MARKS & HARRISON

# POINTS of LAW

By Marks & Harrison Attorneys | Volume 4 | Number 3 | Fall 2026

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## The Contingency Fee and the Rule of Law

*By Garrett A. Handegan*

As said by one of our founding fathers, John Adams, ours is "a government of laws and not of men." Mass. Const. of 1780, First Part, Art. XXX; *see also* Thomas Paine, *Common Sense* Chapter 3, "Thoughts on the Present State of American Affairs" (Philadelphia, 1776) ("in America the law is king").

In order for that principle to be realized citizens must have access to courts to ensure that no person is above the law and that everyone is treated fairly and equally. *See Boyle v. Anderson*, 301 Va. 52, 56, 871 S.E.2d 226, 228 (2022) ("Access to the courts to seek legal redress is a constitutional right."). Yet if only the wealthy can afford to utilize our civil justice system then when wrongs are committed wrongdoers will not be held to account.

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***Disclaimer:*** *Except where otherwise indicated, these articles address the law in Virginia, are provided for general informational purposes only, and may not reflect the current law. These articles should not be construed as legal advice from the author and/or Marks & Harrison, P.C., or as creating an attorney-client relationship. These articles should not be treated as a substitute for legal counsel. Readers of these articles must seek appropriate legal or other professional advice on the particular facts, circumstances, issues, and law involved from a lawyer licensed in the appropriate licensing jurisdiction(s) who has expertise in the areas of law involved.*

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Fortunately, people of ordinary means can retain lawyers on a contingent fee basis in many circumstances. *See* Va. Sup. Ct. R., Pt. 6, Sec. II, R. 1.5. A contingency fee is permitted in any matter except for criminal cases and, except in rare instances, family law cases. *See id.* Contingency fees are quite common in personal injury matters.

Under this rubric, litigants are not required to pay an hourly rate or even a flat fee but, rather, they can retain a lawyer of their choice and pay them a percentage of the recovery, if and only if there is a recovery (either a plaintiff's verdict or a settlement). *See* Bouvier Law Dictionary, "Contingency Fee" (Desk ed.). In contingency fee matters the lawyer usually advances the cost of the litigation as well as invests his or her time and is paid only if the case is successful. *See Portsmouth 2175 Elmhurst, LLC v. City of Portsmouth*, 298 Va. 310, 334, 837 S.E.2d 504, 515-16 (2020).

The contingency fee, typically between 33% and 40%, is calculated at the same percentage whether the case takes 3 months or 3 years to resolve, which can feel unfair at either extreme. Consequently:

> "A contingent fee may permissibly be greater than what an hourly fee lawyer of similar qualifications would receive for the same representation." Restatement (Third) of the Law Governing Lawyers [] § 35 cmt. c [(2000)]. That is so because "contingency fee agreements transfer a significant portion of the risk of loss to the attorneys taking a case." *Portsmouth 2175*, 298 Va. at 334 . . . . "A lawyer might expend considerable effort" only to recover nothing. *Id*. Or "a lawyer may expend minimal time on a case and obtain a full recovery." *Id.*

*Moncrieffe v. Deno,* 76 Va. App. 488, 500-01, 882 S.E.2d 524, 530 (2023).

Among the most common critiques of contingency fees is the perceived windfall to plaintiff's counsel in personal injury cases involving massive injuries recoveries, especially if the case resolves quickly or without extensive litigation. Despite this criticism, the contingency fee serves a noble purpose in our justice system.

> The contingent fee is often criticized by the defense bar as encouraging plaintiffs to bring frivolous cases, but it may actually discourage them, as the plaintiff's lawyer recovers nothing from a lost case. The contingent fee is also criticized because it reduces the recovery of a meritorious claim, such that a person who loses a leg would recover only two-thirds of the compensation awarded for the leg. Yet . . . but for the lawyer bearing the risk and paying the costs, the one-legged plaintiff probably would not have had the means to seek any recovery at all. For many poor people, a lawyer on a contingent basis is essential for their access to the court. In the end, the contingent fee is a natural response to a system of civil litigation, particularly in tort, that follows the American rule, in which all clients must pay for their own lawyers.

Bouvier Law Dictionary, "Contingency Fee."

In practical terms, this approach allows everyday injured people to stand toe-to-toe on an equal basis with governments, trucking companies, healthcare providers, and multinational corporations armed with ample financial resources. "[C]ontingency fees provide access to counsel for individuals who would otherwise have difficulty obtaining representation" and "are an acknowledged feature of our legal landscape, approved by legislative and judicial bodies alike, that help secure for the impecunious access both to counsel and to court." *Pellegrin v. Nat'l Union Fire Ins. (In re Abrams & Abrams, P.A.)*, 605 F.3d 238, 245 (4th Cir. 2010).

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This system protects the rule of law and not only seeks compensation for those who have been harmed but promotes safety and therefore protects us all. Because of the rule of law and the contingent fee system, the dangers of cigarettes are known, cars are manufactured more safely, dangerous drugs are off the market, and lawyers are incentivized to fight to make sure the wealthy do not control the system. This fulfills John Adams' statement which is so critical to our system of government.

For over 115 years, the attorneys and staff at Marks & Harrison have led the way in challenging the actions of wrongdoers and have achieved some of the largest results in Virginia history against those who have harmed our clients. Marks & Harrison has represented a multitude of injured persons against interstate trucking companies, huge corporations, large healthcare systems and providers, and various other wrongdoers across Virginia, Maryland, and Washington D.C. Virtually every case handled by our firm has been on a contingency-fee basis where no client was prevented from access to justice due to inability to afford a lawyer. Marks & Harrison embodies John Adams's admonition that we are a country of laws and not of kings.


# Tort Claims Against the United States

*By Steven G. Friedman*

Bringing suit against the government implicates rules and procedures not applicable to the usual private-party tort case. The following is the conclusion to a three-part series summarizing the various specialized process for bringing a negligence claim against local, state, and federal governmental entities. The following article addresses filing a tort claim against the United States. Please note, however, that any immunity issue is beyond the scope of this writing.

## Pre-Suit Notice

Pursuant to the Federal Tort Claim Act ("FTCA"), 28 U.S.C. §§ 2671, et seq., "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[.]" 28 U.S.C. § 2401(b). The FTCA's time limitation is not jurisdictional and thus is subject to equitable tolling. *See United States v. Kwai Fun Wong*, 575 U.S. 402 (2015).

Prior to filing a lawsuit, "the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." 28 U.S.C. § 2675(a). If the agency fails to make a final determination within six months of the claimant's filing, then the claimant may consider the claim denied. *See id.* ("The failure of an agency to make final disposition of a claim within six months after it is filed shall, <u>at the option of the claimant any time thereafter</u>, be deemed a final denial of the claim for purposes of this section.") (emphasis added).

Notably, the emphasized statutory text means that the claimant can choose to deem the administrative claim denied after 6 months without a response so that suit can be filed; but the claimant is also free to wait as long as desired, provided that the agency does not issue a denial. *See Conn v. United States,* 867 F.2d 916, 920 (6th Cir. 1989) ("the six-month period within which the action must be filed is simply tolled so long as the claim is not finally denied"); *e.g., id.* (error to dismiss claim filed 6 years after the alleged injury where agency never denied administrative claim); *see also Taumby v. United States,* 919 F.2d 69, 70 (8th Cir. 1990) ("[T]he government . . . concedes that there is no time limit for the filing of an FTCA action when an administrative claim is deemed to be denied under 28 U.S.C. § 2675(a) . . . by virtue of an agency's failure to finally dispose of the claim within six months."). Therefore, "[a]s long as a claimant files an administrative claim within two years of its accrual and the agency does not send notice of final denial, <u>the claimant may wait indefinitely before filing suit</u>." *Pascale v. United States*, 998 F.2d 186, 192-93 (10th Cir. 1993) (emphasis added).

The "appropriate federal agency" means "the Federal agency whose activities gave rise to the claim." 28 C.F.R. § 14.2(b)(1). The supplemental regulations within each federal agency should provide the necessary details to properly serve an administrative claim under the FTCA. *See* 28 C.F.R. § 14.11 ("Each agency is authorized to issue regulations and establish procedures consistent with the regulations in this part."); *e.g.*, 39 C.F.R. § 912.4 (Postal Service); 14 C.F.R. § 1261.304 (NASA).

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"When a claim is presented to any other Federal agency, that agency shall transfer it forthwith to the appropriate agency, if the proper agency can be identified from the claim, and advise the claimant of the transfer. If transfer is not feasible the claim shall be returned to the claimant." 28 C.F.R. § 14.2(b)(1). Significantly, "[a] claim shall be presented as required by 28 U.S.C. 2401(b) as of the date it is received by the appropriate agency." *Id.* (emphasis added).

Standard Form 95 (SF95) is a federal claim form that is typically used to present claims against the United States under the FTCA, but "other written notification" could suffice, 28 C.F.R. § 14.2(a), provided that such notice "(1) is sufficient to enable the agency to investigate and (2) places a sum certain value on her claim." *Ahmed v. United States,* 30 F.3d 514, 516-17 (4th Cir. 1994) (internal quotation marks omitted).

A copy of SF95 is available from the website of the U.S. Department of Justice. *See* https://www.justice.gov/civil/documents-and-forms-0. SF95 essentially just seeks the basic who, when, where, how, and what of the incident. *See id.* Among other things, the SF95 requires the claimant to specify a "sum certain" dollar figure the claimant seeks from the United States as compensation. *See id.*

Regarding the "sum certain," absent newly discovered evidence, the dollar figure stated in the SF95 is the most you can ask for in any subsequent lawsuit. *See* 28 U.S.C. § 2675(b) ("Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.").

Although the claimant's "duly authorized agent or legal representative" may sign the SF95 or other written notice, in that event the notice must be "accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative." 28 C.F.R. § 14.2(a). Thus, in a wrongful death case or when the claimant is a minor, the notice must include a copy of the document evidencing the agent's authority to act on behalf of the estate or the minor.

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The SF95 may be amended by a signed writing but any such amendment restarts the 6-month period for the agency to make a final determination, and thus delaying/extending the time within which the claimant must file suit. *See* 28 C.F.R. § 14.2(c). Depending on the client's circumstances, this could be a good thing or a bad thing.

## Service of Process

You must file suit "within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency[.]" 28 U.S.C. § 2401(b). Beware that the 6-month period is measured from the date of mailing by the agency, not the date of receipt of the agency's denial. *See id.*

As previously noted, however, the FTCA's time limitation is not jurisdictional and thus is subject to equitable tolling. *See United States v. Kwai Fun Wong,* 575 U.S. 402 (2015). Further, if the agency never denies the claimant's administrative claim, then the time for filing suit is tolled until the claimant decides to "deem" the administrative claim denied. *See supra Conn v. United States*, 867 F.2d 916, 920 (6th Cir. 1989); *Taumby v. United States*, 919 F.2d 69, 70 (8th Cir. 1990); *Pascale v. United States*, 998 F.2d 186, 192-93 (10th Cir. 1993).

To effect service of process upon the United States, you must:

(A) (i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought—or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk—**or**

(ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office; [**and**]

(B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; **and**

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

Fed. R. Civ. P. 4(i)(1) (emphasis added).

## Miscellaneous

The FTCA is the claimant's exclusive remedy for all common law tort claims against the United States. 28 U.S.C. § 2679(b)(1). The federal district courts have exclusive jurisdiction over all FTCA cases. 28 U.S.C. § 1346(b)(1). FTCA cases must "be tried by the court without a jury." 28 U.S.C. § 2402. The United States cannot be liable for pre-judgment interest or punitive damages. 28 U.S.C. § 2674. The claimant's attorney's fee is capped at 20% if settled administratively and 25% if suit is filed. 28 U.S.C. § 2678.


# An Overview of Charitable Immunity in Tort Claims

*By Elijah R. White* & Alistair D. Edwards*

Litigants who wish to bring tort claims against charitable institutions may be surprised to discover that the doctrine of charitable immunity is alive and well in Virginia. With origins in the 19th century, the doctrine has become a part of the general public policy of the Commonwealth. It is grounded in the rationale that charities' assets, held in trust for their charitable purposes, are better used to further the institution's charitable purposes rather than to pay tort claims.

> In the words of Justice Carrico:
>
> "It cannot be debated that the care of the sick and injured is a public purpose, a matter of public concern. When a portion of the responsibility therefor is borne by the gifts of the philanthropic-minded, so much of the burden is removed from the public. If a portion of those gifts is diverted to the payment of tort claims, without restriction, the spirit and intent of the gifts are, at once, nullified and that much of the burden is again cast upon the public."

*Hill v. Leigh Mem'l Hosp. Inc.*, 204 Va. 501, 507, 132 S.E.2d 411, 415 (1963).

## Scope of Charitable Immunity

Virginia's charitable immunity is a doctrine of limited scope. Charities and their agents are immune only for acts of simple negligence, and do not receive such immunity for intentional torts, gross negligence, and willful or wanton negligence. *Cowan v. Hospice Support Care, Inc.*, 268 Va. 482, 488, 603 S.E.2d 916, 919 (2004). Further, charitable entities are not immune from claims brought by persons who have no beneficial relationship to the charity but are merely invitees or strangers. *Id.* at 486, 603 S.E.2d at 918.

More, the General Assembly has restricted the doctrine of charitable immunity in the context of healthcare. Hospitals are generally not immune from liability for negligence on charitable grounds unless either the "hospital renders exclusively charitable medical services for which no bill for service is rendered" or the plaintiff "was accepted as a patient . . . under an express written agreement . . . providing that all medical services furnished . . . are to be supplied on a charitable basis without financial liability." Va. Code § 8.01-38.

## Test for Charitable Immunity

"To establish charitable immunity as a bar to tort liability, an entity must prove at least two distinct elements. The absence of either element makes the bar of charitable immunity inapplicable." *Ola v. YMCA of S. Hampton Rds., Inc.*, 270 Va. 550, 556, 621 S.E.2d 70, 72 (2005). "First, the entity must show it is organized with a recognized charitable purpose and that it operates in fact in accord with that purpose." *Id.* "Second, assuming the entity has met the foregoing

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test, it must then establish that the tort claimant was a beneficiary of the charitable institution at the time of the alleged injury." *Id.* at 556, 621 S.E.2d at 73.

A brief analysis of each of those two steps is set forth below.

**Step 1: Is the Entity Truly a Charity?**

Virginia courts have adopted a two-part test to assess the first element of the charitable immunity analysis: "examining (1) whether the organization's articles of incorporation have a charitable or eleemosynary purpose and (2) whether the organization is in fact operated consistent with that purpose." *Ola,* 270 Va. at 556, 621 S.E.2d at 72-73 (citation omitted).

To begin this analysis, courts look to "the powers and purposes set forth in an entity's charter." *Ola,* 270 Va. at 556-57, 621 S.E.2d at 73. "If an organization's charter sets forth a charitable or eleemosynary purpose, there is a rebuttable presumption it operates as a charitable institution in accordance with that purpose." *Id.* at 557, 621 S.E.2d at 73.


In practice, courts find a wide range of purported purposes set forth in an entity's articles of incorporation to be charitable, the aim may be to promote community, culture, education, values, or religion. In many cases, the organization's articles of incorporation, charter, constitution, or other governing documentation will explicitly state the entity's charitable purpose. *See, e.g., Ola,* 270 Va. at 559-60, 621 S.E.2d at 74-75 (the YMCA's articles of incorporation expressly stated its purpose as putting "Judeo-Christian principles into practice through programs that build a healthy body, mind and spirit for all"; the YMCA's charter expressly stated that it could not "carry on any activities not permitted to be carried on by a corporation exempt from Federal income tax" and that its property was so dedicated even upon dissolution); *Byrd Theater Found. v. Barnett,* 287 Va. 291, 297, 754 S.E.2d 299, 302 (2014) ("Based on the Foundation's articles of incorporation and amended bylaws, its charitable aim was to cultivate an appreciation for the performing arts through restoration and preservation of the Byrd Theatre and the organ."); *Conway v. Mount Lebanon Missionary Baptist Church*, 80 Va. Cir. 148, 155 (Chesapeake 2010) (although the church did not have a charter or articles of incorporation, its constitution stated that it provides services to the community by way of "social, economic, political, and educational welfares of the community as a living testimony to Christ," which was held to be a charitable purpose).

Once the court has determined that a given entity is charitable, it proceeds to the second step in its analysis: whether the organization operates in fact with its purported charitable purpose. The Virginia Supreme Court has articulated a number of factors for this inquiry:

> (1) Does the entity's charter limit the entity to a charitable or eleemosynary purpose?
>
> (2) Does the entity's charter contain a not for profit limitation?
>
> (3) Is the entity's financial purpose to break even or earn a profit?
>
> (4) Does the entity in fact earn a profit, and if so, how often does that occur?

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(5) If the entity earns a profit (a surplus beyond expenses) must that be used for a charitable purpose?

(6) Does the entity depend on contributions and donations for a substantial portion of its existence?

(7) Is the entity exempt from federal income tax and/or local real estate tax?

(8) Does the entity's provision of services take into consideration a person's ability to pay for such services?

(9) Does the entity have stockholders or others with an equity stake in its capital?

(10) Are the directors and officers of the entity compensated and if so, on what basis?

*Ola,* 270 Va. at 557 n.1, 621 S.E.2d at 73 n.1 (internal citations omitted).

Notably, "[t]hese factors are not exclusive and the presence or absence of any particular factor is not determinative." *Ola,* 270 Va. at 557, 621 S.E.2d at 73. Furthermore, whether an organization is "charitable" under this test "turns on the facts of each case and not on the particular type of institution." *Id. Compare Ettlinger v. Trustees of Randolph-Macon Coll.*, 31 F.2d 869 (4th Cir. 1929) (holding the college was entitled to charitable immunity) *with Radosevic v. Virginia Intermont Coll.*, 633 F. Supp. 1084 (W.D. Va. 1986) (holding the college was not entitled to charitable immunity).

**Step 2: Is the Tort Claimant a Beneficiary of the Organization?**

Assuming an entity has met the foregoing test, it must then establish that the tort claimant was a beneficiary of the charitable institution at the time of the alleged injury. In this context, "an individual need not receive financial assistance from a charitable entity to be a beneficiary of that organization. Instead a beneficiary is a person who receives something of value, which the organization by its charitable purpose, undertakes to provide." *Ola*, 270 Va. at 564, 621 S.E.2d at 77; *e.g., Egerton v. R.E. Lee Mem'l Church*, 395 F.2d 381, 384 (4th Cir. 1968) (tourist entering historic church to view stained glass is a beneficiary).

Moreover, "a person who pays the full price for services is still a beneficiary of the charitable work of the charitable organization because that entity could not provide those services without charitable contributions[.]" *Ola,* 270 Va. at 564, 621 S.E.2d at 77; *e.g., id.* at 565, 621 S.E.2d at 77-78 ("Ola clearly was a beneficiary of the YMCA's charity, not because she received membership at a reduced fee, but because she was participating in the YMCA swimming program at the time of her injury."); *City of Richmond v. Richmond Mem'l Hosp.*, 202 Va. 86, 94, 116 S.E.2d 79, 84 (1960) ("[W]e hold that hospitals not operated for profit, which devote all of their funds exclusively to the maintenance of the institutions, are charities, and this is so irrespective of the fact that a majority of their patients are required to pay for services rendered.").

However, "mere membership in a class eligible to receive future benefits, conditioned upon circumstances which might never occur, is too remote and speculative to be considered." *Thrasher v. Winand*, 239 Va. 338, 342, 389 S.E.2d 699, 701 (1990); *e.g., id.* ("Mountain Magic's pursuit of its corporate purpose to 'create a greater awareness and visibility of the community of Buchanan' confers indirect benefits which are too remote to give rise to the defense of charitable immunity" to members of other organizations who paid for the privilege of participating in Mountain Magic's festival; "The beneficiaries of Mountain Magic's charity were only those to whom its board of directors donated the proceeds of its fundraising activities, a category to which Thrasher did not belong. Accordingly, the defense of charitable immunity may not be asserted against him.").

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