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Federal Tort Claims Act and independent contractors

A CLOSER LOOK AT THE INDEPENDENT CONTRACTOR AND DISCRETIONARY FUNCTION RULES

This article is a survey of two discreet areas of the Federal Tort Claims Act ("FTCA") law. The first concerns when the government is liable for the acts of an independent contractor. The second is the discretionary-function exception to the FTCA, which is a potential consideration for any FTCA regardless of whether an independent contractor is involved. Both areas require careful factual considerations.

For a federal court to have jurisdiction over an FTCA claim, the complaint must show the case comes within the FTCA (*Edison v. U.S.* (9th Cir. 2016) 822 F.3d 510 [independent contractor]; *Nurse v. United States* (9th Cir. 2000) 226 F.3d 996, 1000-1001 [affirmative defenses, such as the discretionary function defense].)

Independent contractors

The FTCA provides for liability of the U.S. for torts committed by its employees. (28 U.S.C. § 2674.) 28 U.S.C. § 2674 states, "The United States shall be liable, ... relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances ..." *United States v. Olson* (2005) 546 U.S. 43 held one looks to whether a *private* person would be liable under local law, not whether a *government* would be liable. The Court also made it clear that the term "like circumstances" in the FTCA does not mean the "same circumstances" as presented in the case. Rather, the court's inquiry must look "further afield." (*Id.*, 546 U.S. at p. 47.)

The U.S. is *generally* not liable for the negligence of its independent contractors or the employees of its independent contractors. (*U.S. v. Orleans* (1976) 425 U.S. 807, 813-14; *Logue v. U.S.* (1973) 412 U.S. 521, 525-26.) The critical element in distinguishing whether an agent of the government is an independent contractor, rather than an employee, is whether the government retains authority to control "the detailed physical performance of the contractor," or "supervise its day-to-day operations." (*Logue*, 412 U.S. at 527-28; *Orleans*, 425

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U.S. at 814-15; *Letnes v. U.S.* (9th Cir. 1987) 820 F.2d 1517, 1519.)

While 28 U.S.C. § 2671, *generally*, makes 28 U.S.C. section 2674 applicable only to situations wherein a federal employee, not an independent contractor, has committed the tort, there are *exceptions*, to that rule that make the U.S. liable for the torts of its independent contractors, acting either alone, or in conjunction with the U.S.

Edison v. U.S., *supra*, 822 F.3d 510, sets forth the requirements for the U.S. to be held liable pursuant to the FTCA when the tort was committed by an independent contractor retained by the U.S. These include "a separate non-delegable or undelegated duty which the United States could be held directly liable for breaching. ..." (*Id*. at p. 518.) *Edison* describes a three-step inquiry to determine whether the U.S. is *directly* liable, for its, and for an independent contractor's acts, when a non-delegable duty exists. The first step is to determine "whether state law ... would impose a duty of care on a private individual in a similar situation. 28 U.S.C. § 2674 ..." (*Id*. at p. 519.) The second step is to "look to the contract and the parties' actions to determine whether the United States retained some portion of that duty for which it could be held directly liable. ..." (*Ibid*.) The last step states that "even if it appears that the government delegated all of its duties to the independent contractor, we ask whether California law imposed any nondelegable duties on the government...." (*Ibid*.)

Thus, if under any theory California would find *any* non-delegable duty regarding a private employer, the U.S. is liable for the acts of the independent contractor. There are several theories pursuant to which there is a non-delegable duty.

California liability of those who hire independent contractors

Vargas v. FMI, Inc. (2015) 233 Cal.App.4th 638, noted *two of the different reasons* a hirer of an independent contractor may be held liable for the independent contractor's torts. One is a non- delegable duty. Another is a peculiar risk presented by the involved work.

Non-delegable duties

Pursuant to California law, one who hires an independent contractor, where the hirer has a non-delegable duty, is liable for that independent contractor's torts. (*J.L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388, 400.) Thus, regarding California, if there is a non-delegable duty, the U.S. is directly liable for the acts of its independent contractor.

Possibility of public harm under public franchise

Serna v. Pettey Leach Trucking, Inc. (2003) 110 Cal.App.4th 1475, 1486, held that, when there is a possibility of harm to the public by a business carried on under a public franchise, there is a non-delegable duty because to rule otherwise would provide a disincentive to supervise its activities, and deprive those injured of the financial responsibility of the company granted the public franchise. *Serna* wrote: "an activity (1) which can be lawfully carried on only under a public franchise or authority and (2) which involves possible danger to the public is liable to a third person for harm caused by the negligence of the carrier's independent contractor." (*Ibid*.) *Serna* reflects not only the possible risk/public franchise exception, but also notes a carrier operating on the public highway involves a sufficient risk that it is a non-delegable duty.

Camargo v. Tjaarda Dairy (2001) 25 Cal.4th 1235, did not use the word possible but reflected the same concept, that a possible risk to the public is sufficient. *Camargo* provides an even broader duty, in that it speaks of [any] risk, not just a possible risk. "'... An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor ... (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or ... (b) to perform any duty which the employer owes to third persons.'" (*Id*. at p. 1241.)

Work can only be performed by authority granted by public body

Vargas v. FMI, Inc., *supra*, 233 Cal.App.4th at pp. 649- 650, held that if the involved work can only be performed pursuant to authority of a government body, the duty is non-delegable. The court analyzed many cases involving non-delegable duties. In coming to that conclusion, the court referenced Restatement Second of Torts Section 424 [regulatory safety procedures required], Section 428 [work which can only be done by a franchise granted by a public authority] and *Eli v. Murphy* (1952) 39 Cal.2d 598 [citing said section 428, operating as a highway common carrier involves considerable risk; thus, being highly subject to California regulatory powers.]

Venuto v. Robinson, 118 F. 2d 679, 682 (3rd Cir. 1941), held, citing Restatement Second of Torts, section 428, that there are various theories on non-delegable duties, including work which may not be lawfully done except for a grant of authority by a public entity.

Safety procedures

Yanez v. United States (9th Cir. 1995) 63 F.3d 870, held that the government has a non-delegable direct duty regarding acts of its independent contractors concerning safety procedures. The court explained that "liability has been construed as creating direct liability for the government's nondelegable duty to ensure that the contractor employs proper safety procedures. See *McCall v. United States* (9th Cir. 1990) 914 F.2d 191, 194 (collecting cases)." (*Id*. at p. 872, fn. 1.)

Yanez also stands for the principle that, regarding safety precautions, U.S. contracts, with independent contractors, must specifically, and in detail, provide for safety precautions, mandatorily to be taken by the independent contractor. (*Id*. at p. 873.)

Peculiar-risk doctrine

Edison v. U.S., *supra*, 822 F.3d at p. 518, fn. 4, ruled that, if an activity involves a "peculiar risk," the U.S. is

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liable for its independent contractor's acts. "The Ninth Circuit has previously applied this principle to hold the United States liable under the FTCA. An example is the line of FTCA cases applying the peculiar risk doctrine to hold the government directly liable for its failure to act, despite its delegation of safety procedures to an independent contractor. (See *Myers v. United States* (9th Cir. 2011) 652 F.3d 1021, 1034; *Yanez*, 63 F.3d at 872 n.1 ('Under the FTCA, the United States may not be held vicariously liable. However, [peculiar risk] liability has been construed as creating direct liability for the government's nondelegable duty to ensure that the contractor employs proper safety procedures.' (citing *McCall v. United States* (9th Cir. 1990 914 F.2d 191, 194); *McGarry v. United States*, 549 F.2d 587, 590 (9th Cir. 1976)." (*Ibid*.)

Srithong v. Total Investment Co. (1994) 23 Cal.App.4th 721, 726, held that, under California law, one who hires an independent contractor, wherein a peculiar risk is involved, is liable for that independent contractor's negligent acts. (Accord *Secci v. United Independent Taxi Drivers, Inc*. (2017) 8 Cal.App.5th 846, 860, regarding the peculiar risk doctrine, [referencing *Eli* and *Vargas*.].)

Mackey v. Campbell Construction Co. (1980) 101 Cal.App.3d 774, 785-786, noted "A peculiar risk may arise out of a contemplated and unsafe method of work adopted by the independent contractor."

One does not look at whether conduct, in the abstract, is a peculiar risk, but; such must be determined in light of the facts of the particular situation. "the question was not whether ... involved a peculiar risk in the abstract, but whether the particular ... work at the particular time in question involved a peculiar risk of injury." (*Id*. at p. 786.)

Mackey defined a peculiar risk as, "some peculiar unreasonable risk of harm to others unless special precautions are taken ... " (*Id*. at p. 784.) *Mackey* continues, regarding the definition of peculiar risk, "one which arises out of the character of the work to be done or the place it is to be done and against which a reasonable person would recognize the necessity of taking special precautions. (Rest.2d Torts, § 413, com. b, § 416, com. b.) It is something other than the ordinary and customary dangers normally arising from the work as it is usually done." (*Id*. at p. 785.)

Vargas v. FMI, Inc., *supra*, 233 Cal.App.4th at p. 646 held, "peculiar risk is an exception to the common law rule that a hirer was not liable for the torts of an independent contractor. Under this doctrine, 'a person who hires an independent contractor to perform work that is inherently dangerous can be held liable for tort damages when the contractor's negligent performance of the work causes injuries to others.'"

A potential area for liability, for the acts of independent contractors, is when such is a courier for the U.S. This is important; as, much of the government's transportation, of property, is by independent contractors.

As of now, courts have been reluctant to classify the driving of a motor vehicle as a peculiar risk. For example, Restatement of Torts, sections 413 and 416, *Myers v. United States* (9th Cir. 2011) 652 F.3d 1021, 1034, *A Teichert & Son, Inc. v. Superior Court*, (1986) 179 Cal.App.3d 657, and *Bowman v. Wyatt*, (2010) 186 Cal.App.4th 286 hold driving a motor vehicle is not a peculiar risk. However, these merely reference driving a motor vehicle, in general, without considering the additional factors.

An additional factor, which might bring driving into the realm of a peculiar risk, would be when the courier company uses a driver who presents a risk of harm to the public. An example would be a driver who is potentially not fit to drive safely. Another factor might be the fact that a courier company uses the roads, in a quantitative amount, greater than the general user of the roads. As the courier is on the road in greater quantities, there is more opportunity to negligently cause a collision. (https://www.osha.gov/Publications/motor_vehicle_guide.pdf; https://osha.europa.eu/en/tools-and-publications/ .../Road-transport-accidents.pdf/; https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4565185/).

The trend, not to consider driving to be a peculiar risk, may be changing. *People v. Morales* (2019) 33 Cal.App.5th 800, 807 ruled, "... Driving is an inherently dangerous activity..." (Followed in *People v. Brito*, B290418 (Cal.App. Dist.2 09/19/2019), *People v.* Stanley, B293011 (Cal.App. Dist.2 11/20/2019), *People v. Hyson*, A153805 (Cal.App. Dist.1 12/19/2019). (Since FTCA actions are litigated in federal court, the California rule against citing unpublished decisions, is inapplicable.) While these are criminal, not tort, cases, they still show California law now recognizes driving is inherently dangerous; thus, it can be argued, a peculiar risk.

Discretionary function exception to Federal Tort Claim Act

A defense to U.S. liability, pursuant to the FTCA, is the statutory discretionary function rule. This basically means that if the injurious act is within the U.S. discretionary functions, there is no liability pursuant to the FTCA.

28 U.S.C. section 2680(a), which sets forth the discretionary function defense, providing for exemption of liability pursuant to the FTCA, provides: "The provisions ... shall not apply to – (a) Any claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

Berkovitz v. United States (1988) 486 U.S. 531, 536-37 and *Terbush v. U.S.* (9th Cir. 2008) 516 F.3d 1125, 1129, set forth the two elements required for said exception to apply. Those elements are: (1) did the action involve an element of judgment, or choice, and, (2) whether the involved judgment was the type of which the discretionary function exception was designed to shield, based upon considerations of public policy. If the first element is not established, by the U.S., the second need not be considered.

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Senger v. United States (9th Cir. 1996) 103 F.3d 1437,1444 places the burden of proof on the U.S. to establish the discretionary function defense, based upon particularized facts. "The determination of whether an act or omission falls under the discretionary function exception requires a particularized and fact-specific inquiry.' ... 'the United States bears the burden of proving the applicability of one of the exceptions to the FTCA's general waiver of immunity.' ..."

Linder v. U.S. (7th Cir. 2019) 937 F.3d 1087, 1090-1091 held the discretionary function rule is not a consideration, relating to violations of the U.S. Constitution because the FTCA does not apply to such violations. It was for this reason the Supreme Court created potential liability, of a U.S. government official, pursuant in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for Constitutional violations.

US v. Varig Airlines (1984) 467 U.S. 797 involved the promulgation of airline safety regulations. The government was sued for injuries and damages arising from fires in Boeing 707 airplanes. *Varig* ruled the discretionary function rule precludes liability against the U.S. wherein, the conduct involves initiation of programs and activities. It also precludes liability based upon decisions made by "executives or administrators in establishing plans, specifications or schedules of operations. This includes legislative and budgeting activities. (*Id.* at p. 811.) *Varig* also noted the exemption precludes liability for the acts of regulatory agencies. (*Id.* at p. 813.) However, *Varig* also notes, "... it is ... impossible to define with precision every contour of the discretionary function exception. ..." (*Ibid.*) *Varig* further ruled the discretionary function exception shielded the U.S. from liability in that case even for the implementation of inspection requirements, because the inspection requirements were not mandatory but involved discretion in the inspections. (*Id.* at p. 816-820.)

First element: Judgment or choice?

The first element is whether the action involves an element of judgment or choice. This is not met where a federal policy, based upon matters such as a statute, regulation, policy, or contract, specifically prescribes a course of action. "First, we must determine whether the challenged actions involve an 'element of judgment or choice.' (*Gaubert*, 499 U.S. at 322, 111 S.Ct. 1267.) This inquiry looks at the 'nature of the conduct, rather than the status of the actor' and the discretionary element is not met where 'a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. *Berkovitz*, 486 U.S. at 536 ... If there is such a statute or policy directing mandatory and specific action, the inquiry comes to an end because there can be no element of discretion when an employee 'has no rightful option but to adhere to the directive.' *Id*." (*Terbush v. U.S.*, *supra*, 516 F. 3d at p. 1129.)

Whisnant v. U.S. (9th Cir. 2005) 400 F. 3d 1177, 1180 noted: " ... Courts are to ask first whether the challenged action was a discretionary one — i.e., whether it was governed by a mandatory statute, policy, or regulation. If the action is not discretionary, it cannot be shielded under the discretionary function exception. ..."

Vickers v. United States (9th Cir. 2000) 228 F.3d 944 involved employee regulations regarding carrying a firearm, training and supervision. It noted as to *retention* and *supervision*, there were no mandatory policies. However, *Vickers* ruled the U.S. had not established the discretionary function exception under the first element. This was because the government failed to follow *mandatory reporting* requirements.

Sanders v. U.S. (4th Cir. 2019) 937 F.3d 316 involved an action against the U.S. for failure to do a proper gun permit background check upon an individual who went into a church, shooting and killing several people. *Sanders* held violation of certain governmental procedures, relating to such background check, denied the U.S. of the discretionary function defense.

Routh v. U.S. (9th Cir. 1991) 941 F.2d 853 held a U.S. contracting officer's failure to require an independent contractor's machinery, to have a particular piece of safety equipment, was not protected by the discretionary function rule. *Routh* so held because the contract with the independent contractor had mandatory language, requiring compliance with certain matters, thus precluding invocation of the discretionary function rule.

Second element: shield of discretionary function

The second element is whether the involved judgment was the type which the discretionary function exception was designed to shield, based upon considerations of public policy. *Terbush v. U.S.*, *supra*, 516 at p. 1129 wrote, in this regard: "When a specific course of action is not prescribed, however, an element of choice or judgment is likely involved in the decision or action. We then must consider 'whether that judgment is of the kind that the discretionary function exception was designed to shield,' namely, 'only governmental actions and decisions based on considerations of public policy. (*Berkovitz*, 486 U.S. at 536-37.)'"

The public policy focus "is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but, on the nature of the actions taken and on whether they are susceptible to policy analysis." (*United States v. Gaubert* (1991) 499 U.S. 315, 335.)

Chadd v. U.S. (9th Cir. 2015) 794 F.3d 1104, 1109 noted there is a strong presumption the exception applies when a regulation calls for discretion. *Chadd* noted if there are competing policy considerations, the discretionary exception applies.

Nurse v. U.S. supra, 226 F.3d 996 notes the exception applies, under the second element, *only if* conduct "implements, social, economic or political

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policy considerations." (*Id*. at p. 1112.) *Nurse* involved negligent supervision and training. *Nurse* notes retention of an employee is *generally* a discretionary function. It does not state it is *always* a discretionary function. (*Id*. at p. 1101.)

Nurse cites *Tonelli v. U.S.* (8th Cir. 1995) 60 F. 3d 492, involving a postal employee stealing materials from a post office box. *Tonelli* rejected the general rule that supervision and retention fall within the discretionary judgment exception. It found the exception applied to the hiring, not retention and supervision wherein, the U.S. is on notice of an employee's illegal conduct and fails to terminate the employee's employment "employee supervision and retention generally involve the permissible exercise of policy judgment and fall within the discretionary function exception. See, e.g., *K.W. Thompson Tool Co. v. United States* .... However, this action involves allegations that the post office failed to act when it had notice of illegal behavior. Failure to act after notice of illegal action does not represent a choice based on plausible policy considerations. Consequently, the unresolved notice issue renders summary judgment inappropriate on the employee supervision and retention claims." (*Id*. at p. 496.)

KW Thompson Tool Co., Inc. v. U.S. (1st Cir. 1988) 836 F. 2d 721, 726 cited in *Nurse* and *Tonelli*, referencing, *United States v. Varig Airlines*, 467 U.S. 797, 813 (1984) writes: "basic inquiry is 'whether the challenged acts of a government employee ... are of the nature and quality that Congress intended to shield from tort liability. 467 U.S. at 813." Also, *KW* noted: "implicit in *Varig* and *Dalehite* is the proposition that a 'decision cannot be shielded from liability if the decision maker is acting without actual authority.'" (*Id*. at p. 727 fn. 4)

There is no governmental discretion involved, which would invoke 28 U.S.C. 2608, when the act is the act of an occupational or professional nature. *Sigman v. United States* (9th Cir. 2000) 208 F.3d 760, 770 held the discretion exception does not apply when the matter is the type of function performed by professions or occupations in private business.

Senger v. United States, *supra*, 103 F.3d 1437 involved drunken sailors sexually assaulting a dancer hired to perform at a Naval function. The Court noted the negligent hiring, supervision and retention of a person will qualify as coming within the FTCA, with a possible exception of assault and battery.

Senger ruled that the discretionary act exception was not established. It remanded for further consideration of whether, "the decision to warn the public of violent employees would involve policy issues, there is no evidence in the record showing that the 'specific acts of negligence [alleged here] flowed directly from the policy choices' of Postal Service employees. See *Prescott*, 973 F.2d at 703'. (*Id*. at p. 1444.) ..."

Doe v. Holy See (9th Cir. 2009) 557 F.3d 1066, 1084 did not involve an FTCA case. However, it used the FTCA discretionary function rule, in relation to the statute of which it was concerned, determining the discretionary function rule precluded liability of the Holy See.

Holy See involved retention of a priest, whom the Holy See was aware was a child molester. The Ninth Circuit ruled it was within the Holy See's discretionary function to retain the priest, and not warn the public; because, to do so would make the Catholic Church look bad. "…the Holy See might have decided to retain him and not to warn his parishioners because it felt that to do otherwise would have harmed the Church's reputation locally, or because it felt that pastoral stability was sufficiently important for the parishioners' well-being, or because low ordination rates or staffing shortages made it necessary to keep Ronan on. That such social, economic, or political policy considerations could have influenced the decision renders it the kind of judgment that the discretionary function exception was designed to shield." (*Id*. at p. 1085.)

While it has taken decades of the Catholic Church concealing its child molesters, accountability is now starting to take place. Would the Ninth Circuit take this position today?

Gonzalez v. U.S. (9th Cir. 2016) 814 F.3d 1022, 1027 held whether law enforcement chooses to make public, threats, shields U.S. liability, pursuant to the discretionary function defense. The reason was that such decisions are grounded in policy considerations.

Kim v. U.S. (9th Cir. 2019) 940 F.3d 484 involved a lawsuit where boys in a campground were killed by a falling tree. The Ninth Circuit held, once the U.S. government decided to inspect for dangerous trees, the scrutiny was for the manner in which they did so, not whether, ab initio, they should have conducted such inspection. (*Id.* at p.488.) *Kim* ruled that because there were written policies, with technical requirements, as to how to do the inspections, the government was not shielded by the discretionary function rule. No policy decision was involved. (*Id.* at pp. 488-489.)

So too, *Kennewick Irrigation District v. U.S.* (9th Cir. 1989) 880 F.2d 1018, 1021, which ruled that while the design of a canal was protected by the discretionary function rule, the building of such, was not. Such did not involve a policy consideration.

Chaffin v. US (9th Cir.1999) 176 F.3d 1208, 1211 ruled the discretionary function protected the government regarding a design decision, which involved a policy not to fill a certain area with gravel, that had led to a man being mauled and injured by a bear. It did find potential liability upon another basis.

Ducey v. US (9th Cir. 1983) 713 F.2d 504, 515 makes the distinction of whether the involved act is on the planning level or the operational level, and, whether, without the discretionary function defense, there would be an impairment of the government's functions. *Ducey* ruled while, whether to encourage recreation at a certain area is discretionary, the duty to warn against such hazards is not discretionary, concluding, "[T] he judgment and decision-making involved in day-to-day management of

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a recreational area are not the sort of decision-making contemplated by the exemption." (*Ibid.*)

Camozzi v. Roland/Miller and Hope Consulting Group (9th Cir. 1989) 866 F.2d 287, 289 held the failure of the Postal Service to inspect its floors for uncovered and unguarded openings did not involve policy decisions; thus, the discretionary function rule did not bar liability.

McCall v. United States Department of Energy Through Bonneville Power Administration (9th Cir. 1990) 914 F.2d 191 held there was no policy consideration involved in the U.S. government's failure to properly supervise its independent contractor, to ensure compliance with safety inspection procedures.

Conclusion

FTCA claims can require careful evaluation of the facts in relation to the law concerning the independent contractor rules, and, the discretionary function rules. Failure to carefully analyze such issues, in relation to the detailed facts of one's case, can present a myriad of problems in determining whether to provide representation, and if so, in litigating the case. However, the challenges in these two areas of FTCA law should not, particularly since the issues are so case-by-case factually dependent, deter one from pursuing a case, even if it pushes the boundaries of existing case law.

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