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## FEDERAL TORT CLAIMS ACT—RIGHTS OF SUBROGEEES

In August, 1946, Congress passed the Legislative Reorganization Act of 1946. Included within this act as Title IV is the Federal Tort Claims Act.<sup>1</sup> The importance of this section of the act was overlooked in the tumult over another section of the act which granted a raise in pay and provided for the retirement of members of Congress.<sup>2</sup>

Under the Tort Claims Act, the government gave its consent to be sued in tort for damages caused by the negligence or wrongful acts of any employee of the Federal government while acting within the scope of his employment. The section of the act with which this note is concerned reads as follows:

“(a). . . the United States district court. . . shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States. . . on account of damage. . . caused by the negligent or wrongful act or omission of any employee of the Government. . . *in accordance with the law of the place where the act or omission occurred.* Subject to the provisions of this chapter, the United States shall be liable in respect of such claims *to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances,* except that the United States shall not be liable for interest. . .”<sup>3</sup> (Emphasis ours)

Many problems of interpretation have developed since the passage of this statute, and one of the most important is that concerning the rights of a subrogee under its provisions. The question may be stated as follows: Where a person has been damaged in such manner as to have a right of action against the United States under the act, may his insurer, who has paid all or a portion of the damages suffered, and to the extent of payment been subrogated to the injured party's right, bring an action against the Government in its own behalf? The district courts have split into two factions in answering this question. There are courts in Texas,<sup>4</sup> California<sup>5</sup> and Ohio<sup>6</sup> which hold that a subrogee has no right to bring the action; while Wisconsin,<sup>7</sup> and Texas<sup>8</sup> directly, and New York<sup>9</sup> by implication, have held that a subrogee may bring the

<sup>1</sup> Federal Tort Claims Act, 28 U.S.C.A. 921 et seq. (1946).

<sup>2</sup> Legislative Reorganization Act, Title VI (1946).

<sup>3</sup> 28 U.S.C.A. 931 (1946).

<sup>4</sup> *Bewick v. United States*, 74 F. Supp. 730 (D.C., N.D., Texas, San Angelo Division, 1947).

<sup>5</sup> *Rusconi v. United States*, 74 F. Supp. 669 (D.C., S.D., Calif., Central Division, 1947).

<sup>6</sup> *Old Colony Ins. Co. v. United States*, 74 F. Supp. 723 (D.C., S.D., Ohio, W.D., 1947).

<sup>7</sup> *Wojciuk et al v. United States*, 74 F. Supp. 914 (D.C., E.D., Wisconsin, 1947).

<sup>8</sup> *Hill et al v. United States*, 74 F. Supp. 129 (D.C., N.D., Texas, Amarillo Division, 1947).

<sup>9</sup> *Commissioners of the State Ins. Fund. v. United States*, 72 F. Supp. 549 (D.C., S.D., N.Y., 1947).

action in its own behalf for that part of the claim to which it has been subrogated.

Those courts which have held against a subrogee have based their decisions upon one or both of two principal contentions. One argument used is well stated in *Schillinger et al v. United States*, where it was stated:

"The United States cannot be sued in their own courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted to the court for judicial determination. Beyond the letter of such consent the courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the government."<sup>10</sup>

The decision of the district court in California<sup>11</sup> may be taken as a good example of this point of view. It denied the motion of an insurance company to intervene as party plaintiff, and stated:

"The Federal Tort Claims Act does not expressly consent to suit by a subrogee of the claimant, and consent of the government to be sued must be strictly interpreted inasmuch as such consent is relinquishment of sovereign immunity."

The other basis for denying the rights of a subrogee is founded upon the so-called anti-assignment statute<sup>12</sup> which prohibits the assignment against the United States. It is reasoned that subrogation is of the same nature as assignment, and hence is not permitted under the Tort Claims Act because it would involve assignment of a citizen's right to sue the sovereign.<sup>13</sup>

While these arguments have a strong basis historically, they do seem to operate to prevent the desirable result which Congress had in mind in passing the act. The courts which have based their opinions upon either one of these propositions have flatly come to the conclusion that subrogees fall into one of the excluded classes. They have presented very little more in the way of enlightenment as to why subrogees do fall into such class.

The courts which have held in favor of the subrogee appear to have considered the question more broadly, and their opinions present what seems to the writer a more reasonable solution. Probably the most convincing of these opinions is that written by Judge Duffy of the Wisconsin district court. Quite likely his experience as a member of Congress prior to his appointment to the bench has given Judge Duffy a

<sup>10</sup> *Schillinger v. United States*, 155 U.S. 163, 15 S. Ct. 85, 39 L. Ed. 108 (1894).

<sup>11</sup> *Supra* note 5. See also *Cascade County Mont. et al v. United States*, 75 Fed. Supp. 850 (D.C., D. Montana, Great Falls Division, 1948).

<sup>12</sup> 31 U.S.C.A. Sec 203 (1908).

<sup>13</sup> *Supra* note 4.

knowledge of the burden which was placed upon Congress in considering hundreds of bills introduced annually for damages caused by acts of governmental agencies. Just what was the intention of Congress in passing this act? Probably this can best be shown by a House Committee Report which was made pending the passing of the act. The report stated:

"For many years the present system has been subjected to criticism, both as being unduly burdensome to the Congress, and as being unjust to the claimants. . . The existing exemption in respect to common law torts appears incongruous. Its only justification seems to be historical. With the expansion of governmental activities in recent years, it becomes especially important to grant to private individuals the right to sue the Government in respect to such torts as negligence in the operation of vehicles. . ." <sup>14</sup>

The magnitude of the task of considering and disposing of private claims can be gathered from the following statistics: 68th Congress—about 2200 claims, 70th Congress—2268 claims. Since that time each Congress has had to consider in the neighborhood of 2000 claims.

In keeping with the tenor of the House Report, Judge Duffy in *Wojciuk v. United States* stated:

"Furthermore, the history of the tort claims legislation strongly indicates that there is no proper basis for the narrow construction. Congress was greatly burdened by the large number of claims presented at every Congressional session. Senators and Representatives were forced to spend on these claims an amount of time disproportionate to their relative importance. When the act was passed, members of Congress undoubtedly sighed in relief over the shift of the burden of determining the merits of such negligence claims to the federal courts. It would be a strained and unwarranted interpretation of the intention of Congress to say it planned to give the district courts jurisdiction of cases brought by claimants originally suffering loss, but to reserve to itself the consideration of the claims of those standing in the shoes of the original claimant by operation of law." <sup>15</sup>

While great weight must be given to the rule of strict interpretation laid down in our early history, should interpretation be made so strict as to defeat the intended purpose of the act? If the act must be strictly construed, such construction may just as reasonably run in a very different direction. The reader is referred to that part of the act quoted in the beginning of this comment which has been italicized, "In accordance with the law of the place where the act or omission occurred. . . to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances. . ." <sup>16</sup> In giving these phrases

<sup>14</sup> House Report 1287, 79th Congress, 1st Session (1946).

<sup>15</sup> *Supra* note 7.

<sup>16</sup> *Supra* note 3.

a strict interpretation, would it not be sound to say that Congress intended the Government to be placed on the same footing as a private individual as the first step in determining its liability? Having been placed in such a position, its liability is then determined in accordance with the law of the place where the act occurred, subject only to expressed limitations contained in the act.

In speaking of these limitations another argument in favor of the liberal view is brought to attention. Congress exercised great care in designating twelve different categories of claims which the Federal Tort Claims Act was not intended to cover.<sup>17</sup> The claims of subrogees and assignees generally were not included in such classification, and the familiar maxim of interpretation, *expressio unius est exclusio alterius*, may be invoked.

The next argument to consider is that based upon the anti-assignment statute,<sup>18</sup> which provides that an assignment of a claim against the United States shall be null and void unless freely made and executed in the presence of at least two attesting witnesses after the allowance of the claim and the ascertainment of the amount due and the issuing of a warrant for payment thereof. The courts holding with this argument blandly put a subrogee into the same class as an assignee and apply the statute. The difference between subrogation and assignment is well established.<sup>19</sup> Subrogation is the substitution of another person in the place of a creditor or claimant, to whose rights he succeeds in relation to the debt or claim asserted, which he has paid to protect an interest. It contemplates some original privilege on the part of him to whose place substitution is claimed. There must exist the relation of principal and surety or guarantor, or other relation between the parties which would entitle such person to succeed to any rights of the creditor or claimant.<sup>20</sup> Subrogation effects an assignment by operation of law, and so it is sometimes termed "equitable assignment." It differs from an ordinary assignment of the debt in that assignment assumes a continued existence of the debt, while subrogation follows upon its payment.<sup>21</sup> "Subrogation" differs materially from legal assignment in that the doctrine of subrogation does not arise from any contractual relationship, but is an equitable doctrine designed to accomplish substantial justice.<sup>22</sup> From the foregoing definitions it readily appears that there is a substantial difference between a subrogee and an assignee. Sub-

<sup>17</sup> 28 U.S.C.A. 943 (1946).

<sup>18</sup> *Supra* note 12.

<sup>19</sup> *Meyers v. Bank of America Nat. Trust & Savings Ass'n*, 11 Cal. (2d) 92, 77 P. (2d) 1084, 1085 (1938).

<sup>20</sup> *Fuller v. Davis Sons*, 184 Ill. 505, 50 N.E. 791 (1898).

<sup>21</sup> 50 Am. Juris. 681 (1938).

<sup>22</sup> *In re Dorr Pump & Mfg. Co.*, 39 F. Supp. 295, affirmed 125 F. (2d) 610 (1941).

rogation is a substitution by operation of law, and as stated in *United States v. Gillis* in considering the anti-assignment statute:

"The object of this section is to protect the government and prevent frauds upon the Treasury. It applies only to cases of voluntary assignment of demands against the government, and does not embrace cases where there has been a transfer of title by operation of law."<sup>23</sup>

Further, the purpose of the statute prohibiting assignment of claims upon the United States is to restrict voluntary assignments or powers of attorney for collection of claims against the government, so as to facilitate the undistracted consideration, determination, and safe payment of such claims.<sup>24</sup> The statute prohibiting the assignment of claims against the United States must be read according to the natural and obvious import of the language without resorting to forced construction for the purpose of either limiting or extending its operation.<sup>25</sup> The object of Congress was to protect the government and not the claimant, and it does not stand in the way of giving effect to an assignment by operation of law.<sup>26</sup>

Further insight into the problem may be gained from a comparison of statutes. The two principal statutes waiving the sovereign immunity of the national government in suits on torts contain very similar provisions placing the government on a parity with a private litigant. These parallel provisions of the Tort Claims Act<sup>27</sup> and the Suits in Admiralty Act<sup>28</sup> are quoted together in the footnotes for ready comparison. If anything, the Tort Claims Act has the more far-reaching language. Surely there should be as much liberality in the allowance of suits under the Tort Claims Act as under the Suits in Admiralty Act. The courts have permitted a libelant to amend and claim as assignee by purchase of a vessel and a cause of action for damages thereto received in collision with a vessel operated by a government corporation;<sup>29</sup> and in a shipowner's libel in personam against the government for damages received in a collision between the libelant's ship and a dredge owned by the government the courts have permitted the owner of the ship's cargo to intervene.<sup>30</sup> Assignees of tort claims covered by the

<sup>23</sup> *United States v. Gillis*, 95 U.S. 407 (1877).

<sup>24</sup> *Martin v. Nat'l Surety Co.*, 300 U.S. 588, 57 S. Ct. 531, 81 L. Ed. 822 (1937).

<sup>25</sup> *Moore v. United States*, 249 U.S. 487, 39 S. Ct. 322, 63 L. Ed. 721 (1919).

<sup>26</sup> *Houston v. Ormes*, 252 U.S. 469, 40 S. Ct. 369, 64 L. Ed. 667 (1920).

<sup>27</sup> See 28 U.S.C.A. 931 (1946): "Subject to the provisions of this chapter, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except the United States shall not be liable for interest prior to judgment, or for punitive damages."

<sup>28</sup> See 46 U.S.C.A. 743 (1920): "Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties."

<sup>29</sup> *Charles Nelson Co. v. United States*, 11F. (2d) 906 (1926).

<sup>30</sup> *A. H. Bull S.S. Co. v. United States*, 21 F. (2d) 835 (1927).

Admiralty Act have recently been held entitled to proceed in admiralty against the United States, notwithstanding the provisions of the anti-assignment statute.<sup>31</sup>

A further development in this field was litigated recently before Judge Duffy in *Forrester v. United States*,<sup>32</sup> where the subrogee insurance company assigned its claim back to the injured claimant. It was argued in that case that while this was a voluntary assignment, it was not of the type proscribed by the Anti-Assignment Statute. It was brought out that the anti-assignment statute is aimed at definite evils, and has been construed to cover only those situations clearly within its spirit. In *Sea Board Airline Ry. v. United States*,<sup>33</sup> Justice McReynolds quoted from the land-mark case of *Goodman v. Niblack*, stating as follows:

"It was intended to prevent fraud upon the Treasury, and the mischiefs designed to be remedied are namely two: First, the danger that the rights of the government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction. Second, that, by a transfer of such claims against the government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts, or the Congress, as desperate cases, when the reward is contingent on success, so often suggest."<sup>34</sup>

Certainly in the *Forrester* Case there was no danger of the United States having to deal with several persons. The insurance company had assigned its claim, and would be bound by any adjudication of it to the same extent that any contract assignor is bound. The claim had not been assigned to a stranger to the original action, or to a person not originally interested in it. The danger of fraud upon the government, which the purpose of the statute is to prevent was patently not present in that situation. In keeping with his decision in the *Wojciuk* case Judge Duffy held that this was not such an assignment as should bring into play the anti-assignment statute.

At the present writing, there has not been a case determined on appeal as to the subrogee's rights. But it may well be a problem which eventually will be determined by the Supreme Court of the United States. At present it appears that the arguments in behalf of a liberal construction of this particular phase of the law far outweigh those advanced to favor a strict construction. In view of the ever-increasing number of individuals who are being insured, it will be the exception

<sup>31</sup> *Seaboard Fruit Co. v. United States*, 73 F. Supp. 732 (D.C., S.D., N.Y., (1947).

<sup>32</sup> *Forrester v. United States*, 75 F. Supp. 272 (D.C., E.D., Wis., 1948).

<sup>33</sup> *Seaboard Airline Ry. v. United States*, 256 U.S. 655 (1920).

<sup>34</sup> *Goodman v. Niblack*, 102 U.S. 556 (1881).

rather than the rule for a party entitled to an action against the United States not to be covered by insurance. This question of subrogation will be constantly present in cases arising under the Tort Claims Act.

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