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Federal Statute of Limitations Not Tolled Pending Settlement of Workmen's Compensation Claim.

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FEDERAL COURTS—TORT CLAIMS—STATUTE OF LIMITATIONS—FEDERAL STATUTE OF LIMITATIONS NOT TOLLED PENDING SETTLEMENT OF WORKMEN'S COMPENSATION CLAIM. *Mendiola v. United States,* 401 F.2d 695 (5th Cir. 1968).

On January 11, 1967, Mendiola filed suit against the United States under the Federal Tort Claims Act to recover damages for injuries sustained in 1963. The complaint alleged that a workmen's compensation suit against appellant, Maryland Casualty Company, was settled on March 16, 1965. The Casualty Company intervened to assert subrogation rights for the amount paid to Mendiola under the Texas Workmen's Compensation Act. Appellants alleged that the suit was not barred because under Texas law, when Mendiola proceeded initially against the Casualty Company, the statute of limitations was tolled pending the outcome of the compensation suit and thus the cause of action did not arise until the claim was finalized in 1965. The United States district court dismissed on the grounds that the action was barred by the federal statute of limitations.[1] Held—*Affirmed.* When a cause of action accrues was a question involving federal law. State law determines whether an actionable wrong was committed by the United States. The federal statute of limitations was not tolled by the workmen's compensation suit because section 2401(b) contains no tolling provision, either expressly or by implication.

A principal case involving the application of a federal statute of limitations is *State of Maryland, Use of Burkhardt v. United States.*[2] In this case, a wrongful death action was brought under the Federal Tort Claims Act. Although the suit was timely filed under the federal statute of limitations, the action was dismissed by the trial court because the action was not instituted within one year, as prescribed by the wrongful death statute of Maryland. The Fourth Circuit held that inquiry will be made into state law for the purpose of *defining* the actionable wrong, but to the federal statute to determine the time period within which the action may be instituted.[3] State law determines the character of the cause of action and the damages recoverable, but it does not determine the time within which the action must be commenced.[4] The court noted there is practical value in looking to state law to characterize the numerous tort actions that may arise, but the problem of limitations was a

1 28 U.S.C. § 2401(b) provides:
A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.
2 165 F.2d 869 (4th Cir. 1947).
3 *Id.*
4 *Id.*

simple matter that Congress could establish for all such actions that may arise.[5]

The majority rule is that federal law determines when a claim or cause of action accrues within the meaning of section 2401 (b).[6] In *Quinton v. United States*,[7] the plaintiff's wife was given the wrong blood type during a transfusion at an Air Force base hospital. The transfusion occurred in 1956 but the mistake was not discovered until 1959. Suit was instituted in 1960, and the federal district court held that under the law of Washington the claim accrued when the alleged negligent act occurred, in 1956, and was thus barred by the two year federal limitation period. Reversing, the Fifth Circuit held that the claim accrued in 1959 when the negligence was discovered; therefore, the action instituted in 1960 was timely under section 2401(b). Under this statute, federal law and not the state law, determines when the federal statute of limitations begins to run on tort claims against the United States.[8] Judge Tuttle, speaking for the court, stated: we look to state law to determine whether the plaintiff's action is premature, but to federal law to determine whether the action is stale.[9] If under state law the plaintiff has a cause of action, federal law will determine whether the suit against the Government was timely instituted.[10] The court felt it was the intention of Congress that a single statute of limitations govern all actions brought against the United States under the Federal Tort Claims Act and that the uniformity Congress sought to accomplish would be defeated if the various states' rules were used to determine when the period in section 2401(b) begins to run.[11] The appellant in *Kossick v. United States*[12] was injured in 1950 while a patient in a Public Health Hospital in New York. Surgery to correct the ailment was performed in 1952, and he continued to make occasional visits to the hospital until 1961. When the suit was instituted in 1963, the appellant contended that a cause of action did not accrue under New York law as long as the plaintiff was under continuous treatment for his injury. The court held that the action was barred by section 2401(b). The appellant had to discover his injury when it was inflicted in 1950, or at the latest in 1952 when corrective surgery was attempted. It would be adverse to the purpose of the federal statute to allow a state rule postponing "accrual" far beyond any necessities of the case to subject the United States to the stale claims

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5 *Id.*

6 Quinton v. United States, 304 F.2d 234 (5th Cir. 1962); Beech v. United States, 345 F.2d 872 (5th Cir. 1965); Kossick v. United States, 330 F.2d 933 (2d Cir. 1964), *cert. denied*, 397 U.S. 837 (1964); Kington v. United States, 396 F.2d 9 (6th Cir. 1968), *cert. denied*, 89 S. Ct. 396 (1968); Hungerford v. United States, 307 F.2d 99 (9th Cir. 1962).

7 304 F.2d 234 (5th Cir. 1962).

8 *Id.*

9 *Id.* at 239.

10 Quinton v. United States, 304 F.2d 234 (5th Cir. 1962).

11 *Id.*

12 330 F.2d 933 (2d Cir. 1964), *cert. denied*, 89 S. Ct. 397 (1964).

which the prescription of the short two-year period was intended to avoid.[13] To allow postponement of the running of the statute as long as appellant exercised his right to further treatment would likewise be unreasonable, because he would have this privilege as long as he retained his present employment as a seaman.[14] In *Hungerford v. United States*,[15] an organic injury to the brain of traumatic origin was negligently diagnosed as psychosomatic. The injury was sustained in 1950 while the appellant was serving in the Army. He subsequently experienced blackouts and head pains. In 1957 an incorrect diagnosis was made at a veterans' hospital. In 1959 the true nature of his injury was discovered and suit was instituted in 1960. The district court dismissed the action. In reversing, the court held that federal law governs when a cause of action accrues and the federal limitation period begins to run under the statute.[16] The provisions of section 1346(b)[17] and section 2674,[18] allowing liability of the United States to be determined as if it were a private individual, had reference only to the question of substantive liability and not to whether the suit is timely filed under section 2401(b).[19] A malpractice claim against the government accrues when, in the exercise of reasonable diligence, the claimant discovered or should have discovered the negligence.[20] Because the incorrect diagnosis was not discovered until 1959, the suit was not barred by the federal limitation period. *Kington v. United States*[21] held that a cause of action for wrongful death accrued upon the date of death although the cause was not discovered for two months. Plaintiff's husband was exposed to beryllium while working in federally owned facilities. He died in July, 1964, and the suit was not brought until August, 1966. Although the actual cause of death was not learned until two months after death, the plaintiff had a reasonable time in which to institute suit within the two years prescribed by the federal statute.[22]

The minority view of a literal interpretation of the statute is ex-

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13 *Id.* at 935.
14 Kossick v. United States, 330 F.2d 933 (2d Cir. 1964), *cert. denied*, 397 U.S. 837 (1964).
15 307 F.2d 99 (9th Cir. 1962).
16 *Id.*
17 28 U.S.C. § 1346(b) provides:
Subject to provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions . . . 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. (1966)
18 28 U.S.C. § 2674 provides:
The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. (1948)
19 Hungerford v. United States, 309 F.2d 99 (9th Cir. 1962).
20 *Id.*
21 396 F.2d 9 (6th Cir. 1968), *cert. denied*, 89 S. Ct. 397 (1968).
22 *Id.*

pressed in *Tessier v. United States.*[23] Metal fragments were left in plaintiff's body during an appendectomy performed at a veterans' hospital in 1947. The fragments were not discovered until 1954. The court, applying Maine law held that a cause of action accrues when it may be made the basis of judicial action. They reasoned that under section 2674, which provides: ". . . the United States shall be liable . . . in the same manner and to the same extent as a private individual under similar circumstances . . . ," a cause of action arises when a private person would become liable under the law of the state where the negligent act or omission occurred.[24] The law of Maine allowed a cause of action in 1947, when the tort occurred. Because his claim was not filed within two years, it was barred by section 2401(b). Judge Duniway's dissenting opinion in *Hungerford v. United States*[25] expressed a view similar to that held in *Tessier.* He said that just because Congress eliminated the problem of which state's statute of limitations to apply, by enacting a uniform time period within which to institute an action against the Government, this does not lead to the conclusion that the words "after such claim accrues" were to be interpreted by application of federal law.[26] Had this been their intention, Congress could have so provided in the Act.[27] In support of his opinion he noted that section 1346(b) provides that district courts have jurisdiction ". . . of civil actions on claims against 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] He concluded that because the majority opinion was not in accordance with the law of the state where the tort occurred, the United States is not liable ". . . in the same manner and to the same extent as a private individual. . . ."[29]

The limitation period within which Congress consented to allow suits to be brought against the United States should be strictly construed, and exceptions are not to be implied.[30] Federal court interpretation governs when the application of a state statute of limitations conflicts with the federal statute.[31] In *United States v. Westfall,*[32] the plaintiff was injured in Washington in 1946, but suit was not brought

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23 269 F.2d 305 (1st Cir. 1959).
24 *Id.*
25 *Id.*
26 *Id.*
27 *Id.*
28 *Id.*
29 *Id.* at 309.
30 Soriano v. United States, 352 U.S. 270, 77 S. Ct. 269, 1 L. Ed. 2d 306 (1957); Mann v. United States, 399 F.2d 672 (9th Cir. 1968).
31 United States v. Westfall, 197 F.2d 765 (9th Cir. 1952); Young v. United States, 184 F.2d 587 (D.C. Cir. 1950).
32 197 F.2d 765 (9th Cir. 1952).

until 1950. The government contended that the action was barred by the state statute prescribing a three year limitation period for suits involving personal injury. The court held that "The Tort Claims Act . . . prescribes its own limitation."[33] The Act, as amended in 1949, provided for a two year limitation period after a claim accrued or one year after adoption of the amendment, whichever was later.[34] Thus, the suit was timely filed under the federal act even though barred by the state limitation period.

The courts have been reluctant to find an exception to the statute that would toll its running. In *Jones v. United States*,[35] a New York statute provided for the tolling of the statute of limitations while another suit on the same cause of action was pending. The court held that the time period contained in the United States Code governs, and that the local statute had no application.[36]

It has generally been held that minority does not toll the statute[37] and the "saving provisions of 28 U.S.C. § 2401(a) with respect to persons under legal disability" is not incorporated into section 2401(b) and, thus, cannot extend a minor's claim.[38] In *Brown v. United States*,[39] a baby was given an excessive amount of oxygen, resulting in blindness. Minority did not toll the federal limitation period. The alleged negligence occurred in 1955, but suit was not brought until 1963. Timely institution of the suit by the parent or guardian is necessary to protect an infant's claim.[40] *Jackson v. United States*[41] held that the federal statute of limitations is not tolled because of insanity or mental incompetency even though Jackson alleged he was not mentally competent to bring suit until four years after receiving his injuries. Other decisions have held the statute not tolled due to non-appointment of an administrator,[42] inability to obtain proof of a cause of action,[43] continuing negligent treatment,[44] filing and dismissal of a state and federal

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33 *Id.* at 766.

34 United States v. Westfall, 197 F.2d 765 (9th Cir. 1952).

35 126 F. Supp. 10 (D.D.C. 1954), *aff'd*, 207 F.2d 563 (1954), *cert. denied*, 347 U.S. 921 (1954).

36 *Id.*

37 Mann v. United States, 399 F.2d 672 (9th Cir. 1968); Brown v. United States, 353 F.2d 578 (9th Cir. 1965); United States v. Glenn, 231 F.2d 884 (9th Cir. 1956), *cert. denied*, 352 U.S. 926 (1956); Harper v. United States, 239 F. Supp. 645 (D. Md. 1965); Pittman v. United States, 210 F. Supp. 763 (N.D. Cal. 1962), *aff'd*, 341 F.2d 739 (1965), *cert. denied*, 382 U.S. 941 (1965); Finn v. United States, 152 F. Supp. 721 (E.D.N.Y. 1957).

38 Harper v. United States, 239 F. Supp. 645, 646 (D. Md. 1965).

39 353 F.2d 578 (9th Cir. 1965).

40 *Id.*

41 234 F. Supp. 586 (E.D. S.C. 1964).

42 Foote v. Public Housing Com'r of United States, 107 F. Supp. 270 (W.D. Mich. 1952).

43 Tinkoff v. United States, 211 F.2d 890 (7th Cir. 1954).

44 Kossick v. United States, 330 F.2d 933 (2d Cir. 1964), *cert. denied*, 397 U.S. 837 (1964).

action on the same suit,[45] correspondence between claimant's attorney and legal officers for the government,[46] or the plaintiff's ignorance of his injury.[47] Nonetheless, the courts have allowed exceptions when elements of fraud are involved. Thus, in *Rahn v. United States*,[48] the statute was tolled when negligent facts were concealed by a physician, and the statute began to run only when the facts were discovered. In *Scarborough v. Atlantic Coast Line R. Company*,[49] a railroad agent induced the plaintiff to postpone filing of his claim until he reached twenty one years of age by representing that he would then have three years in which to institute an action for his injuries.

Under Texas law an injured employee who is covered by workmen's compensation may either follow his statutory remedy for benefits from the compensation carrier, or, in the alternative, he may pursue his common law remedy against the negligent tortfeasor.[50] If the injured employee initially sues at common law and prosecutes the suit to a final judgment or settlement, he is precluded from later filing a claim for benefits under the compensation statute.[51] The underlying rationale is that by pursuing his rights at common law against the negligent tortfeasor, he, in effect, destroys the subrogation rights of the insurance carrier.[52] Should he proceed initially under the compensation act, the two year statute of limitations[53] as applied to personal injury actions is tolled until such time that the carrier assumes obligation of payment.[54] After settlement of the compensation claim, this action does not preclude a common law action for damages against the negligent third party.[55] The carrier in making payments under the compensation award is subrogated (to the extent of those payments) to the rights of the injured employee in an action brought against the tortfeasor.[56] The subrogation rights become established and the statute of limitations

45 Kington v. United States, 396 F.2d 9 (6th Cir. 1968), *cert. denied*, 89 S. Ct. 396 (1968); Humphreys v. United States, 272 F.2d 411 (9th Cir. 1959).

46 Whealton v. United States, 271 F. Supp. 770 (E.D. Va. 1967).

47 Tessier v. United States, 269 F.2d 305 (1st Cir. 1959).

48 222 F. Supp. 775 (S.D. Ga. 1963).

49 178 F.2d 253 (4th Cir. 1949), *cert. denied*, 339 U.S. 919 (1950).

50 TEX. REV. CIV. STAT. ANN. art. 8307 § 6(a) (1917); Fidelity Union Casualty Company v. Texas Power & Light Company, 35 S.W.2d 782 (Tex. Civ. App.—Dallas 1931, writ ref'd).

51 Texas Employers Ins. Ass'n v. Brandon, 126 Tex. 636, 89 S.W.2d 982 (1936); Argonaut Underwriters Ins. Co. v. Ellis, 335 S.W.2d 388 (Tex. Civ. App.—Eastland 1960, no writ); Garza v. United States Fidelity and Guaranty Company, 251 S.W.2d 781 (Tex. Civ. App. —San Antonio 1952, writ ref'd n.r.e.); Younger Brothers, Inc. v. Moore, 135 S.W.2d 780 (Tex. Civ. App.—El Paso 1939, writ dism'd jdgmt cor.).

52 Texas Employers' Insurance Ass'n v. Fish, 266 S.W.2d 435 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.).

53 TEX. REV. CIV. STAT. ANN. art. 5526, § 6 (1897).

54 Webster v. Isbell, 71 S.W.2d 342 (Tex. Civ. App.—Galveston 1934), rev. on other grounds 100 S.W.2d 350 (1937).

55 Kelley v. Summers, 210 F.2d 665 (10th Cir. 1954); Pedigo & Pedigo v. Croom, 37 S.W.2d 1074 (Tex. Civ. App.—Eastland 1931, writ ref'd); City of Austin v. Johnson, 204 S.W. 1181 (Tex. Civ. App.—Austin 1918), *aff'd* 240 S.W. 523 (1922).

56 Kelley v. Summers, 210 F.2d 665 (10th Cir. 1954).

begins to run from the date of payment or assumption of the original award or judgment, and not the judicial finality of the same.[57]

In the instant case, the circuit court followed the rule they had previously announced in *Quinton v. United States*.[58] The accrual of a cause of action under section 2401(b) is a matter determined in accordance with federal law, and the federal statute is not tolled as is the Texas statute under state law. The court reasoned that a cause of action accrued and the limitation period began to run in 1963 when Mendiola sustained discernible injuries, and that this barred the cause of action in 1965. The fact that Texas law tolled the statute during settlement of the workmen's compensation claim is immaterial because section 2401(b) contains no tolling provisions and does not incorporate either expressly, or impliedly, state tolling provisions. The Maryland Casualty Company was subrogated to the rights of Mendiola and could not assert any right that he could not, and thus, their claim was also barred.[59]

To avoid the result reached in *Mendiola*, one possible solution would be to negotiate a compromise settlement agreement between the injured party and the compensation carrier.[60] At this point, the subrogated carrier could pursue the common law cause of action against the United States. The only limitation is that the suit must be instituted within two years from the date of the original injury.

Although the Supreme Court of the United States held in *Erie v. Tompkins*[61] that there was no federal common law, it would appear that the majority rule is based upon a practical, rather than a literal, interpretation of the federal statute of limitations. The preceding cases demonstrate that the federal courts that follow the majority rule will determine for themselves when a cause of action accrues, rather than adopt the approach which may have been applied by the state court had the cause of action been entirely local in nature. It would appear that the phrase in section 2401(b) "when such claim accrues" is a sufficient basis for the federal courts to use as justification for "not" following a literal interpretation of the statute and thus strictly following the law of the state in determining when a cause of action accrues. When a cause of action accrues, however, the federal courts follow a more literal application and rarely allow the tolling of the statute.

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[57] Derr v. Argonaut Underwriters Insurance Company, 339 S.W.2d 718 (Tex. Civ. App. —Austin 1960, writ ref'd n.r.e.); Yeary v. Hinojosa, 307 S.W.2d 325 (Tex. Civ. App.— Houston 1957, writ ref'd n.r.e.); Brooks v. Lucky, 308 S.W.2d 273 (Tex. Civ. App.— Beaumont 1957, writ ref'd n.r.e.); Texas Employers' Insurance Ass'n v. Texas & Pacific Ry. Co., 129 S.W.2d 746 (Tex. Civ. App.—Eastland 1939, writ dism'd jdgmt cor.).

[58] Quinton v. United States, 304 F.2d 234 (5th Cir. 1962).

[59] Mendiola v. United States, 401 F.2d 695 (5th Cir. 1968).

[60] TEX. REV. CIV. STAT. ANN. art. 8307, § 12 (1917).

[61] Erie v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).