



ISSN 1935-0007

*Cite as:* 2020 (4) AELE Mo. L. J. 101  
Civil Liability Law Section – April 2020

**Civil Liability of U.S. Government  
Under the Federal Tort Claims Act  
For Actions of Federal Law Enforcement Officers**

*Part 1 (Last Month)*

- Introduction
- Provisions of Statute
- Discretionary Function Exception
- Excluded Torts and Law Enforcement Exception
- Detention of Goods and Forfeiture Exception

*Part 2 (This Month)*

- Scope of Employment
- Judgment Bar Rule
- Procedural Requirements
- Damages Available
- Attorneys' Fees
- Resources and References

*This is part 2 of a two-part article. To read part 1, click [here](#).*

❖ **Scope of Employment**

*In order for the U.S. government to be held liable under the Federal Tort Claims Act for the actions of a federal employee, that employee must be acting within the scope of their employment.*

Illustrating this, in [Merlonghi v. U.S.](#), #09-2387, 620 F.3d 50 (1st Cir.2010), the federal government was not liable under the Federal Tort Claims Act for the actions of a U.S. Special Agent who became involved in an auto accident during a car chase with a motorcycle rider. He did not act within the scope of his employment and acted

as a private person while driving home from work in an unmarked government vehicle when he became involved in the dispute with the motorcyclist.

**The federal government may substitute itself as the defendant in a lawsuit against a federal employee by certifying that the employee was acting within the scope of his or her employment.** As noted in [Osborn v. Haley](#), #05-593, 549 U.S. 225 (2007), the Westfall Act, 28 U.S.C. Sec. 2679(b)(1) provides federal employees absolute immunity from tort claims for actions taken in the course of their official duties, and gives the Attorney General the power to certify that a federal employee sued for wrongful or negligent conduct was acting within the scope of his office or employment at the time of the incident.

Once that certification takes place, the U.S. government is substituted as the defendant instead of the employee, and the lawsuit is then governed by the Federal Tort Claims Act. Additionally, if the lawsuit began in state court, the Westfall Act provides that it shall be removed to federal court, and renders the Attorney General's certification "conclusive" for purposes of the removal.

Once the certification and removal take place, the federal court has the exclusive jurisdiction over the case, and cannot decide to send the lawsuit back to state court. In this case, the U.S. Supreme Court also ruled that certification can take place under the Westfall Act in instances where the federal employee sued claims, and the Attorney General also concludes, that the incident alleged in the lawsuit never even took place.

Also see [Wang v. Ashcroft](#), #02-6123, 61 Fed. Appx. 757, 2003 U.S. App. Lexis 6349 (2nd Cir. 2003), finding that the U.S. government was not responsible, under Federal Tort Claims Act (FTCA), 28 U.S.C. Sec. 2680(a) for the alleged intentional misconduct of informants in a case where the indictment against the plaintiff for conspiring to transfer human organs from executed Chinese prisoners for human transplantation was dismissed.

Such liability under the statute was not possible when the informants were not employees acting within the scope of their employment and were not investigative or law enforcement officials. The plaintiff also failed to show that the conduct of federal agents involved in the case fell outside the scope of the "operative discretionary function exception" to liability under the statute for law enforcement actions involving an element of discretion.

In [Primeaux v. U.S.](#), #97-2691, 181 F.3d 876 (8th Cir. 1999), the court held that the federal government was not liable for an officer's alleged rape of female motorist when officer's actions were outside of the scope of his employment. A federal appeals court rejected "apparent authority" as a basis for liability under the Federal Tort Claims Act.

In *Ware v. Doane*, 227 F. Supp. 2d 169 (D. Me. 2002), a factual issue existed as to whether a federal employee was acting within the scope of his employment when his vehicle struck a motorist's car as he was driving his own car at the time and made no effort to attend a purported work-related meeting after the collision despite the drivable condition of his vehicle. The plaintiff could therefore challenge the U.S. government's attempts to substitute itself as the proper defendant and have the case dismissed for the plaintiff's alleged failure to pursue administrative remedies under the Federal Tort Claims Act, 28 U.S.C. Sec. 2401(b) within two years of the accident.

### ❖ Judgment Bar Rule

**The “judgment bar” rule, stated in 28 U.S.C. Sec. 2676, operates so that a judgment in an action under the FTCA constitutes “a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.”**

Illustrating this, in *Manning v. U.S.A.*, #07-1120, 549 Fed. 3d 430 (7th Cir. 2008), a former Chicago police officer sentenced to death on kidnapping and murder charges subsequently had his conviction overturned, and sued FBI agents for allegedly “framing” him in violation of his constitutional rights. A jury found for the plaintiff on these claims, and \$6.5 million in damages was awarded. The trial court subsequently granted judgment to the U.S. government on malicious prosecution claims under the Federal Tort Claims Act, 28 U.S.C. Secs. 1346, 2671-2680.

The trial court subsequently also vacated the jury's award to the plaintiff on the federal civil rights claims, finding that the “judgment bar” rule of the FTCA contained in 28 U.S.C. Sec. 2676 barred the federal civil rights claims against the FBI agents, even though the judgment against them had previously been entered. Under the applicable provision of the FTCA, a judgment under the FTCA acts as a “complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.” In this case, the plaintiff, by pursuing both federal civil rights claims, and claims under the FTCA, and failing to drop the FTCA claims after he received the jury's \$6.5 million verdict on the federal civil rights claim, lost any right to collect on the jury's verdict.

His decision to proceed to take the FTCA claims to judgment, the court found, triggered Sec. 2676 and required the vacating of the jury's award after the FTCA claim was rejected. A federal appeals court upheld this result. The appeals court stated that it was “bound by the plain language of the judgment bar, which

makes no exception for claims brought in the same action, and gives no indication that the sequencing of judgments should control the application of the bar.”

## ❖ Procedural Requirements

28 U.S.C. Sec. 2675 provides that those seeking to sue under the FTCA must first submit a claim in writing to the appropriate federal agency, and have that claim denied by the agency in writing. If the agency does not make a final disposition of the claim, the claimant may treat it as denied. The claim must be received by the agency within two years of the negligence or wrongful act.

An exception to the “receipt” rule was recently mandated by a federal appeals court in [Censke v. U.S.](#), #18-2695, 2020 U.S. App. Lexis 1580 (7th Cir.) in an FTCA claim filed by a prisoner. The plaintiff sought damages under the Federal Tort Claims Act (FTCA) for injuries allegedly inflicted on him by Indiana federal prison guards who allegedly physically abused him. The statute required that he give written notice to the federal Bureau of Prisons (BOP) regional office within two years of the incident. The BOP considers claims to be filed when it receives them.

In the two years following the incident at issue, the prisoner moved prisons six times. He contends that he lost his legal materials and that prison staff ignored his request for the required form. When he finally got the form, prison staff allegedly refused to help him determine the correct address to send it to. Nine days before the end of the two year limitations period, he placed his form in the outgoing mail, addressed to the BOP in Washington, D.C.

The BOP stamped it as received at a different office in the North Central Regional Office over two months after he put it in the mail. The BOP denied the claim on the merits, without mentioning timeliness. When he filed a lawsuit under the FTCA, the trial court rejected his claim and his argument for equitable tolling and delayed accrual of his claim, believing his filing untimely. A federal appeals court reversed, ruling that the prison-mailbox rule applies to administrative filings under the FTCA, so his form was deemed received when mailed, not when received.

### **Failure to exhaust available administrative remedies will bar an FTCA lawsuit.**

See [Barrett v. U.S.](#), #05-1905, 462 F.3d 28 (1st Cir. 2006), holding that a wife could not pursue her claim under the Federal Tort Claims Act against the U.S. government for the death of her husband, allegedly murdered by FBI informants, since she failed

to exhaust her available administrative remedies before filing her lawsuit. Also see [\*Callahan v. U.S.\*](#), #04-2466, 426 F.3d 444 (1st Cir. 2005), ruling that a lawsuit against the U.S. government for alleged FBI complicity in the organized crime murder of a man purportedly ordered by two high-level FBI mob informants was barred because the victim's spouse failed to file an administrative claim with the FBI for over two years after she should have known, from publicly available information, that she had a possible claim.

In accord is [\*Cureton v. U.S. Marshal Service\*](#), #03-1531, 322 F. Supp. 2d 23 (D.D.C. 2004), in which the court concluded that a wife who was attacked and injured by her husband when he escaped from the custody of the U.S. Marshals Service after allegedly violating a domestic violence order of protection could not pursue her lawsuit against the Marshals Service and U.S. government when she failed to exhaust available administrative remedies under the Federal Tort Claims Act (FTCA), 28 U.S.C. Sec. 1346, 2671 et seq. She also could not pursue federal civil rights claims against federal officials under 42 U.S.C. Sec. 1983 in the absence of any allegation that they acted under color of state law.

In [\*Gallardo v. United States\*](#), #12-55255, 755 F.3d 860 (9th Cir. 2014), a Marine sergeant was accused of having committed a sexual assault while on a recruitment detail at a middle school. A lawsuit was filed against the U.S. government for the sexual assault under the Federal Tort Claims Act (FTCA). The claim accrued when the plaintiff became aware of her injury, not when she claimed to have learned of the Marine Corp's negligence.

Since she did not file an administrative claim until four years after the incident, the FTCA's two-year statute of limitations would ordinarily bar the claim, but during the appeal of the lawsuit's dismissal, the 9th Circuit ruled in [\*Wong v. Beebe\*](#), #10-36136, 732 F.3d 1030 (9th Cir. 2013) that equitable tolling of the statute of limitations was available in FTCA cases. The appeals court therefore ordered that the trial court hold further proceedings to consider the plaintiff's equitable tolling arguments. [Subsequently, cert. was granted in the *Wong* case, and the U.S. Supreme Court ruled, in [\*United States v. Kwai Fun Wong\*](#), #13-1074, 575 U.S. 402 (2015) that a federal court could equitably toll the time limit.].

In [\*Donahue v. U.S.\*](#), #09-1950, 634 F.3d 615 (1st Cir. 2011), a federal appeals court ruled that lawsuits filed under the Federal Tort Claims Act against the federal government claiming it was liable for two deaths because of the F.B.I.'s thirty-year "alliance" with a mobster-turned-informant were time-barred under an applicable two-year statute of limitations.

The mobster allegedly ordered the decedents' deaths. The plaintiffs had sufficient information to assert their claims more than two years before they did so, based on

testimony in a hearing about the federal government's role in the cases, and media reports of the information.

Similarly, in [\*Feurtado v. Dunivant\*](#), #06-56496, 244 Fed. Appx. 81, 2007 U.S. App. Lexis 14238 (9th Cir.), the court ruled that an arrestee's claims for alleged unlawful detention accrued at the latest in 1996, so that claims he asserted under the Federal Tort Claims Act (FTCA) in 2004, were barred by a two-year statute of limitations in 28 U.S.C.S. § 2401(b).

See also, [\*Braunstein v. U.S. Postal Service\*](#), #05-16390, 2007 U.S. App. Lexis 8831 2007 WL 1112620 (9th Cir.), ruling that arrestee's claims for false arrest and malicious prosecution under the Federal Tort Claims Act and for federal postal employees' alleged violations of his federal civil rights accrued at the date that the alleged wrongful prosecution of him ended, so that they were barred by an applicable two-year statute of limitations.

#### ❖ Damages Available

28 U.S.C. Sec. 2674 provides that in cases involving causing a person's death, if state law of the place where the death occurred "provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."

With a few exceptions, such as a showing of intervening facts or newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, a plaintiff may not be awarded more than the amount of damages they initially asked for in submitting their administrative claim to a federal agency. Prejudgment interest also may not be awarded in most cases. If state law contains a cap on damages in certain types of claims, that cap will also limit damages awardable for such claims under the FTCA.

**The amount of damages potentially awardable under the FTCA is enormous.** The U.S. Department of the Treasury's Bureau of the Fiscal Service reports that the United States spends hundreds of millions of dollars annually to pay tort claims under the FTCA. In [\*Limone v. U.S.\*](#), #08-1327, 579 F.3d 79 (1st Cir. 2009), almost thirty years after four men were convicted of involvement in an organized crime "gangland slaying," the F.B.I. disclosed, for the first time, that it had all along possessed reliable intelligence undercutting the testimony of a cooperating witness whose version of the murder was the basis of the convictions, but had suppressed



this information. All four convictions were vacated, but by then, two of the men had died in prison, the third had been paroled, and only the fourth was still incarcerated.

The two surviving men, along with the estates of the two decedents, sued the U.S. government under the Federal Tort Claims Act (FTCA), 28 U.S.C. Secs. 1346(b), 2671-2680. After a bench trial, the court found the government liable, awarding \$101.7 million in damages.

A federal appeals court, while commenting that the damage awards were “considerably higher than any one of us, if sitting on the trial court bench, would have ordered,” nevertheless upheld the awards, finding that they were not “so grossly disproportionate to the harm sustained as to either shock our collective conscience or raise the specter of a miscarriage of justice.”

There was no liability for malicious prosecution, the court held, as the U.S. government had not initiated the murder prosecution of the four men by the state of Massachusetts, but liability was found on the basis of a state law claim for intentional infliction of emotional distress, applicable to the U.S. government through the FTCA. The court found that the FBI’s conduct was the cause of the convictions, and that the conduct met the standard for intentional infliction of emotional distress, as the alleged actions violated all standards of decency and were intentional.

In [\*Roark v. U.S.\*](#), #6:05CV00041, 456 F. Supp. 2d 739 (W.D. Va. 2006), a motorist injured when his car was rear-ended by a car which had itself been rear-ended by a vehicle driven by an FBI agent was entitled to \$651,037.01 in damages, including \$100,000 for pain and suffering, future lost wages of \$408,562 based on diminished earning capacity, and other damages for medical expenses and property damages. The award was made in a lawsuit for negligence against the FBI agent under the FTCA, and the court ruled that such negligence was the cause of the accident.

Similarly, in [\*Marin v. United States\*](#), #91-135, 814 F.Supp. 1468 (E.D. Wash 1992), the U.S. government was held liable for \$779,305 to the estate and family of a woman murdered by an indicted federal felon released from custody in order to work as an informant for the INS. INS agents failed to adequately supervise the informant, to warn the murder victim or local police department of his release, or to take action to apprehend him.

#### ❖ Attorneys’ Fees

28 U.S.C. Sec 2678 limits attorneys’ fees charged by any lawyer to no more than 25% of any judgment or settlement in an FTCA lawsuit and to a lesser amount of 20% of any award, compromise, or settlement made by the U.S. Attorney General

after an administrative claim is filed with a federal agency. Any attorney who attempts to charge more can be punished by a fine of up to \$2,000 or one year in prison.

**The FTCA does not, by itself, provide for court ordered awards of attorneys' fees. But since it incorporates state law, and state law in some instances may provide for awards of attorneys' fees, such awards are sometimes (rarely) possible in FTCA cases.**

In [Stive v. U.S.](#), #03-2151, 366 F.3d 520 (7th Cir. 2004), an Illinois man brought a lawsuit against the U.S. government under the Federal Tort Claims Act (FTCA), 28 U.S.C. Sec. 2671-2680, alleging battery by two police officers employed by the Department of Veterans Affairs at a VA hospital. In this case, applying Illinois state law, which requires, in a lawsuit for battery against police officers, that the plaintiff prove that the officers acted “willfully and wantonly.” The trial court judge found that the plaintiff had proven his case and awarded \$87,000 in damages, as well as later awarding \$49,000 in attorneys' fees.

The government appealed only the award of attorneys' fees, arguing that the trial judge had used the wrong legal standard in making the award. The trial judge had ruled that for the government to be liable for payment of the attorneys' fees in the case, it would have to be shown to have acted “wantonly” in resisting (defending against) the lawsuit, which he defined as “causelessly, without restraint, and in reckless disregard of the rights of others.”

The Equal Access to Justice Act, [28 U.S.C. Sec. 2412\(b\)](#), the appeals court noted, makes the United States liable for attorneys' fees “to the same extent that any other party would be liable under the common law.” Under common law, however, the general rule is that each party to a lawsuit pays their own attorneys' fees unless “the losing party 'has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.” The U.S. government, therefore, argued that the trial judge's awarding of attorneys' fees on a mere showing of “wanton” conduct was improper, and that something closer to “deliberate misconduct” was required.

The appeals court found, however, that when it looked carefully at the trial judge's definition of “wantonly,” the key term was “reckless disregard,” and “one is reminded that recklessness is frequently in the law a near synonym for intentionality.”

Whichever standard was used, however, the appeals court found that it was “not close to being satisfied” in this case.



“A defendant normally has a right to defend, rather than having to keel over just because a suit has been filed against him. There are utterly frivolous defenses, as we know from tax-protester cases, but the defense in this case was not frivolous. Nor was it improperly motivated.”

In this case, the officers ordered the plaintiff out of his car, patted him down, and handcuffed him because of a suspicious, although ultimately innocent bulge in his pocket. During the encounter, his shoulder was seriously injured. He claimed that one of the officers had pushed his face against the car, grabbed his arm, and twisted his arm and shoulder, but the officers stated that in the process of handcuffing him one of them had applied an arm lock to him because he was resisting.

Unknown to the officers, the plaintiff, who was 72-years-old, had a damaged rotator cuff in his shoulder which was vulnerable to being injured by an application of even slight force. The trial judge found that an officer punched the plaintiff in the shoulder, telling him that it would “be sore” for days. As there was “no excuse for his doing that,” the battery was “wanton” under Illinois law, the appeals court found.

This did not mean, however, that the government was “wanton” in defending against the battery claim. Based on the pre-existing condition of the plaintiff's shoulder, the severity of his injury was “not inconsistent” with what the officers claimed happened. Accordingly, if the judge had believed the officers, he would not have found them to have acted wantonly. Under these circumstances, the appeals court found that the award of any amount of attorneys' fees was unreasonable.

## ❖ Resources

The following are some useful resources related to the subject of this article.

- [Federal Tort Claims Act](#). AELE Civil Case Summaries.
- [Federal Tort Claims Act](#). AELE Corrections Case Summaries.
- [Federal Tort Claims Act](#). Text of statute.
- [Federal Tort Claims Act](#). Wikipedia article

## ❖ References: *(Chronological)*

1. [The Federal Tort Claims Act: A Legal Overview](#), Congressional Research Service (November 20, 2019).
2. [Assigning the Burden of Proof for the Discretionary Function Exception to](#)

[the Federal Tort Claims Act: An Optimal Approach](#), by Adin Pearl, 73 NYU Annual Survey of American Law 275 (2018).

3. [Federal Tort Claims Act](#), U.S. Attorney's Bulletin, U.S. Department of Justice (November 2010).

---

### **AELE Monthly Law Journal**

Bernard J. Farber  
Civil Liability Law Editor  
P.O. Box 75401  
Chicago, IL 60675-5401 USA  
E-mail: [bernfarber@aele.org](mailto:bernfarber@aele.org)  
Tel. 1-800-763-2802

© 2020, by the AELE Law Enforcement Legal Center

**Readers may download, store, print, copy or share this article, but it may not be republished for commercial purposes. Other web sites are welcome to link to this article.**

- 
- The purpose of this publication is to provide short articles to acquaint the reader with selected case law on a topic. Articles are typically six to ten pages long. Because of the brevity, the discussion cannot cover every aspect of a subject.
  - The law sometimes differs between federal circuits, between states, and sometimes between appellate districts in the same state. AELE Law Journal articles should not be considered as “legal advice.” Lawyers often disagree as to the meaning of a case or its application to a set of facts.

---

**[AELE Home Page](#) --- [Publications Menu](#) --- [Seminar Information](#)**