym*, 466 F2d 1226 (3rd Cir. 1972), and *Reily v. United States*, 863 F2d 149 (1st Cir. 1988), that found no authority for setting up reversionary trusts in federal tort liability situations.

In *Frankel*, a young woman was left almost totally disabled following a road accident between the car she was riding in and an army vehicle. She was brain damaged and left in a psychotic state, with the mentality of a five-year-old child. Following suit, based on the immunity waiver of the FTCA, the plaintiff was awarded damages of more than $1,100,000.

The government asked the district court to make any award to the plaintiff in the form of a judicially established trust for her benefit, with the court designating or approving a trustee. The corpus of the trust would be supplied by the United States, with the government supplementing that amount as it became necessary. The remainder would revert to the government upon the plaintiff's death. The district court denied this request.

On appeal, the Third Circuit looked back to the promulgation of the FTCA, which created a tort action right against the United States that had not previously existed. Section 2679(b) of Title 28 made the remedy provided in section 1346 of that title the exclusive resort of claimants like the plaintiff in *Frankel*. Section 1346(b) authorized district courts to entertain "civil actions on claims against the United States, for money damages," among other things. "Arguably," the court noted, "this language at least implies that primary awards in such civil suits must take the form of common law money judgments, the only form of 'money damages' known to the common law. More probably, the Congress never considered whether it might be desirable that some awards be made in a different form." Because of this, the Third Circuit sided with the district court, concluding that the court should not make any other type of award under the FTCA other than a lump sum award "unless and until Congress shall authorize a different type of award. The relaxation of sovereign immunity is peculiarly a matter of legislative concern, responsibility and policy. If novel types of awards are to be permitted against the government, Congress should affirmatively authorize them."

In *Reily,* the Fifth Circuit came to the same conclusion. That court disagreed, in particular, with the government's reliance on dicta in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 US 523 (1983), in which the Supreme Court had said of a case brought under the FTCA that "[t]he award could in theory take the form of periodic payments, but in this country it has traditionally taken the form of a lump sum, paid at the conclusion of the litigation." The *Reily* court dismissed this language as providing a basis for authorizing a new method for payment of damages in cases brought under the FTCA, stating: "Many things are possible 'in theory' — *e.g.,* moving faster than a speeding bullet, leaping tall buildings at a single bound — but to transform theoretical possibility into actuality, without the faintest shred of precedential support, is a feat more suited to disciples of Blackstone on Magic than to students of Blackstone's Commentaries. The carefully landscaped terrain of the FTCA allows for no such necromancy to be practiced." The Fifth Circuit concluded that, absent agreement by the parties or statutory authority, a tortfeaser — even the United States — must pay the judgment "in one fell swoop" because the court possesses no "right to impose a periodic payment paradigm on the parties, over protest, solely to ease the tortfeasor's burden or to suit some fancied notion of equity."

Traditional Payment Method Holds

Like the First and Third Circuits courts of appeal before it, the Fifth Circuit in *Vanhoy* declined to deviate from a conventional lump-sum award. In doing so, the Fifth Circuit court reiterated the previous two court's rationale for denying the government's request for the creation of a reversionary trust: that the FTCA contains no provision for setting up trusts to pay for the government's torts, and it is within Congress' realm to change the law, not the court's.

The *Vanhoy* court, in fact, was partially swayed away from the government's point of view by the fact that Congress has been cognizant of the *Frankel* and *Reily* holdings for years and yet has made no move to change the terms of the FTCA to require, or even allow for, the creation of a reversionary trust when a successful plaintiff will need future medical care. Unless and until Congress does so, *Vanhoy* stands with *Frankel* and *Reily* as one more authority behind the increasingly accepted rule that lump-sum payments are the only method authorized by the FTCA for payment of most plaintiffs' future medical expenses.

Janice G. Inman is Editor-in-Chief of this newsletter.