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Federal Tort Claims Act Practice Alert

UNITED STATES V. KWAI FUN WONG

2015 WL 1808750, 575 U.S. __ (APR. 22, 2015)

Summary:

According to the United States Supreme Court, the two-year and six-month time limits in section § 2401(b) of the Federal Tort Claims Act (FTCA) "are just time limits, nothing more. Even though they govern litigation against the Government, a court can toll them on equitable grounds."

History:

Under the FTCA, "the United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages (28 U.S.C. § 2674)."

The FTCA is a limited waiver of the United States' immunity from tort liability and, therefore, the language of the Act is strictly construed.

Relevant to this summary update is the FTCA's statute of limitations language which provides "a tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun

within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented (28 U.S.C. § 2401(b))."

When the FTCA was adopted in 1946, claimants had only one year to file suit in federal district court from claim accrual (see Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812 (codified at 40 U.S.C. § § 2, 33 and 40 (1986)). Originally, there was no requirement for claimants to first submit a tort claim to a federal agency before filing suit. However, where claimants did present a claim to a federal agency within one year of accrual, they had six months to file suit from whenever the claim was denied or withdrawn.

In 1949, the one year limitations period was extended to two years, but no changes were made to the six-month time period applicable to agency denials (see H.R. REP. NO. 81-276 (1949); S. REP. NO. 81-135 (1949); H.R. REP. NO. 80-1754 (1948).

In 1966, the FTCA was amended to include the presentment requirement (see 28 U.S.C. § 2401(b)). Under the 1966 changes, an FTCA claimant had two years after accrual to present the claim to the appropriate agency for potential resolution (see 28 U.S.C. § § 2401(b) and 2675(a)).

Before 1990, federal courts almost uniformly held that the FTCA's two-year and six-month limitations periods were not subject to equitable tolling (see, e.g., *Leonhard v. U.S.*, 833 F.2d 599 (2d Cir. 1980), cert. denied, 451 U.S. 908 (1981); *Lien v. Beehner*, 453 F.Supp. 604 (N.D.N.Y. 1978), *Hoch v. Carter*, 242 F.Supp. 863 (S.D.N.Y. 1965)).

Irwin v. Dept. of Veterans Affairs

The landscape changed in 1990, when the Supreme Court addressed equitable tolling in *Irwin v. Department of Veterans Affairs* (see 498 U.S. 89 (1990)). At issue in *Irwin* was whether the plaintiff could maintain a district court action for violation of Title VII of the Civil Rights Act of 1984 when he did not commence suit within 30 days after the issuance of a right-to-sue letter by the Equal Employment Opportunity Commission (EEOC). Specifically, the plaintiff alleged that, while his attorney received the right-to-sue letter on March 24, 1987, he did not receive the letter until he returned from travel outside of the country on April 10, 1987. In turn, he argued that the action was viable because he commenced suit within 30 days of April 10, 1987 and, moreover, that any error on his part may be excused under equitable tolling principles. The district court dismissed the complaint and the Court of Appeals for the Fifth Circuit affirmed (see 874 F.2d 1092 (1989)).

The Supreme Court granted certiorari to determine when the 30 day period under 42 U.S.C. § 2000e-16(c) started running and to resolve a Circuit Court conflict over whether late-filed claims were jurisdictionally barred. The Court noted that “[t]ime requirements in lawsuits between private litigants are customarily subject to equitable tolling,” and that “we think that making the rule of equitable tolling applicable to suits against the

Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver” of sovereign immunity. While the Court concluded that the plaintiff’s claim was properly dismissed (due to a “garden variety claim of excusable neglect”) it held that “the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so.”

After *Irwin*, most courts held that FTCA limitations periods were not jurisdictional and could be equitably tolled (see, e.g., *Kronisch v. U.S.*, 150 F.3d 12 (2d Cir. 1998); *Hyatt v. U.S.*, 968 F.Supp. 96 (E.D.N.Y. 1997); *Long v. Card*, 882 F.Supp. 1285 (E.D.N.Y. 1995)).

U.S. v. Brockamp and U.S. v. Beggerly

The Supreme Court decisions in *United States v. Brockamp* (see 519 U.S. 347 (1997)) and *United States v. Beggerly* (see 524 U.S. 38 (1998)), cast doubt on the availability of equitable tolling in FTCA cases. In *Brockamp*, the Court rejected the plaintiff’s reliance upon *Irwin*, and held that Congress did not intend the equitable tolling doctrine to apply to § 6511 of the Internal Revenue Code of 1986. In *Beggerly*, the Court also rejected the plaintiff’s reliance upon *Irwin*, and held that equitable tolling was not available in a suit brought pursuant to the Quiet Title Act.

After *Brockamp* and *Beggerly*, courts took a number of approaches to equitable tolling. Some appear to have altogether ignored the decisions, while others distinguished the FTCA from the statutes at issue in *Brockamp* and *Beggerly*, or crafted case-specific justifications to keep equitable tolling alive. Regardless, doubt remained.

U.S. v. Wong

On April 22, 2015, the Supreme Court issued a seminal decision in *United States v. Kwai Fun Wong* (575 U.S. ___ (2015)). In sum, equitable tolling is alive and well in FTCA cases.

Two cases were before the Court in *Wong*. In the first (*U.S. v. Wong*), the plaintiff alleged that she was falsely imprisoned for five days by the Immigration and Naturalization Service (INS). On May 18, 2001, she timely presented an administrative tort claim to the INS. That same day, she also filed suit in district court asserting various non-FTCA claims against the Government arising out of the same misconduct.

Perhaps anticipating that her claim would be denied by the INS, the plaintiff moved in mid-November of 2001 to amend the complaint to include her FTCA claims. INS denied her claim on December 3, 2001. Thus, under the FTCA, *Wong* had until June 3, 2002 to file an FTCA action in federal court.

On April 5, 2002, a Magistrate Judge recommended granting leave to amend, but the district court did not adopt the Magistrate's recommendation until June 25, 2002 – twenty-two (22) days after expiration of the FTCA's six-month deadline. An amended complaint was filed on August 13, 2002. The Government moved to dismiss the FTCA claim on the ground that it was filed late. Initially, the district court rejected the motion, recognizing equitable tolling for the time between the Magistrate's recommendation and the district court's order.

Several years later, the Government moved for reconsideration relying upon *Marley v. U.S.* (567 F.3d 1030 (9th Cir. 2009)), and argued that

the 2401(b) six-month time-period was jurisdictional and not subject to equitable tolling. The district court dismissed the plaintiff's claim, but the Ninth Circuit heard the case en banc, holding that the six-month time limit was not jurisdictional and that equitable tolling was available (see *Wong v. Beebe*, 732 F.3d 1030 (9th Cir. 2013)).

In the second case (*U.S. v. June*), the plaintiff filed a wrongful death action against the State of Arizona for the 2005 death of Andrew Booth, who was killed in a collision that occurred after his car crossed through a cable median barrier. Years into the state court litigation, the plaintiff learned that the Federal Highway Administration (FHWA) had approved installation of the barrier despite knowledge that the barrier had not been crash tested.

In 2010, the plaintiff presented a tort claim to the FHWA. After the claim was denied, the plaintiff filed suit in district court and argued that equitable tolling should apply because the Government concealed the absence of crash testing. The district court dismissed the action as untimely under the FTCA's two-year bar, but the Ninth Circuit reversed in light of its recent decision in *Wong v. Beebe* (see 732 F.3d 1030 (9th Cir. 2013)).

The Supreme Court granted certiorari in both cases (see 573 U.S. ___ (2014)), to resolve a Circuit Court split about whether courts may equitably toll § 2401(b)'s two-year and six-month time limits (compare, e.g., *In re FEMA Trailer Formaldehyde Prods. Liability Litigation*, 646 F.3d 185 (5th Cir. 2011) (tolling unavailable), with *Arteaga v. U.S.*, 711 F.3d 828 (7th Cir. 2013 (tolling available)).

The Court's analysis in *Wong* began with a review of *Irwin* including, specifically, the notion of the "rebuttable presumption" of equitable tolling. "One way to meet that burden – and the way the Government pursued here – is to show that Congress made the time bar at issue jurisdictional. Where that is so, a litigant's failure to comply with the bar deprives a court of all authority to hear a case. Hence, a court must enforce the limitation even if the other party has waived any timeliness objection . . . [a]nd, more crucially here, a court must do so even if equitable considerations would support extending the prescribed time period."

Noting that the "Government must clear a high bar to establish that a statute of limitations is jurisdictional," and that "most time bars are nonjurisdictional," the Court held that in order for a deadline to be jurisdictional, Congress "must do something special, beyond setting a exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit the court from tolling it." In the case of the FTCA, "Congress did nothing of that kind."

Further, the Court stated that "2401(b)'s text speaks only to a claim's timeliness, not to a court's power. It states that a tort claim against the United States shall be forever barred unless it is presented to the agency within two years . . . or unless action is begun within six months of the agency's denial of the claim. That is mundane statute-of-limitations language, saying only what every time bar, by definition, must: that after a certain time a claim is barred. The language is mandatory – "shall" be barred – but (as just noted) this is true of most such statutes, and we have consistently found it of no consequence."

In closing, Justice Kagan noted "[a]nd so we wind up back where we started, with *Irwin*'s "general rule" that equitable tolling is available in suits against the Government. The justification the Government offers for departing from that principle fails: Section 2401(b) is not a jurisdictional requirement. The time limits in the FTCA are just time limits, nothing more. Even though they govern litigation against the Government, a court can toll them on equitable grounds."

A dissent authored by Justice Alito, and joined by Chief Justice Roberts, and Justices Scalia and Thomas, noted that the FTCA's filing deadlines are jurisdictional because the Act states that untimely claims "shall be forever barred" and this is not generally understood to mean "should be allowed sometimes."

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Mike is also an adjunct professor at Syracuse University College of Law, authors the Civil Practice chapter of the Syracuse Law Review's Survey on New York Law, and is a member of the board of directors of the New York State Academy of Trial Lawyers.

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