

## **PRACTICAL ADVICE ON THE MOST EFFECTIVE WAY TO SETTLE YOUR CASE WITH THE GOVERNMENT**

This article is collaboration between the panel moderator Brian J. Alexander and panel participants, Richard Saltsman, Peter Frost and Harold Dronberger.<sup>1</sup>

### **Introduction**

As all aviation accident litigation practitioners know, cases against the United States are very different from actions against other private defendants in many respects. For our purposes, while by no means exhaustive, the two most oft encountered categories of claims against the Government arise from air traffic control operations and military aircraft crashes. There are unique considerations that must be addressed in both categories.

For example, in a typical case against the Government, alleging air traffic control negligence, the attorney making a claim must consider unique notice provisions (e.g., “Form 95”), special jurisdiction, venue, choice of law, and various statutory exceptions under the Federal Tort Claims Act (“FTCA”) (28 U.S.C.S. §§2671, et seq.). In military air crash cases, practitioners need to be mindful of such issues as the *Feres* doctrine (essentially barring claims by servicemen against the Government for injuries arising out of activities incident to their service), the Military Claims Act (10 U.S.C.S. § 2733), and the Foreign Claims Act (10 U.S.C.S. § 2734), to name just a few.

So given the unique set of considerations to be addressed when litigating against the Government, it should come as no surprise that claims resolution or settling your case is also

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somewhat different. The purpose of this paper is to provide some general practice pointers on preparing your case in a manner that will provide you with the best chances of settling your claim (against any defendant, including the Government) and, more importantly, to provide some information and guidance from the leading practitioners from the Department of Justice (“DOJ”), the Federal Aviation Administration (“FAA”), and the Department of the Navy (“Navy”) on special considerations when trying to reach a settlement with the Government. The article and panel discussion will focus on providing counsel with an understanding of the negotiating process from the Government perspective and will also address what approach to settlement has the best chance of effectuating your goal of settling with the United States. Although the emphasis in this discussion is on the settlement of FTCA administrative claims, the principles described and the limitations on settlement authority apply to both administrative claims and to matters in litigation.

### **General Advice to Plaintiffs’ Lawyers about Settlement**

While somewhat obvious and even cliché, from the perspective of plaintiffs’ counsel, there are some important steps a plaintiffs’ attorney can and should take along the way to help improve his or her chances of success in reaching a settlement in an aviation case. You should first determine if it is a case that can be settled. For example, you may need to ascertain whether the client wants to pursue punitive damages (not available against the Government) and is that an impediment to settlement, or are there issues of law that need to be decided before settlement can be addressed. It is also essential for plaintiffs’ counsel to explain, shortly after being retained, the process of prosecuting an administrative claim and, potentially, a lawsuit and, in doing so, to address the advantages and possibilities of settlement. In such a conversation, counsel should cover all of the factors that may come together to frame the settlement negotiations including,

among other things, strength of liability, availability of damages, risks associated with trials, impact of legal issues, time, cost, the emotional toll of litigation, and any other “problem” that might affect the value of the case. It is also important to communicate with the client concerning a “realistic” expectation for the case. Many victims are, not surprisingly, unfamiliar with how our tort system places a value on a life or what the factors are in determining the value of a personal injury claim (e.g., What’s my pain and suffering worth?). Counsel must be certain that clients understand how cases are valued and how that valuation fits into the settlement negotiation paradigm. If this is not accomplished early and often, it may create difficulty later, even if a fair settlement offer is made. As for plaintiffs’ counsel, it is imperative to know the facts and, as the sage advice of one seasoned plaintiffs’ counsel put it: “prepare every case for trial and you will be in a better position to settle your case whenever the opportunity arises.”

As to nuts and bolts, like other cases, an aviation case requires counsel to gather all relevant information on damages. The best tools to accomplish this are a damages questionnaire and a document checklist (seeking, e.g., tax returns, birth and death certificates, etc.). It is also important to conduct client and other damages witness interviews (treating doctors, family members, employers, etc.). Of course, experts may be necessary or advisable to address complex damages issues like PTSD, future medical treatment, conscious pain and suffering in death cases or occupational or vocational issues. In addition, for those cases with economic loss, early involvement of an economist is often essential.

Once the information gathering process is complete, it is time to prepare the settlement brochure which typically addresses only damages. Should liability issues need to be discussed, as is often the case, we suggest a separate brief or presentation (or at least a separate section up front). It is important to have an effective settlement brochure which is both informative and high

impact – making the impression you want on the other side. First, be certain to include all necessary information to support each element of damages. In a wrongful death case that typically includes, at a minimum, a summary of the decedent’s life (vital statistics, education, family and work history), photographs and documents on the decedents health, life expectancy, funeral expenses, pain and suffering and, of course, economic earnings losses. In personal injury cases it is important to include excerpts from treating doctors or medical experts that summarize the injuries, surgeries, treatment, rehabilitation and future medical care. It is key to personalize the pain and suffering from the client’s perspective so it is often advisable to have this in his or her own words (a day in the life video is always another good tool for this purpose). Photographs of the victim before and after an accident are even more important in a personal injury case.

In all cases it is important to do a calculation of damages that is consistent with the applicable law. To this end, it is helpful to discuss valuation with other practitioners; seek out information concerning settlements and verdicts in similar cases; and, also conduct an evaluation of the jury potential in your likely venue (or assess the judge you are assigned in the case of actions against the FAA). On whether to make a demand it is generally a case specific decision which depends on the stage of negotiations, so generally, while perhaps not necessary or advisable early on, as settlement opportunities develop within the case it is a good idea to provide a realistic demand number.

Armed with these very general thoughts, let’s move to some of the considerations specific to settling with the Government.

### **Settlement Authority for the FAA**

At the outset, it is critically important for plaintiffs’ counsel to know and appreciate the specific settlement authority structure within the Government. This will help counsel and client

understand some of the limitations in the settlement negotiation process as well as the procedural challenges and delays that may arise in trying to settle a claim against the Government. It is also helpful to remember that the FAA is, in effect, the client of the DOJ and that relationship is relevant as between counsel handling the claims. For cases in litigation, the DOJ must approve settlements because, among other reasons, such settlements are paid from the Judgment Fund, the disbursement of which is DOJ's exclusive responsibility in litigation.

The Code of Federal Regulations spells out the levels of authority for various dollar value settlements in connection with administrative claims under the FTCA. Specifically, the Appendix to 28 CFR Part 14 (DOJ FTCA regulations) sets forth certain settlement delegations to the cabinet level departments. Significant for our purposes in cases against the FAA, the Appendix delegates authority to the Secretary of Transportation to enter into FTCA settlements that do not exceed \$100,000. That settlement authority has been re-delegated to the FAA Administrator and further re-delegated to the Chief Counsel and to the Assistant Chief Counsel for Litigation. In those FTCA cases where the administrative claims are valued at less than \$25,000 and do not involve aircraft accidents, the Regional Counsel and counsel for the Technical Center and the Aeronautical Center are vested with authority to settle the claim. What this means is the FAA (through its Chief counsel and Assistant Chief Counsel for Litigation) have authority to settle claims for less than \$100,000 and are without authority, even at higher levels of the FAA itself, to approve settlements above that amount.

For settlements above the \$100,000 level, the involvement of the DOJ is essential. In other words, the settlement of claims in excess of \$100,000 requires the concurrence of the Department of Justice. Obviously, to the extent your settlement dialogue is with FAA counsel this limitation is an important consideration. That said, claimants should contact and work with

the FAA counsel's office regarding the settlement of all administrative claims, even if it is clear that any settlement will be in excess of \$100,000. The message here is that an early settlement opportunity, even during the administrative claims or notice phase, is available and in certain cases does bear fruit. Generally, in such cases, the FAA will contact DOJ if it believes that settlement at the administrative claim stage should be considered. Indeed, there are, in fact, instances where the FAA will proactively contact DOJ in connection with the potential settlement of a claim, even if the claimant has not suggested settlement.

As noted above, the CFR sets forth the levels of authority for various dollar value settlements. Generally speaking, those levels hold, so that if a settlement proposal requires disbursement by the United States of \$1 million or less, the Director of the DOJ Civil Division, Torts Branch, Aviation and Admiralty Section, is vested with authority to approve that payment. If the settlement is between \$1 million and \$2 million, the Assistant Attorney General (AAG) for the DOJ Civil Division must approve. In those cases which exceed \$2 million, the Associate Attorney General for the DOJ has authority, delegated from the Attorney General, to approve.

There is, of course, an exception to that straight dollar value calculation. In cases in which settlement of one case could have substantive legal or damages impact on other related cases, a different procedure is followed. In such matters, the settlement amount limitations that govern the respective authority levels would be the total of all the related cases. As you might expect this happens with some frequency in aircraft crash cases, in which there are multiple plaintiffs from a single crash. In such a case, for example, if one plaintiff offers to settle for \$500,000, but there are four other similarly situated plaintiffs from that incident, DOJ may evaluate the settlement as exceeding \$2 million, and the Associate Attorney General will have to approve even the smaller settlement.

As with all rules, there are exceptions to the exception, but the cases are absolutely evaluated one at a time, each on its own merits, and the Associate's office will likely have the opportunity to weigh in on virtually every matter that involves multiple claims. Equally obvious is the fact that the higher up the chain of command that the approval must go, the longer it will take to obtain final approval. Since the value of the case “is what it is”, a plaintiff is without recourse to effect the approval process, but at least knowing what it is will prepare an anxious client (or one in need of the monies) of this practical procedural reality and the extra time it triggers to obtain a final resolution.

An additional issue with respect to timing is the role of the Department of the Treasury. Once a settlement proposal is approved, it goes to the Treasury for payment. Counsel for DOJ cannot send the package to Treasury until they have all settlement documents executed by all necessary parties. Consequently, it is important to get all required documents signed and returned to the DOJ counsel as soon as possible or further delays will surely ensue. Once the payment package goes to Treasury it is out of the hands of the DOJ and, unlike an insurer, the Treasury doesn't routinely cut a check in just a day or two. So, while DOJ can call to follow up it is, in truth, beyond their control. Typically, on average, from the time DOJ sends the payment package to Treasury it takes anywhere from six to twelve weeks until the funds are electronically transferred.

### **Some Settlement Guidance from Government Counsel**

Both FAA and DOJ counsel make clear that settlement proposals that have well supported economic packages and credible non-economic damages arguments will be much better received and therefore have a much better likelihood of successful resolution. The practitioner should remember that the U.S. government is not an insurance company, nor is it a

corporation concerned with business risk. Therefore, many of the issues that motivate or concern such actors have little or no relevance to the Government decision-making on settlement. By contrast, the considerations are much more straight-forward for the Government attorney. Boiled to its essence, they are compelled to justify every settlement by value in light of litigation risk – that means winning or losing. If the Government attorney honestly believes they will win at trial, it is very hard to settle the case.

As noted above, a well-documented and thoughtful settlement proposal is an essential and critical first step. However, not every claim that is well supported by evidence of economic and non-economic damages can be settled at the administrative claim stage. Often a more detailed investigation is needed, where evidence concerning causation and damages can best be developed through discovery. There are other impediments to settlement including unrealistic expectations, unanswered liability questions, the need for expert analysis and unsettled issues of law which will also debunk early settlement efforts. These obstacles often have more bearing on the timing of the settlement dialogue rather than if one should occur and obviously case specific issues will always impact this decision. Again, however, the key for all attorneys involved is to be fully prepared as soon as possible so that settlement opportunities can be maximized and claims can be processed efficiently and fairly – this benefits the Government and its victims.