



JAN 22 2004

Dear Tribal Leader:

Recently, my staff has received several questions regarding the extent of protection offered by the Federal Tort Claims Act (FTCA). In response to these questions, I want to clarify the extent of FTCA protection for the Tribes and their employees.

When a tort claim is filed against a Federal employee acting within the scope of his/her employment, the FTCA calls for the substitution of the United States for the Federal employee in the legal action. Attorneys at the Department of Justice (DOJ) defend the action against the United States.

Tribal employees are deemed to be Federal employees for the purposes of FTCA coverage while acting within the scope of their employment in "carrying out" contracts/compacts under the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 United States Code (U.S.C.) § 450f(d) and 25 U.S.C. 458aaa-15. The ISDEAA also extends FTCA coverage to an individual under a personal services contract with the Tribe if the individual is acting within the scope of his/her employment pursuant to the Tribe's ISDEAA contract/compact and the services are provided in a facility owned, operated, or constructed under the jurisdiction of the Indian Health Service (IHS). As a general rule, a facility operated under the jurisdiction of the IHS would include a Tribal facility operated under an ISDEAA contract/compact. There is more information about how the FTCA covers Tribal employees when carrying out self-determination contracts and how Tribal FTCA claims are processed in the regulations at 25 Code of Federal Regulations, Part 900, subpart M (copy enclosed).

It is important to understand that the decision about whether or not an individual is protected from liability by the FTCA is a factual determination made on a case-by-case basis by the Department of Health and Human Services, DOJ, and ultimately by the courts. Neither my office nor anyone in the Area Offices or the service units has the authority to make definitive advance assurances of FTCA applicability.

An order from a Federal district court judge in the case of Armstrong v. United States, Case No. A00-31 CV (2003), recently called into question the extent of FTCA coverage when an individual provides treatment outside of an ISDEAA contract, e.g., to non-IHS beneficiaries. Specifically, the judge's order indicates that when providing medical services to non-IHS beneficiaries, a Tribal entity is deemed part of the Public Health Service **only** when it is providing these services in circumstances permitted by Federal law while carrying out its contract/compact. The judge found nothing in the ISDEAA contract demonstrating that the Tribe and the IHS had made a joint determination under 25 U.S.C. 1680c(b) to provide non-emergency medical services to non-IHS beneficiaries. Thus, the judge concluded that the

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Tribe was not carrying out its ISDEAA contract when providing non-emergency medical services to a non-IHS beneficiary and that the FTCA was not applicable.

This order is not a final decision in this ongoing case. While the order would not have a significant precedential effect outside of the State of Alaska, it does merit your consideration. To the extent that Tribal employees are tasked with duties outside of the scope of an ISDEAA contract/compact, the Tribe might want to consult with its legal counsel or consider purchasing appropriate insurance.

You may want to share the information in this letter with your health care staff. The IHS is sending information on the FTCA directly to Federal health professionals, including persons assigned to Tribes and Tribal organizations under the Intergovernmental Personnel Act and commissioned officers detailed under a memorandum of agreement.

I hope this letter has provided you with helpful information on the protection offered by the FTCA. If you have questions, please contact your Area Office.

Sincerely yours,

A handwritten signature in cursive script that reads "Charles W. Grim, DDS".

Charles W. Grim, D.D.S., M.H.S.A.
Assistant Surgeon General
Director

Enclosure