

## Immunity For Potentially Toxic Trailers

*Law360, New York (February 08, 2012, 12:45 PM ET)* -- In January 2012, the U.S. Court of Appeals for the Fifth Circuit upheld the dismissal of putative class actions filed by Mississippi and Alabama residents against the federal government alleging trailers provided to Hurricane Katrina-impacted citizens contained hazardous levels of formaldehyde.

See *In re: FEMA Trailer Formaldehyde Products Liability Litigation (Mississippi Plaintiffs)*, No. 10-30921, and *In re: FEMA Trailer Formaldehyde Products Liability Litigation (Alabama Plaintiffs)*, No. 10-30945 (5th Cir. 2012).

Plaintiffs-appellants brought this Federal Tort Claims Act (FTCA) action against the United States for injuries allegedly related to their exposure to elevated levels of formaldehyde contained in the component materials of the emergency housing units (EHUs) provided to them by the Federal Emergency Management Agency (FEMA) after Hurricanes Katrina and Rita.

In October 2007, the United States Judicial Panel on Multidistrict Litigation (MDL) created MDL No. 07-1873 (*In re: FEMA Trailer Formaldehyde Products Liability Litigation*), and assigned the litigation to the United States District Court for the Eastern District of Louisiana.

The key facts: after the hurricanes, FEMA activated its Individual and Household Assistance Program and, from September 2005 through May 1, 2009, the agency supplied disaster victims with EHUs, at no cost, to use as temporary shelter.

The EHUs were taken from FEMA's preexisting inventory, which had been purchased from public retailers as well as manufacturers. The EHUs were small, portable and usually placed at the disaster victims' home sites. The trailers were installed by government contractors who placed the units on blocks or piers, anchored them to the ground using straps or bolts, and connected them to public sewer and water lines.

In March 2006, when FEMA began receiving formaldehyde complaints, it encouraged shelter occupants to ventilate their EHUs by opening the doors and windows.

In June 2006, FEMA prepared an informational brochure informing EHU occupants of the dangers of formaldehyde exposure, encouraging them to ventilate their units, and urging them to seek medical help if they developed health problems related to formaldehyde.

In September 2006, FEMA began working with the U.S. Environmental Protection Agency to test the EHUs for formaldehyde, and also developed various mitigation techniques.

In July 2007, FEMA distributed another informational brochure to EHU occupants, set up a hotline and a dedicated call center to field formaldehyde complaints from occupants, and continued to assist occupants in locating alternative housing.

FEMA subsequently entered into an agreement with the U.S. Centers for Disease Control and Prevention (CDC) to conduct additional testing, the findings of which were compiled in a third informational brochure and distributed to EHU occupants in early 2008.

The federal government filed various motions to dismiss the claims against it or in the alternative for summary judgment, based on the FTCA's discretionary function exception.

The district court denied the motions and held that the FTCA's discretionary function exception may not apply to some or all of appellants' claims, the determination of which would be driven by the facts of each individual case.

The district court then denied class certification and scheduled a series of bellwether trials, but none of the FTCA claims brought by the bellwether plaintiffs against the government advanced to the trial stage.

The government then moved under Federal Rule 12(b)(1) to dismiss appellants' FTCA claims for lack of subject-matter jurisdiction on the grounds of no analogous private liability under the Mississippi and Alabama emergency statutes. The district court granted the government's motion and dismissed appellants' FTCA claims. Plaintiffs appealed to the Fifth Circuit.

A plaintiff may only sue the United States if a federal statute explicitly provides for a waiver of sovereign immunity. The United States must consent to be sued, and that consent is a prerequisite to federal jurisdiction. *Delta Commercial Fisheries Ass'n v. Gulf of Mex. Fishery Mgmt. Council*, 364 F.3d 269, 273 (5th Cir. 2004).

Waivers of sovereign immunity are narrowly construed in favor of the United States. *In re Supreme Beef Processors Inc.*, 468 F.3d 248, 253 (5th Cir. 2006).

The FTCA is recognized as providing a waiver of sovereign immunity and provides the sole basis of recovery for tort claims against the United States. See 28 U.S.C. § 1346 and § 2671, et seq.; *In re Supreme Beef Processors*, 468 F.3d at 252 n.4. But the act provides that the United States shall be liable in the same manner and to the same extent as a private individual under like circumstances. 28 U.S.C. § 2674.

The "same manner" analysis is a mix of federal and state law. The FTCA requires the government's liability to be measured in accordance with the law of the state where the alleged act or omission occurred, so here the appellants' FTCA claims were limited by the relevant provisions set forth in Mississippi and Alabama tort law. See 28 U.S.C. § 1346(b)(1); *Richards v. United States*, 369 U.S. 1, 11-14 (1962); *Cleveland ex rel. Cleveland v. United States*, 457 F.3d 397, 403 (5th Cir. 2006).

Whether a private person in "like circumstances" would be subject to liability is also a question of sovereign immunity and, thus, is ultimately a question of federal law. See *United States v. Olson*, 546 U.S. 43, 44 (2005). Because the federal government could never be exactly like a private actor, a court's job in applying the standard is to find the most reasonable analogy. *LaBarge v. Cnty. of Mariposa*, 798 F.2d 364, 366-69 (9th Cir. 1986).

Inherent differences between the government and a private person cannot be allowed to disrupt this analysis. The Fifth Circuit has consistently held that the government is entitled to raise any and all defenses that would potentially be available to a private citizen or entity under state law. *Camacho v. Tex. Workforce Comm'n*, 445 F.3d 407, 410 (5th Cir. 2006).

Therefore, if a private person under “like circumstances” would be shielded from liability pursuant to a state statute, lower courts must decline to exercise subject-matter jurisdiction in a case like this.

Because, here, the Mississippi and Alabama emergency statutes abrogate the tort liability of a private person who, (1) voluntarily, (2) without compensation, (3) allows his property or premises to be used as shelter during or in recovery from a natural disaster, the government’s voluntary, cost-free provision of the EHUs to disaster victims, in connection with Hurricanes Katrina and Rita, was also immunized conduct under the statute.

Despite plaintiffs’ arguments, the government’s provision of the government-owned EHUs, as implemented by FEMA, was voluntary because it was under no contractual or legal obligation, under any federal legislation, to provide the EHUs to disaster victims in response to the disasters.

The government did not receive compensation from the disaster victims in exchange for letting them use the EHUs — the collection of taxes by the government is not comparable to the traditional quid pro quo compensation contemplated by the statute.

In addition, the government’s actions relating to the EHUs fell within the time frame contemplated by the statute as “during or in recovery from” a major disaster, since FEMA’s temporary emergency housing program ran from the hurricanes to May 2009.

Because Mississippi and Alabama emergency laws would protect those private individuals who shelter natural disaster victims from tort liability, the federal government’s voluntary provision of the trailers was likewise immunized, the court concluded.

As an alternative, the appellants asked the Fifth Circuit to certify questions to the state supreme courts of Alabama and Mississippi regarding the meaning of the state emergency statutes, but the appeals court agreed with the district court that these questions did not warrant certification. Dismissals affirmed.

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