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Mr. Saldin

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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

IN REPLY REFER TO: B-196022

June 23, 1980

The Honorable William A. Tendy
Acting United States Attorney
Southern District of New York
1 St. Andrews Plaza
New York City, N.Y. 10007

AGC00058

Dear Mr. Tendy:

Subject: Statewide Insurance Co. v. United States, CA NO. 80-1958

AGC00037

By letter of May 5, 1980 (file reference JA:rb 157-51-2397), the Justice Department forwarded a copy of a summons and complaint filed in the United States District Court for the Southern District of New York, Civil Division, in the above-entitled case and requested our report.

FACTS

The complaint stems from an automobile accident which occurred on April 30, 1979, in Hartsdale, New York, at the juncture of Dalewood and Brookdell Drives. The accident involved (1) a Government-owned vehicle dispatched from the General Services Administration (GSA) motor pool and operated by Mr. Norman Krieger, an employee of the United States General Accounting Office stationed at our New York Regional Office, and (2) a vehicle owned by MacKay Publishing Corporation and operated by Mrs. Mildred Kristt, wife of MacKay's President. The MacKay vehicle was insured by State-Wide Insurance Company, plaintiff in this action, under a $250 deductible policy.

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Shortly after the accident, Mr. Krieger, in accordance with GAO regulations, filed the necessary accident reports with the GAO Office of General Counsel. The documents included Standard Form 91, Standard Form 91A, a copy of his travel order, and a brief statement attesting to his scope of employment at the time of the accident.

According to the reports filed by Mr. Krieger, he was proceeding West on Dalewood Drive and about to turn left onto Brookdell Drive, when the vehicle driven by Mrs. Kristt, proceeding North on Brookdell Drive, went through a stop sign and struck the driver's side of the GSA vehicle. Damage resulted to the front of the rear door of the GSA vehicle, and to the front bumper and left front headlight area of the MacKay vehicle. There were no personal injuries, no witnesses, and no police report was filed.

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On September 10, 1979, we received a claim from State-Wide, as MacKay's subrogee, for property damage resulting from the accident. The claim was submitted on a form letter by State-Wide's Claims Department, and included an itemized repair bill in the amount of $543.83, a Proof of Claim statement, and evidence of State-Wide's payment to MacKay of $293.83 (the repair cost of $543.83 less the $250 deductible). The claim contained no descriptive statement of the accident.

In the total absence of evidence to the contrary, we relied on Mr. Krieger's version of the accident and concluded that the cause was Mrs. Kristt's failure to observe the stop sign. Accordingly, we denied the claim in a letter to State-Wide, B-196022, October 15, 1979. Our letter included the "final denial" language required by 28 C.F.R. § 14.9(a).

Subsequently, based on our denial, GSA filed a claim with State-Wide for $200, representing the damage to the GSA vehicle. Mr. Ronald Lemburger, counsel for State-Wide, then made a proposal to GSA under which State-Wide offered to pay 50% of the Government's claim if GAO paid 50% of State-Wide's claim. For reasons not clear to us, Mr. Lemburger negotiated solely with GSA and made no attempt to contact GAO. During these negotiations, Mr. Lemburger offered a different version of the accident, contending that the MacKay vehicle was stopped at the stop sign when it was struck by the vehicle driven by Mr. Krieger.

By letter dated February 22, 1980, Ms. Carol A. Latterman, Assistant Regional Counsel for GSA in New York, transmitted Mr. Lemburger's proposal to us. Upon receipt of this letter, we again discussed the matter with Mr. Krieger, who reiterated that Mrs. Kristt had gone through the stop sign. He further stated (orally) that Mrs. Kristt had admitted fault after the accident occurred. Moreover, in reassessing the facts, we concluded that the Government's case was stronger than the unsupported statement of Mr. Krieger since:

> "The record shows that the GSA vehicle sustained $200 worth of damages on the driver's side of the car, from the front door to the rear door. The policy-holder's vehicle sustained damages to the front bumper and left front headlight area. It is difficult to conceive how the type of damage sustained by the GSA vehicle could have occurred if, in fact, the policy-holder's car had been standing still".

Accordingly, by letter dated April 7, 1980 to Ms. Latterman (from which the above excerpt is quoted), we refused the compromise proposal. State-Wide then filed suit. Along with the complaint was a document shown to us for the first time -- a New York Department of Motor Vehicles accident report. It bears the apparent signature of Mildred Kristt. The "Date Filed" block at the lower left corner

is blank. We are enclosing two copies of all relevant documents from our file.

ADDITIONAL MATTERS

Apart from our opinion that the Government has a very strong case on the record, several additional matters are important both for purposes of defending the suit and for possibly negotiating a settlement. First, the Government should assert a counterclaim for the $200 cost of repairing the GSA vehicle. (GSA's claim letter to State-Wide is one of the enclosures.) Certainly this should be taken into consideration in determining the amount of any settlement. We have no record of any other claim or demand against the plaintiff for counterclaim or setoff purposes.

The second matter concerns the discrepancy between what State-Wide demands as damages in its complaint, $543.83, and what it actually paid out to MacKay, $293.83. The difference in these figures raises a question under a provision of the Federal Tort Claims Act, 28 U.S.C. § 2675.

Section 2675 provides that an action cannot be instituted under the Federal Tort Claims Act until the claimant first presents a claim to the appropriate Federal agency. The section also prohibits instituting an action for a sum in excess of the amount of the claim presented to the Federal agency except when the increased amount is based on newly discovered evidence. Compliance with § 2675 is jurisdictional and cannot be waived. Melo v. United States, 505 F.2d 1026, 1030 (8th Cir. 1974); Best Bearings Co. v. United States, 463 F.2d 1177, 1179 (7th Cir. 1972).

Since State-Wide's original claim was ambiguous as to precisely how much it was seeking, we construed the claim as being for $293.83. Although total damages to the MacKay vehicle were $543.83, State-Wide paid MacKay only $293.83 since MacKay's insurance policy was a $250 deductible. Assuming that State-Wide properly could have asserted a claim on MacKay's behalf for the additional $250, there was nothing in its submission to indicate it was doing so. Indeed, if we had agreed to pay the claim, it would have been for $293.83. Moreover, to date MacKay has not filed a claim with us.

Based on these facts, we think it arguable that the requirements of § 2675 were not followed and, thus, that part of the complaint seeking damages in excess of $293.83 should be dismissed. On the other hand, a court could construe State-Wide's submission as putting us on notice that the total claim was for $543.83 by virtue of that sum being indicated on the "Appraisal Inspection Report" and "Sworn Statement in Proof of Loss" attached to State-Wide's claim letter.

See Executive Jet Aviation, Inc. v. United States, 507 F.2d 508, 515-17 (6th Cir. 1974); Sky Harbor Air Service, Inc. v. United States, 348 F. Supp. 594, 595-96 (D. Neb. 1972). Accordingly, a court might conclude that, since we had notice of the total damages and would have denied MacKay's $250 claim anyway, it would not serve the purpose of 28 U.S.C. § 2675, which is to "ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite fair settlement of tort claims asserted against the United States," 507 F.2d at 515, to dismiss that part of State-Wide's complaint seeking damages in excess of $293.83. In any event, the actual amount of State-Wide's out-of-pocket loss should be an important consideration in any settlement negotiations you might undertake.

Finally, we note that the complaint asks for "$543.83 with interest from April 30, 1979." Interest is, of course, recoverable against the United States only to the extent expressly provided by statute or contract. The Federal Tort Claims Act expressly prohibits pre-judgment interest. 28 U.S.C. § 2674. With respect to post-judgment interest, entitlement is governed by 28 U.S.C. § 2411(b) as modified by the first proviso of 31 U.S.C. §724a. Apart from this limited entitlement, there is no authority for the awarding of interest under the Federal Tort Claims Act. Kelley v. United States, 568 F.2d 259, 268 (2d Cir. 1978).

We fully appreciate that this lawsuit is for a very small sum and normally would be compromised as a matter of routine. We also appreciate that the final determination in this respect is up to you. However, we felt when we denied the original claim, and we still feel, that the taxpayers' money should not be paid out on a claim which has no merit. If we can provide any further assistance, please contact Mr. Richard Seldin of this Office at (FTS or area code 202) 275-5544.

Sincerely yours,

Rollee Efros

Mrs. Rollee Efros
Associate General Counsel