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WHAT TO EXPECT WHEN A FEDERALLY-QUALIFIED HEALTH CENTER IS NAMED AS A CO-DEFENDANT IN A MEDICAL PROFESSIONAL LIABILITY ACTION

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In 2013, there were at least twenty-seven facilities in West Virginia that were classified as a federally-qualified health center, ("FQHC").[1] These centers provided medical care to 359,067 West Virginians,[2] or approximately 20% of the population of the State.[3] With the number of patients being served by FQHCs on the rise in the United States, it is important to understand how to navigate a case in which a FQHC and/or an employee of a FQHC has been named as a co-defendant in a medical malpractice lawsuit.

I. BACKGROUND

a. What is a Federally-Qualified Health Center

"Federally-qualified health centers" are defined as a special classification within the broader category of "Health Centers" within the meaning of the Public Health Service Act. *See* 42 U.S.C. § 1396d(l)(2)(B); 42 U.S.C. § 254b(a). FQHCs are community-based health centers, funded by the federal government, that serve populations with limited access to health care, including low income individuals, the uninsured, and those with limited English skills. 42 U.S.C. § 254b(a). FQHCs provide primary care, preventative health screenings, and other services such as dentistry and mental health/substance abuse counseling. 42 U.S.C. § 254b(b).

It is often difficult to distinguish between a private health provider and a FQHC because the name of the entity alone does not disclose whether it is a FQHC. Some entities are

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[1] "2013 Health Center Data." - National Program Grantee Data. Web. 12 Apr. 2015. <http://bphc.hrsa.gov/uds/datacenter.aspx?year=2013&state=WV>.

[2] Total patients served including medical care, dental, mental health, substance abuse, vision and enabling was 383,485.

[3] United States Census Bureau." West Virginia QuickFacts from the US Census Bureau. Web. 12 Apr. 2015.

listed within a database maintained by the Health Resources and Services Administration of the Department of Health and Human Services.[4] However, the database is not comprehensive. Often the only way to confirm whether or not a health provider is deemed to be a FQHC is to check with that particular provider.

b. Federally Qualified Health Centers and the Federal Tort Claims Act

The Federal Tort Claims Act, ("FTCA"), provides that a suit against the United States shall be the exclusive remedy for persons with claims for damages resulting from the actions of federal employees taken within the scope of their employment. 28 U.S.C. 2679 (b)(1). The FTCA provides a waiver of sovereign immunity of the United States in specific cases. Liability of the United States is set forth in 28 U.S.C. § 2674, which states in part:

> § 2674. Liability of United States:
>
> The United States shall be liable, respecting the provisions of this title relating to tort claims, 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.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.
>
> With respect to any claim under this chapter [28 USCS §§ 2671 et seq.], the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or

[4] "Search Current Deemed Entities." *Search Current Deemed Entities*. Web. 17 Apr. 2015. http://bphc.hrsa.gov/ftca/healthcenters/ftcahcdeemedentitysearch.html.

> omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

Under Section 224 of the Public Health Service Act, as amended by the Federally Supported Health Centers Assistance Act of 1992 and 1995, 42 U.S.C. Section 233 (g)-(n), employees of eligible FQHCs may be deemed to be federal employees qualified for protection under the FTCA. Specifically, any officer, governing board member, or employee of such an entity, and any contractor of such an entity who is a physician or other licensed or certified health care practitioner, shall be deemed to be Public Health Service employees, ("PHS Employee"). 42 U.S.C. § 233(g)(1)(A).

II. WHAT TO EXPECT

a. Initiation of the Lawsuit in State Court and Removal

Pursuant to the West Virginia Medical Professional Liability Act, ("MPLA"), a plaintiff should file the requisite Notice of Claim and Screening Certificate of Merit upon your client and the FQHC/PHS Employee. W.Va. § 55-7B-6. Because the FQHC/PHS Employee will rarely respond to those preliminaries, pre-suit proceedings are not initiated.[5] After the time period prescribed by the MPLA, the plaintiff's attorney will typically file the medical malpractice suit in the West Virginia circuit where state jurisdiction and venue appear to lie, naming your client and the FQHC/PHS Employee as defendants.

The Public Health Service Act sets forth a special provision for removal, whereby any PHS Employee may invoke immunity (and begin the removal process) by delivering all process to the United States attorney for the district embracing the place wherein the proceeding

[5] You may identify an FQHC/PHS Employee for the first time if you pursue the pre-suit process by trying to contact the named defendant or the attorney who will represent them, and you learn that an Assistant U.S. Attorney has been assigned.

is brought, to the Attorney General, and to the Secretary. 42 U.S.C. § 233(b). The Attorney General has fifteen (15) days in which to enter an appearance in state court to advise whether or not the PHS Employee-defendant was acting within the scope of employment at the time of the incident. 42 U.S.C. § 233(*l*)(1).

If the Attorney General fails to appear within fifteen (15) days of notification of the suit, any PHS Employee-defendant may remove the civil action by petition to the appropriate United States district court. 42 U.S.C. § 233(*l*)(2). Unlike the general removal statute, removal under the Public Health Service Act does *not* require unanimous consent of all defendants, and any one PHS Employee may remove the whole civil action, including claims against non-PHS Employee defendants, irrespective of their objections. *See, e.g., Jacobs v. Castillo*, 612 F. Supp. 2d 369 (S.D.N.Y. 2009).

If the Attorney General appears within fifteen (15) days of notification by the PHS Employee-defendant(s), he/she will file a certification that the healthcare provider named in the civil action was/was not acting within the scope of their employment at the time of the incident. 28 U.S.C. Section 2679(d)(1). Of note, the Attorney General may certify that the PHS Employee's conduct was within the scope of employment, and remove a claim under the Public Health Service Act at *any time before trial*. 42 U.S.C. § 233(c) (emphasis added). Thus, the failure of the Attorney General to enter an appearance only triggers the right of a PHS Employee to remove the action unilaterally, but it does not "permanently forfeit" the Attorney General's right to certify and remove at any time before trial. *Celestine v. Mount Vernon Neighborhood Health Ctr.*, 289 F. Supp. 2d 392, 398 (S.D.N.Y. 2003), *aff'd* 403 F.3d 76 (2d Cir. 2005). Importantly, the certification by the Attorney General is conclusive for purposes of removal. 28 U.S.C. Section 2679(d)(2).

Under either scenario, the case will be removed from the state court to the United States District Court for the district and division embracing the place in which the action or proceeding is pending. Section 1402(b) provides that venue for claims against the United States is only where the plaintiff resides or where the act or omission complained of in the pleadings occurred. 28 U.S.C. § 1407.

Plaintiff may choose to challenge removal of the entire matter. A federal district court may exercise supplemental jurisdiction "over all claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). However, federal district courts have discretion to decline supplemental jurisdiction over any claim if:

1) The claim raises a novel or complex issue of State law,
2) The claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
3) The district court has dismissed all claims over which it has original jurisdiction, or
4) In exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(a). "Among the factors that inform this discretionary determination are convenience of and fairness to the parties, the existence of any underlying issues of federal policy, comity, and considerations of judicial economy." *Shanaghan v. Cahill*, 58 F.3d 106, 110 (4th Cir. 1995); *Crosby v. City of Gastonia*, 682 F. Supp. 2d 537, 545 (W.D.N.C. 2010), *aff'd* 2011 U.S. App. LEXIS 4641 (4th Cir. 2011). Given the nature of medical malpractice claims, it

is likely that the federal district court will exercise supplemental jurisdiction and the case will remain in federal court.

b. After Removal: You're in Federal Court; What's Next?

Pursuant to the FTCA, the action or proceeding shall be deemed to be an action or proceeding brought against the United States and the United States shall be substituted as the sole party defendant in place of the FQHC/PHS Employee. 28 U.S.C. 2679(d)(2). Thus, shortly after the Notice of Removal, the United States is likely to file a motion to dismiss the FQHC/PHS Employee and substitute the United States of America as a party defendant. 28 U.S.C. Sections 1346(b), 2671 *et seq*. The motion should be granted and the FQHC/PHS Employee dismissed from the action, and the case caption is then changed to reflect the substitution of the United States of America.

If the plaintiff has not pursued administrative remedies for the alleged negligence of the FQHC/PHS Employee, you can expect that the United States will likely file a motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The basis for the motion will be the plaintiff's failure to exhaust his/her administrative remedies as required by 28 U.S.C. Section 2675(a). This requirement is jurisdictional and therefore cannot be waived. That motion will be supported by an affidavit from the Department of Health and Human Services verifying that no administrative claims have been filed by the plaintiff.

The result of this motion is the probable dismissal of plaintiff's claim so that he/she can properly present the claim for consideration to the appropriate federal agency, which in this instance would be the Department of Health and Human Services. If the claim with the Department of Health and Human Services is denied or not settled within six months of

presentation of the claim, then the claimant may pursue a lawsuit in federal court or request a reconsideration of the denial.

As a practical corollary, your client may wait up to six months before the case is re-filed. If the claim is denied or not settled within the six months, the plaintiff will have to re-file the action in federal court. However, if the claim is resolved with the Department of Health and Human Services, the plaintiff will likely re-file the action in state court against any remaining MPLA defendant.

c. How Will Your Case Proceed: Reconciling West Virginia's Medical Professional Liability Act with the Federal Tort Claims Act

Once the case is properly in federal court, several issues arise for your client including, but not necessarily limited to, whether a plaintiff has a right to a jury trial and whether the MPLA applies. As set forth below, the claim will likely be covered by West Virginia substantive law and federal procedural law.

i. The plaintiff is not entitled to a trial by jury

Jurisdiction for FTCA cases is exclusive to federal district courts:

> (b)(1) Subject to the provisions of chapter 171 of this title [28 USCS §§ 2671 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1). Accordingly, "a plaintiff cannot opt for a jury in an FTCA action[.]" *Carlson v. Green*, 446 U.S. 14, 22, 100 S. Ct. 1468, 1473, 64 L. Ed. 2d 15 (1980). Further, 28 U.S.C. § 2402 specifies actions brought under 28 U.S.C. § 1346 "shall be tried by the court without a jury[.]" The only exception to this mandate is for claims concerning federal tax collection. *Id.*

West Virginia district courts have denied jury trials in medical professional liability cases pursuant to 28 U.S.C. § 2402. For instance, in *Giambalvo v. United States*, No. 1:11CV14, 2012 U.S. Dist. LEXIS 38925, at *16 (N.D. W.Va., Mar. 22, 2012), the plaintiff filed suit for medical malpractice pursuant to the FTCA. The court denied plaintiff's request for a trial by jury citing 28 U.S.C. § 2402. Likewise, in *Dawson v. United States*, No. 1:11CV114, 2014 WL 1281240 (N.D.W. Va., Mar. 31, 2014) the court held a bench trial pursuant to the FTCA for alleged medical malpractice committed by a PHS Employee. Practically speaking, even though the suit against your client is not being brought pursuant to the FTCA, the exercise of supplemental jurisdiction over the claims will likely result in a bench trial for all claims. Thus, the plaintiff, as well as your client loses the benefit of a jury trial.

ii. Good news: the MPLA applies

Plaintiff's claims are subject to the MPLA.[6] In 2005, the United States District Court for the Southern District of West Virginia confronted the issue of whether the MPLA applied to a claim brought pursuant to the FTCA. *Johnson v. United States,* 394 F.Supp.2d 854, 856-57 (S.D. W.Va. 2005). In *Johnson*, the plaintiff filed suit against the United States for

[6] The Fourth Circuit has not addressed the specific issue of whether § 55–7B–6 is substantive or procedural, but it has held that similar statutes are "substantive." *Stanley v. United States*, 321 F. Supp. 2d 805, 807 (N.D.W. Va. 2004).

alleged medical malpractice that occurred at a Veteran Administration Medical Center. The United States moved to dismiss on the basis that plaintiff failed to comply with the pre-suit requirements of the MPLA. The plaintiff responded, and argued that the MPLA did not apply because the United States was not a "health care provider" or "health care facility" as defined by the MPLA.

In rejecting the plaintiff's argument, the court relied on a Fourth Circuit case holding that the Virginia medical malpractice liability cap applied to claims brought against the United States under the FTCA. *Starns v. United States*, 923 F.2d 34 (4th Cir. 1991), *cert. denied*, 502 U.S. 809 (1991). The *Starns* court noted that liability of the United States in tort claims under the FTCA is "in the same manner and to the same extent as a private individual under like circumstances, but [the United States] shall not be liable for interest prior to judgment or for punitive damages." 28 U.S.C. § 2674. Thus, the *Starns* court reasoned that "[s]ince private health care providers in Virginia would in 'like circumstances' be entitled to the benefit of [the liability cap] ..., so too, is a federally operated hospital in that state." *Id.* *Johnson*, 394 F. Supp. 2d at 857. The *Johnson* court found this reasoning conclusive and held that the MPLA applied to medical malpractice claims in West Virginia brought pursuant to the FTCA. *Id*. The court also cited *Bellomy v. United States*, 888 F. Supp. 760 (S.D. W.Va. 1995) (applying the MPLA to a claim brought under the FTCA and stating "Disposition of actions arising under the FTCA is to be made pursuant to the tenets of law applicable in the state where the negligent act or omission is alleged to have occurred."). *Id.* at 763.

More recently, in *Dawson v. United States*, No. 1:11CV114, 2014 WL 1281240 (N.D.W. Va., Mar. 31, 2014), the court applied the MPLA to a medical malpractice action brought against the United States for the alleged negligence of a PHS Employee of a Veteran

Administration Medical Center. The court utilized the MPLA to determine the need for expert testimony, the applicable standard of care, the alleged breach of the standard of care, and proximate cause. The court also limited plaintiff's recovery pursuant to the damages cap found in W.Va. Code § 55-7B-8. This case leaves little, if any doubt, that the MPLA will apply to cases brought pursuant to the FTCA.[7]

III. CONCLUSION

While there are always some "surprises" along the way, the revelation that your MPLA client in a health care professional liability case has a co-defendant provider who is an FQHC or PHS Employee - NOT subject to the MPLA, but instead to the FTCA and only in federal court - is not necessarily a bad thing. In fact, there is an established routine for judicial handling of this situation, and there are several advantages to be obtained within the pre-emptive jurisdictional provisions and the federal accommodation of the state law claims against your client. Knowing what to expect generally, and being alert to how it is being applied to your case specifically, will put you in a better position to make sure your client's interests are protected.

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[7] For the reasons set forth herein, comparative negligence law of West Virginia should also apply to cases brought against a FQHC/PHS Employee. This is so because the FTCA provides for liability of the United States "under circumstances where the United States if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28. U.S.C. § 1346(b)(1)(emphasis added). Since private health care providers in West Virginia would in "like circumstances" be entitled to the benefit of the defense of comparative negligence, so too, should the providers in suits where an FQHC/PHS Employee is named. *See Johnson*, 394 F. Supp. 2d at 857.