

NOTICE OF CLAIM

A True Story

INTRODUCTION

- ▣ As a prerequisite to filing suit against a governmental entity, the Governmental Immunity Act requires an injured party to file a notice of claim with the entity within one year after the claim arises. *Utah Code Ann. §63G-7-402*
- ▣ The governmental entity has sixty days to approve or deny the claim, after which the claim is deemed denied. *Id. §63G-7-403(1)(b)*
- ▣ The claimant then has one year after the denial of the claim to file litigation in the district court. *Id. §63G-7-403(2)(b)*

Pre-1998 Language

“A claim against a political subdivision, or against its employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the governing body of the political subdivision within one year after the claim arises . . . regardless of whether or not the function giving rise to the claim is characterized as governmental.” Utah Code Ann. § 63-30-13 (1987) (Emphasis added.)

Purpose of Notice of Claim

“The purpose of notice provisions is to afford the political subdivision an opportunity to investigate the claim while the matter is of recent memory, witnesses are yet available, conditions have not materially changed and to determine if there is liability, and if there is, the extent of it.”

Scarborough v. Granite School Dist., 531 P.2d 480, 483 (Utah 1975) (*Dissent*)

Also, to provide opportunity to “correct the condition that caused the injury.” See Houghton v. Dept. of Health, 2005 UT 63, 125 P.3d 860

What about actual notice?

- ▣ Wheeler v. McPherson, 2002 UT 16, 40 P.3d 632 (employee of Kane County involved in motor vehicle accident with plaintiffs)
- ▣ Varoz v. Sevey, 506 P.2d 435 (Utah 1973) (Salt Lake County, through its police officers, was aware of the facts surrounding plaintiff's accident)

Actual Notice is Insufficient

- ▣ “[T]he Supreme Court has indicated that actual notice cannot cure a failure to comply with the notice provisions of the Governmental Immunity Act.” Lamarr v. Utah State Dept. of Transp., 828 P.2d 535, 541 (Utah Ct. App. 1992).
- ▣ “Actual knowledge of the circumstances which resulted in the death of plaintiff’s mother by officials of the county does not dispense with the necessity of filing a timely claim.” Varoz v. Sevey, 506 P.2d 435, 436 (Utah 1973).
- ▣ “The fact that the employees of the County knew of the plaintiff’s injuries at the time they occurred does not dispense of the necessity of filing a timely claim.” Edwards v. Iron County, 531 P.2d 476, 477 (Utah 1975).
- ▣ “Actual notice of a claim by a governmental entity does not excuse a claimant’s strict compliance with the requirements of the Immunity Act.” Greene v. Utah Transit Auth., 2001 UT 109, ¶15, 37 P.3d 1156.

Strict Compliance Required

- ▣ “We have consistently held that where a cause of action is based upon a statute, full compliance with its requirements is a condition precedent to the right to maintain a suit.” Scarborough v. Granite School District, 531 P.2d 480, 482 (Utah 1975).
- ▣ “[T]he Utah Supreme Court has repeatedly held that strict compliance with the notice of claim provision is essential to maintain a suit pursuant to the Governmental Immunity Act.” Kabwasa v. University of Utah, 785 F.Supp. 1445, 1446-47 (D. Utah 1990).
- ▣ “[W]here the government grants statutory rights of action against itself, any conditions placed on those rights must be followed precisely.” Hall v. Utah State Dept. of Corrections, 2001 UT 34 ¶23, 24 P.3d 958.
- ▣ Anything less than strict compliance with the Governmental Immunity Act is not allowed in the absence of ambiguity in the statute. Gurule v. Salt Lake County, 2003 UT 25, 69 P.3d 1287.

How strict is “strict compliance”?

- ▣ Is “substantial compliance” sufficient?
- ▣ Consider Bellonio v. Salt Lake City Corp., 911 P.2d 1294 (Utah Ct. App. 1996), *cert. denied* 917 P.2d 556 (Utah 1996) (plaintiff’s attorney communicated with airport’s insurance carrier, and attorney for airport; served notice of claim on Attorney General, Salt Lake City Attorney, Airport Director, and Airport’s Attorney, but not on mayor or city council.)

Bellonio argued that constructive notice to the governmental entity, coupled with substantial compliance was sufficient.

Substantial Compliance is Insufficient

- ▣ “Because Bellonio never filed his notice of claim with either the mayor or the city council, his claim is barred.” Bellonio v. Salt Lake City Corp., 911 P.2d 1294 , 1296
- ▣ “[I]n conformity with our long established jurisprudence construing the statute – and with our recent interpretation of the 1998 amendment in Greene – we reiterate today that the Immunity Act demands strict compliance with its requirements to allow suit against governmental entities. The notice of claim provision, particularly, neither contemplates nor allows for anything less. . . Accordingly, we decline plaintiffs’ invitation to adopt a ‘substantial compliance’ interpretation of the Act.” Wheeler v. McPherson, 2002 UT 16 at ¶13, 40 P.3d 632

No Duty to Notify Claimant of Errors

In Shunk v. State, 924 P.2d 879 (Utah 1996), the plaintiff erroneously filed his notice of claim with the office of education and the attorney general's office. Notwithstanding the fact that the plaintiff even included a request for assistance in the event that he had not notified the proper governmental entity, the court held:

“Where the statutes are clear . . . as to the requirement for serving a notice of claim on a political subdivision, we cannot require and the statutes do not require that the state or its subdivisions promptly notify claimants of deficiencies of the notice of claim so as to allow them an opportunity to timely rectify their error or deficiency.”

Exceptions to Strict Compliance

“Utah courts have typically required strict compliance with the notice of claim requirements except in certain very limited circumstances.” Bellonio v. Salt Lake City Corp., 911 P.2d 1294 , 1297 (Utah Ct. App. 1996) (emphasis added)

Exceptions to Strict Compliance

Bischell v. Merritt, 907 P.2d 275 (Utah Ct. App. 1995).

Plaintiff was directed by county commission to deliver notice to designated person in county attorney's office. Designated person confirmed the commission's instruction and represented to plaintiff that she was the correct person to receive notice on behalf of county commission.

Court held that plaintiff had "fulfilled the purpose of the notice requirement by filing notice of her claim with the designated person in the County Attorney's Office."

"[i]t appears at best disingenuous for the County to argue that Bischel's notice was inadequate merely because she directed and delivered it as the County Commission and County Attorney's Office instructed. The public deserves more consistent, more credible treatment from its servants."

Exceptions to Strict Compliance

EQUITABLE ESTOPPEL:

Governmental entities may be estopped from raising the Immunity Act as a defense where their statements “induce” plaintiffs into “delay[ing] filing [an] action,” . . . or where such statements mislead plaintiffs into filing notice of claim incorrectly. Wheeler v. McPherson, 2002 UT 16, ¶18, 40 P.3d 632

Exceptions to Strict Compliance

ELEMENTS OF ESTOPPEL:

- (1) a statement or act by one party inconsistent with a claim later asserted;
- (2) a reasonable action or inaction by the other party taken on the basis of the first party's statement or action;
- (3) injury to the second party that would result from allowing the first party to contradict such statement or action.

Exceptions to Strict Compliance

Johnson v. City of Bountiful, 996 F.Supp. 1100 (D. Utah, 1998)

City was estopped as a matter of law from raising plaintiff's failure to comply with notice of claim requirements as a defense where city categorically assured the plaintiff that his damages would be paid (and in fact paid some of plaintiff's damages).

Exceptions to Strict Compliance

Governmental Entity Not Estopped when:

County attorney letter directed plaintiff to “direct all further communications and correspondence to [named outside counsel]” and counsel’s letter included a disclaimer stating letter neither “constituted an acceptance or denial of the ‘Notice of Claim,’ nor . . . Confirm[ed] or verif[ied] sufficiency of the claimants’ notice of claim as required by the Governmental Immunity Act.” Wheeler v. McPherson, 2002 UT 16, ¶19, 40 P.3d 632

See also, Monarrez v. Utah Dept. of Transportation, 2014 UT App 219 (court found denial letter containing similar disclaimer to be persuasive)

Post-1997 Notice of Claim Provisions

▣ Utah Code Ann. §63G-7-401

“Any person having a claim against a governmental entity, or against its employee for an act or omission occurring during the performance of the employee’s duties, within the scope of employment, or under color of authority shall file a written notice of claim with the entity before maintaining an action, regardless of whether or not the function giving rise to the claim is characterized as governmental.”

Post-1997 Notice of Claim Provisions

▣ Utah Code Ann. §63G-7-402

“A claim against a governmental entity, or against an employee fro an act or omission occurring during the performance of the employee’s duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the person and according to the requirements of Section 63G-7-401 within one year after the claim arises regardless of whether or not the function giving rise to the claim is characterized as governmental.”

Post-1997 Notice of Claim Provisions

Unlike the pre 1998 code, current 63G-7-401(3) outlines exactly who is to receive the notice of claim. For example:

- ▣ “The city or town clerk, when the claim is against an incorporated city or town”
- ▣ “The county clerk, when the claim is against a county”

OR . . .

- ▣ “The agent authorized by a governmental entity to receive the notice of claim by the governmental entity under Subsection (5)(e).”

Designated Agent for Notice of Claims

- ▣ “Each governmental entity subject to suit under this chapter shall file a statement with the Division of Corporations and Commercial Code within the Department of Commerce containing . . . (ii) the office or agent designated to receive a notice of claim. . .”
U.C.A. §63G-7-401(5)(a)
- ▣ “A governmental entity may not challenge the validity of a notice of claim on the grounds that it was not directed and delivered to the proper office or agent if the error is caused by the governmental entity’s failure to file or update the statement. . .” *U.C.A. §63G-7-401(7)*

Designated Agent for Notice of Claims

Sauzo v. Salt Lake City Corp., 2007 UT App 282, 168 P.3d 340.

- ▣ S.L.C. designated Risk Manager as Agent to receive notice of claim.
- ▣ Plaintiff filed notice with Risk Manager (3 days after city updated statement to designate City Recorder as agent). **OOPS!**
- ▣ Plaintiff argued that “City’s failure to update the database until November 17 *caused* Suazo to improperly serve his notice of claim on [risk manager] on November 20.”
- ▣ District court held that “reasonable application of the statute demonstrates [Suazo’s] compliance with the [Act’s] requirements.”
- ▣ Court of Appeals reversed the district court stating, “[T]here is nothing to suggest that the City’s failure to update the database until November 17 *caused* Suazo to improperly serve his notice of claim on [the risk manager] on November 20.”

New Timeliness Provision

Utah Code Ann. §63G-7-401(8) (Effective May 13, 2014)

- (8) A governmental entity may not challenge the timeliness, under Section [63G-7-402](#), of a notice of claim if:
- (a) the claimant files a notice of claim with the governmental entity:
 - (i) in accordance with the requirements of this section; and
 - (ii) within 30 days after the expiration of the time for filing a notice of claim under Section [63G-7-402](#);
 - (b) the claimant demonstrates that the claimant previously filed a notice of claim:
 - (i) in accordance with the requirements of this section;
 - (ii) **with an incorrect governmental entity**;
 - (iii) in the good faith belief that the claimant was filing the notice of claim with the correct governmental entity;
 - (iv) within the time for filing a notice of claim under Section [63G-7-402](#); and
 - (v) no earlier than 30 days before the expiration of the time for filing a notice of claim under Section [63G-7-402](#); and
 - (c) the claimant submits with the notice of claim:
 - (i) a copy of the previous notice of claim that was filed with a governmental entity other than the correct governmental entity; and
 - (ii) proof of the date the previous notice of claim was filed.

New Timeliness Provision

In short, if the plaintiff files Notice “with an incorrect government entity” within 30 days before the expiration of the normal filing time, he gets an extra 30 days to file correctly.

Note that this section does not appear to extend time where plaintiff files with incorrect officer or agent – only when plaintiff files with incorrect “government entity.”

Is Strict Compliance Still Required Under the New(ish) Notice Provisions?

Wheeler v. McPherson, 2002 UT 16, 40 P.3d 632

Plaintiff who was involved in motor vehicle accident with county employee filed notice of claim with county commission and county insurance carrier (consistent with pre-1998 code provisions), but not with county clerk (pursuant to post-1997 provisions).

Strict Compliance

McPherson court declined to adopt “substantial compliance” standard proposed by appellant:

“With the 1998 amendment, the legislature has left little open to interpretation and has resolved any potential ambiguities as to whom the Notice must be delivered. This move to clarify the delivery requirements of the Immunity Act reinforces the rule of strict compliance with the statute.”

What About Errors in the Substance of the Notice?

“Applying this rule of strict compliance, we have repeatedly denied recourse to parties that have even slightly diverged from the exactness required by the Immunity Act. Under previous versions of the statute, for example, we have deemed causes of action barred where a party failed to verify her notice with an oath, *Hamilton*, 99 *Utah* at 366-68, 106 *P.2d* at 1030, [or] where the plaintiff filed notice of claim one day late, *Yearsley v. Jensen*, 798 *P.2d* 1127, 1128-29 (Utah 1990).” *Wheeler v. McPherson*, 2002 *UT* 16, 40 *P.3d* 632.

“Nature of Claim” Requirement

Concerning the requirement that notice describe the nature of the claim:

“a plaintiff complies with the mandate of informing a governmental entity of the ‘nature of the claim’ asserted so long as the notice contains enough specificity . . . to inform [the governmental entity] as to the nature of the claim so that the [governmental entity] can appraise its potential liability.” Doyle v. Lehi City, 2012 UT App 342 at ¶14, 291 P.3d 853

Including “other causes of action” in the notice of claim does not provide the required specificity. Cloud v. Washington City, 2012 UT App 348, 295 P.3d 181

Savings Statute Apply?

- ▣ U.C.A. §78B-2-111 permits a plaintiff who timely filed an action to re-file it within one year if the action is dismissed “otherwise than upon the merits.”
- ▣ Nope.
- ▣ *See e.g. Standard Federal Sav. And Loan Ass’n v. Kirkbride, 821 P.2d 1136 (Utah 1991).*

What About Minors?

Utah Supreme Court held that general tolling provisions of the Utah Code apply to all statutes of limitations, including the notice of claim provisions, until a minor reaches the age of 18. Therefore, notice of claim is not required to be filed until within 1 year after minor turns 18. Cole v. Jordan Sch. Dist., 899 P.2d 776 (Utah 1995).

Action by a minor requires appointment of a guardian ad litem.

Minors -- continued

- ▣ If government entity is aware that a minor might have a claim, then it may request that the court appoint a guardian ad litem. *U.C.A. §63G-7-401(4)*
- ▣ “If a guardian ad litem is appointed, the time for filing a claim under Section 63G-7-402 begins when the order appointing the guardian is issued.”

2014 Notice of Claim Cases

Mallory v. Brigham Young University, 2014 UT 27, 332 P.3d 922.

BYU defendants regulated under Provo City Ordinance were held to be “Employees” under the Governmental Immunity Act.

“We hold that the BYU Defendants were servants of Provo City and therefore statutory Employees under the Act. Consequently, Mr. Mallory’s failure to file a timely notice of claim divested the district court of subject matter jurisdiction over his lawsuit.”

2014 Notice of Claim Cases

Monarrez v. Utah Dept. of Transportation, 2014
UT App 219

Plaintiff filed timely notice of claim with UDOT. After the sixty-day “deemed-denied” period, UDOT sent plaintiff a letter denying his claim. Plaintiff argued that denial letter restarted the one-year period in which to file suit in district court.

A Few Do's and Dont's

DO:

- ▣ investigate the claim while the matter is of recent memory, witnesses are yet available, and conditions have not materially changed
- ▣ determine if there is liability, and if there is, the extent of it
- ▣ evaluate opportunities, where appropriate, to settle quickly and avoid unnecessary litigation
- ▣ correct the condition that caused the injury
- ▣ include disclaimers in correspondence with claimants
- ▣ Request appointment of guardians ad litem for injured minors where appropriate

DON'T:

- ▣ issue a denial of the claim AFTER the sixty day “deemed denied” period
- ▣ induce claimants to delay filing a notice of claim
- ▣ make statements which mislead plaintiffs into filing notice of claim incorrectly
- ▣ forget to file (or update) designated agent with Division of Corporations and Commercial Code

THE END