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November 1994

**Principles of  
Federal  
Appropriations  
Law**

**Second Edition**

**Volume III**

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# Foreword

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Volume III of this second edition continues the process of revising and updating Principles of Federal Appropriations Law, originally published in 1982. This is our “claims and judgments” title, consolidating in one volume our coverage of claims against the United States, claims by the United States (debt collection), and the payment of judgments and related litigation awards.

While we will publish a fourth (and final) volume, the first (1982) edition of Principles is now completely superseded with the issuance of this Volume III.

We thank our readers for their expressions of support and hope they will continue to find Principles a useful reference.



Robert P. Murphy  
General Counsel

November 1994

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“He who lives a long life and never changes his opinions may value himself upon his consistency; but rarely can be complimented for his wisdom.”

Justice Joseph Story in a letter written in 1818, quoted in 75 Harv. L. Rev. 707, 720 (1962).

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## Abbreviations

CDA	Contract Disputes Act of 1978
C.F.R.	Code of Federal Regulations
FAR	Federal Acquisition Regulation
FCCS	Federal Claims Collection Standards
FTCA	Federal Tort Claims Act
FY	Fiscal Year
GAO	General Accounting Office
MTMC	Military Traffic Management Command
OMB	Office of Management and Budget
TFM	Treasury Financial Manual
UCC	Uniform Commercial Code
U.S.C.	United States Code

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# Claims Against the United States

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“The Auditors and Comptrollers, and the accountants under them, constitute the safeguard of the National Treasury, and have to withstand the whole army of claimants and their interested clamor.” 4 Lawrence, First Comp. Dec. xix (emphasis omitted) (Introduction) (1883).

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## A. Introduction

A “claim” may be defined simply as a demand for money or property.<sup>1</sup> The settlement of claims against the United States, called “payment claims,” is the subject of this chapter. Claims by the government against others, called “debt claims,” are covered in Chapter 13.

Claims against the government can arise out of virtually any aspect of federal operations. Any federal program that involves the disbursement of funds can generate claims. Claims may arise in areas covered by other chapters of this publication. For example, Chapter 4 discusses a number of restrictions on the purposes for which appropriated funds may be used. Questions in these areas frequently arise in the form of claims which cannot be paid because of a particular restriction. Assistance programs generate claims. Also, a great many claims involve areas covered by GAO’s Civilian and Military Personnel Law Manuals. The purpose of this chapter is to present an overview of the claims settlement process, a description of GAO’s claims settlement functions, and a brief discussion of several types of claims not covered elsewhere.

When, over 100 years ago, First Comptroller Lawrence wrote the words quoted at the top of this page, claims settlement was viewed as largely an adversarial process. “They” (the claimants) were out there, like a horde of invading Huns, trying to get money from the Treasury; “we” (government officials) were the army of the righteous trying to prevent them from doing so. Claims settlement was much simpler back then. Many of the key claim-generating statutes, such as the Federal Tort Claims Act, had not yet been enacted. Most claimants who bothered to file with the accounting officers were denied for lack of a legal basis. Of this group, most lacked access to the courts and could do little else but seek private relief legislation.

To say that the law has changed over the last hundred years is to barely hint at the enormity of the change. Literally dozens of statutes, in varying degrees of detail, now permit claims against the United States in a wide variety of contexts. Persons injured by negligent acts of government

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<sup>1</sup>Black’s Law Dictionary 247 (6th ed. 1990). A claim against the United States, said the Supreme Court, “is well understood. It is a right to demand money from the United States.” Hobbs v. McLean, 117 U.S. 567, 575 (1886).

employees have the Federal Tort Claims Act. There is now a highly sophisticated mechanism for settling contract claims. Victims of certain types of discrimination have avenues of redress unheard of in Lawrence's era. And the list goes on and on. It can scarcely be disputed that the United States has taken huge strides in recent decades towards the goal of a fair and just relationship with its citizens.

Along with these changes in the law, attitudes have also begun to change. To be sure, there is still an adversarial element in claims settlement, especially when a claim is taken to court. There is nothing wrong with this. Certainly the government has the right, if not the duty, to present and argue available defenses, and to the extent the American adversarial approach to litigation has value to begin with, that value applies equally to federal claims litigation. At the administrative level, however, federal claims officials are increasingly recognizing the duality of their role. On the one hand, they are, and will remain, guardians of the Treasury. Claims settlement must be more than just giving away the taxpayers' money. Yet on the other hand, the function of claims settlement is to provide fair compensation, as and to the extent authorized by law, to those harmed by actions of the government. Claims settlement succeeds to the extent it is able to do this in a fiscally responsible manner.

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## B. Claims Settlement in the Federal Government

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### 1. Sources of Authority and Role of the Administrative Process

The fundamental tenet of this entire publication is that the expenditure of public funds must be authorized by law. The payment of claims is no exception. As with other fiscal contexts, "authorized by law" may take various forms. A few claims are authorized directly by the Constitution. For example, the Fifth Amendment mandates the payment of just compensation for governmental takings of private property. You may find statutes telling you what courts to use (28 U.S.C. §§ 1346(a)(2), 1491), but you do not need a statute authorizing you to assert the claim. The Fifth Amendment itself fills that role.

Contractual relationships provide another source of authority. A contract is a legal instrument from which legal rights, duties, and obligations flow. A federal agency has the inherent power—no statute is needed—to enter

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into contracts in the execution of its duties. E.g., United States v. Tingey, 30 U.S. (5 Pet.) 115, 127–28 (1831). While contract claims are now governed by statute, there is authority for the proposition that agencies have the inherent authority, as an incident to the power to enter into contracts, to settle at least certain types of contract claims. United States v. Corliss Steam-Engine Co., 91 U.S. 321 (1875); Cannon Construction Co. v. United States, 319 F.2d 173 (Ct. Cl. 1963); Brock & Blevins Co. v. United States, 343 F.2d 951 (Ct. Cl. 1965). Cannon contains the best discussion.<sup>2</sup>

Another broad source of claims activity is statutes which create a right or entitlement, whether or not they specifically address claims. For example, under 5 U.S.C. § 5702(a), an employee traveling on official business “is entitled to” certain travel allowances. An employee who is erroneously not paid travel allowances otherwise due does not need a statute to authorize him or her to file a claim for the proper allowance. The right to file a claim derives from the entitlement. Similarly, if an agency misapplies a mandatory allocation formula under an assistance program, the beneficiary who got too little does not need specific statutory authority to file a claim for the right amount.

Finally, there is a fairly large universe of claims statutes that serve a wide range of functions. Some establish the authority to settle certain types of claims in situations where that authority would not otherwise exist. A prime example here is the Federal Tort Claims Act. Others, the Contract Disputes Act for example, do not necessarily create the right to file claims but nevertheless provide a statutory basis and establish procedures. Some, as the two cited, are governmentwide. Many others are agency-specific. An example is 31 U.S.C. § 3724, which authorizes the Attorney General to settle claims of not more than \$50,000 for personal injury or property damage caused by law enforcement officers employed by the Department of Justice which cannot be settled under the Federal Tort Claims Act.

Thus, while claims settlement must be authorized by law, there is no particular form that authority must take. When dealing with statutes, however, whether they specifically address claims or create entitlements from which the right to file claims is inferred, the guiding principle is that “liability . . . is not to be imposed upon a government without clear words.” Pine Hill Coal Co. v. United States, 259 U.S. 191, 196 (1922). Where the

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<sup>2</sup>The issue has been controversial and the authorities far from unanimous. For a good discussion, see Joel P. Shedd, Jr., “Administrative Authority to Settle Claims for Breach of Government Contracts,” 27 *Geo. Wash. L. Rev.* 481 (1959). GAO disagreed at one time, at least with respect to breach claims, but later retrenched. See 44 *Comp. Gen.* 353, 356 (1964), modified by 56 *Comp. Gen.* 289 (1977). Also, an agency’s authority to settle a claim must be distinguished from the right to bring a lawsuit. The two are not necessarily coexistent.

liability is potentially large, “only the plainest language” will suffice. Id. See also United States v. Zazove, 334 U.S. 602, 616–17 (1948); Brookfield Construction Co. v. United States, 661 F.2d 159, 163–64 (Ct. Cl. 1981); Schellfeffer v. United States, 343 F.2d 936, 942 (Ct. Cl. 1965).

It should also be noted that, absent an authorizing statute, an agency has no authority to create liability by regulation. Illinois Central RR Co. v. United States, 52 Ct. Cl. 53 (1917).<sup>3</sup> See also, e.g., Mitzelfelt v. Department of Air Force, 903 F.2d 1293 (10th Cir. 1990); B-201054, April 27, 1981. This principle follows logically and directly from the more fundamental principle that—

“Agents and officers of the Government have no authority to give away the money or property of the United States, either directly or under the guise of a contract that obligates the Government to pay a claim not otherwise enforceable against it.”

Bausch & Lomb Optical Co. v. United States, 78 Ct. Cl. 584, 607 (1934), cert. denied, 292 U.S. 645.

If there is no common basis of claims authority throughout the federal government, there is also no common set of procedures. Certainly the courts often have the final word, but the first step in the process is usually an administrative determination, and the care (or lack thereof) with which the agency handles the initial administrative stage can and often does influence the rest of the process. Indeed, most claims against the federal government are resolved administratively without the need for court action. No one has any idea how many claims are processed by the federal government each year. If, however, every claim against the United States had to go to court, the federal court system would sink without a trace.

The role of the administrative process varies depending on the particular statutory scheme involved. As the Supreme Court has stated:

“The United States may create rights in individuals against itself and provide only an administrative remedy. . . . It may provide a legal remedy, but make resort to the courts available only after all administrative remedies have been exhausted. . . . It may give to the individual the option of either an administrative or a legal remedy. . . . Or it may provide only a legal remedy.”

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<sup>3</sup>We have been unable to find any authority or even suggestion that the heads of departments can, by regulation, require from the Government the payment of money for any purpose not specifically authorized by law.” Id. at 59.

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Tutun v. United States, 270 U.S. 568, 576–77 (1926). Taking these in reverse order, at one extreme there may be no administrative process at all. A statute may require that claims of a given type be resolved only by court adjudication. Statutes of this type usually deal with temporary or “ad hoc” situations. An example is the so-called “Tris Act,” Pub. L. No. 97-395, 96 Stat. 2001 (1982), enacted to provide a mechanism to indemnify manufacturers, distributors, and retailers adversely affected when the Consumer Product Safety Commission banned the chemical known as “Tris” in 1977. The statute did not provide for administrative adjudication, but required that claims be filed in what was then the United States Claims Court.

At the other extreme, the administrative process may be the only process there is. Congress may make administrative decisions final and is not required to provide for judicial review. United States v. Babcock, 250 U.S. 328, 331 (1919); Milliken v. Gleason, 332 F.2d 122 (1st Cir. 1964), cert. denied, 379 U.S. 1002; Gross v. United States, 505 F.2d 1271 (Ct. Cl. 1974); Simons v. United States, 25 Cl. Ct. 685 (1992). Under one type of statute known as a “statute of grace,” Congress gives agencies discretionary authority to settle claims of a particular type for which legal liability does not otherwise exist. The statute provides for administrative settlement, but not judicial review. An example is the Military Personnel and Civilian Employees’ Claims Act of 1964, 31 U.S.C. § 3721. Under this type of statute, the courts may compel an agency to actually exercise its discretion and may enforce constitutional requirements, but may not otherwise review the merits of the agency’s decision on an individual claim. E.g., Work v. Rives, 267 U.S. 175 (1925).

In between the two extremes one encounters a variety of situations. Under some of the major claim statutes, an attempt at administrative resolution is a mandatory prerequisite to being able to sue. Examples are the Federal Tort Claims Act and Contract Disputes Act. Under statutes of this type, the merits of the agency’s decision will be subject to judicial scrutiny.

As we have noted, a great many claims arise under statutes which do not directly address claims settlement or procedures. For example, 19 U.S.C. § 1619 authorizes rewards to persons furnishing information concerning violations of the customs laws. The statute nowhere mentions the processing of claims. As discussed in Chapter 4, a person claiming a reward under this statute can file suit under the Tucker Act. This being the case, it follows that the claimant should be able to pursue the presumably faster and less expensive route of administrative adjudication, without the

need to file a lawsuit. For claims in this broad category, administrative settlement is an available option, although it is not legally required as a prerequisite to suit.

For now, the point to emphasize is that every federal agency is exposed to claims. At an absolute minimum, the agency will have employees with various entitlements; it will enter into contracts of one sort or another; and it will be exposed to potential tort liability. Thus, every agency engages in administrative claims settlement. The degree of formality and sophistication will vary with the agency's size and the types of programs it administers, but every agency does it and must therefore be prepared to do it.

There can be no doubt that the policy of the United States Government is to encourage the resolution of claims at the administrative level and thereby minimize the need to resort to the courts. The success of this system requires public confidence in the basic fairness and integrity of the administrative process. This, apart from the fact that we have to do it anyway, is why administrative claims settlement is important.

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## 2. Claims Settlement Under 31 U.S.C. § 3702(a)

### a. The Statute

The basis of GAO's claims settlement authority and jurisdiction is 31 U.S.C. § 3702(a):

"Except as provided in this chapter or another law, the Comptroller General shall settle all claims of or against the United States Government."

This statute is derived from legislation originally enacted in 1817 (3 Stat. 366).<sup>4</sup> The claims settlement function was originally lodged in the Treasury Department, and was transferred to GAO by the Budget and Accounting Act of 1921. The origins and history of the statute are discussed in Lambert Lumber Co. v. Jones Engineering & Construction Co., 47 F.2d 74 (8th Cir. 1931), cert. denied, 283 U.S. 842. GAO's regulations on claims settlement are found in 4 C.F.R. Parts 30–36 and Title 4 of GAO's Policy and Procedures Manual for Guidance of Federal Agencies.

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<sup>4</sup>The original statute addressed both claims settlement and account settlement. The 1982 recodification of Title 31 separated them and placed the account settlement portion in 31 U.S.C. § 3526(a).

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The authority embraced by 31 U.S.C. § 3702(a), reaching back to the original 1817 language, is the authority to “settle and adjust” claims. While the term “settlement” in the litigation context means compromise, it has a different meaning in the administrative claims context. The Supreme Court has defined the term as follows:

“The word ‘settlement’ in connection with public transactions and accounts has been used from the beginning to describe administrative determination of the amount due. . . . The words ‘settled and adjusted’ [as used in the predecessor of 31 U.S.C. § 3702(a)] were taken to mean the determination . . . for administrative purposes of the state of the account and the amount due. . . .

“We should not say, of course, that instances may not be found in which the word ‘settlement’ has been used in acts of Congress in other senses, or in the sense of ‘payment.’ But it is apparent that the word ‘settlement’ in connection with public contracts and accounts, which are the subject of prescribed scrutiny for the purpose of ascertaining the rights and obligations of the United States, has a well defined meaning as denoting the appropriate administrative determination with respect to the amount due.”

Illinois Surety Co. v. United States ex rel. Peeler, 240 U.S. 214, 219–221 (1916).

Thus, to settle a claim means to administratively determine the validity of that claim. Peeler at 220; Cooke v. United States, 91 U.S. 389, 399 (1875); Antrim Lumber Co. v. Hannan, 18 F.2d 548, 549 (8th Cir. 1927); 20 Comp. Gen. 573 (1941). Settlement includes the making of both factual and legal determinations. 20 Comp. Gen. at 577. The authority to settle and adjust claims does not, however, include the authority to compromise. B-200112, May 5, 1983; B-133616, October 25, 1957; B-122319, August 21, 1956. In the context of payment claims, the rationale for this is simply that a claim determined to be valid should be paid in full. Likewise, public funds should not be used to pay any part of a claim determined not to be valid. Thus, the authority to compromise a given claim against the United States depends on the existence of statutory authority above and beyond the authority to “settle and adjust” claims of that type. A survey of claims legislation will bear this out. One example is the specific inclusion of the word “compromise” in 28 U.S.C. § 2672 (Federal Tort Claims Act).

A number of agencies and government corporations are empowered by statute to “sue and be sued.” This has been held to include the authority to compromise a claim without a lawsuit. 25 Comp. Gen. 685 (1946); B-190806, April 13, 1978. However, compromise authority in this context is

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incident to the specific “sue and be sued” power and not to more general claims settlement authority.

The settlement function also includes the determination of whether an appropriation is legally available for making payment. 18 Comp. Gen. 285, 292 (1938).

b. GAO vs. Agency Adjudication

A cornerstone of GAO’s claims settlement policy is the belief that each agency should adjudicate its own claims. Thus, GAO does not adjudicate claims against other agencies in the first instance. GAO’s claims settlement regulations, 4 C.F.R. § 31.4, reflect this policy:

“A claimant should file his or her claim with the administrative department or agency out of whose activities the claim arose. The agency shall initially adjudicate the claim.”

A claimant submitting a claim to GAO which has not been adjudicated by the responsible agency will simply be told to go to that agency. E.g., B-249168, July 30, 1992.

GAO adjudicates claims against other agencies in only two situations. First, an agency can refer to GAO a claim which is otherwise within GAO’s settlement jurisdiction and which the agency considers “doubtful.” A “doubtful claim” is defined in GAO’s Policy and Procedures Manual for Guidance of Federal Agencies, title 4, § 5.2, as follows:

“A claim is doubtful when in the exercise of reasonable prudence either a person having final responsibility for deciding appropriate administrative action or the person who, in accordance with applicable statutes, will be held accountable if the claim were paid and then found to be incorrect, illegal, or improper, is unable to decide with reasonable certainty the validity and correctness of the claim.”

Claims of \$100 or less, however “doubtful” they may appear, may be settled by the agency involved on the basis of written advice from an appropriately designated agency official, and GAO will regard any payment resulting from this procedure as conclusive.<sup>5</sup>

Second, a claimant who believes that his or her claim was wrongfully denied by the adjudicating agency can request GAO review of the agency’s

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<sup>5</sup>This procedure, directed at advance decisions in general as well as claims, was originally limited to \$25 or less. It was raised to \$100 for advance decisions by GAO’s Policy and Procedures Manual, title 7, § 8.3. Since the simplified procedure stemmed from the same source for both claims and decisions, the increase is regarded as applicable to claims as well.

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action. 4 C.F.R. § 31.4. Again, this applies only to claims otherwise within GAO's settlement jurisdiction.

Thus, the sequence is as follows:

- Claimant files claim with the agency involved.
- The agency may, if it regards the claim as doubtful, refer it to GAO.
- If the agency does not regard the claim as doubtful, it proceeds to allow or disallow the claim. If the agency pays the claim, the matter is ended, subject to subsequent GAO audit.
- If the agency denies the claim, the claimant may (1) "reclaim," that is, seek reconsideration by the agency in accordance with whatever regulations the agency may have, or (2) seek review by GAO.

As should be apparent, the overwhelming majority of claims against the United States are processed without GAO involvement. With respect to these, GAO fulfills its claims settlement role by virtue of its audit and account settlement functions. GAO Policy and Procedures Manual, title 4, § 3.1.

### c. Limitations on GAO's Claims Settlement Authority

#### (1) Monetary vs. nonmonetary claims

A claim for purposes of GAO's claims settlement authority means a monetary claim—a claim for the payment of money. Without specific statutory authority, GAO is not authorized to consider nonmonetary claims, such as specific performance (B-179702, October 10, 1973). Also, GAO does not regard its claims settlement jurisdiction as extending to issues involving title to land. 19 Comp. Gen. 196 (1939); B-227438, November 13, 1987; B-223750, March 13, 1987; B-207613, April 6, 1983.

Claims for the recrediting of annual or sick leave, while not calling for the immediate payment of money, are nevertheless regarded as monetary claims within GAO's settlement jurisdiction. 67 Comp. Gen. 188 (1988).

#### (2) Authority otherwise provided for

Even with respect to monetary claims, GAO's claims settlement jurisdiction under 31 U.S.C. § 3702(a) applies only in the absence of some other statutory scheme. This can come about in several ways. If an agency has statutory authority to settle its own claims, either generally or of some particular type, this specific authority will take precedence over 31 U.S.C. § 3702(a). Thus:

(a) The United States Postal Service has specific authority under the Postal Reorganization Act to settle its own claims. B-179464, March 27, 1974.

(b) GAO has no jurisdiction to settle claims against the District of Columbia Government. 1 Comp. Gen. 451 (1922); B-168704, January 16, 1970; B-129677, October 22, 1957. See also 36 Comp. Gen. 457 (1956). (Part of the rationale here is based on the status of the District of Columbia Government as a separate legal entity.)

(c) GAO's claims settlement authority does not extend to government corporations where the corporation has authority to sue and be sued and to determine the character and necessity of its expenditures. 53 Comp. Gen. 337 (1973); 27 Comp. Gen. 429 (1948); B-190806, April 13, 1978; B-156202, March 9, 1965. (These decisions involve the Federal Housing Administration and the Pension Benefit Guaranty Corporation.)

(d) Prior to 1979 legislation implementing the Panama Canal Treaty of 1977, the Panama Canal Company, as a government corporation, could settle its own claims but the Canal Zone Government was an independent agency of the United States subject to 31 U.S.C. § 3702(a). B-179464, March 27, 1974. In 1979, both agencies were replaced by the Panama Canal Commission which has its own claims settlement authority in certain areas. This authority is discussed in B-197052, April 22, 1980, as modified by B-197052, February 4, 1981.

In the absence of legislation expressly placing the authority elsewhere, however, as in the examples noted above, GAO's claims settlement jurisdiction under 31 U.S.C. § 3702(a) extends to all federal agencies. E.g., B-203638, December 23, 1981 (former Federal Home Loan Bank Board).

If a statute authorizes agencies in general to settle claims of a particular type, and provides further that the agency's settlement shall be "final and conclusive," GAO has no authority to review the merits of agency settlements. Examples are the Federal Tort Claims Act and the Military Personnel and Civilian Employees' Claims Act of 1964, discussed later in this chapter.

A statutory scheme may be regarded as exclusive even without explicit "final and conclusive" language. An example is claims subject to negotiated grievance procedures under collective bargaining agreements authorized by the Civil Service Reform Act of 1978. GAO's initial inclination

was to accept jurisdiction where neither the agency nor the union objected. See 62 Comp. Gen. 274 (1983); 61 Comp. Gen. 20 (1981); 61 Comp. Gen. 15 (1981). To implement this policy, GAO issued regulations defining when it would and would not accept jurisdiction in this area. See, e.g., 60 Comp. Gen. 578 (1981); B-235624.2, December 4, 1989.

Subsequent to GAO's regulations, the courts issued a series of decisions holding that, by virtue of the exclusivity language of 5 U.S.C. § 7121, the grievance procedure is the exclusive means of resolving matters within the scope of a negotiated agreement, except for matters specifically excluded by statute or by the agreement itself. E.g., Aamodt v. United States, 976 F.2d 691 (Fed. Cir. 1992); Carter v. Gibbs, 909 F.2d 1452 (Fed. Cir. 1990), cert. denied sub nom. Carter v. Goldberg, 498 U.S. 811; Adams v. United States, 20 Cl. Ct. 542 (1990); Adkins v. United States, 16 Cl. Ct. 294 (1989). See also United States v. Fausto, 484 U.S. 439 (1988). In 71 Comp. Gen. 374 (1992), GAO announced that it was adopting the result of these decisions, and repealed its regulations shortly thereafter. 57 Fed. Reg. 31272 (July 14, 1992). Since that time, GAO has declined jurisdiction over claims subject to negotiated grievance procedures regardless of who consents. E.g., B-251784, February 19, 1993. Of course, GAO's jurisdiction continues to extend to claims involving employees who are not covered by a collective bargaining agreement. E.g., B-249168, July 30, 1992. It also continues to extend to claims subject to the grievance procedures of the Foreign Service Act of 1980, which does not contain an exclusivity provision comparable to that of 5 U.S.C. § 7121, unless the claimant has elected to proceed before the Foreign Service Grievance Board. B-254556, January 21, 1994.

Another area in which GAO has declined settlement jurisdiction is claims for patent infringement. B-209159, October 21, 1982; B-160745, February 13, 1967, aff'd, B-160745, July 27, 1967; B-149392, August 1, 1962. The main reason for this is that the remedy provided by 28 U.S.C. § 1498(a) (action in the Court of Federal Claims) is viewed as exclusive. The Comptroller General may nevertheless render decisions on the use of appropriated funds in patent-related contexts. For example, 37 Comp. Gen. 199 (1957) held that 10 U.S.C. § 2386 authorizes the military departments to enter into agreements, using procurement appropriations, for the settlement of claims arising out of patent infringements. Absent such a statute, however, this authority would not exist. 11 Comp. Gen. 44 (1931).

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Also, GAO cannot resolve issues of mental competency. B-191904, July 19, 1978 (non-decision letter); B-196052-O.M., January 7, 1980. Both of these were claims for the refund of money allegedly donated to the United States in which the claimant contended that mental incompetency precluded the donor from forming the necessary donative intent. This type of issue must be resolved by court action.<sup>6</sup>

(3) Merits vs. cognizability

Even though GAO may not question the merits of a settlement under a statute which makes an agency's settlement action final and conclusive, GAO retains the authority to consider the threshold question of whether a given claim is cognizable under the statute. As stated in 47 Comp. Gen. 316, 318 (1967) with respect to the Military Personnel and Civilian Employees' Claims Act of 1964, an agency's settlement "if made in accordance with the provisions of the . . . act and applicable regulations, would be final and conclusive."

To take a simple illustration, if an agency settles a tort claim resulting from an automobile accident, GAO has no authority to question the agency's determination that its employee was negligent, nor can it question the amount of the award (assuming, of course, that it does not exceed the amount claimed). However, if the claim arose in a foreign country, the agency's settlement would not be entitled to "final and conclusive" status because, in view of the specific exception in the Federal Tort Claims Act for claims arising in foreign countries, the claim would not be properly cognizable under the statute. If the claim is not of the type covered by the statute to begin with, the agency never acquires the authority to make a "final and conclusive" settlement.

The concept was discussed in an early decision of the Comptroller of the Treasury, 21 Comp. Dec. 250 (1914). In that case, the Secretary of Agriculture asked whether he could pay a claim under a statute (now 16 U.S.C. § 502(d)) which authorized the Secretary to reimburse owners of horses, vehicles, and other equipment lost or damaged while being used for official business. The claim was for a mule, owned by a Forest Service employee, which had died presumably while engaged in official business. The Comptroller pointed out that the statute gave the Secretary jurisdiction to determine the facts as to whether loss or damage occurred

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<sup>6</sup>GAO has the jurisdiction to settle claims of this type because no statute places them elsewhere and 31 U.S.C. § 3702(a) refers to "all claims," but because of the practical considerations, the policy has evolved that they may not be allowed. The distinction is discussed in 21 Comp. Dec. 134, 136-139 (1914). Disallowance in these cases does not result from jurisdictional limitations.

incident to official business and the amount of the loss or damage. However, this conclusion “does not deprive the Comptroller of his jurisdiction to determine generally the scope and purpose of the legislation and to limit expenditures thereunder to the contemplated purposes . . . .” 21 Comp. Dec. at 251. See also 4 Comp. Gen. 876 (1925); B-190106, March 6, 1978; B-153031, January 28, 1964.

In 34 Op. Att’y Gen. 55 (1923), the Secretary of War asked the Attorney General if he was bound by the actions of his predecessor in approving certain claims. A World War I relief statute provided that claims could be considered only if they were filed before a specified date, and the former Secretary had proceeded to approve claims filed after that date. Although the statute did not include explicit “final and conclusive” language, the Attorney General’s discussion is nevertheless useful in illustrating the distinction between second-guessing the merits of an authorized settlement and questioning a settlement which is not within the scope of the statute to begin with. In attempting to approve claims filed after the statutory deadline, the former Secretary—

“was without jurisdiction, his decision is not binding upon anyone. Such findings and decisions are wholly void.

“ . . . [T]he Secretary of War was and is absolutely without power or jurisdiction to settle, adjust, or pay such claims.”

Id. at 60.

In a more recent decision, the Comptroller General held that an agency could not pay a claim by an employee under the Military Personnel and Civilian Employees’ Claims Act of 1964 when it was also paying a claim under the Federal Tort Claims Act arising from the same incident. The reason is that allowance of a tort claim must be based on a determination that the employee was negligent while an agency may allow a claim under the 1964 Act only if it determines that the employee was not negligent. Thus, allowance of the tort claim precluded allowance of the employee’s claim. 58 Comp. Gen. 291 (1979).

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### 3. Standards and Procedures

Over the years, GAO has developed a set of standards for use in implementing 31 U.S.C. § 3702(a). Some are reflected in GAO’s published claims regulations (4 C.F.R. Parts 11 and 30–36); others are noted in GAO’s Policy and Procedures Manual for Guidance of Federal Agencies, mostly

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Title 4; some have evolved through the decision and adjudication process; a few have a statutory basis. These are general standards intended to apply in the absence of other governing authority. See 4 C.F.R. § 30.1. When setting up their own claims settlement operations, agencies must of course take into consideration any of their own agency-specific or program-specific requirements.

a. Necessity for Filing Claim

As a general proposition, a person who thinks the government owes him or her money must file a claim to get it. The government is not legally required to initiate payments in the absence of claims or to encourage the filing of claims. For example, the Comptroller General has noted that an agency is not required to notify employees or former employees that they were underpaid in some past transaction. 24 Comp. Gen. 9 (1944); 26 Comp. Gen. 102, 106 (1946). See also 41 Comp. Gen. 761, 764 (1962).

However, GAO has not objected to proposed additional payments of compensation, otherwise legally due, without awaiting the filing of specific claims, particularly where a relatively short time has elapsed between the original payments and the additional payments, or where retroactive rights have been expressly granted by statute. 38 Comp. Gen. 56 (1958); 36 Comp. Gen. 459 (1956); 31 Comp. Gen. 166, 173 (1951); B-115800, December 8, 1964. In some instances, a distinction has been drawn between employees or members still on the rolls and those who have been separated, with claims required from the latter category. See 41 Comp. Gen. 812, 819 (1962); 23 Comp. Gen. 721, 723 (1944); 23 Comp. Gen. 398, 401 (1943). GAO has also approved procedures under which an agency sends a notice of entitlement to former employees, with actual payment to be made upon receipt of written instructions. 50 Comp. Gen. 266 (1970); 38 Comp. Gen. 56 (1958). Similarly, an erroneous overdeduction may be refunded without the need for a specific claim. B-148953, July 13, 1962.

An agency may refund an overpayment when otherwise proper without the need for a formal claim. This is based on public policy. 58 Comp. Gen. 372, 375 (1979) (overpayments of reclamation fees to Interior Department); B-217595, April 2, 1986 (overassessment of late payment charges to timber purchasers). However, in view of the cost to the government of issuing checks and processing payments, the agency should establish a minimum amount below which refunds will not be made unless a claim is filed. 58 Comp. Gen. at 375. GAO's current minimum is \$5. B-220942, January 7, 1986; B-181373-O.M., August 16, 1974. Agencies should provide notice of their refund policies in regulations or other

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appropriate form. 65 Comp. Gen. 893, 900 (1986); 58 Comp. Gen. at 375; B-220942, January 7, 1986.

In sum, while there are situations in which payments may be made without requiring the submission of claims, they are probably best viewed as exceptions and the prospective claimant will be well-advised to file a claim if there is any question.

GAO considered a different aspect of the situation in B-251728.3, December 23, 1993, in which the question was whether a law firm's failure to bill the government for services furnished to an Independent Counsel could be viewed as an unauthorized augmentation of appropriations for that function. The answer was no, although the discussion did not rule out the augmentation possibility in all situations.

#### b. Who May File

A claimant is free to pursue a claim individually or through a representative. The choice is entirely up to the claimant. 4 C.F.R. § 11.1. If the claimant chooses to employ an agent or attorney, an appropriate power of attorney must accompany the claim. *Id.* §§ 11.3, 31.3. The claimant may, at any time while the matter is pending, revoke the representative's authority but must do so in writing. *Id.* § 11.5.

A subrogee is a legal claimant under a proper subrogation relationship. The doctrine was summarized as follows in B-190771, April 17, 1978:

"The doctrine of subrogation applies where one person pays a debt for which another is primarily liable provided that the payment was made under compulsion or for the protection of some interest of the one making the payment and in discharge of an existing liability; it applies where a party is compelled to pay the debt of a third person to protect his own right or interest, or to save his own property. . . . [I]t is well settled that subrogation never lies where one who is merely a volunteer pays the debt of one person to another."

A common example is a claim by an insurance company to recover amounts it has paid to its policyholder.

#### c. Form of Claim

Although some types of claims require specific forms, there is, as a general proposition, no particular form required for filing a claim. 4 C.F.R. § 31.2; B-190771, April 17, 1978; B-171732, March 24, 1971. See also B-210986, May 21, 1984 (noting that an agency could, if it wished, prescribe forms for specific types of claims).

However, claims must be in writing and must contain the signature and address of the claimant or an authorized agent or attorney. 31 U.S.C. § 3702(b)(1); 4 C.F.R. § 31.2; 69 Comp. Gen. 455 (1990); 18 Comp. Gen. 84, 89 (1938). The purpose of the signature requirement is to “fix responsibility for the claim and the representations made therein.” Bialowas v. United States, 443 F.2d 1047, 1050 (3d Cir. 1971). Otherwise, “there would be no assurance that the claimant is still alive, that the record address is still the proper address, that the claimant himself may not have waived or forfeited [the claim], or that the check in payment of the claim would reach the claimant himself.” 24 Comp. Gen. 9, 11 (1944). If GAO involvement in the claim becomes necessary, GAO will accept a copy bearing a legible facsimile signature. B-235749.1, June 8, 1989 (internal memorandum).

While a simple letter format will generally do the job, it must be clear that a claim is being asserted. The receiving agency should not be expected to engage in interpretation to divine the letter’s intent. A letter making an inquiry or requesting information is not sufficient. B-150008, October 12, 1962.

Also, the claim should be as specific as possible and must identify the circumstances giving rise to it. A practice apparently developed around the turn of the century of submitting claims for, in effect, “anything that may be due me under any and all statutes or decisions.” Attorneys presented these on a contingent-fee basis, apparently hoping to get lucky. The Comptroller of the Treasury held that these “dragnet claims” were too general and indefinite to constitute claims against the United States, and that the government was under no obligation to respond. 6 Comp. Dec. 692 (1900). The Comptroller also had a few choice words for lawyers who would present such “claims,” calling them “as useless as the fifth wheel to a wagon.” Id. at 696.

If a particular form is required in some specific context, using the wrong form is not a fatal error. B-190771, April 17, 1978. Whether to require resubmission on the correct form is up to the agency, depending on such factors as the kinds of information the form is intended to elicit.

#### d. No Minimum Amount or Filing Fee

There is no minimum amount for filing of claims. B-180163, January 9, 1974. However, to keep the system from getting too far out of hand, GAO does not want to see claims for \$100 or less and will accept the agency’s action on them as conclusive. See “GAO vs. Agency Adjudication” above. See also 62 Comp. Gen. 168 (1983); B-192246, January 8, 1979.

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Also, there is no filing fee charged for filing a claim against the government. E.g., B-152922, March 6, 1967 (dollar and postage stamp returned to claimant).

#### e. Aiding in Prosecution of Claims

It is a criminal offense for any officer or employee of the United States, in any branch of the government, to act as agent or attorney, except in the proper discharge of official duties, for prosecuting any claim against the United States or, with certain exceptions, representing anyone before a court or agency in a matter in which the United States is interested. 18 U.S.C. § 205(a). A willful violation may draw a jail sentence of up to 5 years. *Id.* § 216(a). In addition, the Attorney General can seek a civil penalty of up to \$50,000 or the amount of any compensation the violator received, whichever is greater. *Id.* § 216(b). Since this is a criminal statute, its enforcement is up to the Department of Justice and the courts, and GAO will not determine what constitutes a violation. 38 Comp. Gen. 56 (1958). The Justice Department's Office of Legal Counsel has issued a number of opinions on section 205. E.g., 1 Op. Off. Legal Counsel 148 (1977) (government employee who prepared his daughter's tax return may appear on her behalf at an IRS audit).

The statute today seems pretty clear. For more than 100 years, however, its predecessor also made it an offense to "aid or assist in the prosecution or support" of any claim against the United States. 18 U.S.C. § 283 (1958 ed.), originating at 10 Stat. 170 (1853). One purpose of the "aid or assist" prohibition was to prevent employees from using their access to government files to identify potential claimants and then solicit representation for a fee. *United States v. 679.19 Acres of Land*, 113 F. Supp. 590, 593 (D.N.D. 1953). As long as this statute was on the books, it had to be taken into account and doubtlessly contributed to the adversarial nature of claims settlement to which we alluded in our introductory observations. A reading of the older cases suggests a paranoia under which employees were afraid to so much as refer a claimant to the right statute. See, e.g., A-32922, August 8, 1930. In any event, the "aid or assist" language was dropped in 1962. The 1962 legislation, the source of the present 18 U.S.C. § 205, is discussed in the Attorney General's "Memorandum re the Conflict of Interest Provisions of Public Law 87-849," published in the Federal Register for February 1, 1963, 28 Fed. Reg. 985.

Even under the old law, GAO had ventured opinions in some of the more obvious cases that certain actions were unobjectionable at least as far as GAO was concerned. Thus, the mere request to a vendor or contractor to

submit an invoice so that timely payment can be made, where there is no question of the government's liability nor dispute as to the facts, is within the discharge of official duties. 30 Comp. Gen. 266 (1951). Similarly unobjectionable is the notification to prospective claimants of their entitlement to a refund where the government's liability is undisputed and especially where the claimants would have no other way of knowing of their entitlement. 34 Comp. Gen. 517 (1955).

#### f. Basis of Settlement

GAO's claims settlement regulations state, at 4 C.F.R. § 31.7:

"Claims are settled on the basis of the facts as established by the Government agency concerned and by evidence submitted by the claimant. Settlements are founded on a determination of the legal liability of the United States under the factual situation involved as established by the written record. . . . The settlement of claims is based upon the written record only."

The above passage makes two key points. First, claims are settled on the basis of the written record presented by the parties. GAO does not conduct adversary hearings or take oral testimony. B-197884, July 15, 1980; B-196686, January 17, 1980; B-192831, April 17, 1979; B-188023, July 1, 1977. In appropriate circumstances, GAO may hold an informal conference with both parties to discuss the issues (e.g., B-186763, March 28, 1977), but these are not formal, adversarial hearings.

The settlement of claims by GAO on the basis of the written record has been held not a denial of due process. 21 Comp. Gen. 244 (1941); B-196924, May 20, 1980. The procedure's advantages are that it—

"is free from technicalities and formal rules and, regardless of the amount involved or the financial status of the claimant, he is permitted without expenditure of funds for counsel or witnesses to have his claim considered on the written record in a manner at least in the first instance less formal than ordinarily prevails in the courts."

B-129874, January 3, 1957.

The second key point of 4 C.F.R. § 31.7 is that settlement is based on legal liability and not on the basis of so-called moral obligations. B-175670, May 25, 1972; B-125839, February 9, 1956; A-29009, October 21, 1929. This follows from the principle that no government official is authorized to give away the money or property of the United States. B-124769, August 4, 1955. If substantial defenses in law exist, GAO must disallow the claim. 42 Comp. Gen. 124, 142 (1962). This is a corollary of the same principle. If, for

example, the statute of limitations has expired and there is no applicable basis for tolling, paying the claim amounts to giving away the taxpayers' money. Another corollary is that, absent a statutory basis, an agency has no authority to issue regulations purporting to accept liability on claims it perceives to be fair and equitable. B-201054, April 27, 1981. Claims may be paid on the basis of moral or equitable rather than legal considerations only under specific statutory authority. An example is 38 U.S.C. § 503 (Supp. IV 1992), authorizing the Secretary of Veterans Affairs to grant certain equitable relief in administrative error cases.

Although allowing a claim requires an adequate legal basis, the claimant may not know what that basis is. Of course, including references to relevant legal authorities, where known, will help any claim. But, especially since there is no requirement that claimants be represented by counsel, they may not know the applicable law or, perhaps worse, may think they know and cite something wrong or irrelevant. If a claimant cites a wrong basis and a proper basis exists and the agency knows it, the agency should act accordingly. GAO's policy in this regard—and one which it urges upon all agencies—mirrors that of the Supreme Court as reflected in the following passage:

“When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.”

Kamen v. Kemper Financial Services, Inc., 500 U.S. 90, 99 (1991). This principle is limited by reason and common sense and does not require an agency to accede to what we earlier referred to as “dragnet claims,” such as the one denied in B-153385, November 16, 1964, in which a gentleman tried to argue that it was the government's responsibility to consider his claim “under any applicable statute on the books.”

#### g. Burden of Proof; Evidentiary Requirements

The burden of proof in establishing the liability of the United States is on the claimant. 4 C.F.R. § 31.7; 31 Comp. Gen. 340 (1952); 18 Comp. Gen. 980 (1939); 20 Comp. Dec. 263 (1913).

There is no hard-and-fast rule as to what evidence is required to support a claim. GAO views 31 U.S.C. § 3702(a) as giving it discretion in determining the quantum of evidentiary support necessary to establish the liability of the United States. 55 Comp. Gen. 402 (1975); 22 Comp. Gen. 269 (1942); B-255037, March 18, 1994; B-190771, April 17, 1978; B-188238, May 20, 1977. Generally, the claimant should submit the “best evidence obtainable.” 55

Comp. Gen. at 404; B-184305, December 22, 1976. A phrase frequently found in the decisions is that the evidence must be “clear and convincing.” E.g., B-247541, June 19, 1992; B-187857, July 26, 1977; B-177639, March 9, 1973.

For example, in a claim for payment for goods sold to the government, the claimant must be able to establish that the goods were delivered to and received by the government. B-230581, March 28, 1988; B-187857, July 26, 1977; B-184712, March 3, 1976. An employee filing a claim for the cost of transportation and temporary storage of household goods must present receipted copies of the bills of lading and storage. B-191539, July 5, 1978. In a claim for loss of goods in a sealed carton marked “packed by owner,” the claimant has a “heavy burden” in establishing the contents. B-198815, April 13, 1982. (Precisely how this burden may be satisfied is not clear.)

In many if not most cases, the information necessary to establish liability will be found in records maintained by the government. B-179942, July 9, 1974. Nonavailability of government records will present evidentiary problems. The general rule is that, where government records have been destroyed pursuant to law or are unavailable due to lapse of time, and there is no other documentation available from any source to establish the liability of the United States, the claim must be denied. B-241592, March 13, 1991 (claim by Virgin Islands for proceeds of customs collections); B-214533, July 23, 1984 (claim for travel and overtime filed just within statute of limitations but after records had been destroyed); B-213654, March 6, 1984 (claim for accrued leave at time of discharge from armed forces 30 years earlier); B-190599, December 9, 1977 (appeal from settlement 28 years later); B-187523, November 9, 1976 (1976 claim for mustering-out pay from Korean War); B-179942, July 9, 1974 (claim alleging non-receipt of government check; neither claimant nor agency could identify date, amount, or purpose of check). The burden is on the claimant to produce other evidence to overcome the lack of government records, not on the government to refute unsupported claims. 53 Comp. Gen. 181, 184 (1973).

While government records are the best evidence, the absence of government records is not necessarily an absolute bar to allowance if competent secondary evidence is available. E.g., *Northup v. United States*, 45 Ct. Cl. 50 (1909); B-217562, September 30, 1985. An illustrative group of cases involves claims for supplies or services provided to Navy vessels. In B-193023-O.M., January 18, 1979, a claim by the United Kingdom for fuel delivered to a Navy vessel was allowed where the Navy verified receipt of

the fuel but was unable to determine from official records whether payment had been made. A claim was allowed under similar circumstances in B-187877, April 14, 1977. In B-244304, July 26, 1991, a claim was denied because there was no evidence of receipt or acceptance and the Navy was not willing to recommend payment. Claims were allowed in 67 Comp. Gen. 52 (1987) and B-238239, March 19, 1991. In both cases, there was no hard evidence of receipt, but the probabilities (reasonable inferences drawn from available facts) supported the validity of the claims, the claimants were foreign governments, and the Navy recommended payment.

Cases involving military records destroyed in the 1973 fire at the Personnel Records Center, St. Louis, Missouri, further illustrate these evidentiary problems. In B-183900, August 3, 1976, a claim was disallowed because no other records could be produced to substantiate the claim. In another case, GAO reviewed regulations to determine whether the department's policy during the times in question supported the claimant's allegations, but disallowed the claim because the regulations did not provide the alleged support. B-188489, April 5, 1977.

The premature destruction of records cannot be used as an excuse to avoid liability. For example, given the 6-year statute of limitations on administrative claims, an agency cannot destroy time and attendance records after 3 years and then deny claims over 3 years old because government records are no longer available. 62 Comp. Gen. 42 (1982). The Court of Federal Claims takes a similar approach. See *Dean v. United States*, 10 Cl. Ct. 563, 570 (1986) (unavailability of evidence attributable to "defendant's own short-sighted and ill-conceived regulation under which that document was prematurely but officially destroyed"); *McCarthy v. United States*, 10 Cl. Ct. 573, 577 (1986).

There is a relevant statute in this connection as well, 44 U.S.C. § 3309:

"Records pertaining to claims and demands by or against the Government of the United States . . . may not be disposed of by the head of an agency under authorization granted under this chapter, until the claims . . . have been settled and adjusted in the General Accounting Office, except upon the written approval of the Comptroller General of the United States."

If the record presents an irreconcilable dispute of fact, GAO will accept the agency's version and disallow the claim. B-192831, April 17, 1979. An "irreconcilable dispute of fact" does not mean merely that the claimant

and the agency disagree on something. It means a conflict that cannot be resolved without adversary proceedings. B-187891, June 3, 1977. Cf. 21 Comp. Dec. 134, 138 (1914). This policy stems in part from the “strong, but rebuttable, presumption that [government officials] discharge their duties correctly, lawfully, and in good faith.” *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). Also, it must be kept in mind that the claimant would still have recourse to the courts whereas the agency would not.

#### h. Administrative Correction of Claims

At one time, GAO took the position that only the claimant could make corrections to a claim; the government could not correct even the smallest and simplest of errors. E.g., 9 Comp. Gen. 251 (1929). This position proved unduly rigid and generated many small claims. Accordingly, GAO said in the 1950s that agencies could adjust minor errors not in excess of \$10 up or down without requiring the claimant to amend the claim. 36 Comp. Gen. 769 (1957). The amount jumped to \$20 in B-131105, May 23, 1973. In 57 Comp. Gen. 298 (1978), GAO raised the ceiling on upward adjustments to \$30, and said that administrative reductions could be made in any amount.

The next change came about with the 1993 revision of Title 7 of GAO’s *Policy and Procedures Manual for Guidance of Federal Agencies*. Section 6.5.C authorizes agencies to establish an amount, not to exceed \$100, for upward administrative adjustments, “based on the risk to the government, extent of internal controls in operation, and the type of claims involved.” The ceiling may vary for different categories of claims. The adjustments may be made without requiring the claimant to amend the claim in cases of obvious error. Agencies should periodically review their procedures to guard against fraud or abuse. As before, downward adjustments may be made in any amount.

Agencies which do not establish procedures to implement section 6.5.C may presumably still use the \$30 authority of 57 Comp. Gen. 298 on an ad hoc basis.

#### i. Expenses of Claim Preparation

One who is victorious over the United States in court is generally able to recover at least some types of costs. No comparable general authority exists in the realm of administrative claims. Thus, it has long been held that, in the absence of statutory authority, expenses incurred by a claimant in the preparation, presentation, and proof of an administrative claim may not be reimbursed. 8 Comp. Dec. 498 (1902); 17 Comp. Gen. 831 (1938) (cost of procuring evidence); B-208166, October 31, 1983 (travel expenses so claimant could come to Washington to discuss claim); B-121929, December 8, 1954; B-35644, April 19, 1948. Of course this

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principle includes attorney's fees. Situations in which attorney's fees and expenses are recoverable are discussed in Chapter 4.

#### j. Foreign Law

A claimant presenting a claim governed by American law does not have to establish what the law is. The claimant is entitled to presume that the forum—court or agency—is familiar with American law. Someone filing a claim under the Federal Tort Claims Act, for example, does not have to establish what the FTCA says. The court or agency is responsible for getting it right.

The status of foreign law is different, however. There is no presumption of familiarity. Foreign law is treated as a matter of fact. E.g., Liverpool Steam Co. v. Phenix Ins. Co., 129 U.S. 397, 445 (1889). As such, it is the claimant's burden to "prove" it the same as any other fact. Id.; 37 Comp. Gen. 485 (1958); B-209649, December 23, 1983; B-189121, April 15, 1983.

#### k. Effect of Claim Settlement

The settlement of an individual claim at GAO, while it may well be useful in providing guidance for the future as a practical matter, does not constitute a decision of the Comptroller General and will not necessarily be followed as precedent. This principle has been stated in numerous decisions. E.g., 52 Comp. Gen. 751 (1973); 20 Comp. Gen. 403 (1941); 18 Comp. Gen. 609 (1939). The same applies to an internal memorandum addressing the disposition of a particular claim (B-153419, November 2, 1964), although again they are often useful because GAO will follow its own precedent, in whatever form it may exist, unless it is shown to be wrong.

#### l. Reconsideration

The opportunity to seek administrative reconsideration should be an element of any claims settlement program. GAO's policy on reconsideration of claims settlements is stated in 4 C.F.R. § 32.1:

"Settlements made pursuant to 31 U.S.C. 3702 will be reviewed: (a) in the discretion of the Comptroller General upon the written application of (1) a claimant whose claim has been settled or (2) the head of the department or Government establishment to which the claim or account relates, or (b) upon motion of the Comptroller General at any time."

A request for reconsideration should specify its basis (legal error, new information not previously considered, etc.). 4 C.F.R. § 32.2. A request which is little more than a diatribe is likely to be summarily rejected. The regulations further provide that "the check issued upon a settlement must not be cashed when its amount includes any item as to which review is applied for, but should accompany the application for review." Id. § 32.3. GAO will consider requests to waive this provision.

As reflected in the above-quoted regulation, reconsideration of a claim settlement by the Comptroller General is discretionary and not a requirement of “due process.” 21 Comp. Gen. 244 (1941). GAO has never imposed a definite time limit on filing a request for reconsideration. The standard is one of reasonableness based on the facts and circumstances of the particular case. 32 Comp. Gen. 107 (1952). Requests for reconsideration have been found untimely in the following cases:

- Personnel claims: B-184971, June 4, 1976 (27 years); B-185026, May 27, 1976 (11 years); B-164378, April 28, 1976 (9 years); 32 Comp. Gen. 107 (1952) (1 year and 8 months).
- Transportation claims: B-155521, February 23, 1965 (8 years); B-147781, September 21, 1967 (5 years); B-157883, December 30, 1965 (3 years).

m. Judicial Review; Res  
Judicata

In B-129874, January 3, 1957, a letter to the House Committee on Government Operations describing certain GAO procedures, the Comptroller General made the following statement:

“[I]t should be emphasized that the authority in the General Accounting Office to settle claims . . . is neither exclusive nor final. In the vast majority of cases persons having claims cognizable by this Office may present them to the Court of Claims or the United States district court before, during, or after consideration here; provided, of course, that they do so during the period of limitations fixed by statute, wherein the law and the facts are determined de novo. Therefore, if any dispute with a claimant does exist respecting essential facts, or if for any reason a claimant is dissatisfied with the action of the General Accounting Office and desires a formal hearing in the matter with an opportunity to present oral evidence, and to examine and cross-examine witnesses, he has an adequate remedy under existing law in those forums mentioned above, and is not prejudiced by any action taken here.” (Emphasis in original.)

It can be seen from this passage that GAO review of a claim is an optional procedure. No one is ever required to seek GAO review as a prerequisite to bringing a lawsuit. *Iran National Airlines Corp. v. United States*, 360 F.2d 640, 642 (Ct. Cl. 1966); B-163046, December 19, 1967. In other words, the doctrine of exhaustion of administrative remedies has never been applied in the context of claims settlement under 31 U.S.C. § 3702(a).

Since a claimant is not required to pursue an administrative resolution, a claimant who initiates an administrative claim may abort it at any time, whether it is before GAO or the agency involved, and go directly to court. See B-219738, April 16, 1986 (agency should not pay settlement agreement where claimant abrogated it and filed lawsuit).

Similarly, disallowance of a claim by GAO does not preclude the claimant from seeking judicial relief, assuming recourse to the courts would have been available in the first place. *E.g.*, St. Louis, Brownsville & Mexico Ry. Co. v. United States, 268 U.S. 169, 174 (1925); B-163046, December 19, 1967; A-87280, January 22, 1938. A claimant wishing to preserve all possible options, however, will need to keep an eye on the calendar, since presenting a claim to GAO does not toll the statute of limitations. Iran National Airlines, 360 F.2d at 642. Once the case is in court, as indicated in the 1957 letter quoted above, it receives a “de novo” review. In this connection, one will find a variety of statements on the “deference” or lack thereof given GAO determinations in various contexts.<sup>7</sup> The simple fact is that a court will agree or disagree with what GAO did and will proceed accordingly.

While disallowance by GAO has no effect on judicial review, the converse is not the case. Once a court has ruled on a claim, GAO will apply the doctrine of res judicata and will regard the court action as a bar to further consideration by GAO. 62 Comp. Gen. 399 (1983); 47 Comp. Gen. 573 (1968); 7 Comp. Gen. 658 (1928); B-215253, October 30, 1984. The same principle applies to a claim for amounts in excess of the \$10,000 jurisdictional limitation of the “little Tucker Act” (28 U.S.C. § 1346(a)(2)) where the claimant won in court and the claim would concern the same parties and issues. 59 Comp. Gen. 624 (1980).

And of course, GAO will not settle a claim which is already pending in court. 33 Comp. Gen. 479, 481 (1954).

#### n. Referral to Court of Federal Claims

GAO may refer claims directly to the Court of Federal Claims in accordance with 28 U.S.C. § 2510, which provides:

“(a) The Comptroller General may transmit to the United States Court of Federal Claims for trial and adjudication any claim or matter of which the Court of Federal Claims might take jurisdiction on the voluntary action of the claimant, together with all vouchers, papers, documents, and proofs pertaining thereto.

“(b) The Court of Federal Claims shall proceed with the claims or matters so referred as in other cases pending in such Court and shall render judgment thereon.”

The Comptroller General has consistently viewed this statutory authority as discretionary. *E.g.*, B-131612, October 31, 1957.

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<sup>7</sup>*E.g.*, Baggett Transportation Co. v. United States, 23 Cl. Ct. 263 (1991); Kinne v. United States, 21 Cl. Ct. 104 (1990).

Referrals under 28 U.S.C. § 2510 have been limited to only two specific categories of claims, as follows:

“These provisions . . . have not been regarded by this Office as having any application to a claim which has been considered and finally determined by this Office. They have only been regarded by us as being for application in the following instances: (1) where there are two or more claimants who have a conflicting interest in a certain and specific sum of money which has been determined to be clearly due and is in the control of the Government as a stakeholder, the adjudication of which by the Court of [Federal] Claims is deemed necessary to protect the Government against a later claim by unsuccessful claimants, and (2) where the rights of claimant are definite and clearly established under applicable provisions of law, but the amount due is too uncertain to permit settlement by this Office.”

B-176997, March 27, 1973. See also B-200923, December 17, 1982. Thus, the Comptroller General will not refer claims which GAO has settled and disallowed.

Further examples of cases denying claimants' specific requests that GAO refer their claims under 28 U.S.C. § 2510(a) are: B-154118, July 23, 1964 (claim for additional retired pay disallowed in prior GAO settlement); B-147203, February 7, 1963 (claim for lump-sum payment in lieu of annual leave disallowed in prior GAO settlement); B-134121, November 7, 1957 (GAO lacked authority under statute to refer claimant's case previously dismissed by Court of Claims for lack of jurisdiction); B-131612, October 31, 1957 (claim for travel and moving expenses disallowed in prior GAO settlement and on reconsideration).

Since the statute authorizes referral of claims only where the court “might take jurisdiction on the voluntary action of the claimant,” GAO will not refer a claim on which suit is barred by the statute of limitations. B-126471, May 11, 1956.

One of the few instances where the authority of 28 U.S.C. § 2510(a) has been exercised, B-150968, May 20, 1963, involved conflicting claims arising under a construction contract for improvements to an airport. When the work was completed and accepted according to the contract provisions, approximately \$10,000 remained due, plus an additional claim by the contractor for \$2,700. However, because the contractor had apparently left outstanding bills for labor and materials on the project, the surety on the performance and payment bonds claimed the funds remaining in government control. Additional claims for this money were filed by a bank

assigned the funds under the contract, and by the IRS for back taxes owed by the contractor. Thus, several claimants had conflicting interests in a specific sum which was due and in the control of the government as stakeholder. Therefore, in order to protect the government, the Comptroller General referred the matter directly to the court for trial and adjudication.

Finally, as obvious as this statement may appear, there is a difference between a referral under 28 U.S.C. § 2510 and merely advising a claimant of the availability of the judicial process. In a case involving a claim by a subcontractor against the United States for termination of a government contract, the claimant attempted to construe a referral from language used by GAO in denying the claim on reconsideration. In this way the claimant hoped to avoid the bar of the statute of limitations. The Court of Claims held that the Comptroller General's conclusion, "to resolve the doubt in favor of that course which will result in the conservation of appropriated funds and leave to the proper judicial authority the final determination of the matter" (B-147131, March 2, 1962), did not constitute a formal referral. Steel Improvement and Forge Co. v. United States, 355 F.2d 627 (Ct. Cl. 1966). The court noted:

"There are no words of transmittal or referral in the above-quoted language. Plaintiff was merely being advised of the option of seeking judicial review of its claim. Had the Comptroller General intended to refer or transmit the case to this court, we believe that, in the least, the Comptroller General would have either mentioned the applicable statute or the Court of Claims."

Id. at 632. Of course the court was correct. A referral under 28 U.S.C. § 2510(a) will be addressed to the court and will expressly state that the claim is being referred pursuant to section 2510, with a copy sent to the claimant. See B-150968, May 20, 1963.

#### o. Alternative Dispute Resolution

In late 1990, Congress enacted the Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736, to authorize generally the use of alternative dispute resolution (ADR) techniques in the federal government. The law defines ADR as "including, but not limited to, settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, or any combination thereof." 5 U.S.C. § 571(3) (Supp. IV 1992). The ADR Act has a sunset date of October 1, 1995. Pub. L. No. 101-552, § 11, 104 Stat. at 2747, 5 U.S.C. § 571 note.

From the perspective of claims settlement, arbitration is probably the most significant of the various ADR procedures. Arbitration has often been characterized as a “split the baby in half” approach. Under the classic form of arbitration, assuming a two-party dispute, each party selects an arbitrator, those two arbitrators then select a third, and the parties agree to be bound by the outcome. Arbitration under the ADR Act is somewhat different.

Agencies may use arbitration if all parties to the dispute consent. *Id.* § 575(a)(1). The law makes clear that all authorized ADR techniques “are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques.” *Id.* § 572(c). The major difference between arbitration under the ADR Act and arbitration in the private sector is that arbitration under the ADR Act is not binding for 30 days after an award. Within that 30-day period, the head of the agency involved can vacate the award, in which event the award is “null and void.” *Id.* §§ 580(b), (c). An agency’s decision to vacate an arbitration award, as well as the decision to use or not use ADR, is regarded as “committed to agency discretion” and is not subject to judicial review. *Id.* § 581(b). If an agency vacates an award, nonfederal parties to the arbitration may recover those attorney’s fees and expenses, as defined in the Equal Access to Justice Act, which they would not have incurred in the absence of the arbitration. *Id.* § 580(g).

Section 580(g) also requires that the fees and expenses “be paid from the funds of the agency that vacated the award.” Thus, if a party has to go to court to get the award of fees and expenses, payment is “otherwise provided for” and cannot be paid from the permanent judgment appropriation (31 U.S.C. § 1304).

The ADR Act also amended two of the major federal claims statutes. First, it amended the Contract Disputes Act to authorize the contractor and contracting officer to use ADR procedures to resolve claims. An arbitration award is subject to judicial review under the standards of 9 U.S.C. §§ 9–13, and the court is expressly authorized to modify or set aside any award that violates limitations imposed by federal statute. Pub. L. No. 101-552, § 6, 104 Stat. at 2745, 41 U.S.C. §§ 605(d) and 607(g)(3) (Supp. IV 1992).

Second, it amended the administrative settlement portion of the Federal Tort Claims Act. An agency is authorized to use arbitration or other ADR procedures to settle tort claims up to the limit of the agency’s authority to

settle without obtaining the prior approval of the Attorney General. That limit is \$25,000, except that the Attorney General can raise it by delegation, not to exceed the authority delegated to the United States Attorneys. Pub. L. No. 101-552, § 8(a), 104 Stat. at 2746, 28 U.S.C. § 2672 (Supp. IV 1992). The Justice Department cautions that agencies should use informal negotiation and settlement whenever feasible rather than a formal or structured process, and reminds agencies that if they do resort to an ADR procedure, they must reserve the discretion to accept or reject the outcome. 28 C.F.R. §§ 14.6(a)(1) and (2).

Prior to the ADR Act, both the Comptroller General<sup>8</sup> and the Attorney General<sup>9</sup> had expressed the view that government agencies may not submit claims and disputes to binding arbitration unless authorized by statute. The essence of the objection was the proposition that a “federal official may not delegate to a private party decisionmaking authority which has been vested in him or her by Congress.” 4B Op. Off. Legal Counsel 709, 715 (1980). In the context of monetary claims, submitting to binding arbitration would amount to delegating the authority to obligate public funds. The ADR Act addresses this concern by virtue of the provision authorizing an agency head to vacate an arbitration award within 30 days. Thus, the final decisionmaking power remains, as it should, in government hands.

Some other examples of statutes authorizing the federal government to submit various matters to arbitration are 5 U.S.C. §§ 7121, 7122 (part of grievance procedure under collective bargaining agreement); 20 U.S.C. § 107d-2 (Randolph-Sheppard Act); 46 U.S.C. App. § 749 (Suits in Admiralty Act); 46 U.S.C. App. § 786 (Public Vessels Act).

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## 4. Payment

### a. Obligation and Source of Funds

Claims settled at the administrative level are paid in one of three ways: (1) from operating appropriations available to the agency whose activities gave rise to the claim; (2) from some existing appropriation or fund other than the agency’s operating appropriations; or (3) by submitting the claim to Congress for a specific appropriation. There is no option involved. For

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<sup>8</sup>E.g., 32 Comp. Gen. 333 (1953); 19 Comp. Gen. 700 (1940); 8 Comp. Gen. 96 (1928); 7 Comp. Gen. 541 (1928). GAO did not object to using arbitrators for making certain factual determinations such as valuations as long as they were not also determining the legal liability of the United States. E.g., 20 Comp. Gen. 95 (1940); B-191484, May 11, 1978; B-184526, August 11, 1975.

<sup>9</sup>33 Op. Att’y Gen. 160 (1922); 4B Op. Off. Legal Counsel 709 (1980). See also 3 Op. Off. Legal Counsel 226 (1979) (exception for Export-Import Bank based on its enabling legislation).

any given claim, one of these methods will apply to the exclusion of the other two. The first place to look, of course, is the statute authorizing the settlement, although this will not always provide the complete answer.

(1) Payment from agency appropriations

This is by far the most common source of payment and will apply unless one of the other methods is expressly directed by statute. In some cases, the relevant claims statute will specifically address payment. For example, under the Federal Tort Claims Act, administrative settlements of \$2,500 or less are paid “by the head of the Federal agency concerned out of appropriations available to that agency.” 28 U.S.C. § 2672. Another example is 16 U.S.C. § 574, which authorizes the Secretary of Agriculture to reimburse property owners up to \$2,500 for loss or damage caused by the government in connection with the administration or protection of the national forests, “payment to be made from any funds appropriated for the protection, administration, and improvement of the national forests.” This authority has been used, for example, to compensate landowners for damage caused by aerial spraying for pest control. B-117720, December 23, 1953. Still another example is 16 U.S.C. § 502(d), which authorizes the Secretary of Agriculture to reimburse owners for loss or damage to horses, vehicles, or other equipment borrowed or rented for use by the Forest Service, payment to be made “from the applicable appropriations of the Forest Service.”<sup>10</sup>

If the statute authorizes agencies to settle claims but is silent with respect to payment, the implication is that the agency will pay from its operating appropriations. A common example is the Military Personnel and Civilian Employees Claims Act of 1964, 31 U.S.C. § 3721. B-143673, November 11, 1976, overruled on other grounds by 56 Comp. Gen. 615 (1977); B-174762, January 24, 1972; B-206856, April 7, 1982 (non-decision letter). Similarly, settlements under the Contract Disputes Act at the contracting officer level are paid from the contracting agency’s procurement appropriations. Another example is 31 U.S.C. § 3724, which authorizes the Attorney General to settle claims for death, personal injury, or property damage caused by investigative or law enforcement officers of the Department of Justice acting within the scope of their employment, which cannot be settled under the Federal Tort Claims Act. Settlement authority is limited to “not more than \$50,000 in any one case.” Id. § 3724(a). The statute makes no mention of how the claims are to be paid, but the legislative history of a

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<sup>10</sup>The relationship between this authority and the Federal Tort Claims Act is discussed in B-153618, April 9, 1964.

1989 revision explains that they are paid from the operating funds of the Justice Department. H.R. Rep. No. 46, 101st Cong., 1st Sess. 3 (1989), reprinted at 1989 U.S. Code Cong. & Admin. News 1226, 1228. Still another statute in this category is 33 U.S.C. § 853, which authorizes the Secretary of Commerce to settle damage claims not exceeding \$2,500 attributable to the National Oceanic and Atmospheric Administration.

For the Department of Defense and the military departments, claims payable from agency funds are paid from Operation and Maintenance appropriations in accordance with 10 U.S.C. § 2732. While the terms of the statute are general (“claims authorized by law to be paid”), its scope is clarified by its origin. Until fiscal year 1989, the Defense Department received a separate lump-sum appropriation entitled “Claims, Defense.” It was available for all noncontractual claims payable from agency funds, including “personnel claims, tort claims, admiralty claims, and miscellaneous claims.”<sup>11</sup> Starting with FY 1989, Congress discontinued the Claims, Defense appropriation and instructed Defense to charge the claims to O&M appropriations.<sup>12</sup> The authority was made permanent in 1990.<sup>13</sup>

If payment is to be made from agency appropriations, it is necessary to determine when the obligation occurs and hence what fiscal year to charge. The governing principle, stated in a number of earlier decisions, is that a claim against an annual appropriation is chargeable to the appropriation for the fiscal year in which the liability was incurred. *E.g.*, 18 Comp. Gen. 363, 365 (1938). Exactly when this happens depends on the type of claim.

As a general proposition, claims involving property damage or personal injury will be chargeable to the fiscal year in which the final determination of the government’s liability is made. The theory is that there is no obligation on the part of the government until the claim is adjudicated and allowed. Thus, administrative awards of \$2,500 or less under the Federal Tort Claims Act are payable from funds current when the award is made. 38 Comp. Gen. 338 (1958); 35 Comp. Gen. 511, 512 (1956); 27 Comp. Gen. 445 (1948); 27 Comp. Gen. 237 (1947). Similarly, payments under the

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<sup>11</sup>S. Rep. No. 325, 95th Cong., 1st Sess. 191 (1977). This is the report of the Senate Appropriations Committee on the 1978 Defense appropriation. The Claims, Defense appropriation for that year is found at Pub. L. No. 95-111, 91 Stat. 886, 891 (1977).

<sup>12</sup>Department of Defense Appropriations Act, 1989, Pub. L. No. 100-463, § 8098, 102 Stat. 2270, 2270–35 (1988).

<sup>13</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 1481(j), 104 Stat. 1485, 1708 (1990).

Military Personnel and Civilian Employees' Claims Act of 1964 are chargeable to funds current at the time of award. B-174762, January 24, 1972.

These cases are an outgrowth of an earlier decision which had reached the same result under a statute authorizing the (then) War Department to pay claims for damage caused by American forces abroad. 1 Comp. Gen. 200 (1921). This decision would still apply to similar statutes such as 10 U.S.C. § 2734 to the extent payment must come from agency appropriations. GAO applied the same reasoning and result to expenses of hospitalization and related transportation paid by the State Department under the discretionary authority of the Foreign Service Act of 1946. Under the statute, there is no obligation until the State Department administratively determines that the illness or injury occurred in the line of duty and not as the result of misconduct. B-80060, September 30, 1948.

Contract claims settled at the contracting officer level are chargeable to appropriations current at the time the basic contract was executed if they are based on "antecedent liability." A contract claim is based on antecedent liability if the modification or adjustment is within the general scope of the original contract and is made pursuant to a provision, such as a "Changes" clause, in the original contract. Contract claims not based on antecedent liability are chargeable to appropriations current when the claim is allowed. For example, a contractor provided supplemental research services under a contract with the Interior Department without the issuance of written contract amendments. Since the government received the benefit of the services and ratified the transaction, the contractor was entitled to be paid. The work was within the general scope of the original contract and the government's liability was viewed as deriving from the "Changes" clause. Therefore, the contractor's claim was chargeable to funds available at the time the original contract was executed. B-197344, August 21, 1980. See also B-208730, January 6, 1983.

In a contract implied-in-law (quantum meruit) situation, there is no contract to which the allowance of the claim can relate. The payment is chargeable to the fiscal year in which the goods were received or the services rendered. B-210808, May 24, 1984; B-207557, July 11, 1983.

When GAO allows bid preparation costs incident to a successful bid protest, the obligation relates to the fiscal year in which GAO issued its decision. B-199368.4, January 19, 1983.

Claims by federal employees for compensation and related allowances are chargeable to appropriations for the fiscal year in which the work was performed. If the claim covers more than one fiscal year, the payment must be prorated accordingly. If the applicable appropriation account is insufficient to pay the claim, the agency must seek a deficiency appropriation. 69 Comp. Gen. 40 (1989) (administrative awards of back pay); 54 Comp. Gen. 393 (1974) (claim for statutory salary which claimant had previously improperly waived); 47 Comp. Gen. 308 (1967) (payment resulting from recrediting of sick leave); B-171786, March 2, 1971 (overtime). If the applicable account for a prior year has been closed pursuant to 31 U.S.C. § 1552(a), the portion chargeable to that year must be charged to current appropriations, subject to the one-percent limitation of 31 U.S.C. § 1553(b). Interest under the Back Pay Act is chargeable to the same fiscal year or years as the back pay to which it relates. 69 Comp. Gen. at 43.

The rule is the same in situations where the claimant did not perform any work, for example, restoration after an improper termination where the period of wrongful termination is deemed valid service under the Back Pay Act. 69 Comp. Gen. 40, 42 (1989); 58 Comp. Gen. 115 (1978). The latter case held that agency contributions to an employee's retirement account, where not payable from the permanent judgment appropriation, must be prorated among the fiscal years covered. While the case does not discuss administrative payments of back pay, it implies that back pay under the Back Pay Act, Title VII of the Civil Rights Act, and the Veterans Preference Act should be treated similarly.<sup>14</sup>

#### (2) Payment from separate appropriation or fund

In a number of instances, Congress has prescribed that claims of a particular type be paid from a separate fund established for that purpose. If this is the case, the agency does not have a choice. Since a specific statutory provision governs over a more general one, the agency must use the prescribed source and may not use its regular operating appropriations. In these cases, you simply do what the statute says.

A number of examples may be found elsewhere in this chapter. Claims under the Federal Employees Compensation Act are paid from the Employees' Compensation Fund administered by the Department of

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<sup>14</sup>One older case reached a contrary result, concluding that back pay resulting from restoration could be charged to current year funds since the administrative action directing the restoration could be viewed as creating the government's obligation. B-113279-O.M., January 30, 1953. However, it does not appear to have been followed.

Labor. Claims under the Government Losses in Shipment Act are paid from a revolving fund administered by the Treasury Department.

Several types of administrative claims are payable from the permanent judgment appropriation established by 31 U.S.C. § 1304. The primary example is administrative awards in excess of \$2,500 under the Federal Tort Claims Act, 28 U.S.C. § 2672. Monetary awards by agency boards of contract appeals are payable in the first instance from the judgment appropriation, subject to reimbursement by the contracting agency from current appropriations. 41 U.S.C. §§ 612(b) and (c); 63 Comp. Gen. 308 (1984). A 1978 amendment to the judgment appropriation added several categories which previously had required specific appropriations. Those covered elsewhere in this chapter are the Small Claims Act, 31 U.S.C. § 3723, and amounts in excess of amounts payable from agency appropriations under the Military Claims Act, 10 U.S.C. § 2733, Foreign Claims Act, 10 U.S.C. § 2734, and National Guard Claims Act, 32 U.S.C. § 715. Claims payable from the judgment appropriation are not reimbursable unless provided by statute, such as the Contract Disputes Act.

One additional category covered by the 1978 amendment to 31 U.S.C. § 1304 is claims under section 203 of the National Aeronautics and Space Act of 1958, 42 U.S.C. § 2473(c)(13). This statute authorizes the Administrator of the National Aeronautics and Space Administration to settle claims for death, personal injury, or property damage resulting from the conduct of NASA's functions, if presented in writing within 2 years after the incident giving rise to the claim. Claims of \$25,000 or less are paid directly by NASA from its own funds. Claims in excess of \$25,000 are paid from the judgment appropriation. The NASA statute differs from the Military, Foreign, and National Guard Claims Acts in one important respect. Under the military statutes, if a claim exceeds the amount payable from agency funds, only the excess over that amount is paid from the judgment appropriation. Under the NASA statute, the entire amount of claims in excess of \$25,000 is paid from the judgment appropriation.<sup>15</sup>

A key point about the claims under this heading—payable from separate appropriation or fund—is that, even though the agency may not use its own appropriations, a source is available for immediate payment.

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<sup>15</sup>The statute still refers to reporting the claim to Congress. 42 U.S.C. § 2473(c)(13)(B). However, this is effectively overridden by 31 U.S.C. § 1304(a)(3)(D).

(3) Payment from specific congressional appropriation

There are several instances in which there is no source of funds available for immediate payment. If the legislation governing a particular type of claim requires specific appropriations, then payment must await congressional action. Statutes of this type frequently require that the agency's determination be reported to Congress for its consideration or certified to Congress as a "legal claim." Examples are:

- Admiralty claims settled by the Army, Navy, Air Force, and Coast Guard under, respectively, 10 U.S.C. §§ 4802, 7622, 9802, and 14 U.S.C. § 646. Under these statutes, the applicable agency head may settle and pay admiralty claims up to a specified limit (\$500,000 for the Army and Air Force, \$1,000,000 for the Navy, and \$100,000 for the Coast Guard). If the settlement exceeds the specified limit, the claim must be certified to Congress. GAO has no settlement jurisdiction under these admiralty statutes. B-126162, March 16, 1956.
- 20 U.S.C. § 975(b): Claims for losses under indemnity agreements authorized by the Arts and Artifacts Indemnity Act. Certification to Congress is made by the Federal Council on the Arts and Humanities.
- 31 U.S.C. § 3725: Claims for death or personal injury of a foreign national caused by a government employee in a foreign country in which the United States has privileges of extraterritoriality. Settlement authority is conferred upon the State Department and is limited to \$1,500. See B-120773, March 22, 1955.
- 42 U.S.C. § 2207: Claims resulting from certain nuclear or other explosive detonations in the conduct of programs undertaken by the Department of Energy.
- 42 U.S.C. § 2211: Claims resulting from a nuclear incident involving the nuclear reactor of a United States warship, excluding combat activities.
- Administrative settlements under the Suits in Admiralty Act, 46 U.S.C. App. § 749, where there is no available agency appropriation or insurance fund. At one time, a permanent appropriation existed for these but it was repealed in 1935. See 46 U.S.C. App. § 748 note.

b. Who Gets Paid

(1) Payment to right person

The guiding principle is the rather common-sense proposition that payment should be made to the person or entity entitled to receive it. Common sense in this instance is reinforced by 31 U.S.C. § 3322(a), which instructs disbursing officers to draw public money from the Treasury only

“payable to persons to whom payment is to be made.”<sup>16</sup> The government’s motives are not purely benevolent. To quote a phrase used in innumerable GAO decisions, the government’s objective in making payment is to secure a “good acquittance” or a “valid acquittance” for the United States. 62 Comp. Gen. 302, 307 (1983); 24 Comp. Gen. 261, 262 (1944). This means the assurance that the payment is discharging the government’s obligation and that the government will not find itself embroiled in controversy between competing claimants with the resulting possibility of being required to pay twice. Also relevant is the government’s policy against serving as agent for the collection of private debts. *E.g.*, 54 Comp. Gen. 424, 427 (1974).

If the payee is an individual who is (a) alive, (b) not a minor, (c) mentally competent, and (d) at a known location, the matter is simple. The check is drawn payable to the individual and sent to his or her address of record. See, *e.g.*, B-217468, June 25, 1985 (where individual who was also incorporated had been retained to provide services as an individual, payment should be made to the individual and not to the corporation). If any of the 4 elements noted are not present, the matter becomes more complicated.

If the payee is deceased, payment should be made to the legal representative (executor or administrator) of the payee’s estate. Normally, this refers to probate proceedings in the state of the decedent’s domicile at the time of death. In appropriate circumstances, however, this does not preclude a person from qualifying as legal representative where the decedent’s will has been properly probated in a state other than the state of domicile, for example, a state in which the decedent’s property is located. See *Miniafee v. United States*, 17 Cl. Ct. 571, 577 (1989) (reaching this conclusion with respect to final settlement of accounts of deceased members of armed forces under 10 U.S.C. § 2771).<sup>17</sup> If the estate has been closed and state law has a procedure for handling the distribution of property found after closing, that procedure should be followed. B-234425, May 30, 1989.

Procedures may be relaxed for small amounts. The *Annual Report of the General Accounting Office, 1923*, H.R. Doc. No. 101, 68th Cong., 1st Sess. 37 (1923), contains the following policy statement:

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<sup>16</sup>This provision has never been regarded as impeding the negotiability of government instruments. See, *e.g.*, 22 Op. Att’y Gen. 637, 643 (1899); 15 Comp. Dec. 604 (1909).

<sup>17</sup>The court expressed disagreement with 33 Comp. Gen. 346 (1954) and 52 Comp. Gen. 113 (1972), purportedly reaching a different result. There is no inconsistency, however, in that neither case involved a legal representative duly appointed in a nondomiciliary state.

“In a large number of cases, where the Government is found indebted to a person who dies before payment can be effected, it happens that the amount of the indebtedness is so small that to insist upon the appointment of an administrator before payment would result in a virtual confiscation of the amount due or at least reduce it so as to leave little for the beneficiaries of the estate.”

See also 12 Comp. Dec. 439, 440 (1906). GAO’s current policy stems from B-69787-O.M., May 2, 1979. Payments of \$3,000 or less may be made without requiring the appointment of a legal representative. For payments larger than \$3,000, appointment should be required if and only if required by the law of the decedent’s domicile at the time of death. If there are no probate proceedings, payment is made in accordance with the law of the decedent’s domicile.

Similarly, if a settlement involves payment to or on behalf of a minor, appointment of a legal guardian generally will be required where required by state law, for example, if state law limits the amount payable to a parent or natural guardian and the award exceeds that amount. B-176252-O.M., September 5, 1972. See 4 C.F.R. § 35.5 for documentation requirements. For payments to “incompetent public creditors,” see 4 C.F.R. Part 36. If the payee’s whereabouts are unknown, the money is credited to a trust account described later in this chapter under the Unclaimed Money/Property heading.

Payments to a corporate payee which is no longer in existence also present complications. Some guidance exists in GAO’s determinations under the International Claims Settlement Act discussed later in this chapter. In a case where a corporation had been dissolved and potential claimants (e.g., creditors, stockholders) were unknown, GAO advised the agency to simply close its file and deobligate the money. If a claimant should subsequently surface, payment could be made in accordance with 31 U.S.C. § 1553 for expired or closed accounts. B-203676, September 21, 1981. In *Automatic Sprinkler Corp. v. Darla Environmental Specialists, Inc.*, 852 F. Supp. 16 (N.D. Ill. 1994), the General Services Administration was holding money concededly owed to a contractor which had been dissolved under state law. To prevent what it regarded as a “windfall” for the government, the court ordered the money paid to a state court judgment creditor of the defunct corporation, subject to an outstanding federal tax lien.

There will be the occasional case in which the proper payee cannot be determined short of an adversary proceeding, in which event the proper

course of action is to deny payment administratively and leave the competing claimants to their remedy in the courts. E.g., 68 Comp. Gen. 284 (1989).

As a general proposition, government checks should be delivered directly to the payees. 16 Comp. Gen. 840 (1937). However, they may be delivered to the agency involved for subsequent forwarding to the payees where there is some valid reason for doing so. 65 Comp. Gen. 81 (1985).

(2) Payment to wrong person

Payment to the wrong person does not discharge the government's obligation. If, through administrative mistake of fact or law, or clerical error, a payment is made to a person not entitled to it, the government is still obligated to make payment to the proper claimant. The agency should take action to recover from the first payee, but payment to the proper claimant should not be held up pending recovery of the erroneous payment, even though this may result in a duplicate payment. Illustrative cases are 66 Comp. Gen. 617 (1987), affirmed upon reconsideration, B-226540.2, August 24, 1988 (agency which breached joint payment agreement by erroneously sending check to only one of the parties was liable to co-payee); 37 Comp. Gen. 131 (1957) (payment of death gratuity to erroneously designated payee); 19 Comp. Gen. 104 (1939) (payment to wrong beneficiary under Social Security Act); B-249869, January 25, 1993 (agency which made payment to agent after receiving notice of termination of agent's association with contractor remains liable to contractor). Two additional situations where this rule comes into play are discussed later in this chapter—payment to a contractor or assignee in derogation of the superior claim of a surety, and payment to a contractor after being notified of a valid assignment to a financing institution.

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## C. Specific Types of Claims

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### 1. Claims “Sounding in Tort”

The traditional classification of claims starts with the two major categories of tort and contract. It is difficult to define “tort” with any precision. One authority defines the term simply as “[a] legal wrong committed upon the person or property independent of contract.” Black's Law Dictionary 1489 (6th ed. 1990). Common examples are motor vehicle accidents, medical

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malpractice, and slip-and-fall cases. The common law also recognizes non-physical torts, such as libel, slander, and misrepresentation. The essence of a tort is (a) a noncontractual legal duty owed by one party to another, and (b) a breach of that duty. In the motor vehicle context, for example, a driver owes other drivers and pedestrians the duty to exercise reasonable care and to observe the traffic laws.

a. Federal Tort Claims Act

(1) Overview<sup>18</sup>

Prior to 1946, with limited exceptions, the United States was not liable for the tortious conduct of its employees. E.g., 1 Comp. Gen. 178 (1921). Congress rectified this situation with the enactment of the Federal Tort Claims Act (FTCA), Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 812, 842, now codified at 28 U.S.C. §§ 1346(b) and 2671–2680.

The first section of the FTCA, 28 U.S.C. § 2671, defines “Federal agency” and “employee of the government” for FTCA purposes. The term “Federal agency” is broadly defined to include—

“the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.”

Consistent with the manifest intent of this definition and its predecessors, GAO regards the FTCA as applicable to all federal agencies and employees unless specifically excluded. 35 Comp. Gen. 511 (1956); 26 Comp. Gen. 891 (1947). Examples include 67 Comp. Gen. 142 (1987) (FTCA applies to Federal Retirement Thrift Investment Board but should not be used as a device to cover program losses); B-236022, January 29, 1991 (Stennis Center for Public Service Training and Development, a legislative branch agency); B-229660, April 28, 1989 (office of the Market Administrator of the Agriculture Department’s Federal Milk Order Program).

An important part of the definition of federal agency is the exclusion of contractors. By virtue of this provision, the United States is not liable for the tortious conduct of its independent contractors. E.g., Berkman v. United States, 957 F.2d 108 (4th Cir. 1992). However, the independent contractor exception may not preclude liability if there is also negligence

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<sup>18</sup>The body of law that has evolved under the Federal Tort Claims Act is voluminous. Our objective here is merely to provide an overview of the statute with emphasis on administrative settlement authority and payment. A comprehensive reference on all aspects of the Federal Tort Claims Act is Lester S. Jayson, Handling Federal Tort Claims: Administrative and Judicial Remedies.

attributable to some government employee. Phillips v. United States, 956 F.2d 1071 (11th Cir. 1992) (negligence in carrying out safety responsibilities).

The definition of “employee” in 28 U.S.C. § 2671 includes temporary as well as permanent employees and those serving without compensation.

The next section of the statute, 28 U.S.C. § 2672, which we will address in detail later, is perhaps the most important for our purposes. It authorizes agencies to settle claims resulting from the tortious conduct of federal employees committed within the scope of their employment, and addresses how the settlements are to be paid. Agency settlements are final and conclusive. Therefore, except for claims involving GAO employees, GAO’s claims settlement jurisdiction does not extend to claims under the FTCA. B-176147, July 5, 1972; B-161131, April 18, 1967.

Section 2674 provides that the United States shall be liable “in the same manner and to the same extent as a private individual under like circumstances.” The elements or extent of damages allowable are thus determined by local law (which usually means the law of the state in which the tort occurred) and matters over which GAO has no jurisdiction. B-130096, January 25, 1957; B-115538, July 2, 1953. Section 2674 also provides that the United States shall not be liable for punitive damages nor for interest prior to judgment. The Supreme Court addressed the meaning of “punitive damages” for purposes of 28 U.S.C. § 2674 in Molzof v. United States, 112 S. Ct. 711 (1992), holding that the term is limited to the traditional common-law concept of punitive damages whose purpose is to punish.

Section 2675 establishes the important requirement to exhaust administrative remedies before going to court. The statute prohibits the filing of a lawsuit unless a claim has first been filed with the appropriate agency. This requirement means exactly what it says. Complying with the administrative claim requirement before substantial progress is made in the litigation is not enough. McNeil v. United States, 113 S. Ct. 1980 (1993).

Judgment will operate as a release to the employee as well as to the government. 28 U.S.C. § 2676. Section 2677 authorizes the Attorney General or his or her designee to compromise claims after the commencement of suit. A requirement in the original FTCA for court approval was deleted in 1966.

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The next section, 28 U.S.C. § 2678, sets maximum attorney’s fees—20 percent of administrative awards (section 2672) and 25 percent of judgments (section 1346(b)) and settlements (section 2677). Penal sanctions are provided for excessive fees. The attorney’s fees are a portion of the amount recovered and not in addition to it. Section 2678 has been held to preempt state statutes imposing limits on attorney’s fees. Jackson v. United States, 881 F.2d 707 (9th Cir. 1989).

Under 28 U.S.C. § 2679(b), the FTCA remedy—

“is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee.”

Prior to 1988, the FTCA was the exclusive remedy for motor vehicle accident claims (part of the then-existing 28 U.S.C. § 2679 was known as the “Federal Drivers Act”) and, by virtue of several other statutes, medical malpractice cases. See B-114839, January 25, 1979. The Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, broadened the “exclusive remedy” protection in response to the Supreme Court’s decision in Westfall v. Erwin, 484 U.S. 292 (1988) which had seriously eroded the immunity of government employees from state-law tort liability. The exclusive remedy protection does not apply to constitutional torts or to statutes which specifically authorize suits against individual officers or employees. 28 U.S.C. § 2679(b)(2).

If an employee is sued in a state court for something within the scope of the FTCA’s exclusive remedy protection, and the Attorney General certifies that the employee was acting within the scope of his or her employment at the time of the incident in question, the suit must be removed to a federal court and the United States substituted as defendant. Id. § 2679(c)(2).

The exclusive remedy provision of 28 U.S.C. § 2679 applies to bar suit against an individual employee even where one of the specific exceptions in the FTCA precludes recovery against the United States. United States v. Smith, 499 U.S. 160 (1991).

Finally, section 2680 lists several exceptions to the FTCA. They include the following:

- The “discretionary function” exception: The FTCA does not waive sovereign immunity with respect to an employee exercising due care in the

execution of a statute or regulation, or to the exercise or performance or the failure to exercise or perform a discretionary function. § 2680(a). The scope and meaning of this exception have generated much litigation. Two of the leading Supreme Court cases are United States v. Gaubert, 499 U.S. 315 (1991), and Dalehite v. United States, 346 U.S. 15 (1953). GAO will not review an agency's finding that a claim is within the "discretionary function" exception. B-190362, December 14, 1977.

- The FTCA does not apply to claims arising out of the loss or miscarriage of letters or postal matter. § 2680(b). E.g., Kissell v. Mann, 750 F. Supp. 55 (D.N.H. 1990) (suit dismissed alleging that package was stolen because mail carrier failed to leave card in plaintiff's mailbox notifying him that it had been delivered).
- The FTCA does not apply to claims in respect of the assessment or collection of any tax or customs duty. § 2680(c). E.g., B-178232, April 13, 1973 (claim for erroneous filing of tax lien by Internal Revenue Service not cognizable). The customs exception precludes liability under the FTCA, but does not preclude liability for breach of an implied contract of bailment in appropriate cases. Hatzlachh Supply Co. v. United States, 444 U.S. 460 (1980).
- The FTCA does not apply to claims cognizable under the Suits in Admiralty Act or the Public Vessels Act. § 2680(d).
- The FTCA does not apply to claims for libel, slander, misrepresentation, deceit, or interference with contract rights; nor does it apply to claims for assault, battery, or false arrest or imprisonment except with respect to investigative or law enforcement officers. § 2680(h).
- The FTCA does not apply to any claim "for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system." § 2680(i).
- The FTCA does not apply to claims arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war. § 2680(j).
- The FTCA does not apply to any claim arising in a foreign country. § 2680(k). Antarctica is regarded as a foreign country for purposes of this exception. Smith v. United States, 113 S. Ct. 1178 (1993).

## (2) Administrative settlement

As noted above, the first step in the process is the filing of an administrative claim, and a lawsuit cannot be maintained until this has been done. Administrative settlement is authorized by the first paragraph of 28 U.S.C. § 2672, as follows:

“The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency 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 . . . .”

The Justice Department’s implementing regulations are found at 28 C.F.R. Part 14.

The above excerpt from 28 U.S.C. § 2672 makes several important points:

1. The agency head may delegate settlement authority. The number of persons to whom it is delegated is discretionary with the agency head. 40 Op. Att’y Gen. 503 (1947).
2. Settlement authority expressly includes compromise.
3. A claim under the FTCA must be for money damages. The FTCA does not cover nonmonetary claims such as a claim for the restoration of annual leave. B-171716, March 26, 1971.
4. The damage must be caused by the “negligent or wrongful act or omission” of a federal employee. This includes intentional torts not expressly excluded. Waters v. United States, 812 F. Supp. 166 (N.D. Cal. 1993).
5. The federal employee must have been acting within his or her scope of employment. What is or is not within the scope of employment is determined under the law of the state (or District of Columbia, as the case may be) in which the incident occurred. Williams v. United States, 350 U.S. 857 (1955); Simmons v. United States, 805 F.2d 1363 (9th Cir. 1986); Rallis v. M.P.W. Stone, 821 F. Supp. 466 (E.D. Mich. 1993). State law applies even where the incident occurred on federal property. Lutz v. United States, 685 F.2d 1178, 1184 (9th Cir. 1982).

The claimant will usually be the injured person or his or her legal representative (or estate), or the owner of the damaged property. 28 C.F.R. §§ 14.3(a)–(c). An insurance company which has become subrogated to the rights of its insured by virtue of making payments under a policy can

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file a claim in its own name. United States v. Aetna Casualty & Surety Co., 338 U.S. 366 (1949); 28 C.F.R. § 14.3(d).

The administrative claim must be filed within two years after it accrues. 28 U.S.C. § 2401(b). The claim must be in writing and must specify a “sum certain” (specific dollar amount). 28 C.F.R. § 14.2(a). There is a claim form, Standard Form 95, prescribed for FTCA claims, but other written notification is acceptable. *Id.* If the claimant files with the wrong agency, the receiving agency should transfer the claim to the proper agency. If the receiving agency can’t determine the proper agency, it should return the claim to the claimant. *Id.* § 14.2(b)(1). For purposes of satisfying the two-year limitation, the claim is received when received by the correct agency. *Id.*

Upon receipt of a claim, the agency must first make its own scope of employment determination in accordance with applicable state law. While there are variations from state to state in some respects, the basic elements tend to be fairly constant. For example, ordinary home-to-work commuting (travel between one’s permanent residence and permanent place of duty) is not within the scope of employment for purposes of the FTCA. *E.g.*, Perez v. United States, 253 F. Supp. 619 (D. Mass.), *aff’d*, 368 F.2d 320 (1st Cir. 1966). However, for employees on official travel, travel between temporary lodging and the temporary duty or training site normally is considered within the scope of employment. *E.g.*, Dunaville v. Carnago, 485 F. Supp. 545 (S.D. Ohio 1980).

Assuming the claimant has filed on time and the claim meets the scope of employment test, the agency then proceeds to conduct whatever investigation may be warranted,<sup>19</sup> and to consider the merits of the claim. The agency has six months to respond to the claim. More precisely, the claimant cannot sue until either (a) the agency finally denies the claim in writing, or (b) the agency fails to make final disposition within six months, whichever first occurs. 28 U.S.C. § 2675(a). If there has been no final denial, the claimant does not have to file suit at the end of six months. As long as the administrative claim has been filed within the prescribed two-year period and the agency has not issued a final denial, there is no statute of limitations on filing a lawsuit. Upon expiration of the six-month period, filing the lawsuit is at the claimant’s option.

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<sup>19</sup>The regulations specify the kinds of information or evidence the agency may require the claimant to submit, and authorize agencies to request other agencies to conduct investigations for them, which may be reimbursable where authorized or required. 28 C.F.R. §§ 14.4, 14.8.

If the agency allows the claim, or if the parties reach a compromise agreement, the award or settlement is paid and that is usually the end of the matter. A proposed award in excess of \$5,000 must be reviewed by the agency's legal department. 28 C.F.R. § 14.5. Awards in excess of \$25,000 require the prior written approval of the Attorney General, except that the Attorney General may delegate increased settlement authority to any agency, up to the limit delegated to the United States Attorneys. 28 U.S.C. § 2672. Unless procured by fraud, awards made under the authority of 28 U.S.C. § 2672 are final and conclusive on the government. *Id.*, 2d paragraph. Acceptance of the award is final and conclusive on the claimant and operates as a "complete release of any claim against the United States and against the employee of the government, whose act or omission gave rise to the claim, by reason of the same subject matter." *Id.*, 4th paragraph.

If the claim is one that should not be allowed (no scope of employment, agency employee not negligent, claim time-barred, claim subject to one of the exclusions of 28 U.S.C. § 2680, etc.), or if the parties are unable to reach agreement on the amount of damages, the agency should issue a "final denial" which must be transmitted by certified or registered mail. 28 U.S.C. § 2675(a); 28 C.F.R. § 14.9(a). The claimant then has an option. Within six months from the date of mailing of the final denial, the claimant may (a) submit a written request to the agency for reconsideration, in which event the agency has another six months to respond, or (b) file a lawsuit. 28 U.S.C. § 2401(b); 28 C.F.R. § 14.9(b). A final denial letter must advise the claimant of the right to file suit within six months. 28 C.F.R. § 14.9(a).

The United States district courts have exclusive jurisdiction over FTCA actions. 28 U.S.C. § 1346(b). Trial is before a judge without a jury. *Id.* § 2402.

To sum up the pertinent time limitations:

- The claimant must file the administrative claim not later than two years after it accrues, and cannot sue unless this has been done.
- Upon filing the administrative claim, the claimant must give the agency 6 months to respond. If the agency does not issue a final denial within 6 months after the claim is filed, the claimant may file suit any time thereafter.
- Once the agency issues its final denial, whether during or after the initial 6-month period, the claimant must sue or seek reconsideration not later than 6 months from the date the final denial is mailed.

(3) Payment

The third paragraph of 28 U.S.C. § 2672 provides for the payment of administrative settlements. If the award is \$2,500 or less, the agency must pay “out of appropriations available to that agency.” If the award exceeds \$2,500, it is paid “in a manner similar to judgments and compromises in like causes.” This means that awards in excess of \$2,500 are paid, upon certification by GAO, from the permanent indefinite appropriation for judgments established by 31 U.S.C. § 1304. Compromise settlements made by the Attorney General under 28 U.S.C. § 2677 are payable under 31 U.S.C. § 1304 regardless of amount.<sup>20</sup>

The \$2,500 limit refers to the amount awarded to each claimant and not to the aggregate. B-168705-O.M., January 27, 1970. Thus, if three claimants are awarded \$1,000 each from the same incident, the agency must pay. If two are awarded \$1,000 each and the third is awarded \$3,000, the agency pays the first two and the third will be paid from the judgment appropriation. For purposes of applying the \$2,500 limitation, the claims of an insurance company (subrogee) and its insured (subrogor), even though presented separately, are viewed as interests in the same claim; if the total award exceeds \$2,500, it is payable under 31 U.S.C. § 1304. 49 Comp. Gen. 758 (1970). See also 41 Op. Att’y Gen. 70 (1950).

Occasionally, an award which will be ultimately distributed among several individuals may be stated in a lump sum in accordance with state law. For example, the award in B-173975-O.M., September 14, 1971, was made under the Arizona wrongful death statute, under which an action is brought in the name of the surviving spouse or legal representative on behalf of other survivors such as children. The award is made in a lump sum to be distributed in accordance with the Arizona intestacy statute. In this particular case, an FTCA award was made in this form to the surviving spouse and decedent’s administrator. The total award exceeded \$2,500 although some of the beneficiaries would receive less than \$2,500 under Arizona law. The award was held payable under 31 U.S.C. § 1304.

For awards payable from agency funds, there is no obligation on the part of the United States until a final determination of the government’s liability is made by the person authorized to do so. Thus, the appropriation to be

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<sup>20</sup>Prior to 1966, FTCA judgments were payable from the permanent appropriation but compromise settlements had to be paid from agency funds, a fact not particularly conducive to compromise settlements. The judgment appropriation was amended in that year to make it available for administrative FTCA settlements in excess of \$2,500 and compromise settlements by the Attorney General. See 31 U.S.C. § 1304(a)(3)(A). References in pre-1966 cases to payment of compromise settlements from agency funds are thus no longer valid. E.g., 45 Comp. Gen. 514 (1966).

charged is the appropriation current at the time such final action is taken. 35 Comp. Gen. 511, 512 (1956); 27 Comp. Gen. 445 (1948); 27 Comp. Gen. 237 (1947). Specific appropriations are not required for the payment of tort claims. Section 2672 authorizes the agency—

“to select for the payment of such claims any appropriation of that agency which is currently available for obligation at the time the claim is determined to be proper for payment and the use of which for such purpose is not specifically proscribed or limited. Also, the word agency is not confined to a particular bureau but embraces the whole of the department or independent establishment. . . . Thus, any appropriation selected by the head of the agency, the use of which is not specifically proscribed or limited and which is currently available . . . for obligation may be used to make such settlements.”

38 Comp. Gen. 338, 340 (1958). The General Supply Fund of the General Services Administration (40 U.S.C. § 756) is an appropriation for purposes of 28 U.S.C. § 2672. B-148229-O.M., May 15, 1962.

Awards payable under 31 U.S.C. § 1304 should be submitted to GAO on a Standard Form 1145 payment voucher, together with other required documentation, in accordance with 28 C.F.R. § 14.10(a). GAO’s certification for payment will be in the form of a certification stamp made directly on the voucher. When the voucher so designates, payment will be made jointly to the claimant and his or her attorney. *Id.* For the most part, payment is made in a lump sum directly to the claimant or the claimant’s legal representative. In appropriate cases, however, the award may be in the form of a reversionary trust or structured settlement. See B-162924, December 22, 1967, and the discussion of structured settlements under the Requirement for Money Judgment heading in Chapter 14.

The provision in section 2672 that awards in excess of \$2,500 shall be payable “in a manner similar to judgments and compromises in like causes,” combined with the express inclusion of section 2672 in 31 U.S.C. § 1304, not only makes the judgment appropriation available but also incorporates those limitations which exist with respect to “judgments and compromises in like causes.” Thus, to be payable under 31 U.S.C. § 1304, an award must be “final,” payment must be “not otherwise provided for,” and the payment must be certified by GAO. For the most part, agency appropriations will not be available and there will be relatively few “otherwise provided for” situations, at least with respect to noncorporate agencies. *E.g.*, B-189652, July 17, 1979 (FTCA settlements by the Alaska Railroad).

Administrative expenses incurred by an agency in investigating an FTCA claim are chargeable to the agency's regular operating appropriations current at the time the expenses are incurred. 29 Comp. Gen. 111 (1949).

In 53 Comp. Gen. 214 (1973), a federal employee was involved in an accident while operating a motor vehicle within her scope of employment. She was given a traffic citation and a summons to appear in court. GAO found that, in view of the government's potential liability under the FTCA, it had a direct interest in the disposition of the traffic charge. Therefore, the employee's appearance in court could be regarded as the performance of official duty and the agency could reimburse her travel expenses. (It could not, however, pay or reimburse the amount of any resulting fine.)

Nothing in the Federal Tort Claims Act or elsewhere specifically authorizes reimbursement of a government employee who has paid a claim cognizable under the FTCA from personal funds. However, reimbursement has been permitted in rare cases where the payment was made in urgent and unforeseen emergency circumstances and where the interest of the government in being released from future claims was protected. B-186474, June 15, 1976; B-177331, December 14, 1972. However, as a general proposition, reimbursement is not authorized. See, *e.g.*, B-152070, October 3, 1963.

When the government pays a claim under the Federal Tort Claims Act, it may not recoup the payment from the employee whose actions or inactions gave rise to the claim. *United States v. Gilman*, 347 U.S. 507 (1954); *Garrett v. Jeffcoat*, 483 F.2d 590, 592 (4th Cir. 1973); B-121593, February 7, 1955. The right of the United States to recover from a third-party tortfeasor is discussed in 57 Comp. Gen. 781 (1978).

If a claimant under the FTCA is indebted to the United States, the amount of the indebtedness should be set off against the award. If the award is \$2,500 or less, the agency should make the setoff administratively under 31 U.S.C. § 3716. If the award exceeds \$2,500, GAO will apply 31 U.S.C. § 3728. B-135984, May 21, 1976.

In a different type of setoff situation, a nonveteran claimant had been furnished emergency care by a Veterans Administration hospital and was billed pursuant to statutory authority which required reimbursement to the VA appropriation. The claim was subsequently settled for \$25,000 plus the care which had been billed but not paid. The agency was instructed to prepare the voucher for the total amount (\$25,000 plus the cost of the

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care), with the setoff to be credited to the VA appropriation account and the balance paid to the claimant. 51 Comp. Gen. 180 (1971). See also B-138962, July 7, 1959. The cost of the care was viewed as a setoff of indebtedness because the claimant would have been liable for it but for its inclusion in the tort settlement.

b. Small Claims Act

Prior to the enactment of the Federal Tort Claims Act, Congress had provided limited settlement authority for tort claims in the Act of December 28, 1922, 42 Stat. 1066, known as the “Small Claims Act” or “Small Tort Claims Act.” Now found at 31 U.S.C. § 3723, the statute authorizes civilian agencies to settle claims for loss or damage to privately owned property caused by the negligence of government employees acting within their scope of employment, which cannot be settled under the Federal Tort Claims Act. Claims under 31 U.S.C. § 3723 may not exceed \$1,000, and must be filed within one year after they accrue.

For many years, the existence of the Small Claims Act was under a cloud. The repealer provision of the Federal Tort Claims Act (section 424, 60 Stat. 846–47), listed the 1922 statute as repealed, yet at the same time expressly preserved any settlement authority with respect to claims not cognizable under the new FTCA. See 26 Comp. Gen. 452, 455 (1947); 26 Comp. Gen. 149 (1946); 40 Op. Att’y Gen. 527 (1947). Due to an apparent misreading of the repealer language, the Small Claims Act was dropped from the United States Code upon enactment of the FTCA and not restored until the 1982 recodification of Title 31.

In any event, while the Small Claims Act was repealed to the extent of claims cognizable under the FTCA, it was not repealed to the extent it authorized settlement of claims not cognizable under the FTCA, and this is true even for the period it was missing from the U.S. Code. Therefore, 31 U.S.C. § 3723 remains as a vehicle for the administrative settlement of negligence claims not exceeding \$1,000 which are not cognizable under the FTCA nor covered by any other statute. For example, it has been used to settle tort claims arising in foreign countries. B-120773, March 22, 1955; B-123479-O.M., June 21, 1955. It has also been used to settle claims resulting from the detention of goods or merchandise by customs officers which are specifically excluded from the FTCA by 28 U.S.C. § 2680(c). The Treasury Department has regulations on the application of the Small Claims Act to claims against that department. See 31 C.F.R. §§ 3.20–3.24.

The Small Claims Act is limited to property damage claims and does not include death or personal injury. 10 Comp. Gen. 175 (1930); 2 Comp. Gen.

529, 531 (1923). Loss of use of the property is compensable. 39 Op. Att’y Gen. 122 (1937). Subrogation claims by insurers are cognizable. United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 376–78 (1949); 21 Comp. Gen. 341 (1941); 19 Comp. Gen. 503 (1939); 36 Op. Att’y Gen. 553 (1932).

One decision noted that the Small Claims Act had been used to settle certain property damage claims by government employees. 20 Comp. Gen. 339, 341 (1941). This would presumably still be true, at least to the extent the claims are not cognizable under the Military Personnel and Civilian Employees’ Claims Act of 1964, discussed later in this chapter.

Agency appropriations cannot be used to pay awards under the Small Claims Act. Under the statute as originally enacted, a proposed award had to be certified to Congress as a legal claim and Congress had to make a specific appropriation to pay it. See, e.g., 4 Comp. Gen. 876 (1925). In 1978, 31 U.S.C. § 1304 was amended so that awards under the Small Claims Act are now payable, upon certification by GAO, from the permanent judgment appropriation. 31 U.S.C. §§ 1304(a)(3)(B), 3723(c). The award must be accepted in full settlement of the claim. 31 U.S.C. § 3723(c).

As with the Federal Tort Claims Act, when the government pays a claim under the Small Claims Act, it cannot recoup its payment from the employee whose negligence generated the claim. 40 Op. Att’y Gen. 38 (1941).

Claims under 31 U.S.C. § 3723 are settled by the cognizant agency and are beyond GAO’s settlement jurisdiction. 3 Comp. Gen. 22, 24 (1923).

### c. Tort Claims Arising in Foreign Countries

As noted previously, the Federal Tort Claims Act does not apply to “any claim arising in a foreign country.” 28 U.S.C. § 2680(k). However, certain agencies have specific authority to settle tort claims arising in foreign countries. Agencies with such authority in the form of permanent legislation are the State Department (22 U.S.C. § 2669(f)), United States Information Agency (22 U.S.C. § 1474(5)), and the Department of Veterans Affairs (38 U.S.C. § 515(b)).

In addition, similar authority is sometimes found in appropriation acts. For example, the 1993 Department of Commerce Appropriations Act includes foreign tort settlement authority for the International Trade Administration, Export Administration, and United States Travel and

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Tourism Administration. Pub. L. No. 102-395, Title II, 106 Stat. 1828, 1851-53 (1992).

All of the “foreign tort” provisions cited above are worded similarly and authorize the payment of tort claims “in the manner authorized in the first paragraph of” 28 U.S.C. § 2672. GAO has construed this as authorizing payment of awards under the “foreign tort” statutes in the same manner as payment of “domestic torts” under 28 U.S.C. § 2672—awards of \$2,500 or less are paid from agency appropriations and awards in excess of \$2,500 are payable, upon certification by GAO, from the permanent judgment appropriation, 31 U.S.C. § 1304. B-199449-O.M., August 7, 1980.

Where “foreign tort” settlement authority derives from annual appropriation acts, its continuing existence will, of course, depend on its continuing inclusion in the appropriation acts. Id.

Awards payable from agency funds should be charged to appropriations current at the time of settlement. This follows from the decisions involving the Federal Tort Claims Act discussed previously. 38 Comp. Gen. 338 (1958); 27 Comp. Gen. 445 (1948); 27 Comp. Gen. 237 (1947).

In B-177331, December 14, 1972, a Veterans Administration employee in the Philippines paid a claim cognizable under 38 U.S.C. § 515(b) from personal funds and requested reimbursement. He made the payment to avoid detention by the Philippine police and to obtain release of a government vehicle which had been impounded. Since payment was made in an urgent and unforeseen emergency situation, and since the effectiveness of the release provision of 28 U.S.C. § 2672 was not involved, GAO agreed that the employee could be reimbursed. However, the general rule remains that reimbursement of a claim paid from personal funds is not authorized.

The reason for the specific reference in the various foreign tort statutes to the “first paragraph” of 28 U.S.C. § 2672 is not entirely clear, especially since the foreign tort statutes all mention “payment” and the first paragraph of 28 U.S.C. § 2672 has never addressed payment authorities or procedures. One possible reason might have been to make it clear that the authority conferred is limited to administrative settlement authority and does not include the right to sue. B-199449-O.M., August 7, 1980.

In sum, agencies with specific “foreign tort” settlement authority are not subject to the exclusion of 28 U.S.C. § 2680(k), at least to the extent of

administrative settlement. Agencies which do not have such specific authority may still administratively settle negligence claims arising in foreign countries under authority of the Small Claims Act, 31 U.S.C. § 3723, but are subject to the limitations of that statute (\$1,000 ceiling and property damage claims only).

One court has considered the State Department's responsibilities under 22 U.S.C. § 2669(f) and refused to impose procedural requirements beyond what was provided in departmental regulations. Tarpeh-Doe v. United States, 904 F.2d 719 (D.C. Cir. 1990), cert. denied, 498 U.S. 1083.

Finally, the military departments have authority to settle tort claims arising in foreign countries by virtue of the Foreign Claims Act, 10 U.S.C. § 2734, discussed in our next section.

#### d. Military Claims Act and Similar Statutes

The military departments have a variety of authorities, in addition to the Federal Tort Claims Act, for the settlement of tort claims in different contexts.

First is the Military Claims Act, 10 U.S.C. § 2733. It authorizes the military departments, and the Coast Guard, to settle claims for death, personal injury, or loss or damage to real or personal property caused by a member of the armed forces or a civilian employee of the department acting within his or her scope of employment, or otherwise incident to noncombat activities, which cannot be settled under the Federal Tort Claims Act or Foreign Claims Act. Id. §§ 2733(a), (b)(2). The reference to the Foreign Claims Act means that the Military Claims Act applies essentially to incidents occurring in the United States.

Claims must be presented within two years. Id. § 2733(b)(1). The statute does not apply to claims for death or personal injury of federal civilian or military personnel occurring incident to service. Id. § 2733(b)(3). Nor does it apply if there is any contributing fault or negligence on the part of the claimant except to the extent permitted under the law of the place where the incident occurred. Id. § 2733(b)(4).

Next is 10 U.S.C. § 2734, the Foreign Claims Act. It authorizes the military departments to settle claims arising in foreign countries for the death of or personal injury to any inhabitant of a foreign country, or for loss or damage to real or personal property of a foreign country or subdivision or inhabitant of foreign country. It applies to damage or injury incident to noncombat activities or caused by a member of the armed forces or

civilian employee of a military department. Id. § 2734(a). The statute is intended to “promote and to maintain friendly relations through the prompt settlement of meritorious claims.” Id. As with the Military Claims Act, there is a 2-year statute of limitations. Id. § 2734(b)(1). Subrogation claims are expressly precluded. Id. § 2734(a).

Chapter 163 of 10 U.S.C. includes three additional claim statutes:

- 10 U.S.C. § 2734a: authorizes payment or reimbursement under international agreements for damage caused in a foreign country by a member of the armed forces or civilian employee of the United States.
- 10 U.S.C. § 2734b: authorizes the settlement of claims arising out of the activities of armed forces or civilian employees of foreign countries in the United States under international agreements (such as the NATO Status of Forces Agreement).
- 10 U.S.C. § 2737: authorizes the military departments to settle and pay claims, if presented in writing within two years after accrual, for up to \$1,000 for death, personal injury, or property damage caused by a civilian employee or member of the armed forces “incident to the use of a vehicle of the United States at any place, or any other property of the United States on a Government installation.”

These statutes have several common elements. Settlement authority is discretionary. Aaskov v. Aldridge, 695 F. Supp. 595 (D.D.C. 1988) (addressing 10 U.S.C. § 2734). “Settle” is defined as “consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or by disallowance.” 10 U.S.C. § 2731. Settlement under each of the statutes is final and conclusive. Id. § 2735. Sections 2733, 2734, and 2737 authorize the issuance of implementing regulations. Advance payments not to exceed \$100,000, even in advance of the submission of a claim, are authorized in situations covered by 10 U.S.C. § 2733 or 2734. Id. § 2736.

One final statute which belongs with this group is 32 U.S.C. § 715, the National Guard Claims Act. It is patterned after, and very similar to, the Military Claims Act, and covers the Army and Air National Guard. As with 10 U.S.C. § 2733, the National Guard Claims Act has a 2-year statute of limitations, applies only to claims which cannot be settled under the Federal Tort Claims Act, and settlements are final and conclusive. 32 U.S.C. §§ 715(b)(1), (b)(2), (g). The \$100,000 advance payment authority applies. 10 U.S.C. § 2736(a)(2).

GAO has no jurisdiction to settle claims under any of the statutes which are subject to the “final and conclusive” provisions of 10 U.S.C. § 2735 or 32 U.S.C. § 715(g). 41 Comp. Gen. 235 (1961); B-180082, March 1, 1974; B-113727, April 6, 1953. However, GAO may address the kinds of claims that are cognizable under those statutes. Thus, in 43 Comp. Gen. 711 (1964), the University of Mississippi filed a claim for damage resulting from the occupation of the university by federal troops under presidential order in the racial conflicts of the early 1960s. GAO saw no basis to consider the claim under the “implied contract of lease” theory proposed by the claimant, but noted that it didn’t see why the claim could not be considered under the Military Claims Act as incident to the noncombat activities of the Army. See also 51 Comp. Gen. 125 (1971).

GAO has further noted that an agency’s regulations under the Military Claims Act have the force and effect of law. 40 Comp. Gen. 691 (1961). An agency cannot be required to construe its regulations to permit cognizability in a given case. 41 Comp. Gen. 235 (1961).

Except for allegations of the violation of constitutional rights, the courts have generally held that determinations subject to the “final and conclusive” authority of 10 U.S.C. § 2735 are not subject to judicial review. Schneider v. United States, 27 F.3d 1327 (8th Cir. 1994); Hata v. United States, 23 F.3d 230 (9th Cir. 1994); Rodrigue v. United States, 968 F.2d 1430 (1st Cir. 1992); Poindexter v. United States, 777 F.2d 231 (5th Cir. 1985); Broadnax v. United States, 710 F.2d 865 (D.C. Cir. 1983); Labash v. U.S. Department of the Army, 668 F.2d 1153 (10th Cir. 1982), cert. denied, 456 U.S. 1008; MacCaskill v. United States, 834 F. Supp. 14 (D.D.C. 1993); Bryson v. United States, 463 F. Supp. 908 (E.D. Pa. 1978); Towry v. United States, 459 F. Supp. 101 (E.D. La. 1978), aff’d, 620 F.2d 568 (5th Cir. 1980), cert. denied, 449 U.S. 1078. The same result applies to 32 U.S.C. § 715(g). Rhodes v. United States, 760 F.2d 1180 (11th Cir. 1985). One district court case, Welch v. United States, 446 F. Supp. 75 (D. Conn. 1978), suggests a broader scope of judicial review, but it seems to stand alone, especially in light of the First Circuit’s Rodrigue decision.

There is no authority to pay interest on a claim under the Military Claims Act. B-154102, June 16, 1964.

Claims under 10 U.S.C. §§ 2734a and 2734b are paid from the Operation and Maintenance appropriations of the department involved. Id. §§ 2732, 2734a(c), 2734b(d). Claims under 10 U.S.C. §§ 2733 and 2734 and 32 U.S.C. § 715 have their own payment structure. Claims not in excess of \$100,000

are paid directly by the agency concerned, presumably from Operation and Maintenance funds in accordance with 10 U.S.C. § 2732. *Id.* §§ 2733(a), 2734(a); 32 U.S.C. § 715(a). If a claim in excess of \$100,000 is determined to be meritorious and otherwise cognizable under the particular statute, the agency pays the first \$100,000 and submits the excess to GAO for payment under 31 U.S.C. § 1304. 10 U.S.C. §§ 2733(d) and 2734(d); 32 U.S.C. § 715(d); 31 U.S.C. § 1304(a)(3)(D). There is one exception to this payment structure. If a claim under 10 U.S.C. § 2734 is for damage caused by a civilian employee of the Department of Defense other than an employee of one of the military departments, the claim is payable from Defense Department Operation and Maintenance appropriations. *Id.* § 2734(h). GAO regards the \$100,000 limit under these statutes as applicable to each individual claim and not to the aggregate payment resulting from a single incident. See B-249060.2, October 19, 1993, and B-249060, April 5, 1993 (non-decision letters).

Claims under the Military, Foreign, and National Guard Claims Acts submitted to GAO for payment under 31 U.S.C. § 1304 are subject to the requirements in the permanent appropriation that payment be certified by GAO and that the award be final. The concept of finality with respect to a National Guard Claims Act settlement was discussed in B-198029, May 19, 1980. The claim was for damage resulting when an Air National Guard plane crashed into a grain elevator in Montana, totally destroying the business. Some elements of damage could readily be determined with certainty, such as the expenses of removing debris and the destroyed inventory. Other elements, however, primarily the value of the building, would take much longer. In view of the hardship imposed on the claimant through no fault of his own, the Air Force requested payment of a partial settlement, to consist of those elements which had been determined with certainty and agreed upon, with the balance of the settlement to be submitted after the value of the building had been determined. GAO noted that the purpose of the finality requirement was to protect the government against loss by premature payment of an award or judgment which might later be modified upon review or appeal. However, there is no judicial review of a settlement under the National Guard Claims Act, nor is the settlement subject to review by any other administrative body. Therefore, since further review was unavailable, the claimant had signed a release covering the items of damage included in the partial settlement, and the award for each item was complete and final with respect to that item, GAO concluded that the partial settlement could be certified for payment. GAO cautioned that the decision would not be applicable in any situation which might ultimately come before a court, such as the Federal Tort Claims Act.

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e. Federal Employees  
Compensation Act

The Federal Employees Compensation Act (FECA), found at Title 5, United State Code, Chapter 81, provides a broad and comprehensive plan for the compensation of injured government employees. The Act is a federal worker's compensation law which provides compensation for disability and death and medical care for civilian employees of the United States who suffer injuries in the performance of their duties. 5 U.S.C. §§ 8102, 8103; 35 Comp. Gen. 646 (1956). Compensation is not available if the death or injury was caused by the employee's willful or intentional misconduct or proximately by the employee's intoxication. 5 U.S.C. § 8102(a).

In order to be entitled to compensation under FECA, the employee or someone on his or her behalf must file a claim in writing and on a form approved by the Secretary of Labor. *Id.* § 8121. There is a three-year statute of limitations but it does not apply if written notice of the injury or death was given to the immediate superior, or if the immediate superior had actual knowledge of the injury or death, within 30 days. Also, the Secretary of Labor may waive the time limitation in "exceptional circumstances." *Id.* § 8122. Assignment of a claim for compensation under FECA is void, and FECA compensation is exempt from claims of creditors. *Id.* § 8130.

FECA claims are paid from a fund in the United States Treasury known as the "Employees' Compensation Fund." Congress appropriates money to the Fund on the basis of appropriation requests made by each agency and instrumentality covered by FECA. *Id.* § 8147.

The responsibility for administering FECA and deciding all questions arising under it rests with the Secretary of Labor. *Id.* § 8145. Implementing regulations are found at 20 C.F.R. Part 10. The Secretary's action in allowing or denying a FECA claim is final and conclusive and not subject to review by any other official of the United States or by a court. 5 U.S.C. § 8128. Accordingly, GAO has no direct role in adjudicating FECA claims. B-172722, October 12, 1971; B-165874, February 10, 1969. However, GAO occasionally addresses certain ancillary areas, for example, the provision in 5 U.S.C. § 8116 that an employee while receiving FECA compensation may not receive any other salary or remuneration from the United States except "in return for service actually performed." See, e.g., 35 Comp. Gen. 646 (1956).

If it appears that the injury was caused by some third party and that the third party is legally liable, the Labor Department may require the beneficiary to assign any right of action against the third party to the

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United States, or may require the beneficiary to pursue the third-party claim. 5 U.S.C. § 8131(a). Whichever option the department chooses, a beneficiary who refuses will have his or her FECA claim denied. Id. § 8131(b).

A beneficiary who receives a third-party recovery may deduct the costs of suit and a reasonable attorney's fee, but must refund the balance to the government, for credit to the Employees' Compensation Fund. Id. § 8132. This applies regardless of whether the recovery represents medical expenses and lost wages or noneconomic losses like pain and suffering. United States v. Lorenzetti, 467 U.S. 167 (1984).

FECA is the exclusive remedy for injuries within its coverage and expressly takes precedence over other federal tort statutes. 5 U.S.C. § 8116(c). E.g., Woodruff v. U.S. Department of Labor, 954 F.2d 634 (11th Cir. 1992) (employee's car hit by military bus); Joyce v. United States, 474 F.2d 215 (3rd Cir. 1973) (postal employee hit on head by bar of soap dropped or thrown from restroom window on third floor of federal building.)

The relationship between FECA and the Federal Tort Claims Act may be illustrated with two court decisions. Suppose a federal employee, riding as a passenger in a vehicle being driven by a federal employee within the scope of his employment, is injured in a collision with another vehicle driven by another federal employee also within the scope of his employment. The injured employee alleges negligence by both drivers. If the injured person were a private party, he could proceed under the Federal Tort Claims Act. However, since he is a federal employee, his sole and exclusive remedy is compensation under FECA. Van Houten v. Ralls, 411 F.2d 940 (9th Cir. 1969), cert. denied, 396 U.S. 962 (identical fact situation).

The mere fact that the injured person is a federal employee does not automatically eliminate the Federal Tort Claims Act. In order for FECA to be the exclusive remedy, the employee must have been injured "while in the performance of his duty." 5 U.S.C. § 8102(a).<sup>21</sup> In Walker v. United States, 322 F. Supp. 769 (D. Alaska 1971), an employee was driving to visit a personal friend while on her lunch break. Her vehicle was struck by a government-owned and operated train while she was somewhat remote

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<sup>21</sup>The Federal Tort Claims Act uses the term "scope of employment." The Military Claims Act and the Military Personnel and Civilian Employees' Claims Act of 1964 use the term "incident to service." FECA uses the term "performance of duty." The differences in terminology have caused some confusion since, while the concepts are obviously similar, the terms are not identical.

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from her actual place of employment although still within the confines of the Air Force base on which she worked. The court held that the injury did not occur while she was in the performance of official duties. Therefore she was not covered by FECA and could proceed under the Federal Tort Claims Act.

f. Inverse Condemnation: Tort vs. Taking

The term “inverse condemnation” refers to a claim for the taking of a property interest by the government for which just compensation is payable under the Fifth Amendment. E.g., *United States v. Clarke*, 445 U.S. 253, 257 (1980). It is called “inverse” because it is the property owner who files the claim or brings the lawsuit, whereas in a direct condemnation the government brings the action. *Id.* at 255.

The concept covers a wide range of actions. At one extreme, the government action may amount to a “de facto” exercise of the power of eminent domain, as in *Althaus v. United States*, 7 Cl. Ct. 688 (1985). At the other extreme is the so-called “regulatory taking,” in which some government regulatory action or inaction is deemed a sufficient invasion of property rights as to constitute a compensable taking. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2892–95 (1992); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986); *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990). A variety is regulation through land use planning. The Supreme Court’s approach to this is discussed in *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994). In between is a variety of situations, the test being whether “the government by its actions deprives the owner of all or most of his or her interest in the property.” *Poorbaugh v. United States*, 27 Fed. Cl. 628, 632 (1993); *Aris Gloves, Inc. v. United States*, 420 F.2d 1386, 1391 (Ct. Cl. 1970).

There is no rule or formula for determining whether a taking has occurred; the determination depends on the particular circumstances of each case. *Aris Gloves*, 420 F.2d at 1391; *Althaus*, 7 Cl. Ct. at 693. The mere indication of ownership, such as the publication of a map inadvertently indicating government ownership of the claimant’s land, does not amount to a taking. *Poorbaugh*, 27 Fed. Cl. at 632. Destruction of trees without the taking of the underlying land is also not a taking for Fifth Amendment purposes. *Id.* at 633.

The taking need not be a fee simple taking but may be the taking of an easement, such as an air easement. Aircraft flights which are sufficiently low, loud, and frequent may support inverse condemnation liability if the interference is permanent, or at least constructively permanent. Some of

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the cases are Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946); Batten v. United States, 306 F.2d 580 (10th Cir. 1962), cert. denied, 371 U.S. 955; Wilfong v. United States, 480 F.2d 1326 (Ct. Cl. 1973); Brown v. United States, 30 Fed. Cl. 23 (1993).

Inverse condemnation claims resulting from damage to land, as opposed to the “de facto eminent domain” cases, are conceptually related to tort claims in that the same kinds of government action may give rise to both. The distinction is based generally on the permanency of the damage. One of the more common situations is flood damage caused by government construction activities such as levee construction by the Corps of Engineers. In order for the damage to constitute an inverse condemnation, either the land must be permanently flooded or it must be subject to frequent and inevitably recurring overflows. Damage short of this is a tort. Turner v. United States, 17 Cl. Ct. 832, 835 (1989), rev’d on other grounds, 901 F.2d 1093 (Fed. Cir. 1990); B-190362, December 14, 1977; B-137765, December 19, 1958.

The tort vs. taking distinction is important because different remedies and procedures apply. See B-226619, July 2, 1987; B-127766, February 13, 1959. For example, if the case is a tort, the claimant must file an administrative claim before going to court; there is no similar requirement for inverse condemnations. Tort claims must go to a United States district court; inverse condemnation claims over \$10,000 must go to the Court of Federal Claims. E.g., Myers v. United States, 323 F.2d 580 (9th Cir. 1963). It has also been suggested that the Military Claims Act might be an available remedy in appropriate cases. See B-215491, June 13, 1984; B-134854, January 29, 1958.

In addition, if the claim is viewed as a tort claim, any administrative consideration must be by the agency whose activities gave rise to the claim; GAO review is not available. On the other hand, an inverse condemnation claim is within GAO’s claims settlement jurisdiction inasmuch as it is a monetary claim against the United States and there is no other statutory settlement procedure. B-139543-O.M., June 10, 1959. An example is 71 Comp. Gen. 60 (1991) (claim for flood damage caused by Corps of Engineers construction of hydroelectric plant denied because project was a legitimate exercise of government’s dominant servitude over navigable waters under the Commerce Clause). An older example is B-22355, January 7, 1942 (damage to private property resulting from water wave caused by launching of Navy vessel not a compensable taking). Since the claims are within GAO’s settlement jurisdiction, they are subject to the

6-year statute of limitations of 31 U.S.C. § 3702(b). B-192917-O.M., March 6, 1980.

GAO's role in settling inverse condemnation claims is limited. GAO settles claims based on the written record, and inverse condemnation claims often involve issues which are not amenable to resolution in this manner. GAO has been able to settle taking claims where there is no disagreement as to amount. E.g., B-146291-O.M., August 3, 1961. In a case where the parties had not reached agreement, GAO authorized settlement in the amount determined by the agency. B-157405, August 30, 1965. In many cases, however, when faced with conflicts which could not be resolved from the written record, GAO has been forced to disallow the claims, leaving the claimants to their remedy in the courts. B-218982, November 1, 1985; B-162853, November 30, 1967; B-152725, February 19, 1964; B-136783, December 18, 1958.

Finally, although we have been talking mostly about real property, the Fifth Amendment is not limited to real property, and the inverse condemnation concept can apply to personal property as well. E.g., King v. United States, 427 F.2d 767 (Ct. Cl. 1970) (substantial and permanent interference with crops).

#### g. Military Personnel and Civilian Employees' Claims Act of 1964

The Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. § 3721, authorizes agencies to settle claims by government employees for loss or damage to personal property. Prior to the 1964 statute, similar authority had existed for the military departments, the immediate predecessor being the Military Personnel Claims Act of 1945 (59 Stat. 225), but no such authority existed for the civilian agencies. E.g., 45 Comp. Gen. 468 (1966); B-146256, August 16, 1961.<sup>22</sup> The 1964 enactment incorporated the existing authority and extended it to the civilian agencies.

The Act authorizes the President to prescribe uniform implementation policies, at least for the civilian agencies (31 U.S.C. § 3721(j)), but the authority has not been exercised. Thus, it is up to each department and agency to determine its own policies subject to the statutory criteria.

The Act applies to all federal agencies, but does not apply to nonappropriated fund activities or contractors. 31 U.S.C. §§ 101, 3721(a)(1).

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<sup>22</sup>Legislation authorizing personal property claims by military personnel goes back to 1816 (3 Stat. 261). That statute was concerned primarily with dead horses, as were its successor versions into the early 20th century. See, e.g., 11 Comp. Dec. 364 (1905) (horse had to be killed after contracting "loathsome disease, dangerous alike to man and beast"); 3 Comp. Dec. 636 (1897) (horse "alleged to have died from constipation"). We won't comment further on that.

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Apart from the specified exclusions, GAO has liberally construed the Act as applicable to all branches of the government. For example, it applies to the Library of Congress. 44 Comp. Gen. 402 (1965); B-163125, February 12, 1968. It also applies to the judicial branch. B-155877, June 22, 1971.

“Settle” is defined as “consider, determine, adjust, and dispose of a claim by disallowance or by complete or partial allowance.” 31 U.S.C. § 3721(a)(3). Denial of a claim therefore constitutes settlement. Macomber v. United States, 335 F. Supp. 197 (D.R.I. 1971). There is no mention of compromise.

An agency’s settlement of a claim is “final and conclusive.” 31 U.S.C. § 3721(k). Thus, GAO has no jurisdiction to settle claims under the Act except for claims by GAO employees, nor may it question an agency’s settlement as long as it was made in accordance with the statutory criteria and applicable regulations. *E.g.*, 62 Comp. Gen. 641, 642 (1983); 47 Comp. Gen. 316 (1967); B-219094, December 5, 1985; B-185513, March 24, 1976; B-185008, October 29, 1975. Also, judicial review is not available. Meade v. Federal Aviation Administration, 855 F. Supp. 619 (E.D.N.Y. 1994); Macomber, 335 F. Supp. at 199; Merrifield v. United States, 14 Cl. Ct. 180 (1988).

Another consequence of the “final and conclusive” authority is that a certifying officer will not be held liable for an erroneous determination by an agency claims officer. B-187913, February 9, 1977; B-185497, August 6, 1976. However, a certifying officer (or disbursing officer, as the case may be) who suspects fraud is not expected to don blinders and pay the claim anyway, but rather has a duty to inquire further. B-192978, February 28, 1979.

It has been said that payment of a claim under the Act “is not a matter of right but of grace resting in administrative discretion.” 62 Comp. Gen. 641, 642 (1983), quoting B-144926, February 23, 1961 (statement originally made in context of military predecessor of 1964 statute). Within the limits of cognizability (e.g., claimant must be a government employee, loss or damage must be to personal property, etc.), each agency is free to determine what claims it will or will not consider. There are limits, however, in the sense that an agency must actually exercise its discretion and cannot merely refuse to consider all claims. 62 Comp. Gen. 641 (1983). Thus, if GAO advises an agency that it may consider claims of a particular type, this does not mean that the agency must consider them. The decision either way is within the agency’s discretion. Stating this from the

claimant's perspective, unless the agency has limited its discretion in its regulations, an employee does not have the right to have a particular claim paid; he or she, however, does have the right to submit a claim and to have the agency respond to it. Of course, the agency must exercise its discretion fairly and consistently.

The authority and limitations of the statute may be described in the form of nine elements which must be present for an agency to settle a claim and to have that settlement entitled to "final and conclusive" status. These elements, which in effect comprise a checklist of the statutory requirements, are listed separately below.

1. The claimant must be a member of the uniformed services or a civilian officer or employee. 31 U.S.C. § 3721(b). A claim by anyone else may not be considered. Thus, the Comptroller General held that the Federal Aviation Agency "community club" in Guam, the property of which was either donated by club members or purchased with club funds, was not a proper claimant and that its claim was therefore not cognizable under the Act. B-190106, March 6, 1978.

The Vice President of the United States is an "officer of the United States" for purposes of the statute. B-202683, December 9, 1981.

2. The claim must be for damage to or loss of personal property. 31 U.S.C. § 3721(b). The Act does not cover damage to real property. B-197240-O.M., March 17, 1980.<sup>23</sup> Within the universe of personal property, it generally applies to tangible property but not to intangible property such as the loss of a nonrefundable airline ticket when the employee is called back to duty. B-244256, June 14, 1991 (non-decision letter). It does cover lost or stolen cash, such as money representing an advance payment of per diem for temporary duty, if and to the extent permitted by agency regulations. B-208639, October 5, 1982; B-197927, September 12, 1980; B-190125, December 28, 1977. For example, where several Navy members gave their paychecks to an enlisted member to get them cashed and the enlisted member was robbed at gunpoint, the loss was viewed as a loss of personal property cognizable under section 3721. B-185008, October 29, 1975.

The Act does not require that claims be filed only by the owner of the property. Thus, an employee who has borrowed property may file a claim

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<sup>23</sup>For purposes of guidance, we have included several internal "Office Memoranda" addressing claims by GAO employees, to illustrate some of the things GAO considers permissible or not permissible under the Act.

under appropriate circumstances, generally where he or she has reimbursed the owner for the loss. B-192088-O.M., May 28, 1980.

The claimant does not have to show that the loss or damage was caused by someone else's negligence, or indeed even be able to explain how it occurred. All the claimant needs to establish is that the loss or damage occurred and, if questioned by the agency, that there was no contributing fault attributable to the claimant. *Anton v. Greyhound Van Lines*, 591 F.2d 103, 109 (1st Cir. 1978); B-208627, September 16, 1983.

3. Maximum settlement authority is \$40,000. 31 U.S.C. § 3721(b). Of course, the loss may have been much greater, but a maximum of \$40,000 is recoverable from the government.<sup>24</sup> The claim may be paid in money or the property replaced in kind, presumably at the agency's discretion. *Id.* The monetary ceiling in 31 U.S.C. § 3721(b) was intended to provide equal treatment and a uniform level of benefits for all covered employees. Thus, a provision in the Foreign Assistance Act of 1961 authorizing the use of funds without regard to laws and regulations governing the obligation and expenditure of United States funds as necessary to accomplish the Act's purposes does not authorize settlement in excess of the \$40,000 limit. B-246211.2, December 7, 1992.

If household goods are lost or destroyed in transit incident to a change of duty station, and it is necessary for the employee to ship replacement items, the cost of shipping the replacement items was at one time regarded as an allowable component of a section 3721 claim. In 68 Comp. Gen. 143 (1988), GAO advised that the cost of shipping the replacement items can be borne by the government wholly independent of 31 U.S.C. § 3721 and its monetary limit. 68 Comp. Gen. 143 (1988).

The statute does not require that payments received from another source, such as an insurance company, be applied against the \$40,000. However, a claimant should not recover twice for the same loss. Thus, the more common approach, which GAO views as consistent with the legislative history, is to deduct third-party recoveries from the statutory limit when the loss does not exceed that limit. If the loss exceeds the \$40,000 limit, third-party recoveries should be applied against the dollar amount of the loss, with the \$40,000 ceiling then relating to the balance. B-91607-O.M., August 1, 1974. Thus, a claimant with a \$10,000 loss who receives \$10,000 in insurance payments should be entitled to claim nothing. A claimant with

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<sup>24</sup>The original ceiling was \$6,500. It reached its present level in stages. It was raised to \$40,000 by Pub. L. No. 100-565, 102 Stat. 2833 (1988).

a \$50,000 loss who receives \$10,000 in insurance payments, however, would still be able to file a claim for up to the \$40,000 limit.

For claims involving possible third-party liability (carrier, insurer, etc.), the agency has a choice. It can require the employee/claimant to first pursue any third-party recoveries before filing a claim with the agency, or it can accept a claim for the full amount up to the monetary ceiling. 61 Comp. Gen. 537 (1982). The choice is discretionary with the agency, but the agency should declare its policy in its regulations and apply that policy consistently. *Id.* at 540. If the agency chooses the latter policy—that is, if it is willing to consider claims without requiring the employee to first pursue any third-party recoveries—settlement with the employee operates as an assignment of the third-party claim to the government. *Id.* at 537–38; 53 Comp. Gen. 61 (1973).

If the agency then recovers from the liable third party, the recovery does not have to be deposited in the Treasury as miscellaneous receipts, but may be retained by the agency for credit to the appropriation used to pay the original claim. 61 Comp. Gen. 537 (1982); B-208627, September 16, 1983.

4. The loss or damage must be “incident to service”. 31 U.S.C. § 3721(b). The decisions have frequently pointed out that neither the Act nor its legislative history defines the term “incident to service.” *E.g.*, B-187913, February 9, 1977; B-185513, March 24, 1976; B-169236, April 21, 1970. One court has stated that the loss must bear some substantial relation to the claimant’s service or employment. *Fidelity-Phenix Fire Ins. Co. v. United States*, 111 F. Supp. 899 (N.D. Cal. 1953), *aff’d sub nom. Preferred Ins. Co. v. United States*, 222 F.2d 942 (9th Cir. 1955), *cert. denied*, 350 U.S. 837. The phrase is somewhat analogous to “scope of employment” in the Federal Tort Claims Act but the exact relationship has not been definitively established.

While there is no definition as such, a review of legislative materials is instructive in identifying situations Congress thought it was covering. For example, the report of the House Judiciary Committee on the bill to increase the ceiling to \$40,000 contains the following statement:

“The Committee is also informed that most major losses of property by military and civilian personnel occur through no fault of the individual, but arise from fires in on-base military quarters, fires in warehouses where goods are being stored at government expense,

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destruction of moving vans transporting goods during permanent change-of-station moves, and losses at sea.”

H.R. Rep. No. 1037, 100th Cong., 2d Sess. 2 (1988), reprinted in 1988 U.S. Code Cong. & Admin. News 3678, 3679. The Federal Aviation Administration, which recommended the 1964 legislation, gave several examples in its letter to Congress transmitting the draft bill: typhoons on Wake Island and Guam; loss of personal belongings when employees were forced to evacuate from an aircraft while on government business; theft of employee-owned hand tools stored in government buildings; fire at government buildings. S. Rep. No. 1423, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S. Code Cong. & Admin. News 3407, 3415–16.

Legislation in 1980 specifically added loss or damage (1) incident to an evacuation of United States personnel in response to political unrest or hostile acts, and (2) resulting from acts of mob violence, terrorist attacks, or other hostile acts directed against the United States Government or its personnel. Pub. L. No. 96-519, 94 Stat. 3031 (1980). The 1988 amendments deleted the detail as redundant; the situations are now covered by the general provisions of section 3721(b). H.R. Rep. No. 1037 at 7, 1988 U.S. Code Cong. & Admin. News at 3684.

Some of the more common situations embraced within the term “incident to service” are listed below. It must be emphasized that the extent to which these situations—or any others—are covered by a given agency will depend on that agency’s regulations.

- Loss of or damage to household goods or other personal property while in shipment incident to a transfer of official duty station. 62 Comp. Gen. 641, 645 (1983); B-155619, January 18, 1965; B-181483-O.M., July 30, 1974. This may include motor vehicles. B-190652-O.M., December 15, 1977.
- Loss or damage incident to authorized nontemporary storage. 44 Comp. Gen. 290, 292 (1964); B-178243, May 1, 1973; B-180778-O.M., April 17, 1974. The claimant’s failure to insure the property does not require disallowance. B-163125, February 12, 1968.
- Loss or damage to a privately-owned motor vehicle while being used for official business other than ordinary commuting. B-185513, March 24, 1976; B-174669, February 8, 1972; B-187262-O.M., January 25, 1977.

If the employee received a mileage allowance under 5 U.S.C. § 5704, no reimbursement may be claimed under that provision since the mileage allowance is a commutation of all operating expenses except for the items

specified in section 5704. 15 Comp. Gen. 735 (1936). However, this does not preclude consideration of a claim under 31 U.S.C. § 3721. B-185513, March 24, 1976; B-174669, February 8, 1972; B-190853-O.M., November 6, 1979.

Also, as noted above, ordinary home-to-work commuting, including parking incident thereto, is not “incident to service.” B-199074-O.M., February 23, 1981. In B-180994, June 12, 1974, the Comptroller General expressed doubt that an agency could properly consider a claim for a bicycle stolen from a federally-leased garage. The bicycle was used for commuting to and from work and the parking facility was provided for the convenience of the employees. GAO recognized an exception in B-241443, March 14, 1991, for theft from a car parked in government-furnished space where the employee’s duties required her to use her own car when a government vehicle was not available.

Other situations which GAO has advised might properly be considered “incident to service” are:

- Suitcase damaged by airline while employee was traveling at government expense to attend training session. B-187913, February 9, 1977.
- U-Haul trailer stolen from motel garage incident to transfer of duty station where agency had approved use of trailer. B-180161, January 8, 1974.
- Claim for residential fumigation and related costs upon discovery that household goods had been damaged by termites while in storage. B-173369-O.M., June 22, 1977.
- Loss or damage during inactive training duty by members of the Army and Air Force National Guard. 40 Comp. Gen. 31 (1960).
- Loss or damage to employee-owned hand tools used on the job voluntarily or under a union agreement. 65 Comp. Gen. 790 (1986); B-206183-O.M., July 6, 1982.

As we have indicated, agencies have considerable discretion to determine, and announce in their regulations, what types of claims they will or will not consider. This being the case—that is, if an agency can decide to completely exclude some particular type of claim—it follows that the agency can set monetary limits on what it will allow. For example, an agency should be able to decide that it will consider claims for stolen cash but only up to some specified limit, or motor vehicle claims up to a specified amount.

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5. The claim must be “substantiated”. 31 U.S.C. § 3721(f)(1). The degree of evidence necessary to satisfy this requirement is up to the agency. Thus, GAO denied a claim by one of its own employees for sterling silver flatware lost in shipment where the flatware was not listed on the shipper’s inventory and there was no other documentary evidence to substantiate that the flatware was in fact included in the shipment. B-201703-O.M., June 8, 1981.

If an agency suspects fraud or misrepresentation, in addition to pursuing other appropriate actions, the agency must decide how much of the claim should be denied. Thus, GAO found in B-192978, February 28, 1979, that it was within an agency’s discretion under the statute to treat each item claimed as a separate claim for adjudication purposes.

6. The agency must determine that possession of the property was “reasonable or useful under the circumstances.” 31 U.S.C. § 3721(f)(2). This determination is up to the agency and GAO will not question it. See 58 Comp. Gen. 291, 293 (1979) (use of privately-owned vehicle when government vehicles were apparently available); B-195295, November 14, 1979 (transporting liquor on Coast Guard aircraft).

7. A claim must be presented within two years after it accrues. The period of limitation may be tolled during time of war or armed conflict. 31 U.S.C. § 3721(g). Standard concepts of accrual used under other statutes of limitation apply to this one as well.

8. A claim for loss or damage occurring at “quarters” occupied by the claimant within the 50 states or the District of Columbia is cognizable only if the quarters were “assigned or provided in kind” by the government. 31 U.S.C. § 3721(e). This limitation does not apply to quarters outside of the 50 states or the District of Columbia.

Claims by military personnel for damage occurring in government-owned quarters occupied on a rental basis have been held not excluded under this provision. Fidelity-Phenix Fire Ins. Co. v. United States, cited above; B-142446-O.M., June 3, 1960. Similarly, government-owned rental housing at a remote ranger station in a national forest can be regarded as “assigned” for purposes of 31 U.S.C. § 3721. 64 Comp. Gen. 93 (1984).

Loss occurring in a rental trailer in a private trailer court is not cognizable. 52 Comp. Gen. 487 (1973). However, the Fidelity-Phenix court held that a trailer park on an Air Force base, regulated and maintained by the base, on

which lots were assigned to specific trailers on a rental basis, constitutes “assigned” quarters.

Note that the exclusion does not say “in” quarters; it says “at” quarters. Thus, the loss or damage does not have to occur within the four walls of a house for the exclusion to apply. GAO has advised one of its own employees that the theft of property from a car parked in the employee’s driveway adjacent to his home occurred “at quarters” within the meaning of this provision. B-234189, January 13, 1989

9. The loss must not have been caused in whole or in part by negligent or wrongful conduct attributable to the claimant or the claimant’s agent or employee. 31 U.S.C. § 3721(f)(3). Thus, a determination of negligence for purposes of the Federal Tort Claims Act precludes a determination of non-negligence for the same incident under 31 U.S.C. § 3721. 58 Comp. Gen. 291 (1979); B-187844-O.M., July 7, 1977.

If property is shipped using the “commuted rate” method authorized by 5 U.S.C. § 5724(c) in lieu of the “actual expense” method, the carrier is the agent of the employee and a claim for loss or damage attributable to the carrier’s negligence is not cognizable under 31 U.S.C. § 3721. B-153031, January 28, 1964; B-91607-O.M., March 12, 1973; B-155208-O.M., November 13, 1964. Under the “actual expense” method, the carrier is deemed the agent of the government. E.g., B-190652-O.M., December 15, 1977.

To sum up, 31 U.S.C. § 3721 gives federal agencies the authority and the discretion to pay up to \$40,000 on a claim by a federal employee, civilian or military, for loss or damage to personal property incurred incident to service, provided the claim is filed within 2 years after accrual, the claimant is free from contributing fault or negligence, and a few other conditions are met.

Most claims under 31 U.S.C. § 3721 are filed and pursued without the need to retain counsel. If the claimant does hire a lawyer, the law establishes a maximum fee of 10 percent of the amount paid in settlement of the claim. Charging a fee in excess of this amount can earn a fine of up to \$1,000. 31 U.S.C. § 3721(i).

Claims under 31 U.S.C. § 3721 are payable from the regular operating appropriations of the settling agency. B-143673, November 11, 1976, overruled on other grounds by 56 Comp. Gen. 615 (1977); B-206856,

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April 7, 1982 (non-decision letter). As to which fiscal year to charge, the principle is the same as under the Federal Tort Claims Act:

“Where . . . there is no obligation on the part of the United States for the payment of any amount on a claim until a final determination of the Government’s liability is made by the person authorized to do so thereunder, the appropriation current at the time such final action is taken is the appropriation obligated for and chargeable with the payment of the amount of the adjudicated claim. [Citations omitted.]”

B-174762, January 24, 1972.

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## 2. Contract and Quasi-Contract

### a. Contract Disputes Act

In 1969, Congress created the Commission on Government Procurement to study all aspects of federal procurement and to recommend improvements, legislative and administrative, to promote economy and efficiency. Pub. L. No. 91-129, 83 Stat. 269. The Commission issued its final report in 1972. One outgrowth of the Commission’s recommendations was the enactment of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601–613. The CDA is intended “to provide for a fair and balanced system of administrative and judicial procedures for the settlement of claims and disputes relating to Government contracts.” H.R. Rep. No. 1556, 95th Cong., 2d Sess. 5 (1978).

The CDA applies to certain contracts of “executive agencies.” The statute defines “executive agency” as including (a) cabinet-level departments listed in 5 U.S.C. § 101, (b) military departments as listed in 5 U.S.C. § 102, (c) independent establishments of the executive branch as defined in 5 U.S.C. § 104(1), (d) wholly owned government corporations as listed in the Government Corporation Control Act, 31 U.S.C. § 9101(3), and (e) the United States Postal Service and Postal Rate Commission. 41 U.S.C. § 601(2). This is a precise definition. A given entity is either included in one of these groupings or it is not. Thus, for example, the CDA does not apply to the Government Printing Office. Tatelbaum v. United States, 749 F.2d 729 (Fed. Cir. 1984). Nor does it apply to the judiciary. Erwin v. United States, 19 Cl. Ct. 47 (1989).

The statute also defines the types of contracts to which it applies—any express or implied contract (including certain nonappropriated fund contracts) for “(1) the procurement of property, other than real property

in being; (2) the procurement of services; (3) the procurement of construction, alteration, repair or maintenance of real property; or (4) the disposal of personal property.” 41 U.S.C. § 602(a). Under this definition, the CDA has been held applicable to a lease of real property. Forman v. United States, 767 F.2d 875 (Fed. Cir. 1985); United States v. Black Hawk Masonic Temple Ass’n, 798 F. Supp. 646 (D. Colo. 1992). However, a contest sponsored by the American Battle Monuments Commission to design a memorial to honor Korean War veterans, although a form of contract, is not a “procurement” for CDA purposes. Lucas v. United States, 25 Cl. Ct. 298 (1992). Also, the CDA does not apply when the government is providing a service. Cedar Chemical Corp. v. United States, 18 Cl. Ct. 25 (1989); Rider v. United States, 7 Cl. Ct. 770 (1985), aff’d mem., 790 F.2d 91 (Fed. Cir. 1986).

As discussed later in our section on quantum meruit claims, an implied contract under 41 U.S.C. § 602(a) means a contract implied-in-fact but not a contract implied-in-law because the latter is not really a contract at all. One type of implied-in-fact contract not covered by the CDA is the implied contract to treat all bids fairly and honestly. Coastal Corp. v. United States, 713 F.2d 728 (Fed. Cir. 1983). Noting that the CDA “does not cover all government contracts,” the court went on to say, id. at 730:

“Congress explicitly specified the types of contract that it intended the Act to cover. An implied contract to treat bids fairly and honestly is not one of them.”

Once the threshold issues of applicability have been met, the first step in the CDA process is the first sentence of 41 U.S.C. § 605(a):

“All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision.”

This sentence includes several points: there must be a “claim,” the claim must be by a “contractor,” the claim by the contractor must “relate to” an express or implied-in-fact contract, etc.

The statute itself does not define the term “claim.” The Federal Acquisition Regulation (FAR) includes the following definition:

“[A] written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. . . . A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a

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claim. The submission may be converted to a claim . . . if it is disputed either as to liability or amount or is not acted upon in a reasonable time.”

48 C.F.R. § 33.201. Thus, for the most part, a claim for CDA purposes requires dispute or disagreement. E.g., Santa Fe Engineers, Inc. v. Garrett, 991 F.2d 1579 (Fed. Cir. 1993); Dawco Construction, Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991); CPT Corp. v. United States, 25 Cl. Ct. 451 (1992); Essex Electro Engineers, Inc. v. United States, 22 Cl. Ct. 757 (1991), aff’d, 960 F.2d 1576 (Fed. Cir. 1992), cert. denied, 113 S. Ct. 408.<sup>25</sup> As one GAO decision stated:

“While in its broadest sense, ‘claim’ could be read to include such routine matters as progress payment requests, price proposals on formal changes and even invoices, the context of the Act itself clearly indicates that ‘claim’ as used in the Act is intended to refer to situations where the entitlement to recovery or the amount of recovery is disputed by the Government.”

59 Comp. Gen. 232, 233 (1980).

The claim must be by a “contractor,” which the CDA defines as “a party to a Government contract other than the Government.” 41 U.S.C. § 601(4). That narrows it down. This preserves the traditional requirement of “privity of contract” (i.e., a direct contractual relationship). Thomas Funding Corp. v. United States, 15 Cl. Ct. 495, 501 (1988). Accordingly, an assignee under the Assignment of Claims Act is not a “contractor” and cannot assert a claim under the CDA. Id. Nor is a subcontractor. 62 Comp. Gen. 633 (1983). Nor a bidder. Straga v. United States, 8 Cl. Ct. 61 (1985).

For claims greater than \$100,000, the contractor must certify that the claim is being made in good faith and that it is accurate and complete to the best of his knowledge and belief. 41 U.S.C. § 605(c)(1), as amended by Pub. L. No. 103-355, § 2351(b) (1994). A defective certification is not a jurisdictional bar to a court or board of contract appeals, but it must be corrected before entry of a final judgment or award. Id. § 605(c)(6).

The claim must be submitted to the “contracting officer,” defined in 41 U.S.C. § 601(3) as “any person who, by appointment in accordance with applicable regulations, has the authority to enter into and administer

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<sup>25</sup>Some of the cases, Santa Fe and Essex Electro, for example, have used the term “impasse.” One authority argues that a dispute should be enough without requiring that the parties reach an “impasse.” John Cibinic, “No Dispute—No Claim: The Impasse Requirement,” 7 Nash & Cibinic Report ¶ 40 (July 1993).

contracts and make determinations and findings with respect thereto.” The contractor should normally know precisely who this is because it is the contracting officer who signs the contract for the government and his or her name and title are required to be “typed, stamped, or printed on the contract.” FAR, 48 C.F.R. § 4.101(a). Life is not always this simple, of course. One court has held the CDA applicable to transportation services contracts.<sup>26</sup> Since there was no designated contracting officer, claims filed by an airline in bankruptcy with the General Services Administration and Justice Department lawyers representing the government were held to satisfy the statute. *In re Frontier Airlines, Inc.*, 146 B.R. 574 (D. Colo. 1992).

The contracting officer must render a written decision on the claim. 41 U.S.C. § 605(a). The decision must state the reasons for the result reached, and must be issued within a “reasonable time” and in accordance with any applicable agency regulations. *Id.* §§ 605(a), 605(c)(3). For claims under \$100,000, if the contractor asks that a decision be issued within 60 days, the contracting officer must comply, the 60 days running from the receipt of the request. For claims over \$100,000, the contracting officer must, within 60 days from receipt of a certified claim, either issue a decision or notify the contractor when to expect it. *Id.* §§ 605(c)(1), (c)(2), as amended by Pub. L. No. 103–355, § 2351(b) (1994). Failure to issue a decision by a specified deadline is regarded as a denial of the claim. *Id.* § 605(c)(5). Other requirements for the contracting officer’s decision are in the FAR, 48 C.F.R. § 33.211.

The first sentence of 41 U.S.C. § 605(b) provides:

“The contracting officer’s decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter.”

This provision, in conjunction with the mandatory language of section 605(a) (all claims shall be submitted to contracting officer), makes the CDA the exclusive remedy for claims within its scope. Therefore, claims to which the CDA applies are not within GAO’s claims settlement jurisdiction, and GAO will not consider them. 64 Comp. Gen. 330 (1985) (mistake in bid claims alleged after award); 63 Comp. Gen. 338 (1984) (claim alleging improperly taken prompt payment discount); 61 Comp. Gen. 114 (1981) (claim for improper cancellation); B-212984, February 3, 1984.

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<sup>26</sup>GAO reached a different conclusion in 62 Comp. Gen. 203 (1983).

While GAO will not address the merits of a CDA claim, it can and will continue to address threshold or ancillary issues. For example, in 63 Comp. Gen. 338 (1984), the Commerce Department, the contracting agency, deducted the amount of a prompt payment discount, but a malfunction in the Treasury Department's check-issuing equipment caused the check to arrive too late. When the contractor then claimed the amount of the improperly taken discount, Commerce argued that the delay was attributable to Treasury. True as this may have been, the contractor had a contractual relationship ("privity") with Commerce, not Treasury, so Commerce was the proper agency against which to assert the claim.

If the contracting officer renders a decision adverse to the contractor, the contractor has two avenues of appeal. The contractor may, within 12 months from receipt of the decision, appeal directly to the Court of Federal Claims (except that actions against the Tennessee Valley Authority must be brought in a United States district court). 41 U.S.C. § 609(a). Alternatively, and this is the preferred and far more common method, the contractor may, within 90 days from receipt of the decision, appeal to the appropriate board of contract appeals. Id. § 606.<sup>27</sup>

The concept of an administrative board of contract appeals apparently originated shortly after the Civil War, although they did not become commonplace until the World War II period.<sup>28</sup> Thus, the CDA did not create the boards of contract appeals. What it did was, for the first time, give them a statutory foundation. It also eliminated the longstanding jurisdictional distinction between claims "under the contract" and breach claims, giving the boards jurisdiction over both. See Z.A.N. Co. v. United States, 6 Cl. Ct. 298, 303 (1984).

The CDA authorizes the establishment of a board of contract appeals within an executive agency if justified by the work load.<sup>29</sup> 41 U.S.C. § 607(a)(1).

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<sup>27</sup>Prior to 1994, the CDA did not provide a limitation period on filing a claim with the contracting officer. Farmers Grain Co. v. United States, 29 Fed. Cl. 684, 687 (1993); Board of Governors of the University of North Carolina v. United States, 10 Cl. Ct. 27, 30 (1986); B-219337, December 30, 1985. Notwithstanding, it was possible to find a claim barred under the doctrine of laches (unreasonable and unexcused delay which prejudices another party). LaCoste v. United States, 9 Cl. Ct. 313 (1986). In 1994, Congress amended 41 U.S.C. § 605(a) to require that claims be submitted to the contracting officer within 6 years after accrual. Pub. L. No. 103-355, § 2351(a).

<sup>28</sup>4 Report of the Commission on Government Procurement 14 (1972).

<sup>29</sup>The number of boards has varied from time to time. As of 1994, there were 12 major boards: Agriculture, Armed Services (the biggest, of course), Corps of Engineers, Energy, General Services Administration, Housing and Urban Development, Interior, Labor, NASA, Postal Service, Transportation, and Veterans Affairs. In addition, the Tennessee Valley Authority has its own board because it is explicitly authorized by 41 U.S.C. § 607(a)(2).

Upon appeal by a contractor, the board of contract appeals must issue a written decision and may grant any relief that would be available to a litigant asserting a contract claim in the Court of Federal Claims. *Id.* §§ 607(d), (e). Board rules must provide procedures for the expedited and nonprecedential disposition, at the contractor's sole election, of "small claims" of \$50,000 or less. *Id.* § 608, as amended by Pub. L. No. 103-355, § 2351(d) (1994).

Either the contractor or the agency may seek judicial review of a board decision in the Court of Appeals for the Federal Circuit,<sup>30</sup> except that there is no appeal from a determination under the "small claims" procedure unless fraud is involved. Appeal by the agency requires the prior approval of the Attorney General. Except for appeal to the Federal Circuit, a board decision is final. *Id.* §§ 607(g), 608(d).

Payment of CDA claims is governed by 41 U.S.C. § 612. The Commission on Government Procurement had recommended that contract claims be paid from the appropriations of the contracting agency to the extent feasible. There were two reasons for this. First, prior to the CDA, board awards were paid directly by the agency whereas court judgments were paid from the permanent judgment appropriation established by 31 U.S.C. § 1304 without any form of charge-back to the agency. Under this system, it actually paid agencies to resist settlement and force the case to court. Second, charging agency appropriations would more accurately reflect the "true economic costs" of the agency's procurement activities. 4 Report of the Commission on Government Procurement 29-30 (1972). These considerations formed the backdrop of what became the CDA's payment provision.

Subsection (a) of 41 U.S.C. § 612 provides:

"Any judgment against the United States on a claim under this chapter shall be paid promptly in accordance with the procedures provided by section 1304 of Title 31."

There is nothing new here; subsection (a) merely states what the law was prior to the CDA.

Subsection (b) provides:

"Any monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures contained in subsection (a) of this section."

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<sup>30</sup>Note the distinction. A contractor electing to go directly to court from the contracting officer's decision goes to the Court of Federal Claims, with the usual right of appeal to the Court of Appeals for the Federal Circuit. Appeals from a board decision go directly to the Federal Circuit.

This was new. Board of contract appeals awards had never before been payable from the judgment appropriation. Without more, however, this would have stood the Procurement Commission's recommendation on its head by virtually assuring that claims would almost never end at the contracting officer's level.

Subsection (c) provides:

"Payments made pursuant to subsections (a) and (b) of this section shall be reimbursed to the fund provided by section 1304 of Title 31 by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes."

Thus, subsections (a) and (b) assure prompt payment to the successful claimant; subsection (c) implements the Procurement Commission's recommendation.

Since payment of board awards is to be made "in accordance with the procedures provided by" 31 U.S.C. § 1304, the requirements relating to judgments discussed in Chapter 14 will be generally applicable. In view of the CDA's reimbursement requirement, the provision in 31 U.S.C. § 1304 that payment be "not otherwise provided for" will generally not be an issue in Contract Disputes Act payments. However, payment may be made only upon certification by the Comptroller General, and the award or judgment must be "final." Since the CDA authorizes the Court of Federal Claims to enter partial judgments (41 U.S.C. § 609(e)), and authorizes a board to grant the same relief available from the Court of Federal Claims (*id.* § 607(d)), it is possible to have two or more partial judgments or awards in the same case, a result that is normally not permissible under 31 U.S.C. § 1304. Thus, in one case, the principal portion of a board award was held payable notwithstanding that an appeal had been taken on the interest award. 60 Comp. Gen. 573 (1981).

Generally, a prerequisite for payment will be the certification by both parties that no further review will be sought. This tells GAO that the award or judgment is final and therefore ready for payment. There are no uniform procedures for obtaining payment of board awards although a system has evolved informally under which the board's clerk or recorder gathers the necessary documentation from both parties and submits the package to GAO.

Note that 41 U.S.C. § 612(b) refers to “monetary awards” by boards of contract appeals. There is no provision for payment if the parties reach a settlement while the case is still pending before a board. Of course, the agency can simply pay just as it would pay an award by the contracting officer. If the agency is faced with insufficient funds, however, it can take advantage of section 612(b) by consenting to the entry of an award by the board based on the settlement. *E.g.*, Casson Construction Co., GSBCA No. 7276, 84-1 BCA ¶ 17,010 (1983). See also Bath Iron Works Corp. v. United States, 20 F.3d 1567, 1583 (Fed. Cir. 1994) (one purpose of CDA’s payment scheme was to permit payment without regard to adequacy of contracting agency’s appropriations). No harm is done because the reimbursement requirement of section 612(c) will apply in all cases.

Reimbursement under 41 U.S.C. § 612(c) is chargeable to appropriations available for the agency’s procurement activities current at the time of the award or judgment. 63 Comp. Gen. 308 (1984). If the agency has insufficient funds available for reimbursement, the statute permits it to seek additional appropriations. This does not require a specific, line-item appropriation, but can be satisfied from subsequent lump-sum appropriations available for the agency’s procurement. *Id.* at 312. This is a common-sense proposition. If it were not the case, an agency could avoid reimbursement simply by never making the request.

While reimbursement is a statutory requirement, the statute does not require that it occur within any specified time. The agency has some discretion in the matter. How much discretion is addressed in the following excerpt from B-217990.25-O.M., October 30, 1987:

“It is clear that Congress wanted the ultimate accountability to fall on the procuring agency, but we do not think the statute requires the agency to disrupt ongoing programs or activities in order to find the money. If this were not the case, Congress could just as easily have directed the agencies to pay the judgments and awards directly. Clearly, an agency does not violate the statute if it does not make the reimbursement in the same fiscal year that the award is paid. Similarly, an agency may not be in a position to reimburse in the following fiscal year without disrupting other activities, since the agency’s budget for that fiscal year is set well in advance. In our opinion, the earliest time an agency can be said to be in violation of 41 U.S.C. § 612(c) is the beginning of the second fiscal year following the fiscal year in which the award is paid.”

b. Unauthorized  
Commitments/Contracts  
Implied-in-Law

Justice Holmes once wrote, “Men must turn square corners when they deal with the Government.” Rock Island, Arkansas & Louisiana R.R. Co. v. United States, 254 U.S. 141, 143 (1920). What he meant, of course, is that

private citizens dealing with the government who do not follow applicable laws do so at their own risk. Some years later, speaking through Justice Frankfurter, the Court endorsed this statement, explaining that it “does not reflect a callous outlook. It merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury.” Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 385 (1947). From the perspective of government contracting, the Court stated the point as follows:

“Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.”

Id. at 384. The lesson of Merrill is that the United States is not bound by the unauthorized acts of those who purport to act for it.<sup>31</sup> While this rule can produce the occasional harsh result, a moment’s reflection will confirm its necessity. “Clearly,” the Federal Circuit has stated, “federal expenditures would be wholly uncontrollable if Government employees could, of their own volition, enter into contracts obligating the United States.” City of El Centro v. United States, 922 F.2d 816, 820 (Fed. Cir. 1990), cert. denied, 111 S. Ct. 2851. See also 46 Comp. Gen. 348, 349 (1966). This section discusses some ways in which, in the interest of basic fairness, the corners have become somewhat rounded.

#### (1) Contract implied-in-fact vs. contract implied-in-law

Contract-related claims fall into three categories—express, implied-in-fact, implied-in-law. An express contract is “an agreement or mutual assent by the parties manifested in words, oral or written.” People’s Bank & Trust Co. v. United States, 11 Cl. Ct. 554, 566 (1987). While an oral contract is thus possible, “express contract” usually refers to the traditional piece of paper signed by both parties. As we have seen, claims under an express contract are governed by the Contract Disputes Act.

A contract implied-in-fact is an agreement—

“founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.”

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<sup>31</sup>See also the Supreme Court’s more recent decision in Office of Personnel Management v. Richmond, 496 U.S. 414 (1990), discussed in detail later in this chapter under the Estoppel heading.

Baltimore & Ohio R.R. Co. v. United States, 261 U.S. 592, 597 (1923); DeRoo v. United States, 12 Cl. Ct. 356, 361 (1987); 55 Comp. Gen. 768, 777 (1976); B-238112, July 30, 1990. The requirements for an implied-in-fact contract are the same as for an express contract—offer and acceptance, consideration, mutuality of intent. Haberman v. United States, 26 Cl. Ct. 1405, 1411 (1992); Chavez v. United States, 18 Cl. Ct. 540, 544–45 (1989); Eliel v. United States, 18 Cl. Ct. 461, 466 (1989), *aff'd mem.*, 909 F.2d 1495 (Fed. Cir. 1990); New America Shipbuilders, Inc. v. United States, 15 Cl. Ct. 141, 143 (1988), *aff'd*, 871 F.2d 1077 (Fed. Cir. 1989). In addition, whether the contract is express or implied, the person purporting to act for the government must have actual authority to do so. Construction Equipment Lease Co. v. United States, 26 Cl. Ct. 341, 346 (1992); Eliel, 18 Cl. Ct. at 466; New America Shipbuilders, 15 Cl. Ct. at 143; Pollack v. United States, 15 Cl. Ct. 46, 48–49 (1988). (All four cases cite Merrill.) This can be “implied actual authority” as well as “express actual authority.” H. Landau & Co. v. United States, 886 F.2d 322 (Fed. Cir. 1989). The essential difference between an express contract and an implied-in-fact contract is the nature of the evidence (Chavez, 18 Cl. Ct. at 545)—under an implied contract, the meeting of minds is not expressed but is inferred from the conduct of the parties. Thus, a contract implied-in-fact is a “real” contract and as such, it too is governed by the Contract Disputes Act. 41 U.S.C. § 602(a).

A contract implied-in-fact can be found only in situations in which the government would have the authority to make a binding express contract. Grismac Corp. v. United States, 556 F.2d 494 (Ct. Cl. 1977).

In contrast, a contract implied-in-law, also called a “quasi contract,”<sup>32</sup> is not a contract at all. It is a legal fiction whose purpose is to prevent unjust enrichment. Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989, 998 (3d Cir. 1987). It is “imposed by operation of law without regard to the intent of the parties” and is treated as a contract “for purposes of remedy only.” Nitol v. United States, 7 Cl. Ct. 405, 415 (1985). Unlike a contract implied-in-fact, there is no mutuality of intent. Hickman v. United States, 135 F. Supp. 919, 922 (W.D. La. 1955). A simple example will illustrate. Your neighbors hire someone to paint their house. The painter arrives but mistakenly starts to paint your house. You watch from the window, chuckling, thinking you are going to get your house painted for nothing. Wrong. There was certainly no “contract”—no meeting of minds between you and the housepainter—but, in order to prevent unjust enrichment, you will be held liable for the fair value of the work as if there were.

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<sup>32</sup>Black’s Law Dictionary 1245 (6th ed. 1990).

(2) Ratification

When analyzing a claim “sounding in contract”—i.e., a claim for goods furnished or services performed—for which no contractual obligation can be found, the agency should first ask whether it can ratify the transaction. The FAR addresses the subject in 48 C.F.R. § 1.602-3, “Ratification of unauthorized commitments.” The authority applies to agreements that are not binding on the government solely because the official purporting to represent the government lacked the authority to enter into that agreement. *Id.* § 1.602-3(a). This is not limited to officials with no contracting authority, but includes officials with limited authority who exceed the applicable limit. *E.g.*, B-169745, May 27, 1970; B-169557, May 4, 1970. (Both cases involved regional officials who procured services in excess of a delegated monetary ceiling, with GAO advising in both cases that the transactions should be ratified under a prior version of the regulation.)

The ratifying official must have had the authority to enter into the agreement at the time it was made, and must still have that authority at the time of ratification. *Id.* § 1.602-3(c)(2). This is a fundamental element of ratification under agency law. See 22 Comp. Gen. 1083, 1086 (1943). See also *Consortium Venture Corp. v. United States*, 5 Cl. Ct. 47, 51 (1984), *aff’d mem.*, 765 F.2d 163 (Fed. Cir. 1985) (same requirement under prior version of regulation). The courts have occasionally noted the concept of “institutional ratification” (ratification by agency action such as acceptance of benefits), but it is not clear under what circumstances it might form the basis of government liability. See *City of El Centro v. United States*, 922 F.2d 816, 821 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 2851.

The FAR also provides that the agreement to be ratified must have been “otherwise proper.” 48 C.F.R. § 1.602-3(c)(3). GAO has cautioned not to equate “otherwise proper” with “otherwise perfect.” If the unauthorized individual either didn’t know that he or she lacked the necessary legal authority or didn’t care, one shouldn’t be too surprised to find other procedural defects as well, but these should not preclude ratification of an otherwise ratifiable transaction. B-210808, May 24, 1984. In addition, the price must be “fair and reasonable.” 48 C.F.R. § 1.602-3(c)(4).

The FAR cautions that the ratification of unauthorized commitments should not be viewed as an alternative to sound contracting procedures. While the

authority does exist, agencies should take “positive action” to minimize the need to resort to it. 48 C.F.R. § 1.602-3(b)(1).<sup>33</sup>

If the authority of 48 C.F.R. § 1.602-3 is not available, ratification may nevertheless be possible under the “extraordinary relief” authority of Public Law 85-804 for those agencies eligible to use it. See FAR, 48 C.F.R. §§ 50.101(b) (eligible agencies), 50.302-3 (formalizing informal commitments).

For appropriations accounting purposes, ratification is treated the same as if there had been a valid contract all along. If the need arose and the work was performed in the same fiscal year, then the obligation is chargeable to that fiscal year regardless of when the ratification takes place. 58 Comp. Gen. 789 (1979); B-208730, January 6, 1983. If the need arose in one year and performance took place in another year, or if performance relates to a contract executed in a prior year, the chargeable fiscal year is determined by applying the relevant element of the bona fide needs rule covered in Chapter 5, again as if there had been a valid contract all along. See B-197344, August 21, 1980.

### (3) Quantum meruit claims

If the agency determines that it cannot ratify the transaction in question, it should then proceed with the only remaining possibility, a quantum meruit<sup>34</sup> analysis. The underlying premise is that the government should not be unjustly enriched by retaining a benefit conferred in good faith, even where there is no enforceable contractual obligation, as long as the “benefit” is not prohibited by law. See 40 Comp. Gen. 447, 451 (1961). This is the pure “contract implied-in-law” situation. The Court of Federal

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<sup>33</sup>Unauthorized commitments can also violate the voluntary services prohibition of the Antideficiency Act. See GAO report, Unauthorized Commitments: An Abuse of Contracting Authority in the Department of Energy, EMD-81-12 (December 4, 1980).

<sup>34</sup>Quantum meruit means “as much as deserved” and is used in the case of services. Black’s Law Dictionary 1243 (6th ed. 1990). Quantum valebant means “as much as they were worth” and is used in the case of goods sold and delivered. *Id.* at 1244. The legal elements of each are identical. For the sake of simplicity, we use quantum meruit for both situations.

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Claims<sup>35</sup> and the boards of contract appeals<sup>36</sup> decline jurisdiction over contract implied-in-law claims because there is no “contract” for purposes of their jurisdictional statutes (Contract Disputes Act, Tucker Act). The district courts similarly lack Tucker Act jurisdiction<sup>37</sup>, but may be able to find some other basis. E.g., Niagara Mohawk Power Corp. v. Bankers Trust Co. of Albany, 791 F.2d 242, 244 (2d Cir. 1986). However, GAO regards claims of this type as coming within its general claims settlement jurisdiction (31 U.S.C. § 3702). E.g., 65 Comp. Gen. 692, 695 (1986); 64 Comp. Gen. 727, 727-28 (1985). Thus, contract implied-in-law claims can be settled administratively even though judicial review may be unavailable in many, if not most, cases.

At one time, for all claims of this type, if the agency could not or chose not to ratify, and the claimant continued to request payment, the required procedure was referral to GAO. See B-210808, May 24, 1984. Now, however, GAO applies the general standard of 4 C.F.R. § 31.4—agencies should adjudicate all claims in the first instance, with referral to GAO only (a) if the agency regards a claim as doubtful, or (b) if a claimant seeks review of a disallowance. Agencies should, of course, apply the criteria set forth in GAO’s numerous quantum meruit decisions.

In order to allow a quantum meruit claim, four elements must be established:

- (1) The goods or services would have been a permissible procurement if correct procedures had been followed.
- (2) The government must have received and accepted a benefit.
- (3) The contractor or other performing party must have acted in good faith.
- (4) The amount claimed—or in any event the amount that can be paid on the claim—must represent the reasonable value of the benefit received.

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<sup>35</sup>E.g., Army and Air Force Exchange Service v. Sheehan, 456 U.S. 728, 738 n.10 (1982); United States v. Minnesota Mutual Investment Co., 271 U.S. 212, 217 (1926); Aerolineas Argentinas v. United States, 31 Fed. Cl. 25, 36 (1994); Haberman v. United States, 18 Cl. Ct. 302 (1989); Alta Verde Industries, Inc. v. United States, 18 Cl. Ct. 595 (1989), aff’d mem., 907 F.2d 158 (Fed. Cir. 1990), cert. denied, 498 U.S. 1082; Gratowski v. United States, 6 Cl. Ct. 458 (1984); Russell Corp. v. United States, 537 F.2d 474, 482 (Ct. Cl. 1976), cert. denied, 429 U.S. 1073.

<sup>36</sup>E.g., Energroun, Inc., EBCA No. 413-5-88, 89-1 BCA ¶ 21,233 (1988); David Contractors, Inc., HUD BCA No. 87-2452-C15, 88-3 BCA ¶ 20,963 (1988); General Security Services Corp., GSBCA No. 7684, 85-3 BCA ¶ 18,380 (1985); J. Brinton Rowdybush, ASBCA No. 24955, 83-1 BCA ¶ 16,188 (1982).

<sup>37</sup>Minnesota Mutual, 271 U.S. at 217; Weisberg v. United States Department of Justice, 745 F.2d 1476, 1494 (D.C. Cir. 1984); Alnor Check Cashing v. Katz, 821 F. Supp. 307, 316 (E.D. Pa.), aff’d, 11 F.3d 27 (3d Cir. 1993).

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E.g., 70 Comp. Gen. 664 (1991); 69 Comp. Gen. 13 (1989); 66 Comp. Gen. 351 (1987); B-215651, March 15, 1985; B-210808, May 24, 1984.<sup>38</sup>

The first element, the “permissible procurement” test, is not concerned with procedural deficiencies, even where the procedures are statutorily mandated; it was procedural deficiencies that got the parties to this point in the first place. 63 Comp. Gen. 579, 584 (1984). In applying the test, it is important to distinguish between a procedurally deficient procurement of otherwise authorized goods or services, and a procurement of goods or services which are themselves unauthorized. See 71 Comp. Gen. 145 (1992). Thus, the question is whether the government could have made a binding express contract for the goods or services in question. B-187593, June 26, 1978 (applying the standard of Grismac Corp. v. United States, noted earlier in connection with contracts implied-in-fact).

For example, violation of an old statute, since repealed, which required that certain contracts be in writing did not preclude payment on a quantum meruit basis where the goods procured were not unauthorized. Salomon v. United States, 86 U.S. 17 (1873); 8 Comp. Dec. 526 (1902). Examples of expenditures which did not meet the “permissible procurement” test are 71 Comp. Gen. 145 (1992) (T-shirts to be given to Combined Federal Campaign donors); 64 Comp. Gen. 467 (1985) (security equipment purchased by bank on military installation in circumstances beyond scope of regulations authorizing reimbursement); B-252780, August 26, 1993 (printing by private establishment in violation of statutes requiring printing to be done by Government Printing Office); B-251541, July 21, 1993 (procurement of interpreter services from active duty military officer on fee basis); B-230382, December 22, 1989 (meals for federal employees attending a conference at their official duty station); B-195566, March 17, 1980 (another printing case). Similarly, expenditures for permanent improvements to non-government property, generally prohibited subject to a few exceptions, would not be a permissible procurement for quantum meruit purposes. B-226843-O.M., October 13, 1987.

The second element is the firmly established principle that the government must have received some tangible benefit to support a quantum meruit payment. United States v. Mississippi Valley Generating Co., 364 U.S. 520,

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<sup>38</sup>Decisions prior to the early 1980s also specified express or implied ratification by the agency involved as a required condition. E.g., 58 Comp. Gen. 94, 100 (1978); B-202744, May 4, 1981. While this was intended to signify essentially that the agency recommended payment, it was too easily confused with the concept of ratification as expressed in the FAR. See, e.g., B-204388, January 5, 1982. The language is no longer used and should be disregarded.

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566 n.22 (1961); 46 Comp. Gen. 348 (1966); 40 Comp. Gen. 447, 451 (1961). Without such benefit, loss to the claimant is not enough, regardless of good faith. If there is no benefit, there can be no unjust enrichment. The benefit must be clear and not merely speculative. B-215145, August 13, 1985.

Determining the benefit is usually a fairly simple matter, at least in most cases. It either exists or it doesn't. Cases in which the benefit was clear include 70 Comp. Gen. 664 (1991) (repairs to government vehicles); 66 Comp. Gen. 351 (1987) (supplies which the government actually used); 64 Comp. Gen. 727 (1985) (emergency service to restore telephone service after power outage); B-215651, March 15, 1985 (dental services to Coast Guard recruits). Cases in which claims were denied because there was no demonstrable benefit to the government include B-221226, July 6, 1987 (goods allegedly shipped but it could not be established that they were ever received or used); B-215792, January 8, 1985 (claim by instructor for salary for period of unemployment following discontinuance of training course); B-212529, May 31, 1984, aff'd upon reconsid., B-212529, June 8, 1987 (expenses incurred in preparation for conducting laboratory accreditation program which agency decided not to implement); B-189266, September 7, 1977, aff'd upon reconsid., B-189266, March 29, 1978 (expenses incurred in preparation for contract where solicitation was subsequently canceled). A case involving consultant services which required a much greater degree of factual analysis is B-214529, January 19, 1988.

A case in which a court seems to have stretched the concept a bit is Niagara Mohawk Power Corp. v. Bankers Trust Co. of Albany, 791 F.2d 242 (2d Cir. 1986). The claimant was a utility which had provided service to a housing complex for which the Department of Housing and Urban Development had provided mortgage insurance. The court found "unjust enrichment" to HUD on the theory that if the utility had stopped providing service, the tenants would inevitably have stopped paying rent, thereby hastening the development's insolvency and increasing HUD's financial exposure. An earlier similar holding on which the court relied is S.S. Silberblatt, Inc. v. East Harlem Pilot Block, 608 F.2d 28 (2d Cir. 1979).

The third required element is that the claimant must have acted in good faith. Good faith will normally include the exercise of reasonable diligence. B-215145, August 13, 1985. However, negligence alone has been found insufficient to negate a finding of good faith. B-226733-O.M., October 13, 1987. A history of satisfactory prior dealings between the

claimant and the government is evidence of good faith. 69 Comp. Gen. 13, 15 (1989). See also B-210808, May 24, 1984. Sometimes, especially when all other elements are clearly present, a finding of good faith can be based on the absence of any evidence in the record to suggest anything else. E.g., 70 Comp. Gen. 664, 666 (1991).

Performance by a claimant entirely on his, her, or its own initiative, without the knowledge or consent of any government official, authorized or unauthorized, raises a question as to the claimant's good faith. The fact that services were provided on an emergency basis is an adequate answer. 64 Comp. Gen. 727 (1985).

If the above three elements are satisfied, the claim may be allowed, but—and this is the fourth and final element—only for the fair value of the benefit received. The claim is not measured by the loss to the claimant nor necessarily by the value the claimant places on the goods or services, but on the reasonable value of those goods or services to the government, which may or may not be the same as the amount claimed.<sup>39</sup>

The “reasonable value of services and materials is generally considered to be the amount for which they could be obtained under like circumstances.” Wunderlich Contracting Co. v. United States, 240 F.2d 201, 205 (10th Cir. 1957), cert. denied, 353 U.S. 950. In 66 Comp. Gen. 351 (1987), for example, where an unauthorized official ordered supplies, agency contracting personnel determined that those supplies could have been procured for a lesser amount under competitive procedures. The supplier's quantum meruit claim was allowed, but only for that lesser amount. A quantum meruit payment may not exceed the price under a mandatory Federal Supply Schedule contract. 63 Comp. Gen. 579 (1984); B-213489, March 13, 1984; B-195123, July 11, 1979. The same rule applies with respect to non-mandatory schedules. 69 Comp. Gen. 13 (1989). The reason is that Supply Schedule prices are derived through competition and are therefore presumptively fair and reasonable. Id. at 16.

Similarly, in a quantum meruit claim for transportation services, the measure of recovery is the lowest rate available to the government for the same or similar services. 64 Comp. Gen. 612, 614 (1985); B-212991, November 28, 1983.

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<sup>39</sup>This is also the measure of payment in certain contract implied-in-fact situations, a notable example being contracts in violation of the cost-plus-percentage-of-cost prohibition in 41 U.S.C. § 254(b) and 10 U.S.C. § 2306(a). Urban Data Systems, Inc. v. United States, 699 F.2d 1147 (Fed. Cir. 1983); 58 Comp. Gen. 654 (1979); 38 Comp. Gen. 38 (1958); 33 Comp. Gen. 533 (1954); B-252378, September 21, 1993; Alisa Corp., AGBCA No. 84-193-1, 94-2 BCA ¶ 26,952 (1994).

If there has been a prior contractual relationship between the parties, the most recent contract price is a relevant indication of fair value. B-212430, June 11, 1984. If there is no other evidence one way or the other, and all other elements of the claim have been satisfied, the agency may pay the “contract price” or the amount claimed if it regards that amount as fair and reasonable. E.g., B-251728.2, June 9, 1993 (services provided to Office of Independent Counsel). However, the agency should make some attempt at an independent determination and should not blindly agree to whatever is claimed. B-197057-O.M., August 22, 1980. Also, a quantum meruit payment may, in appropriate circumstances, include an allowance for profit. 67 Comp. Gen. 507 (1988); 38 Comp. Gen. 38 (1958); B-167790, April 12, 1973.

Whatever measure is used, the payment must relate to the benefit received by the government. In B-232148, October 3, 1988, for example, a towing company towed a government trailer which had caught fire on the highway, and subsequently made a quantum meruit claim for towing and storage services. The payment could properly include storage charges up to the time the government was ready to remove the trailer, but not for a period beyond that point, during which the company held the trailer as security for its payment. Storage during this “excess” period was of no benefit to the government.

If the amount claimed is questioned, the claimant must be prepared to support it. Unsupported, blanket statements are not enough. 65 Comp. Gen. 692, 696 (1986). If the primary source documents are no longer available, reasonable secondary evidence may be used. B-226733-O.M., October 13, 1987 (agency’s audit recommendation).

Applying the standards described above, GAO has approved quantum meruit payments in a wide variety of situations. Examples in addition to the cases previously cited include B-249075, September 16, 1992 (use of space in a nongovernment building without a written lease); B-245433, December 26, 1991 (computer software package installed and used without contracting officer approval); B-240994, October 15, 1990 (security services, obtained without following formal contracting procedures, to guard alleged member of Colombian drug cartel); B-228637, October 16, 1987 (emergency repair services to restore air conditioning and hot water to military facility); B-221604, March 16, 1987 (emergency assistance in cleaning up oil spill); B-212968, April 10, 1984 (repairs to barge damaged when it ran aground); B-209582, November 22, 1982 (press clipping service requested orally by temporary commission which subsequently ceased existence).

There is no authority to pay interest on a quantum meruit claim. 70 Comp. Gen. 664 (1991); B-252778, August 19, 1993; B-245433, December 26, 1991; B-195123, July 11, 1979. Since by definition there is no “contract,” neither the Contract Disputes Act nor the Prompt Payment Act applies. 70 Comp. Gen. at 666–67; B-215505, February 19, 1985.

The determination of which fiscal year to charge for a quantum meruit payment is the same as under a ratification, previously discussed. Thus, where services are rendered in one fiscal year and a quantum meruit claim is allowed in a subsequent year, the payment is properly chargeable to the prior year, the year in which the services were rendered. B-210808, May 24, 1984; B-207557, July 11, 1983. The rationale is that the government incurred the obligation to pay when it received the benefit.

As with ratification, the quantum meruit theory provides a way to reach a fair and equitable result in appropriate cases. While it is thus a useful and important concept, it should not be construed as encouraging a permissive view of informal commitments and, again like ratification, “should not be viewed as a routine alternative to proper contracting procedures.” B-197057-O.M., August 22, 1980.

We noted earlier that the Court of Federal Claims and its predecessors have traditionally declined jurisdiction over contract implied-in-law claims. The situation has become somewhat unclear, however, in view of a line of cases in which the Court of Appeals for the Federal Circuit seems to recognize a “contract implied-in-fact for a quantum meruit.” The leading case for this concept is United States v. Amdahl Corp., 786 F.2d 387 (Fed. Cir. 1986). The rationale is very hard to distinguish from the traditional implied-in-law unjust enrichment reasoning. See 786 F.2d at 393. See also Gould, Inc. v. United States, 935 F.2d 1271, 1275 (Fed. Cir. 1991), citing Amdahl for the proposition that a “court may grant equitable relief under an illegal contract if the government received a benefit from the contractor’s performance”; United International Investigative Services v. United States, 26 Cl. Ct. 892, 899–900 (1992) (“Actual mental assent is not required for the formation of an implied-in-fact contract for a quantum meruit”). An earlier case consistent with Amdahl at least in result is Yosemite Park v. United States, 582 F.2d 552 (Ct. Cl. 1978).

Precisely what Amdahl means and how far the courts or the boards of contract appeals may be willing to take it are far from clear. See, e.g., Mega Construction Co. v. United States, 29 Fed. Cl. 396 (1993) (recognizing that Amdahl blurs the implied-in-fact vs. implied-in-law distinction and

declining to apply it); Eastern Trans-Waste of Maryland, Inc. v. United States, 27 Fed. Cl. 146, 150–52 (1992) (similarly regarding Amdahl and its progeny as an exception to the jurisdictional ban on implied-in-law claims); Chavez v. United States, 18 Cl. Ct. 540, 545–47 (1989) (characterizing the Amdahl theory as more of a contract implied-in-law); H. Landau & Co. v. United States, 16 Cl. Ct. 35, 38–40 (1988), vacated and remanded, 886 F.2d 322 (Fed. Cir. 1989). In any event, at least in terms of what relief may be available in the Court of Federal Claims and the Court of Appeals for the Federal Circuit, what was once regarded as “black letter law” (Chavez v. United States, 15 Cl. Ct. 353, 357 n.2 (1988)) is perhaps now best characterized as “gray letter law.”

In addition, relief in unauthorized commitment cases is conceptually related to the doctrine of estoppel, although the extent of the relationship has yet to be definitively determined. The question is the extent to which the unauthorized commitment/quantum meruit cases are affected by the Supreme Court’s decision in Office of Personnel Management v. Richmond, 496 U.S. 414 (1990), holding that estoppel cannot form the basis of a monetary claim against the United States, at least where the payment would contravene a statute. One court opined that Richmond is distinguishable from, and has no effect on, Amdahl and its progeny. Janowsky v. United States, 23 Cl. Ct. 706, 716 (1991), rev’d in part and vacated in part, 989 F.2d 1203 (Fed. Cir. 1993). A later case disagreed, holding that Richmond bars relief, regardless of any benefit analysis, based on a contract, express or implied, in violation of a federal statute. Gould, Inc. v. United States, 29 Fed. Cl. 758 (1993)

### c. Priority to Contract Balances

In the ideal world, every contractor is financially healthy, and every contractor fulfills all contractual and financial obligations. In the real world, of course, this is not always the case. If a contractor defaults, or falls short in some other aspect of, or incident to, performing a government contract, those who are financially damaged as a result of the contractor’s actions or inactions often seek to recoup their losses from the unexpended contract balance. The term “unexpended contract balance” in this context means all funds remaining in the government’s hands under the contract, including, without distinction, withheld percentages (retainage) and progress payments. See, e.g., Balboa Ins. Co. v. United States, 775 F.2d 1158, 1161–63 (Fed. Cir. 1985); National Surety Corp. v. United States, 319 F. Supp. 45, 49 (N.D. Ala. 1970); Reliance Ins. Co. v. United States, 15 Cl. Ct. 62, 67 (1988). GAO’s formulation of this principle has consistently excluded any liquidated damages to which the government is entitled under the contract. B-192237, January 15, 1979;

B-155504, July 8, 1966, modifying B-155504, November 16, 1965. The number of claimants in a given case can range from one to as many as five or six, and a body of law has developed to determine relative priorities.

(1) The players

The players (claimants) may include, as applicable, sureties, government agencies, assignees, a trustee in bankruptcy, subcontractors, and of course the contractor itself.

The Miller Act, 40 U.S.C. §§ 270a–270f, requires a performance bond and a payment bond, both with sureties, on federal construction contracts exceeding \$100,000. Id. § 270a(a), as amended by Pub. L. No. 103-355, § 4104(b) (1994). The performance bond surety guarantees that the project will be completed if the contractor defaults. The payment bond surety guarantees payment to subcontractors, laborers, and materialmen if the prime contractor fails to pay any of them. Dependable Ins. Co. v. United States, 846 F.2d 65, 66–67 (Fed. Cir. 1988); Aetna Casualty and Surety Co. v. United States, 845 F.2d 971, 973-74 (Fed. Cir. 1988); Morrison Assurance Co. v. United States, 3 Cl. Ct. 626, 632 (1983).

While the Miller Act requires the bonds and sureties only in certain construction contracts, it recognizes the discretionary authority of contracting officers to require them in other situations. 40 U.S.C. § 270a(c). The general policy of the Federal Acquisition Regulation is against requiring performance and payment bonds in other than construction contracts, although agencies may require them when necessary to protect the government’s interests. FAR, 48 C.F.R. §§ 28.103-1(a), 28.103-2(a). The FAR gives four examples of situations which may warrant bond requirements: (1) government property or funds provided to contractor for use in performance; (2) government wants assurance from successor in interest which has merged with, or purchased assets of, original contractor; (3) substantial progress payments made before delivery of end items starts; and (4) contracts for dismantling, demolition, or removal of improvements. Id. § 28.103-2(a).

The contracting agency’s decision to require surety bonding in non-Miller Act cases should not be disturbed if reasonable and made in good faith; permissible justifications are not limited to the four examples given in the FAR. E.g., 69 Comp. Gen. 22 (1989); B-225738, June 2, 1987, aff’d upon reconsid., B-225738.2, July 28, 1987; Vikonics, Inc., GSBICA No. 10575-P, 90-3 BCA ¶ 23,044 (1990). Applying this standard and based on varying

justifications, GAO has upheld surety bonding requirements in contracts for security guard services (70 Comp. Gen. 165 (1991)); laundry services (68 Comp. Gen. 204 (1989)); custodial services (64 Comp. Gen. 593 (1985); B-233983, March 21, 1989); and food services (B-208317, November 2, 1982; B-204303, December 1, 1981).

If a contractor defaults, the performance bond surety may fulfill its obligation in several ways. It may formally take over the project and find a new contractor to finish the work. This is usually, but not always, done by means of a “takeover agreement.” See FAR, 48 C.F.R. § 49.404; B-225115, February 20, 1987. It may let the government arrange to complete the work and then be liable to the government for any excess reprocurement costs. 48 C.F.R. §§ 49.405, 49.406. Or it may simply pay the original contractor to complete the work. Which of these methods to use is essentially the surety’s option. E.g., Aetna Casualty and Surety Co., 845 F.2d at 975.

The primary purpose of the performance bond is to protect the government by assuring completion of the contract at the original contract price, more or less. E.g., Trinity Universal Ins. Co. v. United States, 382 F.2d 317, 321 (5th Cir. 1967), cert. denied, 390 U.S. 906. The payment bond, on the other hand, is designed to protect the laborers, subcontractors, and suppliers rather than the government. It does this by providing an alternative to mechanics’ liens, which cannot attach to government property. Goldman Services Mechanical Contracting, Inc. v. Citizens Bank & Trust Co., 812 F. Supp. 738, 741 (W.D. Ky. 1992); 70 Comp. Gen. 165, 168 (1991). The payment bond does not protect the government directly because the creditors it guarantees lack privity of contract with the government and thus can have no legal claims against the government. United States v. Munsey Trust Co., 332 U.S. 234, 241 (1947); United States Fidelity & Guaranty Co. v. United States, 475 F.2d 1377 (Ct. Cl. 1973); United Pacific Ins. Co. v. United States, 319 F.2d 893, 896 (Ct. Cl. 1963).<sup>40</sup> The laborers, subcontractors, and suppliers must look first to the prime contractor for payment. If the prime contractor fails to pay, they then turn to the surety. Morrison Assurance Co., 3 Cl. Ct. at 632. The payment bond surety has no claim against the contract balance until all of the claims of the laborers, subcontractors, and suppliers have been satisfied. American Surety Co. v. Westinghouse Electric Mfg. Co., 296 U.S. 133, 137 (1935); United States Fidelity & Guaranty Co., 475 F.2d at 1381; International

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<sup>40</sup>An agency may be able to recognize a subcontractor’s “equitable claim” in limited circumstances, but must be sure that the rights of all parties have been adequately determined before making any payment. 57 Comp. Gen. 176 (1977); B-231719, December 29, 1988. If this cannot be done, the agency should let a court sort it all out rather than risk having to pay twice. B-218813, April 9, 1986.

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Fidelity Ins. Co. v. United States, 25 Cl. Ct. 469, 474 (1992); B-192237, January 15, 1979.

More often than not, the same surety provides both the performance bond and the payment bond. If the situation is at all complicated, it may not be particularly clear under which bond the surety is making payments. The determination is based on “an objective analysis of all the facts and circumstances of the particular case.” Aetna Casualty and Surety Co., 845 F.2d at 975.

The next group of claimants are federal agencies, several of which may have claims against the unexpended balance. The most common is probably tax claims asserted by the Internal Revenue Service. Another group consists of claims asserted by the Department of Labor for unpaid or underpaid wages under laws such as the Contract Work Hours and Safety Standards Act, 40 U.S.C. §§ 327–333, and the Service Contract Act of 1965, 41 U.S.C. §§ 351–358. The contracting agency itself may have claims, e.g., liquidated damages, excess procurement costs, claims arising under separate contracts. Another government claim occasionally encountered is a claim by the Small Business Administration for the recovery of authorized advance payments to a “section 8(a)” subcontractor.

Other potential claimants are (1) a bank or other financing institution to which the contractor has made a valid assignment under the Assignment of Claims Act; (2) a trustee in bankruptcy, if the contractor has filed for bankruptcy under the Bankruptcy Code; and (3) last and probably least, the contractor him/her/itself.

## (2) The priorities

The first item to be paid is liquidated damages to which the contracting agency is entitled under the contract in question. See 68 Comp. Gen. 269 (1989); B-225115, February 20, 1987.<sup>41</sup> Liquidated damages are consistently excluded from the unexpended balance before determining the remaining priorities. E.g., 65 Comp. Gen. 29 (1985); B-192237, January 15, 1979; B-155504, November 16, 1965, modified on other grounds by B-155504, July 8, 1966. The FAR provides that a takeover agreement may not waive the government’s right to liquidated damages for delays in completion, “except to the extent that they are excusable under the contract.” 48 C.F.R. § 49.404(e)(2).

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<sup>41</sup>These cases do not state explicitly that liquidated damages come first. However, the conclusion clearly follows from the fact that they are withheld before paying the claim of the performance bond surety which beats everything else.

The next three priorities, in order, are:

1. The performance bond surety, to the extent of its expenses actually incurred in completing the contract;
2. Offsets for debts owed to the United States; and
3. The payment bond surety, to the extent of payments made to laborers, suppliers, and subcontractors.

If the contracting agency has no liquidated damage claim, the claim of the performance bond surety will be the first priority. The relationship of the performance and payment bond sureties to government claims is well-settled:

“A surety that pays on a performance bond in order to complete the subject contract has priority over the United States to the retainages in its hands. A surety that pays on its payment bond, however, does not have priority when the United States is asserting a tax or other obligation owed by the prime contractor.”

United States Fidelity & Guaranty Co. v. United States, 475 F.2d 1377, 1383 (Ct. Cl. 1973). See also Aetna Casualty and Surety Co. v. United States, 845 F.2d 971 (Fed. Cir. 1988); Security Ins. Co. of Hartford v. United States, 428 F.2d 838 (Ct. Cl. 1970); International Fidelity Ins. Co. v. United States, 27 Fed. Cl. 107 (1992); Dependable Ins. Co. v. United States, 12 Cl. Ct. 711 (1987), aff'd, 846 F.2d 65 (Fed. Cir. 1988); Morrison Assurance Co. v. United States, 3 Cl. Ct. 626 (1983). As one court explained:

“The [performance bond] surety is not only a subrogee of the contractor, and therefore a creditor, but also a subrogee of the government and entitled to any rights the government has to the retained funds. . . . The surety who undertakes to complete the project is entitled to the funds in the hands of the government not as a creditor and subject to setoff, but as a subrogee having the same rights to the funds as the government.” (Footnotes omitted.)

Trinity Universal Ins. Co. v. United States, 382 F.2d 317, 320 (5th Cir. 1967), cert. denied, 390 U.S. 906. The Comptroller General has consistently followed the same order of priorities. E.g., 68 Comp. Gen. 269 (1989); 65 Comp. Gen. 29 (1985); 64 Comp. Gen. 763 (1985); B-192237, January 15, 1979; B-187456, November 4, 1976, aff'd upon reconsid., B-187456, March 8, 1977; B-169420, October 22, 1970.

The performance bond surety not only prevails over government and payment bond claims, it beats all other competition as well, such as an assignee (65 Comp. Gen. 719 (1986); 64 Comp. Gen. 763 (1985); 58 Comp. Gen. 295 (1979)), and a trustee in bankruptcy (58 Comp. Gen. 295).

Cases on the surety vs. assignee question have not been unanimous. The assignee won over a surety claiming on both its performance and payment bonds in Coconut Grove Exchange Bank v. New Amsterdam Casualty Co., 149 F.2d 73 (5th Cir. 1945). However, the Coconut Grove holding is generally regarded as limited to funds already paid to the assignee which, by virtue of the Assignment of Claims Act, cannot be recovered. For example, a performance bond surety received priority to unpaid contract balances over an assignee in Industrial Bank of Washington v. United States, 424 F.2d 932 (D.C. Cir. 1970), and National Shawmut Bank of Boston v. New Amsterdam Casualty Co., 411 F.2d 843 (1st Cir. 1969). See also 63 Comp. Gen. 533 (1984) (same point in a payment bond case).

A surety may be the surety on more than one contract for the same contractor, raising the question of whether the balance sought must be from the same contract as that for which the completion expenses were incurred. In one case, the Court of Appeals for the Federal Circuit held, in effect, that a claimant could not use its status as performance bond surety on contract A to enhance its priority position with respect to contract B on which it was only a payment bond surety. Dependable Ins. Co. v. United States, 846 F.2d 65 (Fed. Cir. 1988). However, as the court explained a few years later, this was because the government had a competing tax claim to the contract B funds. In a case where the government was merely a stakeholder, the court held that a performance bond surety could assert a claim for expenses incurred under contract A against an equitable adjustment payable to the contractor under contract B under which the surety had incurred no expenses. Transamerica Ins. Co. v. United States, 989 F.2d 1188 (Fed. Cir. 1993).

Next after the performance bond surety are government claims. Within the category of government claims, there is also a more-or-less established “pecking order”:

- Claims for unpaid/underpaid wages asserted by the Department of Labor.
- Liquidated damages claimed by the Labor Department under the wage statutes it administers.
- Claims for excess procurement costs by the contracting agency.
- Tax claims.

This listing is derived by a process of deduction as no single case includes each item. First, the Labor Department claims have priority over tax claims. 56 Comp. Gen. 499 (1977), overruled in part on other grounds, 60 Comp. Gen. 510 (1981); B-216549, December 5, 1984; B-214905, May 15, 1984, aff'd upon reconsid., B-214905.2, July 10, 1984; B-210243, April 22, 1983. The unpaid wage portion of Labor's claim takes precedence over the liquidated damage portion. B-210243, April 22, 1983.

An excess procurement cost claim also has priority over a tax claim. B-211539, September 26, 1983; B-189902, October 5, 1977; B-180333, April 2, 1974. However, excess procurement cost claims may be subordinated to unpaid wage claims. B-189137, August 1, 1977, overruled in part on other grounds, B-189137, May 19, 1978; B-178198, August 30, 1973; B-161460, May 25, 1967. The only uncertainty in the above listing is the relationship between a Labor Department liquidated damage claim, not involved in any of the cases just cited, and an excess procurement cost claim.

A case involving a tax claim and a Small Business Administration claim was resolved by applying the "first in time" rule, with the tax claim winning because it was assessed first. B-189679, September 7, 1977.

Next in line after government claims is the payment bond surety. The subordination of the payment bond surety to government claims, noted in many of the previously cited cases, stems from the Supreme Court's decision in United States v. Munsey Trust Co., 332 U.S. 234 (1947). The most common government claim in this situation is a tax claim, which invariably wins. E.g., In re Lanny Jones Welding & Repair, 106 B.R. 446 (Bankr. E.D. Va. 1988); 65 Comp. Gen. 29 (1985); 64 Comp. Gen. 763 (1985); 54 Comp. Gen. 823 (1975); B-189125, June 7, 1977; B-187903, December 21, 1976; B-174488, December 29, 1971. The principle applies equally to a Labor Department wage underpayment claim (B-181695, April 7, 1975), or a Small Business Administration advance payment claim (68 Comp. Gen. 269 (1989)). Munsey Trust itself involved an excess procurement cost claim. An agreement purporting to commit the government to pay the surety without regard to government claims is unauthorized. 40 Comp. Gen. 85 (1960).

After the payment bond surety is the assignee. The Court of Federal Claims and its predecessors have consistently held an assignee subordinate to a payment bond surety. E.g., Great American Ins. Co. v.

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United States, 492 F.2d 821, 824 (Ct. Cl. 1974); Royal Indemnity Co. v. United States, 93 F. Supp. 891 (Ct. Cl. 1950); Reliance Ins. Co. v. United States, 15 Cl. Ct. 62 (1988). Starting with 63 Comp. Gen. 533 (1984), GAO has followed suit. See also 64 Comp. Gen. 763 (1985) and 67 Comp. Gen. 309 (1988). If a payment bond surety takes priority over an assignee, logic suggests that any claim with priority over the payment bond surety also has priority over the assignee.

The principle of the preceding paragraph works neatly when the surety and assignee are the only competing claimants. It runs into conceptual difficulties when a tax claim enters the picture. As discussed in more detail under the Assignment of Claims heading of this chapter, an assignee is protected against tax offsets if the contract contains an authorized no-setoff clause. E.g., 65 Comp. Gen. 554 (1986). Even without a no-setoff clause, the assignee will prevail over a tax claim arising after perfection of the assignment. 67 Comp. Gen. 505 (1988). The problem is that integrating this relationship with the payment bond surety's subordination to tax claims resembles the proverbial dog chasing its tail—the IRS beats the surety who beats the assignee who beats the IRS who beats the surety, ad infinitum. See 63 Comp. Gen. at 536; 64 Comp. Gen. at 767. As both of these cases state, the solution is to recognize that the assignee is entitled to its priority over the tax claim only if it can show that it is otherwise entitled to the funds, which it cannot do by virtue of the surety's dominant claim. Id.

If a payment bond surety could qualify as an assignee, it could in some cases enhance its position by taking advantage of a no-setoff clause. As a general proposition, this cannot happen since a surety is not a financing institution for purposes of the Assignment of Claims Act. E.g., B-187456, November 4, 1976; B-169420, October 22, 1970. Consistent with the rule for assignments in general, one board of contract appeals has held that an agency can waive the statutory protections and accept an otherwise non-qualifying assignment to a surety, at least for limited purposes. Rodgers Construction, Inc., and Federal Insurance Co., IBCA Nos. 2777 et al., 92-1 BCA ¶ 24,503 (1991). Rodgers did not involve competing claims, however, and it is doubtful that the concept could be used to defeat an otherwise valid government claim.

Next in line is the contractor's trustee in bankruptcy. If it can be said that the funds in question never became the property of the contractor, a payment bond surety will prevail over the trustee in bankruptcy. Pearlman v. Reliance Ins. Co., 371 U.S. 132 (1962); Great American Ins. Co. v. United

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States, 492 F.2d 821, 824 (Ct. Cl. 1974); B-221519, July 1, 1986; B-211539, September 26, 1983. Absent a preferential transfer, the trustee's claim has also been held subordinate to that of an assignee whose assignment has been perfected. 56 Comp. Gen. 499 (1977), overruled in part on other grounds, 60 Comp. Gen. 510 (1981). It may also be subordinate to certain government claims. 68 Comp. Gen. 215 (1989); B-211539, September 26, 1983. However, the government must comply with the automatic stay provisions of the Bankruptcy Code before attempting an offset. 68 Comp. Gen. at 219. If the contractor is not in bankruptcy, the contractor will occupy this rung on the ladder. See B-169420, October 22, 1970.

To sum up, the priorities, in descending order, are:

1. Liquidated damages arising under the same contract.
2. Performance bond surety.
3. Government claims.
  - a. Labor Department unpaid/underpaid wage claims.
  - b. Labor Department liquidated damage claims.
  - c. Excess procurement costs on same contract.
  - d. Tax claims.
4. Payment bond surety.
5. Assignee under a proper assignment.
6. Trustee in bankruptcy or contractor, as applicable.

(3) Government's obligations and liability as stakeholder

Where performance of the contract is complete and there are no government claims to the unexpended balance, the government is a mere stakeholder with respect to that balance. The government doesn't particularly care who gets paid as long as it pays the right party and protects itself against the possibility of having to pay twice.

As a general proposition, the government when acting as stakeholder has a duty to pay the proper party or parties, and will be held liable for breaches of this duty. For example, in Newark Ins. Co. v. United States, 169 F. Supp. 955 (Ct. Cl. 1959), the government was found liable to a payment bond surety when it made a final contract payment to an assignee after being put on notice of the surety's claim. The court said:

"Surely a stakeholder, caught in the middle between two competing claimants, cannot, in effect, decide the merits of their claims by the mere physical act of delivering the stake to one of them."

Id. at 957. The result is the same where the government erroneously pays the contractor. Home Indemnity Co. v. United States, 376 F.2d 890 (Ct. Cl. 1967); International Fidelity Ins. Co. v. United States, 25 Cl. Ct. 469 (1992); 58 Comp. Gen. 64 (1978); B-200374, October 21, 1980. See also National Surety Corp. v. United States, 319 F. Supp. 45 (N.D. Ala. 1970).

In another assignee case, the court held that “the Government improperly abandoned its role as a stakeholder and elected to decide the merits of the conflicting claims by paying the amount in dispute to the assignee without a valid reason for doing so.” Great American Ins. Co. v. United States, 492 F.2d 821, 825 (Ct. Cl. 1974). This should not be construed to mean that the government should not try to resolve claims administratively. Following precedent would presumably be a “valid reason,” although we have no case to cite for this proposition. Also, a good faith attempt to follow precedent would be more than “the mere physical act of delivering the stake.” Certainly, however, if the claims cannot be resolved by applying precedent, the solution is to let a court sort it out. B-190181, December 8, 1977.

Where a payment is found to be erroneous in disregard of a surety’s superior claim, the fact that the payment depleted the stake is no defense and the government will still lose. Newark Ins. Co., 169 F. Supp. at 956–57; 62 Comp. Gen. 498 (1983). The stake is measured as of the time of default and is deemed to include amounts subsequently paid out in error. See Universal Surety Co. v. United States, 10 Cl. Ct. 794, 797–98 (1986); 62 Comp. Gen. 498. If the erroneous payment was made to the contractor, the government can and should pursue recovery against the contractor. 62 Comp. Gen. at 502. If the erroneous payment was made to an assignee, the Assignment of Claims Act prevents recovery from the assignee, but the government may still be able to recover from the contractor. Great American Ins. Co., 492 F.2d at 826–27.

A variation occurred in B-214985, May 22, 1984, in which the contracting agency erroneously paid the contractor instead of a payment bond surety. Before the contractor could pay the surety, the IRS grabbed the money under a tax lien. Notwithstanding the government’s error, the surety’s claim was denied because of the tax claim’s priority.

In the preceding cases, the government was merely a stakeholder. Where a surety notifies the government of a claim while the contractor is still performing, the situation is different. The government “is primarily concerned with completion of performance under the contract and is far

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from being a simple stakeholder.” United States Fidelity & Guaranty Co. v. United States, 475 F.2d 1377, 1384 (Ct. Cl. 1973). In this situation, the contracting officer must balance the interests of the government against possible harm to the surety, and must exercise reasoned discretion in deciding whether to pay the contractor, the surety, or neither. Id.; Argonaut Ins. Co. v. United States, 434 F.2d 1362 (Ct. Cl. 1970); Peerless Ins. Co., ASBCA No. 28887, 88-2 BCA ¶ 20,730 (1988). This duty to exercise discretion arises “when a . . . surety alleges that the contractor has breached the contract by defaulting under one of the bonds.” Balboa Ins. Co. v. United States, 775 F.2d 1158, 1162 (Fed. Cir. 1985).

The contracting officer’s discretion is very broad. The Court of Claims has stated:

“[S]o long as there is no showing of bad faith or an abuse of discretion, the decision of a Government contracting officer that a progress payment to a financially strapped contractor should not be withheld will be accorded deference by this court, and the surety’s burden of proving to the contrary is high.”

United States Fidelity & Guaranty Co. v. United States, 676 F.2d 622, 628 (Ct. Cl. 1982). One reason for this broad range of discretion, as a district court has cautioned, is that “contractors rely upon contract proceeds administered through progress payments to properly finance the contract” and the government therefore should not “lightly withhold funds the contractor may need for this purpose.” Fireman’s Fund Ins. Co. v. United States, 362 F. Supp. 842, 846 (D. Kans. 1973).

The Court of Appeals for the Federal Circuit, in Balboa Ins. Co. v. United States, 775 F.2d at 1164–65, identified eight factors that are relevant in evaluating an agency’s discretion in distributing funds. The “Balboa factors,” minus case citations, are:

- (1) Attempts by the government after notification by the surety to determine that the contractor had the capacity and intent to complete the job.
- (2) Percentage of contract performance completed at time of notification by surety.
- (3) Efforts by government to determine progress made on the contract after notice by the surety.

(4) Whether the contract was subsequently completed by the contractor. This is not conclusive but is relevant to show reasonableness of contracting officer's determination of the progress on the project.

(5) Whether the payments to the contractor subsequently reached the subcontractors and suppliers. This relates to the government's "equitable obligation" to the subcontractors and suppliers and, in view of the surety's liability to these creditors, furthers the surety's objectives as well as those of the government.

(6) Whether the contracting agency had notice of the problems with the contractor's performance prior to the surety's notification of default.

(7) Whether the government's action violated any of its own statutes or regulations.

(8) Evidence that the contract could or could not be completed as quickly or cheaply by a successor contractor.

For applications of the Balboa factors, see Ohio Casualty Ins. Co. v. United States, 12 Cl. Ct. 590 (1987); Indiana Lumbermen's Mutual Ins. Co., VABCA No. 3197, 92-3 BCA ¶ 25,065 (1992); Peerless Ins. Co., ASBCA No. 28887, 88-2 BCA ¶ 20,730 (1988).

In any event, whether the surety lodges its claim during performance or after completion, notice by the surety to the government is essential, as it is this notice which triggers the government's duty. Fireman's Fund Ins. Co. v. United States, 909 F.2d 495 (Fed. Cir. 1990); Indiana Lumbermen's Mutual Ins. Co., 93-2 BCA at 124,918-919.

As with the stakeholder cases, if applicable precedent fails to produce an answer in which the contracting officer can be reasonably confident, the solution may be to simply withhold payment and let a court decide. A decision to withhold, if reasonable under the circumstances, is a valid exercise of the contracting officer's discretion. Reliance Ins. Co. v. United States, 15 Cl. Ct. 62 (1988).

#### d. Bid Protests

Bid protests—challenges to the award of government contracts by unsuccessful bidders—give rise to one type of monetary claim against the government, a claim to recover bid preparation and/or protest costs. The claims may be considered by the courts, GAO, and the General Services Administration Board of Contract Appeals.

Whenever someone submits a bid or proposal in response to a government solicitation, an implied-in-fact contract comes into existence under which the government is obligated to treat the bid or proposal fairly and honestly. If the government violates this obligation, it may be held liable for bid preparation costs. The earliest case to state this proposition appears to be Heyer Products Co. v. United States, 140 F. Supp. 409 (Ct. Cl. 1956). Since that time, the government's duty to treat all bids fairly and honestly has become firmly established and has been recognized in a great many cases. E.g., Prineville Sawmill Co. v. United States, 859 F.2d 905, 909 (Fed. Cir. 1988); Tonya, Inc. v. United States, 28 Fed. Cl. 727, 730 (1993); Durable Metals Products, Inc. v. United States, 27 Fed. Cl. 472, 478 (1993); Joseph L. DeClerk and Associates v. United States, 26 Cl. Ct. 35, 41 (1992); Compliance Corp. v. United States, 22 Cl. Ct. 193, 198 (1990), aff'd mem., 960 F.2d 157 (Fed. Cir. 1992).

This implied promise of fair treatment is not limited to competitive bidding, but applies as well to noncompetitive situations such as the Small Business Administration's section 8(a) program. Refine Construction Co. v. United States, 12 Cl. Ct. 56 (1987). It has also been held applicable to the SBA's issuance of Certificates of Competency. Thomas Creek Lumber and Log Co. v. United States, 22 Cl. Ct. 559 (1991). However, it does not apply to a non-bidder. Motorola, Inc. v. United States, 988 F.2d 113 (Fed. Cir. 1993).

A court can award bid protest costs as well as bid preparation costs. Crux Computer Corp. v. United States, 24 Cl. Ct. 223 (1991). However, there is no authority to award lost profits. Id. at 225–26; Heyer, 140 F. Supp. at 412, 413.

The standard the courts apply is whether the government's actions were arbitrary and capricious. The factors to be applied in making this determination are (1) the presence or absence of bad faith on the part of the government; (2) whether there is a reasonable basis for the administrative decision; (3) the amount of discretion entrusted to the procurement officials; and (4) whether the government violated applicable statutes and regulations. Keco Industries, Inc. v. United States, 492 F.2d 1200, 1203–04 (Ct. Cl. 1974). See also, e.g., Durable Metals Products, 27 Fed. Cl. at 479; Joseph L. DeClerk, 26 Cl. Ct. at 42; 54 Comp. Gen. 1021, 1024 (1975).

The implied contract to treat bids fairly is not a contract for the procurement of goods or services and therefore not subject to the

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Contract Disputes Act. Coastal Corp. v. United States, 713 F.2d 728 (Fed. Cir. 1983); Monchamp Corp. v. United States, 19 Cl. Ct. 797 (1990). Accordingly, unless expressly authorized by statute, the boards of contract appeals lack jurisdiction to consider bid preparation cost claims. Coastal Corp., 713 F.2d at 730.

Prior to 1984, following the judicial precedents such as Heyer and Keco, GAO considered claims for bid preparation and protest costs on the same basis as did the courts. E.g., 60 Comp. Gen. 36 (1980); 54 Comp. Gen. 1021 (1975). In 1984, Congress enacted 31 U.S.C. § 3554(c) as part of the Competition in Contracting Act. Subsection (1), as amended by Pub. L. No. 103-355, § 1403(b) (1994), provides:

“If the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation, the Comptroller General may recommend that the Federal agency conducting the procurement pay to an appropriate interested party the costs of—

“(A) filing and pursuing the protest, including reasonable attorneys’ fees and consultant and expert witness fees; and

“(B) bid and proposal preparation.”

The parties should first try to negotiate the amount. If they cannot agree and the “interested party” so requests, GAO will determine the amount. Id. § 3554(c)(4). Once the amount is determined, the agency must either pay promptly or report to GAO its reasons for refusing to pay, in which event GAO is to then promptly report the matter to specified congressional committees. GAO’s report is to include recommendations appropriate to the circumstances, which may include such things as relief legislation and/or the legislative rescission or cancellation of funds. Id. §§ 3554(c)(3) and (e)(1).

The original (1984) version of 31 U.S.C. § 3554(c) specified that payment is to come from the agency’s procurement appropriations. While the 1994 amendments left out this detail, there is no substantive change because the only funds from which the agency can pay are its own operating appropriations. Prior to 1995, the obligation was chargeable to appropriations current at the time of GAO’s decision. B-199368.4, January 19, 1983 (non-decision letter). The extent to which the 1994 law may have changed this remains to be addressed.

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The General Services Administration Board of Contract Appeals decides bid protests involving automatic data processing contracts under the Brooks Automatic Data Processing Act, 40 U.S.C. § 759(f). The law provides remedies if the board finds that the agency involved has violated a statute or regulation. Subsection 759(f)(5)(C), as amended by Pub. L. No. 103-355, § 1435(a) (1994), provides:

“Whenever the board [determines that the agency has violated a statute or regulation], it may, in accordance with section 1304 of Title 31, United States Code, further declare an appropriate prevailing party to be entitled to the cost of filing and pursuing the protest (including reasonable attorneys’ fees and consultant and expert witness fees), and bid and proposal preparation.”

Under this statute, the GSBCA has held that it will not simply rubber-stamp a cost stipulation, but must actually make the award. Systemhouse Federal Systems, Inc., GSBCA No. 9446-C(9313-P), 89-2 BCA ¶ 21,773 (1989). However, in a case where the parties entered into a monetary settlement agreement after the board had rendered its decision on the merits, the Court of Appeals for the Federal Circuit held that the board was bound to accept it. Federal Data Corp. v. SMS Data Products Group, Inc., 819 F.2d 277 (Fed. Cir. 1987).

In awarding costs under the Brooks Act, the GSBCA is not limited to items taxable under the statutes applicable to the courts. Sterling Federal Systems, Inc. v. Goldin, 16 F.3d 1177 (Fed. Cir. 1994).

Unlike 31 U.S.C. § 3554(c), the Brooks Act as quoted above provides for payment “in accordance with” 31 U.S.C. § 1304, the permanent judgment appropriation. This potential access to the Treasury gave rise to concern over an abuse known as “fedmail” (derived from “blackmail”), under which an agency simply throws money at a protester to get rid of the interruption, or someone files a protest with this expectation. If the agency is not financially accountable for its settlements, and it is not to the extent of unreimbursable payments from the general fund of the Treasury, there is no effective control. To address the “fedmail” problem, GAO recommended that the Brooks Act be amended to require payment from agency appropriations. ADP Bid Protests: Better Disclosure and Accountability of Settlements Needed, GAO/GGD-90-13 (March 1990) at 34. The GSBCA tried various approaches, finally declaring that it would refuse to make an award of protest costs in “fedmail” cases, aptly characterizing the situation as an attempt to buy off a protester with someone else’s appropriated funds. ICF Severn, Inc. v. NASA, GSBCA No. 11552-C-R

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(11334-P), 94-3 BCA § 27, 162 (1994). Congress acted in late 1994, amending the Brooks Act to (1) require public disclosure of all protest settlements calling for the expenditure of appropriated funds, (2) provide for payment from the judgment appropriation, and (3) require that contracting agencies reimburse the judgment appropriation for all Brooks Act payments, both GSBCA awards and payments under dismissal settlements. 40 U.S.C. §§ 759(f)(5)(D) and (E), added by Pub. L. No. 103-355, § 1436 (1994). The tortured history of the reimbursement issue is discussed further in Chapter 14.

#### e. Damage to Leased Property

Since a lease is a contract, damage claims under a lease are governed by the Contract Disputes Act. Goodfellow Bros., Inc., AGBCA No. 80-189-3, 81-1 BCA ¶ 14,917 (1981). GAO had been active in this area prior to the CDA and, although GAO no longer settles individual claims, it may nevertheless be useful from the perspective of the proper use of appropriated funds to summarize the applicable principles.

Where the United States enters into a leasehold agreement, the validity and the construction of the lease and its consequences on the rights and obligations of the parties are governed by federal, rather than state, law. Goodfellow, 81-1 BCA at 73,814; B-174588, September 6, 1972. If there are no federal cases on point, it is then appropriate to resort to state landlord-tenant law. 49 Comp. Gen. 532, 533 (1970). The starting point, of course, is the terms of the lease agreement.

Claims against the government for damage to leased real property frequently arise from the government's agreement in the lease to surrender the leased premises in some designated condition of repair, generally either in good order and repair, or in the same state and condition as when received. This general covenant to surrender the premises in good condition or repair is often expressly qualified. Common express exceptions are usual wear and tear, action of the elements, and so-called "acts of God." Absent an applicable exception, the United States will be held liable for violating this covenant. See, e.g., San Nicolas v. United States, 617 F.2d 246 (Ct. Cl. 1980). Claims for damages to or restoration of leased property, however, must be considered in light of the purpose for which the property was leased. That is, the government is not liable unless the damage is over and above the normal wear and tear incident to the purpose for which the property was leased. 5 Comp. Gen. 522 (1926); 4 Comp. Gen. 211 (1924); B-192230, November 27, 1978.

The government's liability does not derive solely from the terms of the lease. Even in the absence of specific "good repair" and "ordinary wear and tear" clauses, unless the lease expressly provides to the contrary, there is in every lease an implied obligation on the tenant to surrender the leased property at the end of the tenancy in as good condition as at the beginning of the tenancy, except for reasonable wear and tear and damage over which the tenant had no control. 26 Comp. Gen. 585 (1947); 25 Comp. Gen. 349 (1945); 23 Comp. Gen. 477, 479–80 (1944). One way to determine compliance with this requirement, whether express or implied, is to compare the initial and terminal inspection surveys. B-193722, March 29, 1979.

A lease provision exempting the government from liability for "acts of a stranger" has been held to include window breakage by vandals. 49 Comp. Gen. 532 (1970).

The measure of damages is the actual cost of repair or restoration, not to exceed the diminution in fair market value of the property caused by the government's nonperformance. San Nicolas, 617 F.2d at 249; Missouri Baptist Hospital v. United States, 555 F.2d 290 (Ct. Cl. 1977); Dodge Street Building Corp. v. United States, 341 F.2d 641 (Ct. Cl. 1965). Some lease provisions may permit the government to make a cash payment in lieu of restoration so long as the payment does not exceed the diminution in value of the premises resulting from the federal use and occupancy. E.g., B-181236, October 20, 1977.

The lease may require timely notice of the lessor's demand for restoration. If so, compliance with the notice requirement will be a condition precedent to the lessor's restoration rights. 6 Comp. Gen. 533 (1927). However, if there has been substantial compliance with the notice requirement—that is, if notice is given within a reasonable time after the premises are vacated—and if the lessor's failure to strictly comply with the requirement does not affect the merits of the restoration claim or operate to the prejudice of the United States, the failure will not defeat an otherwise proper restoration claim. 40 Comp. Gen. 300, 304 (1960); 26 Comp. Gen. 585, 588 (1947). The "reasonable notice" principle would generally apply even in the absence of a notice requirement in the lease. 26 Comp. Gen. at 588.

Because the government can restore or further destroy realty so long as its occupancy continues, restoration claims should generally not be settled until the government's occupancy rights terminate. 40 Comp. Gen. 300

(1960) (failure to give timely notice of demand for restoration held not to destroy lessor's restoration rights where government continued to occupy premises under subsequent lease). Thus, in a case where the government occupied land under a lease and subsequently decided to acquire the land in fee simple by condemnation, with the just compensation to be based on the current value of the property as if in undamaged condition, claims for restoration of the land could not be paid so long as the government continued to occupy the premises under the lease. B-181236, October 20, 1977. If, however, improvements to the land have been completely destroyed and the government does not intend to restore them, the considerations which mandate delaying claims for damage to the land itself do not exist with regard to the obligation to restore the improvements. Thus, claims for the restoration of the improvements in B-181236 could be settled without awaiting the government's acquisition by condemnation.

Although land with improvements and appurtenances is ordinarily considered a single unit for valuation purposes (the "unit rule"), departures from the unit rule have been sanctioned in appropriate circumstances. One such circumstance where improvements can be valued apart from the rest of the premises to settle a restoration claim is where the improvements have been completely lost or destroyed during a temporary occupation by the government, as in B-181236. Claims for restoration of improvements only should be computed on the basis of the replacement or reproduction cost. Thus, in order to account for the ordinary wear and tear which has occurred over a period of years, it is necessary to depreciate the improvements' replacement value as determined on the termination date of the lease so that the amount allowed reflects only the damage done by the government. B-181236, cited above.

Although a lease agreement may expressly exempt the government from restoration liability for certain types of damage, if the government subleases the property and later assesses its sublessee for the exempted damage, the government may be found to hold such amounts as are assessed in constructive trust for the lessor. B-177989-O.M., March 23, 1973.

Even if damage exceeds that attributable to normal wear and tear, the government may avoid liability for restoration if the damage can be attributed to the lessor's breach of an express covenant in the lease to maintain the premises or property in good repair and tenantable condition.

A lessor's obligation to maintain premises or property in good repair and tenantable condition "embraces acts of repair to prevent a decline in the condition of the premises." 48 Comp. Gen. 289, 290 (1968). Painting has been held to be an expense of maintenance included within the "good repair" provisions of a lease. Id.; 21 Comp. Gen. 90 (1941); 6 Comp. Gen. 215 (1926).

If the government incurs expenses for painting or other services which a lessor is obligated to perform under a lease but has failed or refused to perform, the costs may be recovered by setoff against payments to be made under the lease. 48 Comp. Gen. 289 (1968); 15 Comp. Gen. 1064 (1936).

The doctrine of "constructive eviction" applies to the government as tenant just as it would apply to any other tenant. Under this concept, if a lessor allows the premises to become untenable, the lessee is relieved from the obligation to pay rent provided the lessee vacates within a reasonable time. The case of Richardson v. United States, 17 Cl. Ct. 355, 356 (1989), illustrates one set of facts which the court found to justify termination of the lease and cessation of rental payments:

"As a result of the failure to repair roof leaks and water seepage, [the Social Security Administration] repeatedly experienced problems and inconveniences, including: being forced to mount computer equipment necessary to the daily operation of the office on boards to protect it from flooding; soaked and slippery carpets; mildewed walls; water-damaged supplies; having to vacate offices due to dampness; and employees being forced to mop water during business hours."

Where there is a factual dispute involving either discrepancies in the extent of damage, the cost of repairs, or the kind and extent of repair necessary in order to restore items to their original condition less ordinary wear and tear, claimant must satisfactorily establish their claim by convincing evidence. In cases where claimants were unable to meet the burden of proof, GAO has accepted the findings of fact in the government agency's administrative report. B-193722, March 29, 1979; B-192230, November 27, 1978; B-169876, July 12, 1972.

Finally, the very existence of a landlord-tenant relationship may be an issue. A 1964 decision involved a claim by the University of Mississippi for damage to University property resulting from the occupation of the University by federal troops under presidential order. The University argued that the occupation constituted an implied contract of lease and

thus created a landlord-tenant relationship. Under this theory, the government was under an implied obligation to return the premises in the same condition as they were in when federal occupancy began, reasonable wear and tear excepted. Noting the University's opposition to the presence of the federal troops and the absence of any indication in the record that the United States contemplated paying rent, GAO was unwilling to allow the claim under the implied lease theory absent a judicial determination. However, GAO advised that the claim appeared cognizable under the Military Claims Act. 43 Comp. Gen. 711 (1964).

Claims may also involve the rental of personal property. The principles involved are generally similar. As in the case of real property, the terms of the lease agreement control. Several cases have found the government not liable where there was no negligence on the part of the government and the lease did not impose a more stringent standard of liability. 55 Comp. Gen. 356 (1975) (no liability for typewriter destroyed in fire where no government negligence, "absent any contractual provision increasing the Government's liability beyond its duty of ordinary care as a bailee"); 23 Comp. Gen. 907 (1944) (truck overturned after driving over a shovel handle which was thrown up and managed to lock the steering mechanism); 18 Comp. Gen. 17 (1938) (equipment destroyed in fire caused by unknown person); 15 Comp. Gen. 929 (1936) (stolen equipment); 4 Comp. Gen. 1028 (1925) (lost horse); 1 Comp. Gen. 192 (1921) (injured horse). Conversely, negligence will make the government liable.<sup>42</sup> E.g., 8 Comp. Gen. 448 (1929). As in the case of real property, the duty to use due care and to return the property in the same condition as when received, reasonable wear and tear excepted, is implied by law even where not expressly stated in the lease. 21 Comp. Gen. 411, 419 (1941). A summary of bailment principles and an extensive discussion of early cases may be found in A-89545-O.M., March 15, 1938.

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<sup>42</sup>As this paragraph suggests, a claim may have elements of both contract and tort. Depending on such factors as the precise terms of the contract, the relationship of the tortious conduct to the government's obligations under the contract, and the law of the state in which the tortious conduct occurred, the claimant may or may not have an option as to which remedy to pursue. Unfortunately, there is no simple rule and the jurisdictions are not in total harmony. Some cases holding the contract remedy to be exclusive are *United States v. Peter Kiewit Sons' Co.*, 345 F.2d 879 (8th Cir. 1965); *Blanchard v. St. Paul Fire and Marine Ins. Co.*, 341 F.2d 351 (5th Cir. 1965); *Woodbury v. United States*, 313 F.2d 291 (9th Cir. 1963); *Coffey v. United States*, 626 F. Supp. 1246 (D. Kans. 1986). Cases permitting a claimant to proceed under the Federal Tort Claims Act include *Fort Vancouver Plywood Co. v. United States*, 747 F.2d 547 (9th Cir. 1984); *Aleutco Corp. v. United States*, 244 F.2d 674 (3d Cir. 1957); *Green Construction Co. v. Williams Form Eng. Corp.*, 506 F. Supp. 173 (W.D. Mich. 1980). The Court of Federal Claims will take Tucker Act jurisdiction if the claim is "primarily contractual," without regard to the possible existence of a tort claim. *Wood v. United States*, 961 F.2d 195 (Fed. Cir. 1992); *Estate of Dunaway v. United States*, 18 Cl. Ct. 492 (1989).

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f. Canceled Hotel Reservations

Ordinarily the cancellation of hotel reservations within a reasonable time prior to the dates of the reservations involves no liability on the part of the government. 41 Comp. Gen. 780 (1962). However, a claim for the actual cost of unused hotel rooms may be allowed when (1) it is clear that the reservations were made by and on behalf of the government; (2) there is sufficient basis to conclude that the making of reservations gave rise to a contractual relationship between the hotel and the government; (3) the government failed to cancel within a reasonable time; and (4) the hotel attempted to mitigate its damages. Since the basis of the government's liability is contractual, either express or implied-in-fact, the claims should be resolved under the Contract Disputes Act. As with the preceding section on leased property, GAO had looked at a number of these claims prior to the CDA.

Allowable claims must be distinguished from cases in which an employee is reimbursed on a per diem basis and makes a hotel or motel reservation himself or through an agent on his behalf. Under such circumstances, there is no basis for the government to pay a claim because the government was not a party to the agreement. 48 Comp. Gen. 75 (1968). The distinction is between cases in which a block reservation is made on a contractual basis between the government and the hotel through official administrative action, and cases in which the agreement is essentially one between the individual and the hotel, even though the reservation may have been made by some other government employee on the traveler's behalf. Thus, in B-190503-O.M., December 19, 1977, a member of the Casualty Branch on an Army post, determined by the Army to have been acting "in his official capacity," made motel reservations for an 11-member funeral detail. The bus carrying the detail broke down and the detail had to travel through the night to reach the funeral on time. The reservations were never canceled and the motel held the rooms open. GAO viewed the agreement to reserve the rooms as an obligation of the government and allowed the motel's claim for the cost of the rooms. Similarly, GAO allowed payment for reservations made by military officials acting in their official capacity where the members for whom the reservations were made had been notified that, because of the nature of their mission, the reservations could not be altered without official approval. B-192767, May 3, 1979.

In contrast is B-181266, December 5, 1974. An employee was scheduled to travel from Washington to Kansas City on official business and agency employees in Kansas City made a hotel reservation for him. The trip was canceled and the Kansas City office canceled the reservation but not until after the employee had been scheduled to arrive. The situation was viewed

as a transaction between the individual and the hotel which did not obligate the government. A similar decision is B-192804, December 18, 1978.

Since claims may be allowed only on the basis of legal liability, it is necessary to find some contractual or similar binding arrangement between the government and the hotel whereby the government agrees to either pay for the rooms reserved or cancel within a reasonable time. However, evidence of the contractual arrangement need not necessarily be in writing. In B-194389-O.M., June 25, 1979, the reservations were initially made by telephone. Later, an advance party inspected and approved the accommodations and follow-up telephone calls were made to remind the hotel of the booking. The hotel relied on the conduct and representations of the government and incurred a loss as a result of that reliance. GAO concluded that the booking was viewed by the parties as more than only tentative, and that a contractual relationship existed despite the absence of written evidence. On the other hand, where such facts do not exist, even subsequent issuance of a purchase order by the government will not provide adequate evidence of a contract. B-181266, December 5, 1974.

Once the existence of a contractual agreement to either pay for the rooms reserved or cancel within a reasonable time is established, the government can avoid liability only by showing that the time of cancellation was reasonable. What is "reasonable" depends on the specific circumstances involved. For example, in 41 Comp. Gen. 780 (1962), payment was approved for unused rooms when the reservations were canceled late in the afternoon of the day for which the rooms had been reserved, and the hotel was unable to rent all the rooms after the receipt of the cancellation notice. That holding was followed in 51 Comp. Gen. 453 (1972), in which the reservations were canceled a week ahead but it was found that the hotel was unable to use the space reserved by the government despite attempts to do so. Other circumstances such as special events taking place in the city and the relative difficulty of re-letting accommodations on short notice may also have a bearing on reasonableness. B-194389-O.M., June 25, 1979.

The hotel must generally attempt to mitigate its loss, and its attempts to do so will be relevant in evaluating the claim. For example, in one case when the hotel received three days notice of the cancellation of all accommodations being held, it immediately took steps to insure that the canceled accommodations were re-let. By moving some guests, utilizing its waiting list, and accepting new bookings for the vacancies, the hotel was

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able to re-let the majority of the rooms canceled. These efforts were held sufficient to discharge the hotel's duty to mitigate its losses. B-194389-O.M., June 25, 1979. See also 41 Comp. Gen. 780 and 51 Comp. Gen. 453, previously cited.

The government's liability for canceled hotel reservations is ordinarily limited to the actual cost of the rooms. B-121198, August 1, 1955. Certain other elements of damage may be allowed if it can be established that they represent a liability of the hotel regardless of occupancy. Thus, a Value Added Tax and a service charge were allowed on a claim by a hotel in London. The tax was based on revenues received by the hotel and payment of the claim counted as revenue. The service charge represented staff wages for which the hotel was also liable regardless of occupancy. B-194389-O.M., June 25, 1979. However, loss of anticipated profits and miscellaneous revenue is too remote and speculative and is not allowable. B-121198, August 1, 1955. Interest was disallowed prior to the Contract Disputes Act (B-194389-O.M.), but would now be payable on a claim processed under the CDA.

Claims may also arise in contexts not governed by the CDA. For example, in B-256156, June 15, 1994, an employee used her credit card to guarantee reservations made in her official capacity. The card was charged when the reservations were canceled. Since the government would have been liable to the hotel under the circumstances, the claimant could be reimbursed.

#### g. Commercial Rental Vehicles

Government employees are often authorized to use commercial rental vehicles in the performance of their jobs, particularly on temporary duty assignments. A set of rules and procedures for handling damage claims had developed over the years. In the late 1980s, the Defense Department's Military Traffic Management Command (MTMC) negotiated an agreement with the majority of rental companies on behalf of the entire government. Situations not covered by the MTMC agreement continue to be governed by the "old" rules. Thus, two systems for handling rental vehicle damage claims exist side-by-side.

##### (1) Collision damage waiver

Under the traditional form of rental agreement, the rental company assumes responsibility for damage to the vehicle, whether or not caused by the renter's negligence, except for the deductible portion of its commercial insurance policy. The standard rental contract gives the renter the option to purchase what is commonly called "collision damage waiver"

(CDW) coverage, or something similar, for an additional daily charge.<sup>43</sup> If the optional coverage is purchased, the renter will generally have no liability to the rental company for damage to the vehicle. If the optional coverage is not purchased, the renter is liable to the rental company for damage to the vehicle up to an amount specified in the contract, regardless of whether or not the damage was caused by the renter's negligence. See Federal Travel Regulations (FTR), 41 C.F.R. § 301-3.2(c). Not too many years ago, the specified amount tended to represent the rental company's own deductible and was relatively small, \$100 or \$250 being fairly common. The amount jumped substantially in the 1970s and 1980s, and amounts in the thousands are now encountered, and even "actual cash value" in some cases.

At one time, both civilian employees and military personnel who purchased the optional collision damage waiver coverage could be reimbursed. *E.g.*, 35 Comp. Gen. 553 (1956); B-172721, July 19, 1971. The rationale was that the employee's election to purchase the CDW was not an unreasonable exercise of discretion. However, in view of the government's general policy of self-insurance, GAO also recognized that an employee's failure to purchase this optional coverage should not be viewed as unreasonable. Thus, it was held in 47 Comp. Gen. 145 (1967) that an employee could be reimbursed who had declined the collision damage waiver and who was required to pay the rental company \$100 (the rental company's exclusion as specified in the rental contract) for damage to the vehicle incident to the performance of official business but not attributable to the employee's negligence.

Subsequently, because it was viewed as more economical to the government to assume the risk of loss covered by a collision damage waiver than to reimburse federal personnel for the continually growing cost of these waivers, the travel regulations applicable to civilian employees and military personnel were revised to prohibit reimbursement of the cost of optional CDW coverage. GAO endorsed the change. B-158712, November 16, 1970.

Now, if an employee chooses to purchase this optional coverage, it is viewed as a personal expense and not reimbursable by the government. FTR, 41 C.F.R. § 301-3.2(c)(1); B-215614, April 18, 1985; B-190698, April 6, 1978; B-184623, October 21, 1975; B-172721, March 13, 1972. This is true even if the employee has been erroneously advised by his agency that he

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<sup>43</sup>The rental companies are quick to point out that CDW is not insurance. From the customer's perspective, however, it functions in much the same way.

should purchase this coverage. B-181180/B-181187, June 27, 1974. Absent special circumstances, it makes no difference that the rental occurs in a foreign country. B-185454, July 1, 1976. The prohibition applies to direct payment to the rental company as well as reimbursement of the employee, notwithstanding an erroneous authorization by a contracting officer. B-208630, March 22, 1983.

However, collision damage waiver is not always optional. If an employee has no choice but to purchase the CDW as a condition of renting the vehicle (if, for example, it is required by law or procedure in certain foreign countries), then reimbursement may be permitted. B-242309, March 21, 1991; B-189770, September 12, 1978; B-189082-O.M., December 16, 1977; B-179336-O.M., January 23, 1974. The determination of whether CDW should be reimbursable is within the scope of the applicable travel regulations, and in 55 Comp. Gen. 1343 (1976), GAO advised the General Services Administration that there was no legal objection to amending the Federal Travel Regulations to permit reimbursement of CDW in foreign countries if determined to be in the best interest of the government. This is now reflected in the regulations at 41 C.F.R. § 301-3.2(c)(2). See also 55 Comp. Gen. 1397 (1976).

#### (2) Non-MTMC damage claims

An employee who does not purchase the optional collision damage waiver will, as noted above, be liable to the rental company for damage to the vehicle up to the deductible amount, whether or not the damage was caused by the employee's fault or negligence. Under both GAO's decisions and the FTR, where an employee has declined to purchase the CDW and is subsequently required to pay the rental company for damage to the vehicle, the employing agency may allow a claim by the employee for reimbursement, whether or not the damage was caused by the employee's negligence, as long as it occurred within the employee's scope of employment. E.g., B-162186, January 7, 1970; B-176235 August 2, 1972; B-158712-O.M., December 13, 1974. Cf. 47 Comp. Gen. 145 (1967). The FTR states that—

“[A]gencies are authorized to pay for damage to the rented vehicle up to the deductible amount contained in the rental contract if the damage occurs while the vehicle is being used for official business.”

41 C.F.R. § 301-3.2(c)(1). The concept of “official business” or “scope of employment”—in the context of rental vehicle damage claims—does not

limit payment to situations in which the employee is actually performing his or her job at the time of the accident. Rather, in recognition of the realities of temporary duty, the FTR provisions relating to use of government-furnished vehicles should be applied by analogy to define the parameters of “official business.” 65 Comp. Gen. 253 (1986) (trip to drug store to obtain required medication). Under these regulations—

“[The vehicle’s] use shall be limited to official purposes . . . which include transportation between places where the employee’s presence is required incident to official business; between such places and places of temporary lodging when public transportation is unavailable or its use is impractical; and between either of the above places and suitable eating places, drug stores, barber shops, places of worship, cleaning establishments, and similar places necessary for the sustenance, comfort, or health of the employee to foster the continued efficient performance of Government business.”

FTR, 41 C.F.R. § 301-2.6(a). Other cases allowing claims under these principles include 68 Comp. Gen. 318 (1989); 65 Comp. Gen. 799 (1986); and B-220779, April 30, 1986. In B-209951, June 7, 1983, an accident occurred while the employee was outside the primary duty area on his way to a restaurant with friends, one of whom he had allowed to drive. The agency determined that he did not meet the “official business” test, and his claim for reimbursement was denied.

In some instances, the rental company may be willing to file its claim directly with the government. However, the rental contract is between the company and the employee, and the government is not a party. Therefore, in many cases, the company will demand payment from the employee, with the employee then filing a claim for reimbursement.

If the damage was caused by the negligence of a third party, the government, upon paying a claim, will become subrogated to the employee’s rights against the third party. There is no requirement that the employee first seek to recover from the third party before filing the reimbursement claim. B-176235, August 2, 1972.

The “third party” may be another government employee. In a 1989 case, a military officer who had rented a car under travel orders left the keys with two colleagues so they could go to dinner. Another member of the group took the car, however, consumed a quantity of beer, and drove the car through the hotel wall. Certainly the officer who had rented the car did nothing wrong and the rental company was entitled to be paid. The

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solution: pay the rental company's claim and get the money back from the person who assaulted the hotel. 68 Comp. Gen. 309 (1989).

In B-202186, March 9, 1982, GAO considered a claim for damage to a commercial rental vehicle under a Federal Supply Schedule contract. Under the contract, the contractor assumed full responsibility for loss or damage to the vehicle, except that the contractor could exclude "the deductible amount as set forth in its normal commercial insurance policy." A rental company in a state where collision insurance was not required argued that its "normal commercial insurance policy" did not include collision coverage and therefore the government should be liable for the full amount of the damage. However, the apparent intent of the relevant contract provision was that the rental company bear the full risk of loss or damage to its vehicles, except to the limited extent of the deductible that is commonly included in insurance policies. The rental company's decision not to procure commercial collision insurance could not operate to shift that risk to the government. The claim was therefore denied.

### (3) The MTMC agreement

In the late 1980s, the Military Traffic Management Command, Department of Defense, negotiated a standard rental car agreement with many of the rental companies. The MTMC agreement greatly simplifies the damage claim process. The agreement is not mandatory for government agencies or employees, although the General Services Administration strongly encourages its use. The terms of the agreement are summarized in the "Rental Car Information" section of GSA's Federal Travel Directory, published monthly.

The rental company agrees to carry liability insurance, or to self-insure, up to specified limits, for death, personal injury, and property damage. This insurance is designated as "primary in all respects." MTMC Agreement, para. 9.a. Thus, claims by a third party should be referred to the rental company rather than processed under the Federal Tort Claims Act.<sup>44</sup>

For government employees renting a car on government business, CDW is included in the basic daily rate. Contract forms may still include the option boxes because the companies are unlikely to redesign their forms to accommodate just one segment of their business. The MTMC agreement (para. 1) anticipates this by providing that its terms "take precedence over

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<sup>44</sup>In non-MTMC situations, it is necessary to examine the rental agreement to determine the types and extent of insurance coverage provided.

any contrary policies and provisions of any Company rental document that the Government employee signs when renting a vehicle.”

Damage to the vehicle is covered in para. 9.b of the agreement. Basically, the company “assumes and shall bear the entire risk of loss” or damage “from any and every cause whatsoever,” unless the loss or damage is caused by one of several listed factors. One of the factors listed is operation of the vehicle by a person other than an authorized driver. Another is “willful or wanton misconduct” on the part of a driver. Under para. 9.c, the company agrees to submit any damage claims to the employee’s agency and not to the employee, and not to include loss of use in any such claim.

Exactly what “willful or wanton misconduct” means is not entirely clear. What is clear, at a minimum, is that it requires more than ordinary negligence. The best approach in any given case, whether or not required as a matter of law, would appear to be to examine the law of the state where the accident occurred. In one case, for example, GAO looked to Florida law and found that it defined three separate degrees of negligence—ordinary, gross, and willful and wanton—with “willful and wanton” being very close to intentional conduct. Under this standard, GAO denied a claim where an employee had driven a car down a boat ramp into a lake. While, under the particular facts and circumstances, it would have been difficult to deny ordinary negligence, the conduct did not amount to “willful and wanton misconduct.” B-230064, April 14, 1988.

Maximum use of the MTMC program should substantially reduce the number of rental vehicle damage claims agencies must consider. Participating companies and locations are listed in the monthly Federal Travel Directory. For nonparticipating companies and/or locations, damage claims continue to be handled under the pre-MTMC rules described above.

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### 3. Miscellaneous Statutory Claims

#### a. International Claims Settlement Act of 1949

The International Claims Settlement Act of 1949 (22 U.S.C. Chapter 21) establishes a mechanism for the adjudication of claims by the Government of the United States and by nationals of the United States against a foreign government arising out of the nationalization or other taking of property, in situations where the United States and the foreign

government have entered into an agreement whereby the United States has agreed to accept payment of a lump sum in settlement of all such claims. The statute was intended to implement the 1948 settlement agreement with Yugoslavia and any similar agreements with other governments in the future. S. Rep. No. 800, 81st Cong., 1st Sess., reprinted in 1950 U.S. Code Cong. Serv. 1949, 1950–51. The Act has been amended from time to time to add agreements with several other governments such as Czechoslovakia, the German Democratic Republic, and Vietnam. While, strictly speaking, these are not claims against the United States, they are claims by U.S. nationals adjudicated by U.S. government agencies and paid from funds under the control of the U.S. Treasury.

The Foreign Claims Settlement Commission, an agency within the Department of Justice, adjudicates claims, renders final decisions, and makes awards under the Act. 22 U.S.C. §§ 1622a, 1623(a). The Commission's implementing regulations are found at 45 C.F.R. Part 531. Payments received from foreign governments under claims settlement agreements are deposited in special funds in the Treasury and are permanently appropriated for making payments of awards under the Act. 22 U.S.C. § 1627. Awards in favor of the Government of the United States are credited to miscellaneous receipts. *Id.* § 1623(g). Other awards are certified by the Foreign Claims Settlement Commission to the Treasury Department for payment from the applicable special fund, in accordance with priorities specified in the Act. *Id.* §§ 1624, 1627. Treasury has implementing regulations on the Act's payment provisions, found at 31 C.F.R. Part 250. A 1987 amendment to the statute "authorizes and directs" Treasury to invest the amounts held in the special funds "in public debt securities with maturities suitable for the needs of the separate accounts and bearing interest at rates determined by the Secretary, taking into consideration the average market yield on outstanding marketable obligations of the United States of comparable maturities." 22 U.S.C. § 1627(g).

In adjudicating claims under the Act, the Commission relies first on the relevant provisions of the claims agreement itself, and second, on applicable principles of "international law, justice, and equity." *Id.* § 1623(a). The Commission's decisions on claims are final and conclusive, and not subject to review by any other agency or court. *Id.* §§ 1622g, 1623(h). Thus, apart from constitutional issues, there is no judicial review of Commission decisions. *E.g.*, *De Vegvar v. Gilliland*, 228 F.2d 640 (D.C. Cir. 1955), cert. denied, 350 U.S. 994; *Gutwein v. United States*, 17 Cl. Ct. 720 (1989). There is also no private right of action under the Act, at least in

the context of a suit by a claimant's executor against a law firm that had allegedly taken a fee in excess of the 10 percent permitted by 22 U.S.C. § 1623(f). Leinwander v. Newman, Aronson & Neumann, 625 F. Supp. 1269 (S.D.N.Y. 1985).

By virtue of the "final and conclusive" provisions, GAO cannot review Commission decisions any more than the courts can. GAO does, however, have a role under the Act and is responsible for making determinations of entitlement in certain situations. GAO's role is spelled out in 22 U.S.C. §§ 1626(c)(1) and (2), under which payments must be made only to the person(s) on behalf of whom the award is made, except that—

"(1) if any person to whom any payment is to be made pursuant to this subchapter is deceased or is under a legal disability, payment shall be made to his legal representative, except that if any payment to be made is not over \$1,000 and there is no qualified executor or administrator, payment may be made to the person or persons found by the Comptroller General to be entitled thereto, without the necessity of compliance with the requirements of law with respect to the administration of estates;

"(2) in the case of a partnership or corporation, the existence of which has been terminated and on behalf of which an award is made, payment shall be made, except as provided in paragraphs (3) and (4) of this subsection, to the person or persons found by the Comptroller General of the United States to be entitled thereto[.]"

The exceptions referred to in subsections (3) and (4) relate to corporations for which a receiver or trustee has been appointed. Payment in accordance with section 1626 "shall be an absolute bar to recovery by any other person against the United States, its officers, agents, or employees with respect to such payment. Id. § 1626(d).

Awards by the Foreign Claims Settlement Commission are frequently divided into installments which are then paid out over a number of years. A 1968 amendment to the statute raised the dollar amount of 22 U.S.C. § 1626(c)(1) from \$500 to \$1,000 and substituted the words "any payment" for "total award." Consequently, GAO is authorized to make determinations under subsection (c)(1) where the amount of an individual payment does not exceed \$1,000, regardless of the amount of the total award. B-167253, July 15, 1969. If an award is to be paid in installments over a number of years, GAO's determination on the initial claim may be used as precedent for the duration of the payout, as long as the claim remains the same, the amount of payment does not exceed \$1,000, and the probative evidence does not change. Id.

The distribution of estates is ordinarily a matter of state rather than federal law. Therefore, in making determinations under 22 U.S.C. § 1626(c)(1), GAO will normally apply the laws of descent and distribution of the state of the deceased payee's domicile at the time of death. For example, in B-186611, November 9, 1976, GAO determined that a claim awarded by the Foreign Claims Settlement Commission was to be divided equally among the awardee's widower and two surviving children. The awardee, a domiciliary of California, died intestate and no administrator was appointed. In determining the proper recipients for this award, GAO applied the California law governing intestate succession, under which the separate property of a decedent survived by a spouse and more than one child passes one-third to the spouse, and two-thirds equally among the children.

Also, any priority state law may create in favor of the payment of funeral expenses should be given effect. In B-172238-O.M., April 9, 1971, an award under the International Claims Settlement Act was claimed by both the awardee's widow and his daughter, the named executrix. The awardee was a New York resident who died testate, although the value of the estate did not justify probate costs. In support of her claim, the widow filed an itemized receipt, signed by the funeral home manager, for funeral expenses she had paid. Citing the New York law requiring that reasonable funeral expenses be preferred to all debts and claims against a decedent's estate, GAO determined that the widow was the proper recipient of the full award, which amounted to less than half of the total funeral expenses. See also B-169969-O.M., September 30, 1970.

A will is often a useful source of evidence of the testator's intent. E.g., B-167740-O.M., September 17, 1969. However, as B-172238-O.M. illustrates, an unprobated will cannot be given precedence over the provisions of the applicable state law.

The second situation in which GAO makes entitlement determinations under 22 U.S.C. § 1626 is where a recipient partnership or corporation has been terminated. In B-143052, February 1, 1965, a corporate recipient had been dissolved under New York law for nonpayment of taxes. The Comptroller General considered a number of claims for the award, and determined that the proper recipients were the named president and treasurer of the corporation, who in their official capacities were authorized to endorse all checks payable to the corporation. Accordingly, GAO advised the Treasury Department to make the award check payable to both parties jointly, and suggested further that Treasury consider notifying

federal and state tax offices. B-143052, September 15, 1961, and B-143052, June 14, 1960, are earlier considerations of this same matter and include discussion of the applicable standards and necessary documentation.

A simpler determination is B-160559, June 12, 1967, in which an award was found payable to two individuals and a corporation to whom the assets of the dissolved corporation had been transferred. See also B-188312-O.M., April 18, 1977 (payment to terminated partnership determined payable in equal shares to former partners as individuals). More recently, B-202723, July 22, 1981, involved an award to a corporation which had terminated by operation of law in 1959. Since none of the corporation's directors was still living, the award was held payable to the heirs of the deceased sole shareholder of the corporation. The approach of B-202723 was followed in B-223618, October 10, 1986, advising that Treasury could either seek to have a former receiver reappointed, or make payment to the shareholders of the defunct corporation in proportion to the interest they held at the time of dissolution.

Claims involving International Claims Settlement Act awards often present evidentiary problems. This is because the events giving rise to the awards may have occurred many years ago, under unusual circumstances, and the claimants are often heirs or descendants of the original property owners with little "hard evidence" to support their claims. GAO's approach, as with other types of claims, is to require the "best evidence obtainable." Exactly what this will be depends on the circumstances of the particular case. The mere uncorroborated statement of a claimant will not be sufficient to support a claim. When "primary" evidence is unobtainable, GAO has accepted "secondary" evidence in the form of pertinent data from which the necessary information can reasonably be constructed. This is really nothing more than an application of the eminently sensible axiom of life that "you do the best you can with what you've got." For the application of these principles to a group of related claims under the China Claims Program, see B-201150, July 11, 1983; B-201150, January 18, 1983; B-201150, December 1, 1981; and B-201150, May 13, 1981.

b. Estates of United States  
Citizens Who Die Overseas

When an American citizen (except a seaman who is a member of a crew of an American vessel) dies overseas, or at the time of death is domiciled overseas, and leaves no legal representative in that country, the State Department and, under certain circumstances, the General Accounting Office, have statutory responsibilities concerning the decedent's estate. Detailed provisions governing the disposition of such estates are contained in 22 U.S.C. § 4195. The statutory procedures apply when

authorized by treaty provisions or permitted by the laws of the country in which the death occurs or the decedent is domiciled, or when permitted by established usage.

The appropriate United States consular officer, or other diplomatic officer in his or her absence, becomes the “provisional conservator” of the estate, with duties spelled out in the statute. The provisional conservator must: (1) take possession of the personal estate; (2) after taking possession of the personal property, inventory and appraise the effects; (3) collect the debts due to the decedent in his or her jurisdiction and pay from the estate the obligations owed there by the decedent;<sup>45</sup> (4) sell at public auction any perishable items in the estate and, after reasonably attempting to notify the next of kin, such other portions of the estate as may be necessary to pay the decedent’s debts and funeral expenses. At the expiration of one year from the date of death (or longer if necessary for final settlement of the estate), the provisional conservator is to sell the residue of the estate “with the exception of investments of bonds, shares of stock, notes of indebtedness, jewelry or heirlooms, or other articles having a sentimental value,” and then transmit the proceeds of the sale and any unsold effects to the General Accounting Office. If the decedent’s legal representative appears at any time prior to transmission of the estate to GAO, the consular or diplomatic officer is authorized to deliver the estate to the legal representative.

Once the State Department transmits an estate to GAO under 22 U.S.C. § 4195, the Comptroller General or his designee becomes the conservator of the estate, with the duty to hold the estate in trust for the legal claimant. For a period of six years from the date GAO receives the estate, GAO may consider and settle claims against the estate presented by a “legal claimant.” During the six-year “holding period,” GAO may take necessary actions to conserve the estate, including selling portions of it. The proceeds of any such sale are deposited in the Treasury in a fund in trust for the legal claimant.

A question open to some debate is whether conservation of the estate includes the duty to make interest-bearing investments in order to guard against diminution of its value through inflation. The requirement in the statute that any money received by GAO be deposited in the Treasury obviously restricts options, but GAO regards investment in Treasury or

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<sup>45</sup>The authority to collect debts due to the decedent does not include the unpaid compensation of a deceased government employee. 7 Comp. Gen. 396 (1927).

other government securities as consistent with the statute, whether or not absolutely required. B-220775-O.M., September 25, 1986.

If no claim has been received from a legal claimant by the end of the six-year period, and the state or territory of the decedent's last domicile in the United States is known, GAO is to transmit the proceeds of any trust accounts established in the Treasury plus any remaining unsold effects to the proper officer of that state or territory. If the decedent's last domicile in the United States is not known, the trust funds must be deposited in the general fund of the Treasury as miscellaneous receipts, and GAO may dispose of any remaining effects as it deems appropriate, including the destruction of any items considered "no longer possessed of any value." Any expenses GAO incurs in the administration and disposition of the estate are to be deducted from the proceeds of the estate.

In B-174465-O.M., January 10, 1972, the Comptroller General served as conservator under 22 U.S.C. § 4195 for an American citizen who died intestate in Hungary. Based on a birth certificate and other evidence (and in the absence of any other claimants), it was determined that a German-born woman was the acknowledged daughter and only surviving heir of the decedent. Accordingly, she was the "legal claimant" and therefore the proper recipient of the residue of the estate then being held by GAO, consisting of a watch, a wedding ring, personal papers and photographs, and approximately \$1,000 in cash. See also B-184160-O.M., October 3, 1975 (where GAO determined that under New York law a public administrator had the same standing as a private, court-appointed administrator and was, therefore, a proper claimant under 22 U.S.C. § 4195) and B-159357-O.M., July 8, 1966 (claim of a cousin of the deceased would precede that of a public administrator).

In A-33582, October 14, 1930, a Post Office Inspector requested the residue of the estate of an American citizen who died in Mexico. The (then) Post Office Department had received information from various government agencies that the personal papers of the decedent contained evidence that he had been living under an assumed name and was in fact a man sought for mail fraud. Apparently, the trial of a second man charged in the same case had been continued while investigators sought his accomplice. As conservator, the Comptroller General refused the request because the inspector was neither a proper heir nor a legal representative of the decedent. However, qualified representatives of the Post Office Department were invited to inspect the effects being held, and GAO offered to provide copies of any documents relevant to the pending court action.

In B-169616-O.M., May 8, 1970, the Comptroller General received the residue of the estate of an American citizen who died in Malta. Among the items of personal property to be held in trust were two checkbooks representing deposits with a Maltese bank. When GAO requested transmission of the funds on deposit, the bank declined, citing a bank policy requiring a letter of indemnity prior to the release of funds to any party other than a depositor's legal heirs. It was determined, however, to be inappropriate for GAO to agree to indemnify the bank for any payments which it might make upon presentment of a claim by a lawful claimant of the decedent. In explaining this position, the memorandum stated:

“Remittance of the funds to this Office, as the statutory conservator of the deceased's estate, is equivalent to payment of the estate and would relieve the bank of any further obligation to [the decedent's] heirs or lawful claimants. As trustee of the funds, it is this Office's obligation, and not the bank's, to determine to whom the funds are properly payable and thus the bank should refer to this Office any claim to moneys which it receives.”

See also B-171430-O.M., March 29, 1971 (Mexican bank refused to transmit proceeds of bank account to GAO because it was prohibited by Mexican law; procedures under 22 U.S.C. § 4195 do not apply where not permitted by laws of country where death occurs).

On June 3, 1962, 120 Americans (mainly from Atlanta, Georgia) died in a plane crash near Paris, France. Following the tragedy, several hundred dollars in United States and foreign currencies was delivered to the American Embassy by French authorities. The money belonged to the deceased Americans, but under the circumstances individual ownership could not be established. In 43 Comp. Gen. 52 (1963), the State Department asked whether a proposal to donate the “unidentified effects” to two Atlanta charities would be authorized. The plan was apparently the result of correspondence between the American Consul General in Paris and the mayor of Atlanta, who had been in contact with the decedents' next of kin. Two charities were named because the relatives could not agree upon a single beneficiary. The Comptroller General held that the plan was not authorized by 22 U.S.C. § 4195, stating:

“Notwithstanding the practical and ethical considerations giving rise to the Embassy's proposed distribution, we cannot view the contemplated action as a proper extension of the duties and responsibilities imposed by section [4195], both upon the Foreign Service and our Office. In the absence of unanimous concurrence by the various legal claimants, effectuation of the proposed distribution would not be authorized.”

43 Comp. Gen. at 54. The proper course of action was to follow the statutory procedures, with the money to be turned over to the state of Georgia to the extent unclaimed after the six-year waiting period.

Problems under 22 U.S.C. § 4195 also arose after a 1977 plane crash at Tenerife, Canary Islands, in which a number of American citizens were killed. Personal effects were recovered initially by Spanish authorities and turned over to Pan American Airlines to aid in establishing the identity of victims. The airline flew the bodies and personal effects to an Air Force base in the United States where the State Department took possession of the effects and transported them to Washington. Some of the items in the State Department's possession could be identified with certainty, but many could not. The circumstances had precluded application of the "provisional conservation" portions of 22 U.S.C. § 4195 and State Department regulations (notice and inventory) and strict compliance with the statute had become impossible.

The airline had offered to appraise the effects, attempt to locate heirs, and consider claims, but GAO had informally advised that this procedure was not consistent with 22 U.S.C. § 4195. Subsequently, the State Department proposed to send a letter to each victim's legal representative, asking the legal representative to submit a description of items believed to be in the victim's possession at the time of the disaster. GAO approved this proposal as a reasonable approach under the circumstances, but further advised that, notwithstanding that more than a year and a half had passed since the accident, the State Department should nevertheless comply with those portions of the statute that were still reasonably capable of being satisfied with respect to the items which could be positively identified. B-193039, December 12, 1978 (non-decision letter).

### c. Government Losses in Shipment Act

The Government Losses in Shipment Act (GLISA), 40 U.S.C. §§ 721–729, was enacted in 1937. It applies to shipments by government agencies and was designed to save the government money by eliminating the need for the government to purchase private insurance to obtain protection against losses of valuables in transit. S. Rep. No. 738, 75th Cong., 1st Sess. 5–6 (1937). Although the self-insurance rule discussed in Chapter 4 was in full bloom in 1937, agencies often purchased commercial insurance when shipping valuables because the amounts involved tended to be too large to be absorbed immediately by existing appropriations, and the appropriation process was considered inadequate to meet the need for prompt duplication or reimbursement. Id. The Act is administered by the Treasury

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Department, which has issued implementing regulations at 31 C.F.R. Parts 361 and 362.

The Act applies to “valuables” as defined in 40 U.S.C. § 729 and 31 C.F.R. § 362.1. Claims procedures are set forth in 40 U.S.C. § 723. In the event of a loss (loss, damage, or destruction) of valuables shipped in accordance with the regulations, the agency must file a claim for replacement in writing with the Secretary of the Treasury. If the Secretary allows the claim, replacement is made out of a revolving fund established by 40 U.S.C. § 722. The money in the fund comes from congressional appropriations and recoveries and repayments under the Act. The Secretary’s determination that a loss occurred or that a given shipment was in accordance with regulations is final and conclusive. If the Secretary determines that replacement can be effected in whole or in part without loss to the United States by a credit to the account of the department or agency which made the claim, the revolving fund is not used to the extent the credit is deemed sufficient.

There is one situation in which GLISA applies to a loss other than a loss in shipment. In the event of loss, damage, or destruction to certain categories of Treasury paper (for example, Documentary Internal Revenue Stamps) while in the custody or possession of the Postal Service acting as sales agent for or on behalf of the Treasury Department, the loss is to be replaced from the GLISA revolving fund. 40 U.S.C. § 724; B-171400, August 4, 1971.

Although GAO will not review the Treasury Department’s decisions on GLISA claims, it has considered a number of issues relating to GLISA. They tend to fall generally into three categories. The first group deals with threshold issues of applicability. Thus, a “shipment” for purposes of GLISA includes the local transportation of valuables in the custody of government employees (messengers). 19 Comp. Gen. 369 (1939), modifying 18 Comp. Gen. 782 (1939). It also includes contract armored car service. 19 Comp. Gen. 490 (1939). However, it does not include the transportation of valuables in the privately-owned automobile of an employee in travel status. 17 Comp. Gen. 419 (1937). Also, the Act applies only with respect to those items declared by the Secretary of the Treasury to be “valuables.” 32 Comp. Gen. 153 (1952); 21 Comp. Gen. 928 (1942).

The second group of cases involves requests for the relief of accountable officers and the relationship between GLISA and accountable officer liability. These are discussed in Chapter 9.

The third group of decisions concerns 40 U.S.C. § 726, which prohibits the purchase by a government agency of insurance against loss, damage or destruction in the shipment of valuables except as specifically authorized by the Secretary of the Treasury. The Secretary may authorize such insurance upon finding that the risk cannot be adequately guarded against by the facilities of the United States or that adequate replacement cannot be provided under GLISA and other relevant statutory authorities.

Where transportation charges are regularly fixed at a rate which includes the cost to the carrier of indemnity insurance, and the carrier will not accept a government shipment at a rate exclusive of such cost, the total sum paid to the carrier for the shipment may be considered as a transportation cost and payment does not violate 40 U.S.C. § 726. 17 Comp. Gen. 139 (1937). Similarly, payment of a transportation rate based on the real worth of “valuables,” higher than the minimum or “release” value provided by tariff rates, does not violate GLISA. Payment of such higher rate places a greater measure of responsibility on the carrier and is thus calculated to minimize the risk of loss. 17 Comp. Gen. 741 (1938).

These two decisions were followed in 34 Comp. Gen. 175 (1954), in which the Comptroller General concluded that the payment of charges for armored car service for the shipment of coins by the Treasury Department, under contracts requiring the contractor to carry designated insurance and where the charges included the cost to the carrier of the indemnity insurance, would not violate GLISA where the carrier would not accept the shipments at a rate exclusive of the additional costs. The decision pointed out that GLISA would provide an inadequate alternative in that the loss of one individual armored car shipment could conceivably exhaust the revolving fund. If the value of a shipment exceeds the carrier’s commercial insurance coverage, the GLISA revolving fund is available for the amount of a loss in excess of that coverage. B-214326, October 19, 1984.

Similarly, an agency shipping “valuables” by Federal Express should not pay an “excess declared value” charge to obtain indemnification beyond Federal Express’s basic liability. GLISA would apply to any loss beyond that amount. B-244473.2, May 13, 1993. Paying for insurance coverage up to a stated limit as part of the basic rate is authorized under decisions such as 34 Comp. Gen. 175. Id.

A 1943 decision, 22 Comp. Gen. 832, held that GLISA did not prohibit the purchase of postal insurance. Postal insurance had also been permissible

prior to GLISA. 3 Comp. Gen. 391 (1923). Both of these decisions were modified in 58 Comp. Gen. 14 (1978), in which the issue was the application of 40 U.S.C. § 726 to insured and registered mail. The decision concluded that GLISA prohibits the use of insured mail by the government since it offers no special or additional service apart from the indemnity feature. Registered mail, on the other hand, affords additional protection as well as insurance. Thus, since the insurance is only incidental to the protective features, GLISA does not prohibit the use of registered mail where administratively determined to be necessary. Registered mail should not be used, however, for the sole or primary purpose of obtaining indemnity.

The General Services Administration suggested that the Postal Service should provide a separate fee schedule for federal agencies which would eliminate the charge for indemnity insurance from registered mail. The Postal Service expressed the opinion that any new fee structure would have to be applicable to all registered mail users. 58 Comp. Gen. at 16. While GAO agrees with the GSA suggestion as a matter of policy, whether the Postal Service has the authority to establish a special rate for federal agencies is not an issue to be decided by the Comptroller General but must be determined by the Postal Service and the Postal Rate Commission. 58 Comp. Gen. 640 (1979).

#### d. Published Advertisements

Originally enacted in 1870, 44 U.S.C. § 3702 provides:

“Advertisements, notices, or proposals for an executive department of the Government, or for a bureau or office connected with it, may not be published in a newspaper except under written authority from the head of the department; and a bill for advertising or publication may not be paid unless there is presented with the bill a copy of the written authority.”

The statute applies only to discretionary advertising and not to advertising required by law (statute, statutory regulation, court order). 27 Comp. Gen. 48 (1947); 5 Lawrence, First Comp. Dec. 382, 389–90 (1884).

The statute applies to all departments, agencies, boards, commissions, or establishments of the executive branch, whether or not part of a cabinet-level department. 60 Comp. Gen. 379 (1981) (Environmental Protection Agency); 27 Comp. Dec. 134 (1920) (Federal Power Commission); 25 Comp. Dec. 348 (1918); 5 Comp. Dec. 700 (1899) (Interstate Commerce Commission); B-126299, January 5, 1956. It does not, however, apply to a legislative branch agency. B-194074, April 11, 1979 (National Commission on Air Quality).

The statute applies to the publication of advertisements in a “newspaper.” This includes newspapers devoted exclusively to specialized fields of activity if they include “news and information of a general and current nature such as may be found in the ordinary newspaper.” 26 Comp. Gen. 76 (1946). See also 25 Comp. Gen. 734 (1946), holding that the entertainment journal “Variety” is a “newspaper.” A telephone directory, however, is not a “newspaper.” 22 Comp. Gen. 606 (1943). Nor is a business directory published by a police benevolent association (B-182938-O.M., February 26, 1975); nor a high school yearbook or high school “newspaper” distributed to the students and staff and containing mostly items of interest to the students and teachers (B-187099-O.M., February 2, 1977).

Given the mandatory language of the statute,<sup>46</sup> a voucher cannot be paid nor can a claim by a newspaper be allowed without the prior written authority required by section 3702. *E.g.*, 35 Comp. Gen. 235 (1955); 17 Comp. Gen. 693 (1938); 3 Comp. Gen. 737 (1924). The statute does not permit any exception for hardship. 4 Comp. Gen. 841 (1925). If an agency cannot pay the newspaper directly, it follows that an employee who pays the newspaper from personal funds may not be reimbursed. 60 Comp. Gen. 379 (1981).

However, an agency head may delegate the approval authority required by 44 U.S.C. § 3702. 5 U.S.C. § 302(b)(2); 28 Comp. Gen. 305 (1948). A line of early cases recognized that an agency head may, by order or regulation, authorize subordinate officials, such as officials at geographically dispersed field stations, to place or approve advertisements. The order may be general or specific and may or may not designate the newspapers by name, but it should be limited at least as to territory. The order should also direct the officials to whom it is addressed to place the advertisements in writing. 27 Comp. Dec. 134 (1920); 19 Comp. Dec. 628 (1913); 13 Comp. Dec. 446 (1907). These cases were based on *United States v. Odeneal*, 10 F. 616 (C.C.D. Ore. 1882), holding that a general order issued to superintendents of Indian affairs constituted compliance.

More recent decisions have also recognized that a written delegation from the agency head is “written authority from the head” of the agency and have applied a “substantial compliance” approach. *E.g.*, B-206625, July 26, 1982; B-242413, July 12, 1991. This in turn permits resort to the concept of ratification in appropriate cases. As the earlier cases recognized, you cannot ratify something which is prohibited by statute. However, under

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<sup>46</sup>“If any statute is mandatory this is . . .” 5 Comp. Dec. 166, 168 (1898).

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the “substantial compliance” established by a written delegation, procedural deviations at the operating level may be cured by ratification. B-226248, May 13, 1987. See also 65 Comp. Gen. 806 (1986).

GAO has expressed the opinion that the application of current procurement procedures should be adequate to safeguard the government’s interests, and has recommended that 44 U.S.C. § 3702 be repealed. B-203115, May 8, 1981; B-114829, October 2, 1978; B-181337(2), November 25, 1974. As long as it remains on the books, however, it cannot be ignored. The equitable position of the newspapers in claims under section 3702 is clear in that they provided a service in good faith upon the request (albeit unauthorized) of a government official and the government received the benefit of that service. Thus, while the claims cannot be allowed administratively, at least where there has been total noncompliance with the statute, the Comptroller General has submitted a number of them to Congress with a recommendation for the enactment of relief legislation under the Meritorious Claims Act. E.g., B-199453, October 2, 1980; B-196440, April 3, 1980; B-181337, November 25, 1974; B-160052, January 22, 1969. Taking advantage of the delegation/ratification approach outlined above can eliminate many claims arising under 44 U.S.C. § 3702.

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#### 4. Miscellaneous Nonstatutory Claims

##### a. Estoppel

Estoppel, as simply as we can put it, is a concept under which, if you talk a certain way or act a certain way, a court may hold you to that position, even if it is wrong, if letting you deny your previous position would damage someone else. There are several types of estoppel, although we will note only two. “Promissory estoppel” is a type of estoppel which arises when one party makes a promise with the expectation that it will induce reliance by the party to whom it was made. If it in fact induces reliance to the detriment of the second party, courts will enforce the promise.<sup>47</sup> Black’s Law Dictionary 1214 (6th ed. 1990). “Equitable estoppel” is a related concept “by which a person may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he otherwise would have had.” Id. at 538. The Ninth Circuit has explained the difference as follows:

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<sup>47</sup>Where the United States is concerned, it has been held that the courts lack Tucker Act jurisdiction over promissory estoppel claims because a promissory estoppel is neither an express nor an implied-in-fact contract. Jablon v. United States, 657 F.2d 1064, 1070 (9th Cir. 1981); Biagioli v. United States, 2 Cl. Ct. 304 (1983).

“The difference between the doctrines can best be explained by observing that promissory estoppel is used to create a cause of action, whereas equitable estoppel is used to bar a party from raising a defense or objection it otherwise would have, or from instituting an action which it is entitled to institute. Promissory estoppel is a sword, and equitable estoppel is a shield.”

Jablon v. United States, 657 F.2d 1064, 1068 (9th Cir. 1981). See also American Maritime Transport, Inc. v. United States, 18 Cl. Ct. 283, 292 (1989).

The principal focus of this section is equitable estoppel. Equitable estoppel cannot by itself form the basis for a monetary claim against the United States. E.g., ATC Petroleum, Inc. v. Sanders, 860 F.2d 1104, 1111 (D.C. Cir. 1988). However, it rears its head in the claims context in various ways.

At the outset, everyone concedes that “equitable estoppel will not lie against the Government as it lies against private litigants.” Office of Personnel Management v. Richmond, 496 U.S. 414, 419 (1990). Exactly what the differences are, however, has yet to be definitively determined. The “leading case” (id. at 420) is Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). A farmer had applied for federal crop insurance, and had been told by government officials that his entire crop was insurable. After a drought destroyed most of the crop, he learned that, under regulations published in the Federal Register, over 80 percent of the crop was not covered. Cautioning that courts must “observe the conditions defined by Congress for charging the public treasury” (id. at 385), the Court held that the government was not bound by the unauthorized representations of its agents. In other words, telling the farmer that his entire crop would be insured did not “estop” the government from later denying coverage with respect to the legally ineligible portion. Although Merrill nowhere uses the word “estoppel,” it cites to Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917), which contains the often-quoted statement that “the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.”

In subsequent Supreme Court decisions, the camel managed to poke its nose into the tent in the guise of “dicta” suggesting that some forms of “affirmative misconduct” might be sufficient to support an estoppel against the government, although the Court refused to find estoppels in

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each instance. See Montana v. Kennedy, 366 U.S. 308, 314–15 (1961); Immigration and Naturalization Service v. Hibi, 414 U.S. 5, 8 (1973).

Given this “encouragement,” the lower courts and the Comptroller General became more inclined to find estoppels against the government where the traditional elements of equitable estoppel were met. Those elements, repeated verbatim in numerous cases, are:

1. The party to be estopped must know the facts.
2. He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended.
3. The latter (the party asserting the estoppel) must be ignorant of the true facts.
4. He must rely on the former’s conduct to his injury.

E.g., United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970); Emeco Industries, Inc. v. United States, 485 F.2d 652, 657 (Ct. Cl. 1973); 55 Comp. Gen. 911, 931 (1976); 53 Comp. Gen. 502, 506 (1974); B-183799, September 23, 1975. Restated, one who does not know the facts must rely on the conduct or representations of one who does know the facts, the reliance must be reasonable under the circumstances, and it must produce injury.

Georgia-Pacific is one of the more frequently cited examples of government estoppel. The government sought to enforce a 30-year old agreement under which a lumber company had agreed to convey certain land to the government for national forest purposes. The government had let the contract lie dormant for most of that time, and successive owners had spent a considerable amount of money on forest management. Applying the four elements cited above, and finding further that the government was acting in its proprietary rather than sovereign capacity, and that the government officials involved were acting within the scope of their authority, the court found that “the dictates of both morals and justice” warranted a finding of equitable estoppel. 421 F.2d at 103. The Emeco case, as well as a number of GAO decisions such as 53 Comp. Gen. 502 and B-188607, July 19, 1977, applied the four-part test and concluded that the government was estopped from denying the existence of a contract in various contexts.

A 1973 case, United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973), represents perhaps the outer limits of the trend started by cases like Georgia-Pacific and Emeco. Without so much as mentioning the four traditional elements of estoppel, the court held simply that the United States, even when acting in its sovereign capacity, can be estopped “where justice and fair play require it.” Id. at 988.

The Supreme Court revisited estoppel in Heckler v. Community Health Services of Crawford County, 467 U.S. 51 (1984), a challenge to the government’s right to recoup erroneous payments made to a Medicare health care provider. The government urged the Court to rule that there can be no estoppel against the United States. The Court was unwilling to go that far, but emphasized once again that the rules for private litigants and the government are different. Id. at 60. Exactly how they differ is an issue the Court was not forced to address. At an absolute minimum, the traditional elements of estoppel must be present. Id. at 61. Since the Court found the facts insufficient to support an estoppel even against a private litigant, it was not necessary to address what further elements would be necessary to make a case against the government. One thing to keep in mind, however, is that the government is spending the taxpayers’ money. “Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law . . . .” Id. at 63.

Heckler confirmed that estoppel will not be found if any of the four traditional elements are missing.<sup>48</sup> Apart from this, it resolved nothing, and left the lower courts free to continue forging their own paths. In Phelps v. Federal Emergency Management Agency, 785 F.2d 13 (1st Cir. 1986), the plaintiff, a claimant under a flood insurance policy, had been told by a FEMA official that he did not have to file a written report required by the policy. FEMA subsequently raised the failure to file a written report as one reason for denying the claim. The traditional elements of equitable estoppel were all present, but the court found the case very similar to Federal Crop Insurance Corp. v. Merrill and, feeling constrained to follow the Supreme Court, denied the estoppel. In a pre-Heckler case also involving a FEMA claimant who did not file a formal proof of loss, the court held FEMA estopped from denying coverage because it did not provide the claimant with the form and had the required information from other sources. Meister Bros., Inc. v. Macy, 674 F.2d 1174 (7th Cir. 1982). The Meister court noted that “it is far from clear when the Government

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<sup>48</sup>GAO cases denying estoppel for failure to establish one or more of the traditional elements include 55 Comp. Gen. 911, 931–32 (1976); B-220527, August 11, 1987; B-197872.2, October 9, 1981; B-200815, August 31, 1981; B-187445, January 27, 1977.

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may be estopped.” Id. at 1177. Heckler does not tell us which approach is right.

In ATC Petroleum, Inc. v. Sanders, 860 F.2d 1104, 1111 (D.C. Cir. 1988), the District of Columbia Circuit also struggled with the estoppel concept, noting that it could apply to the government, but that its application “must be rigid and sparing” and must include all of the traditional elements.

The next landmark in this evolutionary process is Office of Personnel Management v. Richmond, 496 U.S. 414 (1990). Richmond was a retired federal employee receiving a disability annuity. There are statutory limits on how much an annuitant can earn from wages or self-employment and still qualify for the annuity. Richmond sought advice on these limits from a federal employee, was given erroneous information, and as a result lost 6 months of benefits. Richmond first took his case to the Merit Systems Protection Board, which denied his estoppel argument. The Court of Appeals for the Federal Circuit reversed. Finding that the government could be estopped upon establishing the four traditional elements plus affirmative misconduct, the court held that the erroneous information was sufficient “misconduct” and remanded the case to the MSPB with instructions to direct payment of the withheld benefits. Richmond v. Office of Personnel Management, 862 F.2d 294 (Fed. Cir. 1988).

As it had done in Heckler, the government again urged the Supreme Court to rule flatly that estoppel may not run against the United States. The Court first reviewed its own precedents (Utah Power & Light, Merrill, Hibi, Heckler, etc.) and noted that it has “reversed every finding of estoppel that we have reviewed.” 496 U.S. at 422. Yet in doing so it has been unwilling to declare absolutely that “no estoppel will lie against the Government in any case.” Id. at 423. By the Court’s own admission, the lower courts had been taking this unwillingness “as an invitation to search for an appropriate case in which to apply estoppel against the Government.” Id. at 422. The Court further admitted that its approach to estoppel cases “has provided inadequate guidance for the federal courts and served only to invite and prolong needless litigation.” Id. at 422–23. Unfortunately, however, after setting the patient up for the certain cure, the Court then ordered a relapse:

“[I]t remains true that we need not embrace a rule that no estoppel will lie against the Government in any case in order to decide this case. We leave for another day whether an estoppel claim could ever succeed against the Government.”

Id. at 423. Having once again refused to prescribe a treatment, the Court recognized its responsibility “to state the law and to settle the matter of estoppel as a basis for money claims against the Government.” Id. at 426. It did this by resorting to a fiscal rationale not previously used in estoppel cases. The rationale proceeds along these lines:

- By virtue of the Appropriations Clause of the Constitution, any payment of money from the United States Treasury must be authorized by an act of Congress.
- Richmond’s award is not only not authorized by an act of Congress, it is in direct contravention of one.
- This being the case, there is no appropriation lawfully available for the payment, and payment would therefore violate the Appropriations Clause.

A contrary result, the Court explained, could effectively transfer the power of the purse to the Executive Branch. If Congress enacted a restriction the Executive Branch didn’t like, the Executive Branch could simply make contrary representations, which the courts would then uphold as estoppels. Id. at 428. The Court concluded with the following statement:

“Whether there are any extreme circumstances that might support estoppel in a case not involving payment from the Treasury is a matter we need not address. As for monetary claims, it is enough to say that this Court has never upheld an assertion of estoppel against the Government by a claimant seeking public funds. In this context there can be no estoppel, for courts cannot estop the Constitution.”

Id. at 434.

We present the Richmond case in some detail because a survey of post-Richmond cases shows a lack of consensus on precisely what Richmond stands for, and suggests that the Court may have further spawned one of the “evils” it apparently set out to correct—inviting the lower courts to continue searching for loopholes. The impact of Richmond depends on whether it is broadly or narrowly applied. As one court correctly stated:

“The precise holding of Richmond is that the Court will not uphold an estoppel claim against the government for money in violation of a statute.”

United States v. Alaska Public Utilities Commission, 800 F. Supp. 857, 862 (D. Alaska 1992). Thus, at an absolute minimum, equitable estoppel cannot be used if the result would be a payment contrary to statute (as opposed to

one which is merely not expressly authorized by statute). Some examples are Koyen v. Office of Personnel Management, 973 F.2d 919 (Fed. Cir. 1992) (claim for survivor annuity where deceased spouse had not made timely election of benefit options); United States v. Fowler, 913 F.2d 1382 (9th Cir. 1990) (recovery of payment made under flood insurance policy which had been erroneously issued to someone not eligible for the program); Mullens v. United States, 785 F. Supp. 216 (D. Maine), *aff'd mem.*, 976 F.2d 724 (1st Cir. 1992) (contrary indications from agency officials could not estop U.S. from denying claim for misrepresentation expressly excluded from Federal Tort Claims Act).

Reaching back to Federal Crop Insurance Corp. v. Merrill, this principle would appear to apply equally to statutory regulations. See Kinnucan v. United States, 25 Cl. Ct. 355, 359–60 (1992) (estoppel under Richmond not applicable in claim for travel and transportation expenses at variance with Joint Federal Travel Regulations). See also Schweiker v. Hansen, 450 U.S. 785, 790 (1981); Augusta Aviation, Inc. v. United States, 671 F.2d 445, 449 (11th Cir. 1982); 56 Comp. Gen. 85 (1976).

Also, it would seem undisputed that nothing in Richmond weakened the principle that there can be no estoppel if any of the traditional elements are missing. E.g., United States v. Guy, 978 F.2d 934, 938 (6th Cir. 1992); Tri-O, Inc. v. United States, 28 Fed. Cl. 463, 473–74 (1993); Wm. T. Thompson Co. v. United States, 26 Cl. Ct. 17, 35 (1992). From this point on, however, the law remains murky.

Under a broader application of Richmond, some courts have received what appear to be the Supreme Court's pretty clear signals that it is not particularly excited over using estoppel in any monetary claim against the public treasury, not just those that are explicitly prohibited by statute. E.g., United States v. Walcott, 972 F.2d 323, 327 (11th Cir. 1992) ("Supreme Court has recently held that equitable estoppel cannot apply against the United States in a suit to recover 'public funds'"); Andrews v. United States, 805 F. Supp. 126, 132 (W.D.N.Y. 1992) ("Since plaintiffs' claim has not been authorized by an Act of Congress, it is prohibited by the Appropriations Clause"); Shearin v. United States, 25 Cl. Ct. 294, 297, *aff'd mem.*, 983 F.2d 1085 (Fed. Cir. 1992) (government not estopped from asserting lack of authority to pay fees of court-appointed attorney in civil case because "[t]here was no express statutory basis for payment of fees").

What we call the narrow application is illustrated by Burnside-Ott Aviation Training Center, Inc. v. United States, 985 F.2d 1574 (Fed. Cir. 1993), an

equitable adjustment claim by a contractor, in which the Court of Appeals for the Federal Circuit reversed and remanded a finding that equitable estoppel was barred as a matter of law. The court said:

“In particular, the Claims Court erred in concluding that Richmond stands for the proposition that equitable estoppel will not lie against the government for any monetary claim. . . . Richmond is limited to ‘claim[s] for the payment of money from the Public Treasury contrary to a statutory appropriation.’ . . . [Richmond’s] holding must be limited to claims of entitlement contrary to statutory appropriations.” [Emphasis in original.]

Id. at 1581. In another contract case, the Court of Federal Claims said:

“The precise effect of Richmond on contract cases is unclear, primarily because the awards sought by Government contractors are generally based on contract principles that do not contravene the eligibility requirements contained in federal statutes.”

Tri-O, Inc. v. United States, 28 Fed. Cl. 463, 473 (1993). In sum, if the Supreme Court was looking for “another day” (496 U.S. at 423), the inevitability of that day seems assured.

An interesting case which would appear to stand on its own regardless of whether Richmond is broadly or narrowly applied is United States v. Cox, 964 F.2d 1431 (4th Cir. 1992). A dispute arose as to whether the costs of a psychiatric examiner at a release hearing should be paid by the Department of Justice or from funds appropriated to the Federal Public Defender and administered by the Administrative Office of the United States Courts. The court held Justice estopped from declining payment because it had previously concurred in guidelines issued by the Administrative Office indicating Justice would pay in that type of situation and, to the extent Justice was in the process of changing its position, it had not adequately communicated that change to the Administrative Office. The fact that the case involved a payment of public funds did not bar the estoppel because “the disputed sum will, one way or the other, be paid by an agency of the federal government.” Id. at 1435. The lesson of Cox is that Richmond does not apply where it is clear that the claim in question must be paid from the public treasury, the only question being which government pocket will bear the expense.

b. Expiration of Agency or Commission

Government agencies may cease to exist for a variety of reasons. They may be abolished or Congress may simply refuse to appropriate further funds. Also, a board or commission may be created as a temporary

organization for a limited purpose, for example, to conduct a particular study and prepare a report.

A temporary organization may have an expiration date specified in its enabling legislation. This may be a fixed date or a fixed period of time after the happening of some event. The standard government formula for computing a period of time between two events is to exclude the former and include the latter. Also, a statute takes effect on the date of its approval by the President unless some other date is fixed. Combining these two principles, where a commission was established by a statute approved on September 22, 1922, which provided that the commission would cease to exist “one year after the taking effect of this act,” the commission was in existence through September 22, 1923. 3 Comp. Gen. 123 (1923). The expiration date may also be a fixed number of days after the submission of a report. See, e.g., B-182081, January 26, 1977.

When an agency or commission ceases to exist, the service of all of its officers and employees is automatically terminated, and none of those officers or employees can thereafter undertake activities on its behalf, whether for the purpose of concluding the affairs of the agency or commission, or otherwise. 14 Comp. Gen. 738 (1935); B-182081, January 26, 1977, aff'd, B-182081, February 14, 1979.

Once an agency or commission expires, its appropriations cease to be available for the incurring of any new obligations. 16 Comp. Gen. 15 (1936); 14 Comp. Gen. 490 (1934); B-182081, February 14, 1979. However, obligations properly incurred during the life of the agency or commission may of course be liquidated as long as the account remains open.

In B-182081, cited above, the National Commission on State Workmen’s Compensation Laws was created by statute as a temporary organization and was directed to report its findings, conclusions, and recommendations to the President and the Congress not later than July 31, 1972. On the 90th day after submitting its report, it was to cease to exist. The Commission submitted its report on July 31, 1972, and thus, according to statute, ceased to exist on October 29, 1972. After the Commission expired, one of its former officials placed several requisition orders with the Government Printing Office for the printing of several documents relating to the Commission’s report. GPO did the printing and then sought reimbursement for its services. The Comptroller General concluded that the person who placed the orders had no authority to obligate funds after

the Commission had expired, and that there were therefore no appropriations legally available to reimburse GPO.

As noted, obligations validly incurred prior to expiration may be liquidated subsequently, at least until the expired account is closed. Under authority of the Economy Act, 31 U.S.C. § 1535, the General Services Administration may contract with another agency or commission to provide administrative support services, to include the certification for payment of valid claims against the agency or commission not presented until after its expiration. In such a situation, a GSA certifying officer can certify the expired agency's vouchers for payment. However, this authority is limited to instances where the authority is expressly included in a written Economy Act agreement, and only with respect to obligations validly incurred prior to the expiration of the agency or commission. 59 Comp. Gen. 471 (1980). GSA may, of course, seek GAO's help in doubtful matters. E.g., B-210226, May 28, 1985.

In the absence of such a written Economy Act agreement, and if Congress has not statutorily designated a successor agency, claims against an expired agency or commission may be paid only upon submission to GAO for direct settlement. 33 Comp. Gen. 384 (1954); 14 Comp. Gen. 738 (1935); 14 Comp. Gen. 490 (1934); 3 Comp. Gen. 123 (1923). This is perhaps the only remaining instance where direct settlement by GAO is required because there is simply no one else left to do it. Whether a claim is being settled by GSA under an Economy Act agreement or by GAO under direct settlement, an interesting problem arises if the account in question has been closed. There would be no appropriation available to pay the claim, however valid it may be, and it would appear necessary to seek appropriations from Congress, or perhaps invoke the Meritorious Claims Act.

## c. Voluntary Creditors

### (1) Introduction

A "voluntary creditor" for purposes of this discussion is someone who makes a payment from personal funds which he or she is not legally required or authorized to make, ostensibly on behalf of the government, and then claims reimbursement from the government. Voluntary creditors may be government employees or private parties, although they tend more often than not to be government employees. The term is not intended to have any connotation as to the person's motives. B-129004, October 25, 1956.

The government is under no obligation to reimburse a voluntary creditor, although there are situations in which, as a matter of public policy, voluntary creditors can be, should be, and are reimbursed. The Supreme Court discussed the basic concept in an early case:

“No individual can be made a debtor against his will. Voluntary benefits may be conferred on him, which may excite his gratitude, and which, in the exercise of his generosity, he may suitably reward. But this depends on his own volition.

“. . . To find an obligation in such a case, we must look into those writers on ethics who speak of imperfect obligations, which cannot be enforced. The rule is the same, whether the voluntary benefit be conferred on an individual, or on the government.”

Heirs of Emerson v. Hall, 38 U.S. (13 Pet.) 409, 412–13 (1839). The reason for the rule should be pretty obvious. If a voluntary creditor acquired an enforceable claim, the government would lose control over the creation of monetary obligations. “If in this form debts could be originated against the government . . . , there would be no security against such demands.” Id. at 413.

Early decisions of the accounting officers recognized this principle and established the proposition that:

“Except for certain personal expenses, including those of duly authorized travel, officers of the Government are not entitled to reimbursement for expenditures from their own private funds unless such expenditures are made under urgent and unforeseen public necessity . . . .”

12 Comp. Dec. 308 (1905). The rule is much older than that, however. In 4 Comp. Dec. 409, 410 (1898), the Comptroller of the Treasury quoted the following passage from an 1855 Treasury decision:

“It has been so often decided by the accounting officers that no person could acquire a legal claim against the United States by such advances, that it must now be considered as the settled adjudication of the question, at least, by that branch of the Government.” (Emphasis in original.)

Note that these cases talk about legal claims or entitlement to reimbursement. This is the real rule, to which there are no exceptions. A voluntary creditor has no right to be reimbursed. If the government does not find sufficient equitable or public policy reasons to make

reimbursement, the voluntary creditor may not go to court, and has no other recourse but to seek private relief legislation.

A point we noted earlier in this chapter is that the claims settlement jurisdiction of 31 U.S.C. § 3702(a) extends only to claims based on legal liability and not to claims based on equity or moral obligations. Early decisions struggled with this principle in the voluntary creditor context, and some cited it as one of the reasons for prohibiting reimbursement. E.g., 8 Comp. Dec. 582, 586 (1902); 4 Comp. Dec. 409, 410 (1898).

At the same time, however, it was clear that some voluntary creditors should be paid. For example, a 1901 case, 8 Comp. Dec. 43, approved reimbursement for an Army medical officer who had hired laundresses to wash bed and table linen in an Army hospital. Ten years later, the Comptroller of the Treasury approved reimbursement of a Justice Department employee who had used personal funds to pay the fees of witnesses summoned to testify in a court action where there was insufficient time to follow normal authorization and payment procedures. 18 Comp. Dec. 297 (1911). The decision states at page 299 that the voluntary creditor prohibition “is a rule of accounting and should not be permitted to hinder the public business or prevent the payment of just and lawful claims against the Government.” In any event, no case in recent decades has denied a voluntary creditor claim on the basis of perceived jurisdictional limitations under 31 U.S.C. § 3702(a). Voluntary creditor claims, therefore, may be viewed as an exception to the principle that claims may be allowed only on the basis of legal liability.

Thus, by the time GAO took over the claims settlement function in 1921, it was already established that (a) a voluntary creditor has no legal claim against the government, (b) although there is no right to reimbursement, neither is there an absolute prohibition, and (c) there are cases in which voluntary creditors should be reimbursed as a matter of public policy. Once these fundamental tenets are accepted, the role of the decisions becomes to develop a set of guidelines so that claims can be resolved on the basis of rational principles and not extraneous factors such as the grade or position of the claimant.

At one time, GAO wanted all voluntary creditor claims forwarded to it for direct settlement. 62 Comp. Gen. 419, 425 (1983). This is no longer the case. Agencies should treat voluntary creditor claims the same as any other claims, referring only “doubtful claims” to GAO. 4 C.F.R. § 31.4.

(2) Underlying expenditure improper

The cases under this heading are easy. If a given payment is improper—either expressly prohibited or beyond the agency’s authority—a claim for reimbursement by a voluntary creditor must be denied because no basis for reimbursement can exist where the agency could not have made the payment directly. 64 Comp. Gen. 467 (1985); 62 Comp. Gen. 419, 423 (1983).

An early decision, 3 Comp. Gen. 681 (1924), involved a claim by the Dry Branch Coal Company for the expense of hiring a private detective. A mine superintendent discovered that two men had broken into the Dry Branch post office and that “one had been shot in the leg and the other had fled up the creek.” He called a company official who, being unable to contact post office authorities, called a private detective. (The decision does not disclose why he did not call the police.) The detective pursued and apprehended the suspect as he was about to board a train. The company paid the detective and filed a claim for reimbursement. In view of the statutory prohibition against the employment of private detectives (5 U.S.C. § 3108), the claim had to be denied. The decision further stated, at page 682:

“[T]he voluntary intervention of claimant in the matter can not operate to authorize the making indirectly of a payment that could not legally be made directly.”

In 2 Comp. Gen. 581 (1923), a federal prohibition officer for the State of Indiana sought reimbursement for the cost of materials he had purchased in order to paint several signs. He had painted the signs for the Indiana Health Exposition after state officials asked him to maintain a prohibition booth at the fair. Concluding that appropriations for the enforcement of the National Prohibition Act were not available for the expenses of participation in fairs or expositions without further statutory authority, and also noting the voluntary creditor rule, the Comptroller General denied the claim.

More recently, an employee of the Environmental Protection Agency had certain notices placed in newspapers in violation of 44 U.S.C. § 3702. He paid the newspapers from personal funds and filed a claim for reimbursement. Since the agency could not have paid the claim directly, GAO denied the claim for reimbursement, citing 3 Comp. Gen. 681 and the voluntary creditor rule. 60 Comp. Gen. 379 (1981).

Several cases have involved the prohibition against paying from appropriated funds the cost of food furnished to government employees at their normal duty station without specific authority. In a case which predated the Postal Reorganization Act of 1971, a Post Office official brought in carry-out restaurant food, purchased from personal funds, for a group of employees who were presiding as election officials at a union election which lasted well past the normal dinner hour. The lives of the employees were not a stake and they were not there for the purpose of protecting government property. In view of the prohibition on furnishing free food to civilian employees, and further noting the voluntary creditor rule, the Comptroller General denied reimbursement. 42 Comp. Gen. 149 (1962). See also B-185159, December 10, 1975, and B-129004, September 6, 1956.

Another case involving food, 53 Comp. Gen. 71 (1973), recognized an exception. In that case, the unauthorized occupation of a building in which the Bureau of Indian Affairs was located necessitated the assembling of a cadre of General Services Administration special police, who spent the whole night there. Agency officials purchased and brought in sandwiches and coffee for the cadre. GAO concluded that it would not question the agency's determination that the expenditure was incidental to the protection of government property during an extreme emergency, and approved reimbursement. The decision cautioned against getting carried away, however—emergency means emergency. A similar exception occurred in B-189003, July 5, 1977 (FBI agents stranded in office during severe blizzard).

### (3) Voluntary vs. involuntary creditors

The cases under this heading involve items the government provides for its employees at government expense. If an employee uses personal funds to purchase an item which is authorized, but not required, to be furnished at government expense, and the item is primarily for the employee's personal use even though used in the performance of official duties, the employee is nothing more than a voluntary creditor and reimbursement will usually be denied.

For example, employees at an Air Force hospital who bought their own uniforms were voluntary creditors and could not be reimbursed. 46 Comp. Gen. 170 (1966). Similarly, an Army employee who purchased safety orthopedic shoes for use in his work as an automotive mechanic could not by his own voluntary action obligate the government to pay. B-162606,

November 22, 1967. The fact that the government could have furnished the items but failed to do so (the uniforms under 5 U.S.C. § 5901 and the safety shoes as special equipment under 5 U.S.C. § 7903) did not give the employees the right to, in effect, make the determinations on their own and circumvent the failure by buying the items themselves and then expecting the government to pay.

On the other hand, if the item is something the government is required to furnish at government expense and fails to do so, the employee who uses personal funds is more of an “involuntary creditor” and may be reimbursed. *E.g.*, 8 Comp. Dec. 377 (1901); A-24089, October 8, 1928. Both of these cases involved transportation allowances to which the employee was entitled by law. Of course, in order to become an “involuntary creditor,” the employee must attempt to obtain payment from the government before resorting to personal funds. 8 Comp. Dec. at 379; 8 Comp. Gen. 627 (1929).

#### (4) Consent

One early formulation of the voluntary creditor principle is that “a person can not make himself the creditor of another without that other’s consent.” 4 Comp. Dec. 409, 411 (1898). The essence of the rule is unilateral action by the voluntary creditor.

Consent was the dispositive factor in 61 Comp. Gen. 575 (1982). It is frequently necessary for the Internal Revenue Service to file tax liens with state or local recording offices, which customarily charge a filing fee. Many states and localities have worked out periodic billing arrangements with the IRS. Others, however, require payment at the time the lien is filed. The amounts are small and getting a government check in advance for each individual filing would be an enormous nuisance. In the cited decision, a certifying officer of the IRS questioned whether the voluntary creditor rule was a bar to an arrangement under which an agent paid the filing fees from his own pocket and submitted vouchers periodically for reimbursement. While there would have been a problem if the agent had acted entirely on his own, he had acted in accordance with formal IRS policy which sanctioned the arrangement in question. Therefore, the agent was not a “voluntary creditor” for purposes of the prohibition. He did, however, have to pay his own check printing charges.

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(5) Procurement of goods or services

The unauthorized procurement of goods or services generates the bulk of the voluntary creditor cases, and some of the more difficult ones. The guidelines in this area stem from 62 Comp. Gen. 419 (1983). In brief, the commanding officer of a National Guard unit spent over \$300 of his own money to buy food for his troops on a weekend training exercise when the paperwork required to obtain the necessary purchasing authority was not completed in time. He then sought reimbursement. The resulting decision is GAO's most extensive discussion of the voluntary creditor rule.

The decision first reviewed the early cases and the foundations of the rule. Does it continue to serve a useful purpose? Yes it does, GAO concluded. The system the federal government uses to obligate and disburse public funds is not some haphazard concoction. It exists for a reason—more precisely, several reasons—and permitting reimbursement for payments made from personal funds allows the individual, at least to some extent, to usurp the government's prerogative.

“There are well-established procedures for making purchases, submitting and adjudicating claims, and making disbursements. Keeping in mind that we are spending the taxpayers' money, the interests of the Government are best served when these procedures are followed. It is, we think, clearly undesirable for individual employees to presume to make these decisions on their own and beyond their authority based on what they believe should happen.”

Id. at 422. This had been a concern, and one of the foundations of the voluntary creditor rule, from the earliest days. E.g., 12 Comp. Dec. 308 (1905); 8 Comp. Dec. 582, 585 (1902). Disregard of established procedures “would produce endless confusion and lead to double payment and serious embarrassments.” 8 Comp. Dec. at 585.<sup>49</sup> However, since the time of the Treasury decisions which had sought to achieve a balance, the rule somehow tightened up. The “‘rule of accounting’ . . . became treated, in effect, as a rule of law and acquired a rigidity it was never intended to have,” 62 Comp. Gen. at 422–23. The decision then set out to formulate guidelines for the evaluation of voluntary creditor claims involving the acquisition of goods or services.

The first step is the threshold test of “public necessity.” Id. at 424. Prior cases, such as 12 Comp. Dec. 308 quoted earlier, used language like “urgent and unforeseen” public necessity or emergency. While this may be

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<sup>49</sup>An example of a double payment occasioned by a voluntary creditor's intervention is B-220689, September 24, 1986. GAO recommended that the government recover the duplicate payment from the voluntary creditor, leaving it to him to chase the recipient since it was all his fault to begin with.

appropriate where the expenditure is otherwise unauthorized, examples being the emergency food cases noted above, the voluntary creditor case in which underlying authority is not a factor requires no such stringency. The standard, as defined in 62 Comp. Gen. 419 and subsequent cases, is merely whether the claimant has a mission-related reason to act. The situation in 62 Comp. Gen. 419 is a good example: failure to act would have disrupted the mission. Another good example is B-195002, May 27, 1980, in which an Air Force sergeant purchased certain items from personal funds to be used in connection with the installation of Air Force communications equipment in Italy. For various reasons, the items could not be promptly acquired through established procedures and the mission would have been impaired without them. The Comptroller General approved reimbursement, stating:

“Of course, when an employee expends his own funds in what he judges to be the interest of the Government, he does so at his own risk; no legal liability of the Government is created unless the Government ratifies his action as falling within the exception . . . and agrees to reimburse him. However, it would be shortsighted indeed not to recognize that this kind of initiative by the employee in an emergency is very valuable and, when it results in preserving a Government property interest, the employee should not be penalized through denial of reimbursement.”

Other cases which passed the “public necessity” test are:

- Upon receipt of shipment of contaminated drinking water and in view of past problems in receiving timely shipments, Army officer used personal funds to buy bottled water for his troops in Saudi Arabia. B-236330, August 14, 1989.
- Claimant used personal funds to place recruitment advertisements upon discovery that purchase order had, through administrative error, not been issued. B-242413, July 12, 1991.
- Claimant used her own funds to purchase replacement picture mats for a lounge at an Army facility because she thought that using the normal procurement process would not result in delivery in time for scheduled inspection by base officials. B-242412, July 22, 1991.

Thus, there does not have to be an “emergency.” All there has to be is a duty-related act by an individual who believes in good faith that failure to act will be detrimental to the interests of the government. An even lesser standard may be sufficient where an employee is induced, directed, or “pressured” by a superior to make the expenditure. 62 Comp. Gen. at 424; 62 Comp. Gen. 595 (1983). An employee is not expected to risk his or her

job, even if the superior is clearly wrong. There must, however, be something. If there is no colorable reason to act other than personal convenience or desire, reimbursement will be denied. E.g., 11 Comp. Dec. 486 (1905); B-232686, December 7, 1988.

Another case in which a lesser standard was acceptable is B-204073, September 7, 1982. An officer at the Naval War College was told that he could buy certain computer software with personal funds and file a claim for reimbursement. The software was needed for a research project, and there was an assertion that time was of the essence. This would have been sufficient if true, but there was nothing in the record to back it up. Be that as it may, the case was different in one important respect. The typical case involves either services already performed or property which cannot be returned to the claimant. Here, the War College could have returned the software to the claimant, but it would then have had to go out immediately and repurchase the same thing, a rather pointless course of events. The claim was allowed, the decision reiterating that unauthorized purchases create no legal liability on the part of the government.

A 1984 case presented a “mixed bag.” A trial attorney for the Equal Employment Opportunity Commission needed to get several indigent witnesses from San Diego to San Francisco to appear at a court hearing. When the witnesses arrived at the San Diego airport the night before the hearing, the airline refused to honor the Government Transportation requests. The attorney paid the fares from his own funds and also advanced money to the witnesses for their hotel and meal expenses. The air fares clearly qualified for reimbursement under the standard of 62 Comp. Gen. 419. Failure to act would have jeopardized the litigation. With respect to the funds advanced for lodging and subsistence, however, there was nothing in the record to support a need to act—or a reasonable perception of such a need—so this portion of the claim was denied. B-210986, May 21, 1984.

If the public necessity test is satisfied, the next step is for the agency to look at the transaction as if the contractor or vendor had not been paid, and to ask if it could have ratified the transaction under whatever authority it may possess, such as the Federal Acquisition Regulation, 48 C.F.R. § 1.602-3. If the agency could have ratified the transaction to pay the contractor, it may reimburse the voluntary creditor. 62 Comp. Gen. at 424.

If for whatever reason ratification is not available, the next step is for the agency to apply the standards for quantum meruit recovery—again looking

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at the transaction as if the contractor had not yet been paid. The standards are:

- Procurement would have been permissible if proper procedures were followed. This knocks out the cases in which the underlying expenditure would be unauthorized even if made directly by the agency.
- Government received a benefit. For the most part, this will already have been answered by virtue of the “public necessity” determination.
- Claimant acted in good faith. Again, the “public necessity” analysis will almost certainly take care of this item as well.
- Measure of recovery is the fair value of the benefit received by the government. The government should not be paying \$100 for a \$10 item, and this is true regardless of whether the government is paying the contractor directly or reimbursing a voluntary creditor.

Based on this analysis, if the agency could have made a quantum meruit payment directly to the contractor or vendor, it can reimburse the voluntary creditor. 62 Comp. Gen. at 424–25. The claimant in 62 Comp. Gen. 419 clearly met these standards and was reimbursed.

#### (6) Monetary claims

Just as there is an established mechanism for making purchases, there is also an established system for the settlement and payment of claims against the government, and the voluntary creditor who short-circuits the system by paying a claim from personal funds takes a heavy risk.

In 33 Comp. Gen. 20 (1953), a certifying officer paid a portion of a disputed travel voucher to another government employee from personal funds. It took GAO only half a page to deny reimbursement. The certifying officer’s belief that the payment was correct was immaterial. In another case, a National Park Service employee used personal funds as a security deposit against a claim for rent due by the government for space in a privately-owned trailer park. The federal employee, under the impression, later found to be erroneous, that the rental claim was valid, used his own funds in order to secure the release of a government-owned trailer which the trailer park owner had originally threatened to hold as security. The Comptroller General held that, although time was a factor (the vehicle had to be winterized for use in another location), release of the trailer could have been accomplished through other means and therefore there was no basis for an exception to the rule. The claim for reimbursement was denied. B-184982, October 13, 1976.

As with the other types of cases, there are exceptions here, too, although this category is expressly excluded from 62 Comp. Gen. 419 (*id.* at 423), and the standards have not been defined to the extent that 62 Comp. Gen. 419 defined them for the procurement cases. The answer will depend on the strength of the justification which must, of course, be more than mere convenience or an employee's belief that something is a good idea. Thus, reimbursement was authorized in B-177331, December 14, 1972, when an employee paid a claim resulting from an automobile accident in a foreign country in order to avoid detention by the local police and to obtain release of the impounded government vehicle. See also B-186474, June 15, 1976 (government driver paid tort claim from personal funds, claimant executed release protecting United States from any further claims).

#### (7) Conclusion

It must be emphasized that the voluntary creditor always acts at his or her own risk and never has a right to be reimbursed. GAO has cautioned in numerous cases that payments from personal funds are undesirable and should be discouraged. *E.g.*, 62 Comp. Gen. at 424; 60 Comp. Gen. 379, 381 (1981); B-186474, June 15, 1976. Nevertheless, the voluntary creditor rule is nowhere near as harsh as it is sometimes perceived to be. Many claims are allowed, and this is as it should be.

In closing, we reach back to another old Comptroller of the Treasury decision for a passage upon which we would not attempt to improve:

"I do not wish . . . to be understood as countenancing indiscriminate payments of this character. Officers and employees in the field should, before using their own funds to pay legitimate expenses of the Government, ascertain whether there is a feasible means of making payments in the usual and prescribed manner, and the measure of such feasibility should not be their own convenience or desire. Where the stress of public necessity requires officers to use their own funds, they should represent the facts when claiming reimbursement."

12 Comp. Dec. 308, 309 (1905).

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## 5. Government Checks and Electronic Transfer

### a. Source of Law: The Clearfield Trust Doctrine

In the private sector, the rights and liabilities of parties to a check or other negotiable instrument are governed by the Uniform Commercial Code

(UCC), which has been adopted at least in part, with some variations, by all 50 states and the District of Columbia. Rights and liabilities under checks issued by the federal government, however, are governed by federal law. Since the United States is exercising constitutional functions when it disburses funds or pays its debts, the Supreme Court has held that the “rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law.” Clearfield Trust Co. v. United States, 318 U.S. 363, 366 (1943). The Court reaffirmed the doctrine two years later in National Metropolitan Bank v. United States, 323 U.S. 454 (1945).

The governing federal law may be found in three places. First, of course, is any statutes Congress may choose to enact. Several will be noted later in this section. Second is Treasury Department regulations. See Clearfield, 318 U.S. at 366 n.2; Metropolitan Bank, 323 U.S. at 458; United States v. City National Bank & Trust Co., 491 F.2d 851, 853 (8th Cir. 1974); 54 Comp. Gen. 75, 77 (1974). The Clearfield Court identified the third element when it stated that, absent an applicable statute, “it is for the federal courts to fashion the governing rule of law according to their own standards.” 318 U.S. at 367.

The virtually universal adoption of the Uniform Commercial Code occurred well after the Supreme Court’s Clearfield and Metropolitan Bank decisions. Once this development had taken place, litigants began arguing that the courts should dump or ignore Clearfield because the uniformity it sought to achieve now existed by virtue of the UCC. Uniformity is not the whole story, however. There is a second underpinning to Clearfield, discussed as follows by one district court:

“It is quite clear that the Supreme Court in Clearfield was pointing the federal courts in a new direction. . . . [T]he Court went further when it spoke for the first time of the duty of the federal courts to choose ‘a federal rule designed to protect a federal right.’ [Emphasis in original.]

. . . .

“. . . The Clearfield Trust doctrine gives a federal court the added function of developing a body of law consonant with those interests which are uniquely federal.

. . . .

“ . . . Because the several states have adopted a different rule does not mean that the federal interest . . . has been since diluted.”

United States v. Bank of America National Trust and Savings Ass’n, 288 F. Supp. 343, 346–47 (N.D. Cal. 1968), aff’d, 438 F.2d 1213 (9th Cir. 1971), cert. denied, 404 U.S. 864. See also United States v. Philadelphia National Bank, 304 F. Supp. 955, 956 (E.D. Pa. 1969). Responding to the same argument, another district court said in a 1993 case, “Clearfield Trust is still the law of the land” and where federal commercial paper is involved, “federal law preempts the Uniform Commercial Code.” Alnor Check Cashing v. Katz, 821 F. Supp. 307, 312 (E.D. Pa.), aff’d, 11 F.3d 27 (3d Cir. 1993).

The UCC still has a role, however. GAO’s position is that “the Government should follow [the UCC] to the maximum extent practicable in the interest of uniformity where not inconsistent with Federal interest, law or court decisions.” 51 Comp. Gen. 668, 670 (1972). See also 54 Comp. Gen. 397, 400 (1974); 54 Comp. Gen. 75, 79 (1974).

#### b. Time Limit on Negotiating Government Checks

The time limit on negotiating government checks has changed several times over the years. For 30 years prior to 1987, there was no time limit. See 31 U.S.C. § 3328(a)(1) (1982 ed.). During this period, it was not uncommon for checks to be presented for payment literally decades after they were issued. E.g., 62 Comp. Gen. 121 (1983) (claim for proceeds of checks issued in 1936 and 1937). Checks thought to be lost might resurface many years later. E.g., B-140628, September 24, 1959 (no authority to cancel an indemnity bond given by a bank on a check issued 17 years earlier because the check was still “good”).<sup>50</sup>

In 1987, Congress tried to bring some order to the system by the enactment of title X of the Competitive Equality Banking Act, Pub. L. No. 100-86, 101 Stat. 552, 657. Treasury checks issued on or after the law’s effective date must be negotiated within one year.<sup>51</sup> 31 U.S.C. § 3328(a)(1)(A); 31 C.F.R. § 240.3(a)(1). The checks are to bear the legend “Void After One Year.” 31 C.F.R. § 240.3(b). Treasury provides each agency with a monthly list of the agency’s checks which became stale (i.e., were unnegotiated for 12 months) during the preceding month. Treasury then

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<sup>50</sup>This situation was not necessarily all bad, however. Since the government must borrow—and pay interest on—money needed to pay its debts, the failure to cash government checks for extended periods results in reduced interest costs. B-207224, September 20, 1982.

<sup>51</sup>The Treasury Department was given discretion in setting the Act’s effective date, which it set at October 1, 1989. 53 Fed. Reg. 3584 (February 8, 1988). Treasury is also authorized to issue implementing regulations. Pub. L. No. 100-86, § 1005, 101 Stat. 659, 31 U.S.C. § 3328 note.

cancels those checks and the proceeds are returned to the accounts originally charged. 31 U.S.C. § 3334(a); 31 C.F.R. § 240.4(a).

Checks issued prior to the effective date had to be negotiated not later than October 1, 1990. 31 U.S.C. § 3328(a)(1)(B). The law directed Treasury to cancel all such checks still outstanding six months later, i.e., on April 1, 1991 (*id.* § 3334(b)(1)), and authorized it to use the proceeds to clear balances in certain Treasury accounts (*id.* § 3334(b)(2)). The cancellation and disposition requirements of 31 U.S.C. § 3334(b) applied to all Treasury checks without exception. 70 Comp. Gen. 705 (1991) (Railroad Unemployment Insurance Act benefit checks).

Whether we are talking about pre-effective date checks or post-effective date checks, it is important to emphasize that cancellation relates only to the check and not the underlying obligation. The statute makes this clear:

“Nothing in this subsection shall be construed to affect the underlying obligation of the United States, or any agency thereof, for which a Treasury check was issued.”

31 U.S.C. § 3328(a)(3). For a statute notable for its lack of legislative history, the conference report stressed this point. H.R. Conf. Rep. No. 261, 100th Cong., 1st Sess. 188, reprinted at 1987 U.S. Code Cong. & Admin. News 588, 657. The proper course of action for a payee whose check has been canceled is to file a claim with the agency which authorized issuance of the check. Upon verification, the agency is authorized to certify a new payment. 31 C.F.R. § 245.5.

While the law thus preserves underlying obligations, it does not resurrect dead claims. 70 Comp. Gen. 416, 418 n.2. The underlying claims remain governed by the 6-year statute of limitations of 31 U.S.C. § 3702(b). B-244431.2, September 13, 1994 (containing a comprehensive discussion of the CEBA changes); B-243536, September 7, 1993; B-250212, April 15, 1993; B-251044, April 14, 1993; B-244431, October 8, 1991. Two examples will illustrate:

- Agency issued a paycheck in September 1989 (pre-effective date). The recipient, a wealthy government employee, didn't bother cashing it. It became stale in October 1990 and was canceled in April 1991. The underlying salary obligation was not affected, and the recipient could file a claim for a new check until September 1995. The same principle applies to post-effective date checks.

- Same situation except original check was issued in 1980. If it wasn't negotiated prior to cancellation in April 1991, the underlying obligation is time-barred since the statute of limitations expired in 1986. Again, the same principle would apply to a post-effective date check.

A post-cancellation claim is chargeable to the same appropriation initially charged when the first check was issued, to the extent funds remain available. If that account has been closed pursuant to 31 U.S.C.

§§ 1551–1557, the payment must be charged to current appropriations, subject to the one-percent limitation of 31 U.S.C. § 1553. This applies regardless of whether the original check was issued before or after October 1, 1989. This is because, for pre-effective date checks, while the specific funds may have been diverted upon cancellation, the underlying obligation—and hence the fiscal year chargeable—was unaffected. 70 Comp. Gen. 416 (1991); B-243536, September 7, 1993; B-239249.2, May 21, 1991 (applying these principles to appropriations for the Senate and House of Representatives).

For checks negotiated within the one-year period, if Treasury is on notice of a question of law or fact, it may, at its discretion, defer payment and refer the matter to GAO. 31 U.S.C. § 3328(a)(2). An example of such a referral under the pre-1987 law is 62 Comp. Gen. 121 (1983) (no evidence to support allegation that checks were gifts to claimants).

Checks drawn on “designated depositaries” are addressed in 31 U.S.C. § 3328(b). A “designated depositary” is a commercial bank or banking institution designated by the Treasury Department to hold government funds for the account of the United States. See 31 C.F.R. Part 202. If a check drawn on a designated depositary has not been paid by the end of the fiscal year following the fiscal year in which the check was issued, the amount must be withdrawn from the depositary and deposited for credit to a consolidated Treasury account (20X6045, Proceeds and Payment of Certain Unpaid Checks). Claims for the proceeds of unpaid checks are payable from this consolidated account upon settlement by GAO. This does not mean that all transactions involving stale designated depositary checks require GAO settlement. The distinction is between transactions which involve claims for the proceeds of a check and transactions which represent essentially bookkeeping adjustments. GAO settlement is required in the former situation but not the latter. B-254649, October 20, 1993 (internal memorandum); B-112924-O.M., May 13, 1974; B-112924-O.M., July 6, 1973.

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c. Withholding Checks to Be  
Sent to Foreign Countries

If a government check is to be sent to a payee in a foreign country (other than a foreign government), and the Secretary of the Treasury determines that conditions in that country do not reasonably ensure that the payee will receive the check and be able to negotiate it for full value, the Secretary may, subject to certain exceptions, prohibit transmission of the check. 31 U.S.C. § 3329(a). Treasury has implementing regulations at 31 C.F.R. Part 211 and I Treasury Financial Manual § 4-2085.

Countries subject to this prohibition naturally vary from time to time with the international climate. Countries which are expected to remain subject to the prohibition for a reasonable length of time are published in 31 C.F.R. § 211.1.<sup>52</sup> In addition, if warranted by conditions such as natural disaster or political upheaval, Treasury may subject countries to temporary withholding without publishing their names in the regulation. I TFM § 2085.10.

A withheld check may be released during the same calendar quarter if conditions change. Otherwise, the amount is to be transferred at the end of the calendar quarter to a special deposit account entitled “Proceeds of Withheld Foreign Checks” (20X6048). 31 U.S.C. § 3329(b)(4). A claim for an amount deposited in the special account may be paid if the person making the claim can provide reasonable assurance that he or she will receive the check and be able to negotiate it for full value. *Id.* § 3329(c).

The statute also provides that the withheld checks be sent to GAO for credit to the proper accounts. *Id.* § 3329(b)(4). Given the evolution of GAO’s approach to account settlement, there is no longer any need to send the checks to GAO. In any event, Treasury has developed an alternative procedure for implementing the statute. Agencies are instructed to withhold payment and establish the liability (i.e., record an obligation) on their books, but not to actually issue checks. I TFM § 2085.10. Claims are to be filed with and adjudicated by the agency responsible for originally authorizing the withheld payment. 31 C.F.R. § 211.2; I TFM § 2085.20. If a claim is allowed, payment will be made either by Treasury from the special account or by the authorizing agency from its appropriations, depending on whether funds were actually transferred to the special account or withheld under the checkless procedure. *Id.*

The special deposit account authorized by 31 U.S.C. § 3329(b) is essentially a trust account for the benefit of the intended payees. Therefore, consistent with GAO’s position that the Barring Act (31 U.S.C. § 3702(b))

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<sup>52</sup>The 1993 edition of 31 C.F.R. § 211.1(a) lists Cuba, Kampuchea, North Korea, and Vietnam.

does not apply to claims against trust funds, there is no statute of limitations on administrative claims by proper claimants against that account. 70 Comp. Gen. 612 (1991); 55 Comp. Gen. 1234, 1236 (1976); B-155963, March 19, 1965; B-144046, October 31, 1960. Similarly, as 70 Comp. Gen. 612 held, there is no statute of limitations on administrative claims under the checkless procedure. The decision states, at 615:

“[T]he right of a claimant to recover money that the government is required by law to hold in trust for the claimant’s benefit cannot be diminished because the government adopts an alternative procedure as a matter of administrative convenience, and does not actually deposit any funds into a trust fund.”

#### d. Statutes of Limitations on Certain Check Claims

The statute of limitations applicable to claims against the United States on government checks is found at 31 U.S.C. § 3702(c)(1):

“Any claim on account of a Treasury check shall be barred unless it is presented to the agency that authorized the issuance of such check within 1 year after the date of issuance of the check . . . .”

Subsection (c)(2) reiterates that the underlying obligation is not affected. Prior to the Competitive Equality Banking Act of 1987, the limitation period was 6 years, but only with respect to checks which government records showed to have been paid. 31 U.S.C. § 3702(c) (1982 ed.); B-201707, July 14, 1981; B-180143, February 26, 1974. This was because, if government records did not indicate that the check was paid, there could be no statute of limitations on claims on the check because there was no time limit on negotiation.

It is helpful to read 31 U.S.C. § 3702(c) in conjunction with 31 U.S.C. § 3328(c), which provides:

“A limitation imposed on a claim against the United States Government under section 3702 of this title does not apply to an unpaid check drawn on the Treasury or a designated depository.”

A comparison of the two statutes illustrates the distinction between a claim on the check and a claim on the underlying obligation. A claim on the check is subject to the 1-year limitation. This is consistent with 31 U.S.C. § 3328(a) because the check will be canceled if unnegotiated after a year. In contrast, a claim on the underlying obligation is governed by the statute of limitations applicable to claims of that type. See generally B-244431.2, September 13, 1994.

The Competitive Equality Banking Act also reduced to one year the limitation in 31 U.S.C. § 3712(a) on actions brought by the United States to enforce the liability of endorsers in forgery and unauthorized signature cases. The revised section 3712(a) provides in part:

“(1) Period for claims.—If the Secretary of the Treasury determines that a Treasury check has been paid over a forged or unauthorized endorsement, the Secretary may reclaim the amount of such check from the presenting bank or any other endorser that has breached its guarantee of endorsements prior to—

“(A) the end of the 1-year period beginning on the date of payment; or

“(B) the expiration of [an additional 6-month period] if a timely claim is received under section 3702.

“(2) Civil actions.—(A) Except as provided in subparagraph (B), the United States may bring a civil action to enforce the liability of an endorser, transferor, depository, or fiscal agent on a forged or unauthorized signature or endorsement . . . not later than 1 year after a check or warrant is presented to the drawee for payment.”

Subparagraph (B) extends the period by 3 years if the government gives the endorser written notice of the claim within one year after presentment.

In United States v. Duncan, 527 F.2d 1278 (3d Cir. 1976), the court discussed the origin and purpose of what is now 31 U.S.C. § 3712(a)(2), and held that the term “endorser” does not include—and hence suit is not barred against—“someone who improperly signs the name of another in order to benefit persons who are not entitled to the proceeds.” Id. at 1281. In other words, the statute exists to protect innocent third parties. Id. at 1280.

#### e. Forged, Altered, or Fraudulently Endorsed Checks

An important Treasury regulation, 31 C.F.R. § 240.5, states:

“The presenting bank and the indorsers of a check presented to the Treasury for payment are deemed to guarantee to the Treasury that all prior indorsements are genuine.”

When the Treasury pays a check bearing a forged endorsement, the government can, given the primacy of the Treasury regulations under the Clearfield Trust doctrine, seek recovery (“reclamation”) from a guarantor under section 240.5, subject to the limitation period of 31 U.S.C. § 3712(a). 31 C.F.R. § 240.6. This is the essence of the Clearfield Trust decision and applies even where the government was negligent in failing to discover the fraud prior to the guarantee. National Metropolitan Bank v. United States,

323 U.S. 454 (1945). It also applies regardless of the fact that the perpetrators of the fraud were government employees. United States v. Philadelphia National Bank, 304 F. Supp. 955 (E.D. Pa. 1969); United States v. Bank of America National Trust and Savings Ass'n, 288 F. Supp. 343 (N.D. Cal. 1968), aff'd, 438 F.2d 1213 (9th Cir. 1971), cert. denied, 404 U.S. 864.<sup>53</sup>

The government's right of reclamation applies to unauthorized as well as forged endorsements. E.g., Alnor Check Cashing v. Katz, 11 F.3d 27 (3d Cir. 1993); United States v. National Bank of Commerce in New Orleans, 438 F.2d 809 (5th Cir. 1971). For reclamation purposes, unauthorized signature includes the unauthorized use of a rubber-stamp imprint of the payee's name. 53 Comp. Gen. 19 (1973).

A check made payable to two parties jointly must be endorsed by both to be properly negotiated. Negotiation by only one of the parties, without authority from the other, is a form of unauthorized endorsement for purposes of 31 C.F.R. §§ 240.5 and 240.6. 51 Comp. Gen. 668 (1972); B-196485, January 15, 1980; B-187957, July 1, 1977; B-155599, December 11, 1964; B-129118, December 4, 1956. As several of these cases illustrate (51 Comp. Gen. 668, B-196485, B-187957), this situation commonly arises when a spouse or former spouse negotiates a joint tax refund check.

Suppose a check falls into the hands of someone with the same name as the payee. Is it forgery to sign your own name? Perhaps not, but at minimum it is still another form of unauthorized endorsement. Fulton National Bank v. United States, 197 F.2d 763 (5th Cir. 1952) (bank which guaranteed prior endorsements held liable to government). GAO decisions in "same name" cases have examined whether it is reasonable to place the burden on the endorser under the particular circumstances involved. Thus, reclamation should proceed where a check bearing the payee's address is negotiated by someone with the same name but different address. However, GAO has recommended against reclamation where the check gave the address of the actual recipient with the same name as the intended payee, or where there was no address on the check. 26 Comp. Gen. 834 (1947); 14 Comp. Gen. 840 (1935); 6 Comp. Gen. 532 (1927); B-121119, October 27, 1954; B-112491, April 17, 1953.

The "same name" cases may be distinguished from the so-called "imposter rule" which provides that—

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<sup>53</sup>Other cases upholding the government's right of reclamation under Clearfield Trust include United States v. City National Bank & Trust Co., 491 F.2d 851 (8th Cir. 1974), and United States v. First National Bank of Atlanta, 441 F.2d 906 (5th Cir. 1971).

“a drawer, having made payable and delivered an instrument to an impostor [sic] whom the drawer believes to be the person whose name he has assumed and who is the very person intended by the drawer to present and endorse the instrument, must as against the drawee or a bona fide holder in due course bear the loss where the impostor has obtained payment or negotiated the instrument. The intent of the drawer having been effectuated, the impostor’s endorsement is regarded as genuine and not as a forgery nor, accordingly, is a guarantee of prior endorsements regarded as breached . . . .”

United States v. Union Trust Co., 139 F. Supp. 819, 822 (D. Md. 1956). GAO has tried to construe the imposter rule narrowly but has not visited the issue for some time. E.g., 18 Comp. Gen. 880 (1939); B-141231, December 15, 1959.

Of course the government is not entitled to recover twice. If the government manages to collect from both the bank and the fraudulent endorser, the bank gets the refund. 6 Comp. Gen. 513 (1927).

In a claim by the payee for the proceeds of a check allegedly cashed over a forged endorsement, the opinion of the government’s handwriting expert will be given great weight and will certainly prevail over the unsubstantiated allegation of the payee. B-128696, August 27, 1956; B-47755, June 2, 1945.

Another group of cases involves the rights of the parties when a payee fraudulently alters the amount of a government check. In 3 Comp. Gen. 626 (1924), the payee of a government check fraudulently raised the amount from \$153.83 to \$653.83. The City National Bank of Tuscaloosa, Alabama, the claimant in the case, accepted the check and credited the payee’s account for the higher amount. The bank sent the check to the Federal Reserve Bank of Atlanta and was given credit for \$653.83. The Treasury Department subsequently discovered the alteration. It was determined that the bank, as a holder in due course, was entitled to payment of \$153.83 on the forged check, based on the principle that “a holder of the instrument in due course . . . not a party to the alteration may enforce payment of it according to its original tenor.” Id. at 627. See also B-133923-O.M., November 18, 1957.

Where an alteration is so apparent as to put a person of average prudence on notice that something is wrong, the bank cashing the check will not qualify as a holder in due course and its claim for the original amount will be denied. 27 Comp. Gen. 674 (1948); B-131762, June 17, 1957; B-126761, March 8, 1956.

Alteration of the amount generally voids the check as to the payee. E.g., B-131762, June 17, 1957. Under Treasury's general procedure, a payee who fraudulently alters a government check is held to have extinguished the government's obligation to him or her and is therefore no longer entitled to the original amount. An exception occurred in B-54418, January 25, 1946, in which a payee had raised the amount from \$73 to \$78 because he believed the government's amount was in error. Under the circumstances, GAO felt that the alteration should not be regarded as a material alteration. The solution: accept the payee's refund of \$5 and forget the matter.

A revolving fund, known as the "Check Forgery Insurance Fund," is authorized to be established in the Treasury for making payments to an innocent payee or special endorsee where a check has been negotiated on a forged endorsement. 31 U.S.C. § 3343. The CFIF is described and discussed in 72 Comp. Gen. 295 (1993) and in Chapter 9.

#### f. Miscellaneous Check Cases

##### (1) Government error

The government pays many of its employees by direct deposit. In a 1981 case, an employee had submitted a change-of-address form to cancel a direct deposit arrangement, which his payroll office processed one pay period earlier than it should have, resulting in one less check going to the bank. The employee incurred overdraft charges when he wrote checks on the deposit he thought was in his bank account but was not. His claim for reimbursement of the overdraft charges was denied. 60 Comp. Gen. 450 (1981). Even though the government had made a mistake, it was nevertheless the employee's responsibility to make sure there was enough money in his account to cover his checks.

A case which we suspect brought a sigh of relief (no pun intended) to a heavily perspiring accountable officer is United States v. Hibernia National Bank, 841 F.2d 592 (5th Cir. 1988). The Army issued a check to pay a contractor. The amount due was \$24,844.50. In the center of the check (where nonfederal checks spell out the amount in words) was the correct amount. On the right side of the check, however, the amount appeared as \$244844.50. The bank credited the payee with the higher amount, most of which was withdrawn and spent before Treasury caught the error. The government sued to get its money back. The court held that, although Treasury checks do not state the amount in words, "the figure in the body of the check, in the place customarily reserved for words, is the controlling amount." Id. at 595. The bank was liable because it failed to exercise ordinary care in processing the check. While it is difficult to argue

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with the bank's allegation that the government was negligent too, the court pointed out that comparative negligence does not apply in commercial transactions. *Id.* at 596. Recovery from the bank obviated any need to consider enforcing liability against the relevant accountable officer(s).

(2) Holder in due course

The Uniform Commercial Code defines “holder in due course” as a holder who takes a negotiable instrument for value, in good faith, without notice that it is overdue or has been dishonored, and without notice of any claims or defenses. UCC § 3-302(1). As we have seen, even a holder in due course is subordinated to the government's right of reclamation in the case of forged or unauthorized endorsements. However, in situations not involving the guarantee of prior endorsements, the holder in due course usually wins.

In 54 Comp. Gen. 397 (1974), for example, GAO applied the UCC in the absence of any contrary federal law or countervailing federal interest, and held that the claim of a holder in due course should prevail over transportation overcharge claims asserted by GAO and a tax indebtedness claim of the Internal Revenue Service.

An earlier case upheld the claim of a holder in due course to a benefit check issued to an ineligible person. The erroneous initial determination of the payee's eligibility was a mistake of fact, not the type of defense that can be asserted against a holder in due course. 12 Comp. Gen. 492 (1933).

(3) Government as endorser

We include one case which does not involve a government check because it illustrates the “flip side” of some of the concepts we have been discussing. The case is First National Bank of Fort Worth v. United States, 8 Cl. Ct. 774 (1985).

An Internal Revenue Service agent went to the premises of a delinquent taxpayer to seize business assets. To avoid the seizure, the proprietor gave the agent a check payable to the IRS for \$100,000. The agent ran to the bank, endorsed the check and converted it to a certified check, which he promptly forwarded to the appropriate IRS district office. Of course, you guessed it—the original check bounced. When the bank was unable to collect from the person who had written the check, it sued the IRS.

The Claims Court noted the broader policy issue of “whether, as a matter of federal tax policy, the United States ought to be relieved of an endorser’s duty to repay where it negotiates taxpayer checks in the course of collecting the revenue.” *Id.* at 777. Whatever the answer might be from the policy perspective, the bank lost this case. When the bank gave the IRS agent the cashier’s check, it “paid” the taxpayer’s check as effectively as if it had given the agent cash, thereby extinguishing the government’s liability as endorser.

#### g. Electronic Funds Transfer

More and more payments these days are being made by electronic funds transfer (EFT)—the so-called “paperless check.”<sup>54</sup> Treasury regulations state that payments are to be made by EFT “when cost-effective, practicable, and consistent with current statutory authority.” 31 C.F.R. § 206.4(a). Additional Treasury regulations are found in 31 C.F.R. Parts 210 and 370. No reason is apparent why the Clearfield Trust doctrine shouldn’t apply with equal force to EFT payments, and it seems fair to regard Treasury’s EFT regulations as having the same primacy vis-a-vis EFT that Part 240 has vis-a-vis paper checks.

The cases thus far tend to cluster around two basic issues. First is the government’s liability if it fails to make a deposit or sends a deposit to the wrong place. Under the regulations, the government is liable to the recipient for the amount of the payment. In other words, the government is liable to do what it should have done in the first place. 31 C.F.R. § 210.10(a).

The government is not liable, however, for any overdraft or other charges the recipient may incur. The government’s liability, states the Treasury regulation, “shall be limited to the amount of the payment.” *Id.* As noted earlier, GAO has denied a claim for reimbursement of overdraft charges resulting from a direct deposit error using a check. 60 Comp. Gen. 450 (1981). There would seem to be no basis for a different answer under EFT, and the Federal Labor Relations Authority has so held. *Federal Union of Scientists and Engineers, NAGE*, 25 F.L.R.A. 615 (1987) (overdraft penalties are employee’s personal responsibility).

The second broad issue is the rights and liabilities of the government and the bank when a recipient dies. If the recipient is getting a recurring payment, a retirement annuity for example, and nobody notifies the government or the bank, the payments will continue to come and, too often, someone with access to the account will keep spending them.

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<sup>54</sup>See GAO report, *Electronic Funds Transfer—Its Potential for Improving Cash Management in Government*, FGMSD-80-80 (September 19, 1980).

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Under the regulations, a bank is liable to the government for the amount of all benefit payments received after the death or legal incapacity of the recipient. However, there are procedures under which the bank can limit its liability to payments made within 45 days after the recipient's death or legal incapacity. 31 C.F.R. § 210.12. In 63 Comp. Gen. 293 (1984), a bank which failed to take advantage of these procedures was found liable. Specifically, it had failed to provide Treasury with the names and addresses of those who made withdrawals from the account after the recipient's death as required by the regulations. See also B-201557, September 28, 1981 (bank which fully complied with regulations not liable for government's error).

Another decision, 59 Comp. Gen. 597 (1980), regarded the Treasury regulations as a "reasonable exercise of discretion" (*id.* at 600), but noted that the limitation of a bank's liability has no effect on a disbursing officer's liability for the full amount of an improper payment, subject of course to relief under the appropriate relief statute.

Legislation enacted in late 1994 makes EFT the preferred method of payment for federal "wage, salary, or retirement payments." Persons beginning to receive these payments on or after January 1, 1995, are required to use EFT, except that anyone may have the requirement waived on written request. Waivers may also be granted by recipient group. 31 U.S.C. § 3332, as amended by Pub. L. No. 103-356, § 402(a) (1994).

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## D. Interagency Claims

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### 1. Damage Claims Between Federal Agencies: The General Rule

As a general proposition, a federal agency or establishment which damages public property, real or personal, under the control of another federal agency or establishment may not pay a claim for that damage. Put another way, federal agencies may generally not assert damage claims against one another. E.g., 65 Comp. Gen. 464 (1986); 25 Comp. Gen. 49 (1945); 6 Comp. Dec. 74 (1899). The rule is sometimes referred to as the "interdepartmental waiver doctrine."<sup>55</sup> The rule applies equally to components of a single agency funded under separate appropriations. See

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<sup>55</sup>See, e.g., 60 Comp. Gen. 406 (1981); 59 Comp. Gen. 93 (1979). The term seems to have evolved from language in 25 Comp. Gen. 49, 55 (1945), approving a "mutual waiver" of damage claims by the Navy and two government corporations. The term is somewhat curious in that, if there is no legal basis for a claim to begin with, there is really nothing to "waive."

65 Comp. Gen. 910, 911 (1986); 3 Comp. Gen. 74 (1923); B-35478, July 24, 1943.

The rule is based in large measure on the premise that ownership of public property is in the United States as a single entity and not in the individual departments or agencies. 41 Comp. Gen. 235, 237 (1961); 22 Comp. Dec. 390 (1916). A number of cases also rely in part on 31 U.S.C. § 1301(a), which restricts the use of appropriations to the purposes for which they were made. 26 Comp. Gen. 235, 239 (1946); 6 Comp. Gen. 171, 172 (1926). The theory is that an agency which is authorized to acquire property is also authorized to maintain or repair that property to keep it suitable for its intended use; its appropriations, if not expressly available for repairs, are nevertheless available by necessary implication without regard to what caused the damage. See 6 Comp. Dec. at 75. If, as these cases indicate, payment by the agency causing the damage would be a payment for an unauthorized purpose, it follows that it would also improperly augment the appropriations of the claimant agency. 29 Comp. Gen. 470, 471 (1950); 6 Comp. Gen. at 172.

The elements of the rule are indicated in the following excerpt from 46 Comp. Gen. 586, 587–88 (1966):

“In those cases where the rule has been applied, there are uniformly involved agencies or instrumentalities of the United States performing governmental functions with Federal funds and replacement of the loss or repair of the damage incurred was required to be effected with Federal funds.”

Viewed from the perspective of this passage, the rule is seen merely as a way of determining which government pocket will bear the expense in certain situations, in other words, a formula for allocating loss. Whether it will apply in a given case depends on whether all of the cited factors are present—(1) federal agencies or instrumentalities, (2) performing governmental functions, (3) using federal funds, and (4) in circumstances under which the damage must be borne by federal funds.<sup>56</sup>

This rule, as with any other rule, applies only in the absence of statutory direction to the contrary. For example, the General Services Administration is required by law to establish and maintain an interagency motor pool system. The law (40 U.S.C. § 491) authorizes GSA to recover all

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<sup>56</sup>Some of the cases suggest that a further test is whether the funds are “subject to the control of the accounting officers of the Government.” E.g., 25 Comp. Gen. 49, 54 (1945). However, analysis of the cases reveals that this is not a material factor as long as both parties are government agencies or instrumentalities and the funds involved are federal funds.

costs connected with operating the system from agency users. Since the expense of repairing damaged vehicles is clearly a cost of operating and maintaining a motor pool, GSA is authorized to charge the using agency with the cost of repair of GSA vehicles damaged through the negligence or misconduct of a driver employed by that agency. 59 Comp. Gen. 515 (1980). The most important statutory exception is the Economy Act, discussed later.

There are also nonstatutory exceptions, usually where one or more of the previously noted elements of the rule is not present. In 41 Comp. Gen. 235 (1961), the San Carlos Irrigation Project was damaged by the crash of a Civil Air Patrol plane. The question was whether the claim of the Bureau of Indian Affairs on behalf of the Pima Indians, the project beneficiaries, against the Air Force would represent a claim by one government agency against another. GAO found that, although the San Carlos Irrigation Project was an instrumentality of the United States, the project funds were moneys held in trust by the government for the Pima Indians. If the general rule were applied, the expense of repairing the damage would be borne not by the government but by the project beneficiaries. Thus, the BIA could present its claim. The decision cautioned, however, that Air Force claims regulations precluded claims by government instrumentalities, and GAO could not require the Air Force to treat the claim as cognizable.

Applying similar reasoning, the Comptroller General found Navy appropriations available to pay a claim for damage to property of the Ryukyu Electric Power Corporation. B-159559, August 12, 1968. The Corporation, while an instrumentality of the United States Civil Administration of the Ryukyu Islands, was not an instrumentality of the United States Government. Further, while funds available to the Civil Administration were government funds, they were in the nature of a trust account held for the sole benefit of the Ryukyuan people. Another case applying the trust reasoning is B-35478, July 24, 1943.

The reverse situation was presented in 46 Comp. Gen. 586 (1966), when the Department of Agriculture sought to file a claim against the government of American Samoa for losses due to improper storage of donated agricultural commodities. Following the rationale of 41 Comp. Gen. 235, GAO found that the general rule would not have prevented a claim by the Interior Department on behalf of the Samoan people against a federal agency for damage to Samoan Government property. Therefore, a federal agency, in this case the Department of Agriculture, could present a claim against the Samoan Government. The decisive factor was that the

Government of American Samoa was not an instrumentality of the United States Government, at least for purposes of this rule, and the fact that the funds of both parties were subject to audit by GAO was immaterial. The same result applied to a claim against the Trust Territory of the Pacific Islands. B-160506, August 15, 1967; B-160506, April 10, 1970. A claim for damage to donated agricultural commodities was held subject to the general rule, and therefore precluded, in B-136949, September 8, 1958, where both parties were government agencies.

The “trust exception” of cases like 41 Comp. Gen. 235 and B-159559, August 12, 1968, has its limits and does not apply where the so-called trust is form over substance. An illustrative case is 65 Comp. Gen. 464 (1986), in which a Navy plane crashed into and destroyed a Federal Aviation Administration instrument landing system. Although the FAA used funds from the Airport and Airway Trust Fund to repair its facility, this “trust fund” is little more than an earmarked appropriation and does not involve the same kind of trust relationship as in the San Carlos and Ryukyu cases. Accordingly, the general rule controlled, and Navy appropriations were not available to reimburse the FAA.

Another element of the rule, noted above, is that the agency sought to be charged must have been performing a governmental function. The absence of this element justified an exception in 14 Comp. Gen. 256 (1934), where a claim was allowed for damage to an Army dredge caused by a government-owned vessel employed solely as a merchant vessel. A similar case is A-36441, May 19, 1931 (government-owned vessel used as merchant ship dragged its anchor across Army cable).

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## 2. Interagency Loans of Personal Property

For the most part, the cases previously cited involve accidental damage to property still in the custody or control of the acquiring agency. The issue of interagency reimbursement for property damage also arises when government property has been loaned by one agency to another. Again, it is well-established that where public property in the custody of one federal agency or establishment is temporarily loaned to another, the cost of repairs or replacement upon return of the property, being for the future use and benefit of the loaning agency, may not be charged against the borrowing agency’s appropriations.

A case often cited for this proposition is 10 Comp. Gen. 288 (1930), holding that the Bureau of the Census was not authorized to reimburse the Marine Corps for the cost of replacing and repairing furniture temporarily

borrowed by the Bureau, notwithstanding an understanding between the parties that the furniture would be returned to the Corps in as good condition as when loaned. In reaching this conclusion the decision stated, at page 289:

“The rule has long been established that where one department loans property or equipment to another it is not entitled to charge for its use or depreciation, or to have lost property replaced or damaged property repaired upon its return to the loaning establishment. . . . [T]he ownership of public property is in the Government and not in a department or branch thereof having possession of the property, and, accordingly, an executive department may not lawfully be reimbursed for the value of such property loaned to, and lost by, another department. . . . If appropriations of an establishment to which property is loaned are not chargeable with the cost of replacing articles lost or for use and depreciation of the property, obviously they are not chargeable with the costs of repairs to restore the property to its former condition upon its return to the loaning establishment. Such repairs are not for the benefit of the borrowing establishment but are for the future use and benefit of the establishment to which the property is returned.”

Early applications of this principle include 22 Comp. Dec. 390 (1916) (cost of replacing lantern loaned by Commerce Department’s Lighthouse Service and washed away during heavy storm could not be charged to borrowing agency); and 10 Comp. Dec. 222 (1903) (no authority to reimburse lending agency for borrowed mule which drowned). An exception occurred in 10 Comp. Gen. 563 (1931) for property loaned for exhibit purposes only. The Architect of the Capitol loaned a model of the United States Capitol to a commission established to administer the government’s participation in the 1927 International Exposition in Seville, Spain. At the close of the Exposition, the model was returned with its dome shattered. GAO construed the resolution establishing the commission as requiring by implication that property be returned in as good condition as when borrowed. An additional factor in that case may have been that there appeared to be no funds under the control of the Architect of the Capitol remaining available to make the repairs.

Another application of the general rule, noted in the above quotation from 10 Comp. Gen. 288, is that an agency may not charge another agency for depreciation of property loaned to it or made available for its use. 8 Comp. Gen. 600 (1929); 25 Comp. Dec. 682 (1919).

#### a. Revolving Funds

The rule prohibiting reimbursement between federal agencies does not apply when the appropriation to be charged with the cost of the use or depreciation of loaned property is a reimbursable or revolving fund. In 3

Comp. Gen. 74 (1923), the Interior Department asked which account it should charge for the depreciation of certain Bureau of Reclamation equipment used for general Interior Department investigations. Concluding that the cost of depreciation of the Bureau's equipment should be charged against the Interior appropriation for general investigations, the Comptroller General stated:

"The general rule is that where a branch of the service permits the use of its equipment by another there is no authority to demand a return or compensation based on the use alone. [Citation omitted.] This applies equally with respect to interbureau matters; however, the rule is predicated on appropriations not reimbursable. The reclamation fund is reimbursable, and the use of equipment purchased therefrom is on a somewhat different basis, the equipment being an asset which should not be permitted to be depreciated from use on other than objects for which the fund was created." *Id.* at 74-75.

More than 60 years later, GAO considered a case involving damaged property. An engineering team on an Air Force base had borrowed two vehicles from the local office of the Air Force Industrial Fund (a working capital fund), and damaged the vehicles on work unrelated to the Industrial Fund. Applying the rationale and result of 3 Comp. Gen. 74, GAO advised that the Industrial Fund should be reimbursed. 65 Comp. Gen. 910 (1986).

b. Repairs for the Future Use of the Borrowing Agency

The general rule is based on the premise that repairs will be for the primary use and benefit of the loaning agency. This assumes that the repairs will be made when the borrowing agency's use of the property is completed or substantially completed. It therefore does not apply when the borrowing agency's use of the property is not completed. Thus, where repairs are necessary for further use of loaned property by the borrowing agency, and therefore for its benefit, the cost is properly charged to the borrowing agency. For example, in 5 Comp. Gen. 162 (1925), the Comptroller General held that repairs to the engine of a seaplane loaned by the Navy to the Coast Guard were authorized under Coast Guard appropriations if the repairs were required for the continued use of the plane by the Coast Guard. See also unpublished decision of September 1, 1921, 1 MS Comp. Gen. 712 (no file number).

c. Economy Act Exceptions

Section 601 of the Economy Act of 1932, 31 U.S.C. § 1535, provides general authority for government agencies to enter into reimbursable interagency agreements. In view of this authority, 10 Comp. Gen. 288 and similar decisions prohibiting the payment of claims for damage to property loaned by one agency to another do not apply where the transaction is

undertaken under an Economy Act agreement which provides for the borrowing agency to pay for repairs.

The earliest case to discuss the Economy Act authority in this context appears to be 30 Comp. Gen. 295 (1951). The Bureau of Land Management of the Interior Department loaned a motorboat to the Agriculture Department's Soil Conservation Service under a written agreement that the Soil Service would "return the boat in as good condition as when received, normal wear and tear excepted." Repairs to the boat's motor were necessary to satisfy this agreement and the question was whether the repair cost was a proper charge against Soil Service appropriations. Responding in the affirmative, the Comptroller General stated:

"[Since the Economy Act permits] for a consideration, the total transfer between departments of material, supplies, and equipment on a permanent basis, [it] would appear to sanction, as well, lesser transactions between departments on a temporary loan basis . . . . [N]o good reason appears why the loaning department may not provide by agreement with the borrowing department that the property be returned in as good condition as when loaned and that the expense of placing the property in such condition be borne by the latter department provided, of course, that its appropriation is available therefor." *Id.* at 296.

In another case, the Air Force loaned two planes to the Army under an agreement which provided that the Army would be liable for damage to or destruction of the property from any cause. One plane was completely destroyed in a crash. In B-146588, August 23, 1961, GAO held that the Army could properly reimburse the Air Force for the lost property, stating:

"[T]he rule prohibiting replacements of or repairs to property generally, no longer applies to loans of personal property as between Government agencies when the loan agreement provides that the borrowing agency must return the property in as good condition as when loaned and that the expense of placing the property in such condition would be borne by that agency, subject, of course, to the availability of its appropriations."

Apart from the repair provision, the loan transaction may be otherwise nonreimbursable, although indefinite-term Economy Act agreements may not be used to effect a permanent transfer of property without reimbursement. 59 Comp. Gen. 366 (1980); 38 Comp. Gen. 558 (1959).

In the absence of an agreement under the Economy Act or similar statutory authority that the borrowing agency will reimburse the loaning agency for the use, repair or replacement of the property, the

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“interdepartmental waiver” rule continues to apply. For example, in 25 Comp. Gen. 322 (1945), the Army lost a 50-ton ball bearing jack borrowed from another Defense establishment. The parties had not entered into an Economy Act agreement providing for reimbursement, although they could have done so. Therefore, the general rule applied and the Army was not authorized to pay for the lost property. See also B-137208, December 16, 1958, in which the Navy had agreed to help the Interior Department transport supplies at a fixed per diem rate of reimbursement. Since no property was actually loaned, the “exception” of 30 Comp. Gen. 295 did not apply and there was no authority for Interior to pay the cost of repairing damage to the Navy ships.

One district court, in the context of a criminal case, has expressed the view, without further discussion, that the Economy Act does not authorize interagency loans of personal property. *United States v. Banks*, 383 F. Supp. 368, 376 (D.S.D. 1974). While GAO has not formally addressed the effect of *Banks* in the interdepartmental waiver context, there does not appear to be any compelling reason to change the decades of precedent starting with 30 Comp. Gen. 295.

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### 3. Claims Involving Real Property

The Economy Act applies only to personal property. Therefore, interagency claims for damage to real property not subject to some other statutory exception are governed by the interdepartmental waiver rule and payment is generally not authorized. *E.g.*, 31 Comp. Gen. 329, *aff'd*, 32 Comp. Gen. 179 (1952) (national forest).

One group of cases involves damage by military departments to real property under the control of other federal agencies in the course of military maneuvers or training exercises. The decisions consistently held that claims for restoration of the property could not be honored. 59 Comp. Gen. 93 (1979) (national forest); 44 Comp. Gen. 693 (1965) (national park recreation area). The military departments now have statutory authority to use operations and maintenance or military construction appropriations “to restore land used by that military department by permit or lease from another military department or Federal agency if the restoration is required by the permit or lease making that land available to the military department.” 10 U.S.C. § 2691(a). The cases remain useful for the limited purpose of expressing the rule that applies in the absence of statutory authority.

Other cases involve damage to government-owned buildings. In a case predating the Federal Property and Administrative Services Act of 1949, GAO advised the Selective Service System that, upon vacating premises in a federal building, it was not liable to reimburse the agency controlling the property for damage to that property. 26 Comp. Gen. 585 (1947). In 57 Comp. Gen. 130 (1977), GAO determined that the 1949 legislation did not affect the interdepartmental waiver rule where the General Services Administration is landlord. Thus, GSA is responsible for making repairs to the buildings it controls, but, as the cited decision held, is not required to reimburse the tenant agency for damages to the tenant agency's property resulting from "building failures," regardless of whether a commercial landlord would be liable in like circumstances.

Applying the interdepartmental waiver rule to a real property case involves the same type of analysis and the same elements of the rule as described previously for personal property cases. For example, 71 Comp. Gen. 1 (1991) involved the noninterfering use by the Commerce Department of a Bonneville Power Administration radio station site to broadcast weather information to the general public. Finding a close analogy to the trust theory of 41 Comp. Gen. 235 in that unreimbursed damage costs would fall upon Bonneville's customers, the decision concluded that Bonneville could charge Commerce for damage costs. A rental charge, however, is unauthorized because it would effectively subsidize those customers in a manner inconsistent with Bonneville's governing legislation. See also B-34528, May 22, 1943 (rule not applicable to property intended to be revenue-producing).

Other cases using the rationale of 71 Comp. Gen. 1 to find the interdepartmental waiver rule inapplicable are B-253291.2, February 14, 1994 (National Guard truck hit Western Area Power Administration transmission structure), and B-253613, December 3, 1993 (Federal Highway Administration construction caused damage to Tennessee Valley Authority transmission towers). In each case, if a damage claim were not permitted, the burden would have fallen not upon the government itself but upon the customers of the claimant agency.

The claim prohibition does not apply with respect to damage occurring while the property was in private ownership prior to being conveyed to the government. B-165067, September 20, 1968. Nor does it apply to property held in trust. 20 Comp. Gen. 581 (1941).

An exception to the interdepartmental waiver rule also exists for lands in the public domain which, by definition, are not dedicated to any specific purpose. Under the Federal Land Policy and Management Act of 1976, the Interior Department's Bureau of Land Management administers lands withdrawn from the public domain for agency use. In reference to a proposed regulation, Interior asked whether, when such land is withdrawn and then relinquished by the using agency, reimbursement by the "borrowing" agency to restore the land to its original condition would be authorized. The BLM is not a typical "lending agency" because the relinquished land is not for its future use and benefit, as in other instances. Accordingly, it would be within the BLM's authority to require the borrowing agency to restore the land in the event of relinquishment. 60 Comp. Gen. 406 (1981).

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#### 4. Settlement of Interagency Claims

As a general proposition, the government cannot sue itself because the same party cannot be both plaintiff and defendant in the same lawsuit. E.g., Defense Supplies Corp. v. United States Lines Co., 148 F.2d 311 (2d Cir. 1945), cert. denied, 326 U.S. 746; United States v. Easement and Right of Way, 204 F. Supp. 837 (E.D. Tenn. 1962); 1 Op. Off. Legal Counsel 79 (1977).<sup>57</sup> Thus, as discussed further in Chapter 13, the resolution of interagency claims is largely a matter of comity. Agencies should first pursue good faith negotiations. If this doesn't work, GAO is available to help. See 4 C.F.R. § 101.3(c). Alternatively, the agencies may invoke the aid of the Attorney General pursuant to Executive Order 12146, § 1-4 (1979). It should be understood, however, that both of these approaches are nothing more than administrative efforts to break the impasse, and that neither GAO nor the Justice Department has enforcement authority.

It is GAO's position that the use of offset to collect an interagency claim is inappropriate. For example, tenant agencies may not reduce Standard Level User Charges (SLUC, or rent in English) payable to the General Services Administration as a collection device. 59 Comp. Gen. 515 (1980) (supplies damaged by roof leak in GSA warehouse); 59 Comp. Gen. 505 (1980) (offset against SLUC payment to recover unrelated debt not authorized). See also 57 Comp. Gen. 130 (1977).

A federal agency may use setoff to collect a claim against the Government of the District of Columbia since the United States Government and the

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<sup>57</sup>There are exceptions, the leading one being United States v. Interstate Commerce Commission, 337 U.S. 426 (1949), in which the Attorney General appeared for both sides. The case is discussed and distinguished in United States v. Easement and Right of Way and in the 1977 Justice Department opinion.

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District of Columbia Government are separate and distinct legal entities. However, for reasons of public policy, it should not use setoff against amounts withheld from the salaries of its employees for payment of the employees' D.C. income tax. 60 Comp. Gen. 710 (1981).

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## E. Statutes of Limitations

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### 1. Introduction

We are tempted to start this discussion by saying that if statutes of limitations didn't exist, we would still be litigating Revolutionary War claims. We suspect, however, that without a citation we might be accused of exaggerating, so try *Lunaas v. United States*, 936 F.2d 1277 (Fed. Cir. 1991), cert. denied, 112 S. Ct. 967.

During the winter of 1777–78, General George Washington made an urgent plea on behalf of his troops at Valley Forge.<sup>58</sup> They were short of just about everything—food, clothing, shelter, ammunition. Without help in a hurry, said G.W., the army would either have to disband or starve. Among those responding to the General's plea was a wealthy Pennsylvania merchant named Jacob DeHaven. Mr. DeHaven allegedly lent the Continental Congress \$50,000 in gold and an estimated \$400,000 in supplies, presumably to be repaid with 6 percent interest. Mr. DeHaven's descendants contend that the loan was never repaid, despite several attempts to petition Congress during the 1800s and early 1900s.

In 1989, plaintiff Lunaas, a descendant of Jacob DeHaven, sued on behalf of all descendants to recover a proportionate share of the repayment, then estimated to be worth as much as \$140 billion, depending on whether and how the interest was compounded. An interesting twist was Article VI, clause 1 of the Constitution, which declared valid all debts contracted by the United States prior to its adoption. This clause, the plaintiffs argued, insulated their claim from the scope of any congressionally enacted statute of limitations. The courts disagreed, and held the suit time-barred under the 6-year statute of limitations of 28 U.S.C. § 2501. There was room for debate as to precisely when the claim can be said to have “accrued” for statute of limitations purposes, but under any theory it had been time-barred for over a century.

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<sup>58</sup>We draw our facts from two sources—the Lunaas case cited in the text and a story entitled *213 Years After Loan, Uncle Sam Is Dunned* by Lisa Belkin, appearing in the *New York Times* for May 27, 1990.

As the Lunaas case illustrates, a statute of limitations is a statutorily prescribed deadline for filing a claim or lawsuit. The purpose of a statute of limitations is to bar stale claims. It promotes justice “by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.” Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348–49 (1944). See also Friedman v. United States, 310 F.2d 381, 401 (Ct. Cl. 1962), cert. denied sub nom. Lipp v. United States, 373 U.S. 932. The theory is that “even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.” Railroad Telegraphers, 321 U.S. at 349; Twitchco, Inc. v. United States, 348 F. Supp. 330, 335 (M.D. Ala. 1972).

If there is no applicable statute of limitations, and no indication that the absence means that Congress doesn’t want one in that particular context, an agency may include a reasonable limitation period administratively by regulation or contract. B-206439, October 27, 1982.

A statute of limitations may use varying terminology to make its point. Ideally, it will use language like “received by” which leaves no room for interpretation. It may also use the word “filed.” The Court of Appeals for the Federal Circuit has held that “filed” is ambiguous and can be interpreted as either “received” or “postmarked.” Parker v. Office of Personnel Management, 974 F.2d 164 (Fed. Cir. 1992). An agency administering a statute of limitations which uses “file” or “filed” should define the term in its regulations. Id. at 168.

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## 2. The Barring Act

### a. Applicability and General Requirements

Informally known as the “Barring Act,” 31 U.S.C. § 3702(b) provides a 6-year statute of limitations on the filing of claims cognizable by GAO. Although, as we have seen, administrative claims settlement authority has existed since 1817, it was not subject to a statute of limitations until 1940. GAO first recommended enactment of a statute of limitations in its 1939 annual report. Annual Report of the Comptroller General of the United States for the Fiscal Year Ended June 30, 1939 at 90–92 (1939). Congress agreed. As the pertinent Senate report noted, “claims which accrued during the period of the Spanish-American War and the period immediately following are not uncommon and claims growing out of the Civil War period are not yet so unusual as to cause comment.” S. Rep. No. 1338, 76th Cong., 3d

Sess. 2 (1940). Originally enacted in 1940, the statute provided a 10-year limitation which was reduced to 6 years in 1975. See 58 Comp. Gen. 738 (1979).

The law provides that claims within the scope of 31 U.S.C. § 3702 “must contain the signature and address of the claimant or an authorized representative” and, with certain exceptions, “must be received by the Comptroller General within 6 years after the claim accrues.” 31 U.S.C. § 3702(b)(1). A claim which does not satisfy the signature requirement does not satisfy the Barring Act. 68 Comp. Gen. 681 (1989), *aff’d*, 69 Comp. Gen. 455 (1990); B-201936, April 21, 1981. Unless the claimant has first made a timely filing, a communication from an agency on behalf of a claimant is not a “claim” for purposes of the Barring Act. 25 Comp. Gen. 670, 673 (1946). Nor is an agency’s request for an advance decision, unless accompanied by a voucher signed by the claimant. B-201936, April 21, 1981. See also 60 Comp. Gen. 354 (1981).

While the statute no longer spells out the consequences of late filing, the version in effect prior to the 1982 recodification of Title 31—31 U.S.C. § 71a (1976)—made those consequences abundantly clear: the claim is “forever barred.” While a claimant who files a barred claim may be furnished an explanation as a matter of courtesy, the statute authorizes a rather abrupt response. It is legally sufficient to simply return the claim with a copy of the Barring Act, and “no further communication is required.” 31 U.S.C. § 3702(b)(3).

The Barring Act expressly exempts claims by “a State, the District of Columbia, or a territory or possession of the United States.” *Id.* § 3702(b)(1)(B).<sup>59</sup> It therefore applies essentially to claims by individuals, business entities, and foreign governments. The exemption for claims by a state does not extend to claims by a city, county, or other political subdivision. B-199838, October 20, 1981; B-159110, June 27, 1966. Nor does it extend to state institutions not acting in a sovereign or governmental capacity. B-212848, October 24, 1983 (University of Virginia).

The Barring Act is limited to claims cognizable by GAO under 31 U.S.C. § 3702(a). Thus, if an agency has authority to make “final and conclusive” settlement of claims of a given type, the Barring Act will not apply. See 42 Comp. Gen. 337, 339 (1963). However, for claims within GAO’s claims settlement jurisdiction, the Barring Act will apply and this is not affected

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<sup>59</sup>Neither GAO nor the courts have apparently had the occasion to address whether a concept of “laches” might nevertheless apply to claims subject to this exemption. Application of the Barring Act to interagency claims also does not appear to have been considered.

by the fact that the administrative agency involved may perform the actual adjudication. *Id.* See also 61 Comp. Gen. 295 (1982) (administrative correction of erroneously withheld deductions). The Barring Act does not apply to court judgments even though GAO issues a “settlement” on them since this authority does not stem from 31 U.S.C. § 3702(a). B-49485-O.M., June 3, 1946. Nor does it bar the defense of recoupment. 63 Comp. Gen. 462 (1984).

GAO has repeatedly stated that it has no authority to waive the Barring Act or to extend the time limit. *E.g.*, 62 Comp. Gen. 80, 83 (1982); 42 Comp. Gen. 622, 624 (1963); 25 Comp. Gen. 670, 672 (1946); B-196634, December 13, 1979. *Cf. O’Callahan v. United States*, 451 F.2d 1390, 1394 (Ct. Cl. 1971) (court “cannot restructure [28 U.S.C. § 2501] to satisfy our own ideas of what is right and just”).<sup>60</sup>

The year 1989 saw an important change in GAO’s interpretation of the Barring Act. Prior to that year, GAO had been consistently literal in insisting that the claim be filed with GAO itself. *E.g.*, 57 Comp. Gen. 281, 283 (1978); 32 Comp. Gen. 267 (1952). Filing with any other agency did not count even though that agency rather than GAO would actually adjudicate the claim and regardless of the reason for the failure to file with GAO. *E.g.*, B-199521, August 19, 1980; B-195564, September 10, 1979. By the late 1980s, it became apparent that a new look at this position was in order. When the Barring Act was first enacted in 1940, agencies could not pay undisputed invoices, let alone claims, once the relevant appropriation had expired. All of these had to come to GAO. As discussed in Chapter 5, this changed starting in 1956. At the same time, GAO’s claims settlement role was evolving into essentially an appellate one, with agencies now adjudicating all of their own claims in the first instance. There was no longer any reason for a rigidly literal interpretation.

Consequently, in December 1989, GAO amended 4 C.F.R. § 31.5(a) to read as follows:

“All claims against the United States Government, except as otherwise provided by law, are subject to the 6-year statute of limitations contained in 31 U.S.C. 3702(b). To satisfy the statutory limitation, a claim must be received by the General Accounting Office, or by the department or agency out of whose activities the claim arose, within 6 years from the date the claim accrued. The burden of establishing compliance . . . rests with the claimant.”

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<sup>60</sup>In applying the Barring Act, GAO mostly follows whatever the Court of Federal Claims does with respect to its similar statute of limitations, 28 U.S.C. § 2501. *See, e.g.*, 71 Comp. Gen. 398, 399 (1992).

Thus, a timely filing with the cognizant agency is sufficient, and there is no longer a need to send claims to GAO solely for Barring Act purposes. While the regulation gives claimants the option of filing with either the agency or GAO, as a practical matter a claimant has nothing to gain by filing a claim with GAO in the first instance. Note also that it is the receipt and not the mailing that counts.

The Barring Act does not apply to claims for money held by the government in trust for others. This concept embraces funds deposited with the government under various statutory authorities which the government holds in the Treasury as funds of the depositor rather than as appropriated funds of the government. 42 Comp. Gen. 622, 623 (1963). It has also been applied to the special deposit account for the proceeds of checks withheld from delivery to certain foreign countries under 31 U.S.C. § 3329. 70 Comp. Gen. 612 (1991). Further examples are 66 Comp. Gen. 40 (1986) (savings deposits of enlisted members of the uniformed services) and B-201669, November 26, 1985 (trust account for Unclaimed Moneys of Individuals Whose Whereabouts Are Unknown established by 31 U.S.C. § 1322). Money erroneously transferred from a trust account to a non-trust account does not lose its trust fund status for purposes of the Barring Act. B-134569-O.M., January 13, 1958.

If securing the necessary evidentiary support is likely to cause substantial delay, claimants may protect their rights by filing their claims subject to later completion of the supporting evidence. See B-197661, May 22, 1980. See also United States v. Kales, 314 U.S. 186 (1941).

#### b. Accrual of the Claim

The Barring Act, as does any statute of limitations, starts to run when the claim first “accrues.” The rule is that a claim first accrues on the date when all events have occurred which fix the liability, if any, of the United States, entitling the claimant to sue or to file a claim. E.g., Chevron U.S.A., Inc. v. United States, 923 F.2d 830 (Fed. Cir. 1991), cert. denied, 112 S. Ct. 167. Lins v. United States, 688 F.2d 784 (Ct. Cl. 1982), cert. denied, 459 U.S. 1147; Empire Institute of Tailoring, Inc. v. United States, 161 F. Supp. 409 (Ct. Cl. 1958); Kinsey v. United States, 13 Cl. Ct. 585 (1987), aff’d, 852 F.2d 556 (Fed. Cir. 1988); 42 Comp. Gen. 622 (1963); 42 Comp. Gen. 337 (1963).

Where a claim is based upon a contractual obligation of the government to pay money, the claim first accrues on the date when the payment becomes due and is wrongfully withheld in breach of the contract. 44 Comp. Gen. 1, 7 (1964); B-203624, July 7, 1982 (both cases citing Cannon v. United States, 146 F. Supp. 827 (Ct. Cl. 1956)). Thus, in one case, a school claimed tuition

payments for courses of instruction given to veterans. The pertinent agreement provided for payments to be made “each four weeks in arrears.” GAO found that a new claim accrued when each payment became due (that is, during each four-week period), notwithstanding that the school may have reserved an option to delay billing until courses had been completed. B-147497, August 31, 1964. See also B-196982, September 4, 1980.<sup>61</sup>

The best summary of the accrual of claims for back pay is 62 Comp. Gen. 275 (1983). The claims fall into two categories for Barring Act purposes. First are claims which are payable at the time the employee performs the services in question, with no other condition precedent to payment. These accrue at the time the work is performed. Id. at 276–77; 58 Comp. Gen. 3 (1978). Second are claims under statutes which require an administrative determination of the claim’s validity before they can be paid, an example being the Back Pay Act. These accrue on the date of the administrative determination. 62 Comp. Gen. at 277, amplifying 61 Comp. Gen. 57 (1981).

Several other types of claims accrue as follows, many of which are based on common sense:

- Claims stemming from military discharges accrue on the date of discharge. Mitchell v. United States, 26 Cl. Ct. 1329 (1992); Jones v. United States, 25 Cl. Ct. 235 (1992).
- A claim for a Fifth Amendment taking accrues at the time the taking occurs. Alliance of Descendants of Texas Land Grants v. United States, 27 Fed. Cl. 837, 842 (1993).
- A claim for travel expenses accrues when the travel is performed. B-233352, June 11, 1990.
- A claim for benefits under the Missing Persons Act accrues when the administrative determination of death is made. 35 Comp. Gen. 600 (1956).
- A claim for a death gratuity under 10 U.S.C. Chapter 75 accrues on the date of death or determination of presumptive death. 42 Comp. Gen. 622 (1963).
- A claim for reimbursement of an amount refunded to the government accrues on the date of the refund. 42 Comp. Gen. 337 (1963).

Both GAO and the Court of Federal Claims and its predecessors have recognized what has come to be known as the “continuing claim” doctrine under which, in the case of compensation due and payable periodically, each failure to pay is regarded as giving rise to a new claim. For example,

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<sup>61</sup>As noted earlier in this chapter under the Contract Disputes Act heading, the CDA provides its own time limitation on the contractor’s initial filing of the claim with the contracting officer. We include this paragraph of text because not all “contractual obligations” are procurement contracts governed by the CDA.

numerous cases state GAO's view that pay claims accrue on a daily basis, i.e., as the work is performed. E.g., 29 Comp. Gen. 517 (1950); B-214533, July 23, 1984; B-210748, August 3, 1983. Thus, where an agency used the wrong rate to calculate an employee's pay, the employee's claim for the correct amount could be allowed for 6 years back from the date the claim was filed. B-214245, July 23, 1984. As this case illustrates, under the continuing claim theory, as long as the recurring situation continues, the claimant is never totally barred but can claim or sue for the last 6 years of the allegedly wrongful deprivation.

Overtime claims are also continuing claims, accruing at the end of each pay period for which the agency fails to pay the correct amount. Doyle v. United States, 20 Cl. Ct. 495 (1990); Blair v. United States, 15 Cl. Ct. 763 (1988). Perhaps the most detailed discussion of the continuing claim doctrine may be found in Friedman v. United States, 310 F.2d 381 (Ct. Cl. 1962), cert. denied sub nom. Lipp v. United States, 373 U.S. 932.

The continuing claim concept has not been without criticism. In Hart v. United States, 910 F.2d 815 (Fed. Cir. 1990), the court limited its application, holding the concept inapplicable to a claim for annuity benefits under the military Survivor Benefit Plan on the grounds that all events fixing the government's liability had occurred by the day after the death of the claimant's spouse. The precise scope of Hart is not clear. For example, in one case, the Claims Court stated that, as a result of Hart, "this court no longer recognizes the continuing claim doctrine." Sankey v. United States, 22 Cl. Ct. 743, 746, aff'd mem., 951 F.2d 1266 (Fed. Cir. 1991). Other cases disagree with Sankey, taking the position that Hart limited the doctrine but did not overrule it. Polite v. United States, 24 Cl. Ct. 508 (1991); Acker v. United States, 23 Cl. Ct. 803 (1991). Still others straddle the fence. E.g., Tabbee v. United States, 30 Fed. Cl. 1, 5 (1993).

GAO has said that it will follow Hart in those situations in which it is clear that all events necessary to establish the claim occurred more than 6 years before the claim was filed. 71 Comp. Gen. 398 (1992). Thus, GAO has applied Hart to deny annuity claims under the Survivor Benefit Plan. Id.; B-249968, February 16, 1993. However, GAO has continued to apply the continuing claim doctrine in claims for back pay (B-251301, April 23, 1993) and military retired pay (B-244827, September 9, 1992; B-246871, June 4, 1992).

### c. Tolling

To "toll" a statute of limitations means to suspend it or temporarily stop it from running. Black's Law Dictionary 1488 (6th ed. 1990). The Barring Act

contains a tolling provision for certain wartime claims. When a claim of any person serving in the United States military or naval forces accrues in time of war, or when war intervenes within 5 years after its accrual, the claim may be presented within 5 years after peace is established or 6 years after accrual, whichever is later. 31 U.S.C. § 3702(b)(2). By its terms this provision applies to members of the Armed Forces and not to civilian employees. Therefore, it could not help a civilian employee of the Navy Department interned with the crew of the U.S.S. *Pueblo* in North Korea in 1968 who filed a claim for overtime compensation for his internment which was not received until after the statute of limitations had expired. B-194474, October 24, 1979.

Another statutory provision relevant to claims of military personnel is section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. § 525, which provides that periods of military service shall not be included in applying a statute of limitations, whether the claim or cause of action accrued prior to or during the service. It is not necessary for the claimant to demonstrate hardship or prejudice resulting from military service in order to qualify for tolling. *Conroy v. Aniskoff*, 113 S. Ct. 1562 (1993). GAO decisions applying the Soldiers' and Sailors' Relief Act in various contexts include 63 Comp. Gen. 70 (1983), 41 Comp. Gen. 812 (1962), and 35 Comp. Gen. 527 (1956). GAO does not regard it as applicable to the 3-year limitation period on requesting waiver under 10 U.S.C. § 2774. B-234163, March 8, 1990.

Another form of tolling is the rule that when a right depends upon the happening of an event or contingency, the claim based on that right does not accrue, and hence the statute of limitations does not begin to run, until the happening of that event or contingency. 20 Comp. Gen. 734 (1941). Under a common application of this principle, if a particular administrative determination or remedy is mandatory, then the statute of limitations will not begin to run until it takes place. If, however, it is permissive, it will not toll the statute. *Brighton Village v. Assoc. United States*, 31 Fed. Cl. 324, 331–33 (1994); *P.B. Dirtmovers, Inc. v. United States*, 30 Fed. Cl. 474, 476–77 (1994). Thus, where, by statute, a claim is not cognizable until some particular determination is made by a designated government agency, the claim does not accrue until that determination has been made. E.g., *Camacho v. United States*, 494 F.2d 1363 (Ct. Cl. 1974); *File v. United States*, 17 Cl. Ct. 823 (1989); 62 Comp. Gen. 227 (1983); 50 Comp. Gen. 607 (1971); 34 Comp. Gen. 605 (1955). A previously noted example is the entitlement to benefits under the Missing Persons Act. 35 Comp. Gen. 600 (1956). Another is determinations under

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the Back Pay Act. 62 Comp. Gen. 275 (1983), amplifying 61 Comp. Gen. 57 (1981).

Seeking help from GAO is permissive. Therefore, coming to GAO for a decision or for review of a claim does not toll the statute of limitations for commencing a lawsuit. Withers v. United States, 69 Ct. Cl. 584 (1930); Carlisle v. United States, 29 Ct. Cl. 414 (1894). Nor, if an administrative claim has not already been timely filed, does it toll the Barring Act. 58 Comp. Gen. 3 (1978).

For purposes of the mandatory versus permissive distinction in the tolling context, mandatory means required by statute as a prerequisite to filing the claim or lawsuit. File, 17 Ct. Cl. at 830–31. Where an administrative remedy is not required by statute, a court has no authority to impose it by rule. Clyde v. United States, 80 U.S. (13 Wall.) 38 (1871).

The doctrine of “equitable tolling” permits a court to waive a statute of limitations when the court finds that considerations of equity warrant it. Prior to 1990, equitable tolling had extremely limited application to claims or suits against the United States. One situation was where the claimant did not know that he or she had a claim. This was limited mostly to cases where the government concealed relevant facts or where the claim was “inherently unknowable” at the accrual date. Welcker v. United States, 752 F.2d 1577, 1580 (Fed. Cir. 1985); 70 Comp. Gen. 292 (1991). In 1990, the Supreme Court held in Irwin v. Department of Veterans Affairs, 498 U.S. 89, that “the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.” Id. at 95–96. “Congress, of course, may provide otherwise if it wishes to do so.” Id.

The full impact of Irwin is not likely to be known for some time. For one good discussion, see the opinion of Chief Judge Nies concurring and dissenting in part in Wood-Ivey Systems Corp. v. United States, 4 F.3d 961, 964–68 (Fed. Cir. 1993). The Court of Federal Claims has indicated that it will be inclined to look for factors like those the Supreme Court noted in Irwin, for example, where a plaintiff actively pursued his remedy but filed a defective pleading, or where a claimant is induced or tricked by his adversary’s misconduct into missing the deadline. D’Andrea v. United States, 27 Fed. Cl. 612 (1993); Glick v. United States, 25 Cl. Ct. 435 (1992). One court has applied equitable tolling to permit a suit under the Federal Tort Claims Act where there were no apparently compelling reasons for the late filing. Schmidt v. United States, 933 F.2d 639 (8th Cir. 1991).

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d. Barring Act vs. Other Statutes

Numerous other statutes of limitations exist in various contexts. For example, under 31 U.S.C. § 3726(a), a claim for transportation services must be received within 3 years after it accrues (generally when the shipment is delivered). The claims are adjudicated by the General Services Administration. An illustrative case is B-197661, May 22, 1980. A claimant may seek GAO review within the 3-year period or not later than 6 months after GSA's decision, whichever is later. 31 U.S.C. § 3726(g); B-227179.2, January 5, 1990.

If a more specific statute of limitations relates to claims cognizable by GAO, its relationship to the Barring Act will depend on whether it applies to the administrative settlement of claims or is limited to the filing of suit. As a general proposition, a specific statute of limitations applicable to administrative settlement will take precedence over 31 U.S.C. § 3702(b), the more general provision. See 4 C.F.R. § 31.5(a) (all claims subject to Barring Act "except as otherwise provided by law"), 31.5(c).

However, the Comptroller General has frequently held that time limitations applicable to the commencement of "actions at law" do not affect the authority to settle claims administratively under 31 U.S.C. §§ 3702(a) and (b). An early discussion of this point appears in B-15487, February 16, 1948, in which it was held that the expiration of the time limit for filing suit in the Court of Claims did not preclude administrative settlement by GAO.<sup>62</sup> The principle was restated in 29 Comp. Gen. 54 (1949). To take a more recent illustration, the time limit for filing a claim under the Fair Labor Standards Act is the six years prescribed by 31 U.S.C. § 3702(b), notwithstanding a two-year statute of limitations for commencing actions at law. Thus, a claim filed under the FLSA more than two years but less than six years after it accrues can still be considered administratively, although the claimant will have lost the right of recourse to the courts. 57 Comp. Gen. 441 (1978). The theory in all of these cases is that expiration of the limitation period for filing suit eliminates that particular remedy but does not destroy the underlying right.

The principle has also been applied with respect to shorter statutes of limitations in the Communications Act (51 Comp. Gen. 20 (1971); B-199458-O.M., February 23, 1981), and the Suits in Admiralty Act (29 Comp. Gen. 54 (1949); B-158984-O.M., June 13, 1966). The Attorney General reached similar conclusions in 41 Op. Att'y Gen. 80 (1951) and 20

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<sup>62</sup>The general statutes of limitations applicable to filing suit in the district courts and the Court of Federal Claims, 28 U.S.C. §§ 2401(a) and 2501, are 6 years. Prior to the 1975 amendment to 31 U.S.C. § 3702(b), the Barring Act was 10 years. Now they are all the same. Thus, while B-15487 remains valid to illustrate the point, that specific situation could no longer arise.

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Op. Att’y Gen. 753 (1894). Also in accord are McClure v. United States, 19 Ct. Cl. 18 (1883), and 5 Comp. Dec. 255 (1898).

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## F. Assignment of Claims

### 1. Anti-Assignment Statutes: Origins and Overview

Since the early days of the Republic, the statutes of the United States have reflected a policy against the assignment of claims in transactions involving the federal government. At the present time, this policy is found in two statutes, 31 U.S.C. § 3727 and 41 U.S.C. § 15, which include the traditional prohibitions and a major exception. The authorities have used a variety of names to refer to these statutes, with no real consistency. As do most courts, we will refer to them collectively as the Assignment of Claims Act.

Subsection (b) of 31 U.S.C. § 3727 prohibits the assignment of claims against the United States except under fairly rigid conditions. It originated as section 1 of legislation enacted in 1853 entitled “An Act to prevent Frauds upon the Treasury of the United States” (10 Stat. 170). The anti-assignment concept was not new even then, however, having its roots in earlier anti-assignment statutes, 9 Stat. 41 (1846) and 1 Stat. 245 (1792).

Subsection (a) of 41 U.S.C. § 15 prohibits the transfer of any government contract or interest therein. This provision derives from Civil War legislation, specifically the Act of July 17, 1862, ch. 200, § 14, 12 Stat. 594, 596.

From the contract perspective, 31 U.S.C. § 3727(b) “pertains to claims for work already done,” while 41 U.S.C. § 15, involving executory contracts, is more concerned with continuing obligations. Tuftco Corp. v. United States, 614 F.2d 740, 744 n.4 (Ct. Cl. 1980). Of course this is only one application of 31 U.S.C. § 3727(b), which on its face applies to all claims. “It would seem to be impossible to use language more comprehensive than this.” Spofford v. Kirk, 97 U.S. 484, 488 (1878).

The remainder of both statutes stems from the Assignment of Claims Act of 1940, Pub. L. No. 76-811, 54 Stat. 1029, designed to aid national defense contracting by authorizing the assignment of contract proceeds within limits. The 1940 legislation added identical provisions to both

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anti-assignment statutes.<sup>63</sup> The authority granted by the 1940 amendments has become a very important element in the financing of government contracts. Pertinent provisions of the Federal Acquisition Regulation (FAR) are found in 48 C.F.R. Subparts 32.8 and 42.12.

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## 2. The Prohibitions

### a. 31 U.S.C. § 3727(b): Assignment of Claims

The portion of the statute prohibiting the assignment of claims is 31 U.S.C. § 3727(b):

“An assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued. The assignment shall specify the warrant, must be made freely, and must be attested to by 2 witnesses. . . . An assignment under this subsection is valid for any purpose.”

Subsection (a) makes clear that subsection (b) applies to any claim, portion of a claim, interest in a claim, or authorization to receive payment. Thus, in order for an assignment to be valid, (1) the claim must have been allowed and its amount determined; (2) the assignment must be executed in the presence of two attesting witnesses; and (3) the warrant for payment must have been issued and must be recited on the assignment.

The third condition—issuance of the warrant—is the most problematic. When the statute was first enacted, the payment process was very different than it is today. In brief, after a claim was examined and allowed, a warrant was issued, signed by an appropriate department official, countersigned by one of the Treasury comptrollers, and then presented to the Treasurer for payment. The process is described in detail in *McKnight’s Case*, 13 Ct. Cl. 292 (1877). Under modern payment procedures, there is no document which corresponds precisely to the old warrant. “Warrant” in this context has since been interpreted to mean the check itself. 8 Comp. Gen. 184 (1928).<sup>64</sup>

The Supreme Court has stated that the primary purpose of the prohibition on the assignment of claims “was undoubtedly to prevent persons of

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<sup>63</sup>The difference in language today results from the 1982 recodification of Title 31 and the reorganization of 41 U.S.C. § 15 by the Federal Acquisition Streamlining Act of 1994 (Pub. L. No. 103-355, § 2451).

<sup>64</sup>As a practical matter, this is of little value to the parties to the assignment and makes compliance a near impossibility. The statute was intended to make assignments difficult, but not impossible. Perhaps a document one step closer to the now-obsolete warrant—although still no great favor to the parties—would be a properly certified payment voucher.

influence from buying up claims against the United States, which might then be improperly urged upon officers of the Government.” United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 373 (1949); United States v. Shannon, 342 U.S. 288, 291 (1952). In other words, it was designed to protect the United States from secret assignment arrangements. American Nat’l Bank and Trust Co. v. United States, 23 Cl. Ct. 542, 546 (1991). Additional purposes are “to prevent possible multiple payment of claims, to make unnecessary the investigation of alleged assignments, and to enable the Government to deal only with the original claimant.” Aetna, 338 U.S. at 373; Shannon, 342 U.S. at 291. Still another is to save to the United States defenses by way of setoff and counterclaim which may be available to the United States against an assignor but not an assignee. Shannon, 342 U.S. at 291–92; B-194029, June 18, 1979.

All of these purposes have one thing in common—the protection of the government. Indeed, it has long been recognized that 31 U.S.C. § 3727(b) exists solely to protect the government, not the parties to the assignment. E.g., Martin v. National Surety Co., 300 U.S. 588, 594 (1937); Goodman v. Niblack, 102 U.S. 556, 560 (1880); 47 Comp. Gen. 522, 524 (1968). The courts have interpreted the statute in light of this overall purpose. National Surety, 300 U.S. at 596. Under this approach, the courts have developed two important principles which largely ameliorate the apparent strictness of the statutory language:

- Subsection 3727(b) applies only to voluntary assignments and not to assignments by operation of law.
- Since 31 U.S.C. § 3727(b) is for the protection of the government, most (but not all) courts hold that it can be waived by the government.

Prior to 1982, the statute declared noncomplying assignments to be “null and void,” and the courts often reached precisely this result. E.g., National Bank of Commerce of Seattle v. Downie, 218 U.S. 345 (1910); Amoco Oil Co. v. United States, 3 Cl. Ct. 785 (1983). With the development of the waiver doctrine, it is now more accurate to say that a noncomplying assignment is voidable at the option of the government. Apparently to reflect this judicial evolution, the 1982 recodification of Title 31 dropped the “null and void” language. See Matter of Topgallant Lines, Inc., 125 B.R. 682, 690–91 (Bankr. S.D. Ga. 1991).

Even before the recodification, “null and void” did not mean null and void for all purposes. The Assignment of Claims Act addresses the validity of assignments as against the United States. It does not purport to address

the validity of the assignment as between the assignor and assignee, which is a separate question. Thus, an assignment which is invalid with respect to the government may nevertheless be valid between the parties. Segal v. Rochelle, 382 U.S. 375 (1966); Martin v. National Surety Co., 300 U.S. 588 (1937); 55 Comp. Gen. 744, 746 (1976); B-176890, April 18, 1973; B-169420, October 22, 1970.

b. Assignments to Which 31 U.S.C. § 3727(b) Applies

The rule is firmly established that 31 U.S.C. § 3727(b) applies to voluntary assignments and not to assignments by operation of law. E.g., National Bank of Commerce v. Downie, 218 U.S. 345, 356 (1910); Erwin v. United States, 97 U.S. 392 (1878); 36 Comp. Gen. 157 (1956). Thus, a judgment or court order directing payment to someone other than the claimant is not an assignment prohibited by section 3727(b). Houston v. Ormes, 252 U.S. 469, 473–74 (1920) (payment to court-appointed receiver); 24 Comp. Dec. 779 (1918) (payment to plaintiff’s counsel). Some other examples of assignments arising by “operation of law” are as follows:

- Transfer by intestate succession. Erwin v. United States, 97 U.S. 392 (1878).
- Transfer by consolidation or merger with the successor of a claimant corporation. Seaboard Air Line Ry. v. United States, 256 U.S. 655 (1921).
- Transfer by judicial sale. Western Pacific RR Co. v. United States, 268 U.S. 271 (1925).
- Transfer by subrogation to an insurer. United States v. Aetna Casualty & Surety Co., 338 U.S. 366 (1949); Quarles Petroleum Co. v. United States, 551 F.2d 1201 (Ct. Cl. 1977); 36 Op. Att’y Gen. 553 (1932).
- Transfer by statutory provision to a trustee or receiver in bankruptcy. Erwin, 97 U.S. at 397; McKay v. United States, 27 Ct. Cl. 422 (1892). Similarly, a subsequent assignment by the assignee in bankruptcy is also exempt from the statute when judicially mandated. 3 Comp. Gen. 623 (1924); B-183058, March 7, 1975. However, the exemption does not extend to a “limited receiver” appointed solely to collect funds from the government on behalf of a single creditor. Patterson v. United States, 354 F.2d 327 (Ct. Cl. 1965); B-244992.2, November 16, 1993.
- Assignment pursuant to court order where there is no suggestion of collusive or sham litigation. Keydata Corp. v. United States, 504 F.2d 1115 (Ct. Cl. 1974). See also 36 Comp. Gen. 157 (1956); B-183058, March 7, 1975.

In addition, the Supreme Court has recognized exceptions for two types of voluntary assignments because of their close relationship to “operation of law” situations. First is transfer by testamentary disposition (will), by analogy to intestate succession. Erwin, 97 U.S. at 397 (the reference to

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“devises” means those taking under a will); Shannon, 342 U.S. at 292. Second is the voluntary assignment by an insolvent debtor for the benefit of creditors, by analogy to assignments in bankruptcy. Goodman v. Niblack, 102 U.S. 556 (1880); Shannon, 342 U.S. at 292; 47 Comp. Gen. 522 (1968). With these two exceptions, voluntary assignments are subject to the Assignment of Claims Act and must meet the requirements of 31 U.S.C. § 3727(b) in order to bind the government.

(1) Attorney’s liens

A common application of the rule that voluntary assignments are subject to the Assignment of Claims Act is the attorney’s lien. An early Supreme Court case, Nutt v. Knut (we do not make these up), 200 U.S. 12 (1906), dealt with a contingent fee agreement under which an attorney was to receive one-third of the amount allowed on a claim against the United States. By itself, no problem with that, said the Court. It does no more than establish the basis for determining the attorney’s compensation. Id. at 21. See also Wright v. Tebbitts, 91 U.S. 252 (1875). However, the agreement also purported to give the attorney a lien on the claim. “In effect or by its operation it transferred or assigned to the attorney in advance of the allowance of the claim such an interest as would secure the payment of the fee stipulated to be paid,” and this violated the Assignment of Claims Act. Knut, 200 U.S. at 20. This was followed some years later in Calhoun v. Massie, 253 U.S. 170, 175 (1920).

There is now a considerable body of case law for the proposition that an attorney’s retainer or contingent fee agreement based on either a percentage of the amount to be recovered or a specific dollar amount to be paid from the recovery does not create an enforceable lien against the United States, regardless of its validity as between the attorney and client.<sup>65</sup> An often-cited Court of Claims case is Pittman v. United States, 116 F. Supp. 576 (Ct. Cl. 1953), cert. denied, 348 U.S. 815. A contractor hired an attorney to prosecute a claim against the government and agreed to pay the attorney 15 percent of the amount recovered, to be paid from the recovered funds. The government allowed the claim but offset the entire amount of the award on account of other outstanding liabilities. The attorney sued, arguing that he had a lien against the award from the time it was made. Wrong, held the court. “Call it an attorney’s lien, an equitable interest, or by any other name, the contract between plaintiff and his client gave over to plaintiff an interest in his client’s claim against the

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<sup>65</sup>Of course an assignment in compliance with section 3727(b) would be effective, but this is unlikely since fee agreements are customarily entered into at a very early stage of the representation.

Government,” a violation of the statute. Id. at 579. The court discussed and applied Nutt v. Knut, which—

“stands for the broad principle that any attempt to impress a lien upon the proceeds of a claim against the United States as security for the payment of an attorney’s fee is within the ends to which the prohibition of [31 U.S.C. § 3727(b)] was aimed.”

Id. at 580.<sup>66</sup> The fact that the attorney’s lien is prescribed by state statute makes no difference. Tucker v. United States, 7 Cl. Ct. 374 (1985).<sup>67</sup>

A variation occurred in Schwartz v. United States, 16 Cl. Ct. 182 (1989). Plaintiff attorney had represented a client in prosecuting a claim with the Bureau of Indian Affairs. The plaintiff, pursuant to a contingent fee agreement with his client, asked the BIA to issue the check to the attorney and client jointly, which a BIA employee apparently agreed to do. Instead, however, the BIA deposited the money in the client’s Individual Indian account, whereupon the client withdrew the money. The attorney then sued the government for his fee. The court held that the purported assignment was not binding on the government, and that the BIA employee’s alleged promise was not enough to constitute a waiver of 31 U.S.C. § 3727(b).

## (2) Tax refunds

Tax refund claims are fully subject to the Assignment of Claims Act. E.g., In re Freeman, 489 F.2d 431 (9th Cir. 1973). An assignment to a “discounter”—one who advances funds to a taxpayer and obtains in return an assignment of the refund—is not enforceable against the government. The Internal Revenue Service cannot be required to transmit the refund to the discounter. Knight v. United States, 596 F. Supp. 540 (M.D. Ga. 1984), aff’d mem., 762 F.2d 1022 (11th Cir. 1985); In re R & L Refunds, Inc., 96 B.R. 105 (Bankr. W.D. Ky. 1988). An assignment of a tax refund to the taxpayer’s attorney is similarly unenforceable against the government, but may nevertheless be valid between the parties. Danning v. Mintz, 367 F.2d 304 (9th Cir. 1966); In re Lagerstrom, 300 F. Supp. 538 (S.D. Ill. 1969).

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<sup>66</sup>See also United States v. Transocean Air Lines, Inc., 386 F.2d 79 (5th Cir. 1967), cert. denied, 389 U.S. 1047; Conlon v. Adamski, 77 F.2d 397 (D.C. Cir. 1935); Jung v. United States, 701 F. Supp. 175 (E.D. Wis. 1988); Kearney v. United States, 285 F.2d 797 (Ct. Cl. 1961); 49 Comp. Gen. 44, 47 (1969); B-179424, November 13, 1973; B-63597, February 21, 1952; B-68587, November 10, 1949; B-68587, July 14, 1949.

<sup>67</sup>There is lack of unanimity on this point. The court in Malman v. United States, 202 F.2d 483 (2d Cir. 1953), found an assignment by operation of law. In Knight v. United States, 982 F.2d 1573 (Fed. Cir. 1993), the court found a similar lien ineffective, basing its holding on sovereign immunity and the supremacy clause.

Under one type of arrangement, the refund is paid into an account at a bank which has made a “refund anticipation loan” to the taxpayer. Noncompliance with the Assignment of Claims Act does not impede payment of the refund into the account since the account is in the name of the taxpayer. With the IRS thus out of the picture, the rights and liabilities of the nonfederal parties are determined under state law. E.g., In re Martin, 167 B.R. 609 (Bankr. D. Ore. 1994).

In United States v. Sinton Dairy Foods Co., 775 F. Supp. 1417 (D. Colo. 1991), the IRS issued a refund check to a corporation and it was negotiated by a successor corporation which had acquired all of the payee corporation’s assets, including potential tax refunds, by assignment. Finding that the assignment was voidable at the government’s discretion, and that the government retained a property interest in the check until cashed by the payee, the court held the IRS entitled to recover the refund.

A provision of the Bankruptcy Code, 11 U.S.C. § 1325(c), authorizes the court, upon confirmation of a Chapter 13 plan, to “order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.” In In re I.C. Cochran, 141 B.R. 270 (M.D. Ga. 1992), the court found this provision in conflict with the Assignment of Claims Act and held that it impliedly modified the Act to permit the assignment of tax refunds to a trustee by means of income deduction orders. The court distinguished the type of assignment considered in cases like Knight. Id. at 273.

### (3) Just compensation claims

The relationship of the Assignment of Claims Act to claims resulting from Fifth Amendment takings depends on the type of proceeding involved. It has been held that the Assignment of Claims Act does not apply to the distribution phase in a Declaration of Taking Act condemnation. United States v. 717.42 Acres of Land, 955 F.2d 376 (5th Cir. 1992). In this type of proceeding, the government files a declaration of taking and deposits the estimated just compensation into the registry fund of the court.<sup>68</sup> Title passes by operation of law upon filing the declaration, and the United States becomes irrevocably committed to pay.

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<sup>68</sup>Another case involving money paid into a court’s registry fund is Martin v. National Surety Co., 300 U.S. 588 (1937), upon which the 717.42 Acres court relied. Rival claims in that case were an assignment to a contractor’s surety and a power of attorney given to a creditor. The Court found the Assignment of Claims Act inapplicable because the “fund is in court to be distributed to rival claimants, with the Government discharged irrespective of the outcome.” 300 U.S. at 595.

In contrast, in a “complaint only” condemnation, the court’s determination of just compensation is essentially an offer which the government is free to accept or reject, and a taking does not occur unless and until the government makes payment. In this type of condemnation, an assignment of the landowner’s interest in the award is subject to the Assignment of Claims Act. United States v. Certain Lands in the Town of Highlands, 46 F. Supp. 386 (S.D.N.Y. 1942).

The assignment of an inverse condemnation claim is also subject to 31 U.S.C. § 3727(b). Cooper v. United States, 8 Cl. Ct. 253 (1985). Cooper was a suit by a person who had acquired land which had been flooded by actions of the Corps of Engineers. The court held that only the owner at the time of the taking is entitled to be compensated for the taking, and that an attempt by the owner to assign his claim to a subsequent owner was prohibited by the Assignment of Claims Act.

#### (4) Federal salaries

Early cases found the Assignment of Claims Act fully applicable to requests by a government employee to a disbursing officer to pay the employee’s salary to some third person. 11 Comp. Dec. 790 (1905). Combining the Assignment of Claims Act with 31 U.S.C. § 3322(a), which directs disbursing officers to draw checks only in favor of the person to whom payment is to be made, agencies could not, without statutory authority, issue composite salary checks (lump-sum check payable to a bank covering the salaries of several employees with accounts in that bank). 39 Comp. Gen. 372 (1959); 12 Comp. Dec. 227 (1905); B-141025, December 20, 1960. The cases drew an exception to permit employees to purchase United States Savings Bonds by payroll deduction and have them registered in the name of some other person. 21 Comp. Gen. 942 (1942).

There is now statutory authority for direct deposit and for the issuance of composite checks for federal salaries. 31 U.S.C. § 3332. The background of the legislation is discussed in 48 Comp. Gen. 138 (1968). As amended in 1994 by Pub. L. No. 103-356, § 402(a), the statute no longer explicitly addresses composite checks, although the authority would still be included. There is also authority for a federal employee “to make allotments and assignments of amounts out of his pay for such purpose as [the employing agency] considers appropriate.” 5 U.S.C. § 5525. This statute permits, for example, the collection of union dues by payroll deduction. 42 Comp. Gen. 342 (1963).

(5) Other voluntary assignments

It is difficult to draw any further generalizations except to restate the rule that voluntary assignments do not bind the government unless made in compliance with 31 U.S.C. § 3727(b). Some illustrations reaching this result follow:

- Claim brought by a subsequent purchaser for damage to buildings caused by military personnel under a lease with the prior owner. United States v. Shannon, 342 U.S. 288 (1952). The difference between this case and the inverse condemnation case noted above is that the damage in Shannon was only temporary, thereby generating a tort, rather than an inverse condemnation, claim. The Assignment of Claims Act application, however, is the same.
- Assignment of claim under federal flood insurance policy. Diamond v. Federal Emergency Management Agency, 689 F. Supp. 163 (E.D.N.Y. 1988).
- Assignment of claim for compensation for oil spill cleanup expenses under Federal Water Pollution Control Act. Amoco Oil Co. v. United States, 3 Cl. Ct. 785 (1983).

A final case is Kingsbury v. United States, 563 F.2d 1019 (Ct. Cl. 1977), which we are tempted to subtitle “the ballad of Bruce and Valerie.” Bruce, an enterprising young man, was arrested in 1971 for importing marijuana, convicted, fined, and slapped in jail. Disappointed that the parole board would not consider parole after only 3 months of the sentence, he escaped, stole a prison vehicle, and went to meet his wife, Valerie, with whom he had planned the escape, at a prearranged location. Before they could get away in Valerie’s car, however, they were caught and the FBI seized over \$42,000 in cash, most of it from Valerie’s purse. Of the seized funds, \$15,000 went to the court for Bruce’s fine and the IRS took the rest.

Bruce and Valerie pleaded guilty to new charges stemming from the escape. Valerie, now pregnant, was placed on probation and Bruce was lodged temporarily in a local treatment center until the baby was born. Shortly after delivering the baby, Valerie executed an assignment to Bruce’s father, ostensibly in repayment of a loan, of most of the money the FBI had seized. A week later, Bruce escaped again and Bruce, Valerie, and baby disappeared into the sunset.

Bruce’s father then hired a lawyer and filed suit to collect on the assignment he was left holding. The court found the claim barred by the Assignment of Claims Act. Whatever else the statute may or may not have

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been intended to cover, surely it reached “an assignment made by a convicted criminal on the eve of her flight from justice.” Id. at 1024. And you thought this stuff was boring!

c. 41 U.S.C. § 15: Transfer of Contracts

Subsection (a) of 41 U.S.C. § 15 provides:

“No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.”

In one sense, the purposes of 41 U.S.C. § 15(a) are similar to those of 31 U.S.C. § 3727(b), and it is not uncommon for courts to state that the purposes of both statutes, considered together, are to prevent fraud and avoid multiple litigation. E.g., United International Investigative Services v. United States, 26 Cl. Ct. 892, 897–98 (1992). More specifically, from the government contracting perspective, 41 U.S.C. § 15(a) was intended to ensure that the government would not enter into a contract with “A” only to have “B” show up on its doorstep to perform, or to learn that “A” is not a legitimate contractor but merely a speculator who intended all along to sell the contract to someone else. As the Court of Claims put it in an early case, 41 U.S.C. § 15(a) was enacted “to secure to the United States the personal attention and services of the contractor,” and “to secure Government contracts to bona-fide contractors, who intended to perform . . . , and to prevent parties from acquiring mere speculative interests.” Francis v. United States, 11 Ct. Cl. 638, 640–41 (1875). See also Thompson v. Commissioner, 205 F.2d 73, 76 (3d Cir. 1953); 52 Comp. Gen. 462, 465–66 (1973). Another objective was to prevent a bidder “from making several bids, one by himself and others by his friends and employees, to be afterwards consummated by assignments of the contract by them to the real bidder, for whom they all acted.” 19 Op. Att’y Gen. 186, 187 (1888).

However one may choose to cast the specific objectives, the overall purpose of 41 U.S.C. § 15(a), as with 31 U.S.C. § 3727(b), is to protect the government. Hobbs v. McLean, 117 U.S. 567, 576 (1886); 68 Comp. Gen. 53, 55 (1988); 32 Comp. Gen. 227, 228 (1952); 4 Comp. Gen. 184, 185 (1924).

There is one structural difference between 41 U.S.C. § 15(a) and 31 U.S.C. § 3727(b). Unlike 31 U.S.C. § 3727(b), 41 U.S.C. § 15(a) does not prescribe procedures for a valid assignment; it simply prohibits them. As with 31 U.S.C. § 3727(b), however, the courts and other bodies which consider 41

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U.S.C. § 15(a) do not apply it literally but construe it in accordance with its perceived purposes. Other significant similarities with 31 U.S.C. § 3727(b) are:

- 41 U.S.C. § 15(a) does not apply to assignments or transfers occurring by operation of law. E.g., United International Investigative Services v. United States, 26 Cl. Ct. 892, 898 (1992); 10 Comp. Dec. 159 (1903).
- Since 41 U.S.C. § 15(a) is for the government's protection, the government can waive it and choose to accept the assignment. E.g., Thompson v. Commissioner, 205 F.2d 73, 78 (3d Cir. 1953) (statute “does not act as a self-executing nullification”).

A lease, of course, is a form of contract and a common question has been the application of 41 U.S.C. § 15(a) where the government leases property and the owner subsequently sells the property to a new owner. Early cases established the proposition that the transfer of title to premises leased to the government, where the lessor has nothing to do but collect the rent, does not violate the statute and the rent may be paid to the transferee. Freedman's Saving and Trust Co. v. Shepherd, 127 U.S. 494, 504 (1888); 4 Comp. Gen. 193 (1924). However, this principle does not apply to the more contemporary form of lease under which the lessor does not merely collect rent but is obligated to provide a variety of supplies and services. Broadlake Partners, GSBCA No. 10713, 92-1 BCA ¶ 24,699 (1991).

Also, transfers of government contracts incident to a corporate merger or consolidation, the sale of an entire business, or the transfer of the entire portion of the business embraced by the contract have been held valid. 51 Comp. Gen. 145, 147 (1971);<sup>69</sup> 48 Comp. Gen. 196, 198 (1968); 9 Comp. Gen. 72 (1929); B-184665, September 25, 1975. In applying this principle, there is a distinction between the sale of an entire business and the sale of the assets of an enterprise. A transfer incident to the former is not a transfer for purposes of 41 U.S.C. § 15(a); one incident to the latter is. CBI Services, Inc., ASBCA No. 34983, 88-1 BCA ¶ 20,430 (1987); Mancon Liquidating Corp., ASBCA No. 18304, 74-1 BCA ¶ 10,470 (1974).

Where a prime contractor retains responsibility for contract performance, subcontracting of a substantial portion of the work under the contract is

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<sup>69</sup>This case also considered a different type of transfer—the transfer of a bid as part of a transfer of assets by a financially troubled bidder after bid opening but prior to award. GAO found the attempted novation improper under these circumstances. The FAR mandates rejection of the bid “unless the transfer is effected by merger, operation of law, or other means not barred by [the Assignment of Claims Act].” 48 C.F.R. § 14.404-2(l).

not considered an assignment or transfer of that contract. B-186341, September 7, 1976.

Finally, nothing in the Assignment of Claims Act limits it to procurement contracts. The prohibition and exclusions apply equally to contracts of sale. Examples are Benjamin v. United States, 318 F.2d 728 (Ct. Cl. 1963); Maffia v. United States, 163 F. Supp. 859 (Ct. Cl. 1958); and Monchamp Corp. v. United States, 19 Cl. Ct. 797 (1990).

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### 3. Contract Financing: The Assignment of Contract Payments

#### a. The Assignment of Claims Act of 1940: A Synopsis

With much of the planet already engulfed in war and many seeing America's involvement just over the horizon, Congress enacted legislation in late 1940 to aid defense production by inducing financing institutions to lend money to government contractors with which to finance the performance of their government contracts. The inducement was security in the form of assignment of the contract proceeds. This financing scheme was intended to broaden competition by better enabling small businesses to compete for defense contracts. See Continental Bank and Trust Co. v. United States, 416 F.2d 1296, 1299 (Ct. Cl. 1969); 55 Comp. Gen. 155, 157-58 (1975). The 1940 legislation was cast as an exception to the existing prohibitions of 41 U.S.C. § 15 and what is now 31 U.S.C. § 3727, and made identical amendments to both statutes.

What contracts are eligible? The Act applies to any government contract providing for payments aggregating at least \$1,000. 31 U.S.C. § 3727(c); 41 U.S.C. § 15(b); FAR, 48 C.F.R. § 32.802(a). This includes purchase orders. See 48 C.F.R. § 32.806(a)(1). Although defense contracts may have been the motivating force behind the law, no such restriction appears in the statute.

Assignments may be made under Letters of Intent or comparable documents to the extent that they give rise to valid contracts. B-29624, October 29, 1942. Assignments may not be made, however, until a contract obligation actually arises. B-24402, September 21, 1942. One instrument of assignment may cover several contracts. Id.

Payments under bills of lading which are themselves contracts may be assigned so long as each bill provides for payment of \$1,000 or more. 21

Comp. Gen. 265 (1941). Where goods are transported pursuant to a previously executed contract, the bills of lading are merely a receipt for the goods to be transported, and payment for the transportation is made under the previously executed master contract rather than under a particular bill of lading covering the service. In this situation, the \$1,000 limit in the Assignment of Claims Act applies to the aggregate. 23 Comp. Gen. 989 (1944).

Payments under a requirements or indefinite-quantity contract cannot be assigned unless the contract gives rise to a definite commitment on the part of the government to order services or supplies requiring a minimum expenditure of \$1,000. 50 Comp. Gen. 434, 440 (1970); 26 Comp. Gen. 873 (1947); 23 Comp. Gen. 989 (1944). If the contract authorizes ordering and payment by multiple government activities, the \$1,000 threshold applies to individual orders. FAR, 48 C.F.R. § 32.803(c).

Who can receive the assignment? The assignee must be a bank, trust company, or other financing institution. More about this requirement later.

What can be assigned? The law authorizes the assignment of accounts receivable under a government contract—money “due or to become due” under the contract. 31 U.S.C. § 3727(c); 41 U.S.C. § 15(b). The FAR puts it in plain English: what you can assign is “the right to be paid by the Government for contract performance.” 48 C.F.R. § 32.801. This is all you can assign. The law does not permit an assignment of the contract itself, which remains prohibited by 41 U.S.C. § 15(a). 52 Comp. Gen. 462, 464 (1973); 20 Comp. Gen. 295 (1940). Also, the authority to assign contract proceeds does not include the authority to assign the right to settle, adjust, or compromise claims. A purported assignment of this right need not be recognized by the United States. 35 Comp. Gen. 104 (1955).

The assignment must cover all amounts payable under the contract and not already paid. Partial assignments are invalid unless expressly permitted by the contract. 31 U.S.C. § 3727(c)(2)(A); 41 U.S.C. § 15(b)(2); FAR, 48 C.F.R. § 32.802(d)(1); B-172059, June 29, 1971.

Assignment of an amount payable or to become payable under a government contract includes any additional amounts which may become due pursuant to a change order or modification of the original contract. 23 Comp. Gen. 943 (1944).

Is the government required to recognize the assignment? The agency has some discretion at the contract formation stage. The agency may prohibit assignments if determined to be in the government's interest, and the FAR prescribes a contract clause to be used in that situation. 48 C.F.R. §§ 32.803(b), 32.806(b), 52.232-24. If the agency does not elect to prohibit assignments, the FAR prescribes another clause generally setting forth what the Assignment of Claims Act authorizes. 48 C.F.R. §§ 32.806(a), 52.232-23. The choice is up to the contracting agency. 20 Comp. Gen. 458, 460 (1941). If the agency does not insert the prohibition clause, there is authority for the proposition that the authorization clause will be deemed to be incorporated into the contract by operation of law whether expressly included or not. Rodgers Construction, Inc., and Federal Insurance Co., IBCA Nos. 2777 et al., 92-1 BCA ¶ 24,503, at 122,295 (1991).

If the contract does not include a no-assignment clause, then an assignment made in compliance with the statute is a valid assignment for all purposes. 41 U.S.C. § 15(c).<sup>70</sup> There is no requirement to obtain government consent or approval, and the government cannot arbitrarily refuse or disavow the assignment. Produce Factors Corp. v. United States, 467 F.2d 1343, 1351 (Ct. Cl. 1972); 60 Comp. Gen. 510, 513 (1981).

Is there any required nexus between the assignor and assignee? Yes. The assignee must render financial assistance which facilitates the performance of a government contract. 68 Comp. Gen. 215 (1989). Without this financial participation by the assignee, the assignment is not valid against the government. E.g., American National Bank and Trust Co. v. United States, 22 Cl. Ct. 7 (1990); B-175670, May 25, 1972; B-171552, April 27, 1971. Generally, the financial participation will take the form of a loan which the assignee has made to the assignor to finance the assignor's performance of the contract. In this connection, the FAR defines assignments as assignments given "as security for a loan to the contractor." 48 C.F.R. § 32.801.

This does not mean that there must be a one-to-one relationship between a particular loan and a specific contract. The assignment does not have to be contemporaneous with the loan. Manufacturers Hanover Trust Co. v. United States, 590 F.2d 893, 897 (Ct. Cl. 1978). However, the proceeds of the loan must either have been used in the performance of, or at least available for use in the performance of, the contract whose proceeds are being assigned Id. at 896-97; First National City Bank v. United States, 548

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<sup>70</sup>When Title 31 was recodified in 1982, the recodifiers erroneously attached the corresponding "valid for all purposes" language to subsection (b) when in fact it applies to the 1940 portion of the statute, correctly reflected in the structure of 41 U.S.C. § 15.

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F.2d 928 (Ct. Cl. 1977). As both of these cases point out, this obviously excludes contracts which are fully performed at the time of the loan.<sup>71</sup> See also 68 Comp. Gen. 215, 218–19 (1989). The same principle applies where the purported assignment predates the contract by several years. B-216549, December 5, 1984. In any event, as long as the “used or available” test is met, the loan need not have been made to finance performance of the particular contract whose proceeds are being assigned; if the assignor has several government contracts, it is sufficient that the loan was made for the purpose of financing government contracts in general. Peterman Lumber Co. v. Adams, 128 F. Supp. 6 (W.D. Ark. 1955); 49 Comp. Gen. 44, 46 (1969). See also Continental Bank and Trust Co. v. United States, 416 F.2d 1296, 1301–02 (Ct. Cl. 1969) (recognizing validity of assignment of several contracts under revolving credit financing under which it would be difficult to associate specific amounts loaned with particular contracts).

In addition, it has been held that the Act does not prohibit indirect financing. Coleman v. United States, 158 Ct. Cl. 490, 495 (1962); 55 Comp. Gen. 155, 157 (1975). “[T]he financial assistance from the bank does not have to pass directly from the assignee to the assignor.” 68 Comp. Gen. 215, 217 (1989).

GAO feels that, as a general proposition, an assignment to a financing institution should specify the particular contract involved, and therefore, a blanket assignment (an assignment of all accounts receivable) does not meet the requirements of the Act. B-216549, December 5, 1984; B-195629, September 7, 1979; B-120222, October 27, 1955. However, the lack of specificity of a blanket assignment can be cured for purposes of perfecting a valid assignment under the Act when “there are in existence later amendment schedules [specifying the government contract] signed by the assignor, which purport to be an integral part of the original [blanket] assignment instrument.” B-171125, February 4, 1971. Likewise, an assignor’s secured note which assigned its accounts receivable to a bank and which was executed during the period of the government contract, was recognized under the Assignment of Claims Act where the contractor/assignor’s schedule of accounts receivable listed the government contract account. 58 Comp. Gen. 619 (1979).

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<sup>71</sup>One GAO decision suggests that an assignment may be made at any time before the contract is closed, which includes some period after performance has been completed. B-125205, November 14, 1955. The continued validity of this case must be questioned in light of the court’s “used or available” test and later GAO decisions which follow and apply it. E.g., 62 Comp. Gen. 683 (1983); B-216549, December 5, 1984.

Are multiple or successive assignments permissible? The law provides that an assignment may be made to only one party, except that the one party may be an agent or trustee for two or more parties participating in the financing. 31 U.S.C. § 3727(c)(2)(B); 41 U.S.C. § 15(b)(2). “Trustee” in this context does not require a formal designation. Chelsea Factors, Inc. v. United States, 181 F. Supp. 685, 689 (Ct. Cl. 1960).

Both portions of the statute also prohibit reassignment. This prohibition is limited essentially to subassignments by the original assignee. If the original assignee releases the initial assignment, a subsequent assignment made in compliance with the statute is perfectly valid. FAR, 48 C.F.R. §§ 32.802(d)(3), 32.803(a); 39 Comp. Gen. 533 (1960); B-155400, December 3, 1964; B-33501, April 1, 1943. However, the mere fact of a purported subsequent assignment does not operate to release the original assignment; there must be an actual release by the original assignee, without which the subsequent assignment is ineffective against the government. 22 Comp. Gen. 520, 524–26 (1942); B-40491, March 17, 1944.

b. What Is a “Financing Institution”?

The Assignment of Claims Act of 1940 defined an eligible assignee as a “bank, trust company, or other financing institution, including any Federal lending agency.” 54 Stat. 1029. In their quest to eliminate words, the Title 31 recodifiers reduced this to simply “financing institution” in 31 U.S.C. § 3727(c). However, the original language still appears in 41 U.S.C. § 15(b), and the FAR has retained it as well in 48 C.F.R. § 32.802(b). Thus, banks, trust companies, and federal lending agencies<sup>72</sup> qualify without further question under the plain language of the statute. Any other entity qualifies only if it can be said to be a “financing institution,” which the statute does not define. The significance is that if the assignee is not a financing institution, the assignment will be valid only if it meets the rigid criteria of 31 U.S.C. § 3727(b). B-171125, February 4, 1971.

A “financing institution” for purposes of the Assignment of Claims Act is “one which deals in money as distinguished from other commodities as the primary function of its business activity.” 43 Comp. Gen. 138, 139 (1963); 40 Comp. Gen. 174, 175 (1960); 22 Comp. Gen. 44, 46 (1942). It may be an individual or a partnership as well as a corporate organization. 43 Comp. Gen. at 139; 40 Comp. Gen. at 175; 22 Comp. Gen. at 46; 20 Comp. Gen. 415 (1941).

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<sup>72</sup>An example is the Small Business Administration. E.g., Keco Industries v. United States, 157 Ct. Cl. 691 (1962).

The Comptroller General offered the following additional guidance in 43 Comp. Gen. 138, 139:

“A firm . . . which as a primary function is regularly engaged in the financing business may be regarded as a financing institution. [Citation omitted.] However, a firm whose credit extension and lending operations, although carried on regularly, are merely incidental or subsidiary to another [and], in the light of the firm’s overall operations, more important purpose, is not a financing institution. [Citations omitted.]”

Thus, an ordinary business corporation which incidentally provides financing to its suppliers or to others with whom it deals does not thereby become a “financing institution” for Assignment of Claims Act purposes. 22 Comp. Gen. 44 (1942). On the other hand, a firm primarily engaged in the financing of small and undercapitalized businesses, either through loans or direct purchase and resale, is a financing institution. 31 Comp. Gen. 90 (1951).

Financing institutions under the Act include the following:

- “Factors” or factoring companies (firms which purchase accounts receivable). 20 Comp. Gen. 415 (1941). See also, e.g., Produce Factors Corp. v. United States, 467 F.2d 1343 (Ct. Cl. 1972) (one of several cases involving a factor as assignee in which the factor’s status as financing institution was accepted without question).
- Small business investment companies organized under the Small Business Investment Act of 1958. 43 Comp. Gen. 138 (1963).
- State government small business financing agencies. Maryland Small Business Development Financing Authority v. United States, 4 Cl. Ct. 76 (1983).
- Insurance companies. 40 Op. Att’y Gen. 269 (1943). However, GAO reached a different conclusion with respect to an individual owner of an insurance agency whose credit activities were only incidental. 21 Comp. Gen. 120 (1941).

The following have been held not to qualify as financing institutions under the Assignment of Claims Act:

- A surety. General Casualty Co. of America v. Second Nat’l Bank of Houston, 178 F.2d 679 (5th Cir. 1949); Royal Indemnity Co. v. United States, 93 F. Supp. 891 (Ct. Cl. 1950); B-187456, November 4, 1976; B-155944, February 10, 1965; B-153608, March 17, 1964.

- A subcontractor completing performance. Beaconwear Clothing Co. v. United States, 355 F.2d 583 (Ct. Cl. 1966); Pan Arctic Corp. v. United States, 8 Cl. Ct. 546 (1985); Diamond Manufacturing Co. v. United States, 3 Cl. Ct. 424 (1983); 68 Comp. Gen. 215, 218 (1989).
- A holding company. 55 Comp. Gen. 155 (1975).
- A manufacturer or materialman who agrees to fill orders under a government contract by extending credit to the contractor in consideration of an assignment of the contract proceeds. Uniroyal, Inc. v. United States, 454 F.2d 1394 (Ct. Cl. 1972); B-183305, March 25, 1975 (non-decision letter).

A trust, pension or non-pension, is not an “institution” and therefore cannot be a “financing institution.” 36 Comp. Gen. 290 (1956). However, since the Assignment of Claims Act expressly recognizes a “trust company” as a proper assignee, trust funds under the control of a trust company may be used for loans secured by the assignment of proceeds under government contracts. *Id.* Accordingly, an assignment will not be regarded as invalid solely by reason of the source of funds for the loan consideration for which the assignment is made so long as the assignee qualifies as a financing institution.

A 1960 case upheld the validity of an assignment to a corporate pension trust on the grounds that “the trust corpus, together with the trustees, whether individual, corporate or otherwise, having as a primary function the investing of assets of the trust, may be regarded as a financing institution.” 40 Comp. Gen. 174, 175 (1960). When applying this principle, it is not necessary to distinguish between private (corporate) pension trusts and public (governmental) pension trusts. 50 Comp. Gen. 613 (1971) (holding that the California Public Employees’ Retirement System and the California State Teachers’ Retirement System qualified as financing institutions for Assignment of Claims Act purposes).

As noted previously, an assignment may not be made to more than one party, but it may be made to one party as agent or trustee for two or more parties participating in the financing. This is not a device to circumvent the statute. The Comptroller General has stated that “an assignment to a party or parties not eligible under the act cannot be validated by the simple expedient of having ineligible assignees designate a bank as a trustee for collection.” 52 Comp. Gen. 462, 465 (1973). In that case, following the rationale of 50 Comp. Gen. 613, GAO concluded that a group of municipal bondholders, viewed as an unincorporated totality, had as a group the function of lending money, and could therefore qualify as a financing

institution. The decision further concluded that the bondholders could make a valid assignment to a bank, also a bondholder, acting as trustee for the group, even though some of the bondholders as individuals could not qualify as financing institutions.

In 54 Comp. Gen. 80 (1974), GAO considered a financing scheme used by, and tailored to the needs of, smaller computer firms, and concluded that a company which provides financing by purchasing equipment which has been leased to the government could be regarded as a financing institution for purposes of assigning the government's lease payments. See also 62 Comp. Gen. 368 (1983). However, GAO refused to extend the same mantle to an entity whose primary purpose was obtaining government contracts for data processing equipment (B-200603, November 4, 1980), or to a leasing company dealing with refuse collection equipment (B-244992, October 25, 1991).

### c. The Notice Requirement

The Assignment of Claims Act and the FAR, read together, spell out precisely what must be done to validate an assignment with respect to the government. The assignee must file an original and three copies of the notice of assignment, together with one "true copy" of the assignment instrument (a certified duplicate or photostat of the original), with the following:

- (1) the contracting officer or the head of the contracting department or agency;
- (2) the applicable surety or sureties, if any; and
- (3) the disbursing officer, if any, designated in the contract to make payment.

31 U.S.C. § 3727(c)(3); 41 U.S.C. § 15(b)(3); FAR, 48 C.F.R. §§ 32.802(e), 32.805(b). A sample notice of assignment is found at 48 C.F.R. § 32.805(c). Under the original 1940 legislation, GAO was also listed as a recipient, but was removed in 1951 (Pub. L. No. 82-30, 65 Stat. 41).

These notice requirements are extremely important. If they are not satisfied, the assignment is not valid against the United States. Uniroyal, Inc. v. United States, 454 F.2d 1394 (Ct. Cl. 1972); United California Discount Corp. v. United States, 19 Cl. Ct. 504 (1990); 63 Comp. Gen. 42 (1984); 20 Comp. Gen. 424 (1941) (must be at least substantial compliance). In a 1992 case, for example, a subcontractor filed an

assignment with the Navy but the Navy rejected it because it was not signed by the assignee. The subcontractor apparently didn't bother correcting the defect, and when payment time arrived, the Navy—properly—paid the prime contractor, who “promptly dissipated” the proceeds. Because the assignee bank did not comply with the statutory notice requirements, its suit was dismissed. Trust Company Bank of Middle Georgia v. United States, 24 Cl. Ct. 710 (1992).

It is the assignee's responsibility to comply with the notice requirements. The best way to do this is to do what the statute says. Thus, a simple request to change the remittance address is not the notification of an assignment. Uniroyal, 454 F.2d at 1398. Nor is a “payment address” notation on a purchase order. B-234103, August 24, 1989. See also B-185846, May 11, 1977.

It is not sufficient for the assignee to rely on the contracting officer's representation that he or she will notify the disbursing officer, or on an agency regulation directing the contracting officer to do so. It is the assignee's responsibility and therefore the assignee's risk. American Financial Associates, Ltd. v. United States, 5 Cl. Ct. 761 (1984), aff'd, 755 F.2d 912 (Fed. Cir. 1985); B-159494, September 2, 1966. Thus, there is no “constructive notification,” and an assignee wishing to avoid problems is well-advised to notify both officials even if they occupy adjacent offices in the same building. Also, to trigger the duty to notify the disbursing officer, the contract does not have to identify him or her by name; identification of the pertinent payment office is sufficient. American Financial Associates, 5 Cl. Ct. at 768.

An assignment becomes effective when the government actually receives the notice. Id. at 767; Central National Bank of Richmond v. United States, 91 F. Supp. 738, 740 (Ct. Cl. 1950); 62 Comp. Gen. 683, 689 (1983). Of course, the assignee will not know when the government receives the notice unless the government tells it. To this end, the FAR provides for acknowledgment of the notice. In addition, the government has a “reasonable time” to determine the validity of the assignment before making payment. Produce Factors Corp. v. United States, 467 F.2d 1343, 1349 (Ct. Cl. 1972); Central National Bank of Richmond, 91 F. Supp. at 741. The FAR recognizes this concept by advising contracting officers to make necessary verifications prior to acknowledgment. 48 C.F.R. § 32.805(d). If there is some reason to do so, the agency can reverse the sequence and provide an acknowledgment immediately on the understanding that it is nothing more than advice that the document has been received, and then

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proceed to make the verifications without delay. Central National Bank of Richmond, 91 F. Supp. at 741; 22 Comp. Gen. 161 (1942).

As noted above, the Act also requires written notice of the assignment to applicable sureties, but does not prescribe any time limit within which the written notice must be given. Thus, in 22 Comp. Gen. 520 (1942), it was held that a delay of five months by an assignee bank in filing written notice with the surety did not subordinate its rights to those of the surety with respect to future payments, at least where the surety was unable to show that the delay had operated to its (the surety's) prejudice. There is no requirement to obtain the surety's consent to an assignment. Id. at 523.

Once an assignment has been "perfected," it continues in effect unless and until formally released by the assignee. A release must be filed with, and acknowledged by, the same addressees who were notified of the original assignment. FAR, 48 C.F.R. § 32.805(e). A release, of course, should be explicit. See B-122052-O.M., January 18, 1955 (letter to contracting agency stating that loans have been paid in full and that assignee's only interest in matter was to collect for subcontractor regarded as nothing more than a "gratuitous explanation of the intended disposition of any further payments").

#### d. Rights and Liabilities Under a Valid Assignment

An assignment of contract payments under 31 U.S.C. § 3727 and 41 U.S.C. § 15 does not give the assignee privity of contract with the government. Produce Factors Corp. v. United States, 467 F.2d 1343, 1348 (Ct. Cl. 1972); Thomas Funding Corp. v. United States, 15 Cl. Ct. 495, 500 (1988). Notwithstanding, it must give the assignee some protection or the assignment would be pointless. The assignee's interest has been termed a "qualified interest" commensurate with the debt secured. Beaconwear Clothing Co. v. United States, 355 F.2d 583, 590 (Ct. Cl. 1966); 62 Comp. Gen. 368 (1983). It has also been called a "limited interest in the financing aspects of the contract, not the performance aspects," wholly dependent on performance by the contractor. Produce Factors, 467 F.2d at 1348. In brief, what the assignee gets is the right to receive future contract payments, to the extent the contractor performs and earns them. Id.; Thomas Funding, 15 Cl. Ct. at 502. Assuming compliance with the notice requirements of the Assignment of Claims Act, there is no need for the assignee to make a specific claim. 20 Comp. Gen. 295, 297 (1940).

If the assignee under a valid assignment has a right to receive the payments, then the government must have a corresponding duty. Once the government has been properly notified of an assignment which meets the

requirements of the Assignment of Claims Act, it can no longer discharge its obligations under the contract by paying the contractor/assignor. It must pay the assignee, including invoices which predate the assignment or cover services rendered prior to it. B-122071, December 1, 1954. If the government through mistake or inadvertence pays the contractor, it is still liable to the assignee.

The leading case on this proposition is Central National Bank of Richmond v. United States, 91 F. Supp. 738 (Ct. Cl. 1950). A contractor with the Department of the Navy took a loan from the plaintiff bank and assigned the contract proceeds to the bank as security for the loan. Proper notice was given and acknowledged, but the Navy erroneously sent a check to the contractor, who cashed it and kept the money. Since the assignee had acted in good faith and complied with the statute, the government paid the contractor at its peril. Judgment for plaintiff. Other cases reaching the same result include Florida National Bank of Miami v. United States, 5 Cl. Ct. 396 (1984); Maryland Small Business Development Financing Authority v. United States, 4 Cl. Ct. 76 (1983); 65 Comp. Gen. 598 (1986); B-216246, October 2, 1984; B-214273, June 21, 1984; B-206902, June 1, 1982; B-158212, February 21, 1966. The government's obligation is not diminished by the fact that "the assignor corporation is beneficially owned or controlled by some of the same parties who own or control the assignee." American Financial Associates, Ltd. v. United States, 5 Cl. Ct. 761, 773 (1984), aff'd, 755 F.2d 912 (Fed. Cir. 1985).

As several of these cases point out, there is no entitlement to interest on the assignee's claim. Florida National Bank; Maryland Financing Authority; 65 Comp. Gen. 598; B-206902. Since the assignee is not a "contractor" (Thomas Funding, 15 Cl. Ct. at 501), the interest provisions of the Contract Disputes Act do not apply.

Several of the cases also point out that the government has a valid claim against the contractor whom it erroneously paid, and can pursue appropriate collection action to try to get its money back. Central Bank of Richmond; Maryland Financing Authority; American Financial Associates; B-216246; B-214273; B-158212.<sup>73</sup> However, the assignee's claim is not dependent upon recovery from the contractor, and the government is not justified in delaying payment to the assignee while it pursues recovery. B-214273, June 21, 1984.

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<sup>73</sup>While this may sound like a "wash," it is not. In far too many cases, the contractor is insolvent or no longer in operation and the government ends up paying twice. Since the payment to the contractor is erroneous, some accountable officer is liable although it is usually possible to grant relief. See, e.g., B-206902, June 1, 1982, and further discussion in Chapter 9.

There are limits on the government's right to recoup from the contractor. In Bank of America Nat'l Trust and Savings Ass'n v. United States, 23 F.3d 380 (Fed. Cir. 1994), the court held that the government had no such right where it had made the payment to the contractor, in erroneous disregard of a valid assignment, under a voluntary settlement of a contract dispute which included a stipulation waiving the government's right to appeal or seek reconsideration.

The government's obligation is to pay the assignee. The precise mechanics of how it does this are essentially irrelevant as long as the assignee receives the payment. Fairchild Industries, Inc. v. United States, 620 F.2d 807 (Ct. Cl. 1980) (check payable to assignee delivered to contractor's representative). As the Fairchild court pointed out, even if the assignment documents specified the method of delivery, it would not bind the government because the government was not a party to the assignment. Id. at 810.

The government's liability to the assignee is contingent upon the assignee's compliance with the statutory notice requirement, and claims have been denied where this compliance is lacking. American Financial Associates, 5 Cl. Ct. at 768–69 (notice not filed until after payment); 63 Comp. Gen. 42 (1984) (no notice to disbursing officer); B-159494, September 2, 1966 (same). Also, if the assignment is otherwise invalid, timely notice will not make the government liable. E.g., B-175670, May 25, 1972 (no financial participation by assignee in the contract). As we will discuss later, the government may be found to have waived the protection of the Assignment of Claims Act, in which event it may be liable to the assignee notwithstanding noncompliance with some of the more "technical" aspects of the statute. E.g., Tuftco Corp. v. United States, 614 F.2d 740 (Ct. Cl. 1980); 61 Comp. Gen. 53 (1981).

An important protection for the assignee was added in 1951 (Pub. L. No. 82-30, 65 Stat. 41) and is now found at 31 U.S.C. § 3727(e)(1) and 41 U.S.C. § 15(d). It provides, quoting from the latter:

"In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount . . . received under the assignment."

The corresponding provision of the FAR is 48 C.F.R. § 32.804(a). Thus, when the government pays an assignee under a valid assignment, it cannot get that money back to satisfy a debt of the contractor. Under a literal reading of this provision, it is possible to argue that the government cannot recover even if the payment was erroneously made. See United States v. Hadden, 192 F.2d 327 (6th Cir. 1951). Just how far this proposition may go is not clear, although it is not an absolute. One court has suggested, for example, that the assignee's protection might not extend to payments induced by fraud, although it is probably not possible to generalize. American Fidelity Co. v. National City Bank of Evansville, 266 F.2d 910, 916 (D.C. Cir. 1959). See also Matter of Tailortowne, Inc., 198 F. Supp. 477 (D.N.J. 1961) (payment induced by representations of bankruptcy receiver which could not be implemented); Mercantile National Bank at Dallas v. United States, 280 F.2d 832, 837 (Ct. Cl. 1960) (statute is "so drastic" that courts are likely to depart from a literal application in appropriate cases, for example, an obvious arithmetical mistake).

Mercantile is a significant case for another reason. A dispute arose between the government and a Mexican contractor over the amount of the government's liability under the contract due to the devaluation of the peso. The contractor had made a valid assignment, and the government withheld post-assignment payments to recoup asserted prior overpayments. Noting that the assignee would not have made the loan if it knew that there weren't going to be any future payments, the court invalidated the government's offsets accruing prior to the assignment. The court relied in part on the "no repayment" provision, reasoning that the government should not be able to frustrate the statute by the simple device of "paying itself by offset." Id. at 836–37. The government should keep in mind, the court chided, that the purpose of these assignments is to encourage private financing as an alternative to having to advance public funds, and then said, id. at 836:

"If the Government knows that the right of the contractor to receive payments is worthless because the contractor has already been paid, the Government is under a duty to so advise the bank, so that the bank will not lend its money on worthless collateral. If the Government has the facilities for knowing that the collateral is worthless, and is unconscious of the fact only because of its carelessness in the handling of public money, we think it may not take advantage of its own negligence, and recoup its negligent overpayments by accepting supplies bought with money loaned by the assignee bank on the faith of the assignment."

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The court took note of this duty again several years later in Produce Factors Corp. v. United States, 467 F.2d 1343, 1349 (Ct. Cl. 1972), but it appears to have received little further exploration. A case applying Mercantile to deny an offset based on the “no repayment” provision is Sigmon Fuel Co. v. Tennessee Valley Authority, 709 F.2d 440 (6th Cir. 1983).

e. Setoff

The Assignment of Claims Act authorizes certain agencies to include in their contracts a clause protecting assignees against certain offsets. Those agencies are the Department of Defense, the General Services Administration, and the Department of Energy. 31 U.S.C. § 3727(d); 41 U.S.C. § 15(e). The list can be expanded by statute or presidential designation, and the FAR reflects two additions—the National Aeronautics and Space Administration and the Federal Aviation Administration. 48 C.F.R. §§ 32.801, 32.803(d).

Under the terms of the statute, an authorized no-setoff provision will protect the assignee against setoff for:

- any liability of the assignor to the United States arising independently of the assigned contract; and
- liabilities, whether arising under the contract or independently, on account of statutory renegotiation, fines, penalties (except those imposed for noncompliance with the contract), taxes, or social security contributions.

31 U.S.C. § 3727(d); 41 U.S.C. § 15(f); FAR, 48 C.F.R. § 32.804(b). The no-setoff authority was originally granted only for use in time of war or national emergency. See 60 Comp. Gen. 510, 512 (1981). Under 41 U.S.C. § 15(e) as amended in 1994 by Pub. L. No. 103-355, it requires a “determination of need by the President,” with each such determination to be published in the Federal Register.

An illustration of the first category of offsets proscribed under a no-offset clause—liabilities independent of the contract—is 31 Comp. Gen. 90 (1951). The contractor under a supply contract delivered the requisite supplies and submitted an invoice for payment. The same contractor had an outstanding judgment against it for the balance due on surplus property purchased from the government several years earlier. The supply contract included a no-setoff clause, and the contractor had made a valid assignment of its proceeds. Since the contractor’s debt to the government arose independently of the contract whose proceeds had been assigned, it could not be collected by offset against payments due the assignee.

The second category of prohibited offsets—liabilities which do not arise independently of the contract—is limited to the items specified in the statute. A liability arising under the contract which is not one of the enumerated items is not protected by the no-setoff clause and may be recovered by offset against the assignee. One example is liquidated damages provided for in the contract. B-110730, September 18, 1952. As B-110730 points out, the theory is that an assignment carries with it the right to receive only such amounts as are due and owing to the contractor under the contract; there is no right to payment in excess of those amounts. Another example is excess procurement costs resulting from a default termination. *Modern Industrial Bank v. United States*, 101 Ct. Cl. 808 (1944); 35 Comp. Gen. 149 (1955).

The purpose of the no-setoff authority is to protect the assignee under the types of assignments contemplated by the Assignment of Claims Act, not to insulate the contractor from liability for just debts by making an assignment merely for collection. 35 Comp. Gen. 104, 108 (1955). Accordingly, a no-setoff clause does not apply with respect to payments in excess of the assignor's remaining indebtedness to the assignee under the assignee's financing loans. *Id.*; 62 Comp. Gen. 683, 686–87 (1983); 37 Comp. Gen. 9 (1957); FAR, 48 C.F.R. § 32.804(c)(2). Nor does it apply where there has been no financial participation by the assignee in the contract in question. 62 Comp. Gen. at 688–89; 54 Comp. Gen. 137 (1974); 49 Comp. Gen. 44, 46 (1969); B-176905, November 1, 1972; FAR, 48 C.F.R. § 32.804(c)(1).

The competition between assignments and federal tax claims has been the subject of numerous decisions. It has been said that the no-setoff authority “defeats the operation of the Internal Revenue Service lien for taxes and reduces the Government's common law right of set-off to the extent the assignor is indebted to the assignee.” B-166531, November 10, 1969. GAO reviewed applicable principles and precedents in detail in 60 Comp. Gen. 510 (1981), as clarified by 62 Comp. Gen. 683 (1983), and made the following key points:

(1) If the proceeds of a contract containing a no-setoff clause have been validly assigned, the government cannot offset a tax debt of the contractor against money to be paid to the assignee, except to the extent unpaid contract proceeds exceed the contractor's remaining indebtedness to the assignee. However, if a loan secured by an assignment was not used, or available for use, in performing the assigned contract—and this includes situations in which performance was completed at the time of the loan,

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there is no valid assignment and offset is permissible even in the face of a no-setoff clause. See also B-216549, December 5, 1984.

(2) A no-setoff clause protects the assignee even against tax claims which have matured prior to the effective date of the assignment. See also 65 Comp. Gen. 554 (1986); 37 Comp. Gen. 318 (1957).

(3) If the contract does not contain a no-setoff clause, the assignee stands in the shoes of the assignor, and the government may offset a tax debt of the assignor that was in existence before the assignment became effective. The actual offset cannot be made until the tax debt has matured (i.e., liability assessed), but the fact that the IRS does not actually make the assessment before the assignment becomes effective will not defeat the offset. See also 56 Comp. Gen. 499, 503 (1977); 37 Comp. Gen. 808 (1958); B-152008, September 10, 1963.

(4) An assignment becomes effective on the date the contracting agency receives notification of the assignment. Failure to record or perfect an assignment as a security interest under state law (such as the Uniform Commercial Code) does not affect the validity of the assignment with respect to the federal government.

If the contract does not contain a no-setoff clause, then offset is governed by whatever common-law or statutory authorities are available. E.g., B-152008, September 10, 1963. Under common-law principles, the government may set off against the assignee any claims of the government against the assignor which matured prior to the effective date of the assignment, whether arising out of the contract or independently. South Side Bank & Trust Co. v. United States, 221 F.2d 813 (7th Cir. 1955); B-177648, December 14, 1973; FAR, 48 C.F.R. § 32.803(e). However, even under the common law, debts of the assignor which mature after an assignment is made, at least those arising under separate transactions, may not be set off against payments otherwise due the assignee. 20 Comp. Gen. 458 (1941); 29 Comp. Gen. 40, 45 (1949). Another limitation on the availability of offset is the case of Mercantile National Bank at Dallas v. United States, 280 F.2d 832 (Ct. Cl. 1960), discussed previously under the “Rights and Liabilities” heading.

The contractor’s bankruptcy complicates the picture. While the Bankruptcy Code protects most pre-petition offsets (11 U.S.C. § 553), the creditor agency must be careful not to violate the automatic stay imposed

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by 11 U.S.C. § 362(a)(7). The agency may need to petition the bankruptcy court to have the stay lifted. See 68 Comp. Gen. 215, 219 (1989).

#### f. Prompt Payment Discounts

Logically, an assignment should not defeat the government's right to take a prompt payment discount when provided in the contract since what is being assigned is what the contractor is entitled to be paid. Nevertheless, an incomplete or defective notice of assignment raises the question of the proper starting date for computing the discount period. Normally, the starting point is the date of the invoice (31 U.S.C. § 3904). Yet if the contracting agency has received a defective or incomplete notice of assignment, it faces somewhat of a dilemma. It cannot pay the assignee until it receives the proper assignment documents. Nor should it pay the contractor since the government is on notice, however imperfectly, of the intent to make an assignment. Meanwhile, while the deficiency is being corrected, the clock on the discount period continues to tick.

In these circumstances, GAO and the Armed Services Board of Contract Appeals have taken the position that the government may take the discount if it makes payment within the specified number of days after receipt of the necessary assignment documents. For example, the contract in B-185846, May 11, 1977, included a 20-day prompt payment discount. The contractor submitted an invoice with an assignment notation on it, but the assignment documents themselves had not been filed. The agency (Navy) asked the assignee to furnish the necessary documents. By the time the documents showed up and the Navy made payment, more than 20 days had elapsed from receipt of the original invoice. GAO agreed with the Navy that it was entitled to take the discount as long as it paid within 20 days after receipt of the assignment documents. In reaching this result, GAO relied on the decision of the Armed Services Board of Contract Appeals in Carolina Paper Mills, Inc., ASBCA Nos. 4488 and 4614, 58-2 BCA ¶ 1832 (1958).

GAO considered the same issue, and reached the same result, in B-194981, December 12, 1979, and B-192774, April 16, 1979, pointing out in B-194981 that, under the Assignment of Claims Act, it is the assignee's responsibility to provide appropriate documentation to the disbursing officer, and the government should not be penalized for the assignee's failure or delay in fulfilling this obligation.

At the time these GAO and ASBCA decisions were rendered, the clock for taking a prompt payment discount was considered to start upon receipt of a "proper invoice." In 1988, Congress specified the invoice date as the

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starting date and gave it a statutory basis. While the effect of the 1988 legislation on the decisions has yet to be addressed, their result still seems reasonable.

g. Fraud

Fraud on the part of the contractor may or may not adversely affect the assignee's position. It has been held that the contractor's fraud may not be imputed to an innocent assignee for purposes of forfeiture under 28 U.S.C. § 2514 or the False Claims Act, at least with respect to nonfraudulent elements and where the fraud was committed after notification of the assignment. Chelsea Factors, Inc. v. United States, 181 F. Supp. 685 (Ct. Cl. 1960) (invoices overstated quantity of goods shipped); Arlington Trust Co. v. United States, 100 F. Supp. 817 (Ct. Cl. 1951) (fraudulently padded termination claim). Similarly, the court in In re Gulf Apparel Corp., 140 B.R. 593 (M.D. Ga. 1992), held that the government could not assert "fraud in the inducement" (contract obtained by fraudulent representations) as a defense against an innocent assignee.

However, in First National Bank of Birmingham v. United States, 117 F. Supp. 486 (N.D. Ala. 1953), the government's offset against an innocent assignee was upheld where the contractor submitted fraudulent vouchers before the government received notice of the assignment. The assignee in that case delayed notifying the government for 4 months, and could presumably have avoided, or at least minimized, liability but for that delay. The contract did not include a no-setoff clause, but it would not have made any difference because the court found that the government's claim "did not arise independently of such contract." *Id.* at 489. In contrast, the Gulf Apparel court found that "fraud in the inducement, by its nature, is outside of the contract." 140 B.R. at 598.

Another case, 50 Comp. Gen. 434 (1970), involved fraud by a contractor against its own assignee. The assignment involved an unusual arrangement under which the contractor would submit invoices to the assignee, presumably representing work done. The assignee paid the contractor a percentage of the invoice amount and then submitted the invoices to the government for reimbursement. Over a period of time, the contractor submitted false invoices, got paid by the assignee, and then visited the government disbursing office to retrieve the invoices before the government was able to process them, claiming various errors. The assignee caught on when it realized that, under a contract with an annual value of less than \$14,000, it had paid out over \$50,000 in just 3 months and had received very little reimbursement. Naturally, the contractor had dissipated its assets by then. The assignee first came to GAO to seek relief

under a variety of theories, but GAO could find no legal basis to allow the claim, noting that the Assignment of Claims Act does not make the government “an insurer as to fraudulent schemes devised by an assignor as against an assignee.” *Id.* at 441. GAO clearly sympathized with the assignee, however, and hinted that it might fare better in court. The assignee took the hint but lost there too, in *Produce Factors Corp. v. United States*, 467 F.2d 1343 (Ct. Cl. 1972). The court and GAO agreed that there was no basis to conclude either that the government should not have returned the invoices or that it should have notified the assignee when it did so. 467 F.2d at 1350, 50 Comp. Gen. at 439.

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#### 4. Waiver—Voluntary and Involuntary

If a particular protection exists for the sole or primary benefit of a particular party, logically that party should be able to determine when it does not need the protection, and this is essentially how the Assignment of Claims Act has evolved. It has become firmly established that the government may waive the protections of the Assignment of Claims Act. Put another way, the government may, at its option, choose to recognize an assignment which is not in compliance with the statute. When citing cases for this proposition, it has become common to intermingle cases dealing with different provisions of the statute. As the Court of Claims has noted, it really doesn’t make any difference because “the concerns . . . and the legal concepts involved in their applicability are the same.” *Tuftco Corp. v. United States*, 614 F.2d 740, 744 n.4 (Ct. Cl. 1980). True as that may be, it is nevertheless useful to start by relating the rule to the different elements of the statute.

First is the prohibition on the assignment of claims or interests in claims, 31 U.S.C. § 3727(b). It is commonly accepted that the government may waive section 3727(b) and recognize the assignment. *E.g.*, *United States v. Sinton Dairy Foods Co.*, 775 F. Supp. 1417, 1419 (D. Colo. 1991) (assignment is “voidable at the government’s discretion”); *Schwartz v. United States*, 16 Cl. Ct. 182 (1989); *Radiatronics, Inc.*, ASBCA No. 15133, 75-2 BCA ¶ 11,349, at 54,069; 47 Comp. Gen. 522, 524 (1968); 19 Comp. Gen. 171 (1939). An illustrative case involved a claim for damage to premises leased to the United States in Vietnam in the 1960s. Originally, the claimant was paid only half of the amount allowed because GAO was concerned that his former wife might be entitled to half under a divorce settlement. The former wife gave the claimant a notarized power of attorney appointing him to collect her share. While the power of attorney did not meet the requirements of 31 U.S.C. § 3727(b), GAO felt this was an

appropriate case to waive the statute, and approved payment of the remaining half. B-200402, June 10, 1983.

Next is 41 U.S.C. § 15(a), prohibiting the transfer of contracts. As the Court of Claims said in a frequently cited case, “Despite the bar of [41 U.S.C. § 15], the Government, if it chooses to do so, may recognize an assignment.” Maffia v. United States, 163 F. Supp. 859, 862 (Ct. Cl. 1958). This provision had to be construed as giving the government an option, noted the Comptroller of the Treasury in a 1903 case. Otherwise, anyone who made a contract with the government and then discovered that he, she, or it had made a bad deal could get out of it simply by concocting a phony transfer. 10 Comp. Dec. 159, 162–63 (1903). Quoting the above statement from Maffia, the Court of Claims noted in Tuftco, 614 F.2d at 745, that the rule is further strengthened by the fact that every forum which deals with government contract controversies has adopted it.<sup>74</sup>

An illustrative case is 68 Comp. Gen. 53 (1988). The Navy had contracted for the construction of two fleet oilers with options for two more. After Navy exercised the option, the contractor advised that it was experiencing financial difficulties. Concerned that the contractor might file for bankruptcy, Navy considered various alternatives, including transferring the option contract to another shipbuilder. Although 41 U.S.C. § 15(a) prohibits the transfer of contracts, GAO agreed that Navy could waive the statute and recognize the transfer.

The “soundest and most accepted” method of waiving 41 U.S.C. § 15(a)—although not the exclusive method—is a novation agreement. Tuftco, 614 F.2d at 745. A novation is a three-party agreement (old contractor, new contractor, government) the legal effect of which “is the substitution of a new agreement or obligation for the old one, which is thereby extinguished or discharged.” 58 Comp. Gen. 108, 111 (1978). The FAR includes detailed and important instructions on novation agreements, including a format. 48 C.F.R. Subpart 42.12. Cases approving novations in various contexts are 58 Comp. Gen. 108 (1978); 53 Comp. Gen. 124 (1973); 51 Comp. Gen. 145 (1971); B-184665, September 25, 1975; B-173331, August 19, 1971.

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<sup>74</sup>E.g., Thompson v. Commissioner, 205 F.2d 73, 78 (3d Cir. 1953); Benjamin v. United States, 318 F.2d 728 (Ct. Cl. 1963); G.L. Christian and Associates v. United States, 312 F.2d 418, 423 (Ct. Cl. 1963), cert. denied, 375 U.S. 954; Federal Manufacturing and Printing Co. v. United States, 41 Ct. Cl. 318 (1906); Monchamp Corp. v. United States, 19 Cl. Ct. 797, 801 (1990); Radiatronics, Inc., ASBCA No. 15133, 75-2 BCA ¶ 11,349 (1975); Mancon Liquidating Corp., ASBCA No. 18304, 74-1 BCA ¶ 10,470 (1974); 32 Comp. Gen. 227 (1952); B-155480, December 2, 1964; 16 Op. Att’y Gen. 277 (1879); 15 Op. Att’y Gen. 235, 245–46 (1877).

The third major element of the Assignment of Claims Act is the financing institution exception. Waiver questions arise most often in connection with the notice requirement and, consistent with the approach applied to the other elements of the statute, this too can be waived. The Comptroller General addressed the issue in 20 Comp. Gen. 424, 426 (1941), just a few months after the 1940 legislation was enacted:

“In any case in which there is but one assignment, and not conflicting assignments, the fact that there is not a strict compliance with the statute with respect to ‘written notice’ should not give rise to any serious question, since it has been held that [the Assignment of Claims Act was] enacted for the benefit of the Government and may be waived by it.”

As noted above, the waiver rule is not unanimous. There is some authority on the district court side for the proposition that 31 U.S.C. § 3727(b) cannot be waived until after the claim has been allowed. United States v. Shannon, 186 F.2d 430, 432–33 (4th Cir. 1951), rev’d on other grounds, 342 U.S. 288; Knight v. United States, 596 F. Supp. 540, 542 (M.D. Ga. 1984), aff’d mem., 762 F.2d 1022 (11th Cir. 1985); Marger v. Bell, 510 F. Supp. 9, 12–13 (D. Maine 1980). Most Assignment of Claims Act cases which end up in court tend to be litigated in the Court of Federal Claims, however, which does not follow this precedent. See Schwartz v. United States, 16 Cl. Ct. 182, 188 (1989).

Thus far we have been talking about voluntary waiver by the government. Once it is established that the government can waive something voluntarily, it is perhaps inevitable that the courts will start finding that they can, in effect, waive it too, whether the government intended this result or not. The leading “involuntary waiver” case is Tuftco Corp. v. United States, 614 F.2d 740 (Ct. Cl. 1980). The Department of Housing and Urban Development had entered into contracts for the purchase of mobile homes. The contractor assigned the contracts—the contracts themselves, not just the proceeds—to another party. Before each assignment, the parties informed the contracting officer who agreed and said that HUD would make the payments to the assignee. Instead, HUD made several payments to the original contractor. When the assignee sued, the government raised 41 U.S.C. § 15 as a defense, arguing that the contracting officer had no authority to recognize the assignments.

The court reviewed the evolution of the Assignment of Claims Act and the waiver doctrine, and concluded as follows:

“[W]e conclude the contracting officer was fully aware of the assignments, recognized them, and communicated such recognition to plaintiff. In this case the action of defendant constituted a waiver of the Act’s provisions, including the notice provision applicable to banks and financial institutions. Having chosen to recognize the assignments, defendant was bound to act in accordance with their terms.”

614 F.2d at 743–44. Therefore, the government was liable to the assignee for losses sustained as a result of HUD’s payments to the original contractor. Of course the assignee wanted interest too, which the court denied. Id. at 747.

The post-Tuftco cases fall into two camps. The first group involves—as did Tuftco itself—the transfer prohibition of 41 U.S.C. § 15(a). These cases tend to come before the boards of contract appeals (jurisdiction under the Contract Disputes Act is frequently an issue), with the assignee trying to establish an implied or de facto novation. A “Tuftco waiver” is either found<sup>75</sup> or not found,<sup>76</sup> based on the board’s analysis of the particular facts. The Interior Board provided the following summary:

“In all the cases in which the Government has been found to have recognized an assignment and waived the anti-assignment statutes, the notice of the transfer or assignment has been clear and unambiguous and the Government has either expressly agreed to the assignment . . . or has so conducted itself that the assignee was warranted in concluding that recognition of the assignment or transfer had occurred.”

Rodgers Construction, Inc., IBCA Nos. 2777 et al., 92-1 BCA ¶ 24,503, at 122,307 (1991).

The second group involves defective assignments to financing institutions (no notice, defective notice, no financial participation, etc.). Since the assignee is not a contractor, these do not come under the Contract Disputes Act but usually go directly to court. The Court of Federal Claims applies Tuftco’s “totality of the circumstances test based on three factors: the government’s knowledge of, assent to, and actions in accordance with the assignment.” United California Discount Corp. v. United States, 19 Cl. Ct. 504, 509 (1990). As with the implied novation cases, the result turns on an analysis of the government’s conduct. In addition to United California, some cases in which the court refused to find an involuntary waiver are

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<sup>75</sup>Rodgers Construction, Inc., IBCA Nos. 2777 et al., 92-1 BCA ¶ 24,503 (1991); In-Vest Corporation, GSBICA No. 6365, 83-1 BCA ¶ 16,502 (1983). A pre-Tuftco case is Vertical Aviation Transport Systems, Inc., ASBCA No. 18266, 74-1 BCA ¶ 10,617 (1974).

<sup>76</sup>Broadlake Partners, GSBICA No. 10713, 92-1 BCA ¶ 24,699 (1991); Morrison-Smith, Inc., ASBCA No. 38028, 90-1 BCA ¶ 22,308 (1989); CBI Services, Inc., ASBCA No. 34983, 88-1 BCA ¶ 20,430 (1987).

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Trust Co. Bank of Middle Georgia v. United States, 24 Cl. Ct. 710 (1992); American National Bank and Trust Co. v. United States, 23 Cl. Ct. 542 (1991); and American Financial Associates, Ltd. v. United States, 5 Cl. Ct. 761 (1984), aff'd, 755 F.2d 912 (Fed. Cir. 1985). GAO has also considered a few of these cases, finding a waiver in 61 Comp. Gen. 53 (1981) but not in B-225051, February 19, 1988.

It should be apparent that the rationale of Tuftco and its progeny is basically an estoppel theory. What these cases teach is that the government can find itself bound by its own conduct. In the context of voluntary waiver, GAO has rejected the suggestion that waiver “is permitted only where the government is otherwise estopped from disavowing the assignment.” 68 Comp. Gen. 53, 55 (1988). For involuntary waiver, however, Tuftco remains the standard.

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## G. Interest

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### 1. The No-Interest Rule

Any discussion of the payment of interest by the federal government must start with the “no-interest rule”—the firmly established principle, derived from the concept of sovereign immunity, that the United States is not liable for interest unless expressly authorized in the relevant statute or contract. E.g., Library of Congress v. Shaw, 478 U.S. 310 (1986).<sup>77</sup> A detailed discussion may be found in United States v. Mescalero Apache Tribe, 518 F.2d 1309 (Ct. Cl. 1975). The no-interest rule has also been consistently recognized and applied by the accounting officers and the Attorney General. E.g., 9 Comp. Gen. 421 (1930); 8 Comp. Dec. 498 (1902); 9 Op. Att’y Gen. 449 (1860). Restated, the government is not liable for interest unless it has consented to be liable for interest either by the enactment of legislation or by contractual agreement. The rule does not permit the payment of interest on equitable grounds and applies even where the government has unreasonably delayed payment. “Justice and equity will not give [the claimant] one cent more than he is entitled to by law.” 9 Op. Att’y Gen. at 450.

In the context of administrative claims, the no-interest rule manifests itself in virtually every area in which monetary claims can be brought against

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<sup>77</sup>Shaw is but one in a long line of Supreme Court decisions recognizing the rule. A few others are United States v. Louisiana, 446 U.S. 253, 264–65 (1980); United States v. Thayer West Point Hotel Co., 329 U.S. 585, 588 (1947); United States v. Goltra, 312 U.S. 203, 207 (1941); United States v. North Carolina, 136 U.S. 211, 216 (1890). The no-interest rule is set out more fully, and with additional case citations, under the Interest heading in Chapter 14.

the United States. Examples in which claims for interest have been disallowed are: 65 Comp. Gen. 533 (1986) (refund of amounts set off against Individual Indian Money trust account); B-251228, July 20, 1993 (late payment of California possessory interest tax, an obligation of the employee and not the government); B-241592.3, December 13, 1991 (duties collected by the Customs Service for the Virgin Islands); B-236330.2, February 14, 1990 (voluntary creditor); B-206101, May 20, 1982 (late payment of Treasury bill); B-195265, August 17, 1979 (delayed reimbursement by Labor Department of benefit payments to employee trust); B-154102, June 16, 1974 (award under Military Claims Act). Two of the major claims areas—contract-related claims and claims by government employees relating to pay or allowances—are addressed by statute and are covered separately later in this section.

The interest prohibition applies to claims arising in foreign countries as well as to claims arising in the United States. 45 Comp. Gen. 169 (1965). It does not apply, however, to contract obligations of the District of Columbia government, which is liable for interest on its contract obligations the same as a private corporation. 33 Comp. Gen. 263 (1953). (There must of course be some underlying legal obligation to which interest liability can attach. See B-180565, May 31, 1974.)

The no-interest rule also applies to payments under private relief legislation. United States ex rel. Angarica v. Bayard, 127 U.S. 251, 260 (1888). However, consistent with the rule, such legislation may provide for interest in situations where it would not otherwise be payable. See, e.g., B-182574-O.M., July 19, 1979. In B-187866, April 12, 1977, the Comptroller General concluded that interest could be paid on a claim for which Congress had made a specific appropriation where the appropriation language did not specify interest but it was clear from the legislative history that the amount appropriated included interest. (The specific claim involved in B-187866 would now be covered by the Contract Disputes Act.)

A statute originating in 1841 provides that amounts held in trust by the United States shall be invested in government obligations and shall bear interest at a minimum annual rate of 5 percent. 31 U.S.C. § 9702. Despite its seemingly broad language, however, this statute applies only where trust funds are otherwise required by statute, treaty, or contract to be invested, and is not an independent authorization for the payment of interest. United States v. Mescalero Apache Tribe, 518 F.2d 1309, 1323–31 (Ct. Cl. 1975); White Mountain Apache Tribe of Arizona v. United States, 20 Cl. Ct. 371, 380–81 (1990); B-241592.3, December 13, 1991.

If the necessary authority for the payment of interest does not exist in a particular context, it follows that appropriations are not legally available for that purpose. Thus, appropriations of federal agencies are not available for the payment of interest or penalties to the Internal Revenue Service on account of late forwarding or underpayment of employment taxes in the absence of legislation expressly making federal agencies liable for interest and penalties the same as private parties. B-161457, May 9, 1978. Similarly, the Internal Revenue Service is not liable for interest on overpayments of employer taxes by federal agencies. B-161457, December 5, 1983.

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## 2. Contract Matters

### a. The No-Interest Rule in the Contract Context

At one time, GAO took the position that interest could be provided for in a contract only if supported by statutory authority. The rationale was that a contractual stipulation to pay interest for a delay in payment could end up obligating the government beyond the period of obligational availability of the appropriation, thereby violating the Antideficiency Act. This rule was expressed in 22 Comp. Gen. 772 (1943). However, Supreme Court formulations in cases like *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585 (1947), made it clear that the two bases for interest liability—statute or contract—were indeed alternatives. Consequently, GAO changed its position in 51 Comp. Gen. 251 (1971), overruling 22 Comp. Gen. 772 and recognizing that the government could become liable for interest by contract even without express statutory authority. The potential Antideficiency Act problem could be averted by a reservation of funds. Thus, the United States can be liable for interest either (1) if it is expressly provided by statute, or (2) even in the absence of applicable statutory authority, if it is provided in the relevant contract.<sup>78</sup> See, e.g., 56 Comp. Gen. 55 (1976) (military transportation contracts with air carriers). Absent authority from either source, interest may not be paid. E.g., B-187877, April 14, 1977.

With this issue resolved, the federal procurement regulations began to require the inclusion of a “Payment of Interest” clause in procurement contracts, and the boards of contract appeals awarded interest to the extent permitted by that clause. E.g., *Proserv, Inc.*, ASBCA No. 20768, 78-1 BCA ¶ 13,066 (1978); *General Research Corp.*, ASBCA No. 21005, 77-2 BCA ¶ 12,767 (1977). Indeed, some boards applied the so-called “Christian

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<sup>78</sup>Pre-1971 cases must be read with caution. Although 51 Comp. Gen. 251 expressly overruled only 22 Comp. Gen. 772, other early decisions exist which hold that statutory authority is required in order for a contract to provide for interest. E.g., 5 Comp. Gen. 649 (1926). To the extent inconsistent with 51 Comp. Gen. 251, any such decisions must be regarded as implicitly overruled or modified.

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doctrine”<sup>79</sup> and incorporated the Payment of Interest clause into the contract in cases where it had been inadvertently omitted. E.g., MR’s Landscaping and Nursery, HUD BCA No. 76-29, 76-30, 78-1 BCA ¶ 13,077 (1978); Commonwealth Electric Co., IBCA No. 1048-11-74, 77-2 BCA ¶ 12,649 (1977).

Interest on payments to contractors is now governed by two statutes—the Contract Disputes Act (interest on claims) and the Prompt Payment Act (interest on delayed payments). As we will see, the Federal Acquisition Regulation includes several implementing provisions, although there is no longer a separate “Payment of Interest” clause.

While the Contract Disputes Act and Prompt Payment Act cover most contract-related payments, they do not cover all situations. Those that are not covered remain subject to the no-interest rule. Thus, as we have noted elsewhere in this chapter, payments to an assignee under the Assignment of Claims Act do not bear interest because the assignee is not a contractor, nor do payments under a contract implied-in-law (quantum meruit). In addition:

- Interest is not payable on a claim for bid protest costs. 69 Comp. Gen. 679, 684 (1990); B-226941.3, April 13, 1989.
- The Contract Disputes Act and Prompt Payment Act apply to contracts under which the government is acquiring goods or services. They do not apply when the government is providing goods or services. E.g., B-226231, October 23, 1987 (no interest on claim for refund of overcharges).

Traditionally, interest on borrowings is not an allowable cost. E.g., Myerle v. United States, 31 Ct. Cl. 105, 137 (1896); Radcliffe Construction Co., ASBCA Nos. 39252, 39253, 90-2 BCA ¶ 22,651 (1990); 27 Comp. Gen. 690 (1948). This is based on the policy of encouraging contractors “to finance the performance of Government contracts with their working capital rather than with borrowed capital.” B-185016, July 8, 1976. If interest on borrowings were reimbursable, the Myerle court noted, a contractor would never use its own money to finance performance. This principle is now reflected in the FAR at 48 C.F.R. § 31.205-20 with respect to commercial contractors. However, the cost of capital committed to facilities is treated as an imputed cost which may be allowable, whether derived from equity or borrowed capital, under 48 C.F.R. § 31.205-10 (“Cost of Money”). In addition, there is authority for allowing the recovery of interest, under

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<sup>79</sup>Under the “Christian doctrine,” a clause required by federal law will be read into a contract whether physically there or not. G.L. Christian and Associates v. United States, 312 F.2d 418 (Ct. Cl. 1963), cert. denied, 375 U.S. 954.

limited circumstances, on borrowings made necessary by a government-ordered change. E.g., Gulf Contracting, Inc. v. United States, 23 Cl. Ct. 525 (1991). See also Gevyn Construction Corp. v. United States, 827 F.2d 752 (Fed. Cir. 1987); Dravo Corp. v. United States, 594 F.2d 842 (Ct. Cl. 1979); Bell v. United States, 404 F.2d 975 (Ct. Cl. 1968); A.T. Kearney, Inc., DOT CAB No. 1580, 86-1 BCA ¶ 18,613 (1985). But see Servidone Construction Corp. v. United States, 19 Cl. Ct. 346, 383 (1990), aff'd, 931 F.2d 860 (Fed. Cir. 1991).

For contracts with other than commercial organizations, the FAR instructs contracting officers to determine cost allowability under the applicable OMB circular—A-21 for educational institutions, A-87 for state, local, and Indian tribal governments, and A-122 for nonprofits—using the version in effect as of the date of the contract. 48 C.F.R. §§ 31.303, 31.603, 31.703.

#### b. Contract Disputes Act

The no-interest rule applies to contract disputes just as it applies to any other monetary claim against the government. Monroe M. Tapper & Associates v. United States, 611 F.2d 354, 357 (Ct. Cl. 1979). As noted above, for some years interest was payable on contract claims by virtue of a mandatory “Payment of Interest” clause. Section 12 of the Contract Disputes Act of 1978, 41 U.S.C. § 611, patterned generally after the old Payment of Interest clause, provides:

“Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 605(a) of this title from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board.”

Public Law 92-41 had amended the Renegotiation Act to prescribe interest on Renegotiation Board excess profit determinations. Rates are set by the Secretary of the Treasury for 6-month periods beginning January 1 and July 1 of each year, “taking into consideration current private commercial rates of interest for new loans maturing in approximately five years.” Pub. L. No. 92-41, § 2(a), 85 Stat. 97. The Renegotiation Board ceased to exist in 1979, and the Renegotiation Act was dropped from the United States Code although it has never been repealed. Nevertheless, section 2(a) remains alive for other purposes such as the Contract Disputes Act. The rates are referred to as “Renegotiation Act rates” or “Contract Disputes Act rates.”

Interest is payable under 41 U.S.C. § 611 whether the claim is allowed by the contracting officer, a board of contract appeals, or a court.

The statute talks about interest “on claims.” Therefore, there must be an underlying claim to which an award of interest can attach. Absent an underlying claim, 41 U.S.C. § 611 does not authorize the payment of interest even though the underlying transaction may have resulted in the payment of money by the government to the contractor. E.g., Mayfair Construction Co. v. United States, 841 F.2d 1576 (Fed. Cir. 1988); Nab-Lord Associates v. United States, 682 F.2d 940 (Ct. Cl. 1982); Hoffman Construction Co. v. United States, 7 Cl. Ct. 518 (1985); A.L.M. Contractors, Inc., ASBCA No. 23792, 79-2 BCA ¶ 14,099 (1979).

In Hoffman, for example, the contractor submitted cost proposals on change order work which the parties negotiated and the government paid. No “claim” was ever submitted to the contracting officer. Therefore, there was no entitlement to interest on the change order payments. The Mayfair court reached the same result with respect to termination settlement proposals which the contractor submitted and then tried to characterize as a “claim.” As Mayfair illustrates, what the contractor chooses to call the submission is not controlling. See also CPT Corp. v. United States, 25 Cl. Ct. 451, 455 (1992). Another way of saying all of this is that a demand for interest alone is not a “claim” for purposes of 41 U.S.C. § 611. Hoffman, 7 Cl. Ct. at 522; Esprit Corp. v. United States, 6 Cl. Ct. 546 (1984), aff’d mem., 776 F.2d 1062 (Fed. Cir. 1985).

The GSA Board of Contract Appeals has held that an unreasonable delay in the payment of a negotiated settlement is a “claim” which can support an interest award under 41 U.S.C. § 611. Dawson Construction Co., GSBCA No. 5777, 80-2 BCA ¶ 14,817 (1980). However, the GSBCA declined to extend Dawson to the delayed payment of invoices, in part because of the existence of the Prompt Payment Act. Safeguard Maintenance Corp., GSBCA No. 6054, 83-1 BCA ¶ 16,276 (1983). Interest was awarded on an oral settlement agreement in Elkhorn Construction Co., VABCA Nos. 1493 et al., 84-2 BCA ¶ 17,435 (1984).

Interest begins to run “from the date the contracting officer receives the claim . . . from the contractor.” Congress chose this “red-letter date” for purposes of certainty, and it applies even though the contractor at the time of filing has not yet incurred the total costs involved in the claim. Servidone Construction Corp. v. United States, 931 F.2d 860, 862–63 (Fed. Cir. 1991). The claim must nevertheless “be in sufficient detail so that the contracting officer may reasonably take some action upon it.” A.T. Kearney, Inc., DOT CAB No. 1580, 86-1 BCA ¶ 18,613, at 93,510.

To qualify for interest under 41 U.S.C. § 611, the claim must be presented to the contracting officer by the contractor, not by the government. Youngdale & Sons Construction Co. v. United States, 27 Fed. Cl. 516, 566–67 (1993); Ruhnau-Evans-Ruhnau Associates v. United States, 3 Cl. Ct. 217 (1983). This, however, should not be elevated to the level of form over substance, and a claim will not be disqualified merely because the contractor delivers it to some other government official who in turn presents it to the contracting officer. Dawco Construction Co. v. United States, 930 F.2d 872, 879–80 (Fed. Cir. 1991).

Prior to late 1992, the courts had held that interest on claims of more than \$50,000 did not begin to run until the claim had been properly certified by the contractor as required by 41 U.S.C. § 605(c)(1). Fidelity Construction Co. v. United States, 700 F.2d 1379 (Fed. Cir. 1983), cert. denied, 464 U.S. 826. In October 1992, Congress enacted the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506. Section 907 of the Act, 106 Stat. 4518, permits the correction of defective certifications, in which event interest will run from the date of the contracting officer’s initial receipt of the claim. The portion of the amendment dealing with interest, section 907(a)(3), is not codified but is found as a note following 41 U.S.C. § 611.

Interest under 41 U.S.C. § 611 is applied on a “variable-rate” basis; that is, the rate to be applied to a particular claim will rise or fall each January 1 and July 1 during the accrual period, to mirror rate changes in effect for that period.<sup>80</sup> Brookfield Construction Co. v. United States, 661 F.2d 159 (Ct. Cl. 1981); Honeywell, Inc., GSBCA No. 5458, 81-2 BCA ¶ 15,383 (1981); FAR, 48 C.F.R. § 33.208. Once Brookfield came out, the courts and boards started applying the variable-rate method to their residual pre-CDA claims under the old standard “Payment of Interest” clause.<sup>81</sup> J.F. Shea Co. v. United States, 754 F.2d 338 (Fed. Cir. 1985); McCollum v. United States, 7 Cl. Ct. 709 (1985), vacating in part the court’s prior opinion at 6 Cl. Ct. 373 (1984); Joseph Penner, GSBCA No. 6820, 83-1 BCA ¶ 16,282 (1983).<sup>82</sup>

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<sup>80</sup>The opposing method is the “fixed-rate” method under which the interest rate, once determined with respect to a particular claim, remains the same for that claim throughout the accrual period.

<sup>81</sup>While the FAR no longer includes a separate Payment of Interest clause, an interest provision along the lines of 48 C.F.R. § 33.208 is included as subsection (h) of the Disputes clause, 48 C.F.R. § 52.233-1.

<sup>82</sup>The variable-rate conclusion of the cases cited in the text is perhaps open to question in light of the Supreme Court’s holding in Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 838–39 (1990), that interest under 28 U.S.C. § 1961(a) which, like 41 U.S.C. § 611, refers to “rate” in the singular, is to be applied on a fixed-rate basis. Cf. Honeywell, 81-2 BCA at 76,215, in which the board conceded that its variable-rate conclusion “in effect ignores the literal word of the statute.”

Interest under 41 U.S.C. § 611 is simple interest. The Contract Disputes Act does not authorize compound interest. ACS Construction Co. v. United States, 230 Ct. Cl. 845 (1982). Thus, interest for the first 6-month period is not added to principal to form a new principal for the second 6-month period.

The interest period may be tolled by unreasonable delay in claim processing attributable to the contractor. A.T. Kearney, Inc., 86-1 BCA at 93,509 (contrary result “could be tantamount . . . to providing a contractor with a better investment than his own business might afford”).

Finally, the interest provision of 41 U.S.C. § 611 applies only to claims under the Contract Disputes Act. It does not apply to awards by boards of contract appeals or courts on other than CDA claims. For example, there is no statute authorizing interest on awards of costs and attorney’s fees under the Brooks Act (40 U.S.C. § 759), and in fact the General Services Administration Board of Contract Appeals commonly makes these awards “without interest.” E.g., The Newman Group, Inc. v. NASA, GSBCA No. 11878-C, 93-1 BCA ¶ 25,345 (1992); Horizon Data Corp. v. Department of the Navy, GSBCA No. 11018-C, 92-2 BCA ¶ 24,852 (1992); Berry Computer, Inc., GSBCA No. 11017-C, 92-1 BCA ¶ 24,441 (1991).

Similarly, the Contract Disputes Act does not authorize interest on an indemnification agreement between a pesticide manufacturer and the Environmental Protection Agency under 7 U.S.C. § 136m. Cedar Chemical Corp. v. United States, 18 Cl. Ct. 25 (1989). Such an agreement is not a procurement contract, and the clause in 41 U.S.C. § 602(a) making the CDA applicable to contracts for the disposal of personal property refers to government-owned property. Id. at 32.

## c. Prompt Payment Act

### (1) Introduction

The Contract Disputes Act of 1978 provides for interest on claims under a contract; for the most part, it does not deal with simple delay in making a payment which is not in dispute. Congress addressed this latter situation with the Prompt Payment Act, originally enacted in 1982 (Pub. L. No. 97-177, 96 Stat. 85), and substantially amended in 1988 (Pub. L. No. 100-496, 102 Stat. 2455). The Act is codified at 31 U.S.C. §§ 3901–3907.

The purpose of the Prompt Payment Act, as the House Committee on Government Operations said in reporting the original legislation, is “to accomplish what administrative rules and regulations have failed to

do—provide incentives for the Federal Government to pay its bills on time.” H.R. Rep. No. 461, 97th Cong., 2d Sess. 1 (1982), reprinted at 1982 U.S. Code Cong. & Admin. News at 111.<sup>83</sup> The essence of the statute is the requirement in 31 U.S.C. § 3902(a) that—

“the head of an agency acquiring property or service from a business concern, who does not pay the concern for each complete delivered item of property or service by the required payment date, shall pay an interest penalty to the concern on the amount of the payment due.”

All interest statutes share a common purpose—compensation for the loss of the use of money over some period of time, in other words, a recognition of the time value of money. The Prompt Payment Act has an additional objective, reflected by the use of the term “interest penalty” in the above quotation. The House Government Operations Committee explained as follows:

“By using the word ‘penalties’ to characterize interest payments, the Committee is emphasizing to Government managers that a stigma is attached to the necessity for interest payments caused by an agency’s failure to pay bills on time. Use of the word ‘penalty’ in the context of the Prompt Payment Act connotes inefficient management.”

H.R. Rep. No. 461 at 8; 1982 U.S. Code Cong. & Admin. News at 118.

Without speculating whether two sets of regulations, like the proverbial two heads, may be better than one, we note that the Prompt Payment Act is in that somewhat unusual posture. First, the law directs the Office of Management and Budget to prescribe implementing regulations, and goes on to tell OMB in some detail what those regulations should say. 31 U.S.C. § 3903. These regulations are published as OMB Circular No. A-125, “Prompt Payment” (1989). They are entitled to the deference required by *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), discussed in Chapter 3. *International Business Investments, Inc. v. United States*, 21 Cl. Ct. 79 (1990); *Ocean Technology, Inc. v. United States*, 19 Cl. Ct. 288 (1990); *Technology for Communications International*, ASBCA Nos. 36265, 36841, 93-3 BCA ¶ 26,139 (1993). In addition, an uncodified provision of the 1988 amendments directs modification of the Federal Acquisition Regulation to include solicitation provisions and contract clauses to implement the statute and the OMB regulations. This provision, section 11 of Pub. L. No. 100-496, s 102 Stat. at 2463, 31 U.S.C.

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<sup>83</sup>A 1978 GAO study had concluded that the government made approximately 70 percent of its payments on time. *The Federal Government’s Bill Payment Performance Is Good But Should Be Better*, FGMSD-78-16 (February 24, 1978).

§ 3903 note, also includes considerable detail on the content of the modifications. The FAR coverage is found at 48 C.F.R. Subpart 32.9. Thus, to fully understand or properly apply the Prompt Payment Act, one needs the statute, the OMB circular, and the FAR, as well as any individual agency regulations.

The statute and regulations go into excruciating detail in some areas, most of which we do not reflect here. A well-documented and comprehensive reference to fill in the gaps is Michael J. Renner, “Prompt Payment Act: An Interest(ing) Remedy for Government Late Payment,” 21 Pub. Cont. L.J. 177 (1992).

(2) Which government agencies are covered?

To define the term “agency,” the Prompt Payment Act incorporates the definition in the Administrative Procedure Act, 5 U.S.C. § 551(1). 31 U.S.C. § 3901(a)(1). The APA broadly defines agency as “each authority of the Government of the United States, whether or not it is within or subject to review by another agency,” but there are several exceptions, most notably the Congress, the courts of the United States, the governments of the territories or possessions of the United States, and the government of the District of Columbia. Further, the APA definition does not include the President. Franklin v. Massachusetts, 112 S. Ct. 2767, 2775 (1992).

Thus, case law under the APA definition is directly relevant because an entity which is an agency for purposes of the APA is, by virtue of that fact, also an agency for purposes of the Prompt Payment Act. E.g., Ramer v. Saxbe, 522 F.2d 695 (D.C. Cir. 1975) (Bureau of Prisons); Buckeye Power, Inc. v. Environmental Protection Agency, 481 F.2d 162 (6th Cir. 1973) (EPA); Blackwell College of Business v. Attorney General, 454 F.2d 928 (D.C. Cir. 1971) (Immigration and Naturalization Service).

Cases under the Freedom of Information Act also may be relevant, but must be applied with caution. Prior to 1974, FOIA simply used the APA definition, so pre-1974 cases are directly applicable. E.g., Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971) (agencies within the Executive Office of the President, as distinguished from the President himself, are within the APA definition). FOIA received its own definition of “agency” in 1974 (5 U.S.C. § 552(f)) which, as the court noted in Cotton v. Adams, 798 F. Supp. 22, 24 (D.D.C. 1992), was intended to expand upon the APA definition. Thus, an agency under FOIA is not necessarily an agency under APA/Prompt Payment Act, but an entity which is excluded under the FOIA definition

would also be excluded under the APA/Prompt Payment Act definition. For example, the Library of Congress is not an agency under FOIA. Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 145 (1980). Therefore, it is also not an agency under the APA definition. Ethnic Employees of the Library of Congress v. Boorstin, 751 F.2d 1405, 1416 n.15 (D.C. Cir. 1985).

In addition, the Prompt Payment Act applies to the following:

- An entity being operated exclusively as an instrumentality of a federal agency to administer one or more programs of that agency, and identified as such by the agency head. 31 U.S.C. § 3901(a)(1).
- The Tennessee Valley Authority, except that the TVA may issue its own implementing regulations. Id. § 3901(b).
- The United States Postal Service, except that the USPS may prescribe its own implementing procurement regulations, solicitation provisions, and contract clauses. Id. § 3901(c). This provision was added in the 1988 amendments and is not retroactive. See Brak-Hard Concrete Co., PSBCA No. 2762, 90-3 BCA ¶ 23,067 (1990).

An agency to which the Prompt Payment Act does not apply may nevertheless bind itself by contract to pay interest on a comparable basis. See, e.g., B-223857, February 27, 1987, in which GAO expressed the opinion that the Commodity Credit Corporation was clearly an “agency” under the Prompt Payment Act definition, but that, even if it were not, it would be bound by interest clauses it had included in meat purchase contracts. (The 1988 amendments, in what is now 31 U.S.C. § 3902(h), specifically address certain Commodity Credit Corporation contracts.)

### (3) Who is entitled to receive interest?

The Prompt Payment Act applies to payments made by a government agency to a “business concern.” The term “business concern” is defined in 31 U.S.C. § 3901(a)(2) to include two elements. First is “a person carrying on a trade or business.” The term is not limited to any particular form of business entity (corporation, partnership, sole proprietorship, etc.) as long as that entity is “carrying on a trade or business.” E.g., 65 Comp. Gen. 842, 843 (1986).

The second element of 31 U.S.C. § 3901(a)(2) is “a nonprofit entity operating as a contractor.” This may include state and local governments, but not federal entities. OMB Cir. No. A-125, § 1.g. In an interagency agreement,

however, a provision under which the ordering agency agrees to reimburse the performing agency for expenses incurred in the course of performance will, without further limitation, be construed as referring to ordinary business expenses, including Prompt Payment Act interest incurred by the performing agency. Thus, a federal agency dealing with a nonfederal business concern in the course of performing an interagency agreement is fully subject to the Prompt Payment Act vis-a-vis the business concern; which federal agency will ultimately bear the interest expense depends on the terms of the interagency agreement. 65 Comp. Gen. 795 (1986).

A federal employee is not a “business concern” for Prompt Payment Act purposes. B-231512, September 21, 1989; B-219526, May 25, 1988; B-224628, January 12, 1988.

(4) To what transactions does the statute apply?

The key to the Prompt Payment Act’s applicability is the reference in the first sentence of 31 U.S.C. § 3902(a) to an agency “acquiring property or service from a business concern.” The Act applies to payments stemming from the acquisition of goods or services by the government. It does not apply when the government is providing goods or services. E.g., B-226231, October 23, 1987 (refund of overcharge).

Next, the payment must arise under a contract. OMB Cir. No. A-125, § 2.a; New York Guardian Mortgagee Corp. v. United States, 916 F.2d 1558 (Fed. Cir. 1990); Consolidated Technologies, Inc., ASBCA No. 33560, 88-1 BCA ¶ 20,470 (1987); B-217698, May 16, 1985. OMB defines “contract” as “any enforceable agreement, including rental and lease agreements, purchase orders, delivery orders (including obligations under Federal Supply Schedule contracts), requirements-type (open-ended) service contracts, and blanket purchase agreements,” plus certain Commodity Credit Corporation agreements. OMB Cir. No. A-125, § 1.e. The statute mandates the inclusion of rental contracts (31 U.S.C. § 3901(a)(6)) and the Commodity Credit Corporation transactions (id. § 3902(h)).

Combining these points, the black-letter rule is that the Prompt Payment Act applies when a covered agency is acquiring goods or services by contract from a business concern.

Applying this standard, the Prompt Payment Act does not authorize interest on a quantum meruit payment (contract implied-in-law), even though the government ended up acquiring goods or services, because

there is no legal contract. 70 Comp. Gen. 664, 666–67 (1991). Similarly, it does not include the Department of Veterans Affairs’ statutory obligations under its home loan guarantee program (acquisition of property from lender upon borrower’s default). New York Guardian Mortgage Corp. v. United States, cited above. It does not apply to delayed payments under a grant. Rough Rock Community School Board, IBCA No. 3037, 93-2 BCA ¶ 25,837 (1993). Nor does it authorize interest on an award of attorney’s fees under the Equal Access to Justice Act, because the services were acquired by the opposing party, not the government. FDL Technologies, Inc. v. United States, 967 F.2d 1578 (Fed. Cir. 1992); D.E.W., Incorporated, ASBCA No. 42914, 92-1 BCA ¶ 24,540 (1991).

Unless prohibited by the contract, agencies are expected to make periodic (partial) payments to reflect partial delivery of goods or partial performance of services, and the Prompt Payment Act applies to these partial payments. See 31 U.S.C. § 3903(a)(5); OMB Cir. No. A-125, § 4.o; FAR, 48 C.F.R. § 32.903.

The Prompt Payment Act also applies to certain progress payments. For construction contracts, the statute mandates applicability to progress payments, “including a monthly percentage-of-completion progress payment or milestone payments for completed phases, increments, or segments of any project” which are approved as payable by the contracting agency. 31 U.S.C. § 3903(a)(6).

For other than construction contracts, applicability depends on whether or not the progress payments amount to more than “contract financing payments.” Under the implementing regulations, the Prompt Payment Act does not apply to the late payment of contract financing payments. OMB Cir. No. A-125, § 7.c(2); 48 C.F.R. § 32.907-2.<sup>84</sup> Contract financing payments include advance payments, progress payments based on cost, progress payments based on a percentage or stage of completion (except, as noted above, for construction contracts), and interim payments on cost-type contracts. OMB Cir. No. A-125, § 1.f; 48 C.F.R. § 32.902. The exclusion of financing payments is a logical application of the statute. See, e.g.,

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<sup>84</sup>The specific provision for construction contracts was added to the statute as part of the 1988 amendments, although the Act as implemented by A-125 had previously applied. Many of the progress payment cases applying the then-existing version of the OMB circular are construction cases. Some are B.F. Carvin Construction Co., VABCA No. 3224, 92-1 BCA ¶ 24,481 (1991); Professional Design Constructors, GSBCA Nos. 7937 et al., 91-1 BCA ¶ 23,363 (1990); Sol Flores Construction, ASBCA No. 31557, 32608, 90-1 BCA ¶ 22,365 (1989); Batteast Construction Co., ASBCA No. 34420, 87-3 BCA ¶ 20,044 (1987); Zinger Construction Co., ASBCA No. 31858, 87-3 BCA ¶ 20,043 (1987); Steven E. Jawitz, ASBCA No. 31173, 86-1 BCA ¶ 18,564 (1985). See also Reddick & Sons of Gouverneur, Inc. v. United States, 31 Fed. Cl. 558 (1994).

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Northrop Worldwide Aircraft Services, Inc. v. Department of the Treasury, GSBCA Nos. 11162-TD, 11184-TD, 92-2 BCA ¶ 24,765, at 123,561. Paying interest on an advance payment, for example, would be an unjustified windfall.

For the most part, the Prompt Payment Act is concerned only with payments by the federal government to a prime contractor. There are two exceptions. First, a rather complicated provision of the Act, 31 U.S.C. § 3905, extends its protections to subcontractors at all tiers under federal construction contracts. The statute makes clear that a contractor's interest liability to a subcontractor under section 3905 is not an obligation of the United States and may not be reimbursed to the contractor. Id. § 3905(k).

Second, a grantee under a federal grant may include "interest penalty" provisions in its contracts for the acquisition of property or services from business concerns. However, federal grant funds may not be used to pay this interest, nor may expenditures of nonfederal funds by the grantee for interest penalties be counted as matching funds. 31 U.S.C. § 3902(g). A grantee's liability under section 3902(g), like a contractor's liability under section 3905, is not an obligation of the United States.

#### (5) Public utilities

Public utilities differ from most other providers of goods or services in one important respect. Most utilities are regulated by some state or local governmental authority, and have rate structures approved by the regulating body in the form of a published tariff. Federal agencies acquiring utility services may or may not do so under a formal contract. In cases where there is no formal contract, the agency acquires the services in much the same way an individual customer does—the agency requests the services, the utility provides them and bills the agency periodically. Acceptance of the services with knowledge of the published rate schedule also constitutes a contract which, depending on the precise facts and circumstances, may be an express oral contract or a contract implied-in-fact. The distinction is immaterial to this discussion. The rate structure typically includes a late payment charge. As every reader of this page well knows, utilities tend not to give their customers an overabundance of time to pay their bills before the late payment charge kicks in.

Even before the Prompt Payment Act, based essentially on the principle that the government can bind itself contractually to pay interest, the rule

developed that the government was liable for late payment charges on overdue utility bills where the terms of the utility company's applicable published rate schedule so provided. B-189149, September 7, 1977; B-188616, May 12, 1977; B-184962, November 14, 1975; B-173725, September 16, 1971. As stated in B-173725, "since the Government accepted this utility service with the understanding that its obligation for payment would be governed by the published rate schedule, it is also bound by the late payment clause contained within that schedule."

The Prompt Payment Act does not explicitly address utilities. Nevertheless, GAO has noted that nothing in the statute or its legislative history provides a basis for removing utilities from the statute's coverage. 65 Comp. Gen. 842, 843-44 (1986). Since the Prompt Payment Act defers to specific terms in a contract, the statute and decisional rules are viewed as complementary rather than contradictory. 63 Comp. Gen. 517, 518 (1984).

The rules for utility payments are as follows:

- If the utility services are being acquired under a formal contract, the agency must follow the interest/late payment charge terms specified in the contract. OMB Cir. No. A-125, § 2.b.
- If the contract is silent with respect to interest/late payment charges, or if there is no formal contract, and the utility has a published tariff, the agency must follow the interest/late payment charge provisions of the tariff. *Id.* This is so even though the payment period under the tariff may be (and often is) much shorter than what would be available under the Prompt Payment Act. 63 Comp. Gen. 517 (1984). If interest is payable under a tariff, it cannot also be claimed under the Prompt Payment Act; the utility cannot collect twice. *Id.* at 519.
- If the applicable tariff does not provide for interest/late payment charges and there is no governing clause of a formal contract, interest is payable on late payments in accordance with the Prompt Payment Act. 65 Comp. Gen. 842 (1986).
- If there is no formal contract and the utility is unregulated or otherwise not governed by an approved tariff, the government may nevertheless be bound by the company's customary late payment policy (rather than the Prompt Payment Act) if the relationship amounts to a contract implied-in-fact. 67 Comp. Gen. 24 (1987). In the cited decision, the utility's payment terms were printed on the back of each invoice and became part of the "contract."

Although the decisions tend to use the terms “late payment charge” and “interest charge” interchangeably, courts in some jurisdictions have held that a late payment charge by a utility is not really “interest” but is a device to permit the utility to recoup its costs which are directly attributable to payment delays and thereby avoid indiscriminately charging all users for the delays of some. In two cases predating the Prompt Payment Act, GAO accepted this rationale and held that the government may be liable for late payment charges contained in a utility’s published rate schedule under the general terms of a contract, even in the face of a specific contract clause prohibiting the payment of any “penalty or interest.” B-194905, July 6, 1979; B-186494, July 22, 1976. The effect of the Prompt Payment Act on these cases, if any, has yet to be addressed.

When an agency acquires a utility service such as electric power from another federal entity rather than a business concern, the Prompt Payment Act does not apply and the question of late payment charges depends on the “vendor” entity’s authority under the governing legislation. For example, the Western Area Power Administration, part of the Department of Energy, may assess late payment fees incident to power supplied to other federal agencies under the Reclamation Project Act. 67 Comp. Gen. 426 (1988). See also 44 Comp. Gen. 683 (1965) (similar analysis for Tennessee Valley Authority).

(6) Accrual of the interest penalty

An agency acquiring goods or services from a business concern by contract becomes liable for interest under the Prompt Payment Act if it fails to pay “for each complete delivered item of property or service by the required payment date.” 31 U.S.C. § 3902(a). To determine the “required payment date,” the Prompt Payment Act first defers to the contract. A payment date specified in the contract controls, however strict or lenient it may be. If the contract does not establish a payment date, the statute fills the gap. The law specifies payment dates for a number of specialized situations such as Commodity Credit Corporation payments (§ 3902(h)(2)); meat, fish, dairy products<sup>85</sup>, and perishable agricultural commodities (§§ 3903(a)(2)–(4)); and construction contract progress payments (§ 3903(a)(6)). For all other situations, the required payment

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<sup>85</sup>Includes “edible fats.” Makes your mouth water, doesn’t it?

date where not otherwise specified in the contract is “30 days after a proper invoice for the amount due is received.” Id. § 3903(a)(1).<sup>86</sup>

Thus, the first step is for the contractor to submit a “proper invoice,” defined as an invoice containing or accompanied by the information required by OMB Cir. No. A-125, the regulations of the contracting agency, and the contract. 31 U.S.C. § 3901(a)(3). The required information is spelled out in OMB Cir. No. A-125, § 5.b, and FAR, 48 C.F.R § 32.905(e), and includes such things as the contractor’s name and address, invoice date, and description and price of the goods delivered or services rendered.

A contractor’s “informal calculations” are not a “proper invoice.” Radcliffe Construction Co., ASBCA Nos. 39252, 39253, 90-2 BCA ¶ 22,651 (1990). Nor is an Economic Price Adjustment request. Onan Corp., ASBCA No. 41925, 93-1 BCA ¶ 25,261 (1992). An invoice for change order work is not a “proper invoice” until the value of that work has been recognized in a contract modification. Columbia Engineering Corp., IBCA No. 2322, 98-2 BCA ¶ 21,762 (1989); Ricway, Inc., ASBCA No. 30205, 86-1 BCA ¶ 18,539 (1985).

In determining when an invoice is “received,” the law recognizes that the government is entitled to a reasonable interest-free period to inspect and either accept or reject the performance for which payment is being sought. Therefore, an invoice is considered “received” for interest accrual purposes on the later of (1) the date it is actually received, or (2) the 7th day after delivery or the completion of performance, unless actual acceptance has already occurred or the contract specifies a longer acceptance period. 31 U.S.C. § 3901(a)(4).

It is important to emphasize that the 7-day limit is no more than part of the formula for determining interest accrual. It “does not require the Government to pay for goods or services (including construction) that it has not had the opportunity to inspect and actually accept.” H.R. Rep. No. 784, 100th Cong., 2d Sess. 16 (1988), reprinted in 1988 U.S. Code Cong. & Admin. News 3036, 3044. It recognizes the need for government acceptance while simultaneously precluding excessive uncompensated payment delays.

The contract should tell the contractor where to submit invoices—that is, it should specify a “designated billing office.” An invoice is “actually

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<sup>86</sup>The original Prompt Payment Act provided an additional 15-day “grace period.” See, e.g., Hettich and Company GmbH, ASBCA No. 38781, 93-1 BCA ¶ 25,442 (1992). The 1988 amendments eliminated it.

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received” for interest accrual purposes when it is received by this designated office. 31 U.S.C. § 3901(a)(4)(A)(i); 48 C.F.R. § 32.907-1(a)(1). What counts is receipt or acceptance as provided in the statute, not when the contractor submitted the invoice. Rhondalyn Teel, AGBCA No. 91-224-1, 93-1 BCA ¶ 25,265 (1992).

Also, the agency should note the date of receipt on the invoice. If it fails to do so, the date of the invoice will be considered the date of receipt. 31 U.S.C. § 3901(a)(4)(B).

The next step is for the agency to review the invoice to determine whether it is a “proper invoice.” If it is not, the agency must return it within 7 days of receipt along with an explanation. Id. § 3903(a)(7). If the agency acts within the prescribed 7 days, notification time and response time do not count for interest purposes, and the corrected invoice is treated as the proper invoice. 48 C.F.R. § 32.907-1(b). If the agency delays its notification beyond seven days, the payment due date is adjusted by subtracting the number of days over seven. Id.; 31 U.S.C. § 3903(a)(7)(C). The deferral of interest accrual pending invoice correction does not contemplate frivolous rejections. Tyger-Sayler, A Joint Venture, ASBCA Nos. 33922 et al., 91-2 BCA ¶ 23,726 (1991) (interest payable from date of initial receipt where agency had rejected submission because of essentially harmless typographical errors).

Summing up, then, you determine the required payment date by counting days after receipt of a proper invoice (original or corrected, as the case may be) by the designated billing office. If the government has not paid by the required payment date, interest will start to accrue on the following day. 31 U.S.C. § 3902(b). If the due date falls on a Saturday, Sunday, or legal holiday on which federal offices are closed, the next business day is treated as the due date. OMB Cir. No. A-125, § 4.n; 68 Comp. Gen. 355 (1989).

Interest under the Prompt Payment Act continues to accrue until (1) the delayed payment is made, (2) the business concern files a claim for the unpaid interest under the Contract Disputes Act, or (3) one year from the initial accrual of interest, whichever occurs first. 31 U.S.C. §§ 3902(b) and 3907(b)(1); OMB Cir. No. A-125, §§ 7.a(2) and (5); 48 C.F.R. § 32.907-1(e). The reason for this limitation is that Prompt Payment Act interest is not intended to serve as a substitute investment for the contractor. If the agency has dragged its heels for a full year, the contractor must at that

time either initiate resolution through the Contract Disputes Act claims procedures or see the accrual of interest stop at that point.

Interest does not accrue if there is a dispute between the agency and business concern over the amount of the payment or other issues concerning compliance with the contract. Rather, the contractor should pursue the dispute under the Contract Disputes Act. 31 U.S.C. § 3907(c); OMB Cir. No. A-125, § 7.c(1); 48 C.F.R. § 32.907-1(f). *E.g., James Lowe, Inc., ASBCA No. 42026, 92-2 BCA ¶ 24,835 (1992) (no interest on deduction from progress payment due to disagreement over claimed value of completed work). Merely reviewing a billing or claim to determine whether it is legal and proper is not a “dispute” for purposes of this provision. Arkansas Best Freight System, Inc. v. United States, 20 Cl. Ct. 776 (1990). Also, a request by a certifying officer to GAO for a decision is regarded as an internal government matter and not a “dispute” for purposes of postponing interest accrual. 64 Comp. Gen. 835 (1985).*

If the dispute is over some minor matter, there is authority for the proposition that the government should pay the undisputed amount or incur Prompt Payment Act penalties for failing to do so. *N & P Construction Co., VABCA Nos. 3283, 3286, 93-1 BCA ¶ 25,251 (1992).*

#### (7) Payment

It is important to know exactly what constitutes “payment” for Prompt Payment Act purposes and when it is deemed to occur (a) to determine whether or not there has been a “failure to pay” which will begin the accrual of interest, and (b) to know when to terminate the accrual of interest.

The statute specifies that the date of payment is “the date a check for payment is dated or an electronic transfer is made.” 31 U.S.C. § 3901(a)(5). The reason for selecting this date was to make the law “as easy to administer as possible.” S. Rep. No. 302, 97th Cong., 1st Sess. 11 (1981) (report of Senate Committee on Governmental Affairs on original Prompt Payment Act). Using the date of receipt by the payee would have created an administrative nightmare in that claims would have to be filed and processed in every case, often for very small amounts.

Of course, when a check is dated and when it is mailed can be two very different things. OMB Circular A-125, § 4.n, addresses this by telling agencies to mail or transmit checks on the same day they are dated. (The

FAR says “on or about” the same day. 48 C.F.R. § 32.903.) Payment may be made up to 7 days prior to the required payment date. 31 U.S.C. § 3903(a)(8). However, OMB cautions that, in the interest of effective cash management, agencies should strive to release their payments “so as to pay proper invoices as close as possible to the due date without exceeding it,” and should experiment with the timing of release with this objective in mind. OMB Cir. No. A-125, § 4.1. This mirrors the guidance of the House Government Operations Committee. See H.R. Rep. No. 784, 100th Cong., 2d Sess. 31 (1988), 1988 U.S. Code Cong. & Admin. News at 3059.

The concern here is to minimize early payment which, just as late payment does, costs the government in a very real sense. This was a concern of the original legislation as well as the 1988 amendments, as noted in the report of the Senate Committee on Governmental Affairs on the original Prompt Payment Act. See S. Rep. No. 302, 97th Cong., 1st Sess. 4 (1981), referring to premature payment as another form of “sloppy cash management.” GAO has also been critical. See GAO report, Prompt Payment Act: Agencies Have Not Fully Achieved Available Benefits, GAO/AFMD-86-69 (August 1986), at 25–26. In addition, OMB Circular No. A-125, § 4.q, directs agencies to make payment consistent with the Treasury Financial Manual, which in turn states that payments should be “neither early nor late.” I TFM § 6-8040.20.

Thus, payment is determined by the date on the check, at least in most cases, provided the check is mailed on or extremely close to that date. If all of this occurs on the required payment date, the agency has complied with the letter of the law and will not incur an interest penalty, although an agency should not make this its general practice as it is inconsistent with the intent of both the statute and the OMB regulations.<sup>87</sup>

Failure to pay generally means any action or inaction by the contracting agency which results in payment not being made by the due date. For example, Prompt Payment Act interest has been awarded on the refund of liquidated damages improperly withheld from an invoice request. Youngdale & Sons Construction Co. v. United States, 27 Fed. Cl. 516 (1993). The determination that the withholding was improper meant that the invoice should have been paid by its due date, and failure to do so violated the Prompt Payment Act.

An interesting variation occurred in 64 Comp. Gen. 32 (1984). A contractor submitted a proper invoice to the Forest Service, which issued a check for

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<sup>87</sup>Decisions inconsistent with what is stated in the text, such as 61 Comp. Gen. 166 (1981) and 63 Comp. Gen. 391 (1984), were rendered prior to current statutory and/or regulatory guidance, and are obsolete to the extent of the inconsistency.

payment in full well before the required payment date (in fact, 4 days after receipt of the invoice). The contractor apparently never received the check and asked Forest Service for a replacement. Forest Service notified the Treasury Department which, after a delay of several weeks, issued the replacement check. Since by now the required payment date had been exceeded, the contractor claimed interest. The Comptroller General found that the Prompt Payment Act did not require interest in that situation. The Forest Service had done everything it was required to do, and had done it promptly. While there may have been a delay in receipt of payment by the contractor, there had been no “failure to pay” on the part of the contracting agency.

Noting the penalty aspect of the Prompt Payment Act, the decision also pointed out that “[t]here is no indication that Congress intended to insure contractors against all eventualities, especially where there is no fault on the part of the contracting agency in effectuating the original payment.” *Id.* at 34. A few years later, GAO explained that this language should not be pulled out of context to suggest that the Prompt Payment Act would never apply to delays beyond the contracting agency’s control. B-223857, February 27, 1987 (Act applicable to delay in payment due to exhaustion of funding). The Armed Services Board of Contract Appeals distinguished 64 Comp. Gen. 32 in a 1993 case and awarded interest where a check was stolen by an employee of a courier service before being placed in the mail system. *Sun Eagle Corp.*, ASBCA Nos. 45985, 45986, 94-1 BCA ¶ 26,425 (1993).

#### (8) Rate and computation

The applicable interest rate under the Prompt Payment Act is the rate prescribed by 41 U.S.C. § 611 for the Contract Disputes Act. 31 U.S.C. § 3902(a). There is one significant difference in the method of application, however. Interest under the Prompt Payment Act is computed on a fixed-rate basis. The statute provides that “interest shall be computed at the rate . . . which is in effect at the time the agency accrues the obligation to pay a late payment interest penalty.” *Id.* The implementing regulatory provisions are OMB Cir. No. A-125, § 1.d, and FAR, 48 C.F.R. § 32.907-1(d).

Another significant difference is that, while Contract Disputes Act interest is simple interest, Prompt Payment Act interest is compounded monthly. 31 U.S.C. § 3902(e).

An agency which fails to pay a required interest penalty may be subject to an additional penalty. If an agency's failure to pay interest required by the Prompt Payment Act continues for 10 days after the underlying payment is made, and if the business concern makes a written demand not later than 40 days after that payment date, the agency will owe an additional penalty based on a percentage of the basic interest penalty determined under the OMB regulations. 31 U.S.C. § 3902(c)(3); 48 C.F.R. § 32.907-1(g).

The additional penalty is 100 percent of the original interest penalty, with a minimum of \$25 and a maximum of \$5,000. OMB Cir. No. A-125, §§ 8.b, 8.c. The additional penalty does not apply to utility payments. *Id.* § 8.d.

(9) Procedures and funding

Prompt Payment Act interest is a statutory entitlement. The business concern does not have to file any sort of claim as a prerequisite to payment. The law provides:

“A business concern shall be entitled to an interest penalty of \$1.00 or more which is owed . . . under this section, and such penalty shall be paid without regard to whether the business concern has requested payment of such penalty.”

31 U.S.C. § 3902(c)(1). See also OMB Cir. No. A-125, § 4.p; 48 C.F.R. § 32.903; *B.F. Carvin Construction Co.*, VABCA No. 3224, 92-1 BCA ¶ 24,481 at 122,188 (1991) (“the interest penalty is self-executing”). Thus, the agency has the primary responsibility to keep track of its payments and to add interest where required. Payment should be accompanied by a notice which specifies how much of the payment represents interest and identifies the rate and accrual period upon which the agency based its computation. 31 U.S.C. § 3902(c)(2). OMB Circular A-125, § 6.a, reminds agencies of the common-sense point to also include the contract and invoice numbers.

For interest amounts of under \$1.00, GAO's position in other contexts has been to pay it only if specifically claimed. E.g., 58 Comp. Gen. 372, 375 (1979). Whether this should apply as well to the Prompt Payment Act or whether an agency can refuse to waste the money to process a claim for pennies has yet to be addressed, although we are sure it is just a matter of time until someone with nothing better to do raises the issue.<sup>88</sup>

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<sup>88</sup>There is some legislative history to support the conclusion that the agency need not process the claim. See Michael J. Renner, “Prompt Payment Act: An Interest(ing) Remedy for Government Late Payment,” 21 Pub. Cont. L.J. 177, 229 n.245 (1992).

Prompt Payment Act interest is to be absorbed by applicable program appropriations. The law emphasizes that it does not authorize additional appropriations for the penalties, which are to be paid “out of amounts made available to carry out the program for which the penalty is incurred.” 31 U.S.C. § 3902(f). This includes amounts which an agency may be authorized by law to transfer to the program account from other accounts. H.R. Rep. No. 461, 97th Cong., 2d Sess. 9 (1982), 1982 U.S. Code Cong. & Admin. News at 119. Thus, for example, the “General Expenses” appropriation of the Army Corps of Engineers is not available to pay Prompt Payment Act penalties incurred by civil works projects which receive their own line-item appropriations. B-248150, August 17, 1993. Payments are chargeable to the fiscal year or years in which the interest liability accrued. See 63 Comp. Gen. 517, 519 (1984).

The law also emphasizes that the temporary unavailability of funds does not affect the accrual of interest. 31 U.S.C. § 3902(d). See also B-223857, February 27, 1987 (temporary depletion of borrowing authority did not diminish obligation to pay interest on Commodity Credit Corporation contracts), the case which prompted section 3902(d).

Even though Prompt Payment Act interest is cast in terms of a statutory entitlement, a contractor can waive its right to receive the interest. The waiver may be express, or it may be implied from conduct as long as the conduct shows a clear intent. 62 Comp. Gen. 673 (1983). There is a practical underpinning to this decision in that the government cannot force a contractor to accept the interest payment. The law might as well permit waiver because a contractor wishing for whatever reason to waive the interest is always free to take the payment and give it right back to the government. *Id.* at 674.

Although interest payments are supposed to be automatic, they often have not been. See H.R. Rep. No. 784, 100th Cong., 2d Sess. 18 (1988), 1988 U.S. Code Cong. & Admin. News at 3046. Accordingly, the law provides a collection mechanism by authorizing the contractor to file a claim for unpaid Prompt Payment Act interest under the Contract Disputes Act. 31 U.S.C. § 3907(a). This means a written claim submitted to the contracting officer, whose decision may be appealed to the appropriate board of contract appeals or directly to court.<sup>89</sup> The Contract Disputes Act procedures are a “jurisdictional prerequisite to adjudicating a claim” under the Prompt Payment Act. *CPT Corp. v. United States*, 25 Cl. Ct. 451, 456

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<sup>89</sup>A contractor who has filed a written claim under the Prompt Payment Act need not submit a separate claim in order to satisfy the CDA requirement. *General Electric Co.*, ASBCA No. 33227, 87-1 BCA ¶ 19,484 (1986).

(1992). While GAO has addressed a number of Prompt Payment Act issues, it will not, in view of this explicit statutory procedure, adjudicate or review individual Prompt Payment Act claims. B-213383, November 7, 1983; B-212103, September 22, 1983.

As noted earlier, Prompt Payment Act interest ceases to accrue upon filing the Contract Disputes Act claim or after one year, whichever is sooner. If the claim is allowed, interest on it is payable under the Contract Disputes Act. 31 U.S.C. § 3907(b)(2). Thus, as long as the CDA claim is filed within one year, there is no gap in interest accrual. An award illustrating these principles is Batteast Construction Co., ASBCA No. 34420, 87-3 BCA ¶ 20,044 (1987). The computational aspects can be summarized in the following steps:

- If the government fails to pay for goods or services acquired by contract by the required payment date, interest at the Contract Disputes Act rate begins to accrue on the following day.
- Interest is applied on a fixed-rate basis, and is compounded monthly.
- Interest is payable until the underlying payment is made, the claimant files a claim under the CDA, or one year elapses, whichever is sooner.
- If the claimant files a CDA claim, the amount of unpaid interest, “frozen” as of that point, becomes part of the claim along with any unpaid principal. CDA interest will then accrue on the amount of the claim in accordance with 41 U.S.C. § 611, on a variable-rate basis but not compounded.

The CDA claim may include the “additional penalty” or “double whammy” authorized by 31 U.S.C. § 3902(c)(3). OMB Cir. No. A-125, § 13.a(1). OMB specifies that, if the basic interest penalty ceases to accrue at the end of one year in accordance with 31 U.S.C. § 3907(b)(1), the additional penalty will nevertheless continue to accrue. OMB Cir. No. A-125, § 8.c. Once a CDA claim is filed, however, the additional penalty presumably stops accruing along with the basic penalty, although the regulations could be more explicit on this point.

#### (10) Prompt payment discounts

The Prompt Payment Act also deals with prompt payment discounts. The pertinent provision is 31 U.S.C. § 3904:

“The head of an agency offered a discount by a business concern from an amount due under a contract for property or service in exchange for payment within a specified time may pay the discounted amount only if payment is made within the specified time. For the

purpose of the preceding sentence, the specified time shall be determined from the date of the invoice. The head of the agency shall pay an interest penalty on an amount remaining unpaid in violation of this section. The penalty accrues as provided under sections 3902 and 3903 of this title, except that the required payment date for the unpaid amount is the last day specified in the contract that the discounted amount may be paid.”

The implementing regulations are OMB Cir. No. A-125, §§ 4.i and 4.m; FAR, 48 C.F.R. §§ 32.905(g) and 52.232-8 (contract clause); and the Treasury Financial Manual, I TFM § 6-8040.30.

Section 3904 does several things. First, it codifies the obvious point that an agency is not authorized to take a prompt payment discount beyond the terms under which it is offered. This is nothing new. See, e.g., 6 Comp. Gen. 545 (1927); B-130542, February 15, 1957 (circular letter discouraging the taking of unearned discounts).

Second, it establishes the rule that the period for taking the discount begins on the date of the invoice. This sentence was added to the Prompt Payment Act as part of the 1988 amendments. Prior to 1988, the rule had been that the period starts when the designated government office receives a correct or proper invoice. E.g., B-169682(2), February 2, 1971. While it is clear that the pertinent date is now the date of the invoice rather than the date of receipt, it is certainly reasonable to continue to interpret “invoice” as meaning “proper invoice,” as OMB and the Treasury Department have done. OMB Cir. No. A-125, § 4.i; I TFM § 6-8040.30. Both specify that the discount period “is calculated from the date placed on the proper invoice by the contractor.”

If there is no date on the invoice, the prior rule continues to apply and the discount period will start on the date the designated billing office receives a proper invoice and (on the same day) annotates it with the date of receipt. *Id.*

Third, it establishes the date of the government’s check as the date of payment, the same as for the rest of the Prompt Payment Act.<sup>90</sup> Section 3904 does not say this directly, but since it is part of the Prompt Payment Act, 31 U.S.C. § 3901(a)(5) applies to it as well. Thus, the determination of “payment” in the context of late payments, previously discussed, applies equally to prompt payment discounts.

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<sup>90</sup>Much ink had been spilled on this question prior to the Prompt Payment Act. A brief summary of some of it may be found in B-214446, October 29, 1984.

Finally, it requires the government to pay interest if it improperly takes a prompt payment discount. The required payment date is the last day specified for taking the discount. As with late payments in general, if this day falls on a Saturday, Sunday, or legal holiday on which federal offices are closed, the next business day becomes the due date. 68 Comp. Gen. 355 (1989). See also 65 Comp. Gen. 53 (1985); 56 Comp. Gen. 187 (1976); B-187824, February 28, 1977.

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### 3. Employee Claims

The quest to recover interest from the federal government has touched every conceivable type of monetary claim that may be brought against the government, and claims by federal civilian employees and military personnel are no exception. For the most part, the traditional answer was a simple application of the no-interest rule—there was no authority for it. Starting in 1987, two pieces of legislation have interrupted the unbroken line of disallowances, and the answer now is more of a “mixed bag.”

First is the Back Pay Act, 5 U.S.C. § 5596. Prior to 1987, claims for interest under the Back Pay Act were consistently denied for the simple reason that neither the Back Pay Act nor any other statute provided for interest. E.g., 63 Comp. Gen. 170 (1984); 63 Comp. Gen. 156 (1984); 61 Comp. Gen. 578 (1982). The law was amended in 1987 to require the payment of interest on back pay payable under section 5596. 5 U.S.C. § 5596(b)(2). Implementing regulations by the Office of Personnel Management are found at 5 C.F.R. § 550.806.

Interest is payable from the effective date of the withdrawal or reduction of pay to a date not more than 30 days prior to the date of payment, at the rate for tax overpayments determined under 26 U.S.C. § 6621(a)(1), and is compounded daily. 5 U.S.C. § 5596(b)(2)(B). The accrual date will usually represent one or more pay dates on which the claimant would have received the pay or allowances in question. 5 C.F.R. § 550.806(a). Subject to the 30-day limitation, agencies have discretion to fix the termination date. 70 Comp. Gen. 711, 713 (1991).

Under this authority, interest is payable on awards, administrative or judicial, made under the Back Pay Act and OPM regulations. For example, the delayed payment of an incentive award normally does not create an entitlement to interest. B-202039, May 7, 1982. However, failure to pay an incentive award by a deadline established in a collective bargaining agreement does trigger the interest provision of the Back Pay Act. 70 Comp. Gen. 711 (1991). Other examples are 70 Comp. Gen. 560

(1991) (award of overtime compensation by grievance arbitrator);<sup>91</sup> B-242277, September 12, 1991 (refund of amounts erroneously withheld from salary and credited to retirement fund).

For interest to be payable under 5 U.S.C. § 5596(b)(2), the underlying award must be made under the authority of the Back Pay Act, not some other statute. *E.g.*, *Markey v. United States*, 27 Fed. Cl. 615 (1993) (interest not authorized on back pay award under Rehabilitation Act). Similarly, travel and transportation expenses have not been regarded as “allowances” for Back Pay Act purposes. *Hurley v. United States*, 624 F.2d 93 (10th Cir. 1980); *Morris v. United States*, 595 F.2d 591 (Ct. Cl. 1979). As long as this interpretation stands, delayed reimbursement of these expenses would not trigger interest under 5 U.S.C. § 5596(b)(2). B-249171, August 21, 1992 (non-decision letter).

Interest under the Back Pay Act is payable from the same funding source as the back pay itself (agency operating appropriations, permanent judgment appropriation, etc.). 5 U.S.C. § 5596(b)(2)(C). For awards payable from agency appropriations, interest is chargeable to the same fiscal year or years as the underlying back pay to which it relates, and in the same proportions. 69 Comp. Gen. 40 (1989); B-242277, September 12, 1991.

The second relevant piece of legislation is Title VII of the Civil Rights Act of 1964. As with the Back Pay Act, there was no authority for the payment of interest on monetary awards under Title VII prior to 1987. *E.g.*, 58 Comp. Gen. 5 (1978); B-207176, January 6, 1983. Responding to the suggestion that Title VII might ride the coattails of the 1987 amendment to the Back Pay Act, the Justice Department determined that the 1987 amendment did not apply to Title VII awards. Payment of Interest on Awards of Back Pay in Employment Discrimination Claims Brought by Federal Employees, Op. Off. Legal Counsel (September 18, 1989). GAO was inclined to agree. B-234398, July 14, 1989 (non-decision letter). While some courts strained to reach a contrary result,<sup>92</sup> the issue became moot when Congress amended Title VII in 1991 to provide that “the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.” 42 U.S.C. § 2000e-16(d) (Supp. IV 1992). While interest on monetary Title VII awards is now clearly payable, the statute does not

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<sup>91</sup>Interest was not payable in the cited case because the final decision occurred before the effective date of the 1987 amendment to the Back Pay Act.

<sup>92</sup>See the corresponding headings in Chapter 14 for further discussion of the Title VII and Back Pay Act interest provisions, with additional citations.

specify the applicable rate nor does it provide any further detail on how the interest is to be computed.

Pending a more definitive determination, it is possible to argue that, at least for back pay awards, Title VII interest should be the same as Back Pay Act interest. This is because the Equal Employment Opportunity Commission's Title VII regulations, specifically, 29 C.F.R. § 1613.271(c)(1), talk about back pay "computed in the same manner prescribed by 5 CFR 550.805" (the OPM Back Pay Act regulations), and section 805(f) refers to the inclusion of Back Pay Act interest.

For employee claims not subject to either of these statutes, interest remains unauthorized. A partial listing of situations in which interest has been denied—and would continue to be denied unless the item were part of an award authorized under either the Back Pay Act or Title VII—is set forth below:

- Overtime. 53 Comp. Gen. 264, 269 (1973); B-189181, June 20, 1978.
- Relocation expenses. 70 Comp. Gen. 571 (1991) (mileage expenses to retrieve stored household goods); B-231512, September 21, 1989 (temporary quarters subsistence expenses); B-219526, May 25, 1988 (relocation income tax allowance); B-224628, January 12, 1988; B-182276, April 10, 1975.
- Interest charged an employee for late deposit to Civil Service Retirement System for credit for post-1956 military service. B-232231, February 23, 1989.
- Reimbursement for collection of excess charges on shipment of household goods. B-193856, March 26, 1980.
- Severance pay. B-213346, May 30, 1986; B-165072, May 13, 1969.
- Reimbursement for erroneous deduction of allotment. B-178330, March 11, 1974.
- Delay in issuance of allotment check. 65 Comp. Gen. 541 (1986).
- Payments resulting from the correction of military records under 10 U.S.C. § 1552. B-195129, April 28, 1980; B-173513, August 10, 1971.
- Delayed payment of reenlistment bonus. B-179968-O.M., May 24, 1974.
- Payments received under the Missing Persons Act. B-159399, October 14, 1981.
- Refund of amounts erroneously deducted from retired pay under Survivor Benefit Plan. 72 Comp. Gen. \_\_\_ (B-243671, October 8, 1992).
- Payment to state retirement fund on account of state employee temporarily assigned to federal agency under Intergovernmental Personnel Act of 1970. B-192415, March 1, 1979.

Interest questions also arise under government savings programs. For example, agencies are not authorized to make payments to employee Thrift Savings Plan accounts to compensate for lost earnings attributable to insufficient agency contributions resulting from administrative error. 68 Comp. Gen. 220 (1989). The decision did not consider the effect, if any, of the then newly enacted Back Pay Act interest provision (*id.* at 222 n.3), but in any event suggested the desirability of corrective legislation.

Considering the Serviceman's Deposit Program enacted in 1990 for the benefit of participants in Operation Desert Shield/Storm, GAO found no authority to pay interest on amounts withdrawn by persons who were ineligible to participate when they made their original deposits. B-248439 et al., October 22, 1992. Under an earlier program (Uniformed Services Savings Deposit Program), however, interest was authorized in a case where the Army had erroneously retained a member's funds beyond the program's planned phase-out. Since the statute authorizing interest on the deposits had not been repealed, the government was obligated to pay interest until the deposit was actually returned. B-183769-O.M., April 6, 1976.

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#### 4. Computation

When interest is payable, it is computed by a very precise formula, stated as follows in B-60952, July 2, 1953:

"In the absence of clear authority to the contrary, it has been a rule long followed by the accounting officers of the Government that the computation of interest in Government transactions [is] calculated for a fractional part of a year on the basis of the actual number of days within the period involved, using such number of days as the numerator and the actual number of days in the particular (calendar) year as the denominator—including either the beginning or ending date of the period, but not both . . . [I]nterest is computed on the basis of 365 days per year, or 366 days in a leap year."

This is not quite as complicated as it sounds. For simple interest, the computation involves the following steps:

- (a) Determine the amount of interest for a full year by multiplying the principal by the annual interest rate.
- (b) Determine the daily interest amount by dividing (a) by 365 or 366, as applicable.

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(c) Determine the actual number of days in the accrual period but do not count both the beginning date and the ending date.

(d) Multiply (b) x (c).

See also 22 Comp. Gen. 656 (1943); 15 Comp. Gen. 992 (1936); 15 Comp. Gen. 871 (1936); 1 Comp. Gen. 411 (1922); A-51618, November 21, 1934. Naturally, this formula will apply only where some other formula is not specifically prescribed by law. For example, for interest computations under the Prompt Payment Act, OMB Circular No. A-125, § 7.a(11), states that “calculations are to be based on a 360 day year.”

The portion of the formula which says to count either the beginning date or the ending date but not both is nothing more than an application of the well-established rule that when measuring time “from” a certain day, the designated day is excluded. *Burnet v. Willingham Loan & Trust Co.*, 282 U.S. 437, 439 (1931); *United States v. Tawab*, 984 F.2d 1533 (9th Cir. 1993); 56 Comp. Gen. 187 (1976); 9 Op. Att’y Gen. 131 (1858). We suspect the rule has been stated somewhat differently in the interest context because it made no difference which day was excluded, whereas it could make a significant difference in other contexts (for example, expiration of a statute of limitations, as in *Tawab*). With the advent of variable-rate computations such as under the Contract Disputes Act, it could now make a difference, however slight, in the interest context too, so it is probably more accurate to consistently exclude the beginning date.

Statutes authorizing the recovery of interest from the United States usually, but not always, identify the applicable rate. An exception was discussed in 72 Comp. Gen. 122 (1993). The Outer Continental Shelf Lands Act authorizes the Secretary of the Interior to cancel leases, in which event the lessee is entitled to compensation with interest. The statute is silent as to the applicable rate. GAO advised that Interior has discretion to select an appropriate rate to include in its program regulations, but in exercising this discretion Interior should take a “conservative approach and adopt a rate that will minimize costs to the government while still being fair to lessees.” Consistent with traditional government practice, whatever rate is selected should be applied as simple interest since the governing statute does not specify compounding.

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## H. False or Fraudulent Claims

Several statutes deal with false or fraudulent claims and impose both civil and criminal penalties. Perhaps most important is the False Claims Act, 31

U.S.C. §§ 3729–3733, amended to its present form in 1986. Any person who presents a false or fraudulent claim against the government or uses false documents in connection with such a claim is liable “for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains” as a result of the fraud, plus the costs of suit. *Id.* § 3729(a). Cooperation by the person committing the violation can reduce the treble damages to double damages. *Id.* There is no requirement to prove specific intent to defraud. *Id.* § 3729(b); Gravitt v. General Electric Co., 680 F. Supp. 1162 (S.D. Ohio 1988).

The statute was intended, so said one district court, “to protect the treasury against the hungry and unscrupulous host that encompasses it on every side.” United States v. Griswold, 24 F. 361, 366 (D. Ore. 1885), *aff’d*, 30 F. 762 (C.C. Ore. 1887). Its constitutionality has been upheld against a variety of attacks. E.g., United States ex rel. Kreindler v. United Technologies Corp., 985 F.2d 1148 (2d Cir. 1993) (statute does not violate Article III).

Suit may be brought by the United States or by any person in the name of the United States. 31 U.S.C. §§ 3730(a), (b). A suit brought by a private informer is known as a “qui tam” action and the informer is called the “relator.” The suit is styled “United States ex rel. (name of relator) v. (defendant).” If suit is brought by an informer, the government may elect to take it over or may elect not to proceed, in which event the informer has the right to continue. *Id.* §§ 3730(b), (c). The government, however, remains the real party in interest. Kreindler, 985 F.2d at 1154. Either way, the informer gets a percentage of any recovery plus reasonable costs and attorney’s fees. 31 U.S.C. § 3730(d). In a suit brought against the United States by a contractor under the Contract Disputes Act, the government may present a counterclaim under the False Claims Act which was not the subject of a contracting officer’s decision. Martin J. Simko Construction, Inc. v. United States, 852 F.2d 540 (Fed. Cir. 1988).

The False Claims Act includes a statute of limitations of 6 years after the violation or 3 years after the time material facts are or should have been known, whichever occurs last, not to exceed 10 years after the violation. *Id.* § 3731(b).

A “claim” for purposes of the False Claims Act includes—

“any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government

provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.” Id. § 3729(c).

Thus, the claim does not have to be filed directly with the United States. The statute encompasses, for example, claims filed with state agencies channeled to the federal government for payment under the Medicaid program. United States ex rel. Fahner v. Alaska, 591 F. Supp. 794 (N.D. Ill. 1984). The Act has been found applicable not only where an individual convinces the government to pay out money or to pay out too much money, but also where an individual fraudulently pays too little to the government. United States v. Douglas, 626 F. Supp. 621 (E.D. Va. 1985) (noting that the courts were not unanimous on this point).

Damages under the False Claims Act means actual damages suffered by the government. United States v. Cooperative Grain and Supply Co., 476 F.2d 47, 63 (8th Cir. 1973); United States v. Aerodex, Inc., 469 F.2d 1003, 1011 (5th Cir. 1972) (damages “must be measured by the amount wrongfully paid to satisfy the false claim”); United States v. Woodbury, 359 F.2d 370, 379 (9th Cir. 1966) (“measure of the government’s damages would be the amount that it paid out by reason of the false statements over and above what it would have paid if the claims had been truthful”). The amount of double or treble damages is computed before deducting any compensatory payments received by the government from any source. United States v. Bornstein, 423 U.S. 303, 315–16 (1976). Otherwise the perpetrator could defeat the statute by tendering the actual damages any time prior to judgment. Id. at 316. However, the government does not need to show actual damages to pursue the civil penalty. United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416 (9th Cir. 1991); United States v. Hughes, 585 F.2d 284 (7th Cir. 1978).

The costs of suit referred to in 31 U.S.C. § 3729(a) do not include the administrative costs of an agency’s investigation. B-164031(4).100-O.M., November 21, 1975. However, the statute recognizes, by virtue of the civil penalty and treble damage provisions, that the government incurs indirect administrative expenses over and above the amount actually paid out when it pays a false claim. See Bornstein, 423 U.S. at 315 (statute reflects congressional judgment that multiple damages “are necessary to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims”); United States ex rel. Marcus v. Hess, 317 U.S. 537, 551–52 (1943) (multiple damages plus

specific sum “chosen to make sure that the government would be made completely whole”).

Amounts recovered under the False Claims Act may be credited to the appropriate agency appropriation or fund (if not closed) to reimburse the agency for its losses resulting from the fraud. Amounts recovered in excess of those losses must be deposited in the Treasury as miscellaneous receipts. 69 Comp. Gen. 260 (1990). If the fund involved is a revolving fund, it may also be possible for the agency to retain an additional amount representing interest on the loss, depending on the terms of the governing legislation. Id.

In addition to the civil penalties under the False Claims Act, there are criminal penalties for making false or fraudulent statements or representations to government agencies (18 U.S.C. § 1001) and for possessing false documents with the intent to defraud the United States (18 U.S.C. § 1002). Apart from tangential fiscal matters such as 69 Comp. Gen. 260, GAO will not render decisions under any of these statutes because their enforcement is the responsibility of the Department of Justice, in the case of the False Claims Act because the statute expressly places it there (Martin J. Simko Construction, Inc. v. United States, 852 F.2d 540, 547 (Fed. Cir. 1988)), and in the case of the Title 18 provisions because they are penal statutes. See B-149372, February 14, 1978.

One of the drawbacks of the False Claims Act is that it is not cost-effective for the government to use in cases involving small amounts. Congress addressed this problem by enacting the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. §§ 3801–3812. The Program Fraud Act complements the False Claims Act by providing an administrative remedy for cases involving relatively small dollar amounts. It applies generally to claims of not more than \$150,000. Id. § 3803(c)(1); B-239597, January 23, 1991 (internal memorandum). Penalties for making a false or fraudulent claim include a civil penalty of up to \$5,000 plus an assessment of up to twice the amount of the claim. 31 U.S.C. § 3802(a)(1). The Act establishes procedures for conducting investigations and determining liability, including the opportunity for the person allegedly liable to request a hearing. Id. § 3803. The Act also provides for limited judicial review (§ 3805) and judicial enforcement by the Attorney General (§ 3806).<sup>93</sup>

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<sup>93</sup>A 1991 review of the Act’s implementation indicated limited success. See Program Fraud: Implementation of the Program Fraud Civil Remedies Act of 1986, GAO/AFMD-91-73 (September 1991).

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Except for recoveries by the Postal Service and recoveries under certain titles of the Social Security Act, amounts recovered under the Program Fraud Act, both penalties and assessments, must be deposited in the Treasury as miscellaneous receipts. 31 U.S.C. § 3806(g).

Still another relevant statute is 28 U.S.C. § 2514:

“A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof.

“In such cases the United States Court of Federal Claims shall specifically find such fraud or attempt and render judgment of forfeiture.”

This provision applies only to claims filed in the Court of Federal Claims. It does not apply to a claim which has been settled by payment, nor does it affect the recovery of money paid out as a result of fraud. 41 Comp. Gen. 285 (1961); 41 Comp. Gen. 206 (1961); B-158404-O.M., August 1, 1966. The court applies the statute on a case-by-case basis and applies the common-law elements of fraud—(1) misrepresentation of a material fact, (2) intent to deceive, (3) justifiable reliance by the party deceived, and (4) injury resulting from the reliance. Colorado State Bank of Walsh v. United States, 18 Cl. Ct. 611, 629 (1989).

In Brown Construction Trades, Inc. v. United States, 23 Cl. Ct. 214 (1991), the court held that a contractor who had been convicted of fraud for paying a bribe in connection with a contract modification forfeited all claims arising under the tainted contract. The court cited both public policy and 28 U.S.C. § 2514 as grounds for its holding. “The practice of a fraud on part of a contract condemns the whole.” 23 Cl. Ct. at 216.

The fact that only the Court of Federal Claims has power to declare a forfeiture under 28 U.S.C. § 2514 by no means suggests that an agency should pay a claim if fraud is suspected. In addition to the various statutes mentioned above, decisions of the Comptroller General have developed a set of principles for the handling of false or fraudulent claims at the administrative level.

The starting point is the rule that the fraudulent presentation of a claim vitiates the claimant’s rights in the entire claim. 23 Comp. Gen. 907 (1944); 20 Comp. Gen. 507 (1941); 17 Comp. Gen. 61 (1937); 14 Comp. Gen. 150 (1934). If fraud is suspected, the claim should be viewed as one of doubtful

validity and should be disallowed, leaving the claimant to pursue the matter in the Court of Federal Claims which has the authority to declare a forfeiture under 28 U.S.C. § 2514. 41 Comp. Gen. 285 (1961); 41 Comp. Gen. 206 (1961); B-186020, June 28, 1976. The government's failure to prosecute criminally does not preclude appropriate administrative action. 68 Comp. Gen. 108 (1988); 57 Comp. Gen. 664, 669 (1978); B-219887, January 21, 1986.

A case applying the above principles to a contract claim is 44 Comp. Gen. 110 (1964). The Comptroller General stated, at page 116:

“[U]nder the rule which has been judicially recognized for so long and so often declared in decisions of our Office that it has become a landmark in the disposition of claims involving irregularities and possibly fraudulent practices against the United States, it is the plain duty of administrative, accounting and auditing officers of the Government to refuse approval and to prevent payment of public moneys under any agreement on behalf of the United States as to which there is a reasonable suspicion of irregularity, collusion, or fraud, thus reserving the matter for scrutiny in the courts when the facts may be judicially determined upon sworn testimony and competent evidence and a forfeiture declared or other appropriate action taken.”

See also 17 Comp. Gen. 61 (1937) (payment under rental agreement); 23 Comp. Gen. 907 (1944) (bailment); 14 Comp. Gen. 150 (1934); 20 Comp. Gen. 507 (1941); B-219809, September 17, 1985; B-152676, August 26, 1968. The principle has also been applied with respect to fraudulently altered government checks. See B-54418, January 25, 1946.

In the decision from which the above quotation was taken, 44 Comp. Gen. 110, the Armed Services Board of Contract Appeals made an award to a contractor suspected of fraud. The Justice Department had declined to proceed under the False Claims Act, but stated that its decision had been prompted by practical considerations and that it nevertheless believed that there was “substantial evidence of fraud.” *Id.* at 112. The Board thereafter rendered its decision but expressly disclaimed jurisdiction over the issue of fraud. The Board noted, however, that the issue of fraud was not foreclosed because appropriate officials might decline payment and thus reserve the matter for the courts.

Faced with this, the Army asked whether it could properly pay the ASBCA award. Noting that determinations of fraud are beyond the power of contracting officers and boards (which the ASBCA had expressly recognized), and noting further the forfeiture provisions of 28 U.S.C. § 2514,

GAO concluded that the Board's decision did not impose an obligation on the United States and payment was therefore not authorized. The effect of this was to leave the contractor to his remedy in the courts which would have the power to try the issue of fraud and declare a forfeiture if appropriate. Cf. B-154628, May 31, 1966. Although 44 Comp. Gen. 110 predates the Contract Disputes Act of 1978, the Act expressly recognizes that agencies are not authorized to settle or pay claims involving fraud and exempts such claims from its coverage. See 41 U.S.C. §§ 604, 605(a), 608(d); United States v. Rockwell Int'l Corp., 795 F. Supp. 1131 (N.D. Ga. 1992); United States v. JT Construction Co., 668 F. Supp. 592 (W.D. Tex. 1987).

In subsequent decisions, GAO has recognized that partial settlement might be authorized where the government has received direct benefit for services performed, has suffered no monetary loss as a result of the fraud, and where the fraud was not committed for the purpose of securing payment of the claim. 45 Comp. Gen. 406 (1966); B-171759, June 10, 1971. Generally, however, the rule remains that a claim tainted by fraud cannot be divided so as to allow recovery on part of it.

Although the above principles apply equally to claims for pay and allowances by civilian employees and military personnel, the Comptroller General has held that each separate item of pay and allowances may be treated as a separate claim even though they are included on a single voucher. 41 Comp. Gen. 285 (1961). Thus, the suspicion that some items on a voucher may be false or fraudulent does not necessarily require disallowance of the entire voucher. This approach—treating separate items on a voucher as separate claims—has also been applied to claims under the Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. § 3721. B-192978, February 28, 1979.

With respect to fraudulent travel claims, GAO for many years followed what came to be known as the "tainted day rule," under which a fraudulent claim for any part of a day's subsistence expenses was viewed as tainting the entire claim for that day, thereby requiring disallowance of the entire claim for any days so tainted. E.g., 68 Comp. Gen. 517 (1989); 68 Comp. Gen. 399 (1989); 59 Comp. Gen. 99 (1979); 57 Comp. Gen. 664 (1978). In 70 Comp. Gen. 463 (1991), GAO modified the tainted day rule in recognition of the distinction between fraudulent claimants and fraudulent payees. Based on an analysis of case law under the False Claims Act, and the fact that the Program Fraud Act now provided an administrative remedy for small-dollar cases, the decision concluded that the tainted day rule should no longer be applied in assessing liability against fraudulent payees and

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accountable officers. The 1991 decision is discussed and explained further in 72 Comp. Gen. 154 (1993).

An employee whose claim is disallowed because of fraud cannot reclaim if he or she later actually incurs the expenses for which the fraudulent claim was submitted. B-247574, March 18, 1992; B-220119.1, November 14, 1988; B-186020, June 28, 1976.

In all types of claims, there is a presumption in favor of honesty and fair dealing and the burden of establishing fraud rests with the party alleging it. E.g., B-220119.1, November 14, 1988; B-187975, July 28, 1977. With respect to claims within GAO's settlement jurisdiction, an agency's decision that a claim is fraudulent does not foreclose the claimant's right to seek GAO review. 57 Comp. Gen. 664, 667 (1978).

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## I. Private Relief Legislation

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### 1. Congressionally Sponsored Bills

We noted earlier in this chapter that claims settlement in the federal government is based on legal liability; no agency may pay out the taxpayers' money based on a perceived moral obligation. Congress may, however, choose to recognize a "moral obligation" legislatively. The time-honored method of pursuing a claim against the United States when all else fails has been to persuade a member of your state's congressional delegation to sponsor a private relief bill. The practice dates back to the beginning of the Republic, and the power of Congress to appropriate funds in this manner is beyond question. The Supreme Court said a century ago:

"Payments to individuals, not of right or of a merely legal claim, but payments in the nature of a gratuity, yet having some feature of moral obligation to support them, have been made by the government by virtue of acts of Congress, appropriating the public money, ever since its foundation. Some of the acts were based on considerations of pure charity."

United States v. Realty Co., 163 U.S. 427, 441 (1896). See also Pope v. United States, 323 U.S. 1, 9 (1944).

In earlier times, when waivers of sovereign immunity were few and far between, private relief legislation was plentiful. Now, we have comprehensive schemes for the resolution of tort claims, contract claims,

discrimination claims, admiralty claims, etc., and the need for private legislation has correspondingly diminished. A random survey of the Statutes at Large will bear this out.<sup>94</sup> Be that as it may, there will always be a need for a legislative procedure to recognize the occasional claim that cannot be satisfied any other way.

Private relief legislation is usually enacted in the form of a “Private Law” although it is occasionally found inserted in regular or supplemental appropriation acts. The most common form of relief legislation has been a simple direction to pay a sum of money to a named individual or other entity. Since the device may be used for debt claims as well as payment claims, another form is a bill relieving someone of indebtedness to the government. A third form permits someone to have a claim adjudicated by removing a jurisdictional bar or waiving some other legal defense. The latter type is discussed in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). There are other forms as well, but these are the most important from the perspective of monetary claims. A provision imposing a percentage limitation on attorney’s fees is also sometimes used. E.g., A-91199, December 16, 1937.

A private relief act may or may not include an appropriation. The test, as described in Chapter 2 for all appropriations, is whether it includes both a direction, as opposed to a mere authorization, to pay, and a designation of the source of funds. A direction to pay without designating the source of funds does not constitute an appropriation. 21 Comp. Dec. 867 (1915); B-26414, January 7, 1944. Relief acts which do include appropriations may specify payment from the funds of a designated agency. An example is Priv. L. No. 97-21, 96 Stat. 2620 (1982), directing payment “from the applicable appropriations” of named agencies. More commonly, however, the act will direct payment by the Secretary of the Treasury “out of any money in the Treasury not otherwise appropriated.” E.g., 23 Comp. Dec. 167, 170 (1916).

At one time, GAO settlement was required on all payments under private relief legislation. See, e.g., B-141722-O.M., January 29, 1960. This is no longer the case. GAO settlement is now required only in cases referred to GAO because of aspects of doubt or where the legislation expressly provides for GAO settlement. In all other cases, payment is made directly by the agency designated in the relief act. If a relief act directs payment by the Secretary of the Treasury “out of any money in the Treasury not

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<sup>94</sup>For example, 56 Stat. lists almost 400 private laws for 1942; 82 Stat. lists over 150 for 1968; 1990, according to 104 Stat., saw only 14.

otherwise appropriated,” and does not indicate any more specific source of funds for payment or expressly require GAO settlement, payment is charged to the permanent, indefinite account 20X1706 (Relief of Individuals and Others by Private and Public Laws) and is made directly by the Treasury Department with no need for GAO involvement. See B-142380, March 24, 1960 (circular letter).

The amount specified in a private relief act effectively constitutes a “final adjudication” and confers no authority to do anything other than pay it in accordance with its terms. *United States v. Price*, 116 U.S. 43 (1885); *United States v. Jordan*, 113 U.S. 418 (1885); 22 Op. Att’y Gen. 295 (1899); 5 Op. Att’y Gen. 94 (1849). Except for the possibility of bringing the matter to the attention of Congress, it must be paid even if it is believed to be erroneous. *United States v. Louisville*, 169 U.S. 249 (1898); 2 Comp. Dec. 629 (1896). As the Court of Claims said in *Mumford v. United States*, 31 Ct. Cl. 210, 215 (1896):

“The disposition of public money is in the discretion of Congress, and its reasons for passing an act and the consideration thereof can not be inquired into nor its will thwarted by any executive officers or by the courts.”

In Chapter 2 we discuss the principle that, except for errors in the amount appropriated, obvious clerical or typographical errors in a statute which could change the meaning or render execution impossible may be disregarded if the intent is clear. This principle applies equally to private relief acts. Thus, a relief act appropriating money to pay a claim of Martin and P.W. Murphy which erroneously designated the payees as “Martin and P.B. Murphy” could be paid to the rightful claimants because the context clearly established the “B” as a clerical error. 18 Op. Att’y Gen. 501 (1886).

An interesting case is A-33329, September 22, 1930. An individual had filed a lawsuit in the Court of Claims. The court threw it out and entered a judgment against the individual for costs in the amount of \$416. He then went to Congress and managed to get his claim paid by private relief legislation. GAO at first set off the \$416 against the relief payment, but later reversed the setoff. Since the relief act was based on the same claim the court had dismissed, the congressional action was viewed as “equivalent to a reversal by a higher jurisdiction,” effectively removing the basis for the cost judgment.

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## 2. Meritorious Claims Act

### a. General

In its annual report for 1927, GAO recommended the enactment of legislation which would authorize it to report favorably to the Congress on claims which in its judgment should be paid but could not be under existing law.<sup>95</sup> The legislation, which has come to be known as the Meritorious Claims Act,<sup>96</sup> was enacted in 1928 (45 Stat. 413) and is now codified at 31 U.S.C. § 3702(d):

“The Comptroller General shall report to Congress on a claim against the Government that is timely presented under this section that may not be adjusted by using an existing appropriation, and that the Comptroller General believes Congress should consider for legal or equitable reasons. The report shall include recommendations of the Comptroller General.”

As we will discuss in more detail later, “timely presented” means filed within the 6-year limitation prescribed in 31 U.S.C. § 3702(b).

It is important to note that the Meritorious Claims Act does not authorize the actual payment of anything. It merely authorizes GAO to submit a favorable recommendation to Congress. Since the law’s enactment, it has been the practice of Congress to act on Meritorious Claims Act recommendations in the form of private relief bills rather than including the items in general appropriation acts. A-25269, April 8, 1929. Thus, the Act in effect authorizes GAO to recommend private relief legislation. GAO’s practice is to include draft language for the bill along with its recommendation. Of course, nothing would prevent Congress from including language in a regular or supplemental appropriation act if it chose to do so. Also, at least one Meritorious Claims Act recommendation has been enacted in the form of a public law.<sup>97</sup>

Obviously, anything the Comptroller General can submit under the Meritorious Claims Act can be handled by regular private relief legislation. The difference is that the Meritorious Claims Act case comes to Congress over the recommendation of an agency with expertise in investigating and

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<sup>95</sup>Annual Report of the Comptroller General of the United States for the Fiscal Year Ended June 30, 1927 at 9–11.

<sup>96</sup>Early documents occasionally use the name “Equitable Claims Act.” E.g., B-36492, August 27, 1943. However, “Meritorious Claims Act” has become much more common.

<sup>97</sup>Pub. L. No. 99-330, 100 Stat. 509 (1986), was enacted in response to GAO’s recommendation in B-2059984, June 15, 1982. Relief does not normally take this long, although the Meritorious Claims Act at best is not a particularly swift procedure.

adjudicating claims, presumably making the congressional task easier. In fact this was the purpose of the Act. S. Rep. No. 684, 70th Cong., 1st Sess. 3–4 (1928); H.R. Rep. No. 491, 70th Cong., 1st Sess. 1–4 (1928).

While the Act does permit GAO to recommend action on certain claims not otherwise payable, it is nevertheless quite limited. By its terms it applies only in cases not payable under existing appropriations; it does not apply to claims which, if otherwise allowable, could be paid from existing appropriations. For example, in B-155149, October 21, 1964, the Comptroller General advised that the Meritorious Claims Act was not the appropriate vehicle to consider the claim of an accountable officer who had restored a loss of public funds from personal funds and was later found to be free from fault or negligence. Upon the granting of relief under the pertinent accountable officer relief statute, the officer could be reimbursed from agency operating appropriations. For other illustrations, see A-63014, September 19, 1935; A-21129, January 17, 1929; A-18647, October 25, 1928.

Also, GAO has construed the Act as applicable only to claims within its settlement jurisdiction. Of course this means all claims except those for which settlement authority has been expressly granted to some other agency. Numerous decisions state this position,<sup>98</sup> and several of the earlier cases (e.g., B-121302, October 6, 1954) point out that it is supported by the Act's legislative history. The rationale here is that the Act should not be construed to permit GAO to circumvent a determination that has been expressly committed by statute to another agency.

Combining these two concepts, a claim is cognizable under the Meritorious Claims Act if it is a claim which GAO:

“could consider with a view of making an allowance thereon but for the lack of any authority in previously enacted statutory law, or appropriation made in pursuance of law authorizing the payment of such claims.”

A-18647, October 25, 1928. This formulation has been repeated in numerous cases. E.g., 13 Comp. Gen. 406, 408 (1934); B-121302, October 6, 1954.

There are therefore three conditions which must be met before GAO will report a claim under the Meritorious Claims Act: (1) the claim must be

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<sup>98</sup>A few examples are 62 Comp. Gen. 280 (1983); B-215494, September 4, 1984; B-151903, July 11, 1963; B-144735/B-144817, February 10, 1961.

cognizable by GAO under its claims settlement jurisdiction; (2) the claim must be one for whose payment existing appropriations are not available; and (3) the Comptroller General must judge the claim to have sufficient legal or equitable merit to warrant special consideration by Congress. The third condition introduces the element of discretion.

One commenter noted in 1966 that the Meritorious Claims Act “was rarely used until recently.” Note, *Private Bills in Congress*, 79 Harv. L. Rev. 1684, 1688 (1966). While the source of this may have been interviews with GAO employees (*Id.* at 1684, note), in fact the opposite is true. The Act was used quite often in its early years—17 claims were submitted to Congress in 1928, 16 in 1929, and 20 in 1930. Usage dropped sharply and there were few submissions in the 1940s and 1950s. Usage increased somewhat since then, but the decades since the 1950s have seen on the average only a very few claims submitted each year (for example, 22 for the period 1977–1987). Perhaps the major reason for this overall decline is that the statutory framework for the settlement and payment of claims against the government is vastly more sophisticated than it was in 1928. The trend in favor of the government’s waiver of its sovereign immunity was still in its infancy in 1928 and there are now many more types of claims for which administrative or judicial recourse is available.

In any event, GAO has not considered it appropriate to flood the Congress with Meritorious Claims Act recommendations, and it may certainly be said that GAO has used the Act sparingly. Perhaps in part because of this, most of the Comptroller General’s recommendations under the Act have been enacted. Thus, of the 53 claims reported in 1928 through 1930, 51 were enacted. Out of 31 submitted between 1948 and 1976, 28 were enacted.<sup>99</sup>

GAO views the Meritorious Claims Act as “an extraordinary [remedy] limited to extraordinary circumstances.” E.g., 53 Comp. Gen. 157, 158 (1973); B-232057, February 9, 1989; B-160743, March 24, 1967. Thus, cases reported for congressional consideration have generally involved equitable circumstances of an unusual nature which are unlikely to constitute a recurring problem. 63 Comp. Gen. 93, 95 (1983); 53 Comp. Gen. at 158; B-186000, September 22, 1976. GAO feels that frequently recurring problems are preferably dealt with by general remedial legislation. See B-36492, August 27, 1943; 17 Comp. Gen. 720, 724 (1938).

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<sup>99</sup>The statistics in the text are drawn from two studies by GAO attorneys, B-150882-O.M., March 17, 1977, and B-230950-O.M., August 29, 1988.

The Meritorious Claims Act does not apply with respect to transactions to which the United States is not a party. B-172991, February 23, 1972; B-163051, May 2, 1968. Nor does it apply to disallowances in the accounts of disbursing or other accountable officers. A-46674, January 25, 1933; A-12928, January 5, 1929. As demonstrated by B-155149, October 21, 1964, summarized above, the subsequent enactment of the accountable officer relief statutes reinforces this conclusion.

Also, read literally, the Act applies only to claims against the United States and not to claims by the United States. A-5249, June 18, 1928. Thus, the Act would not be available in general debt cases, especially since the Federal Claims Collection Act provides standards for compromise and termination. However, it has been applied in cases involving overpayments to government employees where termination of collection action was viewed as inapplicable. These have generally been cases involving “mixed” claims, that is, claims including both the cancellation of remaining indebtedness and the refunding of amounts already repaid (B-177097, January 19, 1973; B-160178, January 27, 1969; B-165384, November 13, 1968), although some more recent cases involve only the cancellation of indebtedness (B-195167, February 21, 1980, an “erroneous advice” case). Also, these are cases either (a) which at the time were not covered by applicable waiver statutes (B-195167 and B-186218), or (b) for which waiver would not provide adequate relief (B-160178). In any event, the nonapplicability of the Act to debt cases is no longer rigidly followed.

Some of the earlier documents suggest that a Meritorious Claims Act request may be considered only if submitted directly by the claimant. However, the statute does not require this, and as a practical matter it is necessary only if the statute of limitations is likely to be a problem. Thus, GAO will consider a request submitted by the cognizant agency or a Member of Congress. In addition, GAO will self-initiate a report in appropriate circumstances.

The approach used in evaluating Meritorious Claims Act requests was summarized in 18 Comp. Gen. 454, 457 (1938):

“The propriety of affording relief under the [Meritorious Claims Act] is a matter of discretion to be exercised according to the circumstances of each particular case. However, this discretion is not an arbitrary one, but is required to be exercised in accordance with fixed principles and precedents.”

There are no formal standards for judging if a specific claim is one which GAO is likely to endorse under the Act. Rather, each claim is considered on its own merit and in light of available precedent to determine if it contains the necessary elements of legal liability or equity. B-137604, February 13, 1959.

It must be emphasized that there have been literally hundreds of requests for relief under the Meritorious Claims Act. Many of the older cases have become obsolete by virtue of changes in legislation. Many others are simply not susceptible of generalization. With this in mind, the remainder of this section attempts to draw some guidelines for the presentation and consideration of these claims.

b. Categories of Claims  
Generally Not Reported

(1) Statute of limitations

A claim which is time-barred, either by the Barring Act (31 U.S.C. § 3702(b)) or by some other more specific statutory or regulatory limitation, will not be submitted under the Meritorious Claims Act.

When the Meritorious Claims Act was enacted in 1928, there was no general statute of limitations applicable to the administrative adjudication of claims within GAO's settlement jurisdiction. The Barring Act, as originally enacted in 1940, applied expressly to the Meritorious Claims Act as well as to GAO's general claims settlement statute. Prior to the 1982 recodification of Title 31, the identical barring provision was carried in both locations. The recodification eliminated the duplication by adding the language "timely presented under this section" to the Meritorious Claims Act. Therefore, the "timely presented" language of 31 U.S.C. § 3702(d) clearly incorporates the limitation and tolling provisions of section 3702(b). Thus, if a claim is not filed within 6 years after it accrues (or longer for certain wartime claims or if the period is extended by the Soldiers' and Sailors' Civil Relief Act of 1940), GAO is precluded as a matter of law from submitting it under the Meritorious Claims Act, regardless of the equities.

For example, B-153568, March 16, 1964, involved the claim of a veteran for the redemption of certain military payment certificates he had received during his service in World War II. The claim was not filed until 1964. Because the claim was not filed within the period prescribed by the Barring Act nor within 5 years after the establishment of peace, the Comptroller General had no authority to report the claim to Congress under the Meritorious Claims Act. Similarly, there was no authority to

invoke the Act on behalf of a contractor who filed a claim in 1981 for sums withheld by a contracting officer in 1971. B-208290, September 7, 1982. In both cases, any considerations of equity had become irrelevant. There are numerous other decisions illustrating the effect of the Barring Act on GAO's authority under the Meritorious Claims Act. See, e.g., B-189816, August 29, 1977; B-171732, March 24, 1971; B-106890, August 11, 1970; B-150129, November 15, 1962; B-144246, November 10, 1960.

A claim may be presented which is still within the period of the Barring Act, but which is barred by some other more specific limitation period provided by statute or regulation. Early decisions established the proposition that a claim which is time-barred by any statutory or regulatory limitation period will not be reported to Congress under the Meritorious Claims Act. As stated in 14 Comp. Gen. 324 (1934), the Act "was not intended for employment as a means to revive claims barred by a statutory or regulatory limitation." See also A-74206, August 4, 1936; A-44115, December 12, 1932.

This conclusion follows from the application of established principles of equity, stated as follows in 18 Comp. Gen. 454, 457 (1938):

"It is a principle of long standing, governing the exercise of equitable jurisdiction, that when there is a complete and adequate remedy at law, and the party aggrieved fails to take advantage of such remedy, such party will not be permitted to assert it in equity unless he was prevented by fraud or mistake or by circumstances beyond his control. [Citation omitted.] Where an adequate remedy at law has been lost through either positive negligence or mere failure to seek it at the proper time, equity will not interpose to grant relief."

These early decisions predated the Barring Act—that is, the limitation period involved in the pre-1940 cases was the only available time limitation. However, since a specific provision governs over a more general one, the principle continues to be applicable and has been followed after the enactment of the Barring Act. For example, GAO denied Meritorious Claims Act relief to a claimant seeking a customs refund who had failed to pursue available administrative remedies within the time periods prescribed by the customs laws (B-115724, August 7, 1953), and to a person who missed the time limit on claiming statutory relocation benefits with respect to land acquired by the Interior Department (B-172189, September 22, 1972). Other post-Barring Act cases involving various shorter limitation periods are B-230421, December 22, 1988;

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B-126162, March 16, 1956; B-124678, August 31, 1955; and B-40645, April 21, 1944.

(2) Tort claims

GAO does not view the Meritorious Claims Act as applicable to tort claims. This result follows from the application of two somewhat related principles, not always stated in the decisions. First, the Meritorious Claims Act applies only to claims which are within GAO's settlement jurisdiction, and second, where Congress has enacted legislation providing relief for a certain type of claim, it must be presumed that Congress intended for that legislation to prescribe the limits of available relief.

The first wave of cases involved mostly allegations of negligence by some government employee and arose before the 1946 enactment of the Federal Tort Claims Act, at a time when only limited relief was available under the Small Claims Act and a few other miscellaneous statutory provisions. Although the equities clearly favored the claimant in most cases, GAO consistently refused to submit Meritorious Claims Act recommendations. E.g., 16 Comp. Gen. 642 (1937); 15 Comp. Gen. 1114 (1936); 14 Comp. Gen. 429 (1934); 13 Comp. Gen. 406 (1934); 10 Comp. Gen. 175 (1930). An additional factor mentioned in some of the cases was that numerous tort claim bills had been introduced in Congress but had never passed, presumably indicating the congressional attitude towards them. 16 Comp. Gen. at 643.

The expanded relief available under the Federal Tort Claims Act has greatly reduced the number of Meritorious Claims Act requests arising from tort claims. If anything, the comprehensive nature of the Federal Tort Claims Act makes the rationale of GAO's pre-1946 Meritorious Claims Act cases even stronger, and GAO has reiterated that position in a number of post-FTCA cases. For example, the Comptroller General declined to invoke the Meritorious Claims Act on behalf of an individual who alleged that his truck had been damaged by government negligence (B-204766, March 2, 1982); and a claimant who sought reimbursement for the loss of a rutabaga crop which was destroyed by the application of a pesticide recommended by a Department of Agriculture official (B-160780, February 8, 1967). See also B-147909, January 22, 1962; B-141810, February 10, 1960; B-120853, October 4, 1954.

The rationale applies equally to claims under the various FTCA exemptions in 28 U.S.C. § 2680. The concept that the FTCA prescribes the limits of

available relief is just as true for the exemptions as for the allowable claims. Thus, GAO has declined to report tort claims arising in foreign countries, regardless of the availability of some other avenue of administrative relief. E.g., B-120691, July 28, 1954 (possible relief under Foreign Claims Act).

In a related group of cases, the Comptroller General has declined to proceed under the Meritorious Claims Act on behalf of government employees who paid tort claims from personal funds. 34 Comp. Gen. 490 (1955) (employee sued in individual capacity claimed amount paid in out-of-court settlement plus attorney's fees incurred in defending suit); B-145191, April 7, 1961 (employee paid damages to avoid being sued). These cases were based in part on the traditional nonapplicability of the Meritorious Claims Act to tort claims and in part on the absence of government liability where the employee is sued in his individual capacity. Another case in this group, B-152070, October 3, 1963, offered another reason—the employee's negligence “negates any element of equity in the claim.” Since the Federal Tort Claims Act is now the exclusive remedy for scope-of-employment torts and the option of suing the negligent employee individually no longer exists, these cases should presumably no longer arise.

Relief was recommended in a 1957 case in a claim resulting from the wrongdoing of a government employee. The Western Union Telegraph Company had installed equipment on an Army installation and by agreement permitted the equipment to be used for unofficial messages by military personnel. Army personnel collected the charges for the Company's credit. An Army employee embezzled several thousand dollars of these receipts. The employee was prosecuted but recoupment was not possible. Since there was no way to pay the Company's claim from appropriated funds, the Comptroller General reported it to Congress under the Meritorious Claims Act, stating that “the Government's responsibility for the funds attached immediately upon their receipt, and is not merely that of an employer for an employee's tort.” B-131464, September 4, 1957.

There is an additional reason why it would be inappropriate for GAO to use the Meritorious Claims Act on behalf of a claimant whose claim is cognizable under the Federal Tort Claims Act. A statute enacted in 1946 along with the Federal Tort Claims Act provides that no private bill authorizing or directing “the payment of money for property damages, for personal injuries or death for which suit may be instituted under the Federal Tort Claims Act . . . shall be received or considered” in the

Congress. 2 U.S.C. § 190g. The statute also applies to private bills for a pension, the construction of a bridge across a navigable stream, and the correction of military or naval records. Section 190g has been repealed insofar as it relates to the Senate (S. Res. 274, 96th Congress, November 14, 1979), but now appears as Rule XIV, para. 10, Standing Rules of the Senate. It remains in statutory force for the House of Representatives. Thus, it would be inappropriate for GAO to recommend private relief legislation of a type that both Houses of Congress have clearly said they do not want to receive. See B-180597, May 10, 1974; B-162545, October 10, 1967.

(3) Res judicata

The Meritorious Claims Act is targeted at claims for which existing law does not make provision. It was not designed to give a second shot to claimants who have already adjudicated their claims and lost. Thus, a claim which has been unsuccessfully pursued in court will not be submitted under 31 U.S.C. § 3702(d). A-55736, June 25, 1934 (no basis for GAO to “in effect, reverse the orders and judgments of courts” by applying Meritorious Claims Act); A-28480, September 19, 1929. The same result would apply to a claimant who won in court but later comes back for more money. B-215494, September 4, 1984.

While there is certainly some logic to this position, it does not justify an unyielding application in that a judicial determination of no legal liability does not preclude the existence of strong equities. The preferable approach is to look at the merits and there has in fact been at least one exception, B-145318, December 16, 1969, in which GAO supported relief for a contractor who had lost in the Court of Claims.

(4) Interest

As discussed earlier in this chapter, interest is not recoverable on claims against the United States unless expressly authorized in the relevant statute or contract. Where interest is not otherwise authorized, a claim for interest will not be submitted under the Meritorious Claims Act. A-28455, March 1, 1930; A-27042, September 10, 1929; A-22423, February 1, 1929; A-14295, September 10, 1928. At the time of the cited decisions, there were few situations in which interest was recoverable against the government. The rationale now for GAO’s position would be somewhat different and perhaps even stronger. As evidenced by laws such as the Contract Disputes Act, the Back Pay Act, and the Internal Revenue Code, Congress

has made a conscious decision as to the types of claims which bear interest and, for the most part, the applicable rate and method of computation.

(5) Voluntary creditors

Another topic previously covered in this chapter is the so-called voluntary creditor. The rule is that one who attempts to make him(her)self a “voluntary creditor” of the United States by making a payment of a government obligation from personal funds may not be reimbursed, although a considerably body of exceptions has evolved. The claim of a voluntary creditor which cannot be paid under the principles previously discussed will not be reported to Congress under the Meritorious Claims Act. B-157057(2), July 12, 1965; B-127799, August 24, 1956; B-87319, May 16, 1950.

One reason for this, although not stated in the decisions, is that a voluntary creditor claim is not a claim which could be allowed but for the lack of an available appropriation. If the claim were otherwise allowable, existing appropriations would be available for its payment. Also, while this was not true at the time of the cases cited above, existing precedent should be adequate to pay most voluntary creditor claims with compelling equities.

(6) Personal expenses

GAO will not recommend relief under the Meritorious Claims Act to reimburse a claimant for expenditures which are essentially personal in nature and for which there is no basis for government liability. E.g., B-147628, December 28, 1961 (occupancy tax levied on military member by French municipality). Cases under this heading have most commonly involved attorney’s fees in situations where government payment was not authorized. B-185734, June 14, 1977; B-185612, August 12, 1976; B-136707, December 14, 1962. The answer was “no” in all three cases.

A claim for attorney’s fees was submitted under the Meritorious Claims Act in B-181660, September 30, 1974. The claimant, a General Services Administration employee, had separated a GSA supervisor and another GSA employee who were fighting and, as a result, was named a co-defendant in a civil suit brought by the employee. When GSA denied the claimant’s request for government representation, he retained private counsel. Claimant renewed his request for representation and this time

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GSA referred it to the local United States Attorney who provided the necessary legal representation. GAO felt that the claim for the cost of retaining private counsel prior to being represented by the U.S. Attorney had sufficient equity to merit congressional consideration.

(7) Cost or eligibility limitations

A statute or regulation may impose various limitations and the party affected is charged with knowledge of these restrictions. A cost limitation may be a ceiling on the amount of funds that can be spent on a project or may be a limit on the amount payable on a certain type of claim, for example, the \$40,000 limit in the Military Personnel and Civilian Employees' Claims Act of 1964. An eligibility limitation for purposes of this discussion refers to a time limit on some entitlement, for example, an allowance payable for a specified number of days.

As a general proposition, a claim for an amount in excess of a cost or eligibility limitation set by statute or valid regulation will not be reported to Congress under the Meritorious Claims Act. Illustrations are the time limitations on storage of household goods (B-210170, July 6, 1983; B-201277, February 20, 1981; B-98615, November 2, 1950); the weight limitations on shipment of household goods (B-210113, March 2, 1983; B-134650, May 14, 1959); and the time limitation on incurring expenses incident to a permanent change of station (B-232057, February 9, 1989). See also B-147496-O.M., January 4, 1962 (monetary cap on reward for return of military deserter); B-142433-O.M., May 4, 1960 (time limit on temporary lodging allowance).

Another relevant limitation is the cost limitation in 10 U.S.C. § 2805 on "minor construction" projects for the military departments. In B-147086, September 20, 1961, GAO found it inappropriate to report to Congress a contractor's claim in an amount which would have caused the minor construction limitation to be exceeded. However, a claim for an amount in excess of the minor construction limitation was reported in B-154061, February 15, 1965. In that case, the contractor (claimant) was only one of several on the project and had no way of knowing that the limit might be exceeded. Therefore, adherence to the cost limitation was not a matter within the contractor's control.

The Comptroller General also recommended relief in B-145318, December 16, 1969. A construction contractor on a housing project offered to perform certain additional work and the contracting officer accepted.

However, a change order could not be issued because the maximum insurable mortgage amount was subsequently obligated for other work on the project. Relief was deemed appropriate because the contractor had acted in good faith, the government retained the benefit of the work, and the work could have been paid for at the time the additional cost was agreed to without exceeding the statutory limitation.

(8) Contributing fault by claimant

Older court decisions on equity jurisdiction frequently state that a party seeking equitable relief must have “clean hands.” Although not in those terms, the Comptroller General applies this concept in considering requests for relief under the Meritorious Claims Act. Simply stated, GAO does not view the Meritorious Claims Act as an appropriate means to rescue someone who has contributed to his or her own predicament.

In A-27639, February 25, 1930, a civilian clerk at an Army installation prepared fraudulent vouchers and had checks drawn to fictitious payees. He then indorsed the names of the fictitious payees and cashed the checks. The crook was caught and put in jail. The government recovered its money from the bank to which Treasury had paid the proceeds, with the loss ultimately falling on the bank which had cashed the checks. GAO denied the bank’s request for Meritorious Claims Act relief because the bank, as required by negotiable instruments law, had guaranteed all prior endorsements. “As between the bank and the Government, it would seem that the bank should bear the loss.” Id.

The following cases in which Meritorious Claims Act relief was denied will further illustrate:

- B-186000, September 22, 1976: Claim by Air Force officer for tuition payments to a foreign university. Even after counseling, claimant did not follow applicable regulations for having payments approved.
- B-177437, March 9, 1973: Claim for lost equity in real property sold at foreclosure sale as result of nonpayment of mortgage. Claimant alleged that default resulted from Army’s erroneous discontinuance of his allotment. Army records revealed that claimant had signed a form requesting discontinuance of the allotment.
- B-165901, January 28, 1969: Air Force member shipped household goods knowing that applicable regulations did not authorize shipment at government expense in his particular situation.

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- B-154149, June 5, 1964: Government employee induced claimant's husband to endorse benefit check and leave it with him for later delivery. Employee then cashed the check and pocketed the proceeds. Claimant argued that the dishonest employee had obtained the check under false pretenses, which was obviously true, but claimant had been present when her husband turned over the check and had acquiesced in the transaction.
  - 8 Comp. Gen. 239, 243 (1928): Lapse of insurance because of nonpayment of premiums by claimant.

The claimant's own negligence was also one of the grounds for denying relief in some of the previously discussed cases involving the payment of tort claims from personal funds. E.g., B-152070, October 3, 1963.

(9) Statutory prohibition

It should come as no surprise that claims for items expressly prohibited (as opposed to merely not authorized) by statute or regulation are generally not reported to Congress under the Meritorious Claims Act. The premise is that one who works for or deals with the government must be charged with knowledge of pertinent restrictions.

An example is 32 Comp. Gen. 337 (1953). Under Interior Department regulations then in existence, a qualified person could request that certain public lands be sold at auction. If the request was approved, the applicant was required to publish notice of the sale at his own expense. The regulations expressly provided that the lands could be withdrawn from sale even after publication of the notice and that such withdrawal would create no liability on the part of the United States. GAO advised that the Department could amend its regulations to permit reimbursement of the notice expenses in withdrawal cases. Absent such an amendment, however, the claimant must be held to have assumed the risk that the lands might be withdrawn. Since the claimant must be charged with notice of the regulations, neither legal nor equitable basis would exist to justify a Meritorious Claims Act recommendation. See also 17 Comp. Gen. 720 (1938).

The statutory prohibition rule is not an absolute. Exceptions have been recognized where the equities are particularly strong and especially where the government has received clear benefit from work or services performed. See, for example, the published advertisement cases discussed later in this section. See also B-154061, February 15, 1965, discussed above under "cost or eligibility limitations." The statutory prohibition rule,

therefore, presents a strong presumption against Meritorious Claims Act relief but can be overcome by sufficiently strong equities.

(10) Availability of other administrative settlement procedures

As a general proposition, the Comptroller General will not report to Congress under the Meritorious Claims Act claims for which other administrative settlement procedures are available by law, particularly where those procedures produce determinations which are “final and conclusive.” For the most part, this is merely an application of the previously noted principle that GAO views the Act as applicable only to claims within its settlement jurisdiction. Also, the existence of another administrative settlement procedure suggests that appropriations are available to pay the claim if otherwise allowable and that, therefore, the claim is not one which could be allowed but for the lack of an available appropriation. The most frequently recurring cases in this category have been tort claims, treated separately earlier.

A further illustration is B-163051, May 2, 1968. A construction company claimed reimbursement for expenditures made in connection with a proposed construction project in the Sudan. The Sudanese government was to fund the project with a loan from the U.S. Agency for International Development. However, following the 1967 Middle East war, AID financing for projects in the Sudanese Republic was suspended, and a guaranty contract was executed between AID and the contractor. Under foreign assistance legislation, the President was given the authority to settle claims involving investment guaranty operations and these settlements were to be final and conclusive. Since the claim was not within GAO’s settlement jurisdiction, the Comptroller General declined to invoke the Meritorious Claims Act, stating:

“[I]nsofar as the claim might be considered a claim against the United States under the Contract of Guaranty . . . Congress has specifically conferred jurisdiction to make final settlements of claims arising under such guaranty operations upon the President, and pursuant to delegations of authority that jurisdiction has been vested in the Agency for International Development.”

This principle has also been applied in the following contexts:

- Claims cognizable under the Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. § 3721, and its predecessors. B-222198, April 10, 1986; B-203204, July 24, 1981; B-144926, February 23, 1961.<sup>100</sup>
- Claims cognizable under the Military Claims Act (10 U.S.C. § 2733) or Foreign Claims Act (10 U.S.C. § 2734). 62 Comp. Gen. 280 (1983); B-149624, October 10, 1962; B-136099, July 3, 1958; B-121302, October 6, 1954; B-117677, December 21, 1953.
- Claims under the disability compensation laws administered by the Department of Veterans Affairs. B-170252, July 23, 1970.
- Claims arising under the Tariff Act of 1930. B-138338, February 12, 1959.

Under each of the claim statutes noted above, the agency's determination is "final and conclusive." The tariff case, B-138338, offered the following further explanation:

"[W]e feel that the act was intended to cover only those claims which are considered and passed on in the course of our regular business since otherwise we would have to develop a full factual record and examine into the merits of all claims filed here merely to determine whether the claim should be reported to the Congress even where the Congress has specifically conferred jurisdiction on some other agency to consider and settle the claim."

#### (11) Preferential treatment

As noted previously, claims submitted to Congress under the Meritorious Claims Act are generally limited to those cases which are unusual. For the most part, the Comptroller General has declined to report claims which reflect recurring situations. The rationale is that to recommend relief in a case where the circumstances are common or likely to recur might result in the preferential treatment of one individual over others similarly situated. A statement frequently found in the decisions is that:

"[T]o report to the Congress a particular case when similar equities exist or are likely to arise with respect to other claimants would constitute preferential treatment over others in similar circumstances."

53 Comp. Gen. 157, 158 (1973); B-210831, August 2, 1983; B-209292, February 1, 1983; B-164814, August 10, 1970.

The preferential treatment rule is often used as additional support in cases involving the previously discussed denial categories, for example,

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<sup>100</sup>This type of claim was not viewed as reportable to Congress under the Meritorious Claims Act even before the 1964 legislation. See 38 Comp. Gen. 314 (1958)

B-134038/B-138771, May 23, 1968 (claim barred by statute of limitations). However, it is also used as independent grounds for denial in many cases which do not fall within any of the other categories. See, e.g., B-197982, February 26, 1981; B-171483, March 19, 1971; B-165886, March 24, 1969. B-171483 illustrates a fairly common situation, a loss incurred by a government employee incident to a permanent change-of-station assignment which was subsequently canceled.

A 1975 case involved claims by several employees of a government contractor for reimbursement for loss and damage to personal property resulting from a fire in government-owned quarters on a United States island possession in the Pacific. Contractor employees are not covered by the Military Personnel and Civilian Employees' Claims Act of 1964, and relief was unavailable under the Federal Tort Claims Act because there was no evidence of negligence by government personnel. Based on a straight application of the preferential treatment concept, GAO declined to invoke the Meritorious Claims Act. B-183208, June 30, 1975.

It is important to note that the denial of a claim under the Meritorious Claims Act because it reflects a common or recurring situation refers to the nature of the claim and not to the particular fact pattern. Two cases in which Meritorious Claims Act requests were denied will illustrate. In both cases the fact patterns were certainly unusual but the nature of the claim was viewed as not particularly unusual and therefore within the preferential treatment rule.

In B-201284, April 21, 1981, the claimant corporation had expended a substantial sum to develop an exhibition of works from the Hermitage Museum of Leningrad. The exhibit was scheduled to tour the United States as part of a government-sanctioned effort to promote trade and cultural relations with the USSR. However, when the administration declined to issue a certification necessary to protect the art objects from judicial process in this country, the exhibition was canceled. Alleging unique circumstances, the claimant requested reimbursement of its costs.

It was determined, however, that the loss was caused by a change in U.S. foreign policy following the Soviet invasion of Afghanistan, and that as a result the claim was neither unusual nor unlikely to recur. In declining to submit the case under the Meritorious Claims Act, the Comptroller General noted losses to other U.S. concerns as a result of the invasion and stated:

“[M]any individuals and businesses were affected to their detriment in this particular shift of policy. It is also true that we can expect that others may in the future suffer from changes in United States Government relations with foreign governments. Economic damages may well be wide spread when significant deterioration occurs in the relations between governments. We have specifically declined to recommend relief to the Congress under similar circumstances. See 53 Comp. Gen. 157 (1973). To recommend relief for some parties and not others would be unfair.”

In B-199071, July 16, 1980, the claims of two U.S. servicemen who participated in a failed mission to rescue American hostages held in Iran were considered for possible submission under 31 U.S.C. § 3702(d). Both men had accrued annual leave in excess of 60 days, by statute the reimbursable maximum. One of the soldiers was killed during the raid and the other received serious injuries resulting in his retirement. Despite the unusual factual circumstances, the claims for reimbursement for accrued annual leave in excess of the 60-day limit were not submitted under the Meritorious Claims Act because forfeitures of excess annual leave are not uncommon.

From a philosophical perspective, the preferential treatment rule is discomforting in that it amounts to saying, “We aren’t going to help you because the government has done the same thing to others.” Therefore, it should be applied with scrutiny and should not be taken to extremes. On the one hand, anything that happens once may happen again and this alone should not be enough to eliminate a case from consideration. Yet on the other hand, the failure of Congress to deal in more general terms with a demonstrably recurring situation may indicate a congressional view that the situation should not be compensable from public funds. At the very least it suggests that remedial legislation might be desirable as an alternative to the piecemeal approach of individual relief bills. Also, there are situations where the preferential treatment rule is subordinated by compelling equities, such as the published advertising cases discussed later.

### c. Categories of Claims Which Have Been Reported

Because GAO has viewed the Meritorious Claims Act as an extraordinary remedy to be used only in unusual circumstances, it is much more difficult to generalize with respect to the claims which have been reported to Congress. Nevertheless, some categorization is possible. As with several of the denial categories, placement of a case within a particular category does not guarantee that it will be reported. Each case must be examined on its own merit.

(1) Act of God or the public enemy

GAO will generally recommend relief for claims resulting from a so-called “act of God” (natural disaster) or of the “public enemy.” In B-177096, December 22, 1972, relief was recommended where a transferred government employee was unable to sell his house within the statutory period required for reimbursement of real estate expenses because damage caused by Hurricane Agnes necessitated extensive repairs to the property. In B-69985, June 10, 1948, relief was recommended where the claimant had purchased government property located at a U.S. Marine detachment in China, but was unable to take possession due to the Japanese occupation of the base on December 8, 1941. More recently, private funds temporarily in the custody of the State Department were lost during the seizure of the American Embassy in Tehran, Iran, in 1979. Although the incident produced no legal liability on the part of the United States, GAO found sufficient equitable considerations to warrant a recommendation of relief under the Meritorious Claims Act. B-205984, June 15, 1982.

One older and seemingly inconsistent case exists. Meritorious Claims Act relief was denied in B-44825, October 17, 1944, where a contractor incurred increased costs when performance was delayed by a tornado.

The natural disaster or hostile act must be the direct cause of the loss for which relief is sought. In 17 Comp. Gen. 1012 (1938), the claimant had imported and paid the customs duties on 30,000 pounds of seed. The seed was released to the claimant pending final clearance by the Department of Agriculture. Shortly after release but before the claimant could be notified, the seed, while in storage in the claimant’s plant, was destroyed in a flood. The claimant sought refund of the customs duties. Since the government’s right to the duties accrued on importation and was not affected by the subsequent destruction of the goods, there was no legal basis for the refund, nor did GAO find sufficient equities to warrant a Meritorious Claims Act recommendation.

(2) Congressional precedent

GAO will generally recommend relief under the Meritorious Claims Act where Congress has enacted private relief legislation in similar circumstances. In B-165541, January 29, 1969, relief was recommended where the parents of a U.S. soldier incurred the expense of transporting their son’s car from North Carolina (where it was stored prior to the son’s

departure and subsequent death in Vietnam) to California since the amount was considerably less than the government's cost of transportation would have been, and Congress had previously granted relief in similar circumstances. See also B-163823, April 29, 1968, for a nearly identical situation. Relief was also recommended in B-165384, November 13, 1968, involving the erroneous overpayment of special diving pay to a Navy diver. The claimant had acted in good faith and Congress had enacted relief legislation in the identical case of another member of the same diving team.

Conversely, the Comptroller General has declined to recommend relief under the Meritorious Claims Act where private relief legislation has been introduced but not enacted (9 Comp. Gen. 175, 178–79 (1929); A-30375, February 12, 1930), or vetoed by the President (B-141780, March 28, 1966; B-141780, February 15, 1965). This may be viewed as analogous to the “res judicata” cases previously noted. Presumably the same result would apply if it were known that relief bills for different claimants with similar claims had been unsuccessful.

### (3) Unconsummated offer of employment

On several occasions, the Comptroller General has recommended relief under the Meritorious Claims Act on behalf of a claimant who had received an offer of government employment and incurred a loss when, through no fault of his or her own, the offer could not be consummated.

An illustrative case is 64 Comp. Gen. 617 (1985). The claimant was offered, and accepted, a job in a “manpower shortage” position. She was given a travel authorization and incurred a variety of expenses incident to relocating to the new job site (rental expense, utility deposits, etc.). Due to budget constraints (that's what they all say), the agency rescinded the offer, leaving her with several items of expense which could not be reimbursed under existing law. Since the claimant had acted in good faith, was “ready, willing, and able to begin work on the job,” and incurred the loss through absolutely no fault of her own, GAO submitted a Meritorious Claims Act recommendation for relief (B-215511(2), June 12, 1985).

GAO also recommended relief in the following cases:

- Claimant, given an appointment by the Interior Department as a home economics teacher at an Indian school, traveled to her new job at her own expense. Upon arrival, she discovered that the school did not have a home

economics department, whereupon she returned home. The claimant was unable to start the job for which she had been hired through no fault of her own. A-30416, February 17, 1930.

- Claimant was offered a Forest Service position in Wisconsin, accepted the offer and sold his home in Michigan. Upon reporting for work, he was informed of a delay in his formal appointment because of a question over his veteran's preference eligibility, whereupon he returned to Michigan and accepted private employment. Claimant had acted in good faith at all times. B-148149, May 16, 1962.
- Claimant accepted what he understood to be a firm offer of employment. It turned out to be merely an invitation to participate in a training session as part of a selection process. He was advised that he would not be considered for regular employment at a particular location, but he might be considered for placement elsewhere, and was told to return home to await a possible phone call. B-158406, March 23, 1966.

In B-160747, August 2, 1967, a case somewhat similar to B-158406 but factually distinguishable in several respects, GAO declined to recommend relief. The claimant in B-160747 had not resigned his prior position and continued to receive pay during the period he was enrolled in the government training program. Also, upon being advised of his failure to qualify for the desired position, he was never asked to simply stand by to await a possible further assignment. This claimant was therefore not in the same equitable position as the claimant in B-158406.

#### (4) Published advertisements

As discussed earlier in this chapter, claims by newspapers for published advertisements procured in violation of 44 U.S.C. § 3702 must be disallowed. However, GAO has routinely reported these to Congress under the Meritorious Claims Act. A few examples are B-208306, August 18, 1982; B-199453, October 2, 1980; B-196440, April 3, 1980; B-181337, November 25, 1974; and B-160052, January 22, 1969.

The basis for submitting these is essentially an “unjust enrichment” theory—the newspaper provided a service in good faith expecting to be compensated and the government received the benefits of that service. Also, although 44 U.S.C. § 3702 is a prohibitory statute, it merely establishes a procedural requirement as a condition precedent to payment and does not prohibit the procurement of advertisements per se.

However, in a case where the government had merely asked for a price quotation and the newspaper ran the advertisement based on that request, the newspaper did not stand in the same equitable position and GAO declined to make a Meritorious Claims Act recommendation. B-198568-O.M., October 21, 1980. Similarly, where an employee paid a newspaper from personal funds, GAO refused to submit the employee's claim for reimbursement to Congress under the Meritorious Claims Act. B-1586, March 20, 1939.

(5) Miscellaneous unjust enrichment and related cases

If the government receives the benefit of work or services performed in good faith by someone—a government employee or otherwise—who justifiably expected to be paid, it is inequitable for the government not to pay. In some instances, however, as illustrated by the newspaper advertisement cases, there may be valid legal reasons why direct payment cannot be made. In such cases, and where the claimant is free from fault (for example, has not missed the statute of limitations), GAO will be inclined to favorably consider Meritorious Claims Act relief.

In B-160178, January 27, 1969, the claimant took a GS-9 job with the Army after working only 12 days as a GS-6 with the Justice Department, a violation of the so-called Whitten Amendment which required at least one year in the next lower grade. Payment of his salary was therefore technically illegal. However, since the claimant had successfully performed his GS-9 duties for over a year, GAO recommended relief under the Meritorious Claims Act. The effect of requiring recoupment of the salary would have been that the government received the benefit of the claimant's work without having to pay him.

Similarly, relief was recommended in B-153742, July 8, 1964, where a temporary civilian employee continued to work under the good faith impression that his temporary appointment had been extended for a second time although such an extension was prohibited.

In an early case, a Treasury agent employed a Canadian attorney to help with the extradition of a fugitive who had violated the narcotics laws. Because of a statutory prohibition then in existence, there was no authority to pay the attorney. Since the services had been rendered in good faith and the government received the benefit, GAO submitted a Meritorious Claims Act recommendation. A-30342, February 12, 1930.

The essence of these cases is that the government would be unjustly enriched at the claimant's expense by benefiting from uncompensated services performed in good faith. Note also that this rationale has been sufficient to overcome a statutory prohibition in several cases, as noted previously under the Statutory Prohibition heading.

Relief has also been recommended in a few cases for services performed in good faith where it turned out that the government did not receive the contemplated benefit or the benefit was speculative. The claimant in A-26703, July 10, 1929, rendered undertaker's services at the request of the (then) Veterans Bureau, but it was later discovered that the deceased had never performed any military service. The claimant had no way of knowing and had acted in good faith. Undertaker's services were also involved in B-104517, February 9, 1953, in which the claimant had buried four unidentified individuals killed in an Air Force plane crash, but could not be paid because it could not be clearly established that the decedents were Air Force or Air National Guard members.

#### d. Contract Claims

Contract claims generated many requests to the Comptroller General for Meritorious Claims Act relief in the early years of the statute. There have been much fewer in recent years, largely because many claims are cognizable under modern contract claims authorities and procedures (e.g., government-caused delays). And, the removal of many contract claims from GAO's settlement jurisdiction by virtue of the Contract Disputes Act provides another reason for non-reporting.

Because of their variety, contract claims are impossible to categorize as either reportable or not reportable although, as with most other claim types, Meritorious Claims Act recommendations have been made on only a small percentage. In addition to the principles already discussed in this section, some further guidelines may be noted for contract cases.

One who contracts with the government is not automatically guaranteed a profit, and the mere fact that a contractor incurs a loss rather than a profit does not justify a Meritorious Claims Act recommendation. 37 Comp. Gen. 688, 690-91 (1958); 9 Comp. Gen. 378 (1930); B-163274, December 20, 1968. "[C]onsiderations of sympathy for the misfortune of a contractor" aren't enough. 37 Comp. Gen. at 690.

Losses sustained by a contractor occasioned by the suspension of work due to exhaustion of funds will not be reported to Congress under the Act.

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B-118869, March 30, 1954; A-37562, April 30, 1932; A-29731, January 13, 1930. See also B-147197-O.M., October 27, 1961.

Also not reportable under the Meritorious Claims Act are claims for bid preparation costs. A-90260, December 6, 1937. (If otherwise allowable, these could be paid from existing appropriations.)

Ordinarily, in a requirements contract, the government has no liability if it orders less than the stated estimate. E.g., B-158239, March 11, 1966. Losses resulting from this situation will not justify a Meritorious Claims Act recommendation. 37 Comp. Gen. 688 (1958). However, relief has been recommended where the government did not correctly state its estimate. In an early case, a contracting officer erroneously put 4,000 sacks of flour instead of 4,000 pounds in the solicitation. Upon being notified that its bid was accepted, the contractor made commitments for 4,000 sacks, much more than the government needed. Since the contractor's loss was directly attributable to the government's error in stating the estimate, GAO recommended relief under the Meritorious Claims Act. A-26191, April 30, 1929.

GAO has declined to recommend relief where a contractor's costs have increased due to inflation (54 Comp. Gen. 1031 (1975)) or to the devaluation of the dollar (53 Comp. Gen. 157 (1973)).

A number of contract claims have been reported to Congress under the Meritorious Claims Act. They tend to be cases where there is a direct connection between the government's actions and the claimant's loss, and frequently involve elements of unjust enrichment (benefit to the government from work for which the contractor justifiably contemplated payment). Two cases have been noted above in the discussion of cost or eligibility limitations (B-154061, February 15, 1965, and B-145318, December 16, 1969). A few other examples are summarized below:

- B-194135, November 19, 1979: Contract with Army required contractor to upgrade three Army wastewater treatment facilities. After performance was successfully completed and the contractor partially paid, it was discovered that one of the facilities was the property of the local school board and not the Army.
- B-136117, August 26, 1958: Contractor suffered losses under a salvage timber sales contract due to the government's error in estimating the amount of timber to be cut. Although a small percentage of error in such estimates is normal, this contract was "believed to have contained the

largest percentage of error ever made in the Government's estimate of timber to be sold."

- B-164582, May 6, 1969: Claim by logger for losses sustained under timber sale contract due to work stoppage required to clear insect-infested timber purchased at government's urging and in purported reliance on government's promise to give favorable consideration to time extension for performance.
- B-134386, October 7, 1958: Claim for costs incurred in preparation for anticipated contract, sustained when claimant was erroneously notified that it was the successful bidder.
- B-136897/B-139976, February 8, 1961: Claim for losses incurred in performance of contract for manufacture of sleeping bag cases as a result of government's failure to furnish proper drawings. Armed Services Board of Contract Appeals had denied claim because actual loss was not susceptible to a reasonable adjustment supported by a preponderance of evidence. Contractor subsequently agreed to accept \$50,000, which Army considered a reasonable estimate of the damages the contractor had suffered, and based on this agreement, GAO recommended relief.
- B-163778, December 21, 1970: Claimant purchased land from Post Office Department under agreement to construct vehicle maintenance facility and lease it back to the Post Office Department. Claimant incurred substantial expenses incident to mutual termination of contract when it was discovered that the construction was precluded by a city zoning ordinance.

A final case we may note, involving a different type of "contract" issue, is A-34155, December 30, 1931. A tugboat off the coast of Washington (state) spotted two "white sailor bags" floating in the water. The bags, deeply anchored, were filled with tins of "smoking opium." The tugboat crew retrieved the bags and turned them in to the local customs office. The crew claimed a reward but it could not be paid because pertinent legislation at the time did not authorize a reward except pursuant to an offer. GAO found the equities of the situation sufficient to warrant a Meritorious Claims Act recommendation.

#### e. Erroneous Advice by Government Employee

Elsewhere in this chapter we have discussed the well-established rule that, except as otherwise provided by statute, the government is not bound by erroneous acts done, or erroneous advice given, by its officers or employees. E.g., 53 Comp. Gen. 834 (1974). This rule has generated a large number of requests for Meritorious Claims Act relief. Typically, an erroneous payment is made as the result of administrative oversight, or expenses are incurred in reliance on representations by a government

employee which turn out to be wrong. Having no legal recourse, the claimant seeks equitable relief. The “erroneous advice” cases cannot be categorically labeled as either reportable or not reportable. Although most have been denied, many have been reported. Our objective here, therefore, is merely to point out the various lines of cases and to emphasize that each case will turn on its own particular equities.

GAO’s current policy, at least where the claimants are government employees, is stated in 65 Comp. Gen. 679, 682–83 (1986):

“It has been our general policy not to report to Congress under the Meritorious Claims Act, claims which are based on erroneous official advice furnished to Government employees, even where the employee acted reasonably in reliance on the erroneous advice and incurred substantial costs. . . .

“We now conclude that a change in this policy is warranted. While erroneous advice cases are not unusual, each such case deserves to be considered on its own merits. The fact that we are unable to seek relief in all cases should not prevent the submission of those worthy cases that do come before us. Therefore, we now will submit to Congress erroneous advice cases which, in our judgment, meet the standards for relief under the Meritorious Claims Act.”

A survey of the cases suggests that the policy change announced in 65 Comp. Gen. 679 was more a matter of degree than of kind, and that it applies equally to claimants who are not government employees.

Prior to 65 Comp. Gen., as indicated, most requests were denied. Some examples are: B-209292, February 1, 1983 (improper payment of educational travel expenses); B-199612, January 15, 1981 (erroneous per diem payments); B-195242, August 29, 1979 (unauthorized travel of dependents); B-191121, March 20, 1979 (erroneous reimbursement of real estate expenses); B-191039, June 16, 1978 (improper designation of duty station for reemployed annuitant). A couple of cases not involving government employees are B-168300, December 4, 1969, and B-168300, December 3, 1969 (Farmers Home Administration employee, contrary to regulations, represented to a creditor that the government would guarantee a borrower’s obligations). The denials were almost invariably based on the preferential treatment concept, the decisions frequently noting that the situation is a recurring one. That this was (and is) unfortunately true is evidenced by the large number of claims.

However, GAO was never as stingy as 65 Comp. Gen. 679 might suggest, and had made Meritorious Claims Act recommendations in erroneous advice cases where the equities clearly favored the claimant, as evidenced by the following illustrations:

- B-148568, September 27, 1962: Court-martial denied claimant's request for a civilian expert witness, based on a GAO decision which was inapplicable to the facts at hand, whereupon claimant procured the witness himself.
- B-154694, August 11, 1964: Claimant shipped maple sugar products to the United States exhibition at a trade fair in Sweden in reliance on representations by Commerce Department officials that the products could be sold. Claimant returned the goods to the United States upon learning that retail sales would not be permitted.
- B-171598, March 24, 1971: Claimant was sued by a former landlord in Rhodes, Greece. His superiors erroneously advised him that he was diplomatically immune and therefore did not have to appear in court to defend the suit. A default judgment was rendered against the claimant which he was required to pay.
- B-190014, August 30, 1978: Several employees were paid per diem at the wrong rate after a change in regulations had reduced the rate. Overpayment was due to administrative failure in implementing the regulatory change. Rate reduction was substantial and employees acted in good faith. A similar case is B-189537, December 11, 1978.
- B-201059, March 9, 1981: Military member on temporary active duty incurred medical expenses for treatment of a non-emergency condition at a civilian facility. Member had been advised that Army would pay, but Army could not pay because member had not obtained prior authorization required for use of civilian facility.

The situation that prompted 65 Comp. Gen. 679 was a person appointed to a manpower shortage position who incurred substantial expenses in reliance on erroneous travel orders. Following the favorable recommendation in that case, a minor deluge of manpower shortage cases appeared, and GAO made similar recommendations in B-246004, March 23, 1992; B-240395, January 23, 1991; B-237667, April 27, 1990; and B-234157, August 17, 1989. However, submission is not automatic. Based on its evaluation of two key factors—the amount of the claim and the extent to which the claimant was influenced by the erroneous representations—GAO declined to make reports in B-229395, November 4, 1988, and again in B-245203.2, June 15, 1992.

Apart from the slight surge of manpower shortage cases, the cases after 65 Comp. Gen. 679 fall into a pattern very similar to the pre-1986 cases with one important difference. As with the older cases, most requests continue to be denied. However, the denials are mostly not based on a preferential treatment rationale but on an analysis of the reasonableness and extent of the claimant's reliance on the government's misrepresentation. Thus, a new appointee who was advised of the government's error prior to accepting the employment offer has no great claim to equity. B-227469, October 17, 1988. Nor could the claimants establish sufficient reliance in B-250892, March 31, 1993 (improper payment of severance pay); B-240089.2, May 14, 1991 (real estate closing costs on property not located at former duty station); B-237607, May 21, 1990 (unauthorized real estate expenses); and B-234931, November 29, 1989 (real estate expenses on property not at former duty station).

A situation which has resulted in denial both before and after 65 Comp. Gen. 679 is the disposal of household goods by a new employee based on erroneous advice that the government would not pay to transport them, when the new duty station was in a location to which transportation was authorized. B-241984, May 13, 1991; B-204372, February 8, 1982.

GAO made favorable recommendations in the following cases:

- Employee who was permanently disabled from prior on-the-job injury and was receiving disability compensation was offered reemployment, and was induced to move by offer of relocation expenses which existing law did not authorize. 67 Comp. Gen. 295 (1988).
- Spouse of military officer was issued invitational travel orders to accompany him to conference and award ceremony. Upon submitting her voucher, she learned that payment was expressly prohibited by the Joint Travel Regulations. B-227726.2, September 9, 1988.

Even in non-erroneous advice cases, reliance is a key concept, although the equities can tip the balance either way. In a 1983 case, for example, a transferred employee shipped excess household goods knowing that he would have to pay for the excess. Prior to the move, he had obtained rate quotes and, in reliance on them, decided what to ship and what to sell. Upon being billed, he found that the mover had more than doubled its rates under procedures which were apparently permissible at that time. There was no basis to allow the employee's claim for the difference, but the strong equities in the claimant's favor prompted GAO to recommend relief. B-210561, September 13, 1983. Where there are no reasonable

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grounds for the claimant to rely on an expectation of reimbursement, GAO will not be inclined to support relief however unfortunate the loss may be. E.g., B-224711, January 8, 1987.

Trying to sum up the erroneous advice cases is not easy. On the one hand, denial in the majority of cases is probably the right answer. In terms of equity, GAO's position can be justified because, as a general proposition, it is not inequitable for individuals to have to bear expenses they would have incurred in any event, or to have to give back money they never should have received in the first place. As stated in B-236008, May 7, 1991, "It is not the purpose of the Meritorious Claims Act to provide for payment whenever expenses are incurred pursuant to erroneous authorization." Yet on the other hand, if fairness is to be the hallmark, there are many cases which should not go uncompensated. The judicious application of the Meritorious Claims Act permits the government to mitigate the occasional harsh or inequitable result of the erroneous advice or anti-estoppel rule.

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## J. Unclaimed Money/Property

The government may end up holding unclaimed funds for a variety of reasons. The applicable program statute may contain guidance as to their disposition, or Congress may address the point in separate legislation. For example, Congress directed that most of the unclaimed funds remaining after the Postal Savings System was terminated in 1966 be distributed to the states. See B-230421, December 22, 1988. In the absence of legislation providing otherwise, unclaimed money is held in the Treasury in a trust capacity. Subsection (a) of 31 U.S.C. § 1321 identifies 90 trust funds. Subsection (b) instructs agencies who receive funds as trustee analogous to any of the 90 listed accounts to deposit those funds in a trust account in the Treasury. At the end of each fiscal year, money which has been in any of those accounts for more than a year and which represents money belonging to individuals whose location is unknown is transferred to a Treasury trust fund receipt account entitled "Unclaimed Moneys of Individuals Whose Whereabouts are Unknown." 31 U.S.C. § 1322(a). Subsection 1322(b)(1) establishes a permanent, indefinite appropriation to pay claims from the Unclaimed Moneys account.

Instructions to implement 31 U.S.C. § 1322 are contained in the Treasury Financial Manual (TFM), Volume I, Chapter 6-3000. Agencies should clear their accounts at least once a year of balances due individuals whose whereabouts are unknown, by transferring those balances to one of two Treasury accounts. If a given balance meets 4 criteria—(1) the amount is \$25 or more, (2) a refund if claimed would be absolutely justified, (3) there

is no doubt as to legal ownership of the funds, and (4) a named individual, business, or other entity can be identified with the item—the balance should be transferred to trust account 20X6133, the fund permanently appropriated by 31 U.S.C. § 1322(b)(1). Balances of less than \$25 or larger balances which have been held for more than one year and do not meet all of the specified criteria are transferred to miscellaneous receipts account —1060, Forfeitures of Unclaimed Money and Property. I TFM §§ 6-3030, 6-3040.10.

The transferring agencies must keep records to support the amounts transferred. *Id.* § 6-3085. The rightful owners may file claims without time limitation since the Barring Act does not apply to funds held in trust such as the Unclaimed Moneys account. B-201669, November 26, 1985; B-103575, August 27, 1951. Claims are handled by the agency which transferred the funds. If a claim is determined to be valid, the agency may certify a payment voucher to Treasury. If the money was transferred to trust account 20X6133, payment is made directly from that account. If the money was transferred to miscellaneous receipts (account —1060), the refund is paid from account 20X1807, “Refund of Moneys Erroneously Received and Covered” (31 U.S.C. § 1322(b)(2)). I TFM §§ 6-3040.10, 6-3060, 6-3075. No GAO action is required in either case unless the agency regards the matter as doubtful. *Id.* § 6-3050; B-142380, March 24, 1960 (circular letter).

In one case, the Equal Employment Opportunity Commission brought a sex discrimination complaint against a private company and received back pay awards under a settlement agreement. The EEOC was unable to locate two of the claimants. GAO advised the EEOC to proceed in accordance with 31 U.S.C. § 1322 and the TFM. B-245254, December 31, 1991. A similar holding is B-201669, November 26, 1985 (unrefunded distributive shares held by the Department of Housing and Urban Development under the FHA mortgage insurance program). That case further pointed out that the agency’s failure to transfer the money to the Unclaimed Moneys account did not affect its status as money held in trust, and a claim could therefore be paid without regard to any statute of limitations.

During the 1980s, a number of companies appeared on the scene which track down unclaimed money and then offer to help the owners secure their refunds for a finder’s fee. They are sometimes called “third-party tracers.” GAO has received several inquiries on the use of third-party tracers, and has replied that GAO regards these arrangements as a matter between private citizens, and is aware of no legal prohibition on their use.

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See letters B-230906, June 22, 1988; B-229799, February 4, 1988; B-229152.2, December 2, 1987; B-229152, October 29, 1987.

An area which appears to have received relatively little attention is the question of escheat. “Escheat” is a concept under which unclaimed property becomes the property of the state. Black’s Law Dictionary 545 (6th ed. 1990). For example, in most if not all states, the property of a person who dies intestate and who has no legal heirs goes to the state. It appears that the United States has never attempted to assert any general power of escheat,<sup>101</sup> so questions regarding unclaimed funds in the hands of the federal government will involve escheat under state statutes.

One group of cases involves 28 U.S.C. § 2042, which requires that money which has been deposited in the registry fund of any court of the United States and which has gone unclaimed for 5 years after the right to withdraw it has been adjudicated, be deposited in the Treasury “in the name and to the credit of the United States.” Any claimant who is entitled to the money and who can prove it may petition the court for an order directing payment. Id. One court has used the term “escheat” in discussing section 2042, but conceded that the “escheat” is not permanent. In re Folding Carton Antitrust Litigation, 744 F.2d 1252, 1255 (7th Cir. 1984), cert. dismissed, 471 U.S. 1113. In any event, it appears to be settled that a state’s power of escheat can reach funds deposited in the Treasury pursuant to 28 U.S.C. § 2042. United States v. Klein, 303 U.S. 276 (1938); Matter of Moneys Deposited in and Now Under the Control of the United States District Court for the Western District of Pennsylvania, 243 F.2d 443 (3d Cir. 1957); B-76023, August 18, 1967.

Klein, noting that the United States had not asserted any right, title, or interest in the funds in question, nor had it claimed any federal power of escheat, held that a state court can issue a decree of escheat. This alone, however, would not and could not affect the Treasury’s possession of the money. 303 U.S. at 280, 282. In order to actually recover the funds, the state would have to seek an order from the United States district court. This is precisely what the state did in that case, and the state got the money. See United States v. Klein, 106 F.2d 213 (3d Cir. 1939), cert. denied, 308 U.S. 618.

More recently, 23 states sued the Secretary of the Treasury and the Comptroller General to obtain custody of the money in the Unclaimed

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<sup>101</sup>One court has stated, “There is never a permanent escheat to the United States.” Hodgson v. Wheaton Glass Co., 446 F.2d 527, 535 (3d Cir. 1971).

Moneys account attributable to citizens of their respective states. Of course, they had no idea how much of the account related to any given state, so they also sought information which would enable them to figure it out. Once the states had custody of the money, they would then presumably proceed to declare escheats. The district court described the operation of the Unclaimed Moneys account, discussed the Supreme Court's Klein decision, found Treasury's implementation of 31 U.S.C. § 1322 to be reasonable, and held that the states had failed to exhaust their administrative remedies. They must, like any other claimants, first file claims with the agencies which had transferred the funds. Alabama v. Bowsher, 734 F. Supp. 525 (D.D.C. 1990).

The states appealed, and the Court of Appeals for the District of Columbia Circuit affirmed the district court. Arizona v. Bowsher, 935 F.2d 332 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 584. The court of appeals did not foreclose the possibility of escheat against funds in the Unclaimed Moneys account:

“As to some of the trust funds, escheat of the claimant's right might well substitute the state for the claimant and entitle it to payment. This would clearly not be true for claims that by federal law expire as a result of the events that trigger escheat under state law (e.g., death intestate without heirs). Obviously nothing we say prevents state substitution for the claimant where that is consistent with § 1322 and other relevant federal statutes.”

Id. at 335.

From time to time, Congress has considered legislative proposals to transfer unclaimed funds to the states. GAO analyzed some of the proposals in a 1989 report and pointed out that any such transfer would put a strain on federal deficit reduction efforts. Unclaimed Money: Proposals for Transferring Unclaimed Funds to States, GAO/AFMD-89-44 (May 1989).

Thus far, it should be apparent that we have been talking about money belonging to some private individual which has come into the government's hands, as opposed to a claim against appropriated funds. However, escheat questions can arise in the latter context as well, for example, claims by the estate of a deceased employee for unpaid compensation. The rule GAO has followed is stated in 17 Comp. Gen. 49, 50 (1937):

“[W]here the claim against the United States is the sole asset, there must be a showing of heirs, creditors, etc., before the payment of the claim may be allowed and . . . such payment

will not be allowed where the sole result would be an escheat to the State. However, where the claim against the United States is not the sole asset, payment may be made to the executor or administrator duly appointed and qualified notwithstanding that an escheat may result.”

See also 11 Comp. Gen. 104 (1931); 7 Comp. Gen. 478 (1928); B-147328, November 8, 1961; B-222096-O.M., July 7, 1986.

Unclaimed personal property is governed by statute, 40 U.S.C. § 484(m) for the civilian agencies and 10 U.S.C. § 2575 for the military departments. Under 40 U.S.C. § 484(m), the General Services Administration is authorized to take possession of unclaimed property on premises owned or leased by the government, to determine when title vested in the United States, and to “utilize, transfer, or otherwise dispose of such property.” Former owners may file claims within 3 years from the date title vested in the United States. GSA’s implementing regulations are found in 41 C.F.R. Part 101-48.

Under 10 U.S.C. § 2575, the agency must first try to locate the owner or the owner’s heirs or legal representative. If diligent effort to do so fails, the agency may dispose of the property but, for property with a fair market value of more than \$300, must wait 45 days after receipt at a designated storage point. If the owner or the owner’s heirs or legal representative is determined but not found, the agency must wait 45 days after sending notice to that person’s last known address. Net proceeds from the sale of unclaimed property must be deposited in the Treasury as miscellaneous receipts. The owner or the owner’s heirs or legal representative may file a claim for those proceeds with GAO within 5 years after the date of disposal.

There is no authority to waive or make exceptions to the 5-year limitation on filing claims. B-163551, April 1, 1968. An insurance company may be a proper claimant under 10 U.S.C. § 2575. B-166231-O.M., May 7, 1969. A lienholder is not a proper claimant. However, in cases where the agency sold vehicles without first obtaining release of the liens, in violation of regulations, GAO has advised that the proceeds can be paid to the lienholders. If the proceeds have been deposited as miscellaneous receipts, payment may be charged to the permanent appropriation for “Refunding Moneys Erroneously Received and Covered.” B-210638, February 8, 1984; B-217944, October 25, 1985 (non-decision letter).

GAO does not regard 10 U.S.C. § 2575 as applicable to money. In B-119290-O.M., April 27, 1954, someone found money in a parking lot on a military installation. Viewing section 2575 as inapplicable, and noting the

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absence of any other statute providing otherwise, GAO concluded that the money could be returned to the finder.

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**Chapter 12**  
**Claims Against the United States**

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**Claims Against the United States**

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# Debt Collection

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# Debt Collection

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“It is ‘as much the duty of the citizen to pay the Government as it is the duty of the Government to pay the citizen.’” *Cherry Cotton Mills, Inc. v. United States*, 327 U.S. 536, 540 (1946), quoting from Cong. Globe, 37th Cong., 2d Sess. 1674 (1862).

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## A. Introduction

Debts owed to the federal government arise from many sources. Some examples are tax assessments; sale of government goods and services; federal housing, farm, and student loan and loan guarantee programs; and overpayments or erroneous payments to employees, contractors, assistance recipients, and annuitants. This chapter will discuss how the government goes about collecting its debts.

As with any business, if the government cannot collect amounts owed to it, it must write off the debts as uncollectible. The losses, however, do not simply disappear. The business passes its debt losses on to the consumer. The government must similarly pass its losses on to its consumer, the taxpayer. This may manifest itself in many ways—higher taxes, reduced government services, increased budget deficit, increased national debt. Thus, in a very real sense, the government owes it to those who pay their debts and taxes to try to collect from those who do not.

Before describing the magnitude of the government’s debt collection activities, it is first necessary to distinguish between “receivables” and “delinquent debt.” In making this distinction, it may also be helpful to divide the universe of government debt claims into two broad categories.

The first category is debts resulting from programs involving the extension of credit in one form or another. If, for example, the government makes a loan of a million dollars, it has a “receivable” or “account receivable” until the loan is repaid. If the borrower makes payments on the loan in accordance with the agreed-upon schedule,—that is, if the account is kept “current”—the creditor agency’s actions with respect to that account (billing, recordkeeping, receiving and depositing payments, etc.) are called “account servicing.” At least for purposes of this chapter, however, this is not “debt collection.” See 64 Comp. Gen. 366, 369–70 (1985). The concept of debt collection comes into play only if and when the borrower falls behind in payments and thereby becomes “delinquent.”<sup>1</sup> (Obviously, the debt collection phase will also include account servicing functions.) For this first category, the total amount of outstanding receivables will be much larger than the amount of delinquent debt.

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<sup>1</sup>We use the term “delinquent” here in the broad sense of simply being in arrears in payment. As we will see later, there is a more precise definition of delinquency for debt collection purposes.

The second category is debt claims with respect to which the account servicing and debt collection phases are one and the same. Suppose, for example, an agency makes an overpayment to one of its employees. The debt comes into existence when the agency discovers the overpayment and notifies the employee. The debt is still a receivable, but debt collection commences immediately and there is no separate account servicing phase.

Now for some numbers.<sup>2</sup> As of the end of fiscal year 1991, total receivables owed the federal government amounted to approximately \$300 billion. This amount consisted of \$230 billion in loans receivable and other non-tax debts, and \$70 billion in tax receivables. Much of this will be paid routinely but a sizeable portion will not, forcing the government to pursue claims against its debtors. Out of this \$300 billion total, \$112.5 billion was reported as delinquent. The largest single category of delinquent debt is tax debt, which accounted for \$67 billion, leaving \$45.5 billion of delinquent non-tax debt.

The statistics tell you different things, depending on how you look at them. Most certainly, a delinquent debt total of over \$112 billion is cause for serious concern at all levels of federal management. This, in anyone's vocabulary, is "real money."<sup>3</sup> This, however, does not necessarily translate into the same level of concern for every program. A useful measuring device is the "delinquency rate." If you divide the delinquent debt for a particular program by the total receivables for that program, you get the delinquency rate. Comparing the delinquency rate for the same program over a period of time will give you useful trend data for that program, which may be the same, better, or worse than the overall rate.

Let us take a simple hypothetical to illustrate. Suppose this year you make ten \$100 loans for a total of \$1,000 in loans receivable. If one of those loans becomes delinquent, you have a delinquency rate of 10 percent. Next year, you make fifty similar loans, also of \$100 each. Five of those become delinquent. You have a fivefold increase in the total amount of delinquent debt, but your delinquency rate is still 10 percent. Both figures tell you something important, but the increase in the dollar amount of delinquent

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<sup>2</sup>Section 12 of the Debt Collection Act of 1982, 31 U.S.C. § 3719, requires the Office of Management and Budget, in consultation with GAO and the Treasury Department, to prescribe regulations for agency reporting, at least once a year, on the status of receivables. The statute also lists the types of information required. The governmentwide totals noted in the text, derived from these reports, are taken from OMB's *Budget of the United States Government, Fiscal Year 1993, Part One*, pages 320–322.

<sup>3</sup>One is reminded of the quip attributed to the late Senator Everett Dirksen—a billion here, a billion there, pretty soon you're talking about real money. Library of Congress, *Respectfully Quoted* ¶ 800, at 155 (S. Platt ed., 1989).

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debt in this particular example may be due to increased program size rather than poor debt collection.

Delinquencies occur for a variety of reasons. We have all seen press accounts of some wealthy professional with a seriously delinquent student loan. However, it must also be kept in mind that many federal programs are intended to provide assistance in one form or another to some segment of society which the private market will not accommodate. If private credit markets were available, the federal programs would presumably not have been necessary. Delinquencies in such programs should not be surprising. In addition, changes in the economy or other factors beyond anyone's control have an impact. A severe drought will produce increased delinquencies in farm credit programs. This by itself obviously does not mean that the administering agencies are ignoring debt collection or that farmers are "deadbeats."

The point of all this is to caution against over-generalization. While it is true that debt collection is a major task for the federal government, delinquent debt occurs for a variety of reasons, and federal agencies should formulate their debt collection approaches accordingly.

GAO's debt collection philosophy stems from two key premises. First, each federal agency should have an aggressive debt collection program, taking advantage of all tools available under the law, tailored to the needs and circumstances of the particular program or case. Second, federal debt collection activities should never be unreasonable. It is frequently said that an agency's actions should always be based on the "interests of the government." While maximum recovery of amounts owed is surely one of these interests, it is not the only one. It is not the intent of federal debt collection to impoverish the citizen.<sup>4</sup>

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## B. Legal Foundation

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### 1. The Common Law

While debt collection today is largely a creature of statute, this was not always the case. There is a common-law base to federal debt collection, much of which remains relevant. The Supreme Court has recognized that the United States, as sovereign, has the inherent right to collect debts

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<sup>4</sup>The preamble to the 1984 reissuance of the Federal Claims Collection Standards, discussed later in the text, throughout stresses the concept of avoiding undue financial hardship. 49 Fed. Reg. 8889-96 (March 9, 1984). See also, e.g., 62 Comp. Gen. 599 (1983).

owed to it. “The Government by appropriate action can recover funds which its agents have wrongfully, erroneously, or illegally paid.” United States v. Wurts, 303 U.S. 414, 415 (1938). As another court has stated:

“The only time a government agency is barred from exercising its right to recover overpayments is when Congress has clearly manifested its intention to raise a statutory barrier.”

Old Republic Ins. Co. v. Federal Crop Ins. Corp., 746 F. Supp. 767, 770 (N.D. Ill. 1990), *aff’d*, 947 F.2d 269 (7th Cir. 1991). See also Bechtel v. Pension Benefit Guaranty Corp., 781 F.2d 906 (D.C. Cir. 1986).

The extent to which this right exists under the common law, i.e., without the need for statutory authority, has not been free from debate. At a minimum, it embraces the right to sue. Wurts, 303 U.S. at 415. See also Fansteel Metallurgical Corp. v. United States, 172 F. Supp. 268, 270 (Ct. Cl. 1959); Maryland Small Business Development Financing Authority v. United States, 4 Cl. Ct. 76, 80 (1983).

The government’s common-law right to recover amounts owed to it has also been held to embrace administrative recoupment and setoff.<sup>5</sup> E.g., Woods v. United States, 724 F.2d 1444 (9th Cir. 1984) (food stamp program); Collins v. Donovan, 661 F.2d 705 (8th Cir. 1981) (Labor Department recoupment regulations under Trade Act of 1974); Jacquet v. Westerfield, 569 F.2d 1339 (5th Cir. 1978) (Aid to Families with Dependent Children program); DiSilvestro v. United States, 405 F.2d 150 (2d Cir. 1968) (erroneous payment of disability benefits by Veterans Administration). Also, as we will see later in this chapter, the United States has long asserted the common-law right to charge interest.

Some courts have elevated the government’s common-law right to recover to the status of a duty. The argument begins with Article IV, section 3, clause 2 of the Constitution, the so-called Property Clause, which gives Congress the power to dispose of property belonging to the United States. The term “property” is not limited to tangible property, but includes legal rights as well. Thus, the Supreme Court has stated:

“Power to release or otherwise dispose of the rights and property of the United States is lodged in the Congress by the Constitution. Art. IV, § 3, Cl. 2. Subordinate officers of the

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<sup>5</sup>Technically, “recoupment” and “setoff” are two different things. In a recoupment, both claims arise from the same transaction. In a setoff, the claims arise from different transactions. Black’s Law Dictionary 1275 (6th ed. 1990).

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United States are without that power, save only as it has been conferred upon them by Act of Congress or is to be implied from other powers so granted.”

Royal Indemnity Co. v. United States, 313 U.S. 289, 294 (1941).

A payment which is erroneous or illegal, it has been held, violates the Property Clause because it amounts to giving away government money without congressional authorization, and gives rise to not only a right but a duty on the part of the government to recover. The Court of Claims stated the proposition as follows in Fansteel Metallurgical Corp., 172 F. Supp. at 270:

“As a matter of fact, when a payment is erroneously or illegally made it is in direct violation of article IV, section 3, clause 2, of the Constitution. [Citation omitted.] Under these circumstances it is not only lawful but the duty of the Government to sue for a refund thereof, and no statute is necessary to authorize the United States to sue in such a case.”

See also Aetna Casualty & Surety Co. v. United States, 526 F.2d 1127, 1130 (Ct. Cl. 1975), cert. denied, 425 U.S. 973; Maryland Small Business Development Financing Authority, 4 Cl. Ct. at 80.

It follows that, without a clear statutory basis, an agency has no authority to forgive indebtedness or to waive recovery. Pacific Hardware & Steel Co. v. United States, 49 Ct. Cl. 327, 335 (1914); 14 Comp. Gen. 897, 900 (1935); 14 Comp. Gen. 468 (1934); B-201054, April 27, 1981. See also B-118653, July 15, 1969. This principle applies as well to partial forgiveness without compensating benefit, such as the termination of the accrual of interest. 67 Comp. Gen. 471 (1988).

In exercising its right to recover amounts illegally or erroneously paid, the government cannot be estopped by the mistakes of its officers or agents. Aetna Casualty & Surety Co., 526 F.2d at 1130; 51 Comp. Gen. 162, 165 (1971); B-164031(1).90, December 1, 1976.

Today, many areas of debt collection are governed by statute, and to that extent the need to rely on the common law has been correspondingly reduced. Some legislation has given the government new legal authority; some has restricted existing authority; and some has served to buttress existing authority by giving it a statutory foundation. The common-law principles set forth above continue to arise in various contexts, however, and are by no means obsolete.

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## 2. Role of GAO

GAO's role in the federal debt collection arena stems from several statutes. The first is 31 U.S.C. § 3702(a), the fundamental source of GAO's claims settlement authority. The origin and meaning of 31 U.S.C. § 3702(a) have been discussed in Chapter 12 and are no different in the debt context.

The second statute is the second portion of 31 U.S.C. § 3526(a), which authorizes the Comptroller General to "supervise the recovery of all debts finally certified by the Comptroller General as due the Government." There are no recent decisions discussing the exact meaning of this provision, and it is usually cited in tandem along with 31 U.S.C. § 3702(a) with no further comment. See, e.g., 58 Comp. Gen. 501, 502 (1979). However, it does not mean what a literal reading might suggest, and it is clear that GAO does not view this provision as giving it any special authority in the actual litigation of debt claims in court. The Justice Department is the government's litigator (28 U.S.C. § 516), and GAO has never construed 31 U.S.C. § 3526(a) as in any way pre-empting this. E.g., B-42663, July 26, 1944. What the statute essentially does is confirm or reinforce GAO's oversight role in the debt collection process. See B-117604-O.M., January 12, 1973.

Next is the Federal Claims Collection Act of 1966, as amended. GAO has a special role under this statute and prescribes governmentwide implementing regulations jointly with the Department of Justice. The statute and regulations are discussed in detail in various places throughout this chapter.

GAO's authority to render formal legal decisions also comes into play. On the payment side, decisions of the Comptroller General serve two functions: interpreting statutes and determining the merits of particular claims. On the debt side, there are still decisions interpreting statutes, but there are many fewer decisions adjudicating individual claims. There are several reasons for this. Uniform requirements under the Federal Claims Collection Act eliminate the need for many decisions. Also, the typical debt case tends to be fairly clear-cut at least in terms of its legal foundation, and problems are more likely to relate to collection procedures than to the existence of the debt itself. Finally, while most claimants are aggressive in pursuing payment claims at least through available administrative channels, the average debtor is much less likely to take an active role. As with the payment side, GAO will not intrude into areas committed by statute to the exclusive jurisdiction of another agency. E.g., B-164031(3).125, November 7, 1977 (reasonable cost determinations under Medicare Program).

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Finally, GAO's various audit authorities are relevant. GAO, in the performance of its audit and oversight functions, has issued numerous reports on debt collection. They range from governmentwide reviews, several of which will be noted later, to reviews of particular agencies or programs<sup>6</sup>.

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### 3. Governmentwide Statutes and Regulations: An Overview

Prior to 1966, there were no uniform policies or procedures for debt collection throughout the federal government. While GAO made some efforts by virtue of its audit and claims settlement functions, debt collection lacked a governmentwide statutory basis and procedures varied greatly from agency to agency. As a general proposition, debt collection received little emphasis during this time period.

While some authority existed under the common law, lack of adequate statutory powers hampered debt collection. For example, as discussed in Chapter 12, the authority to "settle and adjust" claims had long been construed as not including the authority to compromise. Although a few agencies had specific compromise authority, most, GAO included, did not. To make things worse, to simply terminate collection action would have been viewed as giving away government property, which, as noted above, no government official has the right to do without statutory authority.

Thus, the administrative agency—if it did anything at all—had to attempt to collect the full amount of the debt. If the agency was unsuccessful, it had to refer the claim to GAO, which again could do nothing more than attempt to collect the full amount. If GAO's efforts were similarly fruitless, the claim went to the Justice Department, and it was only there that compromise could be considered.<sup>7</sup> Under this system, the Justice Department was burdened with referrals of worthless as well as collectible debts. Congress was also burdened with many requests for private relief legislation.

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<sup>6</sup>Some examples are Farmers Home Administration: Debt Relief Actions for Business Entity Borrowers Are Questionable, GAO/RCED-92-29 (December 1991); Debt Collection: More Aggressive Action Needed to Collect Debts Owed by Health Professionals, GAO/AFMD-88-23 (February 1988); Debt Collection: Interior's Efforts to Collect Delinquent Royalties, Fines, and Assessments, GAO/AFMD-87-21BR (June 1987); Defaulted Student Loans: Guaranty Agencies' Collection Practices and Procedures, GAO/HRD-86-114BR (July 1986); Action Needed to Reduce, Account for, and Collect Overpayments to Federal Retirees, GAO/AFMD-83-19 (June 1983).

<sup>7</sup>This is an oversimplification. Older materials often refer to 31 U.S.C. § 194 (1976 ed.), a statute enacted in 1863, prior to the creation of the Justice Department, giving the Secretary of the Treasury a role in approving compromises. The significance of this statute during the first several decades of the 20th century is unclear. See Executive Order No. 6166, § 5 (June 10, 1933); 38 Op. Att'y Gen. 98 (1934). In any event, it was repealed in 1978.

In 1966, Congress took the first major step toward establishing a governmentwide system of debt collection, by enacting the Federal Claims Collection Act of 1966, Pub. L. No. 89-508, 80 Stat. 308. The legislation had been recommended by the Justice Department and was largely a joint GAO-Justice effort. Enactment stemmed from the congressional belief that giving agencies the authority to compromise claims would result in increased collections since agencies would be able to settle claims while they were fresh and while the debtors still had the ability to pay. Also, Congress considered it a better business practice for agencies to handle their own claims since agency staffs are more likely to be familiar with the facts and legalities of the claims. A further congressional objective was to reduce congestion in the courts. See generally S. Rep. No. 1331 (reprinted in 1966 U.S. Code Cong. & Admin. News 2532) and H.R. Rep. No. 1533, 89th Cong., 2d Sess. (1966).

The Federal Claims Collection Act of 1966, as amended, provides the basic legal framework for agency collection of debts owed to the United States, with oversight by the General Accounting Office and the Department of Justice.<sup>8</sup> It directs all agencies to pursue collection efforts and, subject to a monetary ceiling, authorizes compromise, suspension, or termination of collection action in limited circumstances. All of these concepts will be explored fully later in this chapter.

While the 1966 legislation was a major development in federal debt collection, it did not do the job. A 1978 GAO report, The Government Needs to Do a Better Job of Collecting Amounts Owed by the Public, FGMSD-78-61 (October 20, 1978), called attention to serious deficiencies in federal debt collection programs. Continuing its emphasis on debt collection, GAO issued several further reports of governmentwide significance.<sup>9</sup> The heightened awareness generated in part by this series of reports produced improvements in government debt collection through increased management focus. See GAO report entitled Significant Improvements Seen in Efforts to Collect Debts Owed the Federal Government, GAO/AFMD-83-57 (April 28, 1983).

During the same time period, Congress had also once again turned its attention to debt collection, culminating in the next major piece of debt

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<sup>8</sup>A brief description of the 1966 legislation may be found in Sidney B. Jacoby, The 89th Congress and Government Litigation, 67 Colum. L. Rev. 1212 (1967).

<sup>9</sup>Federal Agencies Negligent in Collecting Debts Arising from Audits, AFMD-82-32 (January 2, 1982); Unresolved Issues Impede Federal Debt Collection Efforts—A Status Report, CD-80-1 (January 15, 1980); The Government Can Be More Productive in Collecting Its Debts by Following Commercial Practices, FGMSD-78-59 (February 23, 1979).

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collection legislation, the Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1749.<sup>10</sup> The 1982 law provides a statutory basis for a number of specific collection tools such as interest, offset, and the use of private collection agencies.<sup>11</sup>

The Federal Claims Collection Act authorizes GAO and the Justice Department to jointly issue governmentwide implementing regulations. Individual agency regulations are to conform to these joint regulations. This provision, part of the 1966 legislation, is now found at 31 U.S.C. § 3711(e). The selection of GAO and the Justice Department was quite deliberate—GAO because of its expertise in administrative debt collection, the Justice Department because of its expertise in litigation.<sup>12</sup> The joint GAO-Justice Department regulations are known as the Federal Claims Collection Standards (FCCS). The original version of the FCCS was published on October 15, 1966 (31 Fed. Reg. 13381). The regulations have been amended several times, and were comprehensively revised and reissued in their entirety on March 9, 1984 (49 Fed. Reg. 8889). The regulations themselves are found in 4 C.F.R. Parts 101-105. Those who work regularly in the debt collection area should also have a copy of the preamble (supplementary information statement) accompanying the 1984 reissuance, since it contains much useful explanatory material. It appears at 49 Fed. Reg. 8889-8896.

In issuing the Federal Claims Collection Standards, GAO and the Justice Department have broad authority to “regulate” federal debt collection activities. Many provisions in the Standards correspond to specific provisions in the governing statutes. Others implement the general debt collection mandate found in 31 U.S.C. § 3711(a)(1). The Standards “can be [and are] used to prescribe any method or procedure which could reasonably be said to enhance debt collection efforts so long as it is not inconsistent with other law.” B-117604(3)-O.M., January 16, 1979.

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<sup>10</sup>Several sections of the Debt Collection Act were phrased in terms of amendments to the Federal Claims Collection Act. Other sections amended provisions appearing in other titles of the U.S. Code. As a result of the 1982 recodification of Title 31, the Federal Claims Collection Act, as amended by the Debt Collection Act, appears in Title 31 of the United States Code, with other debt collection provisions, at Chapter 37, Subchapters I (specifically § 3701) and II (§§ 3711-3719).

<sup>11</sup>An early review of selected problems in the implementation of the Debt Collection Act is *Debt Collection: Billions Are Owed While Collection and Accounting Problems Are Unresolved*, GAO/AFMD-86-39 (May 1986). A more recent study, centering more on the extent to which selected agencies are using available authorities, is *Debt Management: More Aggressive Actions Needed to Reduce Billions in Overpayments*, GAO/HRD-91-46 (July 1991).

<sup>12</sup>H.R. Rep. No. 1533, 89th Cong., 2d Sess. 4 (1966); S. Rep. No. 1331, 89th Cong., 2d Sess. 3 (1966), 1966 U.S. Code Cong. & Admin. News at 2534.

While the Standards can thus address both policies and procedures, GAO and the Justice Department have chosen to emphasize the former. The approach is expressed in the following passage from the preamble to the 1984 reissuance of the FCCS:

“Many commenters felt that the Standards are not sufficiently detailed. Several commenters suggested uniform and more detailed procedures either throughout the Standards or in some particular area. . . . However, since their inception in 1966, the Standards have never been intended to prescribe detailed procedures. Rather, they are designed primarily to address policies, and to provide general guidance on sound debt collection principles. It is our belief that detailed procedures are best developed in the context of individual agency regulations, where they can be tailored to meet the needs and experiences of particular programs and activities. Each Federal agency is required to develop its own implementing regulations, based on and consistent with these Standards, and it is there that we believe the detailed procedures belong. While uniformity of policy is desirable throughout the Federal Government, we have never been convinced that uniformity of operating procedures is either necessary or beneficial.” (Emphasis in original.)

49 Fed. Reg. 8889. GAO provides further procedural guidance in title 4 of the GAO Policy and Procedures Manual for Guidance of Federal Agencies. See 4 C.F.R. § 101.1.

Two additional agencies have key roles in the management and oversight of federal debt collection—the Office of Management and Budget and the Treasury Department.

The principal OMB document is Managing Federal Credit Programs, OMB Circular No. A-129 (November 25, 1988). The underlying debt collection philosophy is similar to GAO’s. The circular (Part I, sec. 1) is designed to ensure “fair but aggressive collection” of amounts due the government.

In a 1986 Memorandum of Understanding, OMB designated the Treasury Department’s Financial Management Service as “lead agency” for credit management and debt collection. Treasury has issued several relevant publications. Some of them are:

- Treasury Financial Manual (TFM), Volume I, Part 6, Chapter 8000 (Cash Management).
- Managing Government Credit: A Supplement to the Treasury Financial Manual (January 1989).

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- The Debt Collection Process (December 1987).<sup>13</sup>

Next, it is important to emphasize that our focus in this chapter is on governmentwide authorities and restrictions. Many agencies are subject to additional agency-specific or program-specific statutory provisions, some existing prior to the Federal Claims Collection Act, others enacted subsequently. For example, the Small Business Administration has specific compromise authority. 15 U.S.C. § 634(b)(2). So does the Department of Veterans Affairs with respect to certain of its programs. 38 U.S.C. § 3720(a)(4). Another example is the Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651–2653.

The point to note is that the Federal Claims Collection Act was not intended to increase or diminish the existing authority of any agency to settle, compromise, close, or litigate debt claims. This was specified in section 4 of the 1966 legislation (Pub. L. No. 89–508, § 4, 80 Stat. 309).<sup>14</sup> One of the objectives of section 4 was to preserve existing authority to compromise claims in excess of the monetary limit applicable under the Federal Claims Collection Act. However, it does not make the existing authority exclusive so as to preclude GAO’s compromise authority within the limits of the Federal Claims Collection Act. B-160819-O.M., February 10, 1967.

Another statute which should be mentioned is the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692o. This statute regulates debt collectors by prohibiting a number of harassing or abusive activities (§ 1692d), false or misleading representations (§ 1692e), and unfair practices (§ 1692f). Among the prohibited items are threats of violence, use of obscene or profane language, and threats to take actions that cannot legally be taken.

The Fair Debt Collection Practices Act does not apply to officers or employees of the United States acting in the performance of their official

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<sup>13</sup>We have not attempted to cross-reference the OMB and Treasury publications for each point covered in this chapter, but emphasize that the reader should always consult the relevant OMB and Treasury issuances for additional guidance.

<sup>14</sup>Prior to the 1982 recodification of Title 31, section 4 was found at 31 U.S.C. § 953. The provision was viewed as being of “limited interest” and was not retained in the recodified Title 31. Revision of Title 31, United States Code, “Money and Finance,” Report of the Committee on the Judiciary, H.R. Rep. No. 651, 97th Cong., 2d Sess. 340 (1982) (Table 3—Laws Omitted but not Repealed). Nevertheless, it is still good law.

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duties. 15 U.S.C. § 1692a(6)(C).<sup>15</sup> While the statute may not apply as a matter of law, engaging in abusive practices of the type prohibited is certainly undesirable as a matter of policy. It is, for example, the policy of the Department of Justice for United States Attorneys to follow the limitations of the Fair Debt Collection Practices Act with respect to prohibited activities.<sup>16</sup> While GAO has not addressed the point formally, this strikes the editors as sound guidance for all federal debt collectors.

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#### 4. Scope of the Federal Claims Collection Act and Standards

##### a. What Is a Debt?

In its simplest terms, a debt, for purposes of the Federal Claims Collection Act and Standards, is something you owe the federal government. The Standards define “debt” as “an amount of money or property which has been determined by an appropriate agency official to be owed to the United States from any person, organization, or entity, except another Federal agency.” 4 C.F.R. § 101.2(a).

When GAO and the Justice Department were preparing the 1984 version of the Standards, several commenters asked for clarification of the difference between a “debt” and a “claim.” In one sense, there is a logical distinction. Suppose, for example, you buy a house and take out a mortgage for \$100,000 with your local bank. You have a “debt” to the bank in the full amount of the note you signed. However, as long as you continue making your payments on time, the bank cannot take any collection action against you. In this sense, the bank does not have a “claim” against you unless and until you fall behind in your payments. Be that as it may, as the 1984 preamble notes, the Debt Collection Act of 1982 appears to use the terms interchangeably.<sup>17</sup> It was decided that creating a distinction in the Standards would not serve a useful purpose. “In the final analysis, following the substance of the regulations is more important than specific nomenclature.” 49 Fed. Reg. at 8889. Thus, the Standards also use the terms interchangeably. 4 C.F.R. § 101.2(a).

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<sup>15</sup>Occasional statutory exceptions exist. For example, a provision in recent Treasury, Postal Service and General Government Appropriations Acts requires compliance with certain provisions of the Fair Debt Collection Practices Act by Internal Revenue Service employees in the collection of tax underpayments. E.g., Pub. L. No. 103-123, Treasury Department General Provisions § 104, 107 Stat. 1226, 1233 (1993) (FY 1994).

<sup>16</sup>United States Attorneys’ Manual, title 11, § 11-10-1.120 (April 1986).

<sup>17</sup>The names of the two key statutes bear this out—the Federal Claims Collection Act of 1966 and the Debt Collection Act of 1982.

It should be readily apparent that a “debt,” for purposes of the Federal Claims Collection Act and Standards, requires two elements: there must be an amount of money or property which is owed to the United States, and the government must be entitled to receive it immediately. If it is not immediately payable (as, for example, in the case of loan payments which have not yet become due), then there is no “debt” upon which collection action can be taken, regardless of the terminology used. Thus, the Standards opted for substance over semantics.<sup>18</sup>

One very important point emerges from the definition in section 101.2(a): a debt comes into existence when the government agency determines that there is a debt, unless some statute provides otherwise. The government does not have to go to court to establish the indebtedness. The existence and amount of the debt are determined in the first instance by the agency involved. At first glance, this may seem heavy-handed, but it is not. Obviously, the debtor retains the right to contest the debt through available administrative or judicial channels. Also, the government must follow any required procedures in connection with any particular form of collection action. But it is the agency’s initial determination that triggers or sets in motion the debt collection process. See *Bell v. New Jersey*, 461 U.S. 773, 791 (1983), in which the Supreme Court applied the same concept to government claims under the Elementary and Secondary Education Act. See also *Old Republic Ins. Co. v. Federal Crop Ins. Corp.*, 947 F.2d 269, 276 (7th Cir. 1991) (argument that agency’s overpayment determinations were not “debts” subject to offset held to be without merit); *DiSilvestro v. United States*, 405 F.2d 150, 155 (2d Cir. 1968) (“the right of set-off arose when . . . the V.A. found that its prior decision granting DiSilvestro service-connected disability benefits was [erroneous]”).

What kinds of debts are covered? The Debt Collection Act of 1982 contained a definition of “claim,” now found at 31 U.S.C. § 3701(b): “amounts owing on account of loans insured or guaranteed by the Government and other amounts due the Government.” This is one instance in which the language of the recodification lost some of the flavor of the original. The original Debt Collection Act language was as follows:

“For purposes of this Act, the term ‘claim’ includes amounts owing on account of loans insured or guaranteed by the United States and all other amounts due the United States

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<sup>18</sup>For an early discussion of the ambiguities in words such as “due,” see *United States v. State Bank of North Carolina*, 31 U.S. (6 Pet.) 29, 36–37 (1832). More recently, a “form over substance” argument was rejected in *United States v. Luce*, 78 F. Supp. 241, 243 (D. Minn. 1948).

from fees, duties, leases, rents, royalties, services, sales of real or personal property, overpayments, fines, penalties, damages, interest, taxes, forfeitures, and other sources.”<sup>19</sup>

While the flavor was thus diluted in the recodification, the substance is clearly the same since the specific items would all be included in the phrase “other amounts due the Government” and, more importantly, the recodification was not intended to make any substantive changes.

It becomes rather clear from this definition that Congress intended that the Act and Standards have a very broad scope. The quoted language has been incorporated by the Office of Management and Budget (OMB Circular No. A-129, Appendix 1 at 2) and by the Treasury Department (Managing Government Credit: A Supplement to the Treasury Financial Manual, at 7–9).

Note that the definition in 4 C.F.R. § 101.2(a) refers to claims for “money or property.” The Standards specifically include conversion claims. Where someone is holding property belonging to the government, the creditor agency can demand either return of the specific property or the payment of its value. 4 C.F.R. § 101.5.

Thus far, the only case we have found construing the definition in 31 U.S.C. § 3701(b) is United States v. Excellair, Inc., 637 F. Supp. 1377 (D. Colo. 1986). In that case, the court held that, for purposes of enforcing the government’s priority under 31 U.S.C. § 3713 against a preferential transfer by an insolvent debtor, the government had a “claim” under a guaranteed loan even though at the time of the transfer the guarantee had not yet been honored. *Id.* at 1394–95. While the holding is relevant for purposes of the priority statute, it would seem to have limited application to other forms of collection action.

As noted above, the debt collection process is triggered by the agency’s initial determination of the existence and amount of the debt. While this is enough to start the process, several collection tools, as we will see later in the chapter, apply only to a debt which has become “delinquent.” Thus, for collection purposes, there is a difference between a “debt” and a “delinquent debt.” The theory is that certain collection actions should be employed only after the debtor has been given a chance to pay voluntarily. For purposes of the Federal Claims Collection Act and Standards, a debt becomes “delinquent” (1) if it has not been paid by the date specified in the agency’s initial written notification (i.e., the agency’s first demand

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<sup>19</sup>Federal Claims Collection Act of 1966, § 3(g), added by Pub. L. No. 97–365, § 13(b), 96 Stat. 1758.

letter), unless other payment arrangements have been made by that date, or (2) if at any time thereafter the debtor defaults on a repayment agreement. 4 C.F.R. § 101.2(b). The following examples will illustrate:

- Example 1: Agency sends first demand letter demanding payment within 30 days. Nothing happens. Debt becomes delinquent on day 31.
- Example 2: Agency sends first demand letter demanding payment within 30 days. Within that time, agency and debtor negotiate a repayment agreement calling for monthly payments. Debtor makes first 6 payments on time but misses the 7th. Debt becomes delinquent the day after the due date for the missed payment.

#### b. Agencies Covered

As a general proposition, the Federal Claims Collection Act, as amended by the Debt Collection Act of 1982, and the Federal Claims Collection Standards, apply to all agencies and instrumentalities in the executive and legislative branches of the federal government. Those provisions of the Federal Claims Collection Act, as amended, deriving either from the 1966 statute (e.g., 31 U.S.C. §§ 3711(a)–(e)), or from those portions of the Debt Collection Act of 1982 which were enacted as amendments to the Federal Claims Collection Act (e.g., 31 U.S.C. §§ 3711(f), 3716, 3717, 3718), are phrased as applicable to “executive or legislative agencies,” which in turn is defined in 31 U.S.C. § 3701(a)(4) as including any “department, agency, or instrumentality in the executive or legislative branch of the Government.” The term “executive or legislative agency” in this context has been held to include independent agencies such as the Nuclear Regulatory Commission. Commonwealth Edison Co. v. Nuclear Regulatory Commission, 830 F.2d 610, 618–620 (7th Cir. 1987).

#### c. Exemptions

There are a number of situations in which the Federal Claims Collection Act and Standards do not apply, either in whole or in part. The exemptions vary in scope because they stem from different sources—the Federal Claims Collection Act of 1966, the Standards themselves, the Debt Collection Act of 1982, or some combination thereof.

##### (1) Antitrust claims and claims tainted with fraud

Two partial exemptions were specified in the Federal Claims Collection Act of 1966. Section 3 of that legislation expressly made the authority to compromise, and to suspend or terminate collection action, inapplicable to (1) claims involving a violation of the antitrust laws, and (2) claims in which there is an indication of fraud, misrepresentation, or the presentation of a false claim. These exemptions are now found in 31 U.S.C.

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§ 3711(c)(1). Note that these exemptions do not extend to the entire Act or Standards; they apply only to the compromise, suspension, and termination authority.

The corresponding provision of the Federal Claims Collection Standards is 4 C.F.R. § 101.3(a). It clearly spells out agency responsibilities with respect to fraud and antitrust claims. Upon identifying a claim subject to one of these exemptions, the agency is to promptly refer the matter to the Justice Department. The Justice Department may retain the claim, or it may return it to the agency with instructions to proceed with administrative collection action. Thus, the scope of agency collection actions will depend on precisely what Justice tells the agency to do.

## (2) Tax claims

Tax claims are excluded from the coverage of the Federal Claims Collection Standards. 4 C.F.R. § 101.3(b). This exemption has been in the Standards since their inception. Tax claims “are a special, preferred type of debt and have been from time immemorial.” B-156022-O.M., October 25, 1968. Collection of taxes is governed by the Internal Revenue Code, which has its own authorities and procedures. See, for example, 26 U.S.C. §§ 6321–26 (tax liens) and 6331 (tax levy). The exemption of section 101.3(b) now has a partial statutory basis. Section 8(e) of the Debt Collection Act of 1982, codified at 31 U.S.C. § 3701(d), provides that, with certain exceptions, the Debt Collection Act does not apply to debts arising under the Internal Revenue Code. The exemption in the Standards is broader because it is not limited to authorities contained in the Debt Collection Act.<sup>20</sup>

In B-229068.4, August 3, 1988, GAO considered the applicability of the Federal Claims Collection Act and Standards to reclamation fees assessed against coal mining companies under the Surface Mining Control and Reclamation Act of 1977. The question arose because the court in United States v. River Coal Co., 748 F.2d 1103 (6th Cir. 1984), had held that the fees were involuntary exactions and therefore constituted a tax. GAO first noted that the Federal Claims Collection Act itself has no blanket exemption for tax claims. GAO then found it unnecessary to decide whether 4 C.F.R. § 101.3(b) applied to “tax claims” other than those arising under the

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<sup>20</sup>The pre-recodification version of the definition of “claim” in the Debt Collection Act of 1982, quoted earlier in the text, expressly includes “taxes.” Thus, although they chose not to do so, presumably GAO and the Justice Department could have included tax debts in the Federal Claims Collection Standards, at least to the extent not covered by the Internal Revenue Code and its own implementing regulations nor exempted by section 8(e). What might have been gained by this is not clear.

Internal Revenue Code because the Interior Department was free to adopt similar provisions in its own regulations, and had in fact done so. Thus, Interior could compromise a claim for reclamation fees in accordance with 31 U.S.C. § 3711. (B-156022-O.M., cited above, indicates that section 101.3(b) was viewed as addressing tax claims under the Internal Revenue Code.)

(3) Section 8(e) exemptions

Section 8(e) of the Debt Collection Act of 1982, noted above in connection with tax claims, also embraces debts arising under the Social Security Act or the tariff laws of the United States. This is not an exemption from the entire Federal Claims Collection Act and Standards, but only from those remedies and procedures prescribed by the Debt Collection Act itself. See 31 U.S.C. § 3701(d); 4 C.F.R. § 102.19(a). The Standards further point out that the exemption “should not be construed as prohibiting use of these authorities and requirements when collecting debts owed by persons employed by agencies administering the laws cited in the preceding paragraph unless the debt ‘arose under’ those laws.” 4 C.F.R. § 102.19(b).

In order for the section 8(e) exemption to apply, two conditions must exist: the collection action in question must derive from the Debt Collection Act of 1982, and the debt must be one “arising under” the Internal Revenue Code, the Social Security Act, or the tariff laws. If either of these conditions is not met, the exemption does not apply. This gets somewhat complicated. A few examples may help:

- The Internal Revenue Service asserts a tax underpayment claim against an employee of the Social Security Administration. The claim cannot be referred to a private collection agency since the claim “arose under” the Internal Revenue Code and the authority to hire private debt collectors was prescribed by the Debt Collection Act.
- The Social Security Administration wishes to compromise a benefit overpayment claim against a private individual. Although the debt “arose under” the Social Security Act, the section 8(e) exemption does not apply because compromise authority was not one of the newly enacted provisions of the Debt Collection Act.
- SSA wants to assess a penalty against one of its employees for delinquent repayment of an unused travel advance. Although the penalty provision was one of the newly enacted Debt Collection Act provisions, SSA may assess the penalty because the debt did not “arise under” the Social Security Act, Internal Revenue Code, or tariff laws.

(4) Interagency claims

Interagency claims—claims by federal agencies against other federal agencies—are also excluded from the coverage of the Federal Claims Collection Standards. 4 C.F.R. § 101.3(c). In addition, the definition of “debt” in 4 C.F.R. § 101.2(a), discussed above, excludes amounts owed by other federal agencies. The only statutory reference to interagency claims is 31 U.S.C. § 3701(c), under which interagency claims are not subject to 31 U.S.C. §§ 3716 (administrative offset) or 3717 (interest and penalties). These provisions were added by the Debt Collection Act of 1982. As with tax claims, the exemption in the Standards is broader.

The exemption of section 101.3(c) is a blanket exemption, newly added in the 1984 version of the Standards. However, as the preamble noted (49 Fed. Reg. at 8890), this was merely the codification of existing practice. E.g., B-182398-O.M., September 3, 1976. This is not merely an example of the government being good to itself. Rather, it is a recognition that the collection tools set forth in the Standards simply are not available when asserting a claim against another federal agency. The situation was summed up in the following passage from B-217990.25-O.M., October 30, 1987:

“A claim against another federal agency is different from a claim against a private party. The tools available to collect a debt from the private party are not available when the debtor is another federal agency, either as a matter of law or as a practical matter. We cannot sue the other agency; we cannot hire a private debt collector; we cannot charge interest; we cannot offset the claim against the agency’s present or future appropriations.”

The range of options in collecting a claim from another federal agency is extremely limited. The Standards instruct agencies to attempt to resolve interagency claims by negotiation. If this fails, the claim should be referred to GAO. 4 C.F.R. § 101.3(c). The agency should not simply “write off” the claim. B-214972-O.M., April 26, 1985. GAO will review the claim and render its objective opinion as to the claim’s validity, for whatever persuasive influence that may have. GAO cannot, however, enforce collection any more than the creditor agency itself could.

(5) State and local governments

Another limited exemption deriving from the Debt Collection Act is 31 U.S.C. § 3701(c), which provides that sections 3716 (administrative offset) and 3717 (interest and penalties) do not apply to debts owed by state or

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local governments. The state and local government exemption will be discussed more fully later in this chapter.

(6) Civil vs. criminal claims

Nothing in either the Federal Claims Collection Act of 1966 or the Debt Collection Act of 1982 expressly limits the coverage of those statutes to civil claims. However, since their inception, the Federal Claims Collection Standards have included such a limitation. See 4 C.F.R. § 101.1.

The collection of criminal fines and penalties is the responsibility of the Department of Justice. Authorities and procedures are found in various provisions of Title 18 of the United States Code. Many of the current provisions, including those cited below, stem from the Criminal Fine Improvements Act of 1987, Pub. L. No. 100–185, 101 Stat. 1279.

A criminal fine is imposed by the court as part or all of the sentence. It is payable immediately unless the court provides for installment payments for a period not to exceed five years, excluding any time the defendant is in jail. 18 U.S.C. § 3572(d). The fine is “delinquent” if payment is more than 30 days late, and is “in default” if delinquent for more than 90 days. A fine in default becomes due within 30 days after notification by the Attorney General, notwithstanding any installment schedule. *Id.* §§ 3572(h) and (i), 3612(e).

Fines in excess of \$2,500 bear interest unless waived or limited by the court. In addition, penalties are added to fines which become delinquent or in default. *Id.* §§ 3612(f), (g). If the government petitions the court upon a showing that reasonable collection efforts are not likely to succeed, the court may remit or defer payment of the fine or may extend an installment schedule. *Id.* § 3573. The Attorney General may waive interest or penalties on the same grounds. *Id.* § 3612(h).

In sum, criminal fines have their own detailed collection authorities and procedures prescribed by statute. Because of this, and because of the integral role of the sentencing court in criminal matters, criminal fines are excluded from the coverage of the Federal Claims Collection Standards.

Where a criminal action and civil liability arise out of the same facts, the disposition of the criminal action does not affect the debtor’s civil liability for any outstanding balance. B-136570, August 4, 1958; B-133647, October 30, 1957.

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(7) More specific agency authority

Program legislation or agency organic authority may include provisions dealing with various aspects of debt collection. Where such provisions exist, they, and their implementing regulations, take precedence over the Federal Claims Collection Act and Standards. An example is 19 U.S.C. § 1505(c), specifying the due date, delinquency date, and interest accrual date for customs duties found to be due upon liquidation or reliquidation. Of course, an agency may incorporate part or all of the Standards in its own regulations to the extent consistent with the governing statute. To the extent the agency has not issued its own implementing regulations, the Federal Claims Collection Standards should be followed. 4 C.F.R. § 101.4; 62 Comp. Gen. 489 (1983); B-170686-O.M., April 4, 1972. The same concept applies with respect to the section 8(e) exemption where the authority subject to the exemption can be found elsewhere. A decision discussing all of this in the context of debts arising under the Social Security Act is 62 Comp. Gen. 599 (1983).

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## 5. Agency Regulations

A frequently asked question is whether each federal agency is required to issue its own debt collection regulations. The answer is yes. The basic requirement for individual agency regulations, which must conform to the Federal Claims Collection Standards, stems from section 3(a) of the Federal Claims Collection Act of 1966, now codified at 31 U.S.C. § 3711(e).

In addition, several provisions of the Debt Collection Act of 1982, and of the Standards, require regulations in specific contexts. For example:

- The statute authorizing salary offsets against federal employees requires implementing regulations. 5 U.S.C. § 5514(b). The regulations must be approved by the President, who has delegated approval authority to the Office of Personnel Management.
- Agencies are required to issue regulations for administrative offset under section 10 of the Debt Collection Act of 1982. The regulations should take into consideration the best interests of the government, the likelihood of collecting by offset, and, with respect to offsets beyond the 6-year statute of limitations prescribed by 28 U.S.C. § 2415, the cost effectiveness of leaving the claim unresolved for that period of time.<sup>21</sup> 31 U.S.C. § 3716(b). See 4 C.F.R. § 102.3(b) for additional requirements.

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<sup>21</sup>The intent of this latter provision has never been entirely clear inasmuch as, apart from the erosion in the value of money, it presumably costs nothing to do nothing.

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- Waiver of interest and related charges beyond the mandatory 30-day grace period provided under 31 U.S.C. § 3717 may be exercised only in accordance with regulations. 4 C.F.R. § 102.13(g).
  - Agencies obtaining mailing addresses from the Internal Revenue Service must, by regulation, ensure appropriate safeguarding of the information. 4 C.F.R. § 102.18(c).

The agency's debt collection regulations, apart from the fact that they are required by law, serve many functions. For example, they

- establish agency-specific procedures, such as identifying who within the agency will have responsibility for various functions;
- tailor the policies in the Standards to the needs and requirements of individual programs; and
- reflect the agency's policy choices in areas where discretionary options exist.

GAO will review agency debt collection regulations as part of its audit function. 4 C.F.R. § 101.1.

Preparing and issuing a comprehensive set of regulations takes time, and the law recognizes this. The general principle that an agency has a reasonable time to issue its regulations is discussed in 64 Comp. Gen. 816 (1985). What is "reasonable" in a particular context depends on several variables, such as the complexity of the subject matter. In the cited decision, GAO advised the Department of Education that it could take administrative offset under 31 U.S.C. § 3716 although it had not yet issued the required regulations, but it must of course comply with all requirements of the statute.

There is also authority for the proposition that the failure to publish regulations will not invalidate agency action with respect to a party with actual knowledge. 5 U.S.C. § 552(a)(1); *Rogers v. United States*, 14 Cl. Ct. 39, 48 (1987); B-217215, March 20, 1986 (citing several additional court cases).

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## C. Elements of a Debt Collection Program: Agency Collection Action

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### 1. Affirmative Duty to Collect

The Federal Claims Collection and Debt Collection Acts “express a Congressional mandate that agencies play a more active role in the collection of delinquent claims than merely referring them to the Department of Justice.” *Lawrence v. Commodity Futures Trading Commission*, 759 F.2d 767, 772 (9th Cir. 1985). See also *Collins v. Donovan*, 661 F.2d 705, 708 (8th Cir. 1981).

To this end, the Federal Claims Collection Act of 1966 included a provision, now found at 31 U.S.C. § 3711(a)(1), which requires each agency to attempt collection of all claims of the United States for money or property arising out of the activities of, or referred to, that agency. As the Comptroller General noted in commenting on the 1966 legislation, this was the first general statutory requirement for government agencies to collect their debts. B-117604, June 3, 1966. The requirement applies without regard to the amount of the debt. Thus, regardless of one’s view of the scope of the common-law duty, agencies now have a statutory duty which clearly embraces administrative collection actions.

The corresponding provision of the Federal Claims Collection Standards is 4 C.F.R. § 102.1(a). Agency collection action should be aggressive and timely with effective follow-up. *Id.* Agencies should use all reasonable means of collection consistent with good business practice and the debtor’s ability to pay. Section 102.1(b) states the common-sense proposition that agencies are expected to cooperate with one another in their debt collection activities.

An agency may provide administrative debt collection services to another agency under an Economy Act agreement (31 U.S.C. § 1535), but, since agencies may not use the Economy Act to transfer statutory responsibilities to other agencies, those services cannot include the taking of final compromise or termination action. B-117604(7)-O.M., June 30, 1970.

The various collection tools noted in the Federal Claims Collection Standards serve as a checklist for the agency in developing its own debt collection program. However, every tool does not have to be used in every case. The actions to be taken depend on the facts and circumstances of the particular claim. Also, the agency can use any administrative collection remedy not specified in the Standards and not otherwise prohibited. 4 C.F.R. § 102.20.

Agencies are not required to duplicate administrative procedures. 4 C.F.R. § 101.7. The point is repeated in the Standards in the specific context of administrative offset. *Id.* § 102.3(b)(2)(ii). The 1984 preamble gives an example. If an agency has already provided a within-agency review prior to reporting the debt to a consumer reporting agency, it need not repeat the review for purposes of administrative offset. 49 Fed. Reg. at 8892.

Several of the authorities provided in the Federal Claims Collection Act and Standards require a somewhat detailed discussion and will be covered in subsequent portions of this chapter. The remainder of this section summarizes a number of points not noted elsewhere in the chapter.

Once an agency has determined that a debt exists, the first step in the collection process is to locate the debtor. In doing so, the agency should not overlook the obvious. A number of potential sources, several of which are relatively simple and inexpensive, are listed in 4 C.F.R. § 104.2(a). Examples are motor vehicle license, title, and registration records, and the telephone directory.

If the simpler methods fail, the agency can request the debtor's mailing address from the Internal Revenue Service and may disclose the address to certain third parties. The request must be in writing. This was authorized by section 8 of the Debt Collection Act of 1982, amending 26 U.S.C. § 6103(m). The agency must safeguard the information as provided in 26 U.S.C. § 6103(p). The corresponding provision in the Standards is 4 C.F.R. § 102.18, which does little more than repeat the statute.

Where a debtor corporation has dissolved and, under state law, the corporation's assets become the property of the shareholders, subject to any claims not paid at the time of dissolution, the agency may try to obtain from the appropriate state agency a list of shareholders or an accounting of the distribution of assets, or it may seek payment from a statutory agent. See B-184396-O.M., August 8, 1975.

Agencies should collect claims against a partnership from partnership assets, if any. Otherwise, the government should look to individual assets of any general partners not adjudged bankrupt. See, e.g., B-161821-O.M., August 3, 1967; B-161821, November 28, 1967 (non-decision letter). The government need not forbear collecting from a surety even though there is a possibility of recovery from the principal. See B-160740, February 13, 1969 (non-decision letter).

Where debtors are jointly and severally liable to the United States, the government is not required to collect a proportionate share from each. The government may collect the entire amount from one debtor, leaving it to that debtor to seek contribution from the others, if that is determined to be the best way to liquidate the indebtedness as quickly as possible. 58 Comp. Gen. 778 (1979); 4 C.F.R. § 103.6.

The agency should conduct a personal interview with the debtor whenever feasible. 4 C.F.R. § 102.7. This is subject to common-sense cost effectiveness considerations. You don't, at least without some special reason, send an interviewer across the country on a \$50 debt. As the 1984 preamble emphasizes, an interview will almost always be "feasible" where the debtor is a federal employee. 49 Fed. Reg. at 8892.

Executive Order 12674 (Principles of Ethical Conduct for Government Officers and Employees), § 101(I) (1989), directs federal employees to satisfy all just financial obligations, especially those imposed by law such as taxes. While the employing agency is generally not authorized to assist a private creditor collect a debt from an agency employee (see Taggart v. United States, 17 Ct. Cl. 322 (1881); B-171593, March 9, 1971), it is expected to cooperate with another federal agency. 4 C.F.R. § 102.1(b). Thus, in cases where the creditor agency and the employing agency are different and the creditor agency is unable to collect by offset, it should contact the employing agency for assistance in making suitable payment arrangements. 4 C.F.R. § 102.8.

Agencies seeking to collect statutory penalties, forfeitures, or other debts provided for as an enforcement aid or for compelling compliance should consider suspending or revoking licenses or other privileges in cases of inexcusable, prolonged, or repeated failure to repay indebtedness. 4 C.F.R. § 102.9. See also Lawrence v. Commodity Futures Trading Commission, 759 F.2d 767, 772 n.12 (9th Cir. 1985). Section 102.9 also directs agencies which make, guarantee, or insure loans to give serious consideration to disqualifying a debtor (lender, borrower, or otherwise) from doing further

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business with the agency if the debtor fails to pay a debt within a reasonable time. Section 102.9 is an expression of policy, not a mandatory requirement. Before invoking this authority, the agency should review relevant program legislation for possible restrictions. 1984 preamble, 49 Fed. Reg. at 8893.

An agency holding security or collateral should liquidate it if the debtor does not pay within a reasonable time, if the liquidation can be accomplished through the exercise of a power of sale in the security instrument or nonjudicial foreclosure, unless the cost of disposing of the collateral will be disproportionate to its value. The agency should give the debtor reasonable notice of the sale and an accounting of any surplus proceeds. 4 C.F.R. § 102.10.

The agency should document all collection actions taken and should retain the documentation in the appropriate claim file. 4 C.F.R. § 102.15. The Treasury Department has prepared a detailed sample checklist for this purpose, included as Appendix 4 to Managing Government Credit: A Supplement to the Treasury Financial Manual. Apart from its value during the administrative collection process, keeping a running record will greatly facilitate referring the debt to the Justice Department for litigation if that should become necessary. Also, to the extent feasible and cost effective, agencies should automate their debt collection operations. Id. § 102.16.

Agencies should perform periodic cost analyses of their collection operations. Cost data is useful for many purposes, not the least of which is justifying adequate resources for an effective collection program. See 4 C.F.R. § 102.14.

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## 2. Demand Letters

Once the debtor is located, the next step is to inform him, her, or it of the government's claim and to solicit voluntary payment. This begins the "demand cycle." The demand cycle consists of a series of demand letters ("dunning letters") which inform the debtor of the consequences of failure to cooperate. The requirements for demand letters are found in 4 C.F.R. § 102.2.

Normally, the demand cycle will consist of three letters, in progressively stronger language, sent out at not more than 30-day intervals. Id. § 102.2(a). The first letter is particularly important. It should (1) explain the basis of the government's claim; (2) state the amount of the

indebtedness; (3) specify the payment due date, which normally should be not more than 30 days after the initial demand; and (4) set forth the applicable requirements for assessing interest. *Id.* § 102.2(b). Other items, several of which are specified in section 102.2(c), may also be included as appropriate to the circumstances.

The tone of the letter is also important. The objective is to encourage voluntary payment. While the letter should be firm, an overly harsh or threatening tone gains little. The letter should also be written in “plain English.” A letter which requires a team of lawyers to decipher is not likely to serve its intended purpose.

It is important to emphasize that the use of three demand letters is not an absolute requirement. The first letter is always necessary, although the Standards recognize that even it may be preceded by other actions when necessary to protect the government’s interests, for example, referring the debt to the Justice Department in cases where collection action has not begun until the statute of limitations is about to expire. *Id.* § 102.2(a). As the 1984 preamble noted, “the agency should not be required to follow the demand cycle if doing so would result in loss of the Government’s ability to sue on the debt.” 49 Fed. Reg. at 8890.

In addition, the agency may send fewer than three demand letters where the debtor’s response to the first or second letter indicates that further letters would be futile. 4 C.F.R. § 102.2(a). Conversely, nothing prohibits the agency from sending more than three letters, although it would be the rare case in which this would be a productive effort.

Demand letters should be mailed or hand-delivered on the same day that they are dated. *Id.* § 102.2(b). “If a demand letter is going to impose a deadline on a debtor, the time allowed should not be eroded by the agency’s delay in processing the letter.” 1984 preamble, 49 Fed. Reg. at 8890. Naturally, the agency should respond promptly to any communications from the debtor. 4 C.F.R. § 102.2(d).

The availability of funds for offset is another reason for deviating from the normal demand cycle. If the agency has a source of funds available for offset and intends to use it, it need not pursue any other collection actions. However, the agency still must send the debtor a letter notifying the debtor of the agency’s intention to collect by offset. The agency must also comply with the requirements of the applicable offset statute. 4 C.F.R. § 102.2(e). Exactly what else this letter must contain depends on precisely

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where the agency is in the demand cycle. If the agency has not yet sent any demand letters, the notification of intent to collect by offset must give the debtor the opportunity to avoid the offset by making voluntary payment. Id. In this situation, the notification letter, which is required for offset anyway, “doubles” as the first (and maybe only) demand letter. The situation is explained further in the 1984 preamble, 49 Fed. Reg. at 8890.

Agencies may find it productive to make telephone contact with debtors early in the demand cycle. Finding that private debt collectors and many states use early telephone contact to advantage, GAO has recommended that the Internal Revenue Service try it as a means of increasing tax delinquency collections. GAO report, Tax Administration: New Delinquent Tax Collection Methods for IRS, GAO/GGD-93-67 (May 1993).

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### 3. Collection in Installments

It is the policy of the Federal Claims Collection Standards that debts should be collected in full in one lump-sum payment whenever feasible. 4 C.F.R. § 102.11(a). However, this will not always be possible. Respect for the federal government is not enhanced by attempting to enforce collection in full against someone who simply cannot afford it. Accordingly, the Standards authorize agencies to accept payment in regular installments if the debtor is financially unable to pay the debt all at once. See B-182423, November 25, 1974; B-160158, October 18, 1966.

Requirements for installment payments are contained in 4 C.F.R. § 102.11. The general standard is that the size and frequency of installment payments should be reasonably related to the size of the debt and the debtor’s ability to pay. Id. § 102.11(a). For example, in a case in which collection efforts would have been futile because the debtor’s assets were heavily mortgaged, GAO did not object to the debtor’s proposal to pay ten percent of the debt at once and three percent of the balance monthly thereafter until the debt was liquidated. B-134871, October 20, 1966 (non-decision letter).

Other important points from 4 C.F.R. § 102.11 are as follows:

- Before agreeing to an installment plan, the agency should obtain a financial statement from the debtor. There is no prescribed format for the financial statement.
- If possible, the installment payments should be designed to liquidate the debt in not more than 3 years. This is a target, not a legal requirement. B-256184, May 3, 1994.

- Installment payments should be at least \$50 per month, although the agency may accept less if justified by the circumstances.
- An installment plan should be in the form of a legally enforceable written agreement.
- The agreement should contain an acceleration clause.
- If the deferred balance exceeds \$750 and the claim is unsecured, the agency may wish to obtain a confess-judgment note from the debtor. If the agency does so, it must give the debtor a written explanation of the consequences. If the debtor refuses to execute the confess-judgment note or to provide other adequate security, the agency may or may not accept an installment plan, at its option.

The requirement for an acceleration clause was added to the Standards in the 1984 revision. This refers to a “default” acceleration, under which, if the debtor fails to make an installment payment when it becomes due, or within any grace period provided in the agreement, all of the remaining installments become immediately due and payable, either automatically or at the creditor’s option.<sup>22</sup> The Standards do not authorize the “at will” or “insecurity” type of acceleration under which payment may be accelerated in non-default situations if the creditor deems its position insecure. A case discussing the different types of acceleration is Brown v. Avemco Investment Corp., 603 F.2d 1367 (9th Cir. 1979).

The need for an acceleration clause is summarized in the following passage from Johnson v. McCrackin-Sturman Ford, Inc., 527 F.2d 257, 264 (3d Cir. 1975):

“[T]here is probably not an installment contract in force today that does not contain a clause granting the creditor the right to require immediate payment of all installments upon the happening of a specified event, usually a default in repayment of the loan. Exercise of that right by the creditor shortens, sometimes dramatically, the time period during which the borrower would normally be able to repay the loan. The purpose of such a provision is obvious. Without the right to accelerate payment, the creditor would be forced to sue each month as each installment payment became due and as the borrower defaulted on the installment, a course of action that is both commercially unreasonable and, in all probability, quite expensive to the borrower since he might be liable for 24 or 30 different sets of court costs.”

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<sup>22</sup>The choice between an automatic or a creditor’s option clause has statute of limitations implications. See United States v. Dos Cabezas Corp., 995 F.2d 1486, 1490 (9th Cir. 1993).

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See also Quick v. American Steel and Pump Corp., 397 F.2d 561, 564 (2d Cir. 1968) (“contracts to pay money in instalments are breached one instalment at a time”).

It is important to include an acceleration clause in an installment agreement because, in simple debt repayment situations, acceleration is permissible only if provided for in the relevant contract. E.g., New York Life Ins. Co. v. Viglas, 297 U.S. 672, 679–81 (1936); City of Hampton, Va. v. United States, 218 F.2d 401, 405 (4th Cir. 1955); Local 1574, International Association of Machinists and Aerospace Workers v. Gulf and Western Manufacturing Co., 417 F. Supp. 191, 201 (D. Me. 1976); Llewellyn Iron Works v. Littlefield, 74 Wash. 86, 132 P. 867, 868 (1913); Holcomb v. Webley, 185 Va. 150, 37 S.E.2d 762, 765 (1946); B-226918.2-O.M., April 8, 1988. There may be situations in which the agency chooses not to invoke its right of acceleration, but it should always make sure it has that right and the only way to do that is by including a clause in the agreement.

If an installment agreement does not contain an acceleration clause, all may not necessarily be lost, depending on the type of debt. An early Supreme Court decision stated the following principle:

“By the general commercial law, as well of England as of the United States, a promissory note does not discharge the debt for which it is given unless such be the express agreement of the parties; it only operates to extend until its maturity the period for the payment of the debt. The creditor may return the note when dishonored, and proceed upon the original debt.”

The Kimball, 70 U.S. (3 Wall.) 37, 45 (1865). The principle has found its most frequent application in the context of new notes given for previously held notes, with the courts holding that the renewal note does not extinguish the original liability unless the parties have clearly expressed that intention. E.g., Mid-Eastern Electronics, Inc. v. First National Bank of S. Md., 455 F.2d 141, 144–45 (4th Cir. 1970); In re Mid-Atlantic Piping Products of Charlotte, Inc., 24 B.R. 314, 324 (Bankr. W.D.N.C. 1982). Of course, the concept is most useful in cases in which the debt, prior to execution of the renewal note or agreement, was such that the creditor had the right to demand immediate payment in full (as opposed, for example, to the case of a simple loan agreement in which the original liability is defined in terms of installment payments). Also, it presupposes that action may still be taken on the original debt (e.g., applicable statutes of limitations have not expired). See B-226918.2-O.M., April 8, 1988.

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GAO applied the rule of The Kimball in a 1985 decision, 64 Comp. Gen. 493. The debt in that case arose from nonpayment of contractual obligations to the Soil and Conservation Service, Department of Agriculture, under the Great Plains Conservation Program. After several time extensions under the original contract, the agency, at the debtor's urging, accepted an installment workout agreement. Payments still were not made. GAO agreed with the agency that it could treat the workout agreement as void, and proceed to collect the full amount of the pre-existing debt, including offset against payments due the debtor under another program.

Related concepts are rescheduling and refinancing. Rescheduling is not specifically mentioned in the Federal Claims Collection Standards, but is addressed in OMB Circular No. A-129 and the Treasury Department's Managing Government Credit: A Supplement to the Treasury Financial Manual. Rescheduling is a change in the existing terms of a debt, usually a loan. As both OMB and Treasury point out, the creditor agency should determine that recovery of all or a portion of the debt is reasonably assured before agreeing to a rescheduling. Also, a rescheduling agreement should be in legally enforceable form and should contain an acceleration clause. Managing Government Credit at 4-9.

Refinancing usually involves executing a new note which then replaces the original obligation. Refinancing also is not addressed in the Federal Claims Collection Standards. Program legislation may contain applicable authorities or restrictions. An illustrative case is 43 Comp. Gen. 98 (1963), in which GAO advised that a rescheduling of payments under a vessel mortgage to provide for reduced payments over a longer period of time did not contravene a prohibition on refinancing in the Merchant Marine Act.

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## 4. Interest and Related Charges

### a. Interest

As discussed in Chapters 12 and 14, interest is payable on claims against the United States only where expressly provided by statute or contract. With respect to claims by the United States, however, the rules are not the same, nor is there any legal requirement that they be the same. See Boston Sand and Gravel Co. v. United States, 278 U.S. 41, 49 (1928); 63 Comp. Gen. 391 (1984). While the difference in the rules is sometimes assailed as unfair, it necessarily follows from the concept of sovereign immunity.

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(1) Common law

Prior to the 1980s, there was no governmentwide statute authorizing the United States to charge interest on debt claims, and the government was forced to rely on the common law. The United States had long asserted the common-law right to charge interest on amounts owed to it, and this right was recognized by the courts. For example, in Billings v. United States, 232 U.S. 261, 286 (1914), the Supreme Court stated:

“[A]s to the necessity for a statute it was long ago here decided in view of the true conception of interest, that a statute was not necessary to compel its payment where in accordance with the principles of equity and justice in the enforcement of an obligation, interest should be allowed.”

See also Royal Indemnity Co. v. United States, 313 U.S. 289, 295–97 (1941); Boston Sand and Gravel, 278 U.S. at 49; Swartzbaugh Manufacturing Co. v. United States, 289 F.2d 81, 84 (6th Cir. 1961); United States v. Abrams, 197 F.2d 803, 805–06 (6th Cir. 1952); United States v. Philmac Manufacturing Co., 192 F.2d 517 (3d Cir. 1951). More recent cases are West Virginia v. United States, 479 U.S. 305 (1987) and Riles v. Bennett, 831 F.2d 875 (9th Cir. 1987).

During this time period, the Comptroller General also consistently recognized the government’s common-law right to charge interest. *E.g.*, 59 Comp. Gen. 359 (1980); B-192479, September 27, 1978; B-137762.21-O.M., January 3, 1977. The principle applied to contract debts as well as non-contract debts. *E.g.*, 41 Comp. Gen. 222 (1961); B-131925, July 13, 1964.

The government’s common-law right to charge interest applied equally to claims against its own employees and retirees. B-192479, September 27, 1978. For example, in a letter report to the Chairman of the Civil Service Commission (now Office of Personnel Management), GAO reviewed the status of government claims against employee retirement accounts and recommended that the Commission start charging interest on these claims. FGMSD-77-41, September 15, 1977.

Since their inception, the Federal Claims Collection Standards included an interest provision based on the common law. See 31 Fed. Reg. 13382 (October 15, 1966). The pre-1982 version of the Treasury Financial Manual also included provisions for interest.

However, the common-law authority proved to be inadequate. GAO reviews in the 1970s revealed that many agencies were not charging interest on debt claims, and there was no consistency among those that did. See, e.g., The Government Needs to Do a Better Job of Collecting Amounts Owed by the Public, FGMSD-78-61 (October 20, 1978), Chapter 4; FGMSD-77-41, cited above.

(2) Debt Collection Act of 1982

In section 306 of the Supplemental Appropriations and Rescission Act, 1980, Pub. L. No. 96-304, 94 Stat. 857, 928, Congress directed all agencies receiving funds under the act (essentially the entire government) to charge interest in accordance with the Federal Claims Collection Standards. This appears to be the first governmentwide legislative attempt to mandate interest assessments. Whether section 306 could be construed as permanent legislation does not appear to have been addressed, although the issue would soon become moot.

Reporting on what would become the Debt Collection Act of 1982, the Senate Committee on Governmental Affairs discussed the interest problem as follows:

“Generally, there is either no assessment for interest and penalties on debts owed the government or, if there is, the assessment is at rates that are considerably below market rates. This is in spite of the joint GAO/Justice Department regulations issued in the Federal Claims Collection Standards in April 1979 and subsequent Treasury regulations which require agencies to charge debtors interest on overdue payments. . . .

“In the absence of interest charges for delinquent payments, debtors have little or no incentive to make timely payments. Also, debtors are likely to pay their private sector debts first and their government debts last. The Committee has concluded that this factor is a major contributor to the growing amount of delinquent debt owed the government.”

S. Rep. No. 378, 97th Cong., 2d Sess. 17 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News 3377, 3393.

The resulting legislation was section 11 of the Debt Collection Act of 1982, codified at 31 U.S.C. § 3717. The pertinent provision of the Federal Claims Collection Standards is 4 C.F.R. § 102.13. The preamble to the 1984 Standards noted, somewhat apologetically, that “[t]his portion of the regulation is complex because the corresponding provisions of the Debt Collection Act are complex.” 49 Fed. Reg. at 8893.

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Prior to the Debt Collection Act, there was some confusion as to whether charging interest was required or whether it was merely authorized. The Debt Collection Act removed all doubt. It is now a mandatory requirement. 31 U.S.C. § 3717(a)(1); 4 C.F.R. § 102.13(a); Commonwealth Edison Co. v. United States Nuclear Regulatory Commission, 830 F.2d 610, 620–21 (7th Cir. 1987).

Interest begins to accrue from the date on which notice of the interest requirements is mailed or hand-delivered. 31 U.S.C. § 3717(b); 4 C.F.R. § 102.13(b). As pointed out earlier, interest requirements should be included in the agency’s first demand letter. Under the common law, there was no requirement for a specific interest notification; notice of the underlying debt was sufficient. See B-217215, March 20, 1986. While 31 U.S.C. § 3717(b)(2) refers merely to “notice of the amount due,” the Standards are much more explicit in this regard and require notice of the interest assessment. 4 C.F.R. §§ 102.2(b), 102.13(a). The notice should not be dated prior to the date of actual mailing or hand-delivery. Id. § 102.13(b).

If an agency uses an “advance billing” system—that is, if it mails a bill before payment is actually due—it can include the interest notification in its advance billing, although interest cannot start to accrue until the payment due date. Id.

The rate of interest to be charged is the “Treasury tax and loan account rate,” also known as the “current value of funds rate,” in effect as of the date on which interest begins to accrue. 31 U.S.C. §§ 3717(a)(1), (c)(1); 4 C.F.R. § 102.13(c). Since 31 U.S.C. § 3717(a)(1) uses the language “minimum annual rate of interest,” the Standards recognize that authority exists to charge a higher rate. 4 C.F.R. § 102.13(c). However, noting that the unequal treatment of similarly situated debtors is undesirable, the preamble to the 1984 Standards advises that agencies should charge a higher rate of interest “only under the most compelling circumstances.” 49 Fed. Reg. at 8893. Agencies wishing to avail themselves of this possibility might be well-advised to identify any such “compelling circumstances” in their regulations.

Once the applicable rate of interest is determined with respect to a particular debt, it remains fixed for the duration of the indebtedness. 31 U.S.C. § 3717(c)(2); 4 C.F.R. § 102.13(c).<sup>23</sup>

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<sup>23</sup>This had been the case even prior to the Debt Collection Act. See B-107871, July 31, 1981 (non-decision letter).

Interest is generally computed on a “daily rate” basis, although if this is not cost effective, GAO considers the requirement satisfied by any commercially acceptable method which provides approximately the same result. B-222845, December 9, 1987 (non-decision letter). The “daily rate” method is computed as follows:

- Multiply the principal amount of the debt by the interest rate. This gives you the annual interest amount.
- Divide the annual interest amount by 365 (or 366 for a leap year). This gives you the daily interest amount.
- Compute the actual number of days for the period involved.
- Multiply the number of days by the daily interest amount.

This is the same method that has traditionally been used for computing interest on payments by the United States unless otherwise provided by statute.

A simple illustration may help. Suppose you have a principal of \$1 million with interest due for a 60-day period at an annual rate of 9 percent:

- Step 1:  $1,000,000 \times .09 = \$90,000$ , the amount of interest for a full year.
- Step 2:  $90,000 \text{ divided by } 365 = \$246.58$ , the amount of interest accruing each day.
- Step 3:  $246.58 \times 60 = \$14,794.80$ .

Thus, interest on \$1 million at 9 percent for 60 days is \$14,794.80. Should the accrual period extend beyond 60 days, interest would continue to accrue at the rate of \$246.58 per day.

Although 31 U.S.C. § 3717 does not prohibit charging interest on interest, the Standards permit it in only one situation. If the debtor defaults on a repayment agreement and the agency agrees to a new repayment agreement, the principal amount of the new agreement should consist of the unpaid principal under the old agreement plus any accrued but unpaid interest. The agency may then apply the interest rate in effect at the time of the new agreement to this new principal. 4 C.F.R. § 102.13(c). This is also the only exception to the rule noted above that the initial rate of interest remains fixed for the life of the indebtedness. Interest may not, however, be assessed on penalties or administrative costs, discussed later in this section. 31 U.S.C. § 3717(f); 4 C.F.R. § 102.13(c).

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If a payment is made in less than the full amount due, the Standards apply the so-called “American Rule.” The payment is applied first to outstanding penalty and administrative cost charges, second to accrued interest, and third to outstanding principal. 4 C.F.R. § 102.13(f). This is the same approach the government had traditionally followed under the common law. See, e.g., Woodward v. Jewell, 140 U.S. 247, 248 (1891); B-47882, January 11, 1946.

The statute provides a mandatory 30-day grace period. Although interest accrues from the date of the initial interest notification, no interest will be charged if the debt is repaid within 30 days after the accrual date. 31 U.S.C. § 3717(d); 4 C.F.R. § 102.13(g).

In addition, agencies have discretionary authority to waive interest, in whole or in part, (1) beyond the 30-day grace period on a case-by-case basis; (2) under the criteria specified in 4 C.F.R. Part 103 relating to compromise; or (3) if the agency determines that collection of interest would be “against equity and good conscience or not in the best interests of the United States.” 31 U.S.C. §§ 3717(d), (h); 4 C.F.R. § 102.13(g). These discretionary waivers may be exercised only in accordance with agency regulations. 4 C.F.R. § 102.13(g). One situation the Standards identify as a good candidate for waiver of interest is where, under an installment plan, the interest rate is sufficiently high in relation to the size of the installment payments that the debt will never be repaid—the so-called “perpetual debtor.” Id.

In applying the “equity and good conscience” standard, agencies may look to GAO’s waiver regulations under 5 U.S.C. § 5584 for guidance. The preamble to the 1984 Standards contains the following explanation:

“A commenter asked whether the phrase ‘equity and good conscience’ as used in § 102.13(g) has the same meaning as in 4 CFR 91.5(c), GAO’s waiver regulations under 5 U.S.C. 5584. Although the concepts are not identical, the approach used in 4 CFR 91.5(c) may be useful by analogy in suggesting other situations agencies may wish to consider in their regulations. Under 4 CFR 91.5(c), ‘equity and good conscience’ is generally satisfied where the indebtedness resulted from the agency’s administrative error and there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the debtor. However, waiver should be denied where the agency’s actions giving rise to the indebtedness were such as to put a reasonable person on notice that something was wrong and to have reasonably suggested further inquiry by the debtor.” 49 Fed. Reg. at 8893.

Another potential candidate for waiver of interest under 4 C.F.R. § 102.13(g) is during agency consideration of a request for reconsideration or waiver of the underlying debt under a permissive statute. The collection of many debts may be waived under various waiver statutes. If the waiver statute is mandatory—that is, if it prohibits collection action until the waiver process has run its course—interest may not be charged while the underlying debt is under mandatory suspension. 4 C.F.R. § 102.13(h). If the waiver statute is permissive, the agency has several options. It may continue collecting interest, or it may suspend collection of interest under the suspension standards. If waiver of the underlying debt is denied, the agency may still consider waiving interest during the pendency of the waiver request if it has so provided in its regulations. The topic of assessing interest pending waiver determinations is discussed generally in 63 Comp. Gen. 10 (1983).

The Contract Disputes Act of 1978 is a permissive statute for purposes of 4 C.F.R. § 102.13(g). Accordingly, an agency is not required to discontinue the assessment of—and generally should continue assessing—interest and related charges during the pendency of appeals under the Contract Disputes Act. 70 Comp. Gen. 517 (1991).

The government is authorized to charge interest until it actually receives payment. Treasury Financial Manual, I TFM § 6-8025.40; 63 Comp. Gen. 391 (1984) (quoting an earlier version of the TFM); 17 Comp. Dec. 3 (1910). This can produce a practical problem. Even the most conscientious debtor paying by mail will not know exactly when payment is received. Also, many debtors may tend to compute interest up to the date of their check, not including any allowance for mailing time. In these situations, the agency has the right to assert a claim for additional interest up to the date of actual receipt. However, there may be a number of reasons for not doing so, not the least of which is cost effectiveness. E.g., B-134617, January 30, 1958. Thus, although not identified as such in the Standards, this is another situation agencies may consider including in their interest waiver regulations, although they should probably reserve the option of asserting the additional claim where justified by the amounts involved.

The requirements of 31 U.S.C. § 3717 do not apply “if a statute, regulation required by statute, loan agreement, or contract prohibits charging interest or assessing charges or explicitly fixes the interest or charges.” Id. § 3717(g)(1). Thus, 31 U.S.C. § 3717 defers to any agency-specific or program-specific legislation which addresses late payment charges. For example, interest and related charges assessed by the Department of

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Veterans Affairs are governed by 38 U.S.C. § 5315 (Supp. IV 1992) rather than 31 U.S.C. § 3717. 66 Comp. Gen. 512 (1987).

There are also situations in which more specific agency legislation will not wholly supplant 31 U.S.C. § 3717 but will exist side-by-side with it. For example, the Farmers Home Administration is generally subject to 31 U.S.C. § 3717, although its own legislation prohibits charging interest on the interest portion of loan payments which are less than 90 days overdue. B-199395-O.M., September 13, 1983. Also, the FmHA has its own statutory authority to terminate the accrual of interest on the guaranteed portion of defaulted loans, subject to definition in FmHA regulations. 67 Comp. Gen. 471 (1988).

As noted, 31 U.S.C. § 3717 will also defer to explicit terms in a contract or loan agreement. An illustration is 65 Comp. Gen. 245 (1986), dealing with contract provisions under the Department of Agriculture's Feed Grain, Rice, Upland Cotton and Wheat program. Another is B-235577, August 8, 1989 (internal memorandum) (promissory notes used by FmHA).<sup>24</sup> See also United States v. American Ins. Co., 18 F.3d 1104 (3d Cir. 1994) (court found Internal Revenue Code rate rather than Debt Collection Act rate applicable to surety on a tax obligation).

The Federal Labor Relations Authority has held that the term "contract" in 31 U.S.C. § 3717(g)(1) does not include a collective bargaining agreement. Thus, interest under 31 U.S.C. § 3717 is not a negotiable issue. National Federation of Federal Employees, Local 29, 21 F.L.R.A. 101 (1986).

The exemptions summarized above, together with others previously noted, are listed in 4 C.F.R. § 102.13(i)(1). However, where 31 U.S.C. § 3717 does not apply, agencies may still be authorized to assess interest to the extent authorized under the common law or other applicable statutory authority. 4 C.F.R. § 102.13(i)(2).

The government's right to charge interest applies to debts owed to it by the District of Columbia government. 60 Comp. Gen. 710 (1981) (amounts owed to Government Printing Office for printing and binding services performed under 31 U.S.C. § 1537). Essentially, this is because the District is

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<sup>24</sup>The Debt Collection Act also "grandfathered" contracts which had been executed prior to October 25, 1982 (date of enactment of the Debt Collection Act) and which were still in effect as of that date. 31 U.S.C. § 3717(g)(2). E.g., B-203787-O.M., March 22, 1983 (section 3717 not applicable to Department of Energy uranium enrichment contracts executed prior to, and still in effect on, October 25, 1982). In Florida Department of Labor and Employment Security v. U.S. Department of Labor, 893 F.2d 1319 (11th Cir. 1990), the court applied subsection (g)(2) to find section 3717 inapplicable to certain grants under the former Comprehensive Employment and Training Act.

not a federal agency. Normally, absent statutory authority to the contrary, one federal agency may not assess interest against another federal agency. E.g., B-161457, May 9, 1978 (no authority for Internal Revenue Service to assess interest against another federal agency for late filing or underpayment of income or social security withholding taxes).

Interest recovered on a debt claim must be deposited in the Treasury as miscellaneous receipts unless the creditor agency has statutory authority for some other disposition. I TFM § 6-8025.70. See, e.g., B-217595, April 2, 1986 (interest on late payments under timber sale contracts properly deposited as miscellaneous receipts).

Finally, the subject of interest on penalties merits brief mention. Penalties are of two types, criminal and civil. Absent specific statutory authority, the government may not charge interest on a criminal fine or penalty. Pierce v. United States, 255 U.S. 398, 405–406 (1921). As we have already noted, the Federal Claims Collection Standards do not apply to criminal fines or penalties, although separate statutory authority to charge interest now exists by virtue of the Criminal Fine Improvements Act of 1987. The pre-1984 version of the Standards, based on Rodgers v. United States, 332 U.S. 371 (1947), had also excluded from its interest provision civil penalties and forfeitures designed as punishment or deterrent and not as a revenue-raising device. The 1984 Standards deleted the exclusion for civil penalties and forfeitures because the definition of “claim” in the Debt Collection Act now provides the requisite statutory authority.

#### b. Late Payment Penalties

Penalties often resemble interest, especially when they are expressed in terms of a percentage rate. The concepts are different, however. Interest is designed to compensate for the loss of use of money. Ideally, it should bear a reasonable relationship to the loss actually incurred. A penalty, on the other hand, is precisely what the term implies. Unlike interest, the government has no common-law right to impose a penalty. Penalties require statutory authority. E.g., Pender Peanut Corp. v. United States, 20 Cl. Ct. 447, 453 (1990). Thus, prior to the establishment of a statutory interest rate in the Debt Collection Act of 1982, GAO had cautioned that an interest rate assessed under common-law authority should not be so high as to constitute a penalty. E.g., 59 Comp. Gen. 359, 360 (1980); B-192479, September 27, 1978.

Statutory authority for penalties now exists. Section 11 of the Debt Collection Act of 1982 mandates a penalty of “not more than 6 percent a

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year for failure to pay a part of a debt more than 90 days past due.” 31 U.S.C. § 3717(e)(2).

As we have seen, a debt is “due” on the date specified by the creditor agency in its first demand letter. Therefore, the debt is “past due” when it becomes “delinquent” as defined in 4 C.F.R. § 101.2(b). The penalty attaches when the debt is delinquent for more than 90 days, although it accrues from the date the debt became delinquent. *Id.* § 102.13(e). Thus, if payment is due within 30 days, it becomes delinquent or “past due” on day 31. The penalty attaches on day 121, computed from day 31.

The rate is expressed as a maximum, “not more than 6 percent a year,” and the Standards retain this flexibility. *Id.* However, setting the penalty rate is not wholly discretionary. The 1984 preamble explains the intent of section 102.13(e) as follows:

“As with interest, the penalty rate should be consistent throughout the Government, and agencies should use a rate of less than 6 percent only with compelling justification.” 49 Fed. Reg. at 8893.

While 31 U.S.C. § 3717 prohibits assessing interest on the penalty required by subsection 3717(e)(2), it does not prohibit assessing the penalty on interest. Thus, the penalty should be assessed on all portions of the debt that are delinquent for more than 90 days, including interest and administrative costs. B-222845, December 9, 1987 (non-decision letter).

The portions of the preceding discussion on interest relating to discretionary waiver, non-assessment under a mandatory waiver statute, and the various exemptions apply equally to penalties.

### c. Administrative Costs

In addition to interest and penalties, section 11 of the Debt Collection Act mandates a third type of charge: “a charge to cover the cost of processing and handling a delinquent claim.” 31 U.S.C. § 3717(e)(1). Administrative costs do not come into play unless and until the debt becomes delinquent.

The corresponding provision of the Federal Claims Collection Standards is 4 C.F.R. § 102.13(d). It gives as examples costs incurred in obtaining a credit report or in using a private debt collector, to the extent attributable to delinquency. Administrative costs should be calculated on the basis of either actual costs incurred or cost analyses establishing an average for debts in similar stages of delinquency. *Id.*

The preamble to the 1984 Standards offered the following additional commentary:

“Beyond [the examples cited in § 102.13(d)], further detail is not feasible. For example, if the volume of delinquencies were such that an agency had to hire additional personnel solely to process the delinquencies, then the salaries of these additional personnel might be included. The test agencies must use is whether the particular cost was incurred by virtue of the delinquency or whether it would have been incurred in any event.” 49 Fed. Reg. at 8893.

Administrative costs for purposes of 31 U.S.C. § 3717 do not include the costs of appeals brought under the Contract Disputes Act. 70 Comp. Gen. 517 (1991).

The portions of the preceding discussion on interest relating to discretionary waiver, non-assessment under a mandatory waiver statute, and the various exemptions apply equally to administrative costs.

Unless an agency has statutory authority for some other disposition, administrative costs collected under 31 U.S.C. § 3717(e)(1) may not be retained by the agency for credit to its own appropriations but must, as with interest and penalties, be deposited in the Treasury as miscellaneous receipts. Treasury Financial Manual, I TFM § 6-8025.70; B-199395.3-O.M., December 18, 1984.

#### d. State and Local Governments

As we have seen, section 11 of the Debt Collection Act did not create a new right with respect to the assessment of interest. It merely gave a statutory basis to a right which existed under the common law. Subject to equitable considerations, the common-law right to charge interest applies to debts of state and local governments just as it applies to other debtors. West Virginia v. United States, 479 U.S. 305 (1987); Board of County Commissioners of the County of Jackson, Kan. v. United States, 308 U.S. 343 (1939). However, section 11 defined the term “person” for purposes of the interest, penalty, and administrative cost provisions of that section as not including federal agencies or state or local governments. That exclusion is now codified at 31 U.S.C. § 3701(c).<sup>25</sup>

The exemption for federal agencies added little since interest and offset were not available against other federal agencies to begin with. The “state or local government” language, however, was soon to become a hotly

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<sup>25</sup>Section 10 of the Debt Collection Act included an identical provision with respect to administrative offset. It is also included in section 3701(c). Thus, while we are phrasing our discussion here in terms of interest, it applies equally to administrative offset.

contested issue. The issue, in a nutshell, is whether 31 U.S.C. § 3701(c) is an exemption or a prohibition. If it is an exemption, then 31 U.S.C. § 3717 does not apply to state or local governments, but whatever authority existed under the common law remains. If it is a prohibition, then it totally displaces the common law, and the authority to charge interest on debts owed by state and local governments has been eliminated.

Comments received in connection with the revision of the Federal Claims Collection Standards fell along predictable lines. Federal agencies supported the exemption approach; nonfederal commenters urged the prohibition view. In the final regulations, the Attorney General and the Comptroller General adopted the exemption position. 4 C.F.R. §§ 102.3(b)(4) (administrative offset) and 102.13(i) (interest). Their decision was explained in the 1984 preamble. See 49 Fed. Reg. at 8891 (offset) and 8894 (interest).

GAO had expressed this position—that sections 10 and 11 do not abrogate pre-existing common-law rights beyond the extent required by their terms<sup>26</sup>—in a number of decisions and opinions. *E.g.*, B-212222, January 5, 1984; B-212222, August 23, 1983; B-209669, December 17, 1982. See also 62 Comp. Gen. 599, 601–02 (1983), expressing the same position with respect to the “section 8(e) exemptions.”

The courts of appeals split. The majority of circuits which considered the issue held that section 3701(c) was a prohibition and that the United States no longer had a common-law right to assess interest (or use administrative offset<sup>27</sup>) against state or local governments. *United States v. Benton*, 975 F.2d 511 (8th Cir. 1992); *Texas v. United States*, 951 F.2d 645 (5th Cir. 1992); *Arkansas v. Block*, 825 F.2d 1254 (8th Cir. 1987); *Pennsylvania Department of Public Welfare v. United States*, 781 F.2d 334 (3d Cir. 1986); *Perales v. United States*, 751 F.2d 95 (2d Cir. 1984), *aff'g per curiam* 598 F. Supp. 19 (S.D.N.Y. 1984). The Texas, Arkansas and Pennsylvania courts relied explicitly on what they viewed as the “plain meaning” of the statute. Two courts of appeals agreed with the government’s position. *Gallegos v. Lyng*, 891 F.2d 788 (10th Cir. 1989); *County of St. Clair, Mich. v. United States Department of Labor*, No. 83–3546, slip op. (6th Cir. December 7, 1984).

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<sup>26</sup>There would seem to be no real dispute that 31 U.S.C. § 3717 displaces the common law to the extent of its coverage. For example, an agency to which section 3717 applies may no longer rely on the common law to assess interest against an individual debtor. The controversy concerns the continued vitality of the common law in situations in which the statute does not apply.

<sup>27</sup>The cases all deal with interest but, as noted above, application of the same result to administrative offset is inescapable.

A few lower court cases on administrative offset also supported the government's position. In Housing Authority of the County of King v. Pierce, 701 F. Supp. 844 (D.D.C. 1988), vacated in part on other grounds, 711 F. Supp. 19 (D.D.C. 1989), the Department of Housing and Urban Development claimed to have overpaid a local governmental housing authority, and proposed recovering the overpayments by offsetting them against future payments. The court held that (1) by virtue of 31 U.S.C. § 3701(c), section 10 of the Debt Collection Act, 31 U.S.C. § 3716, and its implementing regulations did not apply; but that (2) HUD retained the authority to use administrative offset under the common law. In Sentry Insurance A Mutual Co. v. United States, 12 Cl. Ct. 320 (1987), the Claims Court upheld the use of administrative offset by the Small Business Administration under both the common law and section 3716.

The Supreme Court first took note of the issue in West Virginia v. United States, 479 U.S. 305 (1987), a case involving the liability of a state for prejudgment interest on a contractual obligation to the Army Corps of Engineers. The Court upheld the government's common-law right to assess interest and found the state liable. However, because the contract in question had been entered into prior to October 25, 1982, 31 U.S.C. § 3717 did not apply. 31 U.S.C. § 3717(g)(2). In view of this, the Court expressly declined to address the effect of the Debt Collection Act on the government's common-law rights. 479 U.S. at 312–13 n.6.

A few years later, the Court squarely addressed the issue, and resolved it in the government's favor, in United States v. Texas, 113 S. Ct. 1631 (1993), reversing Texas v. United States cited above. The Court upheld the government's common-law right to assess prejudgment interest against a state for losses under the food stamp program in excess of the applicable tolerance level. The Court noted three primary grounds for its decision:

- There is an established principle of law that “[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.” Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952). 113 S. Ct. at 1634.
- The Court rejected the lower court's use of the “plain meaning” rule. If anything, the plain meaning of section 3701(c) supports the government's position. “The only obligation from which § 3701 exempts the States is the obligation to pay prejudgment interest in accordance with the mandatory provisions of the [Debt Collection] Act.” 113 S. Ct. at 1635.

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- It is appropriate to construe section 3701(c) in a manner consistent with the overall purpose of the act, which was to enhance the government's debt collection efforts, not to seriously erode existing authority. 113 S. Ct. at 1636.

Thus, the federal government may rely on the common law to assess interest and to use administrative offset when collecting debts owed by state or local governments. However, penalties and administrative costs, authorized by 31 U.S.C. § 3717 against other debtors, cannot be assessed against state or local governments since these were not authorized under the common law.

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## 5. Offset

Offset is one of the most important weapons in the government's debt collection arsenal. The creditor agency should always explore the possibility of collecting a debt by offset. Offset is discussed fully in Section E of this chapter.

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## 6. Consumer Reporting Agencies

One of the reasons you pay your private debts is to avoid a bad credit rating and consequent possible denial of credit in the future. Prior to the Debt Collection Act, this motivation was largely absent in the case of debts owed to the United States. Change came about in stages.

Prior to 1979, agencies generally did not report delinquent debts to credit bureaus. Although there was no prohibition against it, neither was there any statute or regulation authorizing it. A 1979 change to the Federal Claims Collection Standards directed agencies to develop and implement procedures for reporting delinquent debts to commercial credit bureaus. 44 Fed. Reg. 22702, April 17, 1979. However, the regulation received very limited use. Problems arose over the application of the Privacy Act, and the credit bureau industry would not participate if the bureaus would be subject to the Privacy Act.

In 1980, Congress experimented with exempting credit bureaus from the Privacy Act, but only in limited situations—the (then) Veterans

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Administration<sup>28</sup> and the Department of Education.<sup>29</sup> GAO supported extending legislation of this type to all government agencies.<sup>30</sup>

Governmentwide legislation was to come in 1982. The Senate Committee on Governmental Affairs explained the need and objective as follows:

“The use of credit bureaus is an essential, integral part of private sector credit management and debt collection. Probably the single most powerful motivation for individuals to pay their private sector debts is the threat of having their credit rating reflect a poor payment record. A poor credit rating often results in the loss of the ability to obtain additional credit. To date, federal agencies have not been able to use credit bureaus for credit management and debt collection purposes. As a result, there is no penalty from a ‘credit worthiness standpoint’ for debtors who are delinquent or in default on their debts to the government. There is neither an impact on their credit rating for good payment performance nor any public record of their poor payment performance. The theory behind debt reporting by the federal government is that the availability of delinquency information to private sector credit grantors will induce debtors to pay their obligations to the federal government. Those who do not pay may find that other credit is unavailable.

. . . .

“[I]n the private sector, credit reporting is used extensively. In view of the fact that the federal government operates the largest credit institution in the world, the Committee feels that it should have the same collection tools available to private lenders—this is especially true because the federal government is assuming a higher risk than the private sector in lending in most of its programs.”

S. Rep. No. 378, 97th Cong., 2d Sess. 8 (1982), 1982 U.S. Code Cong. & Admin. News 3377, 3384. The House Committee on Government Operations cautioned that:

“[I]f the government is not aggressive in collection efforts, other credit grantors may simply ignore government debts when making credit decisions. Debts that are not likely to be collected are clearly of lesser relevance when evaluating the financial capabilities of an individual. Credit reporting will only be effective if the rest of the government’s collection efforts are also effective.”

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<sup>28</sup>Pub. L. No. 96-466, § 606(e), 94 Stat. 2171, 2212. The authority has been retained for the Department of Veterans Affairs and is found at 38 U.S.C. § 5701(g)(2) (Supp. IV 1992).

<sup>29</sup>Pub. L. No. 96-374, § 445(c), 94 Stat. 1367, 1442. The Higher Education Amendments of 1986 included comparable authority, found at 20 U.S.C. § 1080a.

<sup>30</sup>Improving the Collection of Debts Owed the Government, Statement of Milton J. Socolar, Acting Comptroller General of the United States, before the Senate Committee on Governmental Affairs, April 23, 1981, page 4.

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H.R. Rep. No. 42, 97th Cong., 1st Sess. 3 (1981).

The resulting legislation was section 3 of the Debt Collection Act of 1982, codified at 31 U.S.C. §§ 3701(a)(3) and 3711(f). The corresponding provision of the Federal Claims Collection Standards is 4 C.F.R. § 102.5. The legislation exempts credit bureaus from the Privacy Act, although the creditor agencies remain subject to it.

Under 31 U.S.C. § 3711(f), agencies may report debts to consumer reporting agencies, as defined in 31 U.S.C. § 3701(a)(3), under the following conditions:

- The agency must first publish a Privacy Act notice.
- The debt must be delinquent. The statute uses the term “overdue,” which the Standards define as delinquent. 4 C.F.R. § 102.5(a).
- The agency must provide the debtor with at least 60 days’ written notice of its intent to report the debt, and must provide the debtor an opportunity to seek administrative review or reconsideration of the government’s claim. The procedural standards for this review are the same as for administrative offset (4 C.F.R. § 102.3) discussed later in this chapter.
- The agency must establish procedures for promptly notifying the consumer reporting agency of any changes in the status of the claim; for promptly responding to verification requests from the consumer reporting agency; and for obtaining assurances that the consumer reporting agency will comply with applicable federal laws such as the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 et seq. (An important provision, for example, is 15 U.S.C. § 1681c, which lists a number of items that may not be included in credit reports.)

The following information may be disclosed to a consumer reporting agency: information necessary to establish the individual’s identity (such as name, address, and taxpayer identification number); amount, status, and history of the claim; and the agency or program under which the debt arose. 31 U.S.C. § 3711(f)(1)(F). If the creditor agency has obtained a mailing address from the Internal Revenue Service, it may disclose that information to a consumer reporting agency, but only for the purpose of preparing a commercial credit report on the taxpayer for use by the government agency in collecting the debt. 26 U.S.C. § 6103(m)(2).

The Federal Claims Collection Standards declined to set a dollar threshold for reporting debts to consumer reporting agencies, but do not inhibit others from doing so. See 1984 preamble, 49 Fed. Reg. at 8892. The

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Treasury Department has set a \$100 threshold, but permits reporting of smaller debts at the creditor agency's discretion. Managing Government Credit: A Supplement to the Treasury Financial Manual at 4-13.<sup>31</sup>

OMB and the Treasury Department offer guidance on the use of consumer reporting agencies in a number of documents. Federal debt collection offices should be aware of and consult the following:

- Agency Reporting to Credit Reporting Bureaus, OMB-Treasury Credit Policy Guidelines, Issuance No. G-1-86, February 25, 1986.
- Guidelines and Formats for the Automated Reporting of Commercial Debts to Credit Reporting Bureaus, May 30, 1986 (issued jointly by Treasury and OMB).
- OMB, Guidelines on the Relationship Between the Privacy Act of 1974 and the Debt Collection Act of 1982, March 30, 1983.

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## 7. Commercial Collection Agencies

Another collection tool long used by the private sector but not available to federal agencies until the 1980s is the referral of debts to private debt collectors.

Prior to 1981, GAO had taken the position that the Federal Claims Collection Act did not authorize federal agencies to use private collection agencies. The legal basis for this position was that the Act authorized agencies to refer uncollected debts only to other federal agencies with claims collection responsibilities (GAO and the Justice Department) and not to private parties. From a policy perspective, GAO felt that claims collection should be handled by government agencies themselves. B-117604(11), October 4, 1972; B-171524, January 4, 1971; B-117604.7-O.M., June 30, 1970.

During this time period, GAO also opposed legislation to authorize the use of commercial collection agencies, for two reasons. First, some private collection agencies had acquired unsavory reputations resulting from the use of questionable practices which might be imputed to the United States. Second, commercial services might not have the technical knowledge or resources to provide a debtor with a proper explanation of federal laws and regulations giving rise to the debt. B-117604, October 18, 1973.

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<sup>31</sup>Legislation enacted in 1986 directs the Secretary of Defense to invoke 31 U.S.C. § 3711(f) with respect to debts of more than \$100 arising out of Defense Department activities and which are delinquent by more than 31 days. 10 U.S.C. § 2780(b).

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In 1981, prompted in part by the 1977 enactment of the Fair Debt Collection Practices Act, GAO reexamined—and changed—its position. GAO’s change of heart was reflected in an amendment to the Federal Claims Collection Standards authorizing the use of debt collection contractors. 46 Fed. Reg. 22353, April 17, 1981. However, as with credit bureaus, the Standards extended an invitation to the party, and nobody came. Against this background, Congress decided that statutory authority was warranted. The result was section 13 of the Debt Collection Act of 1982, 31 U.S.C. § 3718(a). The corresponding provision of the Standards is 4 C.F.R. § 102.6.

Under 31 U.S.C. § 3718(a), a debt collection contract must provide for the creditor agency to retain the authority to resolve disputes, compromise claims, suspend or terminate collection action, and refer the matter to the Justice Department for litigation. Id. § 3718(a)(1); 4 C.F.R. § 102.6(a)(1). This does not necessarily require the agency to make all of these decisions on a case-by-case basis. For example, an agency might refer a group of similar claims within its compromise authority to a collection contractor and authorize the contractor to accept compromise offers in excess of a specified percentage.

The contractor is subject to the Privacy Act and to other federal and state laws relating to debt collection practices, such as the Fair Debt Collection Practices Act. 31 U.S.C. § 3718(a)(2); 4 C.F.R. § 102.6(a)(2).

A collection services contract may be funded by payment of a fixed fee, payable from agency operating appropriations. It may also be funded on a contingent-fee basis, by including a contract provision permitting the contractor to deduct its fee from amounts collected. 31 U.S.C. § 3718(d). The Standards state that a contingent fee “should be based on a percentage of the amount collected consistent with prevailing commercial practice.” 4 C.F.R. § 102.6(b)(2). Prevailing practice should be determined by geographical area.

The original 31 U.S.C. § 3718 included language making collection service contracts effective only to the extent and in the amount provided in advance in appropriation acts. This is the language required by the Congressional Budget Act of 1974 for new spending authority, including contract authority. It was misplaced in this context, however, as the authority to enter into contracts conferred by 31 U.S.C. § 3718(a) is not “contract authority” as that term is used in the Congressional Budget Act. Congress amended the law the following year to make the appropriation

act limitation inapplicable to contingent-fee contracts but leaving it intact for fixed-fee contracts. 31 U.S.C. § 3718(e). The appropriation act limitation is also inapplicable to fixed-fee contracts to the extent the agency is using a statutorily authorized revolving fund. 4 C.F.R. § 102.6(b)(3). The reason is that a revolving fund amounts to a continuing appropriation of receipts for authorized expenditures. 1984 preamble, 49 Fed. Reg. at 8892.

The authority to contract for collection services provided by 31 U.S.C. § 3718(a) applies only with respect to delinquent debts. 4 C.F.R. § 102.6(a). It does not apply to routine account servicing of non-delinquent accounts. 64 Comp. Gen. 366 (1985). See also 1984 preamble, 49 Fed. Reg. at 8892. Nor does it apply to the purchase of information identifying abandoned or unclaimed money or other property allegedly belonging to the United States. 72 Comp. Gen. 85 (1993). Such an expenditure, essentially a finder's fee, would have to be charged to some operating appropriation. Id.

Neither the Debt Collection Act nor the Standards address when an agency should refer a debt to a collection services contractor. However, OMB Circular No. A-129, § IV.4.e, directs referral if the account is delinquent by six months or more unless it has been referred to an internal agency workout group<sup>32</sup> or to the Justice Department for litigation, or unless there is an available source of funds for offset. The Department of Defense is directed by statute to use debt collection contractors for debts arising from Defense Department activities that are delinquent by more than three months. 10 U.S.C. § 2780(a)(1).<sup>33</sup>

The General Services Administration has added collection services to the Federal Supply Schedule, and has contracted with a number of private collection firms. Treasury's Financial Management Service has issued guidelines for use of the Federal Supply Schedule contracts. The Federal Supply Schedule permits "secondary referral" (referral to a second debt collection contractor) if the first contractor is unsuccessful and the agency still regards the debt as potentially collectible, or if the first contractor fails to meet the terms of a work order.

In a 1984 decision involving a pre-Federal Supply Schedule contract, a disappointed bidder protested the award of a collection services contract

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<sup>32</sup>See Managing Government Credit: A Supplement to the Treasury Financial Manual at 4-15.

<sup>33</sup>A separate piece of legislation, made permanent by section 9019 of the Defense Department's 1990 appropriation act, Pub. L. No. 101-165, 103 Stat. 1112, 1133, authorizes Defense to enter into contracts "pursuant to" 31 U.S.C. § 3718, apparently giving it the option of proceeding under either 31 U.S.C. § 3718 or 10 U.S.C. § 2780.

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to a firm which proposed retaining local attorneys to perform various non-litigative functions, alleging that this approach constituted the unauthorized practice of law. (States generally regulate the practice of law.) GAO denied the protest because the basic responsibility for defining and regulating the practice of law rests with the courts of the particular state, and the solicitation required that the contractor agree to comply with applicable state law. Any question regarding the unauthorized practice of law would be a matter between the contractor and state authorities. While this might give rise to legitimate concern on the part of the contracting agency, it would be a matter either of bidder responsibility or contract administration. B-213790, June 13, 1984.

The authority of 31 U.S.C. § 3718(a) to employ private debt collection contractors applies only with respect to collection services. It does not embrace legal services, although section 3718(a) would not prohibit contracting with a law firm to provide collection services. See B-221099, February 18, 1986. Contracting for legal services in the debt collection area is the subject of another statute, discussed later in the context of referrals to the Department of Justice.

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## 8. Compromise

### a. In General

We are all familiar with the concept of compromise. We employ it in many contexts in our day-to-day existence. In essence, it means giving something up in order to get something else. In the claims context, it means accepting less than the full amount owed in full satisfaction of the claim.

We have already noted the long-standing principle that compromise requires specific statutory authority. It may not be inferred, even from the authority to “settle and adjust” claims. In fact, one of the major objectives of the Federal Claims Collection Act of 1966 was to give federal agencies limited compromise authority.

Under 31 U.S.C. § 3711(a)(2) and 4 C.F.R. § 103.1, agencies have authority to compromise debt claims where the principal amount (i.e., exclusive of interest, penalties, and administrative costs) does not exceed \$100,000.<sup>34</sup> The statute says merely “excluding interest.” The Standards added penalties and administrative costs to reflect the new authorities of the

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<sup>34</sup>The original ceiling in the 1966 legislation was \$20,000. It was raised to \$100,000 in 1990. 31 U.S.C. § 3711(a)(2), as amended by Pub. L. No. 101-552, § 8(b), 104 Stat. 2736, 2746-47 (1990).

Debt Collection Act of 1982. GAO has the same authority with respect to claims referred to it. The Attorney General is authorized to raise the ceiling from time to time. 31 U.S.C. § 3711(a)(2).

A compromise under the Federal Claims Collection Act and Standards is final and conclusive unless procured by fraud, misrepresentation, or mutual mistake of fact. 31 U.S.C. § 3711(d). Thus, in B-185295, January 21, 1977, a debtor who had made a compromise offer which was accepted, and then paid the compromise amount, could not later claim a refund arguing that he had paid only to avoid involuntary offset and had not intended to make a binding compromise agreement.

If the principal amount of the debt exceeds \$100,000, only the Attorney General has the authority to compromise. See B-165667, December 11, 1968; B-165641, December 2, 1968 (non-decision letter). Under 4 C.F.R. § 103.1(b), Justice Department approval is required only where the agency wishes to accept a compromise offer; it is not required in order to reject an offer. Referrals to the Justice Department under section 103.1(b) must use the Claims Collection Litigation Report discussed later. Id.

A debtor's liability arising from a particular transaction or contract is considered a single claim for purposes of the \$100,000 limit. An agency may not subdivide a claim to avoid the monetary limit. 4 C.F.R. § 101.6. Bills of lading are viewed as separate contracts and may be considered individually for purposes of the ceiling, however closely related they may be. B-182799-O.M., January 24, 1975; B-170829-O.M., May 13, 1974; B-159553-O.M., February 7, 1973.

At one time, some had questioned the appropriateness of compromising statutory penalties or forfeitures established to aid enforcement and to compel compliance. The Standards include a provision expressly authorizing compromise of claims of this type if the agency determines that compromise will adequately serve its enforcement policy, both present and future. 4 C.F.R. § 103.5. A factor for the agency to consider is whether the violation was willful or merely "accidental or technical." Id.

If two or more debtors are jointly and severally liable on a debt owed to the United States, the government may compromise the indebtedness of one debtor or of all of them. The agency should be careful that a compromise with one joint debtor does not release the other(s) unless this is intended. The amount of a compromise with one joint debtor does not

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bind the government to the same amount with respect to the other joint debtor(s). 4 C.F.R. § 103.6.

An agency's compromise authority ceases once it refers the claim to GAO or the Justice Department. 31 U.S.C. § 3711(a)(2); 4 C.F.R. § 103.1(a).

If an agency has a firm written offer of compromise from a debtor and is uncertain whether to accept the offer, it may refer the matter to GAO or the Justice Department. GAO or Justice will, at their option and within their respective authorities, either act on the offer or return it to the agency with a recommendation. 4 C.F.R. § 103.8.

An agency may not accept a percentage of a debtor's profits or stock in a debtor corporation in compromise of a claim. 4 C.F.R. § 103.9. With this exception, there is no prohibition on accepting property instead of, or in conjunction with, money in compromise of a claim. E.g., 37 Op. Att'y Gen. 298 (1933). Obviously, the agency should use sound judgment.

#### b. Standards for Compromise

The term compromise "imports the making of mutual concessions by the parties to a dispute in order to arrive at an amicable settlement without recourse to adversary proceedings." B-122319, August 21, 1956. See also 38 Op. Att'y Gen. 94, 95-96 (1933). The Federal Claims Collection Act does not authorize accepting a lesser amount merely for the sake of closing out the claim. To avoid arbitrary decisions, evaluation and acceptance must be governed by enunciated criteria, and these are found in the Federal Claims Collection Standards, specifically 4 C.F.R. Part 103.<sup>35</sup>

As noted earlier in this chapter, several agencies have their own agency-specific or program-specific compromise authority. See, for example, 62 Comp. Gen. 489 (1983) (Economic Development Administration); 28 Comp. Gen. 638 (1949) (insured mortgage claims by predecessor of Department of Housing and Urban Development). Part 103 applies in these situations as well, to the extent the agency has not published its own implementing regulations. 4 C.F.R. § 101.4; 62 Comp. Gen. at 494.

Generally, the regulations permit compromise in three situations, discussed separately below. Compromise may be based on one or any combination of the factors set out in Part 103. 4 C.F.R. § 103.7. While final authority on claims over \$100,000 rests with the Justice Department,

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<sup>35</sup>Although the relationship between the statute and the Standards has been somewhat obfuscated by the 1982 recodification of Title 31, the original 1966 statutory language clearly expresses the intent. Pub. L. No. 89-508, § 3(b), 80 Stat. 308, 309 (1966).

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agencies should nevertheless use the same factors in deciding whether to recommend acceptance. Id. § 103.1(b).

(1) Inability to pay

An agency may compromise a debt claim if the debtor is unable to pay the full amount within a reasonable time, or if the debtor has refused to pay the debt in full and the government will not be able to collect the full amount by enforced collection proceedings within a reasonable time. 4 C.F.R. § 103.2(a). The regulation lists a number of factors for the agency to consider in evaluating the situation, such as the debtor's age and health, present and potential income, and inheritance prospects. Id. § 103.2(b).

If the agency's files do not contain reasonably up-to-date credit information, the agency may obtain a statement from the debtor, executed under penalty of perjury, showing the debtor's assets, liabilities, income, and expenses. The Department of Justice has several forms available for this purpose, identified in 4 C.F.R. § 103.2(e). Where information available to the government on the debtor's financial status is not sufficient to reach a conclusion as to the debtor's ability to pay, GAO's policy is to recommend against acceptance of a compromise offer. See, e.g., B-186843-O.M., November 24, 1976. (A debtor who is sincere in making a compromise offer is likely to cooperate in providing the information.)

Where a debtor is receiving recurring payments of any substance from the government, it will be correspondingly more difficult to establish inability to pay. E.g., B-217114, August 12, 1988. However, receipt of government benefits is only one factor to be considered and does not automatically preclude compromise under the "inability to pay" standard. 62 Comp. Gen. 599, 604 (1983). Use of the "inability to pay" standard is particularly inappropriate where the debtor is on the federal payroll. 59 Comp. Gen. 28 (1979); B-253640, November 4, 1993.

It is the policy of the Standards to discourage compromises payable in installments. 4 C.F.R. § 103.2(d).<sup>36</sup> However, as stressed in the 1984 preamble, this is policy and not a legal requirement. 49 Fed. Reg. at 8894. An installment plan to implement a compromise should include the same safeguards as any other installment plan—legally enforceable written agreement with a default acceleration clause—plus a provision for the

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<sup>36</sup>Although section 103.2(d) is part of the "inability to pay" standard, the point should apply equally to compromise under any of the standards.

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reinstatement of the prior indebtedness less sums already paid in case of default. 4 C.F.R. § 103.2(d).

(2) Doubtful litigation probabilities

An agency may compromise a claim if it has legitimate doubt concerning the government's ability to prove its case in court for the full amount either because of the legal issues involved or because of a *bona fide* dispute as to the facts. The amount accepted in compromise should reflect the probabilities of the government's prevailing on the legal issue and its actually collecting a full or partial judgment, taking into consideration such factors as the availability of witnesses and other evidentiary support for the government's claim. 4 C.F.R. § 103.3. The cost of litigation is also a legitimate factor to include in the equation. See B-196058-O.M., October 29, 1979.

For example, GAO recommended acceptance of a corporation's offer to compromise for \$19,300 an Atomic Energy Commission claim for \$49,133.74 for loss of a rocket because of the factual uncertainties and legal principles involved in litigating the case. B-160890, May 14, 1970 (non-decision letter). In another case, GAO recommended acceptance of a debtor's offer of \$125,000 to compromise a government claim for \$301,833.51, in part because the debtor had some basis to question the forum in which the matter would be litigated, which could result in transfer of the case to a United States district court where the debtor could request a jury trial with its attendant uncertainties. B-170070, December 29, 1971 (non-decision letter).

In B-165667, December 11, 1968, GAO recommended to the Justice Department that it accept a \$15,000 compromise offer in satisfaction of a \$26,105 government claim for damage to an aircraft under a cost reimbursement Army contract with the builder. Proof of actual damage was considered extremely difficult in the case because the aircraft was never repaired due to a reduction in scope of the contract. In a case where there was serious question as to the admissibility of important documents as evidence and where it appeared that the agency could not furnish better evidence to support its claim, GAO did not object to the acceptance of a \$5,000 compromise offer in settlement of a \$54,655.70 claim. B-156283, July 20, 1970 (non-decision letter).

In a more recent case involving a claim already in litigation, GAO had set off a debt against an award under the Military Claims Act and the debtor sued

to recover the amount withheld. It turned out that the government's claim had been based largely on an oral contract which the debtor disputed. In view of the apparent weakness of the government's position, GAO recommended to the Justice Department that it "seek settlement on the best possible terms." B-202732, July 30, 1981 (non-decision letter).

Litigative probabilities also moved GAO to recommend compromise in B-229329, January 30, 1989. The Air Force had asserted a claim of \$63,749.83 against a carrier for non-delivery of an "atomic clock" (glows in the dark?). However, the record revealed that the government might have difficulty proving delivery to the carrier. Also, there was some question as to whether the government had a duty to disclose the value of the article, and the amount of damages was open to question since the market for atomic clocks is not particularly large. The carrier had indicated a willingness to compromise for \$15,040. In view of the various considerations noted, GAO recommended compromise on these terms.

In evaluating litigative probabilities, the agency should include in its consideration the possibility of an award of attorney's fees against it under the Equal Access to Justice Act if a court should determine that its position was not substantially justified. 4 C.F.R. § 103.3.

When this standard is being applied properly, the agency should be able to point to specific factors justifying the compromise conclusion, over and above the risk of losing which is present whenever one walks into court.

### (3) Diminishing returns

An agency may compromise a claim if the cost of collecting it does not justify the enforced collection of the full amount. The agency should consider both the administrative and litigative costs of collection. 4 C.F.R. § 103.4.

Costs for purposes of section 103.4 may include the costs of administrative procedures required by law, such as hearings, but only when there is a substantial likelihood that they will actually be incurred in the particular case. 65 Comp. Gen. 893 (1986); 1984 preamble, 49 Fed. Reg. at 8895.

It is important to emphasize that compromise on the basis of cost effectiveness is discretionary, not mandatory. The concept should not be applied blindly. There will be situations in which cost effectiveness should

yield to other policy considerations. In this connection, the following portion of 4 C.F.R. § 103.4 is worth quoting:

“Costs of collecting may be a substantial factor in the settlement of small claims, but normally will not carry great weight in the settlement of large claims. In determining whether the cost of collecting justifies enforced collection of the full amount, it is legitimate to consider the positive effect that enforced collection of some claims may have on the collection of other claims. Since debtors are more likely to pay when first requested to do so if an agency has a policy of vigorous collection of all claims, the fact that the cost of collection of any one claim may exceed the amount of the claim does not necessarily mean that the claim should be compromised. The practical benefits of vigorous collection of a small claim may include a demonstration to other debtors that resistance to payment is not likely to succeed.”

In other words, while cost effectiveness is important, the agency’s entire debt collection program will suffer if it develops the reputation of being an “easy mark.”

### c. Compromise and Accountable Officers

Two provisions of law stemming from the Federal Claims Collection Act of 1966 are relevant in connection with the liability of accountable officers.

First, agencies are not authorized to compromise a claim “arising out of an exception the Comptroller General makes” in an accountable officer’s account. 31 U.S.C. § 3711(b). This includes a claim against the ultimate beneficiary of an improper payment. 4 C.F.R. § 103.1(a). Only the Comptroller General is authorized to compromise in this situation prior to referral to the Justice Department for litigation.

The term “exception” in the statute is construed in its general meaning as an objection raised by GAO to an item or items in an accountable officer’s account. The particular form is irrelevant. See B-164729-O.M., April 17, 1969; B-115392-O.M., February 27, 1969; B-117604-O.M., March 24, 1967. Once GAO has raised an exception in an account, a purported compromise by the administrative agency will be legally ineffective. It does not bind the government, nor does it affect the liability of the accountable officer. B-117604.1-O.M., December 29, 1969; B-164729-O.M., April 17, 1969.

The statutory provision barring agency compromise in cases where GAO has raised an exception does not relieve the agency from continuing to pursue aggressive collection action on the debt. B-117604, January 3, 1968. Also, the provision bars only compromise; it does not preclude the agency

from exercising its authority to suspend or terminate collection action if otherwise appropriate. Id.

The second relevant provision is the second sentence of 31 U.S.C. § 3711(d), which provides that a compromise under section 3711 will operate to relieve the accountable officer. Thus, in improper payment cases, a compromise with the recipient or beneficiary will have the effect of relieving the accountable officer regardless of whether he or she would have been entitled to relief under the various relief statutes. This is an equitable result because the government's compromise effectively bars the accountable officer from pursuing recovery against the recipient.<sup>37</sup>

The authority to compromise with the recipient under the Federal Claims Collection Act does not depend on whether the accountable officer is entitled to relief under the applicable relief statutes. However, the probability of recouping the full amount of an improper payment from the accountable officer is a factor to consider in determining whether a compromise offer from the recipient is adequate. B-154400-O.M., January 29, 1968.

The operation of 31 U.S.C. § 3711(d) is illustrated in a Post Office case which arose prior to the Postal Reorganization Act of 1970. A local postmaster had been held liable for failure to assess and collect proper postage for second-class newspaper mailings. The (then) Post Office Department referred its claim against the newspaper to GAO for further collection action, and GAO accepted a compromise offer. By virtue of 31 U.S.C. § 3711(d), acceptance of the compromise relieved the postmaster of any further accountability for the uncollected amount of the deficiency. B-170841, December 5, 1972.

The "relief aspect" of 31 U.S.C. § 3711(d) applies by its terms only to compromises made under the authority of the Federal Claims Collection Act. However, GAO has applied the same policy to compromises made by the Justice Department under its general litigation authority. In B-156846-O.M., October 25, 1967, GAO had raised an exception to an improper payment and denied relief to the accountable officer under 31 U.S.C. § 3527. Subsequently, the government's claim against the recipient of the improper payment was referred to GAO as uncollectible, and then to the Justice Department. The Justice Department compromised the claim for 50 percent. GAO reviewed the cases prior to the Federal Claims Collection

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<sup>37</sup>Prior to 1966, the rule had been that a compromise with the beneficiary did not affect the accountable officer's liability, although in several cases the equitable concerns moved GAO to grant relief. B-156846-O.M., October 25, 1967.

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Act, some of which had held that the compromise operated to relieve the accountable officer, others that it did not, and decided that the policy expressed in section 3711(d) should apply here as well. Therefore, the compromise with the recipient was held to relieve the accountable officer from any liability for the balance. Since the matter had been referred to the Justice Department for litigation, the fact that a GAO exception was involved was, at that stage, irrelevant.

GAO followed the same approach in 65 Comp. Gen. 371 (1986), involving a compromise as part of a plea agreement in a criminal case. Several Corps of Engineers employees were found to have submitted fraudulent travel vouchers and the cases were referred to the Justice Department for criminal prosecution. The United States Attorney entered into a plea agreement under which the defendants agreed to partial repayment.<sup>38</sup> Payment under the plea agreements not only terminated the government claims against the defendants, but also removed any liability for the unpaid amounts on the part of the accountable officer who had certified the fraudulent payments.<sup>39</sup>

While compromise with the recipient of the improper payment effectively relieves the accountable officer, the converse is not true. Relief of the accountable officer does not affect the liability of the recipient. As discussed further in Chapter 9, 31 U.S.C. § 3527(d)(2) expressly provides that relieving the accountable officer does not relieve the recipient from liability, nor does it in any way diminish the government's responsibility to pursue collection action against the recipient.

#### d. Reporting to Internal Revenue Service

In some cases—and we emphasize in some cases—a compromise may result in taxable income to the debtor. There are two relevant sections of the Internal Revenue Code—26 U.S.C. §§ 61(a)(12) and 108. Section 61(a)(12) identifies “income from discharge of indebtedness” as a category of gross income. The concept itself is easy to state: “income may be realized by a taxpayer upon the cancellation of indebtedness and the amount canceled is then to be included in gross income.” Meyer v. Commissioner, 383 F.2d 883, 888 (8th Cir. 1967). Indebtedness for federal tax purposes has been defined as “an unconditional and legally enforceable obligation for the payment of money.” Commissioner v.

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<sup>38</sup>Only the Justice Department may compromise claims involving fraud. 4 C.F.R. § 101.3(a).

<sup>39</sup>By virtue of 70 Comp. Gen. 463 (1991), liability in this type of case would now be computed differently. However, 65 Comp. Gen. 371 remains valid to illustrate the effect of compromise on the accountable officer.

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McKay Products Corp., 178 F.2d 639, 644 (3rd Cir. 1949), cert. dismissed, 339 U.S. 961.

Section 108 of the Internal Revenue Code provides a number of significant exclusions. Some of them are:

- If the discharge occurs in a Title 11 (bankruptcy) case, or if it occurs when the taxpayer is insolvent, the discharged amount is not includible in gross income. 26 U.S.C. § 108(a)(1). Insolvency is given the traditional definition of “the excess of liabilities over the fair market value of assets.” Id. § 108(d)(3).
- Discharge will not result in taxable income to the extent payment of the debt would have been tax deductible. Id. § 108(e)(2).
- Amendments in 1984 and 1986, codified at 26 U.S.C. §§ 108(f) and (g), provided exclusions for, respectively, student loan debts in cases where the individual is required to work for a certain period of time in certain professions, and for certain farm indebtedness.

There is no statutory requirement for creditor agencies to report discharged indebtedness to the Internal Revenue Service, nor was one included in the 1984 revision of the Federal Claims Collection Standards. See 1984 preamble, 49 Fed. Reg. at 8889. However, various OMB and Treasury publications require such reporting as a matter of executive branch policy. GAO has found, not surprisingly, that “information reporting” enhances taxpayer compliance. See GAO report, Tax Administration: Information Returns Can Improve Reporting of Forgiven Debts, GAO/GGD-93-42 (February 1993).

OMB first announced the requirement for federal agencies to report discharged indebtedness, starting with calendar year 1983, in a memorandum to all debt collection officials dated November 17, 1983 (Subject: Reporting Written-Off Debt to IRS). The requirement was subsequently incorporated into OMB Circular No. A-129.

Treasury’s instructions are found in Managing Government Credit: A Supplement to the Treasury Financial Manual, Chapter 5. Agencies are instructed to report amounts discharged by compromise under the “inability to pay” or “diminishing returns” standards. Reporting is not required if the compromise is based on the “litigative probability” standard. Amounts greater than \$600 must be reported; amounts of \$600 or less may be reported, at the creditor agency’s discretion. The discharge is reported on IRS Form 1099-G, a copy of which is furnished to the debtor.

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## 9. Suspension and Termination of Collection Action

### a. In General

Another important authority conferred by the Federal Claims Collection Act of 1966 is the authority to suspend or terminate collection action. As with compromise, the authority of the creditor agency to suspend or terminate applies only to claims whose principal amount does not exceed \$100,000<sup>40</sup> and which have not been referred to another federal agency for further collection action. Also, the authority must be exercised in accordance with the Federal Claims Collection Standards. 31 U.S.C. § 3711(a)(3); 4 C.F.R. § 104.1; B-160506, April 10, 1970. GAO has the same authority as the agencies to suspend or terminate collection action on claims referred to it by other agencies. 31 U.S.C. § 3711(b).

For claims whose principal amount less any partial payments received exceeds \$100,000, the authority to suspend or terminate rests with the Department of Justice (with one exception, to be discussed under “Termination”). 4 C.F.R. § 104.1(b); B-218989, January 27, 1986; B-215982, October 17, 1984. As with compromise, the agency should use the factors identified in the Standards to evaluate the matter. Justice Department approval is required only if the agency wants to exercise the authority, not if it decides against it. 4 C.F.R. § 104.1(b).

### b. Suspension

Suspension is the temporary deferral of collection action. It is authorized by 31 U.S.C. § 3711(a)(3), which originated as part of section 3(b) of the Federal Claims Collection Act of 1966. The standards for suspension are found in 4 C.F.R. § 104.2. In some situations, suspension is mandatory; in others it is permissive or discretionary.

If there is an applicable statute providing for waiver or administrative review of the government’s claim, and if that statute is “mandatory” in the sense that it prohibits recovery until the waiver or review decision has been made, then collection action must be suspended until the waiver or review process has run its course. 4 C.F.R. § 104.2(c)(1). The process “runs its course” when either of two things happens: (1) the agency actually considers a request from the debtor, or (2) the agency notifies the debtor of his or her right to seek waiver or review, and the debtor does not request it within the time period prescribed either in the statute or in the agency’s implementing regulations. *Id.* The regulation in this regard is

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<sup>40</sup>As with compromise, the ceiling was set at \$20,000 in 1966 and was raised to \$100,000 in 1990, with the Attorney General authorized to raise it further from time to time.

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based on the Supreme Court's approval in Califano v. Yamasaki, 442 U.S. 682, 694 (1979), of the method used by the Social Security Administration in administering its mandatory waiver statute.

In all other situations, suspension is essentially discretionary. The Federal Claims Collection Standards authorize discretionary suspension in three broad situations.

(1) Inability to locate debtor

An agency may temporarily suspend collection action if, after diligent effort, it is unable to locate the debtor but believes that future possibilities justify periodic review and action on the claim. 4 C.F.R. § 104.2(a). The agency should liquidate any security it may be holding and, if the debtor has executed a confess-judgment note, should refer it for the entry of judgment. Id.

The regulation contemplates a diligent effort to locate the debtor and identifies several possible sources of assistance. Having a single letter returned by the post office normally isn't enough. 62 Comp. Gen. 91, 98-99 (1982).

(2) Debtor's financial condition

Collection action may be suspended if the debtor is financially unable to make reasonable installment payments or to compromise on reasonable terms but future prospects justify retention of the claim, and if the debtor owns no substantial equity in real or personal property against which collection can be enforced. 4 C.F.R. § 104.2(b). In addition, in order to justify suspension under this standard, one of the following factors should be present: the statute of limitations has been tolled or started running anew; a future offset opportunity will be available; or suspension is likely to enhance the debtor's ability to fully pay principal and interest at a later date. Id.

In 62 Comp. Gen. 599 (1983), applying an earlier but substantially similar version of this standard, GAO advised the Social Security Administration that proposed repayment agreements calling for an initial period of little or no payment, to be followed by a period of more substantial payments, were within the agency's discretion under section 104.2.

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The future potential to collect by administrative offset is, by itself, not sufficient to justify suspension. It must be tied to an appropriate evaluation of the debtor's financial condition. 65 Comp. Gen. 245, 251 (1986).

(3) Permissive waiver/review statute

If there is an applicable statute providing for waiver or administrative review and the statute is "permissive" in the sense that it does not prohibit collection action pending consideration of a request for waiver or review, the agency may nevertheless suspend collection action based on "appropriate consideration," on a case-by-case basis, of three factors: (1) whether there is a reasonable possibility that the debtor's request will prevail; (2) whether there is reasonable assurance of recovery if the debtor does not prevail; and (3) whether collection would cause undue hardship. 4 C.F.R. § 104.2(c)(2). This standard was based largely on a Comptroller General decision, B-185466, August 19, 1976.

The regulation deliberately uses the somewhat vague term "appropriate consideration." The 1984 preamble offered the following explanation:

"Exactly what constitutes 'appropriate consideration' may well vary from case to case. On the one hand, it is not necessary that all 3 factors be present in every case. On the other hand, however, suspension should not be automatic merely because any one of the three is present. The determination to suspend should balance the interests of the Government against fairness to the debtor. The determination should be reasonable in relation to the circumstances of the particular case, and it should be justifiable in terms of the specified factors." 49 Fed. Reg. at 8895.

For purposes of 4 C.F.R. § 104.2(c)(2), administrative review includes referral to GAO for advice or decision. 49 Fed. Reg. at 8895.

Another factor to consider in evaluating suspension under a permissive waiver or review statute is whether the applicable statutes and regulations would authorize the agency to refund payments to the debtor in the event the agency acts favorably on the debtor's request. If refund would not be authorized, collection action should be suspended without regard to the factors listed in subsection 104.2(c)(2), unless it seems clear that the request for waiver or review is frivolous (wholly without merit) or dilatory

(intended primarily to forestall collection). 4 C.F.R. § 104.2(c)(3); 1984 preamble, 49 Fed. Reg. at 8895.<sup>41</sup>

The Federal Labor Relations Authority has determined that the Federal Claims Collection Standards are governmentwide regulations for purposes of 5 U.S.C. § 7117. Accordingly, proposals for automatic suspension of collection action without regard to the factors identified in 4 C.F.R. § 104.2 are inconsistent with a governmentwide regulation and therefore not within an agency's duty to bargain. National Association of Government Employees, Local R1-109, 37 F.L.R.A. 500, 511–12 (1990); American Federation of Government Employees, AFL-CIO, Local 225, 15 F.L.R.A. 607 (1984).

### c. Suspension Pending Congressional Action

Private relief legislation is used not only to authorize payments to claimants but also to relieve debtors of indebtedness. A question often asked is whether collection action must continue while Congress is considering a private relief bill. In the days when GAO had a much more active "accounts receivable" operation, GAO developed a policy in this area, independent of the Federal Claims Collection Standards, which we set forth here for consideration in appropriate cases.

In general, GAO's policy is to suspend collection action pending congressional consideration of private relief legislation, even though there is no requirement to do so. Suspension or abatement should not be automatic, however, but should be based on a request by the sponsor of the bill or an appropriate congressional committee, plus an administrative determination that the circumstances justify suspension. B-168579, February 17, 1970. Basically, in making its determination, the agency must evaluate present vs. future collection prospects.

Normally, suspension, where justified, is allowed until the end of the session of Congress in which the bill is introduced. Id.; B-168762, February 16, 1970; B-161734, July 7, 1967; B-161309, June 13, 1967. If the bill is introduced late in the session, collection action may abate until the end of the next full session. B-152680, October 28, 1966; B-159708, September 23, 1966.

If Congress has not acted on a particular relief bill during the session in which it was introduced, the repeated introduction of the same bill in future Congresses should not in itself form a basis for continuing

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<sup>41</sup>This concept also stemmed from a number of prior GAO decisions. See, e.g., B-185466, August 19, 1976; B-184532, September 16, 1975; B-183863, July 18, 1975.

suspension of collection, especially if prompt collection action is considered necessary to protect the government's interests. B-168579, February 17, 1970. For example, if an accountable officer might also be liable, the agency should be careful not to lose that option through expiration of the 3-year statute of limitations in 31 U.S.C. § 3526(c). Id. However, GAO has agreed to continue suspension for one additional session where the bill passed the House but the Senate did not act during the session of introduction (B-161734, February 9, 1968), and in one case where Congress took no action (B-168762, February 17, 1971).

Although suspension is generally permissible only if relief legislation is actually before the Congress, GAO has not objected to suspension of collection action where a Member of Congress asked GAO to investigate and report on the basis of the government's claim, pending completion of the investigation and GAO's reply. B-159788, October 5, 1966.

#### d. Termination

##### (1) Standards for termination

Section 3(b) of the Federal Claims Collection Act of 1966, 31 U.S.C. § 3711(a)(3), authorizes the termination of collection action on debts whose principal amount does not exceed \$100,000, "when it appears that no person liable on the claim has the present or prospective ability to pay a significant amount of the claim or the cost of collecting the claim is likely to be more than the amount recovered." The specific criteria are found in the Federal Claims Collection Standards, 4 C.F.R. § 104.3.

The Standards are not merely guidelines. They establish the limits of agency authority. If the standards for compromise or termination cannot be met, and if the debt cannot be waived, the agency has no alternative but to pursue collection of the full amount of the debt. See, e.g., B-163495, February 23, 1968; B-160771, February 24, 1967; B-152680, October 28, 1966. Neither the statute nor the Standards permit termination merely because of the inability to collect within a reasonable time. B-117604-O.M., May 23, 1969.

Application of the Standards cannot be arbitrary. The agency must have adequate support for its decision to terminate. As the Comptroller General has stated, "it was not contemplated [in issuing the termination regulations] that any of these bases would be applied in the absence of detailed support of such application." B-117604.1, May 27, 1968.

If an agency is not sure whether collection on a particular claim should be suspended or terminated, it may refer the claim to GAO for advice. 4 C.F.R. § 104.4. If a significant enforcement policy is involved in a particular case, or if recovery of a judgment is a prerequisite to desired administrative sanctions, the agency may refer the claim for litigation even though it may otherwise qualify for termination. Id.

The Federal Claims Collection Standards provide five criteria for termination, the two specified in the statute plus three additional logical items added by the regulations:

1. Inability to collect any substantial amount. The agency may terminate collection action if the debtor is financially unable, both presently and prospectively, to pay any substantial amount on the claim. 4 C.F.R. § 104.3(a). For example, termination was justified where the government had obtained a default judgment but could not find any assets on which to levy, and there were other substantial unsatisfied judgments on record. B-161248-O.M., November 9, 1967. Receipt of government benefits does not automatically preclude termination under this standard. 62 Comp. Gen. 599, 604 (1983).
2. Cost will exceed recovery. The agency may terminate when it is likely that the cost of further collection action will exceed the amount recoverable. 4 C.F.R. § 104.3(c). This is the “diminishing returns” standard. As with the corresponding standard for compromise, the costs of hearings or other administrative procedures required by law may be included if there is a substantial likelihood that they will actually be incurred in the particular case. 65 Comp. Gen. 893 (1986).
3. Inability to locate debtor. The agency may terminate when the debtor cannot be located and either (1) there is no remaining security to be liquidated, or (2) the applicable statute of limitations has run and prospects for offset are too remote to justify retention. 4 C.F.R. § 104.3(b). E.g., B-180072-O.M., November 29, 1973.
4. Claim legally without merit. 4 C.F.R. § 104.3(d). A claim is legally without merit if there is no legal basis for recovery by the United States. 68 Comp. Gen. 609 (1989); B-218989, January 27, 1986. This standard is the one exception to the requirement to refer all claims over \$100,000 to the Justice Department. If an agency determines that its original assertion of a claim was plainly erroneous, it may terminate collection action without Justice Department approval regardless of the amount of the claim. 4 C.F.R.

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§ 104.1(b). If there is room for reasonable disagreement, Justice should be consulted.<sup>42</sup>

5. Claim cannot be substantiated by evidence. However good a claim may be in theory, if the agency has insufficient evidence to prove it (documentary evidence, witnesses, etc.) and the debtor refuses to pay or compromise, termination is appropriate. 4 C.F.R. § 104.3(e).

(2) Termination and federal employees

A thorny and frequently recurring question is whether the termination authority applies to debtors currently employed by the federal government. On the one hand, the argument goes, federal employees are people too, and should be governed by the same standards as nonfederal employees. On the other hand, however,—and wholly apart from any consideration of what should constitute appropriate conduct by a government employee<sup>43</sup>—a government employee has a steady paycheck and should always be able to repay a debt, at least in reasonable installments.

The statute and its legislative history do not address this issue. GAO has issued several decisions over the years which, at first glance, may not appear entirely consistent. They do, however, when viewed in the aggregate, stand for the proposition that (a) as a matter of law, the termination authority applies to federal employees, but (b) the various criteria specified in the Federal Claims Collection Standards must be examined individually as it will generally be more difficult for a federal employee to meet some of them.

Reviewing the criteria in the order listed in the preceding section, the first is inability to pay. GAO first considered the issue in B-159708, September 23, 1966, a response to a Member of Congress on behalf of a civilian employee of the Navy. The Comptroller General pointed out that the law required collection of the full amount of the indebtedness unless there was a showing that the employee was financially unable to pay “any significant sum” on the debt, an event GAO viewed as “unlikely” since the

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<sup>42</sup>Letter dated March 11, 1969, from Assistant Attorney General William D. Ruckelshaus to Agency for International Development (copy on file with editors).

<sup>43</sup>A track record of failing to pay just debts may support a different type of termination—termination of employment. E.g., *Dennis v. Blount*, 497 F.2d 1305 (9th Cir. 1974). Whether an agency can discharge an employee for failure to pay a single debt is questionable. *Id.* at 1307–08; *White v. Bloomberg*, 345 F. Supp. 133, 143–48 (D. Md. 1972). Regardless of the number of debts, filing for bankruptcy will protect the employee from being fired. 11 U.S.C. § 525(a).

debtor was employed by the government. Thus, while the Comptroller General stopped short of expressing a definitive position, he seemed to be saying that the “inability to pay” standard applies to federal employees just as to any other debtor, but that a federal employee would rarely, if ever, be able to qualify under that standard. See also 49 Comp. Gen. 359, 361 (1969); B-163495, February 23, 1968; B-160569, February 28, 1967.

GAO concluded that termination was unauthorized in B-160633, January 19, 1967, a case involving an Air Force employee who had erroneously been paid overtime compensation. The decision held that there was no authority to discontinue collection action since the debtor “currently is employed and there is no showing of his inability to repay the amount in question.” Again, the implication was that the standard applies as a matter of law but that someone receiving a government paycheck is presumptively unable to meet it.<sup>44</sup>

In B-172122-O.M., May 21, 1971, GAO’s General Counsel advised the GAO Claims Group that “the present debt should not be terminated or suspended . . . so long as the employee occupies his present position and has a take home pay of \$980 a month after tax withholding in addition to his retired military pay.” In B-175499, April 21, 1972, overruled on other grounds by 69 Comp. Gen. 72 (1989), GAO held that a particular overpayment could not be waived under 5 U.S.C. § 5584 but advised the agency to consider the various alternatives under the Federal Claims Collection Act, one of which is termination. In that particular case, however, the employee was in the process of resigning and was in a “leave without pay” status.

The cases noted above all involved overpayments or erroneous payments made directly to the debtor. In one case, GAO considered whether termination was available on behalf of an accountable officer where GAO had previously denied relief. Reviewing several of the earlier cases, GAO expressed a general rule that termination is unauthorized where the debtor is currently employed by the government. However, in view of the history of that particular case and the financial hardship which had been demonstrated, GAO advised that no further collection action need be taken. The case was clearly viewed as an exception. B-180957-O.M., September 25, 1979.

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<sup>44</sup>The decision makes no mention of the possibility of waiver since 5 U.S.C. § 5584 was not enacted until the following year.

Thus, in the typical case, it will be difficult at best for a federal employee to qualify for termination under the “inability to pay” standard. The rationale is that the employee cannot legitimately be deemed unable to pay, at least in reasonable installments, where he or she is receiving a steady government paycheck. In many financial hardship cases, if a reasonable installment plan is not feasible, suspension will be the more appropriate course of action. There is, however, no rule of law which prohibits termination if the standard, fairly applied, is satisfied.

The next standard is “diminishing returns.” Prior to the Debt Collection Act of 1982, the decisions had consistently held that termination on this basis was unauthorized where salary offset under 5 U.S.C. § 5514 was an available remedy. B-195471, October 26, 1979; B-189701, September 23, 1977; B-180674, November 25, 1974; B-160483, December 9, 1966. See also B-195322, November 27, 1979. When these decisions were rendered, the cost of taking a salary offset was negligible. The process involved little more than contacting the payroll office. Thus, a “diminishing returns” standard would have little application. However, the Debt Collection Act of 1982 changed the rules by requiring various procedural measures in connection with taking an offset.

The post-1982 offset environment caused GAO to reconsider its position. The new rule is that agencies may—but are not required to—take into consideration the costs of administrative procedures required by law when applying the “diminishing returns” standard to any debtor, federal employees included, if there is a substantial likelihood that the costs will actually be incurred in the particular case. 65 Comp. Gen. 893 (1986). As with compromise, the decision cautioned that cost effectiveness is only one factor in the equation:

“[T]here may be cases in which sound countervailing Government policies dictate that collection be attempted, despite the costs. For example, it may be desirable for the agency to disregard the costs of collection when it wishes to ‘set an example,’ and thereby discourage or deter other persons from incurring similar debts or resisting payment of them.” *Id.* at 897.

The three remaining termination standards are easily addressed. It is difficult to see how “inability to locate debtor” could ever apply to a person on the federal payroll. As to the final two—claim legally without merit and lack of evidence—there is no reason why these should not apply fully to debts asserted against federal employees.

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(3) Categorical termination

As we have seen, one of the standards for termination is the concept of “diminishing returns.” When the cost of collection is likely to exceed the amount recoverable, collection action may be terminated. 4 C.F.R. § 104.3(c). Generally speaking, the termination authority contemplates situations where the agency has already started collection action. 58 Comp. Gen. 372, 374 (1979). There are situations, however, where GAO has construed the Federal Claims Collection Act as permitting an agency to simply forgo collection action before it was actually initiated.

Even before the Federal Claims Collection Act, GAO had advocated that agencies establish realistic points of diminishing returns for their collection activities. E.g., 45 Comp. Gen. 553 (1966). This advice today is found in the Federal Claims Collection Standards, specifically 4 C.F.R. § 102.14, which encourages agencies to use cost benefit analyses to:

“establish guidelines with respect to points at which costs of further collection efforts are likely to exceed recoveries, . . . and establish minimum debt amounts below which collection efforts need not be taken.”

See also GAO’s Policy and Procedures Manual for Guidance of Federal Agencies (GAO-PPM), title 4, § 69.3.

Note that we are dealing with two separate but nevertheless closely related concepts here: (1) minimum debt amounts, which are thresholds below which collection action need not be initiated, and (2) points of diminishing returns, which are thresholds at which the agency may discontinue collection efforts already started. See 65 Comp. Gen. 893, 896 (1986). For purposes of this discussion, we use the term “categorical termination” to encompass both.

Under the Federal Claims Collection Act and Standards, the rule has developed that an agency may establish reasonable minimum amounts for the pursuit of debt claims of particular types, and reasonable points of diminishing returns beyond which collection action need not be continued. The amounts cannot be arbitrary but must be supported by cost studies. The studies should analyze average recovery rates in relation to the size of the debt, the average cost of collection actions applicable to that type of claim, and the apparent possibilities of collection. 4 GAO-PPM § 69.3. There is no requirement for GAO approval. These amounts are,

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however, subject to review under GAO's regular audit authority. 55 Comp. Gen. 1438, 1439 (1976).

For example, based on cost figures supplied by the General Services Administration, GAO approved a \$25 minimum for the filing of loss and damage claims against carriers, including small domestic shipments on commercial forms. 55 Comp. Gen. 1438 (1976). The decision noted that an agency is authorized but not required to observe the minimum, and would retain the option to file a claim in a particular case. Similarly, the Agriculture Department could establish a \$35 minimum for the collection of small claims. B-3338, January 11, 1972.

In B-117604, March 6, 1972, based on cost studies conducted by various services, the Comptroller General approved a proposal by the Defense Department to set a \$25 minimum on pursuing out-of-service indebtedness claims. A few years later, Defense sought to establish a "floating minimum" or, in the alternative, raise the minimum to \$150. While GAO approved the proposal in principle, differences in the findings and accounting concepts among the various services led GAO to conclude that the specific request was not adequately supported. Accordingly, until the cost studies by the various services showed a coordinated and reasonably consistent basis, GAO could not endorse the change. B-115800/B-117604, August 17, 1976.

The authority recognized in this line of decisions applies to claims discovered after the fact. An agency may not "waive" recovery in advance, that is, where the potential overpayment is known or can be readily determined before the payment is made. 49 Comp. Gen. 359 (1969).

Cost benefit analyses do have limitations, as pointed out in the following excerpt from B-197146, September 22, 1980:

"For example, low collection rates and high collection costs may be symptoms of ineffective and inefficient collection techniques, which if improved, would require a reevaluation of minimums previously established. Also cost benefit analyses should not always be the sole determinant for the termination of claims. Other factors, which are not easily quantifiable, such as maintaining the integrity of a collection program, should also be considered."

While, as we have already noted, the costs of administrative hearings and reviews may be considered when evaluating termination of individual claims under 4 C.F.R. § 104.3(c), they should not be used in establishing

categorical minimum debt amounts or points of diminishing returns. 65 Comp. Gen. 893 (1986). The practical rationale behind this position should be apparent. If you announce up front that you will not pursue collection action on debts of a particular type under, say, \$1,000, you virtually eliminate any incentive for voluntary payment.

There are two exceptions to the requirement for cost studies. The first is for nominal amounts. In 58 Comp. Gen. 372 (1979), the Interior Department asked whether, under the Federal Claims Collection Act, it could forgo collection action on underpayments of \$1 or less of reclamation fees paid by coal mine operators under the Surface Mining Control and Reclamation Act of 1977. The Comptroller General noted that “it may safely be presumed, without cost studies, that in cases of \$1 or less collection action will always exceed the amount recoverable.” *Id.* at 375. Therefore, construing the termination provision in the Federal Claims Collection Act in light of its purpose, the Comptroller General held that Interior could make a categorical determination to forgo collection action on underpayments of \$1 or less, based on the diminishing returns concept, without the need for cost studies. See also 18 Comp. Gen. 838 (1939) (\$1); B-134617, January 30, 1958 (\$2). The rule applies equally to debts owed by federal civilian and military personnel. 65 Comp. Gen. 893 (1986).

The second exception involves claims against a group or class of persons where the individual amounts are small, the administrative burden of identifying the debtors and computing the amounts would be disproportionately high, and the individual claims would be eligible for waiver consideration. The first case in point was B-181467, July 29, 1976. The Air Force discovered that it had been overpaying night differential and Sunday premium pay to local employees at Clark Air Base in the Philippines. Since (1) the amount of the individual debts was minor, (2) the administrative costs of identifying the overpayments would have been excessive, and (3) the individual debts would have been eligible for waiver anyway, GAO concluded that the Air Force could terminate collection action. This decision was followed in B-188000, October 12, 1977, and again in B-184947, March 21, 1978.

The most recent decision on this point, B-206699.1/B-206699.2, September 15, 1988, jointly considered two separate problems. In the first case, the Air Force uncovered erroneous overpayments of compensation over a one-year period to nearly 5,000 National Guard technicians. In the second case, the Army undertook a project to reconcile personnel and pay records and discovered minor discrepancies that had resulted in small

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overpayments to approximately 10,000 persons. In both cases, it was established that the individual debts were small, administrative costs of identification and collection would be excessively disproportionate, and the individual cases would be subject to consideration for waiver. In both cases, GAO agreed with agency proposals to forgo collection action.

e. Write-off and Close-out

Termination, write-off, and close-out are three different things. Termination, discussed above, refers to the creditor agency's decision to discontinue active collection efforts. Once the decision to terminate collection action has been made, the logical next step is to remove the debt from the agency's accounting records, i.e., to stop carrying it as a receivable. This step is called write-off. Thus, the proper terminology is: you terminate collection action, and then you write off the debt from your receivables.

Termination and write-off occur either simultaneously or in very close time proximity. Since it is undesirable to carry an active receivable on which no further action is being taken or contemplated, there should be no significant delay between termination and write-off.

The concept of write-off applies equally to a judgment debt which has, to the agency's reasonable satisfaction, become uncollectible. 34 Comp. Gen. 148 (1954). There is no need to first attempt execution on the judgment where the facts indicate it would not be warranted. B-120956, October 6, 1955.

The acts of termination and write-off do not preclude re-opening the case if future collection possibilities are discovered. For example, if you see your debtor's smiling face on the evening news holding the winning lottery ticket, you may want to consider reactivating the file. In the more typical situation, of course, an offset opportunity presents itself that was not contemplated at the time of write-off. The principle was stated in 48 Comp. Gen. 365, 369 (1968):

"Concerning the legality of taking action to satisfy an indebtedness once it has been declared uncollectible, it appears that an administrative determination of uncollectibility is for accounting purposes only and, as such, does not preclude the subsequent satisfaction of the indebtedness should the opportunity to do so thereafter be presented to the administrative office."

See also GAO Policy and Procedures Manual for Guidance of Federal Agencies, title 4, § 70.6; B-182512-O.M., August 6, 1975.

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Largely within their discretion, agencies may retain administrative records (as opposed to accounting records) of inactive debt accounts for possible future reactivation, and may do so indefinitely.

At some point, the agency may determine that even retaining an inactive record is futile. At this point, the agency closes out the debt. Close-out is the agency's final disposition of the debt. Depending on the circumstances, write-off and close-out may occur at the same time, or write-off may precede close-out by a potentially substantial amount of time.

Once the debt is closed out, it should be reported to the Internal Revenue Service on Form 1099-G under the authorities previously discussed in connection with compromise.

Close-out precludes reactivation of the account. The agency may still accept voluntary payments, but may no longer take any further collection action. A written-off account is inactive; a closed-out account is dead.

Further discussion and guidance on the concepts of write-off and close-out may be found in: OMB Circular No. A-129, Managing Federal Credit Programs; Managing Government Credit: A Supplement to the Treasury Financial Manual, chapter 5; and Treasury Financial Management Service, The Governmentwide Task Force Final Report on Write-Off (August 1988).

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## 10. Waiver

If one private individual owes a debt to another, the creditor might decide, for any number of reasons, that it "just isn't right" to enforce collection. A federal agency, as we have seen, is not free to do the same thing. The agency must attempt collection unless that duty is removed in some legally authorized manner. Yet, as we also noted earlier, increasing the ranks of the homeless is not one of the objectives of federal debt collection. We have already discussed some of the ways Congress has provided to relieve an agency of its duty to attempt collection in full in appropriate circumstances, specifically compromise and termination. One more should be noted—waiver.

"Waiver" of a debt is a forgiveness of the debt and relieves the debtor from having to repay it. It has been defined as "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938); 43 Comp. Gen. 311, 314 (1963); B-195188, June 17, 1981. It differs from termination in that termination does not eliminate the debtor's

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liability whereas a debt which has been waived no longer exists and cannot be reopened.

Since waiver amounts to the giving away of government rights or property, it requires statutory authority. Absent a statutory basis, no federal agency is authorized to waive a debt claim owing to the United States. For example, a 1971 decision concluded that the Labor Department was not authorized to waive the recovery of overpayments made under the Disaster Relief Act of 1970. B-171934, April 2, 1971. Similarly, the Federal Emergency Management Agency lacks authority to issue regulations providing for the forgiveness of debts owed to the government. B-201054, April 27, 1981. Along the same lines, the compromise, suspension, and termination authority of the Federal Claims Collection Act applies to overpayments by the Department of Labor under the Redwood Employee Protection Program although there would be no authority to “waive” the claims. B-195188, June 17, 1981.

Neither the Federal Claims Collection Act of 1966 nor the Debt Collection Act of 1982 authorizes anyone (the creditor agency, GAO, or the Justice Department) to waive debt claims. E.g., B-159708, September 23, 1966. Congress has, however, authorized waiver in a number of specific contexts.

Waiver statutes are classified as either mandatory or permissive. See Califano v. Yamasaki, 442 U.S. 682, 693 n.9 (1979). A typical mandatory statute is the Social Security Administration’s waiver statute, 42 U.S.C. § 404(b), which was the subject of the Yamasaki decision:

“In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of [the old-age, survivors, or disability insurance programs] or would be against equity and good conscience.”<sup>45</sup>

The essence of a mandatory waiver statute is that the agency has a “duty to decide” (Yamasaki, 442 U.S. at 694 n.9) and recovery is prohibited until the decision has been made. The decision may be an actual decision on the merits, or it may take place by default. To illustrate, the Supreme Court in Yamasaki expressly approved the way the Social Security Administration administered 42 U.S.C. § 404(b). In each overpayment case, SSA would send

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<sup>45</sup>The “without fault” and “equity and good conscience” standards are common to most waiver statutes, both mandatory and permissive.

a notice to the recipient advising of his or her right to request waiver. If the recipient made a request, SSA would consider the merits and make a decision. Failure to submit a request within the time limit prescribed by regulation was tantamount to a denial. 442 U.S. at 694.

Other mandatory waiver statutes will generally resemble the SSA provision. Several are cited in Yamasaki, 442 U.S. at 694 n.9. Sometimes it is not quite so clear. One example, described in 63 Comp. Gen. 10, 13 (1983), is found in the Black Lung Benefit Program legislation. Under 30 U.S.C. § 940, amendments made by the Black Lung Benefits Act of 1972 with respect to claims filed on or before December 31, 1973, also apply to claims filed after that date. The 1972 act had amended 30 U.S.C. § 923(b) to make section 204 of the Social Security Act applicable to the Black Lung Program. Section 204 is 42 U.S.C. § 404, the very provision the Supreme Court had considered in Yamasaki. Thus, post-1973 black lung benefit claims are subject to a mandatory waiver statute.

Another example described in 63 Comp. Gen. 10, 14, is the waiver provision of the Federal Employees' Compensation Act, 5 U.S.C. § 8129(b):

“Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”

This looks very much like the SSA statute but the wording is not identical. Title 5 was recodified in 1966. The pre-1966 language was “there shall be no adjustment or recovery” (63 Stat. 864), the same as the SSA provision. Since recodifications are not intended to make substantive changes, this too is clearly a mandatory waiver statute.<sup>46</sup>

Where a mandatory waiver statute applies, notice of the right to request waiver should be included in agency's first demand letter.

Under a permissive or discretionary waiver statute, recovery is not prohibited pending the waiver determination. A common example is 5 U.S.C. § 5584, under which erroneous payments to civilian employees of pay and allowances, including travel, transportation, and relocation payments, “may be waived in whole or in part” by the agency for claims of \$1,500 or less (\$10,000 or less for the judicial branch), or by GAO for claims

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<sup>46</sup>As this example shows, resort to the original source statute is often helpful in understanding a recodified statute.

exceeding \$1,500,<sup>47</sup> when the recipient is without fault and when collection “would be against equity and good conscience and not in the best interests of the United States.” GAO has issued implementing regulations, found at 4 C.F.R. Parts 91 and 92, most recently reissued on September 30, 1991 (56 Fed. Reg. 49582). The statute comes into play only when there has been an actual payment for which an employee is indebted to the government; it does not authorize the waiver of erroneous advice. 66 Comp. Gen. 642 (1987). Detailed coverage of 5 U.S.C. § 5584 may be found in GAO’s Civilian Personnel Law Manual.

Other examples of permissive waiver statutes are:

- 10 U.S.C. § 2774: same as 5 U.S.C. § 5584, but for military personnel.<sup>48</sup>
- 32 U.S.C. § 716: same as 5 U.S.C. § 5584, but for National Guard personnel.
- 5 U.S.C. § 4108(c): Government Employees Training Act.
- 10 U.S.C. § 1453: Survivor Benefit Plan (military).

In the case of some government corporations, waiver authority, although not explicitly granted, follows from their broad statutory charter. E.g., B-190806, April 13, 1978 (Pension Benefit Guaranty Corporation).

The waiver statutes, at least those GAO helps administer, contemplate considering the circumstances of individual cases. Thus, GAO has been reluctant to grant “blanket waivers.” One exception is B-222776, June 16, 1986. Legislation enacted in 1986 retroactively changed the formula for computing the hourly rate of pay for federal employees. The result was a small overpayment for most civilian employees (e.g., 6 cents an hour for a GS-13). In response to a request from the Chairman of the House Post Office and Civil Service Committee, GAO concluded that this was an appropriate situation to grant a blanket waiver for all affected employees.

In our preceding discussion of suspension of collection action, we noted that one of the relevant factors identified in the Federal Claims Collection Standards is whether refund would be authorized. Some waiver statutes provide for refund of amounts already collected if the waiver is granted. E.g., 5 U.S.C. § 5584(c). Others do not. See, e.g., 51 Comp. Gen. 419, 422 (1972), with respect to the waiver provision of the Government Employees Training Act. Under a waiver statute which does not authorize refund,

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<sup>47</sup>The threshold in 5 U.S.C. § 5584, 10 U.S.C. § 2774, and 32 U.S.C. § 716 was raised from \$500 to \$1,500 by Pub. L. No. 102-190, § 657, 105 Stat. 1290, 1393 (1991).

<sup>48</sup>The discretionary nature of 10 U.S.C. § 2774 is discussed in Price v. United States, 621 F.2d 418 (Ct. Cl. 1980). Since the statutes are virtually identical, the discussion in Price would apply to 5 U.S.C. § 5584 and 32 U.S.C. § 716.

waiver may be ineffective with respect to amounts already paid because waiver is the relinquishment of an existing right, and to the extent payment has already been made, there is no longer a debt and therefore nothing to waive. Id.

In B-146111, July 6, 1961, an employee of the Federal Aviation Agency had received training under the Government Employees Training Act, had signed an agreement to continue working for the FAA for a specified time, and then resigned in violation of the agreement. The FAA recovered the training expenses from the individual and deposited the money in the Treasury as miscellaneous receipts. Seven months later, the individual rejoined the agency. The agency wanted to waive the debt under 5 U.S.C. § 4108(c) and refund the amount recovered. Since the collection and deposit had been entirely proper when made, the permanent appropriation for refunding money “erroneously received and covered” (31 U.S.C. § 1322(b)(2)) could not be used, and there was no other authority to make the refund.

GAO considered a similar fact pattern in B-208064, November 15, 1983. As in B-146111, the question was whether the agency could refund amounts previously collected upon the debtor’s re-employment. Part of the debt had been collected by offset against salary and leave payments due at the time of resignation. Essentially following 51 Comp. Gen. 419, GAO concluded that this amount could not be refunded. With respect to the remaining portion of the debt, the agency had contacted the Office of Personnel Management to collect from the debtor’s Civil Service Retirement Fund account. However, the agency did not actually receive the money from OPM until after the debtor had become re-employed. The decision held that this portion could be refunded since it had not been “collected” at the time of waiver.

The Supreme Court’s Yamasaki decision, and those portions of the Federal Claims Collection Standards which apply it, have altered the rules of some of the earlier decisions. For example, one of the precedents cited in 51 Comp. Gen. 419 for the proposition that waiver is ineffective where the debt has already been extinguished is 8 Comp. Gen. 664 (1929). That case, however, involved what is clearly a mandatory waiver statute. If the question in 8 Comp. Gen. 664 arose today, the answer would be that recovery should not have been made prior to the waiver decision. If the debt had been collected prior to the waiver decision and the money deposited as miscellaneous receipts, the collection would be erroneous and could be refunded using the “erroneously received and covered”

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appropriation. E.g., 71 Comp. Gen. 464 (1992). Thus, for the most part, if the waiver statute is mandatory, it no longer makes a difference whether the statute itself authorizes refund in view of Yamasaki and the mandatory suspension provision of 4 C.F.R. § 104.2(c).

If the waiver statute is permissive, lack of refund authority can still present a problem, as in 51 Comp. Gen. 419, although careful application of the suspension standards will eliminate the problem in most cases. We say “most cases” because, for example, in B-146111, July 6, 1961, suspension could not have been justified at the time the debt was collected. A possible solution, at least in offset cases, may be a bit of sleight-of-hand suggested in A-27376, March 12, 1930, and noted in B-146111, cited above—a “tentative withholding” pending the waiver decision, as opposed to an “offset tantamount to recovery.” An agency following this approach should not credit any of the “tentative withholding” to miscellaneous receipts prior to the waiver decision.

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## 11. Payment

### a. Modes of Payment

#### (1) Cash

United States coins and currency are legal tender for all debts. 31 U.S.C. § 5103. Thus, cash payments should generally be acceptable. Postage stamps are not currency and generally not acceptable in payment, although acceptance is not legally prohibited where the agency has some practical means of converting the stamps to cash. A-51645, October 19, 1937, at 7.

The rare situation may occur in which cash payment turns out to be no payment at all. To illustrate, we turn to “the strange case of Dr. Alm.” In 1972, Dr. Donald J. Alm was a dentist in Eau Claire, Wisconsin, presumably with no particular involvement with the federal government. In March of that year, his minor son was kidnapped. Dr. Alm paid a ransom of \$50,000 in \$5, \$10, and \$20 bills, and his son was fortunately returned unharmed.

The day after the ransom payment, someone named Diffie drove his truck to the offices of the Farmers Home Administration in Alma, Wisconsin, carried in a suitcase filled with stacks of \$10 and \$20 bills, and used the money to repay a \$20,000 loan. Two days later, Diffie was arrested and charged with the kidnapping. He pleaded guilty and, along with two

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accomplices, was sent to jail. The cash used to pay the Farmers Home loan was confirmed to be part of the ransom money. Dr. Alm, naturally, asked the FmHA to return his money.

Of course, life is not that simple. There is a rule that a party who accepts cash in the normal course of business, without actual or constructive knowledge that it was illegally obtained, is not required to return it. The rule is premised on the need for certainty in business dealings. E.g., Holly v. Missionary Society, 180 U.S. 284, 293 (1901). Or, put another way, where the equities are equal, the law will not transfer a loss from one innocent party to another, but will leave it where it falls. Id. at 295.

This was little comfort to Dr. Alm, who had done absolutely nothing wrong. GAO reviewed the case at the request of the House Judiciary Committee, and suggested that there might be a way out. The rule noted above is based on the receipt of cash in due course, and “there are few conceivable circumstances more out of harmony with a concept of due course” than the “bizarre factual context presented here.” Thus, the facts did not require strict application of the rule. B-177344, April 20, 1973. FmHA apparently agreed and returned the money. The Court of Claims subsequently confirmed what all had conceded—that Dr. Alm did not have a legal claim against the government. Whether he had an equitable claim was mooted by the return of the money. Alm v. United States, 204 Ct. Cl. 791 (1974).

## (2) Check

There is no general prohibition on the acceptance of personal checks. If payment is tendered in the form of a personal check, it should be made clear that the check is being accepted subject to collection only. This protects the collecting officer from liability if the check should “bounce.” See 3 Comp. Gen. 403 (1924); B-201673 et al., September 23, 1982. In other words, it should be made clear that it is the collection of funds on the check that satisfies the obligation and not the mere acceptance of the check itself. I Treasury Financial Manual § 5-2010.

In the absence of legislation one way or the other, an agency is presumably free to issue regulations imposing limitations on the use of personal checks, for example, by requiring certified or cashier’s checks for payments in excess of a specified amount.

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(3) Credit cards

Except where expressly prohibited, a federal agency may accept commercial credit card transactions in payment for goods and services provided by the government or in payment of debts, subject to certain safeguards.<sup>49</sup> Acceptance of payment by credit card:

- should not result in any significant increase in cost to the government;
- should facilitate and enhance the agency's collection activities; and
- should protect the government by means of credit card company guarantees to reimburse the government for all properly conducted transactions.

67 Comp. Gen. 48 (1987) (general discussion); B-219322-O.M., September 25, 1986 (same). See also 56 Comp. Gen. 90 (1976) (credit sales by Government Printing Office); 52 Comp. Gen. 764 (1973) (purchases from National Technical Information Service); B-230374-O.M., February 23, 1988 (coin sales by U.S. Mint under Statue of Liberty-Ellis Island Commemorative Coin Act).

As the decisions cited in the preceding paragraph also note, acceptance of credit cards should also not result in increased cost to the person making the payment. The exception would be where a credit card is being used to pay a delinquent debt, in which case the credit card company's commission may be treated as an administrative cost to be assessed against the debtor under 31 U.S.C. § 3717(e)(1). 67 Comp. Gen. at 49 n.1.

There is one potential drawback to the use of credit cards. In the typical commercial arrangement, the credit card company deducts its fee from the amount to be paid over to the vendor. However, federal agencies are required by 31 U.S.C. § 3302(b) to deposit collections in the Treasury without deduction. Thus, unless the transaction is somehow exempt from 31 U.S.C. § 3302(b), agencies are not authorized to enter into this type of arrangement. 67 Comp. Gen. 48 (1987). For delinquent debts, an exemption exists by virtue of 31 U.S.C. § 3718(d), previously noted under the heading "Commercial Collection Agencies." 67 Comp. Gen. at 50. There is, however, no comparable blanket exemption for non-delinquent payments. GAO supports expanding the concept of 31 U.S.C. § 3718(d) to encompass non-delinquent payments. Id. at 52.

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<sup>49</sup>For a brief history and description of the use of credit cards in the United States, see National Bancard Corp. v. VISA U.S.A., Inc., 596 F. Supp. 1231, 1236-39 (S.D. Fla. 1984).

The Treasury Department has negotiated an arrangement with a number of financial institutions to accept credit card payments to federal agencies. The system is called the Credit Card Collection Network and is described in the Treasury Financial Manual, I TFM Chapter 5-4700. By offering a convenient credit card payment option, the Treasury program is designed to enhance agency collections.

(4) Payment in kind

The Federal Claims Collection Act and Standards generally contemplate payment in money. One provision of the Federal Claims Collection Standards, 4 C.F.R. § 103.9, prohibits accepting a percentage of a debtor's profits or stock in a debtor corporation in compromise of a claim. Apart from this, however, there is no blanket prohibition on accepting payment in kind, at least under a compromise. See generally 37 Op. Att'y Gen. 298 (1933); B-229068.4, August 3, 1988. Of course, this assumes the absence of any other statutory restriction or prohibition applicable to the particular case. An agency proposing to accept payment in kind should exercise common sense and should be careful to assure that the property, when reduced to cash, will provide adequate payment. B-229068.4 at 6.

A 1935 decision in which compromise was not involved held that there is no authority to accept a debtor's offer of merchandise to satisfy a government claim. 14 Comp. Gen. 884 (1935).

(5) Cash Management Improvements Fund

A provision in the Deficit Reduction Act of 1984 (Pub. L. No. 98-369), codified at 31 U.S.C. § 3720, requires executive agencies, in accordance with Treasury Department regulations, to provide for the timely collection and deposit of funds owed to the agency, using such procedures as electronic fund transfer, automatic withdrawals, and post office lockboxes. The objective is to expedite the availability of funds to the Treasury through improved cash management.

If an agency fails to comply with Treasury requirements, the Treasury Department is authorized to charge the agency with the cost to the general fund caused by the noncompliance. Payment of these charges is to come from agency operating appropriations. Noncompliance charges collected by Treasury under 31 U.S.C. § 3720 go into the Cash Management Improvements Fund, a revolving fund available without fiscal year limitation to fund selected cash management improvement projects.

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Further detail may be found in the Treasury Department's implementing regulations, 31 C.F.R. Part 206.

b. Multiple Debts

Suppose a debtor owes more than one debt to the United States and makes a voluntary payment which may or may not be enough to satisfy one of the debts. How should the government apply the payment?

There is a long-established principle of commercial law to the effect that if a debtor owing more than one debt to the same creditor makes a voluntary payment and designates how it is to be applied, the creditor must follow that designation. If the debtor fails to designate the application of the payment, then the creditor may do so within its discretion. The Supreme Court stated the principle over a century ago as follows:

“The rule settled by this court as to the application of payment is, that the debtor or party paying the money may, if he chooses to do so, direct its appropriation; if he fail, the right devolves upon the creditor; if he fail, the law will make the application according to its own notions of justice.”

National Bank of the Commonwealth v. Mechanics' Nat'l Bank, 94 U.S. 437, 439 (1876). The rule “rests upon the concept that the money which the debtor is utilizing to make the payment is his own and is free for use as he pleases.” St. Paul Fire and Marine Ins. Co. v. United States ex rel. Dakota Elec. Supply Co., 309 F.2d 22, 25 (8th Cir. 1962).

The Federal Claims Collection Standards adopt this rule. 4 C.F.R. § 102.11(b). If the debtor fails to designate the application of a voluntary payment, agencies are cautioned to “apply payments to the various debts in accordance with the best interests of the United States, as determined by the facts and circumstances of the particular case, paying special attention to applicable statutes of limitations.” *Id.* Thus, as a general proposition, an undesignated voluntary payment should be applied first to a debt on which the statute of limitations is approaching expiration. While the Standards place the “freedom of application” rule in the section on installment payments, the rule applies to voluntary payments generally and not just to installment payments.

If a debt is collected by administrative offset, payment is not voluntary and the “freedom of application” rule does not apply. In this situation, agencies are instructed to apply recovered amounts “in accordance with the best interests of the United States, as determined by the facts and circumstances of the particular case, paying special attention to applicable

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statutes of limitations.” 4 C.F.R. § 102.3(g). Payment under a tax levy is similarly involuntary and the taxpayer cannot direct its application. Muntwyler v. United States, 703 F.2d 1030 (7th Cir. 1983); Jung v. United States, 701 F. Supp. 175 (E.D. Wis. 1988).

c. Conditional Endorsements

Problem: Debtor owes agency \$1,000. Debtor submits check for \$500, and writes “payment in full” on the check, either on the “memo” line or on the back. If the agency keeps the money, has it agreed to the debtor’s condition and discharged the remaining \$500? Answer: maybe, maybe not. It depends on whether the transaction constitutes what the lawyers call an “accord and satisfaction.” The term “accord and satisfaction” means, in essence, an agreement to accept in full payment an amount less than the amount claimed, coupled with the actual payment of the agreed-upon amount. Since it is contractual in nature, it requires mutual assent and consideration to be valid. 40 Comp. Gen. 261, 264–65 (1960).

An early GAO decision, somewhat short on analysis, took the easy way out and held that there was no authority for the government to accept a check bearing a conditional (full payment) endorsement. 15 Comp. Gen. 1072 (1936). Subsequent decisions took the huge leap of concluding that 15 Comp. Gen. 1072 did not apply where the check was in the amount which the creditor agency had determined to be due. 29 Comp. Gen. 88 (1949); A-74922, October 6, 1936, modifying 15 Comp. Gen. 1072. In other words, it’s OK to say “payment in full” when you’re in fact making payment in full. These cases suggest that the real concern was the unauthorized acceptance of a compromise.

Of course, as we have seen, the Federal Claims Collection Act of 1966 provided across-the-board compromise authority. In a 1969 internal memorandum, the Comptroller General effectively overruled 15 Comp. Gen. 1072. A-74922-O.M., October 30, 1969. (“[I]n view of the . . . Federal Claims Collection Act of 1966 . . . [we do not] consider our decision of 15 Comp. Gen. 1072 . . . to be currently effective to preclude the acceptance of checks bearing conditional endorsements.”) Unfortunately, the memorandum offered no further guidance except to suggest that a check with a conditional endorsement may be temporarily withheld from deposit in the Treasury to give the agency the opportunity to figure out what to do.

The law on this point at the present time appears to be reflected in the cases of Chesapeake & Potomac Telephone Co. v. United States, 654 F.2d 711 (Ct. Cl. 1981), and McDonald v. United States, 13 Cl. Ct. 255 (1987). The effect of accepting a check with a conditional endorsement is

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governed by federal common law, not the Uniform Commercial Code. McDonald at 260. The McDonald court stated:

“[I]n order to have an efficacious accord and satisfaction, both parties must agree that the payment ends a then-existing controversy. Otherwise, it is not enough for the debtor to simply write ‘payment in full’ on the face of his check and, self-servingly, legally attempt to extinguish the unpaid portions of his debt.” Id. at 261 (emphasis in original).

Where the amount is in dispute and the debtor tenders payment of less than the amount claimed, along with a clear expression of intent that the tender is being offered in full settlement, acceptance of the payment will probably constitute an accord and satisfaction. Where the amount due is not in dispute, acceptance of payment in less than the amount of the debt will most likely not constitute an accord and satisfaction, regardless of the debtor’s expressions of intent. McDonald, 13 Cl. Ct. at 261; Chesapeake & Potomac, 654 F.2d at 716; 40 Comp. Gen. 261, 268 (1960).

The message of all of this is that the agency must be extremely careful to avoid an unintended accord and satisfaction.

One final unreported case may merit brief mention. An individual named Linson took a student loan to go to law school and subsequently defaulted on the loan. The (then) Department of Health, Education, and Welfare purchased the defaulted loan and proceeded to pursue collection. Linson made several partial payments, writing on the back of each check the statement “Endorsement of this check acknowledges that the payor does not waive any defenses, including the statute of limitations, in regard to this alleged obligation.” When the partial payments stopped, the government sued. Granting the government’s motion for summary judgment, the court found that the endorsement did not express an intent that the check be considered full payment of the debt, and had “no legal significance” in the case. United States v. Linson, No. CV 83-0383-CHH (C.D. Cal. May 2, 1983).

#### d. Disposition of Amounts Collected

If an agency collects a debt, it must deposit the money in the Treasury as miscellaneous receipts unless the agency has statutory authority to credit the receipts to its own appropriations or the collection qualifies as a “repayment.” This is nothing more than an application of 31 U.S.C. § 3302(b), discussed fully in Chapter 6.

Collections received after an account has been closed in accordance with 31 U.S.C. §§ 1552(a) or 1555 must be deposited as miscellaneous receipts,

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notwithstanding that the agency could have retained the funds if collected prior to account closing. 31 U.S.C. § 1552(b).

Prior to 1990, GAO, when collecting debts referred to it by other agencies, had discretionary authority under 31 U.S.C. § 1552(b) to deposit the money as miscellaneous receipts, even where the referring agency could have retained the money if collected directly. Since 1963, it had been GAO's policy to deposit all such collections as miscellaneous receipts except collections involving trust or deposit fund accounts. B-138706, May 13, 1963 (circular letter); B-138706-O.M., October 1, 1963. Requests for exceptions were routinely denied. E.g., B-156343, January 17, 1966 (large amount); B-138706, November 30, 1965 (no-year account); B-156011, April 30, 1965 (revolving fund). In any event, when 31 U.S.C. § 1552 was amended in 1990, the provision in question was dropped. In view of the virtual phase-out of GAO's accounts receivable operation, the statutory change should not have significant impact.

e. Release

GAO has traditionally discouraged the use of a formal release to evidence the discharge of a debtor from liability. Where the debtor wants something, and it is clear that the amount to be paid will fully satisfy the government's claim, GAO has suggested the use of a conditional endorsement. B-158893, November 7, 1966.

There is, however, no prohibition on executing a release, and the government may do so if the debtor insists. The authority to execute a release is viewed as implicit in the authority to collect the claim. B-164535, June 25, 1968. The release may be signed by the official receiving the payment or any other responsible official of the creditor agency. *Id.*; 29 Comp. Gen. 59 (1941); B-160157, November 1, 1966.

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## D. Elements of a Debt Collection Program: Referrals to GAO and Justice Department

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### 1. Referral to GAO

Prior to the 1984 revision of the Federal Claims Collection Standards, agencies were required to refer administratively uncollectible debts to GAO for further collection action. If GAO could not collect, compromise, or

terminate, it then referred the claim to the Justice Department for litigation. Even prior to the Federal Claims Collection Act of 1966, GAO had acted in this capacity under its general claims authorities. See, e.g., 16 Comp. Gen. 956 (1937). The original version of the Standards contained a provision, unchanged until the 1984 revision, instructing agencies to refer uncollectible claims to GAO unless GAO granted an exception, thereby permitting direct referral to the Justice Department. 31 Fed. Reg. 13384, October 15, 1966 (original 4 C.F.R. § 105.1). Thus, GAO's pre-1984 decisions and opinions contain frequent references to claims referred to GAO for further collection action.

GAO's efforts during this time period were reasonably successful. For example, in fiscal year 1979, GAO was able to collect \$10.6 million in claims which had been referred to it as uncollectible.<sup>50</sup> However, weaknesses inherent in this system became increasingly apparent during the 1970s. GAO's authority to pursue further collection was limited to the same administrative devices that were available to the agency, things the agency had presumably already done or considered. Thus, having GAO as an intermediate step between the agency and the Justice Department was frequently unproductive. Also, the number of referrals grew to the point where GAO could not devote sufficient resources to handle them in a timely fashion.<sup>51</sup> In many cases, the automatic referral system ended up doing little more than using up more time for purposes of the statute of limitations.

GAO realized during this period that it could perform its role under the Federal Claims Collection Act more effectively by audit and oversight than by direct involvement in individual claims. As the first major step in reducing its "accounts receivable" activities, GAO began to liberally grant exceptions from the automatic referral requirement, doing so mostly on an agency-wide or program-wide basis. This approach produced significant results.<sup>52</sup>

The next major step came with the 1984 reissuance of the Federal Claims Collection Standards. The revised 4 C.F.R. § 105.1 eliminated the requirement for automatic referral of uncollectible debts to GAO. Thus,

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<sup>50</sup>U.S. General Accounting Office, *Annual Report 1979* at 37 (1980).

<sup>51</sup>For example, there were over 47,000 uncollectible debt referrals to GAO in fiscal year 1977. See GAO report *Unresolved Issues Impede Federal Debt Collection Efforts—A Status Report*, CD-80-1 (January 15, 1980), at 9.

<sup>52</sup>For FY 1980, referrals to GAO dropped to approximately 2,000 (CD-80-1, *supra* note 51, at 9), and collections dropped correspondingly to \$4.7 million (GAO Annual Report for 1980, at 68).

most uncollectible debt claims can now go directly to the Justice Department.<sup>53</sup>

Apart from referrals for advice regarding a proposed compromise, suspension, or termination (4 C.F.R. §§ 103.8 and 104.4), the Standards currently provide for referral to GAO in only two instances:

- Claims arising from GAO audit exceptions. Id. § 105.1(b). These occur infrequently.
- Doubtful claims, i.e., cases in which the agency is unable to determine either the merits or the amount of the claim with reasonable certainty. Id. § 105.1(c); GAO Policy and Procedures Manual for Guidance of Federal Agencies, title 4, § 5.2.

Referrals to GAO under these provisions should use the same form, the Claims Collection Litigation Report, used to refer claims to the Department of Justice for litigation.

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## 2. Referral to Justice Department

### a. Basic Requirements

If an agency has taken the aggressive collection action prescribed in the Federal Claims Collection Act and Standards, is unable to compromise the claim, and if suspension, termination, or waiver is inappropriate, the debt is at that point considered to be “administratively uncollectible,” and the next step is to sue the debtor. Administratively uncollectible debts must be referred to the Department of Justice for litigation unless the agency is authorized to handle its own litigation either by statute or by delegation from the Attorney General. 4 C.F.R. § 105.1(a).

If the gross original amount of the claim is \$100,000 or less, the claim should be sent to the United States Attorney for the judicial district in which the debtor is located. If the gross original amount exceeds \$100,000, the claim should be sent to the Commercial Litigation Branch of the Justice Department’s Civil Division in Washington. Id. Claims of less than \$600 should not be referred for litigation unless failure to do so would jeopardize a significant enforcement policy, or unless it is clear that the debtor has the ability to pay and the government can effectively enforce payment. Id. § 105.4.

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<sup>53</sup>GAO had studied the matter a decade earlier and had concluded in an internal memorandum that there was no legal objection to discontinuing routine referrals. B-117604-O.M., January 12, 1973.

The debt should ordinarily be referred for litigation within one year of the agency's final determination of the existence and amount of the debt. 4 C.F.R. § 105.1(a). It is axiomatic that time favors the debtor. The longer the collection process drags out, the less likely collection becomes. In all cases, referral must be made prior to the earliest barring date under an applicable statute of limitations, even if this means cutting short the administrative collection process. *Id.*; 4 C.F.R. § 102.2(a). Claims may be referred after the barring date if there is some reasonable theory in support of a later date or if there is doubt as to the proper date. B-158275-O.M., July 5, 1974; B-158275-O.M., December 9, 1971. Referral of a time-barred claim is also appropriate if there is a possibility of using the debt as a counterclaim or offset in a pending suit against the government. 28 U.S.C. § 2415(f); B-169175.2, May 23, 1972 (non-decision letter).

There is a prescribed format for referring claims to the Justice Department for litigation. It is called the Claims Collection Litigation Report (CCLR). The CCLR is a form developed jointly by GAO and the Justice Department designed to provide Justice with all the information it will need to effectively litigate a debt claim. GAO transmitted the CCLR, with detailed instructions, to all executive agencies by circular letter dated January 20, 1983. Referrals to the Justice Department for litigation under 4 C.F.R. § 105.1 must use the CCLR unless Justice grants an exception. 4 C.F.R. § 105.2(a). Required information includes a brief summary of collection actions taken, the debtor's current address, and reasonably current credit data. *Id.* There is also a "short form" CCLR for use in referring claims of \$5,000 or less.

The CCLR is also required when requesting the Justice Department's approval of a proposed compromise, suspension, or termination on a claim over \$100,000. 4 C.F.R. § 105.2(b).

Obviously, the agency does not know at the outset of the collection process whether a referral to the Justice Department will be required. Nevertheless, it is clearly advantageous to use the CCLR as a "running record" of the agency's collection actions. This will greatly expedite and facilitate submission of the CCLR if and when needed.

The agency may, if it wishes, have the CCLR prepared by a debt collection contractor. The Federal Supply Schedule for debt collection services includes preparation of the CCLR when requested by the ordering agency. For further detail, see Adjunct Services Guidelines issued by the Treasury

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Department's Financial Management Service in 1988 to supplement the Supply Schedule.

Once an agency has referred a claim to the Justice Department (or to GAO) under 4 C.F.R. § 105.1, it should not undertake any further collection actions. It is especially important that the agency promptly notify Justice (or GAO, as applicable) if it receives any further payments from the debtor.

b. Federal Debt Collection  
Procedures Act

The Department of Justice, upon receipt of a debt claim referred to it by another agency, has a wide range of authorities available to enforce collection. The statutory basis is the Federal Debt Collection Procedures Act of 1990, enacted as title XXXVI of the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789, 4933 (1990), codified at 28 U.S.C. ch. 176.

Subchapter A, sections 3001-15, defines terms and sets forth some general provisions. The definition of "debt," 28 U.S.C. § 3002(3), is based in part on the detailed definition contained in the original Debt Collection Act of 1982 but is even more detailed. Under 28 U.S.C. § 3011, the government may, in certain cases, recover a 10 percent surcharge to cover the costs of litigation and enforcement.

Subchapter B, sections 3101-05, covers prejudgment remedies. Subject to notice and hearing requirements, these include obtaining a writ of attachment, establishing a receivership, garnishment of property (except earnings) in the possession or control of some third party, and sequestration of income.

Subchapter C, sections 3201-3206, addresses postjudgment remedies. One provision, 28 U.S.C. § 3201, provides for the creation of a judgment lien on real property, with a maximum duration of 40 years. A debtor subject to such a lien

"shall not be eligible to receive any grant or loan which is made, insured, guaranteed, or financed directly or indirectly by the United States or to receive funds directly from the Federal Government in any program, except funds to which the debtor is entitled as beneficiary, until the judgment is paid in full or otherwise satisfied."

Id. § 3201(e). Program agencies may, by regulation, provide for waiver of this restriction. Id.

Subchapter D, sections 3301-3308, defines certain transfers of assets by debtors as fraudulent, and permits the government to avoid those transfers

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or to proceed against the assets themselves or other property of the transferee.

c. Contracting for Legal Services

The Justice Department is the government's litigator (28 U.S.C. §§ 516–519). Therefore, individual agencies cannot litigate their own debt claims without either statutory authority or a delegation from the Attorney General. Also, the debt collection contracts authorized by 31 U.S.C. § 3718(a) cannot include legal services as this could constitute the unauthorized practice of law in many states. With increased emphasis on debt collection throughout the federal government, the resulting burden on the Justice Department should be apparent. As of September 30, 1985, the Justice Department was handling nearly 97,000 civil debt cases.<sup>54</sup> Despite the best efforts on everyone's part, this places Justice in an extremely difficult position in terms of allocating its own limited resources.

During the mid-1980s, Congress considered a number of bills to permit contracting with private counsel for legal services in the debt collection area. In commenting on several of these bills, GAO supported the concept, under proper supervision. See, for example, B-221099, February 18, 1986, outlining GAO's views as to what such legislation should contain. Use of private attorneys could have several advantages, such as increasing the government's yield on smaller claims which agencies would otherwise have to write off. E.g., B-212528, September 23, 1985.

The legislation was enacted in the form of Public Law 99–578, 100 Stat. 3305 (1986), codified at 31 U.S.C. §§ 3718(b) and (c). The law authorizes the Attorney General to contract with private counsel for legal services in debt collection cases, subject to the requirements for competition applicable to government procurement generally. Fees are to be based on fees typically charged private clients for similar services in the same geographical area.

As with the debt collection contracts authorized by 31 U.S.C. § 3718(a), the legal service contracts may be structured on a fixed-fee or contingent-fee basis, with fixed-fee contracts to be effective only to the extent provided in advance in appropriation acts. 31 U.S.C. §§ 3718(d) and (e).

The “first life” of Public Law 99–578 was to be a 3-year pilot program to be conducted in 5 to 10 judicial districts in accordance with the Attorney General's implementing regulations (28 C.F.R. Part 11). Pub. L. No. 99–578,

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<sup>54</sup>GAO report, Justice Department: Impediments Faced in Litigating and Collecting Debts Owed the Government, GAO/GGD-87-7BR (October 1986), at 23.

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§§ 3–5, 31 U.S.C. § 3718 note. The program was extended for another two years in 1990. Pub. L. No. 101–302, 104 Stat. 213, 216 (1990). It was later extended to September 30, 1996, and the number of judicial districts increased to 15. Pub. L. No. 102–589, § 4, 106 Stat. 5133, 5134 (1992).

GAO reviewed the initial phases of the program and issued a report entitled Department of Justice: Status of Implementing Private Attorney Debt Collection Pilot Program, GAO/GGD-89-90 (August 1989). GAO found that the requirements for competition had generally been followed and that the contract prices were reasonable. However, existing cost data did not permit a meaningful effectiveness comparison between the private attorneys and government attorneys. One district has reported extensive use of the authority in delinquent student loan cases. United States v. Spann, 797 F. Supp. 980, 983 (S.D. Fla. 1992).

#### d. Bidding In at Execution Sale

Obtaining a judgment against the debtor does not automatically put any money in the Treasury. If the debtor does not pay the judgment voluntarily, it may be necessary to execute the judgment against the debtor's property. When the government is executing against real property, 31 U.S.C. § 3715 authorizes the creditor agency to bid at the execution sale. It provides:

“The head of an agency for whom a civil action is brought against a debtor of the United States Government may buy real property of the debtor at a sale on execution of the real property of the debtor resulting from the action. The head of the agency may not bid more for the property than the amount of the judgment for which the property is being sold, and costs. The marshal of the district in which the sale is held shall transfer the property to the Government.”

This statute is not part of the Federal Claims Collection Act. It has been on the books since 1824 (4 Stat. 51). A 1965 report of the Senate Judiciary Committee revealed that it is used somewhat infrequently.<sup>55</sup> Nevertheless, “it could be useful in some cases in which forced sale values might not otherwise be expected to approximate fair market values.” B-186813-O.M., October 14, 1976.

The 1982 recodification of Title 31 omitted one detail specified in the source statute—the explicit authority of the creditor agency to appoint an agent to bid at the sale, language the recodifiers thought “unnecessary.”<sup>56</sup>

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<sup>55</sup>Twenty-one cases for the period 1946–62, according to S. Rep. No. 234, 89th Cong., 1st Sess., reprinted in 1965 U.S. Code Cong. & Admin. News 1575, 1577.

<sup>56</sup>Compare 31 U.S.C. § 3715 (1988) with 31 U.S.C. § 195 (1976).

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GAO, in its only relatively recent experience under this statute (B-186813-O.M., cited above), appointed the Assistant United States Attorney.

An agency may bid under 31 U.S.C. § 3715 even if it otherwise lacks authority to acquire real property. 34 Comp. Gen. 47, 50 (1954).

Real property acquired under 31 U.S.C. § 3715 is under the control of the General Services Administration. 40 U.S.C. § 301. If, subsequent to transfer of the property to the United States, the debtor pays the debt in full in money, the Administrator of GSA is authorized to reconvey the property to the debtor or the debtor's heirs or devisees. Id. § 306.

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## E. Government's Right of Setoff

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### 1. Introduction

One of the more logical concepts in the law is setoff. Simply stated, if I owe you \$100 and you owe me \$50, I "set off" the \$50 that you owe me against the \$100 that I owe you, and my payment to you of \$50 discharges both claims. The concept is "grounded on the absurdity of making A pay B when B owes A." Studley v. Boylston National Bank, 229 U.S. 523, 528 (1913). GAO has frequently stated the rule as follows, quoting from 1 Comp. Gen. 605, 606 (1922):

"Every creditor has the right to apply the moneys of his debtor in his hands in the extinguishment of claims due him from the debtor."

The right of setoff derives from the common law. It does not require statutory authority, although as we will see, most applications in federal debt collection are now governed by statute. Of course, it is not available in any situation where it is expressly prohibited by statute.

The right of setoff available to the private creditor is equally available to the federal government. The most often-quoted statement of this principle, at least by GAO, is the following statement from United States v. Munsey Trust Co., 332 U.S. 234, 239 (1947):

“The government has the same right ‘which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.’ [Citations omitted.]”

The government’s right of setoff applies to debts arising from unrelated as well as related transactions, and to noncontractual as well as contractual debts. The right has been consistently recognized by the Supreme Court,<sup>57</sup> the Comptroller General,<sup>58</sup> and the Attorney General.<sup>59</sup>

GAO, in the performance of its claims settlement functions (e.g., claims referred to it under 4 C.F.R. § 105.1), may also exercise the government’s right of setoff.<sup>60</sup> GAO’s setoff authority prior to the Federal Claims Collection and Debt Collection Acts derived by necessary implication from 31 U.S.C. § 3702(a), GAO’s basic claims settlement authority, in addition to the common law and GAO’s other statutory authorities.<sup>61</sup>

There is no requirement that the government’s claim be reduced to judgment before setoff may be used. An administrative determination of indebtedness is sufficient. E.g., United States v. American Surety Co., 158 F.2d 12 (5th Cir. 1946); 56 Comp. Gen. 264 (1977); 3 Comp. Gen. 1006, 1007 (1924); B-195126, January 17, 1980; B-162376, September 20, 1967; B-84150, October 22, 1951. A debtor who disputes an administrative setoff may seek judicial review.

As we noted earlier in this chapter, there is a technical distinction between “setoff” and “recoupment.” For purposes of this discussion, we use “setoff” or “offset” to cover both situations. Another synonym for offset, found mostly in older cases involving military personnel, is “checkage.”

Offsets can be categorized as either administrative or judicial. An administrative offset is one taken by an agency; a judicial offset is

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<sup>57</sup>See, in addition to the Munsey Trust case cited in the text, Pearlman v. Reliance Ins. Co., 371 U.S. 132, 140 (1962); Cherry Cotton Mills, Inc. v. United States, 327 U.S. 536 (1946), aff’g 59 F. Supp. 122 (Ct. Cl. 1945); Barry v. United States, 229 U.S. 47 (1913); McKnight v. United States, 98 U.S. 179 (1878), aff’g 13 Ct. Cl. 292 (1877); Grafiot v. United States, 40 U.S. (15 Pet.) 336 (1841).

<sup>58</sup>E.g., 14 Comp. Gen. 849 (1935); 6 Comp. Gen. 810 (1927); 3 Comp. Gen. 1006 (1924); B-152507, November 29, 1963; B-151895, August 9, 1963; B-146353, August 17, 1961; B-128358, July 9, 1956.

<sup>59</sup>E.g., 37 Op. Att’y Gen. 215, 216 (1933).

<sup>60</sup>E.g., United States v. Munsey Trust Co., 332 U.S. 234, 240 (1947); United States v. American Surety Co., 158 F.2d 12 (5th Cir. 1946); John P. Squire Co. v. United States, 30 F. Supp. 708 (Ct. Cl. 1940), cert. denied, 309 U.S. 689; Taggart v. United States, 17 Ct. Cl. 322 (1881); Bonafon v. United States, 14 Ct. Cl. 484 (1878).

<sup>61</sup>E.g., 14 Comp. Gen. 849 (1935); 1 Comp. Gen. 605 (1922); B-143573, July 5, 1963.

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accomplished by direction of a court. As we will set out in detail later, the Debt Collection Act of 1982 contained two offset provisions—section 5 dealing with offset against the salary of federal employees, and section 10 dealing with administrative offset generally. The terms “salary offset” and “administrative offset” have come to be associated with these two provisions. In addition, there is at the present time a proliferation of other statutes dealing with offset in various situations—several are cited in 64 Comp. Gen. 142, 144 n.2 (1984)—the result being that the topic has acquired an unfortunate degree of complexity. For purposes of establishing a basic conceptual framework, however, it should be kept in mind that all types of nonjudicial offset, including salary offset, are forms of “administrative offset” in the broader sense, the main difference being the different statutes and regulations applicable to the various types. See 64 Comp. Gen. at 144–47.

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## 2. The Due Process Requirement

One of the fundamental underpinnings of American society is the constitutional rule that no person may be deprived of life, liberty, or property without “due process of law.” The Fifth Amendment imposes this requirement on the federal government, the Fourteenth on the states.

Most offset opportunities will likely involve a property right protected under the Due Process Clause. For example, a person’s entitlement to earned wages is a protected property right. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). So is the statutorily created interest in the continued receipt of Social Security disability benefits. Mathews v. Eldridge, 424 U.S. 319, 332 (1976). The interest of a retired federal employee in the receipt of his or her retirement benefits is similarly subject to due process. Wisdom v. Department of Housing and Urban Development, 713 F.2d 422 (8th Cir. 1983); Atwater v. Roudebush, 452 F. Supp. 622, 626–27 (N.D. Ill. 1976).

If due process applies, what kind of process, and how much of it, is due? The two essential elements of procedural due process are notice and an opportunity to be heard. Mullane v. Central Bank & Trust Co., 339 U.S. 306, 313 (1950). Note that we did not say “hearing.” We said “opportunity to be heard.” There is a big difference. Actually, the requirement is for an “opportunity for hearing appropriate to the nature of the case.” Id.

The term “hearing” is often misunderstood. People tend to automatically equate the term with a full-blown, trial-type proceeding with lawyers, cross-examination, transcripts, etc. This, however, is not the case. The

Supreme Court has recognized that “[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the . . . proceedings.” Boddie v. Connecticut, 401 U.S. 371, 378 (1971). A lower court has offered the following definition:

“A ‘hearing’ means any confrontation, oral or otherwise, between an affected individual and an agency decisionmaker sufficient to allow the individual to present his case in a meaningful manner. Hearings may take many forms, including a ‘formal,’ trial-type proceeding, an ‘informal discuss[ion]’ . . . or a ‘paper hearing,’ without any opportunity for oral exchange.”

Gray Panthers v. Schweiker, 652 F.2d 146, 148 n.3 (D.C. Cir. 1981).

Thus, the first question in applying the due process hearing requirement is to determine whether some form of oral hearing is required. A case we have already cited several times in this chapter, Califano v. Yamasaki, 442 U.S. 682 (1979), provides guidance. The test is whether the type of determination involved is likely to involve issues of credibility or veracity. Such issues, the Court explained, cannot be fairly evaluated without personal contact between the person from whom collection is sought and the person deciding the case. Id. at 697. If such issues are usually involved, then an oral hearing is required. If not, then an oral hearing is not required, even though an occasional case of the type in question may raise such an issue. The Court stated:

“[W]e do not think that the rare instance in which a credibility dispute is relevant . . . is sufficient to require the Secretary to sift through all requests for reconsideration and grant [an oral] hearing to the few that involve credibility. . . . [S]ome leeway for practical administration must be allowed.”

Id. at 696. The point to emphasize is that the test is applied by category, not by individual case.

If, under the Yamasaki test, an oral hearing is not required, due process is satisfied by a “paper hearing”—a review of the written record including, of course, any written submissions the debtor may wish to have considered.

Another case which is important in helping to make the oral vs. paper hearing determination is Mathews v. Eldridge, 424 U.S. 319 (1976), in which the Supreme Court held that constitutional due process does not

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require an oral hearing prior to termination of Social Security disability insurance benefits. The Court summarized the relevant factors as follows:

“[R]esolution of the issue whether . . . administrative procedures . . . are constitutionally sufficient requires analysis of the governmental and private interests that are affected. . . . More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”

Id. at 334–35. Applying this test, one court has held that a review of written submissions (paper hearing), with reasonable discovery, would satisfy constitutional due process in a dispute over the offset of overpayments by the Department of Housing and Urban Development under the Housing Act. Housing Authority of the County of King v. Pierce, 701 F. Supp. 844 (D.D.C. 1988), vacated in part, 711 F. Supp. 19 (D.D.C. 1989). (Both decisions must be read together.)

Even in those cases where an oral hearing is required, this still does not automatically mean a trial-type evidentiary hearing. The standard, as noted above, is a hearing “appropriate to the nature of the case.” Thus, the form of oral hearings can range from a telephone conference to an informal face-to-face meeting to a trial-type hearing. Unfortunately, there is no simple formula for determining the appropriate level of formality. For further discussion, see Mathews v. Eldridge, in which the Court noted that “[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances” (424 U.S. at 348), and noted further that in only one case, Goldberg v. Kelly, 397 U.S. 254 (1970), involving the termination of welfare benefits, has the Court required a trial-type evidentiary hearing (424 U.S. at 333).

To sum up, a hearing may be either an oral hearing or a paper hearing. Yamasaki and Eldridge provide guidance in determining when an oral hearing is required. When an oral hearing is required, a careful study of Mathews v. Eldridge is a good starting point for determining the level of formality.

With respect to constitutional due process, two final points should be noted. First, due process rights may be waived. D.H. Overmyer Co. v. Frick

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Co., 405 U.S. 174, 185–86 (1972); Boddie v. Connecticut, 401 U.S. 371, 378–79 (1971); 64 Comp. Gen. 493, 498–99 (1985). Second, due process must normally precede the deprivation of property, “except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.” Boddie, 401 U.S. at 379. Post-deprivation hearings must be provided promptly. E.g., Bailey v. Secretary of Labor, 810 F. Supp. 261, 263 (D. Alaska 1993).

Prior to the 1984 revision of the Federal Claims Collection Standards, the Standards were largely silent on procedural protections. Since enactment of the Debt Collection Act in 1982 and the 1984 revision of the Standards, the applicable procedures for most administrative offsets are provided by statute or governmentwide regulation. It is nevertheless important to understand constitutional due process, for several reasons:

(1) The constitutional requirement, as interpreted by the Supreme Court, forms the basis against which statutory or regulatory procedures will be measured. (The constitutional standard is the minimum. Congress may—and has done so in certain instances—provide procedural protections by statute beyond what the Constitution would otherwise require.)

(2) Although many offset statutes do not specify procedural protections, a fair reading of judicial precedent compels the conclusion that some will be required. As the Comptroller General has stated, “the question would seem to be not whether procedural protections are required, but what form they should take.” 64 Comp. Gen. 142, 148 (1984). This would seem equally true under the common law. E.g., Housing Authority of the County of King v. Pierce, 701 F. Supp. 844 (D.D.C. 1988), vacated in part on other grounds, 711 F. Supp. 19 (D.D.C. 1989).

(3) The procedures provided in the Federal Claims Collection Standards are based heavily on the Supreme Court’s decisions, and are designed to satisfy constitutional due process as the Court has thus far interpreted it.

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### 3. Administrative Offset

#### a. Law Prior to the Debt Collection Act

As noted earlier, the federal government has long asserted its right under the common law to collect debts by means of administrative offset, and the courts, including the Supreme Court, have recognized and upheld this right.

In 1966, Congress enacted the Federal Claims Collection Act which gave agencies an affirmative duty to pursue collection action and authorized issuance of the Federal Claims Collection Standards. While the Federal Claims Collection Act did not specifically mention offset, the Standards since their inception included a provision instructing agencies to use administrative offset whenever feasible. See 31 Fed. Reg. 13381, 13382 (1966) (original 4 C.F.R. § 102.3).

Thus, it has been suggested that, since 1966, administrative offset has had somewhat of a statutory basis, albeit not an explicit one, and was no longer purely a common-law offset. See Louisiana v. Bergland, 531 F. Supp. 118, 122 (M.D. La. 1982), aff'd sub nom. Louisiana v. Block, 694 F.2d 430, 432 n.4 (5th Cir. 1982).

b. 31 U.S.C. § 3716

With the enactment of section 10 of the Debt Collection Act of 1982, codified at 31 U.S.C. §§ 3701(a)(1) and 3716, Congress provided an explicit governmentwide statutory basis for administrative offset. The corresponding provision of the Federal Claims Collection Standards is 4 C.F.R. § 102.3.

The statute defines “administrative offset” as “withholding money payable by the United States Government to, or held by the Government for, a person to satisfy a debt the person owes the Government.” 31 U.S.C. § 3701(a)(1). The basic authority for administrative offset is found in 31 U.S.C. § 3716(a):

“After trying to collect a claim from a person under section 3711(a) of this title, the head of an executive or legislative agency may collect the claim by administrative offset.”

This does not require the agency to attempt the full range of administrative collection actions, but it does mean that offset cannot be the sole first step. As noted in our discussion of demand letters, an offset opportunity justifies deviation from the normal demand cycle. The agency’s first letter to the debtor can combine demand for payment with notification of intent to collect by offset, but it must give the debtor the opportunity to avoid the offset by making voluntary payment. 4 C.F.R. § 102.2(e).

The Standards contain the following general prescription:

“Collection by administrative offset will be undertaken in accordance with these standards and implementing regulations established by each agency on all claims which are

liquidated or certain in amount in every instance in which such collection is determined to be feasible and not otherwise prohibited.” 4 C.F.R. § 102.3(a).

The phrase “liquidated or certain in amount” is merely an incorporation of the limitation applicable to setoff generally. E.g., 56 Comp. Gen. 279, 288 (1977). The regulations do not further define it, but it has been held not to preclude setoff merely because the claim is disputed or the dispute has not yet been finally resolved. E.g., B-193432/B-211194, January 5, 1984. It also does not preclude setoff of an estimated amount. See B-187178, October 7, 1976. However, under certain circumstances, a claim whose amount is derived from statistical sampling may not be sufficiently “liquidated or certain in amount” to support offset under 4 C.F.R. § 102.3(a). 56 Comp. Gen. 963 (1977). See also B-210600, September 18, 1984 (claim against airline calculated from experience of other airlines too conjectural for offset purposes).

Section 102.3(a)(2) discusses when offset is “feasible.” Offset is not mandatory in every case in which there is an available source of funds. Rather, the determination is “to be made by the creditor agency on a case-by-case basis, in the exercise of sound discretion.” Id. The agency should weigh all relevant factors, including the debtor’s financial condition and the extent to which offset might thwart the purposes of the program against whose funds the offset is contemplated. Id. As one court put it, section 102.3(a)(2) “makes explicit the non-mandatory nature of the offset authority and the considerations involved in its exercise.” American Bankers Association v. Bennett, 618 F. Supp. 1528, 1531 (D.D.C. 1985), vacated on other grounds, 802 F.2d 1483 (D.C. Cir. 1986). The standard of feasibility had always been viewed as incorporating the exercise of discretion. E.g., B-167635, November 18, 1975. The detail which is now in section 102.3(a)(2) was taken largely from 62 Comp. Gen. 599 (1983). The regulation does not specify cost effectiveness as one of the factors in the equation. However, as the 1984 preamble notes, “the concept of feasibility is sufficiently broad so as to encompass cost effectiveness in appropriate situations.” 49 Fed. Reg. at 8890.

Agencies are required to issue regulations on administrative offset. 31 U.S.C. § 3716(b); 4 C.F.R. § 102.3(b)(1). An agency attempting an administrative offset without regulations risks having the offset invalidated, although the subsequent issuance and application of regulations which satisfy all requirements have been found to cure violations. Allison v. Madigan, 951 F.2d 869 (8th Cir. 1991); Moseanko v. Yeutter, 944 F.2d 418 (8th Cir. 1991). One thing an agency may do in its regulations is flesh out the definition of

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“person” against whose assets offset may be taken. McCall Stock Farms, Inc. v. United States, 14 F.3d 1562 (Fed. Cir. 1993) (upholding an application of the “alter ego” doctrine).

Section 3716(a) gives the debtor certain procedural rights. The agency must give the debtor written notice of the nature and amount of the debt, the agency’s intent to collect by offset, and an explanation of the following rights:

- Opportunity for review within the agency of the agency’s determination as to the existence and amount of the debt;
- Opportunity to inspect and copy agency records relating to the debt; and
- Opportunity to enter into a written repayment agreement.<sup>62</sup>

The Federal Claims Collection Standards, specifically 4 C.F.R. § 102.3(c), prescribe when “review within the agency” must take the form of an oral hearing, and when a “paper hearing” will suffice. The objective, as explained in the preamble to the 1984 revision of the Standards, is to assure compliance with constitutional due process as well as the statute itself. 49 Fed. Reg. at 8891. To do this, the Standards use the Supreme Court’s Yamasaki test described previously, under which the type of hearing depends on whether issues of credibility or veracity are involved. If an oral hearing is required under section 102.3(c), it does not have to be a formal, trial-type evidentiary hearing unless otherwise required by law. 4 C.F.R. § 102.3(c)(1).

How should an agency evaluate a debtor’s offer to enter into a repayment agreement? The determination is largely discretionary, although the Standards provide some guidance:

“The determination should balance the Government’s interest in collecting the debt against fairness to the debtor. If the debt is delinquent and the debtor has not disputed its existence or amount, an agency should accept a repayment agreement in lieu of offset only if the debtor is able to establish that offset would result in undue financial hardship or would be against equity and good conscience.” 4 C.F.R. § 102.3(b)(2)(i).

“An agency,” added the 1984 preamble, “is not required to accept an unreasonable proposal.” 49 Fed. Reg. at 8891.

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<sup>62</sup>This is an example of Congress going beyond the constitutionally required minimum. Constitutional due process does not include the right to negotiate a repayment agreement. Wisdom v. Department of Housing and Urban Development, 713 F.2d 422, 425 (8th Cir. 1983).

In our previous capsule summary of constitutional due process, we noted that the government can seize first and give the hearing later if warranted by a sufficient governmental interest. The Standards incorporate this point in 4 C.F.R. § 102.3(b)(5), which permits taking the offset prior to completion of the required procedures if necessary to protect the government's ability to collect the debt. The preamble emphasizes that this permits deviation from the time sequence, not elimination of the procedures. 49 Fed. Reg. at 8891. An agency availing itself of this deviation must provide the appropriate procedures promptly after the offset. B-246307.2, August 5, 1992.

As with constitutional due process, rights under 31 U.S.C. § 3716 may be waived as long as the waiver is voluntarily, knowingly, and intelligently made. Similarly, the parties may contractually agree to different procedures, in which event the agreement takes precedence. 64 Comp. Gen. 493, 498 (1985).

An agency is not required to duplicate procedures already provided under some other authority. 4 C.F.R. § 102.3(b)(2)(ii). The debtor may be entitled to due process, but is not entitled to get it twice on the same debt.

If a creditor agency is seeking to offset against a payment to be made by another agency, it is the creditor agency's responsibility to provide the required procedures. In its request for offset, the creditor agency must certify in writing that it has complied with section 102.3. 4 C.F.R. § 102.3(f). The agency receiving the request is expected to cooperate. *Id.* § 102.3(d). It is not the receiving agency's responsibility to look behind a compliance certification that is sufficient on its face. Agency offset regulations should address both ends of this situation—making offset requests to other agencies and processing requests received from other agencies. *Id.* § 102.3(b)(2). “[A]ppropriate regulations are necessary for agencies at both ends of the offsetting process.” American Bankers Association v. Bennett, 618 F. Supp. at 1532.

How is an agency to know if it is about to make a payment to someone who is indebted to another agency? There is, as of the date of this publication, no centralized data bank of persons or organizations indebted to the government. Some favor such a concept because it would greatly facilitate collection. Others, invoking undesirable Orwellian imagery, oppose it. Whatever one's views on this question, the fact is that a centralized governmentwide data base for debt collection purposes does not exist.

There is only a partial and limited solution, based on probabilities and common sense. It is clearly not feasible for an agency to check with every other federal agency before making a payment. A selective check, however, may be useful in appropriate cases. For example, an agency making payment to a group of individuals might check with the Department of Education for delinquent student loans. If farmers are involved, the Agricultural Stabilization and Conservation Service (ASCS), Department of Agriculture, may be able to help. The ASCS maintains a listing at the county level of persons indebted under ASCS programs. This is called the Federal Debt Register or Claims Control Record.<sup>63</sup> In addition, the ASCS will cooperate in offsetting debts owed by ASCS program participants to other agencies. 7 C.F.R. § 13.6. For contract debts, a useful device is the Army Holdup List, described later.

An agency may not use administrative offset under 31 U.S.C. § 3716 to collect a debt which has been outstanding for more than 10 years. Id. § 3716(c)(1); 4 C.F.R. § 102.3(b)(3).

Under the definition of administrative offset noted earlier, any money payable to the debtor, or held by the government for the debtor, is “fair game” for offset unless prohibited by some other law. This would include a Treasury check drawn payable to the debtor and deposited with the clerk of a court pending disposition at the court’s order. The funds evidenced by the check are considered sufficiently within the possession and control of the United States for offset purposes. United States v. Trinity Universal Insurance Co., 249 F.2d 350 (5th Cir. 1957). (While this case predates the Federal Claims Collection and Debt Collection Acts, the point would appear equally valid under 31 U.S.C. § 3716.)

### c. Contract Debts

#### (1) Right of setoff generally<sup>64</sup>

In our discussion of the common-law foundation of federal debt collection, we noted the fundamental principle of United States v. Wurts that the government has the inherent right, independent of statute, to collect debts owed to it. This right applies with full force to contract claims. Consortium

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<sup>63</sup>One court has overbroadly described this as a listing of “all those whom the government reasonably believes owes it money.” United States v. Medlin, 767 F.2d 1104, 1106 (5th Cir. 1985).

<sup>64</sup>Section 6(a) of the Contract Disputes Act of 1978, 41 U.S.C. § 605(a), provides that “[a]ll claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer.” While a contracting officer or agency head is still free to seek GAO’s advice, appeals from the contracting officer’s decision go to a board of contract appeals or directly to court. Thus, the boards of contract appeals now constitute the primary source of administrative case law in this area, with GAO’s involvement correspondingly decreasing.

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Venture Corp. v. United States, 5 Cl. Ct. 47 (1984); Burnett Electronics Laboratory, Inc., ASBCA No. 23938, 80-2 BCA ¶ 14,619 (1980); Foreman Industries, Inc., ASBCA No. 23948, 80-2 BCA ¶ 14,501 (1980).

Contract debts arise in many ways. The Federal Acquisition Regulation, at 48 C.F.R. § 32.602, gives several examples, a few of which are:

- Damages or excess costs resulting from default in performance.
- Government expense of correcting defects.
- Overpayments resulting from errors in quantity or billing.
- Retroactive price reductions resulting from price redetermination clauses.

Because a contractor is more likely to have an ongoing, or at least recurring, relationship with the government, and because of the nature of contract financing, offset opportunities tend to be more common in the context of contract claims. Administrative offset has traditionally been a pivotal means of collecting contract debts, and the government's right to use it has been recognized in a wide variety of situations.

As a general proposition, if a contractor is indebted to the government, the government may set off the indebtedness against contract payments. E.g., Madden v. United States, 371 F.2d 469 (Ct. Cl. 1967); Tatelbaum v. United States, 10 Cl. Ct. 207, 210 (1986); 62 Comp. Gen. 337 (1983); 28 Comp. Gen. 543 (1949); 4 Comp. Gen. 177 (1924).

The debt and payment may be attributable to the same transaction or contract. For example, the Navy could set off against the final contract payment the cost of work remaining to be performed under a warranty clause. B-187178, October 7, 1976. Similarly, the Air Force could set off, for payment to the Internal Revenue Service, underpayments of the contractor's share of Federal Insurance Contribution Act (Social Security) payments. B-196064, November 18, 1980. Setoff under a Bonneville Power Administration contract was appropriate in B-188473, August 3, 1977, to reimburse the Forest Service, pursuant to a clause in the contract, for firefighting costs the Forest Service incurred suppressing a fire caused by the contractor's operations.

The debt may also result from a separate and independent transaction. Thus, indebtedness under one contract may be set off against payments due under another contract. 2 Comp. Gen. 479 (1923); B-176791, September 8, 1972; B-168619, January 14, 1970; 4-J Sales & Service, DOT

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BCA No. 1904, 89-1 BCA ¶ 21,209 (1988). As the Supreme Court said in Barry v. United States, 229 U.S. 47, 53 (1913):

“It would be folly to require the Government to pay under the one contract what it must eventually recover for a breach of the other.”

The indebtedness to be offset need not be contractual. For example, in B-184506, October 29, 1975, GAO found setoff against contract payments a proper means to collect improperly refunded license fees.

If the amount of the government’s claim has not yet been finalized, the government may set off a reasonable estimate. E.g., B-187178, October 7, 1976; B-176791, September 8, 1972. The setoff of an estimate is authorized notwithstanding the absence of a final resolution of a contract dispute (administrative or judicial) underlying the debt. B-188473, August 3, 1977; B-178368, September 24, 1973; B-163625, March 14, 1968.<sup>65</sup> Although the government may base its setoff on an estimate, it may not base its estimate on statistical sampling. 56 Comp. Gen. 963 (1977).

Where a new corporation is in essence a mere continuation of an old (debtor) corporation, debts of the old corporation may be set off against contract payments to the new corporation. The new corporation seeking to avoid liability has the burden of establishing that it is not a mere continuation. B-212991, November 28, 1983; B-191129, September 8, 1978. However, the fact that two corporations were organized by the same officers and shareholders and that one is carrying on the business of the other with the same assets and personnel, while raising a strong presumption, does not automatically establish liability. Thus, setoff against a “buyer” corporation meeting these tests was held improper where the “buyer” had been in existence for several years prior to acquisition, the debtor remained in corporate existence, and the transfer was supported by a fair cash consideration. B-193966, April 12, 1979. The same concepts apply to two co-existent corporations. A creditor agency may “pierce the corporate veil” if it has sufficient factual basis to conclude that the two are essentially different names for the same entity, and the corporation adversely affected then has the burden of showing that the agency is wrong. B-230158.2, March 1, 1991.

The concept of “piercing the corporate veil” usually involves finding individuals liable for debts incurred by a corporation. A case involving a

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<sup>65</sup>This is not really a setoff. It is more akin to a preliminary withholding pending completion of the dispute resolution, which the government is entitled to do. E.g., Cord Moving & Storage Co. v. United States, 17 Cl. Ct. 741, 743 (1989).

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“reverse pierce” is McCall Stock Farms, Inc. v. United States, 14 F.3d 1562 (Fed. Cir. 1993), upholding an offset against a corporation for a debt incurred by its principals as individuals.

A corporation is not liable for debts incurred by one of its officers in his or her individual capacity after leaving the corporation. Thus, contract payments to a corporation could not be used to set off debts the former president of the corporation incurred under government contracts he had entered into as an individual after leaving the corporation. 56 Comp. Gen. 499 (1977).

With respect to a partnership or joint venture, the general rule is that a payment to the partnership or joint venture may not be used to offset the prior, independent indebtedness of an individual partner or co-venturer. 48 Comp. Gen. 365 (1968); 39 Comp. Gen. 438 (1959). However, if there is an agreement by all parties to the contract that the individual’s liability will be borne by partnership or joint venture assets, the rule does not apply. 48 Comp. Gen. at 368.

The government’s right of setoff applies to debts owed to the Small Business Administration by a “section 8(a)” subcontractor. B-189183, January 12, 1979; B-177648, August 10, 1973, aff’d upon reconsideration, B-177648, December 14, 1973.

In 46 Comp. Gen. 178 (1966), the Comptroller General held that moneys withheld from a contractor under the Davis-Bacon Act were available for setoff of government claims against the contractor, at least before the contracting agency transferred the funds to GAO. The Comptroller General modified this decision in 55 Comp. Gen. 744 (1976), holding that the claims of underpaid workers have priority over an IRS tax levy to withheld Davis-Bacon funds.

However, funds withheld under the Davis-Bacon Act are not available to pay the claims of underpaid laborers arising from the performance of a different contract by the same contractor. B-189535, August 9, 1977; B-187142, December 28, 1976; B-187761-O.M., April 15, 1977. GAO has applied the same principle to the Contract Work Hours and Safety Standards Act. 48 Comp. Gen. 387 (1968); B-187142, December 28, 1976; B-170784, February 17, 1971.

Debts resulting from violations of the Walsh-Healey Act, 41 U.S.C. §§ 35–45, may be collected by withholding from “any amounts due on any

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such contracts.” 41 U.S.C. § 36. This provision has been construed to permit offset against other contracts subject to the Walsh-Healey Act, whether or not there were violations under those other contracts, but not against contracts not subject to the Walsh-Healey Act. Unexcelled Chemical Corp. v. United States, 149 F. Supp. 383 (Ct. Cl. 1957); Ready-Mix Concrete Co. v. United States, 130 F. Supp. 390 (Ct. Cl. 1955); B-144604(1), December 18, 1961.

A claim for excess costs under one contract may be set off against the balance due under another contract with the same contracting agency, and a tax claim is subordinate to the excess cost claim. B-189902, October 5, 1977.

Setoff issues frequently arise in cases involving competing claims to unpaid contract balances. The claimants may include assignees under the Assignment of Claims Act, Miller Act performance and payment bond sureties, the Internal Revenue Service, and other government agencies. These cases are discussed in Chapter 12 under the headings “Contract Financing: The Assignment of Contract Payments” and “Priority to Contract Balances.”

The government is under no obligation to exercise the right of setoff against money due a contractor on unrelated contracts for the benefit of a surety, for example, for the purpose of holding a surety harmless on a defaulted contract. B-160641, April 28, 1967.

An award by a board of contract appeals is subject to setoff just like any other contract payment. When a monetary board award is submitted to GAO for payment from the permanent judgment appropriation (31 U.S.C. § 1304), GAO uses the procedures prescribed by 31 U.S.C. § 3728 for setoff against court judgments.

A different type of contract setoff question arose in B-186852, October 21, 1976. The General Services Administration was selling excess zinc and inadvertently overstated the remaining undelivered quantity. Based on GSA’s error, the purchaser overpaid the purchase price. The Comptroller General held that GSA could retain the overpayment to set off a prior unrelated debt of the purchaser.

(2) Repayment bond in lieu of setoff

Prior to the Federal Claims Collection Act of 1966, GAO had held that there was no authority to accept a repayment bond in lieu of setoff. The reasons were set forth in B-71886, January 28, 1948, as follows:

“[T]here is no express provision of law authorizing this Office to accept a bond of indemnity as security for the payment of such an account. The practical effect of the action urged by you would be to deprive the United States of the use of the amount involved for an indefinite period of time, in order to confer an equal benefit upon the company, which company would be permitted to substitute for its obligation a bond upon which the United States well might be required to initiate legal proceedings. Manifestly, such action would be contrary to the interests of the United States. The hardship, if there be any, may not be assumed by the Government but must rest where it falls. Moreover, the offset of amounts due the company obviously is best fitted to protect the United States, especially in cases of disputed liability.”

Under the Federal Claims Collection Act and Standards, as noted earlier, an agency has authority to determine whether collection by offset is feasible in a particular instance. Therefore, the agency has discretionary authority to accept a repayment bond if it determines that offset is not feasible. B-167635, November 18, 1975. The factors noted in the 1948 decision are, of course, relevant in making this determination, keeping in mind that an officer of the United States is expected to protect the interests of the United States. The device should therefore be used sparingly.

(3) Setoff against security deposit

As a general proposition, a security deposit being held by the government should not be used to offset a debt which arose under a separate contract, unless authorized by the solicitation or contract under which the deposit was given. The cases generally involve contracts for the sale of government property (timber sales, surplus property sales, etc.), and range from deposits by unsuccessful bidders to default situations to disposition upon contract completion.

A key decision is 33 Comp. Gen. 262 (1953). A contractor had obtained an excessive weight permit to transport logs from a national forest, and refused to pay the permit fee. The National Park Service held two separate sums of money against which it wanted to offset the debt owed under the permit—a cash bond the contractor had deposited to insure compliance with the permit, and a cash bond submitted under a separate logging

contract which had been completed. The Comptroller General concluded that the cash bond given in connection with the permit could be retained as an offset, but that the bond given under the separate contract should be returned to the contractor. “The general rule of law is that a pledge to secure a specific debt or obligation may not be held by the pledgee as security for any other obligation, and a refusal to return the pledge after the obligation it secures has been performed [is improper].” Id. at 263.

A few years later, the 1953 decision was overruled by 38 Comp. Gen. 476 (1959), based essentially on the “bird in the hand” theory. However, a 1961 decision, 41 Comp. Gen. 86, concluded that 38 Comp. Gen. 476 had been ill-advised and overruled it, effectively reinstating 33 Comp. Gen. 262. A decision similar to 33 Comp. Gen. 262 is B-150897, May 6, 1963.

GAO reviewed the earlier cases in 45 Comp. Gen. 504 (1966), another case involving timber sale contracts, and summarized the state of the law as follows:

“In view of the various reasons for requiring these deposits, or payments, and the numerous clauses governing the disposition of their unused portions, we are unable to give categorical answers . . . Each case must be considered on its own merits in light of the existing circumstances. We can only state generally that where an amount is required in lieu of a security bond or is intended to secure one or more particular obligations, that amount may not be retained after full performance of the secured obligations; however, where an amount is intended to apply on the contract price, and is not otherwise restricted, any residual amount may be retained for extinguishment of other obligations of the party.” Id. at 505–06.

Offset of a security deposit to satisfy prior indebtedness is permissible to the extent authorized under the terms of the contract. Id. at 506; B-169731, June 29, 1970.

As some of the decisions indicate, offset is less of a problem where the debt arises under the same contract. In B-154380, June 24, 1964, the Forest Service incurred costs in suppressing a fire caused by the contractor’s use of explosives in disregard of contract provisions. The contract provided that the purchaser would bear the costs of suppressing negligently caused fires, but was silent as to the disposition of deposit balances. The decision concurred with the Forest Service’s proposal to offset its claim against the deposit balance.

While a security deposit under one contract cannot be used to offset a debt under another contract unless the contract so provides, the deposit has been held available to satisfy a tax levy issued by the Internal Revenue Service. B-156868, July 19, 1965.

In the cases discussed thus far, the contract under which the deposit had been made was either completed or defaulted. Another group of cases involves bid deposits by unsuccessful bidders. Two early decisions held that the deposits could be used to offset debts arising under other contracts.<sup>66</sup> While these decisions have not been expressly overruled or modified, the position of the more recent cases is that bid deposits submitted by unsuccessful bidders may not be used to offset prior claims unless so provided in the solicitation. B-160149(2), December 29, 1966. See also B-153100, October 27, 1965; B-147004, September 11, 1961.

One clever bidder tried to avoid the offset exposure by writing on the back of his deposit check that the check would be dishonored unless an award and contract resulted from the bid. Good try, but it didn't work. The bid was rejected as nonresponsive. 47 Comp. Gen. 401 (1968).

To sum up, a bid deposit by an unsuccessful bidder may not be retained to offset prior claims unless provided in the solicitation. Where there is an actual contract, whether completed or defaulted, a security deposit may be used to offset claims arising under the same contract unless otherwise restricted, but may not be used to offset debts under other contracts unless expressly provided. The terms of the contract or solicitation under which the deposit is provided will be the controlling factor.

#### (4) The Army Holdup List

A highly useful aid in offsetting contract debts is the "List of Contractors Indebted to the United States," more commonly known as the "Army Holdup List," published by the Defense Finance and Accounting Service (DFAS), Indianapolis Center.<sup>67</sup> It is revised and reissued semi-quarterly and distributed to federal agencies on DFAS' mailing list. To hold down costs for DFAS, agencies should request only those copies that are absolutely necessary, locally reproducing whatever else they may need.

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<sup>66</sup>17 Comp. Gen. 923 (1938); 14 Comp. Gen. 430 (1934).

<sup>67</sup>Prior to the 1991 reorganization which created DFAS, the Indianapolis Center was for a very long time the Army Finance and Accounting Center, hence the informal designation.

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Use of the Army Holdup List is encouraged. 4 C.F.R. § 102.3(d). Procedures and instructions are found on the list itself and in Title 4 of GAO's Policy and Procedures Manual for Guidance of Federal Agencies.

Contract debts of \$200 or more may be reported to DFAS for inclusion on the list. The information will thus be available to other federal agencies for offset purposes. A case in which the Holdup List was successfully used is 4-J Sales & Service, DOT BCA No. 1904, 89-1 BCA ¶ 21,209 (1988). It is the responsibility of the creditor agency to report any changes, corrections, or deletions.

Any administrative procedures required in establishing the debt should be completed by the creditor agency prior to reporting the debt to DFAS, and the report should so state.

While the Army Holdup List is designed primarily for contract debts, noncontractual debts may be reported as well. B-184506, October 29, 1975 (claim for return of refunded license fee). However, debts of individuals who have no contracts with the government should not be reported.

#### (5) Debt Collection Act vs. Contract Disputes Act

The preceding sections, for the most part, have discussed the government's basic right to use offset to collect contract debts. They have not addressed what procedures must be followed.

Until the 1980s, it was fairly well settled that the Federal Claims Collection Act and Standards applied to government claims arising from procurement contracts. For example, in Commercial Building Maintenance Service, DOT CAB Nos. 72-14, 72-15, 72-2 BCA ¶ 9527 (1972), the Federal Aviation Administration had asserted a claim for excess procurement costs against a defaulted contractor, and the only issue was the contractor's assertion of financial inability to pay. The board held that there was nothing for it to resolve, and remanded the case to the contracting officer for appropriate action under the Federal Claims Collection Act and Standards.

The Contract Disputes Act of 1978 established new procedures for the adjudication of claims by and against the government relating to procurement contracts. The Contract Disputes Act does not address collection techniques and, by itself, had little impact on debt collection

apart from designating the contracting officer and the boards of contract appeals as the appropriate tribunals for adjudicating contract claims.

With the enactment of the Debt Collection Act of 1982, primarily 31 U.S.C. § 3716, what had been a simple matter became controversial. Questions soon arose over the extent to which the Debt Collection Act applied to procurement contracts. The heart of the issue seems to be the procedural requirements of section 3716 and whether they mandate another layer of procedures over and above the Contract Disputes Act. Nothing in the Debt Collection Act itself or its legislative history addresses the question.

While GAO never had the occasion to address this issue in a formal decision, GAO saw no conflict between the two statutes.<sup>68</sup> The Contract Disputes Act tells you how to determine the existence and amount of a government claim. The Federal Claims Collection Act and Standards tell you how to go about collecting it. In addition, the Federal Claims Collection Standards—specifically 4 C.F.R. §§ 101.7 and 102.3(b)(2)(ii)—make it clear that the government is not required to provide duplicate procedures on the same debt. Under this approach, if the existence and amount of the debt have been determined under Contract Disputes Act procedures, which would presumably include reasonable discovery, there should be no need to duplicate these procedures for purposes of 31 U.S.C. § 3716 in those cases where it is deemed to apply. Compliance with the Contract Disputes Act certainly provides adequate “due process.” See, e.g., *4-J Sales & Service, DOT BCA No. 1904, 89-1 BCA ¶ 21,209 at 107,011*, in which the board noted:

“Contrary to its allegations, 4-J has not been deprived of due process. The requirements of due process were satisfied by the Contract Disputes Act having afforded 4-J the opportunity to contest the two Army contracting officer decisions. Having failed to exercise the rights given by the Act, 4-J cannot now be heard to allege that it has been deprived of due process.”

Be that as it may, others did perceive a conflict, and a minor flood of litigation ensued. The first wave of cases generally found 31 U.S.C. § 3716 inapplicable where the amount due the government and the payment against which it is to be offset arise under the same contract. This was the result in the following cases:

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<sup>68</sup>See B-222029, February 13, 1986 (internal comments on proposed legislation); letter dated November 13, 1987, no file designation, from GAO Associate General Counsel to Administrative Conference of the United States (comments on draft ACUS recommendation) (copy on file with editors). A private commentary which also saw no conflict is *Debt Collection by Offset: What's Wrong?*, 1 Nash & Cibinic Report ¶ 5 (January 1987).

- Reduction in contract price under Defective Cost or Pricing Data clause. Fairchild Republic Co., ASBCA No. 29385, 85-2 BCA ¶ 18,047 (1985), aff'd on reconsideration, 86-1 BCA ¶ 18,608 (1985), dismissed for lack of jurisdiction, Fairchild Republic Co. v. United States, 810 F.2d 1123 (Fed. Cir. 1987).
- Reduction in contract price pursuant to Changes clause. A. J. Fowler Corp., ASBCA No. 28965, 86-2 BCA ¶ 18,970 (1986); Atlantic States Construction, Inc., ASBCA No. 27681, 85-3 BCA ¶ 18,501 (1985).
- Liquidated damages in form of contract price reduction for degradation in performance. Information Consultants, Inc., GSBCA Nos. 8130-COM, 8528-COM, 86-3 BCA ¶ 19,198 (1986).
- Liquidated damages for delay in completion of work. Rivera Construction Co., ASBCA Nos. 29391, 30207, 88-2 BCA ¶ 20,750 (1988).

These decisions seem to view the withholdings in question as contract price adjustments pursuant to various contract clauses rather than administrative offsets within the scope of section 3716. They further appear to draw a distinction between situations in which the government is trying to recoup a payment previously made and situations in which the price adjustment is to be offset against payments not yet made, finding section 3716 inapplicable in the latter situation. Fairchild, 85-2 BCA at 90,600; A. J. Fowler, 86-2 BCA at 95,794; Information Consultants, 86-3 BCA at 97,101; Rivera, 88-2 BCA at 104,858. Cf. 62 Comp. Gen. 337 (1983), in which a contract with an illegal cost-plus-percentage-of-cost clause was to be modified by substituting a fixed fee, with GAO suggesting that any overpayments under the illegal clause be “recaptured” during the fixed-fee negotiations.

In Avco Corp. v. United States, 10 Cl. Ct. 665 (1986), the Air Force withheld progress payments from Avco because of alleged performance deficiencies. Avco argued that failure to comply with 31 U.S.C. § 3716 invalidated the offsets. The government argued that section 3716 did not apply. Noting that the question of whether section 3716 applies to contracts governed by the Contract Disputes Act was a question of first impression in the courts, the Claims Court found it unnecessary to address the broader issue, holding instead as follows:

“The kind of debts targeted by the Debt Collection Act are not intra-contractual disputes like ours. . . . Invoking the Debt Collection Act in this type of case would add a new procedural matrix to every contract. Absent explicit statutory authorization, the court will not infer so significant an expansion of procedural requirements in contract administration. . . . Therefore, pretermittting the question of whether the Debt Collection Act applies to

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government contracts generally, the court concludes it does not apply when payment is withheld because of disputes over performance of a contract.” 10 Cl. Ct. at 667–68.

In one pre-Avco case, a board had held the Debt Collection Act applicable where the agency had tried to recover an erroneous overpayment by offset against an unrelated fund under the same contract. Pat’s Janitorial Service, Inc., ASBCA No. 29129, 84-3 BCA ¶ 17,549 (1984). Post-Avco cases holding that section 3716 does not apply to the recovery of overpayments by offset against future payments due under the same contract include Flag Real Estate, Inc., HUD BCA No. 84-899-C14, 88-3 BCA ¶ 20,866 (1988), and Snowbird Industries, Inc., ASBCA No. 33171, 87-2 BCA ¶ 19,862 (1987).

The next case to note is Allied Signal, Inc. v. United States, 941 F.2d 1194 (Fed. Cir. 1991). The Air Force reduced the contract price on a multi-year contract pursuant to an Economic Price Adjustment clause, and withheld progress payments to recoup the resulting overpayment. The contractor tried to invalidate the withholding because of noncompliance with 31 U.S.C. § 3716. The Federal Circuit reviewed the Claims Court’s decision in Avco and the ASBCA’s decision in Fairchild Republic, and agreed with the analysis in those cases:

“We find the reasoning of the Claims Court and the ASBCA persuasive. ‘Debt’ as used in the [Debt Collection Act] contemplates an existing liability by the contractor, rather than a denial of further liability by the Government within an on-going contract.” 941 F.2d at 1198.

While the courts and boards were in general agreement that section 3716 should not apply to the use of offset to collect a debt arising under the same contract, the Armed Services Board of Contract Appeals found the Debt Collection Act applicable where the debt arose under a different contract. In DMJM/Norman Engineering Co., ASBCA No. 28154, 84-1 BCA ¶ 17,226 (1984), IBM Corporation, ASBCA Nos. 28821, 29106, 84-3 BCA ¶ 17,689 (1984), and Snowbird Industries, Inc., ASBCA No. 33171, 87-2 BCA ¶ 19,862 (1987), the board invalidated offsets because of noncompliance with the procedural requirements of 31 U.S.C. § 3716.

However, the Debt Collection Act was found inapplicable in B & A Electric Co., ASBCA No. 33667, 88-2 BCA ¶ 20,553 (1987). In that case, the Air Force withheld money due under one contract to satisfy a Labor Department claim for violation of the labor standards provisions of another contract. Because the Labor Department has exclusive jurisdiction over labor standards disputes, the board dismissed the appeal for want of jurisdiction, but expressed the opinion that the Debt Collection

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Act would not apply. The board pointed out that the withholding in that case was authorized by labor standards contract clauses which served the same purpose and had the same effect as contract price reductions. Thus:

“Appellant’s non-compliance with the labor standards provisions triggered the Government’s right to withhold payments pursuant to these specific provisions. This was an act of contract administration and did not constitute an administrative offset . . . . Hence, there was no debt to require the application of the DCA procedures.”

88-2 BCA at 103,822. The board further noted that imposition of the Debt Collection Act offset procedures on the specific Labor Department procedures would result in duplication inconsistent with 4 C.F.R. § 101.7. Id. at 103,823,

The next case in this evolutionary process is Cecile Industries v. Cheney, 995 F.2d 1052 (Fed. Cir. 1993). The contractor had delivered goods which did not conform to specifications, and the government incurred substantial corrective costs which it offset against payments due under both the contract in question and two separate contracts. Emphasizing that the Debt Collection Act did not abrogate the government’s common-law right of offset, which applies to both inter-contractual and intra-contractual debts, the court not only held 31 U.S.C. § 3716 inapplicable to the offset under the same contract (the Avco result), but went a step further and held it inapplicable as well to the offsets under the separate contracts.

It would thus appear settled that 31 U.S.C. § 3716 will for the most part not apply to offsets under the same contract. The extent to which Cecile Industries may or may not mandate the same result for offsets under separate contracts is likely to engender further debate.

#### d. Other Specific Contexts

##### (1) Transportation claims

As a general proposition, the Federal Claims Collection Act and the government’s right of setoff apply fully to transportation claims against carriers, augmented by a separate provision of law, 31 U.S.C. § 3726(b), which authorizes the government to use administrative offset to recoup overcharges not later than 3 years after payment of a carrier’s bill.

The Court of Claims has held that 31 U.S.C. § 3726(b) does not extinguish the government’s common-law right of offset. IML Freight, Inc. v. United States, 639 F.2d 676 (Ct. Cl. 1980); Burlington Northern Inc. v. United

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States, 462 F.2d 526 (Ct. Cl. 1972). Thus, administrative offset is not limited to the recovery of overcharges, but may be used to collect claims resulting from such things as freight loss damage (IML) and unauthorized use of government property (Burlington).

The government becomes entitled to invoke setoff when it establishes a prima facie case of carrier liability which the carrier is unable to rebut. The government establishes a prima facie case of liability by showing that the shipment was delivered to the carrier at origin in good condition (evidenced, for example, by a bill of lading signed by the carrier without exception), that the shipment arrived at its destination in damaged condition, and by establishing the amount of damages. Decisions applying the government's right of setoff to transportation claims include 56 Comp. Gen. 264 (1977); B-193101, March 12, 1979; B-191889, October 2, 1978, aff'd upon reconsideration, B-191889, May 16, 1979; B-181871, February 11, 1977.

Other cases under 31 U.S.C. § 3726(b) involve issues of corporate identity resulting from mergers, corporate acquisitions, etc. The rules are discussed in 61 Comp. Gen. 526 (1982) and B-193966, April 12, 1979.

## (2) Trust funds

As a general proposition, funds which the government is holding as trustee are not subject to setoff to liquidate government claims against the beneficiaries, at least where the funds cannot be regarded as government funds. For example, federal prisoners' trust funds are not subject to setoff to satisfy government claims against the inmates. 48 Comp. Gen. 249 (1968). The same result would presumably apply to the trust accounts of patients in Department of Veterans Affairs hospitals. Similarly, funds received from the Government of Poland awarded to a claimant by the Foreign Claims Settlement Commission under the International Claims Settlement Act of 1949 could not be used to set off the claimant's indebtedness to the United States. B-180825-O.M., July 23, 1974. A similar situation would be funds withheld from a contractor and transferred to GAO under the Davis-Bacon Act in specific amounts for specified employees. See 46 Comp. Gen. 178 (1966).

However, where the funds constitute government funds, they may be subject to setoff even though held in a trust capacity. 34 Comp. Gen. 152 (1954) (moneys held in trust for Indians available to set off indebtedness of Indian to government); B-121910, November 29, 1954 (same); B-121946,

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January 5, 1956 (claimant's debt to government may be set off against award by Foreign Claims Settlement Commission under War Claims Act of 1948). Thus, in determining whether setoff is available, it is necessary to examine the nature of the funds as well as their status as trust funds, plus, of course, any applicable statutory restrictions.

(3) Setoff and bankruptcy

This section will summarize the effect of a debtor's bankruptcy on the government's right of setoff. The debtor may be a corporation or other business entity or an individual, including a government employee. The bankruptcy laws are complicated, and our objective here is merely to point out some of the more important principles involved.

The bankruptcy laws have traditionally recognized the right of setoff. Subject to certain refinements specified in the statute, the Bankruptcy Code (Title 11 of the United States Code) preserves "any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case . . . ." 11 U.S.C. § 553(a).<sup>69</sup> These are called "pre-petition" debts.

The administrative offset authority of 31 U.S.C. § 3716 does not apply in Title 11 bankruptcy cases. Matter of Mehrhoff, 88 B.R. 922, 931 (Bankr. S.D. Iowa 1988); In re Britton, 83 B.R. 914, 917 (Bankr. E.D.N.C. 1988). This is because subsection 3716(c)(2) expressly makes section 3716 inapplicable "when a statute explicitly provides for or prohibits using administrative offset to collect the claim or type of claim involved," and the Bankruptcy Code is such a statute.

Setoff under 11 U.S.C. § 553 is neither mandatory nor automatic. Under 11 U.S.C. § 362, the filing of a petition, voluntary or involuntary, under Title 11 operates as an automatic stay of all further collection efforts, including:

"(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

"(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; . . ." Id. §§ 362(a)(6), (a)(7).

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<sup>69</sup>The debtor's right to offset against allowed government claims is found in 11 U.S.C. § 106(b).

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Thus, in order to invoke setoff under 11 U.S.C. § 553, even if the government has filed a proof of claim, it is first necessary to petition the court for relief from the automatic stay. E.g., United States v. Rinehart, 88 B.R. 1014, 1018 (D.S.D. 1988), aff'd in part, rev'd in part, 887 F.2d 165 (8th Cir. 1989); In re Britton, 83 B.R. at 919; 68 Comp. Gen. 215, 219 (1989). Whether or not to grant the motion for relief is within the “equitable discretion” of the bankruptcy court. Rinehart, 88 B.R. at 1018. An attempted offset without obtaining relief from the automatic stay is illegal. Further, an agency may be found to have “waived” its right to setoff by failing to timely assert it in the bankruptcy proceeding. In re Apex Int'l Management Services, Inc., 155 B.R. 591, 595–96 (Bankr. M.D. Fla. 1993).

The automatic stay also applies to the commencement or continuation of any judicial or administrative proceeding against the debtor that was or could have been commenced prior to filing. 11 U.S.C. § 362(a)(1). Whether a proceeding is “against the debtor” is determined by reference to the posture of the initial proceeding. Thus, if a proceeding was initiated by the debtor, a subsequent bankruptcy filing does not require the stay of appellate proceedings. Freeman v. Commissioner, 799 F.2d 1091 (5th Cir. 1986).

The non-applicability of the automatic stay to proceedings initiated by the debtor may operate to permit certain setoffs. One such case is 4-J Sales & Service, DOT BCA No. 1904, 89-1 BCA ¶ 21,209 (1988). The Army had asserted a claim against a defaulted contractor for excess procurement costs. Unable to collect, the Army added the contractor to the Army Holdup List. The Coast Guard noticed the listing and notified the contractor of its intent to offset against a Coast Guard contract. It did so, and transmitted the funds to the Army. Subsequently, the contractor filed a claim with the Coast Guard for return of the money, which the contracting officer denied, and also filed a petition in bankruptcy. The board found the setoff proper and unaffected by the automatic stay provision of 11 U.S.C. § 362.

A debtor may be able to avoid a setoff made within 90 days prior to the filing of the bankruptcy petition. Depending on the case law in the particular jurisdiction, the legal basis may be 11 U.S.C. § 547(b) (preferential transfer) or 11 U.S.C. § 553(b) (avoidable offset). Cases discussing each approach, respectively and in detail, are In re Hancock, 137 B.R. 835 (Bankr. N.D. Okla. 1992), and In re Hankerson, 133 B.R. 711 (Bankr. E.D. Penn. 1991). Both cases involved attempted offsets against tax refunds under 31 U.S.C. § 3720A.

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Setoff under 11 U.S.C. § 553 requires “mutuality of parties.” The debts must be “in the same right and between the same parties, standing in the same capacity.” 4 Collier on Bankruptcy ¶ 553.04[3] (15th ed. 1985). The question of whether the requisite mutuality exists between different federal agencies has engendered considerable litigation. The majority of courts have held that it does. For example, in United States v. Rinehart, 88 B.R. 1014 (D.S.D. 1988), the Small Business Administration wanted to set off a claim for defaulted loan repayments against program payments owed to the debtor by the Commodity Credit Corporation. Although the setoff was found to be improper because SBA had violated the automatic stay provision, the court held that SBA and CCC stood in mutual capacity for purposes of section 553. Other cases expressing the majority rule are In re Apex Int’l Management Services, Inc., 155 B.R. 591, 594 (Bankr. M.D. Fla. 1993); Matter of Butz, 154 B.R. 541 (S.D. Iowa 1993); Waldron v. Farmers Home Administration, 75 B.R. 25 (N.D. Tex. 1987); In re Sound Emporium, Inc., 70 B.R. 22 (W.D. Tex. 1987), aff’g 48 B.R. 1 (Bankr. W.D. Tex. 1984); In re Mohar, 140 B.R. 273 (Bankr. D. Mont. 1992); In re Fryar, 93 B.R. 101 (Bankr. W.D. Tex. 1988); In re Britton, 83 B.R. 914 (Bankr. E.D.N.C. 1988).

Cases taking a contrary view and denying mutuality where different agencies are involved include In re Ionosphere Clubs, Inc., 164 B.R. 839 (Bankr. S.D.N.Y. 1994); In re Hancock, 137 B.R. 835 (Bankr. N.D. Okla. 1992); Matter of Mehrhoff, 88 B.R. 922 (Bankr. S.D. Iowa 1988). Mehrhoff relied on the bankruptcy court’s decision in In re Rinehart, 76 B.R. 746 (Bankr. D.S.D. 1987). However, that portion of the decision was subsequently repudiated by the district court in United States v. Rinehart, cited above.<sup>70</sup>

In addition, the mutuality for purposes of 11 U.S.C. § 553 must exist “before the commencement of the case.” In other words, the debt owing to the government and the debtor’s claim against the government must both be pre-petition. Thus, if both claims are in existence at the time the petition in bankruptcy is filed, setoff will generally be appropriate. 7 Comp. Gen. 186 (1927); 7 Comp. Gen. 576 (1928); 18 Comp. Gen. 301 (1938).<sup>71</sup>

For example, in two cases involving bankrupt carriers, setoff was proper where both the credit due the carrier for services rendered and the carrier’s debt to the government arose prior to the filing of the petition in

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<sup>70</sup>Most of these cases are the result of the farm crisis of the 1980s.

<sup>71</sup>Most of the GAO decisions and opinions cited in the text predate the automatic stay requirement. We include them to illustrate the types of situations in which setoff has been permitted. In applying them today, however, we caution that the requirements of 11 U.S.C. § 362 must be read in.

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bankruptcy. B-150463-O.M., March 18, 1963; B-149191-O.M., August 3, 1962. Similarly, the Navy could set off a member's indebtedness stemming from various overpayments against unpaid leave rations where both obligations pre-dated the member's filing of a voluntary petition in bankruptcy. B-195066, September 22, 1980. See also 56 Comp. Gen. 279 (1977); B-123016, April 11, 1955; B-129669-O.M., December 11, 1956; B-117500-O.M., November 4, 1953.

Where one obligation arises prior to filing the petition and the other obligation arises after the filing, setoff is improper. For example, overcharges for transportation performed before the carrier filed its petition in bankruptcy could not be set off against post-petition bills payable to the carrier by the General Services Administration. B-192974, March 29, 1979. Reversing the sequence, overcharges for services rendered subsequent to the filing could not be collected by setoff against credits for pre-petition services. B-150294-O.M., March 27, 1963. See also B-129669-O.M., December 11, 1956.

The fact that a debt is contingent and unliquidated does not necessarily preclude setoff under 11 U.S.C. § 553. The Bankruptcy Code defines "debt" as "liability on a claim," and "claim" as including "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." *Id.* §§ 101(11), 101(4). The Britton and Fryar cases cited above include discussions of this issue.

While setoff under 11 U.S.C. § 553 usually involves pre-petition debts, there is some authority for allowing the setoff of mutual post-petition debts. In re Apex Int'l Management Services, Inc., 155 B.R. 591, 594-95 (Bankr. M.D. Fla. 1993). Of course, if both obligations arise post-petition and the bankrupt's debt to the government is not included in the discharge in bankruptcy, the bankruptcy proceedings have no bearing and setoff is proper. 45 Comp. Gen. 342, 345 (1965).

The concept of mutuality is also relevant to setoffs against an employee's retirement account. An employee is not entitled to the sums in his or her retirement account until the employee leaves federal service by retirement or resignation. Thus, where an employee files bankruptcy and continues in federal employment, the money in the employee's retirement account does not become part of the estate in bankruptcy and is not available for setoff since it does not constitute an obligation owed by the government at the

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time the bankruptcy petition is filed. See 22 Comp. Gen. 330 (1942); B-185731, March 3, 1976 (non-decision letter).

The mutuality concept has also been applied by analogy in state court liquidation and insolvency proceedings. In B-167886/B-174985, June 1, 1978, the Comptroller General held setoff proper against a surety which was being liquidated in a state court proceeding, since the debts and credits being set off accrued before commencement of the liquidation proceeding. The government did not waive its right of setoff by filing proofs of claim in the proceeding.

In a 1986 Claims Court case, the Government Printing Office was trying to collect a claim for excess procurement costs from a defaulted contractor by offset against the proceeds of other completed contracts. A state court had declared the contractor insolvent and had appointed an assignee for benefit of creditors. Since the assignee had been appointed prior to the default termination, the court found that mutuality of parties existed. Noting that federal bankruptcy law had no direct application in the case, the court affirmed a board of contract appeals decision sustaining the setoff. Tatelbaum v. United States, 10 Cl. Ct. 207 (1986).

A completing surety has priority over a trustee in bankruptcy. 8 Comp. Gen. 58 (1928). Also, a completing performance bond surety is entitled to reimbursement of its actual completion costs free from setoff of the contractor's debts. Combining these two concepts, where a performance bond surety has undertaken to complete the remaining work left by a defaulted contractor which had filed a bankruptcy petition, contract funds in the hands of the government are payable first to the completing surety to reimburse its completion costs, without setoff for the contractor's tax indebtedness. 58 Comp. Gen. 295 (1979).

A discharge in bankruptcy releases the bankrupt from legal liability on all debts included in the discharge. 45 Comp. Gen. 342 (1965); 22 Comp. Gen. 1119 (1943); 22 Comp. Gen. 330 (1942); B-194360, February 15, 1980; B-192974, March 29, 1979. A debt is included in the discharge if it was listed on the bankrupt's schedule of debts, even though the creditor was not served with notice of the proceedings or had no actual knowledge of them. A debt is discharged even if not listed on the schedule if the creditor has notice or actual knowledge of the proceedings. Failure by the creditor to file a proof of claim will not prevent operation of the discharge as a bar to a claim which is provable and which otherwise would be released. 22 Comp. Gen. 1119, 1120 (1943).

### A discharge in bankruptcy

“operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, to collect, recover or offset any such debt as a personal liability of the debtor, or from property of the debtor, whether or not discharge of such debt is waived.”

11 U.S.C. § 524(a)(2). Thus, a debt discharged in bankruptcy cannot be set off against currently payable obligations (such as salary or a new claim) that arose subsequent to the discharge. 45 Comp. Gen. 342 (1965); B-194360, February 15, 1980. Nor may the debt be set off against retirement funds when they become payable. 22 Comp. Gen. 1119 (1943); 22 Comp. Gen. 330 (1942); B-185731, March 3, 1976. Similarly, the withholding of current social security benefit payments to recoup a discharged pre-petition benefit overpayment violates the injunction and may subject the government to sanctions. In re Cost, 161 B.R. 856 (Bankr. S.D. Fla. 1993).

However, a setoff allowable under 11 U.S.C. § 553 may survive a discharge. For example, the Ninth Circuit has held that the right of setoff under 11 U.S.C. § 553 is not defeated by a discharge of pre-petition debts in a Chapter 11 bankruptcy. In re De Laurentiis Entertainment Group, 963 F.2d 1269 (9th Cir. 1992).<sup>72</sup> Similarly, the Internal Revenue Service can offset a tax claim against a refund, both pre-petition, notwithstanding the taxpayer’s discharge in a Chapter 7 proceeding. Posey v. United States Department of the Treasury—Internal Revenue Service, 156 B.R. 910 (W.D.N.Y. 1993).<sup>73</sup>

Prior to the 1978 revision of the Bankruptcy Act, GAO had taken the position that a discharge in bankruptcy did not extinguish the debt. It merely provided a legal defense against enforcement, and the decisions frequently noted that a moral obligation to pay continued. E.g., 45 Comp. Gen. 342 (1965); B-192974, March 29, 1979. The Comptroller General had pointed out that this moral obligation should be viewed as particularly strong where the bankrupt continued to receive a government paycheck, stating in one decision that if the employee did not share this concept of morality:

“[I]t would appear advisable in the interest of efficient and sound administration of Government affairs that officials of the department in which the person is currently

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<sup>72</sup>The De Laurentiis court noted that courts have reached a different result under Chapter 13. 963 F.2d at 1275.

<sup>73</sup>This is clearly the majority view although it is not unanimous. De Laurentiis, 963 F.2d at 1276.

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employed be informed of the situation so as to enable them to decide whether it would be in the interest of the United States to permit that type of employee to continue in the service.” 22 Comp. Gen. 330, 334 (1942).

Times have changed, and the current Bankruptcy Act provides increased protection for debtors. Senate Report No. 95-989, quoted in the Revision Note following 11 U.S.C. § 524, states:

“The injunction is to give complete effect to the discharge and to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts. . . . [Section 524] is intended to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it. In effect, the discharge extinguishes the debt, and creditors may not attempt to avoid that.”

In addition, a governmental unit may not “deny employment to, terminate the employment of, or discriminate with respect to employment against” a bankrupt solely because of the bankruptcy. 11 U.S.C. § 525. In view of this, except to the extent the right of setoff has been expressly preserved, the discharged debtor’s “moral obligation” remains purely moral, and dicta to the contrary such as the quoted passage from 22 Comp. Gen. 330 should be disregarded.

Special instructions for debt collection where the debtor is involved in bankruptcy proceedings are contained in Title 4 of the GAO Policy and Procedures Manual for Guidance of Federal Agencies.

#### (4) Miscellaneous cases

The propriety of collection by setoff may come into question in a wide variety of situations. Following are miscellaneous cases in which GAO upheld the government’s right of setoff. For the most part, the cases merely discuss the basic right and do not address applicable procedures, which have generally changed anyway since enactment of the Debt Collection Act.

- Government claims against insurance companies may be set off against subrogation awards under the Federal Tort Claims Act. If the award is \$2,500 or less, the settling agency makes the setoff directly. If the award exceeds \$2,500, GAO makes the setoff in accordance with 31 U.S.C. § 3728. B-135984, May 21, 1976.

- Indebtedness resulting from default on a Veterans Administration loan could be set off against back pay payable to the debtor under private relief legislation. B-139924, November 21, 1960.
- Social Security payments are subject to setoff. A-89228, April 29, 1938. So are railroad unemployment insurance benefits. B-10614, August 26, 1940.
- The Railroad Retirement Board could set off amounts owed by railroads under the Railroad Unemployment Insurance Act against reimbursements due to those railroads from the Regional Rail Transportation Protective Account for employee protection payments. 59 Comp. Gen. 143 (1979). (The legislation involved in this case was changed in 1981.)
- Where a lessor failed to repaint the leased premises in violation of the lease, the lessee agency could set off the costs of repainting against lease payments. 48 Comp. Gen. 289 (1968). (This case can be viewed as a variety of contract setoff.)
- Where a lending institution files a claim with the Department of Housing and Urban Development under the mobile home loan insurance program authorized by Title I of the National Housing Act, HUD may set off against allowable payments the amount of unpaid premiums attributable to that claim prior to the date the claim was filed. 56 Comp. Gen. 279 (1977).
- A federal agency may use setoff to collect a debt owed by the District of Columbia government since the D.C. government is not another federal agency.<sup>74</sup> However, setoff against funds withheld from salaries of agency employees for payment of D.C. income tax is improper on public policy grounds. 60 Comp. Gen. 710 (1981).

e. State and Local Governments

The government's common-law right of offset has traditionally been held applicable to claims against states or municipalities. E.g., *Georgia v. Califano*, 446 F. Supp. 404, 412 (N.D. Ga. 1977). The government's position has been that the United States may set off its claims against any moneys payable to any agency of the state or municipality. E.g., B-154778, August 6, 1964; B-143573, May 7, 1962; B-141018, February 11, 1960 (non-decision letter). Administrative offset against state and local governments has also been upheld under the pre-1982 version of the Federal Claims Collection Act and its implementing regulations. E.g., *Missouri ex rel. Freeman v. Block*, 690 F.2d 139, 144 (8th Cir. 1982) (offset by Department of Agriculture to recover lost receipts from sale of food stamp coupons).

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<sup>74</sup>Since the District of Columbia is not an agency of the United States, it follows that money owed by the United States to one who is indebted to the District of Columbia is not available for offset to liquidate the debt. 36 Comp. Gen. 457 (1956) (retirement funds); B-39254, February 10, 1944 (contract payments).

Government claims often arise from improperly collected state and local taxes. If the state or municipality refuses to refund the tax, setoff has been held to be the proper remedy. For example, the government's claim for the refund of real estate taxes on government-owned property collected from a contractor who was reimbursed by the government was properly set off against payments in lieu of taxes due the municipality in a subsequent year. 36 Comp. Gen. 713 (1957). Similarly, the overpayment by the government of a state motor vehicle fuel tax on gasoline used in government vehicles was properly set off against funds payable to the state under the Mineral Leasing Act of 1920. B-154113, June 24, 1964. See also, e.g., B-162005, April 8, 1968, and B-150228, August 5, 1963.

The Debt Collection Act of 1982 complicated the picture. As we have seen, section 10 of the Debt Collection Act, 31 U.S.C. § 3716, did not create a new right of offset. It merely gave a statutory basis, with procedural protections, to a right which had long existed under the common law. Section 10 applies to "persons," and defines "person" as not including units of state or local government. 31 U.S.C. § 3701(c). The Federal Claims Collection Standards construe section 3701(c) as merely an exemption from the statutory authorities and procedures of section 3716, thus preserving the common-law right of offset against state and local governments. 4 C.F.R. § 102.3(b)(4); 49 Fed. Reg. at 8891 (Supplementary Information Statement). The controversy over the effect of section 3701(c) is identical to that arising under 31 U.S.C. § 3717 with respect to the assessment of interest. The issue and case law are fully discussed earlier in this chapter under the Interest heading.

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## 4. Government Employees

### a. Law Prior to the Debt Collection Act

A long line of Comptroller General decisions established the proposition that the current salary of a government employee is not subject to setoff to liquidate the employee's indebtedness to the United States unless specifically authorized by statute or unless the employee consents to the setoff. 58 Comp. Gen. 501, 502 (1979); 32 Comp. Gen. 499 (1953); 29 Comp. Gen. 99 (1949); 26 Comp. Gen. 907 (1947); 23 Comp. Gen. 911 (1944); 23 Comp. Gen. 555 (1944); 17 Comp. Gen. 12 (1937). The rule applies equally to the current pay of members of the armed services. E.g., 42 Comp. Gen. 83 (1962); 38 Comp. Gen. 788 (1959). GAO applied the rule regardless of the size of the debt. A-20456, February 27, 1928

One court of appeals has suggested that the rule restricts the government's common-law right of setoff more than is necessary. *United States v. Tafoya*, 803 F.2d 140, 142 (5th Cir. 1986). Be that as it may, the question has become largely moot since all salary offsets now have a statutory basis.

Salary offset prior to the Debt Collection Act was not entirely a common-law offset. Several statutes in Title 5 of the U.S. Code, the pre-Debt Collection Act version of 5 U.S.C. § 5514 for example, authorized salary offset in specific situations. However, these statutes filled only part of the gap. Unless one of them applied, current salary was not subject to setoff without the employee's consent.

The rule prohibiting salary offset without either statutory authority or the employee's consent applied only to current salary. Other moneys payable to an employee were subject to setoff. One example was retirement benefits. Others are:

- "Final pay" for both civilian employees and military personnel. 38 Comp. Gen. 788 (1959); 33 Comp. Gen. 443 (1954); 29 Comp. Gen. 99, 100 (1949). This includes final salary payments on behalf of a deceased employee. B-190291, January 3, 1978.
- Lump-sum payment for accrued leave. 29 Comp. Gen. 99, 100 (1949); B-190291, January 3, 1978.
- Payments, either periodic or lump-sum, under the Federal Employees Compensation Act. 41 Comp. Gen. 178 (1961).

Thus, prior to 1982, employee setoffs fell into one of three categories: (1) setoff against current salary under one of the specific statutes; (2) setoff against payments other than current salary, authorized under the common law; and (3) setoff against current salary in situations not covered by statute. The setoff could be made in categories (1) and (2); in category (3), the employee's consent was required.

b. Salary Offset: 5 U.S.C. § 5514

The most widely applicable salary offset statute is 5 U.S.C. § 5514, originally enacted in 1954 and substantially amended by section 5 of the Debt Collection Act of 1982.

Prior to the 1982 amendments, section 5514 applied only to the recovery of erroneous payments made by the employing agency. It did not extend to debts owed to other agencies (34 Comp. Gen. 170, 173 (1954); B-127814, October 29, 1956), or to debts to the employing agency resulting from

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other than erroneous payments (42 Comp. Gen. 619 (1963)). Thus, for example, an agency could use section 5514 to offset an erroneous overpayment of salary to one of its employees, but not to recover a delinquent student loan. Section 5 of the Debt Collection Act extensively revised 5 U.S.C. § 5514 to include general indebtedness and to provide procedural protections for the debtor.

Agencies are required to issue implementing regulations which must be consistent with the Federal Claims Collection Standards and approved by the President. 5 U.S.C. §§ 5514(a)(3), (b)(1). The President has delegated approval authority to the Office of Personnel Management (OPM).<sup>75</sup> The Federal Claims Collection Standards do not address salary offset under section 5514. OPM has issued governmentwide regulations, found at 5 C.F.R. Part 550, Subpart K, which include minimum requirements for individual agency regulations.

The Treasury Department's Financial Management Service has issued detailed guidance on the use of 5 U.S.C. § 5514 in a publication entitled Guidelines for the Federal Employee Salary Offset Program: A Practical Guide for Collecting Debt Through Salary Offset (May 1988).

Perhaps the best way to outline the key aspects of 5 U.S.C. § 5514 is through a question-and-answer format.

(1) Which agencies may use 5 U.S.C. § 5514?

The statute itself, 5 U.S.C. § 5514(a)(1), refers merely to the "head of an agency." The original section 5514 had been construed as not limited to the executive branch. 34 Comp. Gen. 170, 173 (1954). Nothing in the Debt Collection Act suggests a contrary intent. Thus, section 5514 applies to all agencies and independent establishments in the executive, legislative, and judicial branches of the federal government. 5 C.F.R. § 550.1103; B-217402.2, July 15, 1988; B-217402, June 10, 1985.<sup>76</sup>

(2) Which employees are subject to setoff under section 5514?

For purposes of 5 U.S.C. § 5514, the term "employee" includes all current civilian employees and all current members of the Armed Forces and Armed Forces Reserves. 5 U.S.C. § 5514(a)(1); 5 C.F.R. § 550.1103.

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<sup>75</sup>Executive Order No. 11609, § 8 (1971); Executive Order No. 12107, § 2-101 (1978).

<sup>76</sup>Although GAO has questioned the applicability of 5 U.S.C. § 5514 to the Senate and House of Representatives (B-217402.2, July 15, 1988), they are included in the OPM regulations.

Through a definitional quirk, however, section 5514 does not apply to commissioned officers of the Public Health Service. 64 Comp. Gen. 395, 401 (1985).

(3) What kinds of debts may be set off?

One of the primary objectives of section 5 of the Debt Collection Act was to expand 5 U.S.C. § 5514 to include “general debts.” S. Rep. No. 378, 97th Cong., 2d Sess. 10–11 (1982), reprinted at 1982 U.S. Code Cong. & Admin. News 3377, 3386–87. Thus, any debt owed by an employee to the United States—including debts resulting from fraudulent claims (e.g., B-224750, September 25, 1987)—may be set off under section 5514, except (a) debts to which the Debt Collection Act of 1982 does not apply,<sup>77</sup> and (b) debts for which salary offset is expressly provided for or prohibited by some other statute.

(4) What payments are available for setoff under section 5514?

Setoff is made against the individual’s “current pay account.” The statute refers to “basic pay, special pay, incentive pay, retired pay, retainer pay, or, in the case of an individual not entitled to basic pay, other authorized pay.” 5 U.S.C. § 5514(a)(1). This includes “retired pay” payable to members or former members of the uniformed services, but not the “retirement pay” of civilian employees. 64 Comp. Gen. 907, 909–10 (1985).

What about allowances? In the parlance of federal employee compensation, pay and allowances are usually regarded as two different things. While GAO has not addressed this issue in a formal decision, it has expressed the opinion in an internal memorandum that section 5514 does not apply to offset against allowances. B-213507-O.M., September 12, 1984.

Offset against an individual’s final salary check or lump-sum leave payment upon retirement or resignation is not governed by 5 U.S.C. § 5514 unless it is the continuation of an offset against current salary initiated under section 5514. 64 Comp. Gen. 907 (1985).

(5) What procedures are required?

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<sup>77</sup>In the salary offset context, this means debts arising under the Internal Revenue Code, the Social Security Act, or the tariff laws of the United States. See Pub. L. No. 97-365, § 8(e), 5 U.S.C. § 5514 note; 5 C.F.R. § 550.1102(b)(1).

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Before taking an offset against an employee's salary under section 5514, the agency must give the employee at least 30 days' written notice of its intent to use salary offset, and must provide the following rights:

- Opportunity to inspect and copy government records relating to the debt;
- Opportunity to negotiate a written repayment agreement; and
- Opportunity for a hearing on the existence and amount of the debt and on repayment terms where not established by written agreement.

The agency must provide a hearing if the employee requests one within 15 days after receipt of the agency's notification. The hearing must be conducted by someone not under the supervision or control of the agency, or by an administrative law judge.<sup>78</sup> The hearing official must issue a decision not later than 60 days after the request. 5 U.S.C. § 5514(a)(2). Hearings are not required for pay adjustments resulting from an employee's election of, or change in, coverage under a federal benefits program requiring periodic deductions from pay if the debt accumulated over no more than four pay periods. 5 C.F.R. § 550.1104(c).

The Federal Labor Relations Authority has held that the procedures under 5 U.S.C. § 5514 are not exclusive, and that a proposal to establish the negotiated grievance procedure as an alternative, with respect to debts owed to the employing agency, is negotiable. American Federation of Government Employees, AFL-CIO, Local 1592, 33 F.L.R.A. 691 (1988). However, the alternative procedure cannot extend to debts owed to other agencies. National Association of Government Employees, Local R1-109, 37 F.L.R.A. 500 (1990); National Federation of Federal Employees, Local 29, 32 F.L.R.A. 721 (1988).

(6) How much can be set off?

The pre-1982 version of 5 U.S.C. § 5514 permitted the offset of up to two-thirds of the debtor's paycheck after certain deductions. See, e.g., 34 Comp. Gen. 164 (1954). The revised statute sets a maximum of "15 percent of disposable pay" unless the employee consents in writing to a larger amount. 5 U.S.C. § 5514(a)(1).

The OPM regulations, 5 C.F.R. § 550.1103, define "disposable pay" as:

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<sup>78</sup>The type of hearing (oral or paper) is determined by applying the standard of 4 C.F.R. § 102.3(c) (the Supreme Court's Yamasaki test, discussed earlier in this chapter under the Due Process heading). 5 C.F.R. § 550.1104(g). Agencies are to cooperate in furnishing hearing officers to one another when needed. Id. § 550.1107.

“that part of current basic pay, special pay, incentive pay, retired pay, retainer pay, or in the case of an employee not entitled to basic pay, other authorized pay remaining after the deduction of any amount required by law to be withheld. Agencies must exclude deductions described in 5 CFR 581.105(b) through (f) to determine disposable pay subject to salary offset.”

Thus, disposable pay is determined by deducting from gross pay those items listed in OPM’s garnishment regulations, 5 C.F.R. §§ 581.105(b) through (f). This includes such items as amounts withheld for federal, state, and local income taxes, health insurance premiums, and required retirement contributions.

The 15 percent limitation does not apply to offsets against final salary or lump-sum leave payments. 64 Comp. Gen. 907, 911 n.1 (1985).

(7) What about routine adjustments?

In GAO’s view, one of the major flaws of the revised section 5514 is its failure to explicitly exempt “routine salary adjustments”—adjustments resulting from such things as clerical error or delay in the processing of pay documents. If, for example, a clerical error results in the issuance of two paychecks, or if the decimal point is put in the wrong place resulting in a check for \$5,000 rather than \$500, the full range of procedures under section 5514 should not be required to recoup the overpayment.

Both GAO<sup>79</sup> and the Administrative Conference of the United States<sup>80</sup> have recommended remedial legislation to deal with the “routine adjustment” problem. The military departments, whose pay systems produce the most exposure to these problems, have obtained statutory authority to apply less stringent procedures to debts owed by military personnel.<sup>81</sup>

c. Salary Offset: Other Statutes

In addition to 5 U.S.C. § 5514, offset against the salary of government employees is authorized under a number of other statutes dealing with more specific situations. This section will identify several of these statutes and note their relationship to section 5514. Some of the statutes permit offset against payments other than current salary. The terms of each statute must be examined to determine its precise scope.

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<sup>79</sup>Debt Collection: Billions Are Owed While Collection and Accounting Problems Are Unresolved, GAO/AFMD-86-39 (May 1986), at 48–51.

<sup>80</sup>ACUS Recommendation No. 87-9, 1 C.F.R. § 305.87-9.

<sup>81</sup>37 U.S.C. § 1007(c), discussed later in the text.

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(1) Statutes in 5 U.S.C.

Title 5 of the United States Code contains several provisions authorizing offset against the salary or other entitlements of government personnel. Examples are:

- 5 U.S.C. § 4108(c): violation of employment agreement under Government Employees Training Act.
- 5 U.S.C. § 5511(b): indebtedness of employee removed for cause.
- 5 U.S.C. § 5512(a): withholding of individual's pay "until he has accounted for and paid into the Treasury . . . all sums for which he is liable." Since this provision is clearly directed at persons holding funds for which they must account to the government, it has been construed as applying only to accountable officers. 39 Comp. Gen. 203, 206 (1959); 37 Comp. Gen. 344 (1957); 23 Comp. Gen. 555 (1944); 26 Op. Att'y Gen. 77 (1906).
- 5 U.S.C. § 5513: authorizes setoff against current salary of the recipient of a payment for which GAO has disallowed credit in the account of a disbursing officer or raised a charge against a certifying officer. This statute was enacted in 1950 and was unaffected by the subsequent enactment of 5 U.S.C. § 5514. 34 Comp. Gen. 170 (1954). Its interpretation is discussed in 32 Comp. Gen. 101 (1952) and 32 Comp. Gen. 499 (1953).
- 5 U.S.C. § 5522(c): advance payments made to facilitate the evacuation of employees or their families and dependents from situations of imminent danger.
- 5 U.S.C. § 5705: unused or misused travel advances. A sample case is B-246056, March 10, 1992.
- 5 U.S.C. § 5724(f): travel and transportation advances incident to permanent change of station. The statute does not explicitly mention setoff but provides that the advances may be made "with the same safeguards required under section 5705 of this title." This has been construed as authorizing offset to the extent authorized under section 5705. 58 Comp. Gen. 501, 502 (1979); B-194159, October 30, 1979.

Section 5 of the Debt Collection Act did not repeal these pre-existing statutes by implication. 64 Comp. Gen. 142 (1984). Where one of these more specific statutes applies, then it, rather than 5 U.S.C. § 5514, provides the basis for and governs the offset. *Id.*; 5 C.F.R. § 550.1102(b)(1).

When operating under one of the more specific statutes which does not provide its own administrative procedures (as those cited do not), the agency should follow the procedural requirements of 31 U.S.C. § 3716 and 4

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C.F.R. § 102.3, rather than the more stringent requirements of 5 U.S.C. § 5514. 64 Comp. Gen. 142 (1984).

(2) Public Law 97-276, section 124

The Debt Collection Act of 1982 was enacted on October 25, 1982. Three weeks earlier, on October 2, Congress enacted Pub. L. No. 97-276, 96 Stat. 1186, the continuing resolution for fiscal year 1983. Section 124 of Pub. L. No. 97-276, 96 Stat. 1195, 5 U.S.C. § 5514 note, provides for offset against the current pay account of an employee against whom the government has obtained a court judgment. Offset is to be in reasonable amounts not to exceed “one-fourth of the pay from which the deduction is made.”

The Department of Justice has construed section 124 as permanent legislation and not implicitly repealed by the Debt Collection Act. Collection of Debts by Offset from Salary under § 124 of the October 1982 Continuing Resolution, Op. Off. Legal Counsel, March 11, 1983. It has also been construed as applicable only to civilian employees and not members of the armed services. United States v. Tafoya, 803 F.2d 140 (5th Cir. 1986); B-230865, October 17, 1990.

Offset under section 124 is not addressed in the Federal Claims Collection Standards or in the OPM salary offset regulations. It is included, however, in Office of Management and Budget Circular No. A-129 (part IV, sec. 4.f) and several Treasury Department publications.<sup>82</sup>

The most detail is found in Chapter 552 of the Federal Personnel Manual (FPM). Offset under section 124 is initiated by a request to the employing agency (called a “Requisition for Offset”) from the agency which litigated the claim (usually the Justice Department). Id. § 2-1. A copy of the requisition letter is sent to the employee. Id. § 2-2.a(2). The offset is made against “disposable pay,” determined in the same manner as under 5 U.S.C. § 5514. Id. §§ 1-2, 1-3.e. Amounts deducted are applied first to court costs, second to accrued post-judgment interest, and third to principal. Id. § 3-1.c. No further administrative procedures are required. In this connection, the FPM states:

“Since due process was provided to the employee by a court of the United States prior to the entry of the judgment and a Requisition submitted according to this chapter, judgment offsets do not require further due process procedures.” Id. § 2-2.c.

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<sup>82</sup>E.g., Guidelines for the Federal Employee Salary Offset Program at 15; Managing Government Credit: A Supplement to the Treasury Financial Manual at 4-19.

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(The FPM was abolished on December 31, 1993, However, Chapter 552 has been “provisionally retained” through 1994 and will presumably be incorporated into some other document. Office of Personnel Management, FPM Sunset Document, OPM Doc. No. 157-53-8, at 74 (1993).)

(3) 37 U.S.C. § 1007(c)

An important salary offset statute is 37 U.S.C. § 1007(c):

“Under regulations prescribed by the Secretary concerned, an amount that a member of the uniformed services is administratively determined to owe the United States or any of its instrumentalities may be deducted from his pay in monthly installments. However, after the deduction of pay forfeited by the sentence of a court-martial, if any, or otherwise authorized by law to be withheld, the deductions authorized by this section may not reduce the pay actually received for any month to less than one-third of his pay for that month.”

This statute was originally enacted in 1928 (45 Stat. 698) and prior to fiscal year 1985 was applicable only to enlisted members of the Army and Air Force. It was extended in 1984 to all members of the armed forces (98 Stat. 2492, 2613), and again in 1985 to all members of the uniformed services (99 Stat. 583, 666). The 1985 amendment picks up commissioned officers of the Public Health Service who, as noted earlier, are not covered by 5 U.S.C. § 5514.

The legislative history of the 1984 amendment makes it clear that one of its purposes was to permit routine pay adjustments without the rigorous procedures of 5 U.S.C. § 5514. Given the nature of the military pay system, the ability to make these routine adjustments is especially important to the military departments. See S. Rep. No. 500, 98th Cong., 2d Sess. 215 (1984).

Prior to the 1982 revision of 5 U.S.C. § 5514 and the 1984 amendment to 37 U.S.C. § 1007(c), GAO had struggled with the relationship of the two statutes, drawing distinctions based on the type of debt involved. E.g., 39 Comp. Gen. 46, 51 (1959); 34 Comp. Gen. 164, 168 (1954). The legislative changes of the 1980s have rendered these earlier cases obsolete. The apparent relationship today is that 37 U.S.C. § 1007(c) takes precedence over 5 U.S.C. § 5514 as the more specific and later enactment, with no distinction as to the type of debt. 69 Comp. Gen. 226 (1990). See also in this connection 5 U.S.C. § 5514(c), which expressly preserves section 1007(c).

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When collecting by offset under 37 U.S.C. § 1007(c), the applicable procedures are those specified in 31 U.S.C. § 3716 and 4 C.F.R. § 102.3. 64 Comp. Gen. 142 (1984).

(4) 31 U.S.C. § 3716

Since all nonjudicial offsets, salary offset included, are varieties of “administrative offset,”<sup>83</sup> they are subject to the “umbrella” provision of 31 U.S.C. § 3716 unless some other more specific statute applies. In the context of federal employees, the maze of offset statutes described above has sharply reduced—but did not totally eliminate—the universe of situations in which there would be any need to look to section 3716.

For example, offset against an employee’s final salary check or lump-sum leave payment is governed by 5 U.S.C. § 5514 only where it is a continuation of a salary offset initiated under section 5514. Where not a continuation of a section 5514 offset, an offset against a final salary check or lump-sum leave payment, formerly a common-law offset, is now governed by 31 U.S.C. § 3716. 64 Comp. Gen. 907 (1985); 5 C.F.R. § 550.1104(I).

Miscellaneous offsets against payments owing to government employees which are not covered by any other offset statute would be subject to 31 U.S.C. § 3716. For example, suppose an agency allows a claim by one of its employees for personal property damage under 31 U.S.C. § 3721. An offset of a debt owed to the United States against that award would be an administrative offset within the scope of section 3716.

We have devoted several pages to describing the various statutory bases for different types of employee offsets. Determining the proper statutory basis for a given offset is important because several things flow from that determination—the applicable procedural requirements, the types of payments available for offset, and, in many cases, the amount that can be deducted.

There is one common-law exception to the government’s right of offset that deserves mention. Debts owed by an enlisted member of the armed forces may not be set off against allowances payable at the time of discharge for the purpose of returning the individual to his or her home or place of enlistment. The rule is based on policy considerations described as follows in a 1902 decision:

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<sup>83</sup>64 Comp. Gen. 142, 146 (1984); 5 C.F.R. § 550.1102(b).

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“The practice of returning soldiers and marines to their places of enlistment upon the expiration of their terms of service or when discharged, except by way of punishment for an offense, is based not wholly upon the contract of enlistment, but also upon the grounds of public policy. It would be highly injurious to the service, to say nothing of the country at large, to discharge soldiers without fault of their own in places distant from their homes and leave them without the means of returning thereto.”

8 Comp. Dec. 624, 625 (1902).<sup>84</sup> The exception does not apply to a tax levy under section 6331 of the Internal Revenue Code. 36 Comp. Gen. 106 (1956). Nor does it apply to claims for reimbursement after the individual has completed his or her separation travel since the reason for the exception no longer applies. 65 Comp. Gen. 497 (1986) (discussing the exception generally and citing several of the earlier cases).

#### d. Offset Against Retirement Fund

This section deals with offsets against the Civil Service Retirement and Disability Fund. We start by reiterating a distinction noted above in our discussion of 5 U.S.C. § 5514—retired pay vs. retirement pay. The “retired pay” of military personnel is governed by 5 U.S.C. § 5514, and has been since its enactment. *E.g.*, 51 Comp. Gen. 303 (1971). This is because “retired pay” is specified in the statute.

However, unlike retired pay, which is paid by the department in which the individual served, the “retirement pay” of federal civilian employees is paid not by the employing agency but by the Office of Personnel Management. Civilian retirement benefits have never been viewed as subject to 5 U.S.C. § 5514, and the Debt Collection Act did not change this.

Moneys held in an employee’s retirement account are not available for setoff as long as they are required by law to remain in the Fund. However, once they become payable to the employee, by virtue of either retirement or withdrawal upon separation, they are available for setoff. Prior to the Debt Collection Act, this was viewed as a common-law offset or an offset implicitly authorized under the Federal Claims Collection Act of 1966. *Wisdom v. Department of Housing and Urban Development*, 713 F.2d 422 (8th Cir. 1983); *Atwater v. Roudebush*, 452 F. Supp. 622 (N.D. Ill. 1976); *United States v. United States Fidelity & Guaranty Co.*, 35 F. Supp. 959, 962 (E.D. Pa. 1940); 58 Comp. Gen. 501, 502 (1979); B-195126, January 17,

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<sup>84</sup>See also 34 Comp. Gen. 504, 506–07 (1955) (noting that the exception has never been extended to officers); 34 Comp. Gen. 164, 167 (1954); 8 Comp. Gen. 233 (1928); 20 Comp. Dec. 707 (1914); 18 Comp. Dec. 621 (1912).

1980.<sup>85</sup> The government's right of offset applies as well to disability retirement benefits (B-194159, October 30, 1979) and to Foreign Service retirement benefits (A-54780, February 11, 1935).

The enactment of the Debt Collection Act of 1982 did not affect the government's basic right to offset against the Civil Service Retirement and Disability Fund, except that it is now viewed as a variety of administrative offset under the umbrella provision of 31 U.S.C. § 3716. 64 Comp. Gen. 907 (1985). See also 5 C.F.R. § 550.1104(m).

Retirement Fund offsets are addressed in a separate section of the Federal Claims Collection Standards, 4 C.F.R. § 102.4. The required procedures are those specified in 4 C.F.R. § 102.3 for administrative offsets under 31 U.S.C. § 3716 generally. The creditor agency must provide the necessary procedures and, in its offset request to OPM, certify that it has done so. *Id.* § 102.4(b)(3). In addition, retirement fund offsets are subject to OPM regulations, found at 5 C.F.R. Part 845, Subpart D.<sup>86</sup>

In some cases, the creditor agency will have no way of knowing when the retirement moneys might be available. This could pose a problem under the 10-year statute of limitations of 31 U.S.C. § 3716(c)(1). In such situations, the agency should provide the administrative procedures and make the offset request to OPM right away. Then, at such future time as the debtor makes a claim for payments from the Fund, OPM can complete the offset. 4 C.F.R. § 102.4(c).

Since several years may pass between the initiation and completion of the offset under section 102.4(c), the next logical question is whether due process has a "shelf life." Certainly the passage of time should not affect the initial determination of the existence and amount of the debt. However, other relevant circumstances might change. The Standards take this into consideration:

"At such time as the debtor makes a claim for payments from the Fund, if at least a year has elapsed since the offset request was originally made, the debtor should be permitted to offer a satisfactory repayment plan in lieu of offset upon establishing that changed financial circumstances would render the offset unjust." *Id.*

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<sup>85</sup>Retirement fund offsets were common long before enactment of the Federal Claims Collection Act. E.g., 39 Comp. Gen. 203 (1959); 27 Comp. Gen. 703 (1948); 21 Comp. Gen. 1000 (1942); 16 Comp. Gen. 962 (1937); 16 Comp. Gen. 161 (1936); 3 Comp. Gen. 98 (1923).

<sup>86</sup>OPM also has regulations for collecting debts owed to the Civil Service Retirement and Disability Fund. See 5 C.F.R. Part 831, Subpart M, and Part 845, Subparts B and C.

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How much may be set off against retirement payments? The Standards provide merely that offset be “in reasonable amounts in order to collect in one full payment or a minimal number of payments.” *Id.* § 102.4(a). The 1984 preamble, 49 Fed. Reg. at 8892, commented as follows:

“The circumstances of an offset from the Retirement Fund can be extremely variable. In one case, annuities from the Fund may be a retired employee’s sole source of support. In another case, a younger debtor may be withdrawing a large lump sum upon resignation. We think agencies should have discretion to tailor the amount of the offset to the circumstances of the particular case. In general, it is our intent that the maximum possible amount be offset when a debtor is withdrawing from the Fund in a single lump sum unless there is a demonstration of undue financial hardship. When payments are in the form of annuities, however, agencies should offset in a reasonable percentage, based on such factors as the size of the debt and the age and financial condition of the debtor. We have added language, however, to emphasize that the preferred practice should be to collect in a single lump sum or a limited number of installments wherever reasonably possible.

“As a general proposition, we contemplate that the creditor agency will specify the monthly amount to be offset, subject to any ceiling the Office of Personnel Management may wish to establish by regulation.”

For installment deductions, OPM has established a ceiling of “50 percent of net annuity, unless a higher percentage is needed to satisfy a judgment against a debtor within 3 years or the annuitant has consented to the higher amount in writing.” 5 C.F.R. § 845.407(b).

There have been many cases affirming the right of setoff against retirement funds involving the indebtedness of postal employees resulting from mail theft, embezzlement, and other offenses. A *prima facie* case of liability is established by a showing that (1) the loss occurred, (2) the employee has been caught committing a similar offense, (3) the employee had access to the item in question, and (4) there is no evidence implicating anyone else. *Boerner v. United States*, 30 F. Supp. 35 (E.D.N.Y. 1939), *aff’d*, 117 F.2d 387 (2d Cir. 1941), *cert. denied*, 313 U.S. 587. If the employee is unable to overcome the *prima facie* case by more than a mere categorical denial of liability, he or she becomes indebted to the government for the amount of the loss and setoff against the employee’s retirement account is proper. B-195126, January 17, 1980.<sup>87</sup> The rationale of the postal employee

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<sup>87</sup>See also 23 Comp. Gen. 723 (1944); 21 Comp. Gen. 1003 (1942); 19 Comp. Gen. 88 (1939); 18 Comp. Gen. 524 (1938); 7 Comp. Gen. 593 (1928); B-170316, April 12, 1971, *aff’d upon reconsideration*, B-170316, November 16, 1971; B-164193, June 5, 1968; B-155160, November 9, 1964; B-150407, April 4, 1963. Cf. *Parker v. United States*, 187 Ct. Cl. 553 (1969) (retirement offset upheld on basis of 5 U.S.C. § 5512).

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cases has been applied to other federal employees as well. B-139796, July 10, 1959.

e. Nonappropriated Fund  
Activities

Unless provided by statute, setoff is not available to satisfy a debt owed to a nonappropriated fund activity since a debt to a nonappropriated fund activity is not a debt owed to the United States. 43 Comp. Gen. 431 (1963); 11 Comp. Gen. 161 (1931); 9 Comp. Gen. 411 (1930); 9 Comp. Gen. 353 (1930); B-170400, September 21, 1970, aff'd upon reconsideration, B-170400, February 2, 1971; B-128671-O.M., August 22, 1956.

The same rule applies to a debt owed to a Federal Credit Union since the funds belong to the employees and are not appropriated funds. 31 Comp. Gen. 363 (1952). See also B-113003, March 5, 1953 (non-trust funds of an Indian tribe generated by local activities).

At one time, setoff was permitted to collect debts owed to nonappropriated fund activities in certain situations. E.g., 5 Comp. Gen. 25 (1925); 19 Comp. Dec. 515 (1913); 8 Comp. Dec. 860 (1902). The later prohibitory rule appears to have developed in large measure in response to Kenny v. United States, 62 Ct. Cl. 328 (1926), holding that the property of a nonappropriated fund instrumentality is not the property of the United States, in conjunction with Taggart v. United States, 17 Ct. Cl. 322 (1881) (no government official can make the United States agent or trustee for the collection of private debts). 43 Comp. Gen. 431, 433 (1963); 11 Comp. Gen. 161 (1931).

Statutory setoff authority now exists for military personnel by virtue of 37 U.S.C. § 1007(c), discussed above. The language "United States or any of its instrumentalities" in that statute has consistently been construed as encompassing nonappropriated fund instrumentalities. B-148581.13-O.M., November 2, 1976. In addition, under 10 U.S.C. § 6032, the pay of Marines who are discharged, desert, or are sentenced to prison may be set off to satisfy indebtedness to Marine Corps Exchanges. (In view of the 1984 amendment to 37 U.S.C. § 1007(c), 10 U.S.C. § 6032 would appear no longer necessary.)

Military personnel may consent to setoff to liquidate indebtedness to a nonappropriated fund activity by authorizing allotments from current salary. B-148581.13-O.M., November 2, 1976.

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5. Offset Against Tax  
Refunds

If one is poking through the federal bushes looking for money against which to offset debts, it should not take very long to realize that tax

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refunds are a fertile source. This is not a new idea. GAO studied the matter in the 1970s and concluded that there was no reason why the government's right of offset should not apply to tax refunds. B-137762.21-O.M., January 3, 1977. In fact, offset against tax refunds had been used in the past, although not widely, and had been upheld by the courts. Cherry Cotton Mills, Inc. v. United States, 327 U.S. 536 (1946); Luther v. United States, 225 F.2d 495 (10th Cir. 1954); Belgard v. United States, 232 F. Supp. 265 (W.D. La. 1964).

In 1979, GAO formalized its position in a report entitled The Government Can Collect Many Delinquent Debts by Keeping Federal Tax Refunds as Offsets, FGMSD-79-19 (March 9, 1979). The Internal Revenue Service had misgivings, however, largely on policy grounds. In essence, the IRS felt that the nature of its mission made its agents unpopular enough to begin with, and adding this new role could adversely affect tax administration. GAO recognized the validity of IRS' concern, but nevertheless thought the offset idea was a good one:

"It is patently unfair to the honest citizen who pays his debts to the Government to allow other debts to go uncollected. This inequity is especially acute when the individual owing the debt has the ability to pay but does not, and the validity or amount of the debt is not in dispute." FGMSD-79-19 at 17.

Congress dipped its legislative toe into this new water first in 1981 by authorizing past-due child and spousal support payments under the Aid to Families with Dependent Children program to be offset against tax refunds and paid over to the respective states. 42 U.S.C. § 664; 26 U.S.C. § 6402(c).

Three years later, Congress expanded the concept to cover debts owed to the United States. The pertinent legislation is section 2653 of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, 1153, codified at 31 U.S.C. § 3720A and 26 U.S.C. § 6402(d). Under this legislation, as amended by section 3 of the Cash Management Improvement Act Amendments of 1992, Pub. L. No. 102-589, 106 Stat. 5133, federal agencies, including government corporations, are required to report "past-due legally enforceable" debts to the IRS at least once a year, to be offset against tax refunds. Before referring a debt to the IRS, the agency must (1) notify the debtor of its intent to report the debt to IRS; (2) give the debtor at least 60 days to present evidence that all or part of the debt is not past due or legally enforceable; and (3) consider any evidence so presented. 31 U.S.C. § 3720A(b). The agency must also certify that it has made reasonable efforts to collect. Id.

The original legislation applied to refunds payable prior to January 1, 1988. The sunset date was extended in 1988,<sup>88</sup> and the program made permanent in 1991.<sup>89</sup> The program operated as a pilot program for its first two years. Five agencies were included for the first year (1986); three more were added for 1987. All federal agencies are now supposed to be included.

The Treasury Department is required to issue regulations to implement the tax refund offset program, and agencies in turn are required to follow these regulations. 31 U.S.C. §§ 3720A(a), (d). Treasury's regulations are found at 26 C.F.R. § 301.6402-6. To be eligible to participate, a federal agency must have its own offset regulations. Id. § 301.6402-6(b)(1). Under other subsections of this regulation, the debt must be at least \$25, and the agency must have explored offset possibilities under other authorities and, for debts over \$100, must have reported the debt to a consumer reporting agency under 31 U.S.C. § 3711(f). A debtor wishing to challenge the offset may sue the creditor agency but may not sue the Treasury Department or the IRS. 26 U.S.C. § 6402(e). There is no requirement to exhaust any administrative remedy which might be available. Bolden v. Equifax Accounts Receivable Services, 838 F. Supp. 507 (D. Kan. 1993).

The Treasury regulations expressly provide that using a taxpayer's most recent address obtained from the IRS will satisfy the agency's duty to give notice, unless the taxpayer has provided "clear and concise notification" to use a different address. 26 C.F.R. § 301.6402-6(d)(1). Use of the mailing address obtained from the IRS has been upheld as reasonable. Setlech v. United States, 816 F. Supp. 161 (E.D.N.Y. 1993). "The means used to provide notice need not eliminate all risk of non-receipt." Id. at 167.

The refund offset program has been upheld against a constitutional due process challenge. Richardson v. Baker, 663 F. Supp. 651 (S.D.N.Y. 1987). Offset under 31 U.S.C. § 3720A is not subject to state law personal property exemptions. Bosarge v. United States Department of Education, 5 F.3d 1414 (11th Cir. 1993).

The program has been studied extensively. GAO's conclusion is reflected in the title of its report, Tax Policy: Refund Offset Program Benefits Appear

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<sup>88</sup>Family Support Act of 1988, Pub. L. No. 100-485, § 701(a), 102 Stat. 2343, 2425 (1988).

<sup>89</sup>Emergency Unemployment Compensation Act of 1991, Pub. L. No. 102-164, § 401, 105 Stat. 1049, 1061 (1991).

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to Exceed Costs, GAO/GGD-91-64 (May 1991).<sup>90</sup> The Office of Management and Budget has reported that the refund offset program is succeeding in collecting delinquent debt. For calendar year 1988, collections totalled over \$318 million, of which \$82 million was voluntarily repaid upon the receipt of notification letters.<sup>91</sup> A congressional report states that from January 1986 through July 1992, the program resulted in the collection of almost \$2.8 billion in delinquent debt.<sup>92</sup>

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## 6. The Federal Tax Levy

As noted previously in this chapter, the Debt Collection Act of 1982 and the Federal Claims Collection Standards do not apply to debts arising under the Internal Revenue Code. Thus, for the most part, this chapter has not dealt with tax claims. However, a discussion of offset would not be complete without some mention of the tax levy.

If a taxpayer neglects or refuses to pay a tax after receiving notice and demand, the Internal Revenue Service may “levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax.” 26 U.S.C. § 6331(a). Section 6334(a) lists a number of exemptions, such as wearing apparel, tools of the trade up to a specified limit, unemployment benefits, worker’s compensation, and a minimum salary exemption. Section 6334(c) then provides:

“Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).”

This authority is extremely broad, and indicates that “Congress meant to reach every interest in property that a taxpayer might have.” United States v. National Bank of Commerce, 472 U.S. 713, 720 (1985). The constitutionality of the levy provisions has been upheld. Id. at 721.

Prior to the 1954 version of the Internal Revenue Code, applicability of a tax levy to property in the hands of another federal agency varied, based largely on the availability of common-law offset. Thus, for example, GAO had found a tax levy inapplicable to the current salary of a government employee. 26 Comp. Gen. 907 (1947); 23 Comp. Gen. 911 (1944). The

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<sup>90</sup>Prior GAO and Treasury Department reports include Tax Administration: Collecting Federal Debts by Offsetting Tax Refunds, GAO/GGD-87-39BR (February 1987); Department of the Treasury, Financial Management Service, Federal Tax Refund Offset: Pilot Program 1986-1987 (July 1988).

<sup>91</sup>OMB, Management of the United States Government - Fiscal Year 1990, page 3-12.

<sup>92</sup>S. Rep. No. 420, 102d Cong., 2d Sess. 5 (1992), reprinted at 1992 U.S. Code Cong. & Admin. News 4304, 4308. This is the report of the Senate Governmental Affairs Committee on the Cash Management Improvement Act Amendments of 1992.

Internal Revenue Code of 1954 re-enacted the basic levy authority, and added what is now 26 U.S.C. § 6334(c), quoted above. This provision had the effect of nullifying the previously recognized exemptions, limiting them to those specified in section 6334(a). 49 Comp. Gen. 150 (1969); 36 Comp. Gen. 106 (1956). The revised section 6331(a) deals specifically with federal salaries, making the levy expressly applicable to “the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia.”

In post-1954 decisions, the Comptroller General has consistently held that the levy authority applies to property in the hands of another federal agency, and that the agency in possession must therefore comply with a Notice of Levy served upon it by the IRS. 63 Comp. Gen. 498 (1984) (individual share of Indian judgment funds held by the Bureau of Indian Affairs); 49 Comp. Gen. 150 (1969) (savings deposits of military personnel stationed overseas); 38 Comp. Gen. 23 (1958) (postal savings accounts); 36 Comp. Gen. 106 (1956) (payments to military personnel upon discharge); B-177789, January 26, 1973 (Civil Service retirement annuities); B-156868, July 19, 1965 (cash deposit posted by contractor under timber sale contract); B-201511-O.M., April 8, 1981 (contract funds withheld under Davis-Bacon Act and determined payable to person against whose property IRS had levied). The test is a simple one:

“[A]ll that is necessary to determine for the purposes of applicability of section 6331(a) is whether [the property in question is] ‘property or rights to property’ belonging to the delinquent taxpayer.”

38 Comp. Gen. at 24. The courts are generally in accord. E.g., Expoinpe v. United States, 609 F. Supp. 1098 (S.D. Fla. 1985), upholding a tax levy against property which had been seized by the Drug Enforcement Administration. However, the levy authority has been held not to apply to Treasury checks in the hands of a depository bank which had become a holder in due course. 54 Comp. Gen. 397 (1974).

The authority of 26 U.S.C. § 6331 applies to intangible property such as debts. United States v. Eiland, 223 F.2d 118, 121 (4th Cir. 1955). Under Treasury regulations, the obligation must be “fixed and determinable” in order to be subject to levy. However, this does not mean that it must be “beyond dispute and be calculated to the last penny.” Reiling v. United States, 77-1 U.S.T.C. ¶ 9269 (N.D. Ind. 1977).

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A GAO decision applying these concepts is B-217475, May 5, 1986. An individual had been retained as an independent contractor by the National Mediation Board to serve as an arbitrator. For several years, he had not submitted vouchers for his compensation and expenses. The IRS wanted to levy against this unpaid compensation. Without the vouchers, however, the Board had no way of determining what it owed the individual and its obligation therefore was not sufficiently “fixed and determinable” for tax levy purposes. If the individual should file a claim in the future that was supported by vouchers and not time-barred, the IRS could then seek to enforce any surviving lien it might have under 26 U.S.C. § 6321.<sup>93</sup>

The Supreme Court has characterized the tax levy as a “provisional remedy.” United States v. National Bank of Commerce, 472 U.S. at 720. It “does not determine whether the Government’s rights to the seized property are superior to those of other claimants; it, however, does protect the Government against diversion or loss while such claims are being resolved.” Id. at 721. The Comptroller General has taken a similar view with respect to competing government claims. In a 1962 case, for example, the IRS had filed a levy with the State Department against moneys being withheld from a former employee. The Justice Department asserted a claim against the same funds to satisfy a fine resulting from a criminal conviction. GAO concluded that the funds should be applied first to satisfy the fine, which had been imposed prior to the assessment of the tax. “[T]here appearing to be no overriding equities, we perceive no reason why the monies due from the Government should not be applied with regard to the priority in time of the indebtedness.” B-147557, January 2, 1962.

Whether a tax levy served on a federal agency is just another form of administrative offset or is a separate legal creature has produced a fair amount of litigation. The answer determines such things as the applicable jurisdictional statutes for challenging the levy/offset and the applicable statute of limitations. Thus far, the courts are divided. The majority view holds that a tax levy is not the same as a setoff. Capuano v. United States, 955 F.2d 1427 (11th Cir. 1992); Arford v. United States, 934 F.2d 229 (9th Cir. 1991); United Sand and Gravel Contractors, Inc. v. United States, 624 F.2d 733 (5th Cir. 1980). As the Capuano court put it, “If it is called a levy, and it acts like a levy, then it is a levy.” 955 F.2d at 1431. In disagreement is United States ex rel. P.J. Keating Co. v. Warren Corp., 805 F.2d 449 (1st Cir. 1986), holding that the transfer of funds by another federal agency to

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<sup>93</sup>A tax lien under 26 U.S.C. § 6321 survives as long as the underlying tax liability is enforceable. Id. § 6322.

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the IRS is properly characterized as a setoff, even if it occurs under a formal notice of levy. The only GAO decision addressing the issue agrees with the First Circuit. 70 Comp. Gen. 41 (1990) (transfer by Government Printing Office to IRS of payments on contractor invoices submitted after receipt of notice of levy proper as a setoff).

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## 7. Disposition of Amounts Set Off

How does an agency making an offset account for the amount recovered? There are three possibilities: (1) transfer the amount set off to the general fund of the Treasury as miscellaneous receipts; (2) transfer the amount set off to the credit of some other appropriation or fund; (3) take no action, with the result being that the amount of the setoff remains to the credit of the appropriation used to make the payment against which the debt was set off.

The rule is that a setoff must be accounted for in the same manner as if the debtor had made the payment directly. Whichever of the above three options would apply to a direct payment will apply as well to a setoff. In other words, for appropriations accounting purposes, there is no difference between a direct collection and a setoff.

Thus, if a debt represents tax indebtedness, the amount set off should be paid over to the Internal Revenue Service. See, e.g., B-189125, June 7, 1977; B-187903, December 21, 1976. Similarly, amounts set off against a final contract payment to satisfy a Labor Department claim under the Contract Work Hours and Safety Standards Act should be transferred to GAO for disposition in accordance with that statute. B-181695, April 7, 1975.

If the setoff is not payable to some other agency as in the above examples, again the rule is that the agency must account for the setoff as if the debtor had made the payment directly. Generally, this means that the agency must transfer the amount of the setoff to the Treasury as miscellaneous receipts unless there is statutory authority for retention of the funds, or unless the setoff constitutes a repayment to the appropriation. The agency may not retain the setoff if it would amount to an unauthorized augmentation of the agency's appropriations.

The Comptroller of the Treasury expressed the principle as follows:

"The amount of the claim of the Government against the railroad company for the value of a mule negligently killed is just as much a receipt when deducted from the claim of the railroad company as it would be if collected in cash from some party who had negligently

killed the mule and had no claim against the Government from which a set-off could be made. . . . The appropriation benefiting by the set-off should be charged with the amount of the set-off and miscellaneous receipts credited with a like amount.”

20 Comp. Dec. 349, 351 (1913). See also 64 Comp. Gen. 395, 402 (1985); 52 Comp. Gen. 45 (1972); 19 Comp. Gen. 88, 90 (1939); 2 Comp. Gen. 599, 600 (1923); 22 Comp. Dec. 703 (1916); B-208064, November 15, 1983.

For a more recent illustration, when an agency sets off a debt owed by an insurance company against a subrogation award under the Federal Tort Claims Act, it cannot simply settle the claim for the difference. It must first settle the tort claim, then pay the net amount, if any, to the insurance company and transfer the amount of the setoff to miscellaneous receipts. B-135984, May 21, 1976.

Similarly, receipts collected by setoff from a common carrier for the value of government property lost or damaged in transit must be credited to miscellaneous receipts. 46 Comp. Gen. 31 (1966); 28 Comp. Gen. 666 (1949); B-4494, September 19, 1939. A narrow exception exists in cases where a single appropriation is involved and the freight bill on the shipment of the property lost or damaged exceeds the amounts paid for repairs. 21 Comp. Dec. 632 (1915), as amplified in 8 Comp. Gen. 615 (1929) and 28 Comp. Gen. at 667.

Where a debt is collected by setoff against retirement funds, the Office of Personnel Management pays over the amount of the setoff by check from the retirement fund to the agency that made the request. The requesting agency then must dispose of the funds in accordance with the above principles. 35 Comp. Gen. 38 (1955). If the requesting agency is no longer in existence, the check is sent to GAO for disposition. *Id.* at 39.

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## F. Statutes of Limitations

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### 1. Limitations on Commencing a Lawsuit

The primary statute of limitations on the commencement of actions brought by the United States is 28 U.S.C. § 2415. Enacted in 1966, this was the first general statute of limitations on civil actions brought by the government. It is relevant to the administrative debt collection process because any referrals to the Justice Department for litigation must be

made in sufficient time to permit the filing of a lawsuit before the statute runs. The time periods in 28 U.S.C. § 2415 apply with respect to the types of actions specified unless there is some other more specific statute of limitations applicable to a particular case. The statute applies only to actions for money damages.

Subsection (a) of section 2415 covers contract actions. The limitation period for filing a complaint on “any contract express or implied in law or fact” is six years after the right of action accrues, or one year after the final decision in any applicable administrative proceeding required by contract or law, whichever is later.

The subsection contains a proviso which codifies the common-law principle that a later partial payment or written acknowledgement of a debt starts the time period running anew. The acknowledgement or partial payment may occur before or after the barring period initially expires. United States v. Glens Falls Ins. Co., 546 F. Supp. 643, 645 (N.D.N.Y. 1982).

Whether a partial payment will trigger this proviso depends on the intent of the debtor at the time of payment. The circumstances must permit the inference that the debtor recognizes the whole of the debt and intends to repay it. United States v. Glass Nursing & Convalescent Homes, Inc., 550 F. Supp. 1149, 1152 (S.D. Ohio 1982); Glens Falls Ins. Co., 546 F. Supp. at 645–46. In the latter case, a payment of less than the amount claimed, accompanied by a letter which clearly indicated that payment was being tendered in full satisfaction of the claim, was held not to constitute “partial payment” for purposes of re-starting the statute of limitations.

Subsection (b) provides a 3-year statute of limitations for tort actions brought by the United States (damage or injury from a wrongful or negligent act or omission). However, certain specified tort actions have a 6-year statute of limitations. These are: trespass on federal land; damages resulting from fire on federal land; conversion of federal property; and actions to recover for the diversion of money paid out under a grant program. An action to recover based on the misapplication of social security benefits has been held to be within the grant diversion exception and therefore subject to the 6-year limitation. United States v. Dimeo, 371 F. Supp. 95 (N.D. Ga. 1974).

Subsection (c) provides that 28 U.S.C. § 2415 shall not apply to actions to establish the title to, or right of possession of, real or personal property.

Subsection (d) provides a 6-year limitation period for actions to recover money erroneously paid to or on behalf of any civilian employee of the government or any member or dependent of the uniformed services. The payment must have been incident to the employment or service. As with the contract limitation discussed above, subsection (d) also provides that a later partial payment or written acknowledgement of the debt will start the clock running anew.

Subsection (e) deals with the recommencement of actions. Where an action has been dismissed without prejudice, the government may recommence the action within one year regardless of whether the action would then otherwise be barred. The defendant in a recommenced action may assert any claims which would not have been barred in the original action.

Subsection (h) excludes from the coverage of 28 U.S.C. § 2415 actions brought under the Internal Revenue Code or incidental to the collection of taxes imposed by the United States.

Cases under 28 U.S.C. § 2415 often involve determining when the government's cause of action accrued. For example, under the student loan program, the cause of action accrues when the government pays the lender. United States v. Olavarrieta, 812 F.2d 640 (11th Cir. 1987), cert. denied, 484 U.S. 851; United States v. Tillerias, 709 F.2d 1088 (6th Cir. 1983); United States v. Frisk, 675 F.2d 1079 (9th Cir. 1982); United States v. Ballard, 674 F.2d 330 (5th Cir. 1982).

For suits to recover overpayments to a provider under the Medicare program, the majority of courts hold that the 6-year statute of limitations under 28 U.S.C. § 2415(a) begins to run when the fiscal intermediary makes its final retroactive adjustment, thus fixing the exact amount of the overpayment. United States v. Hughes House Nursing Home, Inc., 710 F.2d 891 (1st Cir. 1983); United States v. Gravette Manor Homes, Inc., 642 F.2d 231 (8th Cir. 1981); United States v. White House Nursing Home, Inc., 484 F. Supp. 29 (M.D. Fla. 1979). The cases are not in total agreement, however, and some courts use the date of completion of the final audit. E.g., United States v. Pisani, 646 F.2d 83, 89 (3d Cir. 1981).

A 1971 GAO memorandum, B-158275-O.M., December 9, 1971, discussed the date of accrual in several contexts. In contract default cases, the limitation period begins to run from the date of breach. In an action to recover for delivery of defective goods, the limitation period would commence on the

date of delivery if the defects are apparent, and from the time of discovery if the defects are latent at the time of delivery. In actions to recover pension overpayments by the Department of Veterans Affairs, the limitation period runs from the date of discovery of the debtor's disqualification. The limitation on debt claims based on a veteran's indemnity obligation runs from the date the government reimburses the lending institution.

It is important to emphasize that 28 U.S.C. § 2415 does not cover all actions brought by the United States. As noted above, it is limited to suits to recover money damages and expressly excludes tax suits and suits to establish title to or possession of property. Apart from these express exceptions, must all other actions be squeezed into one of the covered categories (contract, tort, or money erroneously paid out)? In other words, is every action by the United States subject to some statute of limitations? In general, the answer is no. It has been held, for example, that certain actions founded on statute are not covered by any of the specified categories and hence are not subject to any limitation period. E.g., United States v. Lutheran Medical Center, 680 F.2d 1211 (8th Cir. 1982), aff'g 524 F. Supp. 421 (D. Neb. 1981) (suit under Hill-Burton Act to recover construction grant funds when facility was sold to profit-making organization); United States v. City of Palm Beach Gardens, 635 F.2d 337 (5th Cir. 1981) (facility constructed with Hill-Burton funds ceased to be used as community health center); B-179245-O.M., August 20, 1973 (action to recover statutory reenlistment bonus when payee failed to complete reenlistment term for which it was paid).

In addition, 28 U.S.C. § 2415 does not apply to an action by the United States to enforce a judgment. United States v. Hannon, 728 F.2d 142 (2d Cir. 1984) (default judgment); United States v. Kellum, 523 F.2d 1284 (5th Cir. 1975) (consent judgment); United States v. Johnson, 454 F. Supp. 762 (D. Idaho 1978) (default judgment).

There is language in a few cases to the effect that, for purposes of 28 U.S.C. § 2415, suits for damages by the United States must be characterized as sounding in either tort, contract, or quasi-contract. United States v. Limbs, 524 F.2d 799, 801 (9th Cir. 1975) (suit against employee for restitution of compensation benefits under Federal Employees Compensation Act held to be quasi-contractual and thus subject to 6-year limitation); United States v. Neidorf, 522 F.2d 916, 919 (9th Cir. 1975), cert. denied, 423 U.S. 1087 (suit to recover distributions to shareholders which rendered debtor

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corporation insolvent). The extent of any real inconsistency between the two lines of cases has yet to be determined.

The typical statute of limitations contains various tolling provisions—periods of time that are to be excluded in computing the limitation period. The tolling provisions for 28 U.S.C. § 2415 are found in 28 U.S.C. § 2416. There are four general situations which will toll the limitation periods prescribed in section 2415: (a) defendant outside the United States; (b) defendant exempt from legal process because of infancy, mental incompetence, diplomatic immunity, or for any other reason; (c) material facts not known and could not reasonably be known by responsible government official; and (d) United States in declared state of war. In addition, section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. § 525, tolls the statute for periods of military service.

While 28 U.S.C. § 2415 is the most common statute of limitations on actions brought by the government, there are others dealing with specific situations. Some of them are:

- 31 U.S.C. § 3712(d): United States waives claim under dual compensation laws if claim has not been reported to GAO within six years from the last date of any period of dual compensation. (For implementing procedures, see Title 4 of GAO's Policy and Procedures Manual for Guidance of Federal Agencies.)
- 49 U.S.C. app. § 1502 note: 2-year statute of limitations on loss and damage claims resulting from international air transportation under Article 29 of the Warsaw Convention.
- 31 U.S.C. § 3731(b) (False Claims Act): Suit must be brought (1) within six years after the date of the violation, or (2) within three years after the date material facts were or reasonably should have been known by the responsible government official, but in no event more than ten years after the date of the violation, whichever occurs last.

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## 2. Administrative Offset

Judicial offsets are covered by statute. Since its enactment, 28 U.S.C. § 2415 has expressly preserved the government's right to assert offsets and counterclaims in actions brought against it. Under 28 U.S.C. § 2415(f), in a suit against the United States, the United States may assert any claim arising out of the same transaction or occurrence (counterclaim). The United States may also assert, by way of offset, a claim not arising out of the same transaction or occurrence, even if time-barred, but the claim is

allowable only in an amount not in excess of the opposing party's recovery.

What about administrative offsets? Does the running of a statute of limitations on bringing lawsuits preclude subsequent administrative offset? As a general proposition, the answer is no, unless the statute expressly provides that running of the time period will extinguish the liability as well as bar the remedy of a lawsuit.

For example, 15 U.S.C. § 714b(c) imposes a 6-year statute of limitations on suits by or against the Commodity Credit Corporation. Expiration of the 6-year period does not bar the CCC from collecting debts by administrative offset. Doko Farms v. United States, 956 F.2d 1136 (Fed. Cir. 1992); United States v. Missouri Pacific R.R. Co., 250 F.2d 805 (5th Cir. 1958), cert. denied, 358 U.S. 821; Union Pacific R.R. Co. v. United States, 147 F. Supp. 483 (Ct. Cl. 1957), cert. denied, 353 U.S. 950. The Doko Farms court stated the rule as follows (956 F.2d at 1140):

“Courts have recognized and held that the fact that the statute of limitations bars a government suit to collect an amount due to it does not bar the government from invoking its administrative remedies to offset the indebtedness against other claims by the debtor.”

Similarly, setoff against a contractor for violations of the Walsh-Healey Act (41 U.S.C. §§ 35–45) is proper even after expiration of the applicable 2-year period for filing suit (29 U.S.C. § 255). 33 Comp. Gen. 66 (1953). See also Unexcelled Chemical Corp. v. United States, 149 F. Supp. 383 (Ct. Cl. 1957); Ready-Mix Concrete Co. v. United States, 130 F. Supp. 390 (Ct. Cl. 1955); B-144604(1), December 18, 1961.

However, administrative offset after expiration of the statute of limitations in Article 29 of the Warsaw Convention is improper because Article 29 expressly provides that running of the 2-year period will extinguish the debt. 54 Comp. Gen. 633 (1975).

When the issue began to arise in the context of 28 U.S.C. § 2415, opinions split. GAO and one district court held that expiration of a period of limitations under section 2415 merely bars judicial enforcement but does

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not preclude subsequent administrative setoff.<sup>94</sup> The Department of Justice and another district court concluded that offset was barred.<sup>95</sup>

Congress came to the rescue, at least in part, with two provisions of the Debt Collection Act of 1982. First, section 9 of the Debt Collection Act added a new subsection (i) to 28 U.S.C. § 2415:

“The provisions of this section shall not prevent the United States or an officer or agency thereof from collecting any claim of the United States by means of administrative offset, in accordance with section 3716 of title 31.”<sup>96</sup>

However, Congress did not want to leave administrative offset open-ended. Therefore, it provided in section 10 of the Debt Collection Act that “no claim under this Act [Federal Claims Collection Act] that has been outstanding for more than ten years may be collected by means of administrative offset.” This provision is codified at 31 U.S.C. § 3716(c)(1), which renders section 3716 inapplicable “to a claim under this subchapter that has been outstanding for more than 10 years.”). Thus, administrative offset under 31 U.S.C. § 3716 is not affected by 28 U.S.C. § 2415, but now has its own 10-year statute of limitations.

The Federal Claims Collection Standards, in 4 C.F.R. § 102.3(b)(3), define “outstanding” in terms of when the government’s right to collect the debt first accrued, and provide that the case law under 28 U.S.C. § 2415 should be used to determine the date of accrual. The Standards also incorporate the “knew or reasonably should have known” tolling provision of 28 U.S.C. § 2416, noted previously. See, e.g., 64 Comp. Gen. 395 (1985).

The next question is whether the 10-year limitation of 31 U.S.C. § 3716(c)(1) applies only to offset under the authority of 31 U.S.C. § 3716, or whether it applies to all administrative offsets, such as offset under 5 U.S.C. § 5514 or the various other offset statutes described previously in this chapter. Plausible arguments can be made both ways. On the one hand, it was enacted as part of section 3716 and, at least on its face, does not purport to affect any other statute. Following this approach, GAO

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<sup>94</sup>58 Comp. Gen. 501 (1979); *Atwater v. Roudebush*, 452 F. Supp. 622 (N.D. Ill. 1976). See also Sidney B. Jacoby, *The 89th Congress and Government Litigation*, 67 Colum. L. Rev. 1212, 1231 (1967) (“The legislative history of the new 28 U.S.C. § 2415(f) makes it clear that the permissibility of making administrative setoffs remains unchanged.”).

<sup>95</sup>Effect of Statute of Limitations on Administrative Collection of United States Claims, Op. Off. Legal Counsel, September 29, 1978, summarized in 58 Comp. Gen. 501, 503–04 (1979); *Tomakin v. United States*, No. C 75 1079 RHS (N.D. Cal. September 2, 1975) (unpublished order).

<sup>96</sup>Another statutory codification of the principle is 38 U.S.C. § 5314(c) (indebtedness under veterans’ benefit programs).

concluded in 63 Comp. Gen. 462 (1984) that the 10-year limitation did not apply to offsets under 5 U.S.C. §§ 5705 and 5724(f).

Yet on the other hand, if all non-judicial offsets are varieties of administrative offset,<sup>97</sup> there is no logical reason why the 10-year period, like the due process procedures of section 3716,<sup>98</sup> should not apply to administrative offset under other statutes which do not contain their own limitation periods. Following this approach, the Office of Personnel Management has applied the 10-year limitation to offsets under 5 U.S.C. § 5514. 5 C.F.R. § 550.1106, added by 51 Fed. Reg. 21325, June 12, 1986. The Secretary of the Treasury has done the same thing under the Tax Refund Offset Program. 26 C.F.R. § 301.6402-6(c)(1). GAO has applied the OPM regulations without question. B-232454, September 1, 1989.

The question of taking administrative offset after expiration of a statute of limitations on bringing a lawsuit raised its head with increased vigor under the Tax Refund Offset Program, this time with a new twist. Under 31 U.S.C. § 3720A, “legally enforceable” debts may be reported to the IRS for potential offset. A number of student loan recipients<sup>99</sup> have argued that once the 6-year period for filing suit has expired, the debt is no longer “legally enforceable” for purposes of the offset program. Thus far, the courts have uniformly rejected this argument, holding that expiration of the statute of limitations bars a lawsuit but does not preclude subsequent administrative offset. *Grider v. Cavazos*, 911 F.2d 1158 (5th Cir. 1990);<sup>100</sup> *Jones v. Cavazos*, 889 F.2d 1043 (11th Cir. 1989); *Thomas v. Bennett*, 856 F.2d 1165 (8th Cir. 1988); *Roberts v. Bennett*, 709 F. Supp. 222 (N.D. Ga. 1989); *Gerrard v. United States Office of Education*, 656 F. Supp. 570 (N.D. Cal. 1987).<sup>101</sup> Cf. *Swaney v. Secretary of Education*, 664 F. Supp. 172, 177 (D. Del. 1987) (court found that government’s position had a “reasonable basis in law” for purposes of an attorney’s fee petition under the Equal Access to Justice Act).

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<sup>97</sup>E.g., 64 Comp. Gen. 142 (1984); 5 C.F.R. § 550.1102(b).

<sup>98</sup>64 Comp. Gen. 142 (1984).

<sup>99</sup>For some reason, the cases thus far have all involved defaulted student loans. Perhaps one should be gratified in some small way that the recipients are at least learning their way to court.

<sup>100</sup>As *Grider* illustrates, there is disagreement over how to apply the 10-year limitation on administrative offset, but there is no disagreement on the basic proposition for which we cite the case.

<sup>101</sup>Language in *Hurst v. U.S. Dep’t of Education*, 695 F. Supp. 1137, 1139 (D. Kan. 1988) could be used to support a contrary proposition, but the offset in that case was made within the 6-year lawsuit period. A separate issue in *Hurst* was appealed and affirmed in 901 F.2d 836 (10th Cir. 1990).

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## G. Deceased Debtors

It should be apparent that many of the collection tools we have been discussing throughout this chapter will be of little value against a deceased debtor. If a debtor is deceased, the government may be able to collect from the estate or from a distributee of property from the estate. However, different rules and procedures come into play. This section will attempt to describe some of them.

The key statute to be aware of is 31 U.S.C. § 3713. Subsection (a) gives priority to claims of the United States when “the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.” In other words, if the estate is insolvent (insufficient assets to pay all claims), a claim of the United States must be paid first. The statute is, as one court has put it, “remarkably straightforward and free from significant ambiguity.” Carter v. Carter, 681 F. Supp. 323, 326 (E.D. Va. 1988).

Subsection (b) gives real teeth to the priority. It provides that a personal representative of an estate (executor, administrator, etc.) who pays other debts owed by the decedent before paying debts owed to the United States will be personally liable to the extent of the unpaid government claims.<sup>102</sup> This means exactly what it says. Thus, an executor of a Texas estate who paid the state inheritance tax before paying the federal estate tax was found personally liable for the outstanding federal tax. United States v. Blakeman, 750 F. Supp. 216 (N.D. Tex. 1990).

This statute was not part of the Federal Claims Collection Act of 1966 or the Debt Collection Act of 1982. In fact, 31 U.S.C. § 3713 is one of the oldest federal statutes on the books. The priority portion was originally enacted in 1797 (1 Stat. 515). The personal liability portion was added two years later, in 1799 (1 Stat. 676). A capsule history may be found in United States v. Moore, 423 U.S. 77, 80–82 (1975).

The purpose of 31 U.S.C. § 3713 is a simple one: to aid in raising revenue to help support the operations of the government. United States v. State Bank of North Carolina, 31 U.S. (6 Pet.) 29, 35 (1832). As such, it is to be construed liberally to serve that purpose. United States v. Emory, 314 U.S. 423, 426 (1941); In re Kuhn’s Estate, 21 A.2d 513 (Pa. Super. Ct. 1941). Its constitutionality against challenges of interference with state sovereignty

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<sup>102</sup>In addition to deceased debtors, 31 U.S.C. § 3713 also applies to insolvency of a living debtor in certain circumstances, except for cases under the Bankruptcy Code. We are limiting our coverage to deceased debtors, although a few of the cases cited for the more general propositions are insolvency cases.

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has long been settled. United States v. Fisher, 6 U.S. (2 Cranch) 358, 395-96 (1805) (Chief Justice Marshall); In re Kuhn's Estate, 21 A.2d at 514-15.

Debts for purposes of 31 U.S.C. § 3713 are not limited to debts which are delinquent or past due, or even currently payable. The Supreme Court stated, in United States v. State Bank of North Carolina, 31 U.S. at 36:

“What debt is here referred to? A debt which is then actually payable to the United States? Or a debt then arising to the United States, whether then payable, or payable only in futuro? We think the latter is the true construction of the term of the act.”

See also Leggett v. Southeastern People's College, 234 N.C. 595, 68 S.E.2d 263, 267 (1951) (term merely “denotes a state of indebtedness”).

Debts for purposes of 31 U.S.C. § 3713 clearly embrace federal income taxes. Viles v. Commissioner, 233 F.2d 376, 379 (6th Cir. 1956); United States v. Weisburn, 48 F. Supp. 393, 396 (E.D. Pa. 1943); In re Kuhn's Estate, 21 A.2d at 515. In fact many of the cases under section 3713 have involved tax claims. E.g., Meyerson v. Council Bluffs Savings Bank, 824 F. Supp. 173 (S.D. Iowa 1991) (tax lien given priority over claim of former spouse for unpaid alimony); Westmoreland v. Westmoreland, 716 F. Supp. 217 (D.S.C. 1988) (tax claim entitled to priority over prior recorded judgment lien).

The United States does not have priority under section 3713 over funeral expenses and expenses of administration of the estate. This is because these are debts of the estate and not of the decedent. Weisburn, 48 F. Supp. at 397; Martin v. Dennett, 626 P.2d 473 (Utah 1981); In re Henke's Estate, 39 Misc. 2d 705, 241 N.Y.S.2d 788 (Sur. Ct. 1963). However, the United States does have priority over the expenses of the decedent's last illness because they would have been liabilities of the decedent had he or she survived. Estate of Shoptaw, 54 Wash. 2d 602, 343 P.2d 740 (Wash. 1959); Estate of Muldoon, 128 Cal. App. 2d 284, 275 P.2d 597 (Cal. Dist. Ct. App. 1954).

For purposes of personal liability under 31 U.S.C. § 3713(b), the amount of the government's claim need not have been definitely determined at the time the estate assets were distributed. United States v. Purdome, 240 F. Supp. 221, 223 (W.D. Mo. 1963). If an estate is solvent at the time of death but later becomes insolvent, the statute applies, but one court has held that personal liability will attach only to the extent of post-insolvency distributions. Schwartz v. Commissioner, 560 F.2d 311 (8th Cir. 1977).

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Thus, the United States has a statutory right to have its claims paid before other debts of the decedent, and has the imposing threat of personal liability to enforce this right. We next consider how the government goes about asserting its priority.

Many decedents' estates will have to pass through some form of probate. There is no such thing as federal probate law. Probate is a creature of state law. Thus, probate rules and procedures can and do vary from state to state. State law commonly includes a statute of limitations on filing claims with the probate court. For openers, it is clear that state statutes of limitations do not apply to the federal government. State law cannot invalidate a claim of the United States. United States v. Summerlin, 310 U.S. 414 (1940); United States v. Vibradamp Corp., 257 F. Supp. 931 (S.D. Cal. 1966); United States v. Gibson, 101 F. Supp. 225 (D. Idaho 1951); United States v. Luce, 78 F. Supp. 241 (D. Minn. 1948); United States v. Anderson, 66 F. Supp. 870 (D. Minn. 1946).

The United States has an option. It may file and prosecute its claim in the probate court the same as any other creditor. Alternatively, it may simply notify the personal representative of its claim and otherwise ignore the probate proceedings, leaving it to the personal representative (under the spectre of personal liability) to preserve the government's priority. Vibradamp, 257 F. Supp. at 937; Luce, 78 F. Supp. at 243–44; 58 Comp. Gen. 778 (1979).

If the United States chooses to pursue the probate proceedings, it will be bound by the state court's determination. For example, in United States v. Pate, 47 F. Supp. 965 (W.D. Ark. 1942), the government filed a formal proof of claim. The probate court assigned it a low priority. The government did not appeal the probate court's determination, but instead filed suit to hold the administrator personally liable. Can't do it, held the court.

"Had the Government seen fit to do so, it could have held aloof from said proceedings and given the administrator notice of its claim, and then he, at his peril, would have been bound to see that the priority rights of the Government were fully protected. . . . But it saw fit to pursue another course, and to submit its claim against the Meadors estate to the Probate Court of Howard County, a court having jurisdiction to administer said estate; and, having done so, it is bound by the judgment of said Court." Id. at 968.

If the government chooses to avoid probate and instead serve notice on the personal representative, the notification should obviously be in

writing, and should assert the priority and cite 31 U.S.C. § 3713. See B-212728, August 27, 1984 (non-decision letter).

As a general proposition, if the government notifies the personal representative of its claim, or if the estate otherwise has actual knowledge, the government will be able to enforce personal liability against the representative. The facts that all assets have been distributed, the estate has been closed and the personal representative discharged are irrelevant. United States v. Boots, 675 F. Supp. 550 (E.D. Mo. 1987); Vibradamp, 257 F. Supp. at 937; Gibson, 101 F. Supp. at 227; Luce, 78 F. Supp. at 243; United States v. Munroe, 65 F. Supp. 213 (W.D. Pa. 1946); United States v. Fisher, 57 F. Supp. 410 (E.D. Mich. 1944). Some of the cases (Fisher for example) indicate that the government can also recover from persons to whom the assets have been distributed.

What if the United States does absolutely nothing until the estate has been closed and the assets distributed? The cases are divided. Vibradamp held that the United States cannot recover from either the personal representative or the distributees. The government may have an option, but it must actually exercise it and follow one of the alternatives. However, other courts have held that the United States can still recover from the distributees. United States v. Snyder, 207 F. Supp. 189 (E.D. Pa. 1962); United States v. Anderson, 66 F. Supp. 870 (D. Minn. 1946). See also B-136335, August 18, 1958; B-130974, June 4, 1957. (Personal liability of the executor or administrator was not an issue in Snyder and Anderson because the estates in those cases were not insolvent.)

If a personal representative is liable under 31 U.S.C. § 3713(b), the United States can collect by administrative offset should the opportunity present itself. In 10 Comp. Gen. 425 (1931), for example, the Comptroller General held that a government claim against an executrix could be set off against moneys payable to her under private relief legislation. Should a similar situation arise today, the offset would be accomplished under 31 U.S.C. § 3716. And, if the fiduciary should die before paying the government an amount owed under 31 U.S.C. § 3713(b), the government's claim survives against the fiduciary's estate. King v. United States, 379 U.S. 329, 330 n.1 (1964).

A GAO decision, 58 Comp. Gen. 778 (1979), illustrates many of the principles noted in this section. The debtor, a Wisconsin domiciliary who had received overpayments of Supplemental Security Income benefits, died without repaying the debt. The agency did not file a claim with the

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Wisconsin probate court, but did not notify the estate's attorney, who indicated that the decedent's daughter, one of the distributees, would pay the claim after the estate was closed. Once the estate was closed and the assets distributed, the daughter argued that she should not be held liable because the government had failed to participate in the formal probate proceedings. GAO concluded that the government had acted properly and was entitled to recover the debt, which was otherwise undisputed, from the decedent's daughter. Wisconsin law provided that its probate filing requirements did not apply to claims by the United States, but the result would have been the same even without such a provision.

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## H. Liability of Government Employee for Loss Resulting From Error or Neglect of Duty

Federal employees may find themselves indebted to the government not only by receiving overpayments of various types, but also by causing the government to suffer losses due to their error, mistake in judgment, or neglect of duty. For losses in this latter category, there is a distinction, and a corresponding difference in standards of accountability, between funds and other types of property (although money is concededly a form of "property"). *E.g.*, B-167126, August 28, 1978; B-151156, December 30, 1963. Accountability for funds is strict and is discussed in detail in Chapter 9; this section addresses accountability in situations not governed by the "accountable officer" laws—losses of property other than funds and losses attributable to employees who are not accountable officers.

The following examples will illustrate the variety of contexts in which the problem may arise:

- Example 1: John Q. Bureaucrat is given a General Services Administration motor pool vehicle to use on some official business. Instead of proceeding directly to his destination, he stops at his favorite watering hole for some liquid refreshment. Pleasantly stimulated by the diversion, he returns to the car and proceeds to ram it into a telephone pole.
- Example 2: John Q. is assigned some dictating equipment for use in his work. When he goes home for the night, he leaves it out on top of his desk in an unlocked office, instead of securing it in a locked desk or filing cabinet. The next morning, it is gone.
- Example 3: John's new job is processing payment vouchers. He inadvertently misplaces some invoices under a pile of unpaid traffic tickets, and the resulting delay in payment causes the government to lose a prompt payment discount.

The question in all of these examples is the same: To what extent can the government recoup its losses from John Q's pocket?

At the outset, it is important to distinguish the employee's potential liability to the government from the government's liability under the Federal Tort Claims Act. Suppose in our first example that John ran into another vehicle instead of the telephone pole and the owner of that vehicle, a private citizen, filed a claim under the Federal Tort Claims Act. If John's agency paid the tort claim, it could not recoup from John. However, there would still be the question of liability for the damage to the government car. That is what we are concerned with here.

Before discussing monetary liability, we should point out that the agency can always consider non-pecuniary sanctions in the form of "adverse actions"—firing, suspension, demotion, etc. This was summarily recognized in a very early decision, A-25502, February 2, 1929, again in 25 Comp. Gen. 299, 301 (1945) and 45 Comp. Gen. 447, 450 (1966), and discussed in more detail in B-125045-O.M., June 29, 1977.

Turning to pecuniary liability, the first question to ask is whether the agency has any specific statutory direction in this area. Most agencies do not, but a few do. For example, in the Army and Air Force, pecuniary liability for the loss, damage, or destruction of government property is assessed by means of the "Report of Survey." 10 U.S.C. § 4835 (Army); 10 U.S.C. § 9835 (Air Force). This is an official investigation conducted by military personnel in accordance with regulations of the particular service.

The Report of Survey has been used to assess liability for such things as damage to a government-owned motor vehicle (B-135297, March 28, 1958) and the disappearance of two cases of sunglasses due to negligence by supply personnel (B-192609, September 18, 1978). The Report of Survey statutes apply to civilian employees as well as military personnel. B-154960, August 27, 1964. As the three cases cited in this paragraph point out, determinations resulting from a Report of Survey are final, except for any possible judicial review, and not subject to review by GAO.

If a member of the Army or Air Force damages "arms or equipment" by abuse or negligence, the amount of the damage may be deducted from current salary. 37 U.S.C. § 1007(e). See 51 Comp. Gen. 226 (1971).

However, as noted, most agencies have no similar statutory direction. Absent statutory direction one way or the other, the rule is this: There is no authority to assess pecuniary liability against a government employee for losses resulting from error in judgment or neglect of duty unless the agency has issued regulations specifically providing for such liability. Restating the rule from a different perspective, a government employee may be held liable for losses resulting from his or her error or neglect if and to the extent the agency has issued regulations to that effect. The regulations serve to put the employee on notice of the potential liability.

The earliest published decision spelling out the rule is 25 Comp. Gen. 299 (1945). In that case, the Comptroller General held that since the (then) National Housing Agency had not promulgated administrative regulations, it could not set off against the retirement accounts of two employees a loss it suffered by virtue of the employees' failure to have certain property properly surveyed.

The concept arose again in 26 Comp. Gen. 866 (1947), in which a Commerce Department employee ordered fuel in violation of established procurement procedures, as a result of which the vendor billed the government in excess of the amount authorized under the General Supply Schedule. Since the employee had exceeded his authority, the government was not liable for the excess amount. As to the potential liability of the employee, the Comptroller General said that this was a matter to be resolved between the employee and the vendor. If, under the rule of 25 Comp. Gen. 299, the employee could not be charged for losses to the government in the absence of regulations, it followed that the government could not force the employee to pay for a loss sustained by a third party.

The rule has been applied to bar recovery from an employee for a loss due to the negligent failure to take advantage of a prompt payment discount. 45 Comp. Gen. 447 (1966). However, an employee could be subjected to liability for this type of loss if the agency had so provided by regulation. See A-25502, February 2, 1929. GAO further pointed out that certifying a voucher in the full amount within the discount period could subject the certifying officer to liability under 31 U.S.C. § 3528(a). 45 Comp. Gen. at 450.

Two early decisions affirmed the government's right of setoff against retirement funds in cases where the agency had regulations providing for employee liability. 5 Comp. Gen. 932 (1926) (negligent damage to Post Office truck); 3 Comp. Gen. 878 (1924) (Bureau of Printing and Engraving regulations assessing liability for excess spoilage). For other cases

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discussing or applying the rule, see 52 Comp. Gen. 964, 967 (1973); 32 Comp. Gen. 332 (1953); A-31814, May 29, 1930.<sup>103</sup>

Naturally, there are limits beyond which, with or without regulations, an employee may not escape the consequences of his or her own carelessness. Thus, for example, the rule of 25 Comp. Gen. 299 has been held not to apply to a situation where excess travel or transportation expenses result solely from the traveler's negligence. 34 Comp. Gen. 640 (1955).

In cases involving loss or damage to items of personal property, the legal basis for liability is the concept of bailment, under which a person with custody of property is liable for loss or damage due to ordinary negligence (lack of reasonable care under the circumstances). B-180160-O.M., March 18, 1974. Since the liability in the context of government employees is imposed by regulation, however, the agency can, in its discretion, apply a lesser standard (e.g., gross negligence) or a stricter one. GAO has cautioned that too strict a standard would not be wise. *Id.* Most reasonable people can understand having to bear the consequences of their own negligence. A stricter standard, however, apart from basic fairness, could adversely affect both employee morale and work productivity, since employees may well refuse to accept items of equipment for which they may be held strictly liable.

Assessing negligence in cases involving loss or damage to items of office equipment (calculators, personal computers, dictating equipment, etc.) often boils down to questions of physical security. An employee has an obligation to take reasonable precautions to safeguard government property entrusted to his or her custody. What is adequate, however, depends on the circumstances. You cannot, for example, be faulted for not locking your office if you work in a cubicle without a door. The rule, to the extent one can be said to exist, is "you do the best you can with what is available to you." In addition, common sense dictates that employees should bring security weaknesses to the attention of appropriate supervisory personnel. If, for example, you request some sort of anchoring device for a personal computer and the agency fails to provide it, it is not your fault. An internal GAO memorandum discussing employee liability for loss of computer equipment is B-180160-O.M., October 15, 1985.

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<sup>103</sup>Any discussion in pre-1972 cases of surety bonding of employees is now obsolete in light of 31 U.S.C. § 9302.

Employees against whom liability has been assessed occasionally ask GAO to review their cases. GAO will do so under its general claims settlement statute (31 U.S.C. § 3702(a)), but will apply a narrow standard of review. GAO will review basically two things: the agency's legal basis for assessing liability (i.e., the existence of statutory authority or appropriate regulations) and whether the agency has followed its own regulations. GAO will not second-guess the agency's determination that a given set of facts constitutes negligence unless the finding can be said to lack a rational basis. 65 Comp. Gen. 177, 179–80 (1986). See also B-212502, July 12, 1984; B-208108, July 8, 1983.

For example, in a 1982 case, a Forest Service employee was driving a leased vehicle on official business. The vehicle was damaged as a result of the employee's negligence in (a) leaving the vehicle unattended with the motor running, and (b) failing to set the parking brake in disregard of a memorandum which had advised that vehicles of that particular make had a tendency to jump from "park" into "reverse" gear. GAO found that the Forest Service acted properly in assessing pecuniary liability against the employee pursuant to its regulations. B-202807, March 25, 1982.

In a 1981 case, GAO considered a variation on the theme of employee liability. The Army proposed a program under which a member who lost, damaged, or destroyed an item of government property issued to him or her would be permitted to purchase a replacement at an Army Self-Service Supply Center for a sum equivalent to the value of the depreciated item. The difference between the purchase price of the replacement item and the amount paid by the individual soldier would be charged to appropriated funds. The Comptroller General found the proposal legally unobjectionable, but cautioned that the Army should establish adequate fund control procedures to ensure that the "automatic obligation" feature of the program would not violate the Antideficiency Act, 31 U.S.C. § 1341. The Comptroller General also found that the use of appropriated funds to pay the "depreciation allowance" would not constitute an unauthorized diversion of the funds from their intended purpose in violation of 31 U.S.C. § 1301(a), since the Army's appropriations were available to acquire replacement property. 60 Comp. Gen. 688 (1981).

Liability for damage to General Services Administration fleet management system (motor pool) vehicles is covered by regulation. 41 C.F.R. Subpart 101-39.4. If the damage is attributable to misconduct or negligent or improper operation by a government employee, GSA will charge the repair or replacement costs to the employing agency. The Comptroller General

upheld the validity of these regulations in 59 Comp. Gen. 515 (1980). If the damage is not the employee's fault and the responsible party can be reasonably identified, GSA will absorb the cost or try to recover from the responsible party. The regulations specify that each agency is responsible for disciplining its employees who are guilty of damaging GSA vehicles through negligence or misconduct. 41 C.F.R. § 101-39.406(c). Under the rule of 25 Comp. Gen. 299, if an agency issues regulations to that effect, the forms of discipline could include pecuniary liability. See, e.g., A-31814, May 29, 1930.

One issue that has received little attention in the decisions is how to determine the amount of damages to charge the employee. Presumably, the agency can use any of the "standard" methods of computing damages—cost of repairs, value of item at time of loss less salvage value, etc. See 60 Comp. Gen. 688 (1981); 15 Comp. Gen. 927 (1936).

Once liability has been assessed, the agency should then proceed to collect in accordance with the legal authorities available to it as described elsewhere in this chapter. Since most forms of involuntary collection require varying types of due process procedures, agencies should integrate their procedures as much as they can to avoid duplication.

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## I. Right of Redemption and Release of Lien

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### 1. Government's Right of Redemption

The United States may acquire liens to real property in many ways. A major source is the tax lien (26 U.S.C. § 6321). Also, the government may acquire a lien by virtue of paying a loss to a lender under an insured or guaranteed loan program. E.g., 36 Comp. Gen. 697 (1957). A lien may also result from the nonpayment of a criminal fine. E.g., B-100584, April 6, 1951.

Where the United States is a junior lienholder to real property, it may have the right of redemption to protect its interest against a senior lien. In this connection, 28 U.S.C. § 2410(c) provides in part:

"Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of the sale within which to redeem . . ."

Also, the right of redemption may be granted by state law.

There are statutory exceptions to the one-year right of redemption provided by 28 U.S.C. § 2410(c). For example, the statute itself further provides that the redemption period for a tax lien shall be 120 days or the period allowed by state law, whichever is longer. Federal tax liens are governed by detailed provisions of the Internal Revenue Code. The statute also refers to two other exceptions found elsewhere in the U.S. Code. The right to redeem provided by 28 U.S.C. § 2410(c) does not apply where the government's lien derives from (1) the issuance of insurance under the National Housing Act (12 U.S.C. § 1701k), or (2) a loan guaranteed or insured by the Department of Veterans Affairs (38 U.S.C. § 3720(d)).

At one point, based on the statutory context, the Comptroller General had expressed the view that the right of redemption under 28 U.S.C. § 2410(c) relates only "insofar as foreclosure sales are concerned, to such sales made pursuant to judicial action in a judicial proceeding, and not to a foreclosure sale made under a power of sale in a deed of trust without a judicial proceeding." B-100584, April 6, 1951. A later judicial opinion, however, concluded that the United States (with a junior lien) also has a right to redeem under 28 U.S.C. § 2410(c) when the superior lien has been foreclosed by a nonjudicial sale. *United States v. Boyd*, 246 F.2d 477 (5th Cir. 1957), *cert. denied*, 355 U.S. 889. If the right to redeem applies to a foreclosure of a superior lien by nonjudicial sale, it would logically apply also to a foreclosure by judicial sale where the United States, as junior lienholder, was not made a party to the action. B-169602, June 30, 1970 (non-decision letter).

In a number of cases, the purchaser at a foreclosure sale has asked GAO to release the government's right of redemption under 28 U.S.C. § 2410(e), discussed below. Whether the right of redemption under 28 U.S.C. § 2410(c) qualifies as a "lien" for purposes of release under section 2410(e) is not clear. The cases have all been decided on some other basis, usually that the applicant is the owner of the property rather than a senior lienholder. *E.g.*, B-194391, July 16, 1979. From this perspective, the issue seems largely moot.

In any event, there may be other ways for a purchaser to remove the government's right of redemption, depending on the program agency's statutory authority. For example, in B-194391, July 16, 1979, the Comptroller General noted that the Small Business Administration has discretionary authority by statute to sell or otherwise dispose of claims or

security, and to collect or compromise obligations. Under this authority, SBA could accept a monetary payment in exchange for the release of its right of redemption. In effect, SBA could “sell” its right of redemption to the owner of the property. See also B-141234-O.M., March 10, 1960.

As noted above, a right of redemption may exist by virtue of state law. A statute which bars rights of redemption under 28 U.S.C. § 2410(c) does not bar similar rights arising under state law. Thus, in one case the Federal Housing Administration had a right of redemption under state law even though the application of 28 U.S.C. § 2410(c) was expressly prohibited by 12 U.S.C. § 1701k. The Comptroller General held that FHA could expend Title I funds to redeem the property if redemption was determined to be in the best interests of the government and necessary to carry out the provisions of Title I. 36 Comp. Gen. 697 (1957).

Even assuming that a right of redemption under 28 U.S.C. § 2410(c) is a lien for purposes of the Comptroller General’s release authority in section 2410(e), the Comptroller General has no authority to release or otherwise waive a right of redemption arising under state law. B-165746, December 26, 1968.

Whether the right of redemption stems from 28 U.S.C. § 2410(c) or from state law, the agency, before exercising it, must have appropriations available for that purpose. Indeed, the Supreme Court has noted that the purpose of the one-year period in 28 U.S.C. § 2410(c) is to give the agency involved sufficient time to obtain appropriations to protect the government’s interests. United States v. John Hancock Mutual Life Ins. Co., 364 U.S. 301, 306 (1960). Absent a specific appropriation, the availability of appropriations is determined by applying the “necessary expense” concept developed under 31 U.S.C. § 1301(a). 36 Comp. Gen. 697 (1957); 34 Comp. Gen. 47 (1954). For example, in A-42511, August 24, 1932, GAO concluded that the Internal Revenue Service could charge redemption expenses to its appropriation for collecting the internal revenue, since the sole purpose of exercising the right in that case was to effect the collection of taxes due the United States.

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## 2. Release of Junior Lien

If the United States holds a junior lien, other than a tax lien, to any real or personal property, the Comptroller General is authorized to issue a certificate releasing the property from the lien. 28 U.S.C. § 2410(e). The statute prescribes the procedures to follow in obtaining a release, and the

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requirements which must be met as a prerequisite to invoking the statute. Those requirements are:

- (1) The applicant for the release must be a senior lienholder and must apply in writing to the officer responsible for the administration of the laws giving rise to the government's lien.
- (2) The applicant's lien must be duly recorded in the jurisdiction in which the property is located.
- (3) The government's lien must be junior to the applicant's lien, and must not be a tax lien.
- (4) The officer to whom the application is made must find and report to the Comptroller General that the proceeds from the property's sale would be insufficient to wholly or partly satisfy the lien, or that the government's claim has been satisfied or that it is no longer enforceable because of lapse of time or for some other reason.

Thus, the sequence is: applicant applies in writing to program agency; program agency makes required findings; program agency reports findings to Comptroller General. The statute does not authorize GAO to cancel a lien generally, only to release it with respect to specific real or personal property. A-81605, November 25, 1936.

Issuance of a certificate of release is not an absolute right, but is contingent on compliance with the statutory conditions. Thus, all of the above conditions must be met in order for a release to be issued. *E.g.*, 58 Comp. Gen. 732 (1979); 30 Comp. Gen. 268 (1951); 17 Comp. Gen. 180 (1937).

Most requests under 28 U.S.C. § 2410(e) have been denied, invariably because of noncompliance with one or more of the statutory conditions. The most common situation involves a request by the fee simple owner of the property, who usually bought it at a foreclosure sale. The owner of the property is not a lienholder and therefore does not qualify under the statute to obtain a certificate of release. For example, in 58 Comp. Gen. 732 (1979), the applicant was an individual who had purchased the property at a foreclosure sale and was concerned because the United States had an outstanding unsatisfied judgment against one of the former owners. Although it was doubtful whether, under state law, the United States actually had a lien, the release could not be granted in any event

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because the applicant was the owner of the property rather than a senior lienholder.<sup>104</sup>

Failure to serve notice of the foreclosure proceeding on the United States, as required by 28 U.S.C. § 2410(b), does not affect the owner's status as owner for purposes of entitlement to a certificate of release under subsection (e). B-178601, December 13, 1973.

Not only must the statutory conditions be met, they must continue to exist up to the time the release is issued. An intervening change in the conditions may operate to disqualify an applicant. Thus, a senior lienholder who acquires fee simple title to the property before the release is issued thereby loses eligibility as an applicant. 17 Comp. Gen. 180 (1937); B-194391, July 16, 1979; B-165746, December 26, 1968.

The requirement that the applicant be a senior lienholder would seem to be the most substantive of the conditions. Some of the other conditions tend to be more procedural, for example, the requirement that the program agency report its findings. Be that as it may, all of the conditions, including the procedural ones, must be satisfied before the release may be issued. While it seems clear that the absence of any of the conditions would be sufficient for the Comptroller General to decline to issue the release, the cases that have arisen so far tend to combine a procedural deficiency with one or more substantive failures. See, e.g., B-178601, June 4, 1973; B-162827, December 4, 1967; B-152569, October 21, 1963; B-147347, October 11, 1961. Deficiencies which are purely procedural can presumably be cured and the request resubmitted.

Where all of the statutory conditions have been met, the Comptroller General will issue the certificate of release. In B-180526, April 3, 1974, the applicant, who held a senior mortgage on real property on which the Federal Housing Administration held a junior deficiency judgment lien, desired to extinguish the government's junior lien before foreclosing. FHA found that there were two additional senior liens on the property, and that the sum of the three senior liens was approximately three times the fair market value of the property. Based on this, FHA found that sale of the property would not produce sufficient proceeds to wholly or partly satisfy

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<sup>104</sup>Other cases holding that the Comptroller General is not authorized under 28 U.S.C. § 2410(e) to issue a certificate of release at the request of the owner of the property include 30 Comp. Gen. 268 (1951); B-214696, May 1, 1984; B-178601, June 4, 1973, *aff'd upon reconsideration*, B-178601, December 13, 1973; B-173705, January 17, 1972; B-152569, February 17, 1964; B-152569, October 21, 1963; B-147347, October 11, 1961; B-125310, October 14, 1955.

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the government's lien, reported its findings to the Comptroller General, and the Comptroller General issued the certificate of release.

Certificates of release were also issued in B-158387, February 9, 1966, and B-146068, June 21, 1961. In both of those cases, as in B-180526, it was found that the outstanding senior liens exceeded the fair market value of the property. Fair market value may be derived from appraisals. B-158387, cited above. An earlier case granting a release is B-111161, April 16, 1953.

The nature of the government's junior lien, so long as it is not a tax lien,<sup>105</sup> does not affect the availability of the release under 28 U.S.C. § 2410(e). Thus, the Comptroller General may release the lien whether it arose by judgment, as in B-180526, or otherwise, as in B-158387 and B-146068.

A 1935 case, A-67909, December 2, 1935, specified the documents the agency should submit in requesting the certificate of release. In addition to the senior lienholder's initial application, the "ideal" package should include:

- A statement of the nature of the proceeding out of which the lien of the United States arose, including court record references.
- A description of the property, including plat record references. (This should be taken from a deed or document containing a similar description, as this is the description GAO will use on the certificate.)
- A certificate of the tax assessor, or other officer having custody of such records, as to the assessed value of the property for two taxable years, including the current taxable year.
- The opinion of the trust officer or real estate officer of a bank, trust, or title company, or a recognized appraiser as to the market value of the property. If neither of these is available, the statement of a local real estate dealer or broker as to the value should be furnished.
- A definite finding by the requesting agency as to the present market value of the property, the amount of the debt secured by the senior lien, and whether the lien of the United States has been satisfied or, by lapse of time or otherwise, has become unenforceable.

As a practical matter, GAO will not insist on rigid compliance with this listing, and will accept "substantial compliance" as long as what is submitted is sufficient to enable GAO to independently verify that the statutory conditions are satisfied. In addition, A-67909 said that GAO would

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<sup>105</sup>As noted earlier, the statute expressly excludes tax liens. See, e.g., B-208277, September 7, 1982 (non-decision letter). Tax liens have their own procedures, governed by the Internal Revenue Code. E.g., 26 U.S.C. § 6325.

require the originals of all documents and supporting papers. GAO does not insist on this either.

Three cases arising in the late 1980s in which the Comptroller General issued certificates of release illustrate the kinds of situations in which 28 U.S.C. § 2410(e) has been invoked:

- B-226839, June 15, 1987. Government's lien arose from criminal penalties imposed by judgment. Senior lien was a pre-existing mortgage held by a bank.<sup>106</sup>
- B-230612, March 25, 1988. Government's lien arose from money judgment obtained by Department of Labor under Fair Labor Standards Act. Bank holding pre-existing mortgages was the senior lienholder.
- B-235853, August 14, 1989. Government's lien was a judgment for the balance due on a student loan. Debtor was making installment payments on a house under a contract for deed. The contract seller's interest was the senior lien. Release of the government's lien was necessary so that debtor could convey clear title to his interest under the contract.

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<sup>106</sup>Prior to this case, it was GAO's practice to issue a formal decision along with the certificate. Commencing with B-226839, GAO changed its procedure and now issues the certificate accompanied by a simple transmittal letter. The letter itself includes very little information, with somewhat more detail on the certificate itself.

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**Chapter 13**  
**Debt Collection**

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# Payment of Judgments

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# Payment of Judgments

## A. Introduction

If you had read the Washington Post for September 30, 1985, you would have seen an article boldly proclaiming “SUING UNCLE SAM BECOMES GROWTH INDUSTRY.” To those of us who are involved either with the litigation itself or with the payment process, this was not exactly high revelation. It is no secret that America in the last third of the 20th century has become the most litigious society in the recorded history of the human race. We sue each other and everyone else in sight<sup>1</sup> over just about everything these days, so it seems, and suits against the government are no exception.

In the early years of the Republic, this was not the case, because our legal system adopted from the English common law the concept of “sovereign immunity”—the firmly imbedded rule that the United States, as sovereign, cannot be sued without its consent.<sup>2</sup> Consent is given (or, in other words, sovereign immunity is “waived”) by the enactment of a statute authorizing suits of a given type. Waivers of sovereign immunity must be explicit.<sup>3</sup> Congress may attach conditions to the waiver.<sup>4</sup> And, what Congress gives, Congress can take away. Although it happens infrequently, Congress can at any time withdraw the consent to be sued.<sup>5</sup>

The history of litigation involving the United States is largely the history of congressional waivers of sovereign immunity. Some milestones in this evolution have been: 1855—creation of United States Court of Claims; 1863—amendment to that legislation to empower the Court of Claims to render final judgments (all the court could do under the original legislation was report cases to Congress); 1887—Tucker Act; 1920—Suits in Admiralty Act; 1946—Federal Tort Claims Act. The 1960s and 1970s saw a variety of environmental and civil rights legislation, perhaps the most important of which was the 1972 amendment to the Civil Rights Act of 1964 which made its employment discrimination provisions applicable to the federal government.

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<sup>1</sup>And occasionally some not in sight. See, for example, *United States ex rel. Mayo v. Satan and His Staff*, 54 F.R.D. 282 (W.D. Pa. 1971). The complaint was defective on several grounds, however, one of which was the failure to include instructions for the service of process.

<sup>2</sup>E.g., *United States v. Sherwood*, 312 U.S. 584 (1941); *United States v. Mescalero Apache Tribe*, 518 F.2d 1309 (Ct. Cl. 1975).

<sup>3</sup>*United States v. Mitchell*, 445 U.S. 535, 538 (1980).

<sup>4</sup>*Sherwood*, 312 U.S. at 587; *Federal Housing Administration v. Burr*, 309 U.S. 242, 251 (1940).

<sup>5</sup>*Lynch v. United States*, 292 U.S. 571 (1934) (consent to sue is not a property right but a privilege); *Juda v. United States*, 13 Cl. Ct. 667, 689 (1987) (citing several other cases); 4B Op. Off. Legal Counsel 516 (1980).

Sovereign immunity is still a rule of law in the United States, but it now applies to a much smaller universe. Why has the United States given up such a favorable position? One rather mundane reason is that the flood of private relief bills became too much of a drain on congressional time and resources. (If you can't sue, the only thing left is to ask Congress for help). More importantly, however, there has been increasing recognition of the philosophy expressed by a Comptroller of the Treasury many years ago in 8 Comp. Dec. 12, 18 (1901): "The Government should not be permitted to wrong a citizen any more than a citizen should be permitted to wrong the Government."

Thus, federal courts can now render judgments against the United States in a great variety of actions. This chapter will explore how those judgments are paid.

The payment of judgments against the United States and GAO's role in that process are prescribed by statute. District court judgments are addressed in 28 U.S.C. § 2414, which provides that final judgments rendered by a district court against the United States shall be paid "on settlements by the General Accounting Office." Final judgments rendered by the Court of Federal Claims are paid, pursuant to 28 U.S.C. § 2517(a), "on presentation to the General Accounting Office of a certification of the judgment by the clerk and chief judge of the court." In addition, 31 U.S.C. § 1304 provides a permanent indefinite appropriation for the payment of certain judgments against the United States as "certified by the Comptroller General."

Although these statutes are worded differently, GAO's function under them is the same: to certify judgments for payment. It has been termed an essentially ministerial function in the sense that it does not contemplate review of the merits of a particular judgment. B-129227, December 22, 1960. See also 22 Comp. Dec. 520 (1916). Be that as it may, both because the expenditure of appropriated funds is involved and because the scope and complexity of litigation involving the government are constantly increasing, the payment process gives rise to a number of problem areas.

At the present time, neither GAO nor anyone else in the federal government knows how much the United States pays out in judgments every year. The largest single source of judgment payments is the permanent appropriation established by 31 U.S.C. § 1304. Annual totals from this appropriation are listed in the President's budget submission (nearly \$791 million for fiscal year 1992, for example), and GAO collects data as well. However, as we will see, several types of judgments are paid from

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other sources, and no centralized mechanism exists for the collection of data on judgments which do not pass through GAO.

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## B. Source of Funds

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### 1. Requirement for Appropriation

A waiver of sovereign immunity may result in a judgment against the government but, without more, will not get it paid. This is because the “Appropriations Clause” of the United States Constitution (art. I, § 9, cl. 7), which prohibits the withdrawal of money from the United States Treasury except under an appropriation, applies with equal force to payments directed by a court. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 424–26 (1990); *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1850); *Rochester Pure Waters District v. EPA*, 960 F.2d 180, 184–85 (D.C. Cir. 1992); *Hughes Aircraft Co. v. United States*, 534 F.2d 889, 906 (Ct. Cl. 1976). While this constitutional requirement may not prohibit a court from entering a judgment, it comes into play with respect to the payment of that judgment. As the former Court of Claims said in *Collins v. United States*, 15 Ct. Cl. 22, 36 (1879):

“When this court gives judgment against the United States, the constitutional prohibition referred to applies to the judgment as it did to the claim upon which it is founded.”

Thus, the Appropriations Clause must be satisfied before any judgment against the federal government can be paid. This may take the form of (1) a specific appropriation for a particular judgment or judgments, (2) a general appropriation for judgments, or (3) legislative authorization, which itself can take various forms, to use existing operating appropriations. For 150 years, number (1) was the primary payment mechanism; the payment structure now is a combination of (2) and (3).

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### 2. The Permanent Judgment Appropriation: Overview

#### a. Origin

At the start of the 20th century, various statutes had the effect of requiring specific appropriations for the payment of most judgments against the United States. This being the case, the Comptrollers of the Treasury began holding that agency operating appropriations were not available to pay

those judgments. The Comptrollers saw an element of illogic, at least in some situations, in saying that an appropriation which would have been clearly available to pay something if the matter never went to court ceased being available because the agency failed or refused to pay and a court told the agency to pay it. *E.g.*, 8 Comp. Dec. 261, 262 (1901); 8 Comp. Dec. 145, 149 (1901). Despite these misgivings, the result in most cases was that specific appropriations were required.

The practice of specifically appropriating for judgments became further solidified in 1904 by a statute (33 Stat. 422) which required that estimates for the payment of judgments be transmitted to Congress the same as other requests for appropriations. Against this legislative background, the rule became firmly entrenched that agency operating appropriations were not available to pay judgments. Exceptions were (and continue to be) recognized only where Congress had made some other provision, or established some other mechanism, for payment. *E.g.*, 15 Comp. Gen. 933 (1936); 5 Comp. Gen. 203 (1925); 1 Comp. Gen. 540 (1922); 27 Comp. Dec. 262 (1920); 11 Comp. Dec. 169 (1904).

In 1950, Congress repealed the requirement for specific budget submissions for judgments. The reason, legislative history suggested, was that Congress viewed the thrust of the 1904 statute as having been superseded by 31 U.S.C. § 1105, which provides generally for the submission of the President's budget to Congress. Therefore, the repeal did not produce any change in the way judgments were paid. This legislative development is outlined, and the rule restated, in 34 Comp. Gen. 221 (1954). Thus, prior to 1956, judgments against the United States could be paid, for the most part, only upon enactment of specific congressional appropriations. Under this system, it was possible for Congress to refuse to appropriate the funds for a given judgment, leaving the judgment creditor with a valid entitlement against the United States but no funds legally available to satisfy it. Although there were instances where this happened (see, e.g., 47 Stat. 28 and 33 Stat. 422), it was rare. In *Glidden Co. v. Zdanok*, 370 U.S. 530, 570 (1962), the Supreme Court noted a 1933 study which had found 15 instances in a 70-year period where Congress had refused to pay a judgment.

In the early 1950s, GAO recommended the enactment of a permanent general appropriation for judgments. The recommendation was designed to expedite the payment of judgments by eliminating the need for specific congressional appropriations, and to save the government money both by eliminating the largely ministerial appropriations and by reducing interest

costs. The executive branch supported the proposal. It was not immediately enacted, however, because the original proposal contained language which some felt would authorize the Comptroller General to review the merits of a judgment prior to payment. The Judiciary especially expressed concern over this possibility, fearing that it could destroy the finality of judgments and lead to a situation in which the Comptroller General might deny a claim administratively, with the claimant then suing successfully and the Comptroller General refusing to pay the judgment for the same reasons he had originally denied the claim.

The proposal was refined and, on July 27, 1956, was enacted as section 1302 of the Supplemental Appropriation Act of 1957, 70 Stat. 678, 694, now codified at 31 U.S.C. § 1304.<sup>6</sup> As originally enacted, section 1304 applied only to judgments rendered pursuant to 28 U.S.C. §§ 2414 and 2517, and then only to judgments not in excess of \$100,000,<sup>7</sup> which it was then estimated would cover 98–99 percent of all judgments against the United States.<sup>8</sup>

Thus, as of July 1956, judgments less than \$100,000 could be paid promptly under section 1304. Until the \$100,000 limit was removed in 1977, however, judgments in excess of \$100,000 continued to require specific congressional appropriations, which were made in supplemental appropriation acts. Under this procedure, summarized in B-162076, August 7, 1967, the Justice Department reported all judgments in excess of \$100,000 to the Treasury Department as soon as they became final. As the time for the next supplemental appropriation request approached, the Office of Management and Budget notified Treasury and Treasury forwarded its recommendations for inclusion in the request. Congress generally provided the funds in the form of a lump-sum appropriation, with the specific judgments to which it applied listed in Senate and House Documents. Upon enactment of the appropriation, Treasury sent the judgments to GAO for settlement.

## b. Major Amendments

As noted above, the original version of 31 U.S.C. § 1304 was fairly limited. The appropriation reached its present scope through a series of

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<sup>6</sup>Occasionally called the Automatic Payment of Judgments Act, 31 U.S.C. § 1304 is more commonly referred to as the “Judgment Fund.”

<sup>7</sup>GAO and the courts construed the \$100,000 limitation as applicable to the amount awarded either to a single plaintiff or to two or more plaintiffs jointly, rather than the aggregate judgment amount. *United States v. Varner*, 400 F.2d 369 (5th Cir. 1968); *United States v. Maryland ex rel. Meyer*, 349 F.2d 693 (D.C. Cir. 1965); 40 Comp. Gen. 307 (1960); B-183576, August 26, 1977; B-163682, May 24, 1968.

<sup>8</sup>Hearings on Supplemental Appropriation Bill, 1957, Before Subcomm. of the House Comm. on Appropriations, 84th Cong., 2d Sess., pt. 2, at 884 (1956).

amendments, the most important of which are summarized below in chronological sequence.

(1) Compromise settlements

Public Law 87-187, 75 Stat. 416 (1961), amended the judgment appropriation, and made corresponding amendments to 28 U.S.C. § 2414, to add (1) judgments of state and foreign courts upon the Attorney General's certification that it is in the interest of the United States to pay, and (2) compromise settlements.

The addition of compromise settlements was particularly significant. A compromise settlement is an agreement reached by the parties involving mutual concessions. 38 Op. Att'y Gen. 94, 95-96 (1933). The Attorney General, as the government's chief litigator, has broad authority to compromise cases referred to the Justice Department for prosecution or defense. Executive Order No. 6166, § 5 (June 10, 1933); United States v. Hercules, Inc., 961 F.2d 796, 798 (8th Cir. 1992); 38 Op. Att'y Gen. 124 (1934); 38 Op. Att'y Gen. 98 (1934). The power attaches "immediately upon the receipt of a case in the Department of Justice." 38 Op. Att'y Gen. at 102. However, a compromise settlement which exceeds the authority of the official purporting to make it does not bind the government. White v. United States Department of Interior, 639 F. Supp. 82 (M.D. Pa. 1986), aff'd mem., 815 F.2d 697 (3d Cir. 1987); United States v. Irwin, 575 F. Supp. 405 (N.D. Tex. 1983). The Court of Appeals for the Fourth Circuit has held that the Attorney General, in settling a case, is bound by the same laws that control the government agency being represented. Executive Business Media, Inc. v. United States Department of Defense, 3 F.3d 759 (4th Cir. 1993).

As noted earlier, the original version of the judgment appropriation applied only to judgments, not to compromise settlements. In order to take advantage of the judgment appropriation in cases where agency funds were not otherwise available, it became common practice to submit the compromise agreement or stipulation to the court, whether required or not, and to have the court issue it as a consent judgment. It had long been the view of the "accounting officers" that a judgment based upon such a stipulation was nevertheless a judgment and payable as such. E.g., 21 Comp. Dec. 705 (1915). Thus, the device of converting a compromise settlement into a consent judgment enabled it to be paid under 31 U.S.C.

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§ 1304.<sup>9</sup> In view of this practice, the limitation of the 1956 legislation to judgments turned out to make little difference as a practical matter except to require an additional step which, where not otherwise required, served little useful purpose. The extension of the judgment appropriation to include compromise settlements was therefore a logical application of the concept.

The amendment to 28 U.S.C. § 2414 provided a standard for determining when compromise settlements are payable from the judgment appropriation. It states that compromise settlements “shall be settled and paid in a manner similar to judgments in like causes and appropriations or funds available for the payment of such judgments are hereby made available for the payment of such compromise settlements.” Thus, the rule is that a compromise settlement is payable from the same source that would apply to a judgment in the same suit. If a given action could result in a money judgment payable from the judgment appropriation, a compromise settlement of that action will be payable from the judgment appropriation. *E.g.*, B-212134, June 29, 1983. If the action would not result in a money judgment payable from the judgment appropriation—either because a resulting judgment would be payable from agency funds or because it would not result in a money judgment at all, such as a suit for an injunction—then the judgment appropriation will not be available for a compromise settlement. *E.g.*, B-248313, April 10, 1992 (internal memorandum); B-246660, March 20, 1992 (internal memorandum). See also B-182219, October 23, 1974 (judgment against official in individual capacity). To restate, a compromise settlement has no effect on the source of funds. This is also the position of the Department of Justice. 13 Op. Off. Legal Counsel 118 (1989) (preliminary print). A contrary view, as Justice points out, might encourage settlements driven by source-of-funds considerations rather than the best interests of the United States. *Id.* at 125.

The availability of the judgment appropriation for compromise settlements includes compromises of cases arising in foreign countries. B-167543-O.M., August 4, 1969.

## (2) Federal Tort Claims Act

Public Law 89-506, 80 Stat. 306 (1966), made major changes to the Federal Tort Claims Act. Prior to 1966, the authority of agencies to settle tort

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<sup>9</sup>See B-115234, March 30, 1959, GAO's comments on an early version of the bill which ultimately became Pub. L. No. 87-187. See also 62 Comp. Gen. 12, 16-17 (1982).

claims administratively was limited to claims not in excess of \$2,500. For claims over that amount, a lawsuit had to be filed. Under the pre-1966 version of the Federal Tort Claims Act, compromise settlements, even of the lawsuits, were payable solely from agency funds.<sup>10</sup> The 1966 amendments eliminated the monetary ceiling on administrative settlement authority (although settlements over \$25,000 require the Attorney General's approval), and changed the payment process.

Section 6 of Public Law 89-506, 80 Stat. at 307, added to 31 U.S.C. § 1304 two categories of awards under the Federal Tort Claims Act—administrative awards in excess of \$2,500 (28 U.S.C. § 2672) and compromise settlements entered into after commencement of suit (28 U.S.C. § 2677). Administrative awards of less than \$2,500 continue to be payable from agency funds.

### (3) Elimination of \$100,000 ceiling

By 1977, the \$100,000 limitation on payments under 31 U.S.C. § 1304 had become unrealistically low, and Congress still found itself having to make routine appropriations for judgments, a task it had largely wanted to rid itself of in 1956. For example, Federal Tort Claims Act awards greater than \$100,000 had become increasingly common. Pub. L. No. 95-26, 91 Stat. 61, 96 (1977), removed the \$100,000 limitation. Thus, since 1977, judgments, awards, and compromise settlements payable under 31 U.S.C. § 1304 are payable without regard to amount. See Temoak Band of Western Shoshone Indians v. United States, 593 F.2d 994, 999 (Ct. Cl. 1979).

### (4) Certain administrative awards

It turned out that the elimination of the \$100,000 ceiling still did not totally eliminate the need for periodic specific “judgment appropriations” because those appropriations had included, in addition to court judgments, a few administrative claim settlements under statutes which required specific congressional appropriations for payment. Public Law 95-240, § 201, 92 Stat. 107, 116 (1978), further expanded the judgment appropriation to pick up several of these, now specified in 31 U.S.C. §§ 1304(a)(3)(B) and (D): awards under the so-called Small Claims Act (31 U.S.C. § 3723) and awards in excess of amounts payable from agency funds under 10 U.S.C. §§ 2733 or 2734, 32 U.S.C. § 715, and 42 U.S.C. § 2473(c)(13). These are all discussed further in Chapter 12.

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<sup>10</sup>Since this limitation was specified in the Federal Tort Claims Act itself, it had been unaffected by the 1961 enactment of Pub. L. No. 87-187.

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(5) Contract Disputes Act of 1978

Prior to 1978, while court judgments on contract disputes were payable from the judgment appropriation, awards by agency boards of contract appeals were payable directly by the contracting agency. The Contract Disputes Act of 1978<sup>11</sup> changed this by making monetary awards by boards of contract appeals payable from the judgment appropriation, and by requiring that the contracting agency reimburse the judgment appropriation for both court judgments and board awards. Contract Disputes Act payments are also discussed further in Chapter 12.

(6) Brooks Act awards

The Brooks Automatic Data Processing Act, 40 U.S.C. § 759, generally establishes procedures for the procurement of automatic data processing (ADP) equipment. In 1984, the Competition in Contracting Act (Pub. L. No. 98-369, § 2713, 98 Stat. 494, 1182) amended the Brooks Act to authorize the General Services Administration Board of Contract Appeals to hear and decide protests against ADP contract awards. 40 U.S.C. § 759(f). If the GSBCA finds that the procuring agency has violated a statute or regulation, it may award (a) costs of filing and pursuing the protest, including reasonable attorney's fees, and (b) costs of bid and proposal preparation. These awards are payable from the judgment appropriation initially, subject to reimbursement "out of funds available for the procurement." *Id.* § 759(f) (5) (E), added by Pub. L. No. 103-355, § 1436 (1994).

Prior to late 1994, the Brooks Act did not expressly require reimbursement of the judgment appropriation. The GSBCA initially took the position that it could direct reimbursement in particular cases. Federal Computer Corporation, GSBCA No. 10527-C, 92-1 BCA ¶ 24,415 (1991). The Justice Department disagreed. 14 Op. Off. Legal Counsel 126 (1990) (preliminary print). A divided GSBCA subsequently repudiated its previous position. Sysorex Information Systems, Inc. v. Department of the Treasury, GSBCA No. 10781-C (10642-P)-REIN, 93-1 BCA ¶ 25,428 (1992). The Court of Appeals for the Federal Circuit regarded the issue as a nonjusticiable intra-governmental dispute and declined to rule on it. United States v. Julie Research Laboratories, 881 F.2d 1067 (Fed. Cir. 1989). Congress ended the controversy by adding the reimbursement requirement as part of the

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<sup>11</sup>Pub. L. No. 95-563, §§ 13 and 14(c), 92 Stat. 2383, 2389-90 (1978), codified at 41 U.S.C. § 612 and 31 U.S.C. § 1304(a)(3)(C).

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Federal Acquisition Streamlining Act of 1994. See the Bid Protest heading of Chapter 12 for further discussion.

c. Key Features

An examination of 31 U.S.C. § 1304 as it now exists discloses several key features which, in effect, define the availability of the appropriation.

First, it is a permanent, indefinite appropriation. This means that it has no fiscal year limitations, there is no limit on the amount of the appropriation, and there is no need for Congress to appropriate funds to it annually or otherwise. It operates completely independent of the congressional authorization and appropriation process. It is, in effect, standing authority to disburse money from the general fund of the Treasury.

Second, it very precisely delineates the items for which it is available—the items listed in 31 U.S.C. §§ 1304(a)(3) and (c)(1).<sup>12</sup>

Third, it is available only for judgments, awards, and compromise settlements which are “not otherwise provided for.”

Fourth, it is available only for judgments, awards, and compromise settlements which are “final.”

Fifth, it is available only upon the certification of the Comptroller General.

The last three items are discussed in detail later in this chapter.

Finally, it is important to emphasize that the judgment appropriation is not itself a waiver of sovereign immunity; the legal basis for a judgment or award must be found elsewhere. As the Supreme Court has cautioned, 31 U.S.C. § 1304

“does not create an all-purpose fund for judicial disbursement. . . . Rather, funds may be paid out only on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute.”

Office of Personnel Management v. Richmond, 496 U.S. 414, 432 (1990).  
See also In re All Asbestos Cases, 603 F. Supp. 599, 612 n.16 (D. Hawaii

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<sup>12</sup>The listing in section 1304 while precise is not exclusive. Congress may include a provision in other legislation making some particular item payable under section 1304. An example is section 6239 of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342, 3743, amending 26 U.S.C. § 7430 to authorize the awarding of costs and attorney fees in administrative proceedings before the Internal Revenue Service, and providing expressly for payment under 31 U.S.C. § 1304.

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1984) (31 U.S.C. § 1304 “is irrelevant to the issue of whether . . . the legal predicate for judgment against the government exists”).

d. Budgetary and Obligational Treatment

Although, as noted earlier, the judgment appropriation does not receive money transfusions through the regular appropriations process, it is nevertheless included in the President’s annual budget submissions. In the “program by function” analysis, it appears under the “general government” heading; in the “program by agency” analysis, it is listed under the Treasury Department. Totals appear in the annual Budget Appendix volumes under the title “Claims, Judgments, and Relief Acts.”<sup>13</sup> While the judgment appropriation is thus reflected in the budget in the manner described, disbursements are not accounted for by the agency whose activities gave rise to the judgment.

The judgment appropriation is exempt from reduction or sequestration under the Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings Act), as amended. 2 U.S.C. § 905(g).

As discussed in Chapter 7, one of the criteria for recording obligations under 31 U.S.C. § 1501 is subsection (a)(6), documentary evidence of “a liability that may result from pending litigation.” The recording requirement of 31 U.S.C. § 1501(a)(6) has never been viewed as applicable to the judgment appropriation. The “obligations” are wholly beyond the control of either GAO or the Treasury Department, and attempting to track pending litigation would present an enormous administrative burden with no compensating benefit. Further, since the judgment appropriation is by definition both permanent and indefinite and thus cannot be overobligated nor can a payment be charged to the “wrong” fiscal year, the separate recording of obligations would serve no purpose. Also, pending litigation which may result in a judgment payable from the judgment appropriation does not obligate the appropriations of the respondent agency since the judgment will have no financial impact on that agency’s appropriations.

For judgments payable from agency funds, case law is limited but provides some guidance. The applicability of subsection (6) was first discussed in

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<sup>13</sup>The budget presentation generally parallels the four Treasury accounts which comprise the permanent judgment appropriation: Judgments, Court of Federal Claims (20X1740); Judgments, U.S. [District] Courts (20X1741, including administrative settlements under the Federal Tort Claims Act); Claims for damages (20X1742, these being the payments authorized under 31 U.S.C. §§ 1304(a)(3)(B) and (D)); and Claims for contract disputes (20X1743, the reimbursable payments under the Contract Disputes Act). However, it also includes two items which are not part of the judgment appropriation but which are paid under other permanent accounts: claims for firefighting service and private relief laws. Thus, to determine the total expenditures from the judgment appropriation, these two items must be deducted.

35 Comp. Gen. 185 (1955). Noting that the subsection was enacted to permit obligations to be recorded in land condemnation proceedings under the Declaration of Taking Act, and that it could not have been intended to require recording in every pending case which might or might not result in liability, the Comptroller General concluded that subsection (6) requires the recording of an obligation “only in those cases where the Government is definitely liable for the payment of money out of available appropriations and the pending litigation is for the purpose of determining the amount of the Government’s liability.” 35 Comp. Gen. at 187.

Twenty years later, the scope of subsection (6) was expanded in a decision involving an anti-impoundment suit, 54 Comp. Gen. 962 (1975). That decision concerned a case in which the plaintiff had alleged the failure of the Department of Agriculture to properly administer the Food Stamp Act. The district court ordered the funds in question recorded as an obligation under subsection (6) to prevent the unexpended balance from expiring. The Comptroller General stated that 35 Comp. Gen. 185 had correctly expressed the general rule, but noted further that anti-impoundment litigation must be considered unique and concluded that the court’s order established a valid obligation. See also B-115398.48, December 29, 1975 (non-decision letter); 62 Comp. Gen. 527 (1983).

A few years later, GAO applied its 1975 decision in 61 Comp. Gen. 509 (1982), a case in which the defendant agency, in order to avoid the entry of a temporary restraining order, had entered into a stipulation to obligate the contested funds before the end of the fiscal year. The decision pointed out that the stipulation was sufficient “documentary evidence” to support the recording of the obligation. *Id.* at 512.

Thus far, these are the only situations—land condemnation and impoundment-related cases—in which GAO has applied 31 U.S.C. § 1501(a)(6). See also *Rochester Pure Waters District v. EPA*, 960 F.2d 180, 186 (D.C. Cir. 1992); *Township of River Vale v. Harris*, 444 F. Supp. 90, 94 (D.D.C. 1978). (Both cases cite 35 Comp. Gen. 185.)<sup>14</sup>

Notwithstanding the lack of case law, subsection (6) would presumably apply in any other situation meeting the tests of 35 Comp. Gen. 185—(1) government is definitely liable, (2) purpose of the litigation is to determine the amount of the liability, and (3) resulting judgment is payable from agency funds. Suppose, for example, a court grants an award of

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<sup>14</sup>For an additional situation in which recording an obligation under 31 U.S.C. § 1501(a)(6) might be appropriate, see *Foley v. Carter*, 526 F. Supp. 977, 981 n.9 (D.D.C. 1981).

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attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), with the amount to be determined in subsequent proceedings. The agency should record an obligation under subsection (6) when the determination as to liability becomes final.

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### 3. Scope of the Judgment Appropriation: Some General Considerations

Not all directives issued by a court against the federal government result in the use of 31 U.S.C. § 1304. Several types of judgments are “otherwise provided for,” and these will be explored later. Before getting to that discussion, however, it is necessary first to set out some general considerations which help define what kinds of things may be paid from the judgment appropriation or, in other words, define what is a judgment for purposes of section 1304 and what is not.

#### a. Judgment Appropriation Not Available for Administrative Claim Settlements

As we noted earlier, there are a few situations in which the judgment appropriation has been made available for administrative claim settlements. However, apart from a relatively few explicit statutory exceptions, the important distinction to keep in mind is judicial vs. administrative. See 69 Comp. Gen. 40 (1989) (discussing distinction in context of back pay claims). The judgment appropriation is available for court judgments and certain Justice Department compromise settlements. It is not available for claims settled at the administrative level or awards by administrative tribunals. 64 Comp. Gen. 349 (1985) (administrative settlement of age discrimination complaint); 58 Comp. Gen. 667 (1979) (undisputed administratively imposed penalties under Clean Air Act); B-199291, June 19, 1981 (administrative award of attorney fees under Title VII of Civil Rights Act); B-143673, November 11, 1976, overruled on other grounds by 56 Comp. Gen. 615 (1977) (claims under 31 U.S.C. § 3721); B-130140, January 29, 1957 (claim settled by Comptroller General).

There are many types of administrative claims which agencies routinely pay from their own operating funds. The judgment appropriation does not change this.

#### b. Requirement for Money Judgment

Essentially, 31 U.S.C. § 1304 contemplates a money judgment, that is, a judgment directing the government to pay money as opposed to a judgment directing the government to perform some specific action. Any judgment can be translated into a monetary amount in the sense that the cost of compliance can be calculated, but this does not mean that the ultimate cost is to be borne by the judgment appropriation. 70 Comp. Gen. 225, 228 (1991). The Justice Department reached the same conclusion in 13 Op. Off. Legal Counsel 118 (1989) (preliminary print). Thus, 31 U.S.C.

§ 1304 was not available to fund court orders or settlements directing agencies to: reconsider eligibility under a benefit program, 70 Comp. Gen. 225; implement a nondiscriminatory employment system, 69 Comp. Gen. 160 (1990); hire an equal opportunity expert, B-234793.2, June 5, 1989; or correct structural defects in a building, B-193323, January 31, 1980. None of these are money judgments.

Similarly, a judgment ordering the reinstatement of a terminated federal employee might very well result in an entitlement to back pay under the Back Pay Act, but unless the judgment specifically directs the payment of back pay, any resulting payment would have to come from the employing agency's funds. 58 Comp. Gen. 311, 312 (1979).

A remand to an administrative body is not a money judgment, and does not become one simply because the administrative body subsequently directs the payment of money (or the case is settled) pursuant to the remand. B-189449, August 31, 1977. The cited decision dealt with a suit against the District of Columbia government, but the point is equally applicable in the context of 31 U.S.C. § 1304. See also Sullivan v. Department of Navy, 720 F.2d 1266, 1276 n.3 (Fed. Cir. 1983); Brewer v. United States Postal Service, 647 F.2d 1093, 1098–99 (Ct. Cl. 1981) (remand to Merit Systems Protection Board is not a money judgment even where it directs the Board to issue an order requiring payment of back pay).

Once the basic money judgment requirement has been satisfied, the judgment statutes (28 U.S.C. §§ 2414 and 2517, 31 U.S.C. § 1304) do not address the permissible forms the money judgment may take. For example, while a judgment must be a money judgment to be payable from the permanent appropriation, there are situations in which it does not necessarily have to include a sum certain. Thus, judgments awarding back pay under the Back Pay Act or Title VII of the Civil Rights Act of 1964 are money judgments for purposes of section 1304 even where they do not specify the dollar amount to be paid. 58 Comp. Gen. 311 (1979); 55 Comp. Gen. 1447 (1976). As a general proposition, however, payment delays are less likely to occur if the judgment specifies the dollar amount to be paid.

Money judgments have “traditionally taken the form of a lump sum, paid at the conclusion of the litigation.” Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 533 (1983). While, in the context of judgments against the federal government, this remains true in the overwhelming majority of cases, the decades of the 1970s and 1980s saw the mushrooming of

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“structured settlements” in personal injury cases requiring long-term care. In a structured settlement, the award is either placed in a reversionary trust or used to purchase an annuity. Depending on the circumstances, the trust or annuity may or may not be accompanied by a separate lump-sum amount paid directly to the plaintiff.

The first consideration of such an arrangement from the payment perspective appears to have been in B-162924, December 22, 1967. The case involved a medical malpractice suit under the Federal Tort Claims Act on behalf of a plaintiff expected to remain comatose for life. The proposed settlement included two parts: (1) a lump-sum payment covering all damages other than future care and treatment, and (2) another lump sum payable in trust to a court-appointed trustee. The trust would include the power to invade the corpus if necessary. Upon the death of the plaintiff, any remaining corpus and income would revert to the United States. The Comptroller General found the proposal legally unobjectionable, cautioning only that the amount paid to the trustee should represent the government’s maximum obligation and should not exceed the cost of a reasonable fixed settlement.

Some courts have stated that they lack the authority to order anything other than a lump-sum money judgment. Frankel v. Heym, 466 F.2d 1226, 1228–29 (3d Cir. 1972); Lozada v. United States, 140 F.R.D. 404, 416 (D. Neb. 1991); Andrulonis v. United States, 724 F. Supp. 1421, 1519 n.616 (N.D.N.Y. 1989); Elliott v. United States, 329 F. Supp. 621, 628 (D. Me. 1971). See also Reilly v. United States, 665 F. Supp. 976, 1016–17 (D.R.I. 1987), aff’d in part and remanded on other grounds, 863 F.2d 149 (1st Cir. 1988) (court said it was following Frankel, but then ordered limited reversionary trust).

More recently, the 10th Circuit has held that a district court in a Federal Tort Claims Act case has the inherent power to order that damages be paid in the form of a reversionary trust if in the plaintiff’s best interest, as long as the government’s obligation to the plaintiff ceases upon payment of a fixed lump sum to fund the trust. Hull v. United States, 971 F.2d 1499, 1505–06 (10th Cir. 1992), cert. denied, 113 S.Ct. 1844. The court viewed this as consistent with Frankel because the proposal the Frankel court disapproved would have required the government to supplement the trust from time to time, something the Hull court agreed could not be imposed on the government. Id. at 1504–05. See also Nemmers v. United States, 795 F.2d 628, 636 (7th Cir. 1986) (court may require purchase of annuity if it fears victim’s relatives may misuse lump-sum payment); Hill v. United

States, 854 F. Supp. 727, 732 (D. Colo. 1994); Wheeler Tarpeh-Doe v. United States, 771 F. Supp. 427, 457 (D.D.C. 1991) (government could be required to fund a reversionary trust).

In any event, whatever inherent powers the courts have or do not have, the parties are free to agree to payment in a “structured” (trust or annuity) form. E.g., Gretchen v. United States, 618 F.2d 177, 181 n.5 (2d Cir. 1980) (suit under Public Vessels Act). See also Wyatt v. United States, 783 F.2d 45 (6th Cir. 1986); Robak v. United States, 503 F. Supp. 982, 983 (N.D. Ill. 1980), aff’d in part and rev’d in part on other grounds, 658 F.2d 471 (7th Cir. 1981). (Both cases involve structured settlements—an annuity in Wyatt, a reversionary trust in Robak—which originated in agreements of the parties.) Of course, a structured award is also permissible where expressly authorized by statute. E.g., Reilly, 863 F.2d at 169 n.16.

Money reverting to the United States under a structured settlement is credited to the appropriation from which the settlement was originally disbursed (usually the judgment appropriation). B-209849, December 2, 1982 (non-decision letter).

### c. Form of Judgment

The judgment does not have to be captioned “judgment.” It may be, and frequently is, designated as an “order.” The caption is immaterial as long as the court’s action is a final determination of the rights of the parties. B-164766, June 1, 1979; B-101576, February 3, 1955. Sometimes it may not be called anything. E.g., B-242209, December 17, 1990 (internal memorandum) (judge’s handwritten notation in margin of plaintiff’s pleading).

Clearly the term “judgment” embraces consent judgments or decrees. See, e.g., 4 Comp. Gen. 834 (1925). Also, as discussed previously, the permanent appropriation is available for compromise settlements of suits otherwise within its scope.

### d. What Tribunals May Issue the Judgment

The primary focus of the judgment appropriation is, of course, judgments rendered by a United States district court or the United States Court of Federal Claims. This naturally includes the appellate courts which review judgments of these courts. For example, the United States Courts of Appeals and the Supreme Court occasionally award costs.

The Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980), established the United States Court of International Trade to replace the former Customs Court, authorized it to enter money judgments for or

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against the United States (28 U.S.C. § 2643(a)), and amended 28 U.S.C. § 2414 to include the Court of International Trade. Thus, principles in this chapter applicable to district courts will, to the extent they derive from the authority of 28 U.S.C. § 2414, apply generally to the Court of International Trade as well.

The Tax Court is generally not covered by 31 U.S.C. § 1304. 63 Comp. Gen. 470 (1984). However, by virtue of legislation enacted in 1986, costs and attorney fees awarded by the Tax Court under section 7430 of the Internal Revenue Code are payable from the judgment appropriation. 26 U.S.C. § 7430(a).

As noted earlier in this chapter, legislation in 1961 made the judgment appropriation available for state and foreign court judgments. However, before a state or foreign court judgment may be paid, the Attorney General (or someone to whom the authority has been delegated) must certify that it is in the interest of the United States to pay. 28 U.S.C. § 2414. State courts in this context include the courts of the District of Columbia. 56 Comp. Gen. 592, 595 (1977). Foreign courts may include certain international tribunals, an example being the International Court of Justice. 13 Op. Off. Legal Counsel 240 (1989) (preliminary print).

The “interest of the United States” determination was apparently designed to permit the payment decision to include considerations of policy as well as legal liability. B-206443, June 25, 1984. As with anything else payable from the judgment appropriation, the judgment must be final and payment must be not otherwise provided for. *Id.*; B-227527/B-227325, October 21, 1987 (non-decision letter). Restrictions in 31 U.S.C. § 1304 on post-judgment interest do not apply to state or foreign court judgments. B-206443, June 25, 1984; B-148111-O.M., February 14, 1962.

#### e. Imminent Litigation

Apart from the few categories of administrative claims noted earlier in this chapter, the judgment appropriation is available for one type of payment which may be made prior to the commencement of a lawsuit. Under 28 U.S.C. § 2414, the Attorney General or his designee may compromise claims “referred to the Attorney General for defense of imminent litigation . . . against the United States, or against its agencies or officials upon obligations or liabilities of the United States.” There has been little occasion to construe this authority, but a 1979 decision set forth some general guidelines. The “imminent litigation” authority is not a device to enable an agency to avoid paying otherwise valid claims from its own funds. There must be a genuine disagreement or impasse. Litigation is not

“imminent” for purposes of this provision merely because a claimant will sue if the agency does not pay. There must be a legitimate dispute over either liability or amount. Absent such a dispute or impasse, there is nothing to refer to the Attorney General. 58 Comp. Gen. 667 (1979). See also B-198352, June 22, 1981.

Opinions of the Attorney General on compromise authority in other contexts support the approach of 58 Comp. Gen. 667. See, for example, 38 Op. Att’y Gen. 98 (1934) (nothing to compromise where liability is certain; must be a “bona fide dispute as to either a question of fact or of law”); 38 Op. Att’y Gen. 94, 96 (1933), citing 23 Op. Att’y Gen. 18, 20 (1900) (claim “must in some way be doubtful” to be validly compromised).

f. Designation of Defendant

As a general proposition, at least in suits for money damages, the rule is that a federal agency may not be sued in its own name (the cases use the Latin “eo nomine”) unless explicitly authorized by Congress. Blackmar v. Guerre, 342 U.S. 512 (1952); Shelton v. U.S. Customs Service, 565 F.2d 1140 (9th Cir. 1977); Economou v. U.S. Dep’t of Agriculture, 535 F.2d 688 (2d Cir. 1976), vacated on other grounds, Butz v. Economou, 438 U.S. 478 (1978); Midwest Growers Cooperative Corp. v. Kirkemo, 533 F.2d 455 (9th Cir. 1976).

As one illustration, suits under the Federal Tort Claims Act are supposed to be brought against the United States and not the particular agency involved. City of Whittier v. U.S. Dep’t of Justice, 598 F.2d 561 (9th Cir. 1979); Kohlbeck v. Kis, 651 F. Supp. 1233 (D. Mont. 1987); Murray v. U.S. Postal Service, 550 F. Supp. 1211 (D. Mass. 1982). See also 28 U.S.C. §§ 2674, 2679(a). In contrast, suits under Title VII of the Civil Rights Act of 1964 are required to designate the “head of the department, agency, or unit, as appropriate” as the defendant. 42 U.S.C. § 2000e-16(c). They are nevertheless viewed as suits against the United States for purposes of 31 U.S.C. § 1304. 58 Comp. Gen. 311, 315–16 (1979). In some types of cases, the designation of an agency rather than the United States as defendant will be important where it reflects jurisdiction deriving from a “sue and be sued” clause. A 1994 Supreme Court decision discussed exposure to constitutional tort suits under a “sue and be sued” clause. See FDIC v. Meyer, 114 S. Ct. 996 (1994).

Thus, for payment purposes, or more specifically the availability of 31 U.S.C. § 1304, the caption of a case is not in and of itself controlling. It should not be assumed that all cases in which the defendant is the United States will be payable from the judgment appropriation (a good example being a

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Federal Tort Claims Act suit involving the Postal Service), nor should it be assumed that all cases in which a particular agency or agency head is designated as defendant will be payable from agency funds. The nature of the judgment and not the caption of the case is the controlling factor.

Regardless of how the case is captioned, the key question is whether the judgment binds the United States. If it does not (for example, where the government was not a party), there is no basis to invoke 31 U.S.C. § 1304. E.g., B-240135, August 14, 1990. See also 44 Comp. Gen. 86 (1964); B-244911, July 25, 1991 (internal memorandum).

#### g. Judgment Against Individual Officer or Employee

As seen above, a judgment against an official in his or her official capacity may in appropriate circumstances be viewed as a judgment against the United States for purposes of 31 U.S.C. § 1304. This generally means situations where the official, usually an agency head, is merely a “nominal defendant” and the suit is in reality a suit against the United States. “[A] suit against the head of a federal agency in his official capacity only is considered a suit against the government itself.” Anderson v. Transamerica Specialty Insurance Co., 804 F. Supp. 903, 906 (S.D. Tex. 1992). See also Brandon v. Holt, 469 U.S. 464, 471–73 (1985). A prime example is an employment discrimination suit under Title VII of the Civil Rights Act.

However, a judgment against an officer or employee in his or her individual capacity is not a judgment against the United States and is not payable from the permanent judgment appropriation.<sup>15</sup> An individual capacity suit seeks a remedy against the individual rather than against the government. Suits of this nature skyrocketed after the Supreme Court’s decision in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), holding that federal employees could be held liable for money damages for certain constitutional violations (the so-called “constitutional tort”). The offense in Bivens, for example, was a violation of the search-and-seizure protections of the Fourth Amendment.

Whether individual capacity judgments can be paid or reimbursed from agency funds is a separate question. There are a few situations in which government liability is established by statute. For example, 26 U.S.C. § 7423 authorizes the Secretary of the Treasury to reimburse any officer or employee of the United States for (a) sums recovered against the employee in any court for any internal revenue taxes collected by the

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<sup>15</sup>See Kentucky v. Graham, 473 U.S. 159, 166–67 (1985). The Graham decision includes a brief but useful discussion of the distinction between individual capacity and official capacity actions. An official capacity suit requires a waiver of sovereign immunity. E.g., Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985); Clark v. Library of Congress, 750 F.2d 89, 102–04 (D.C. Cir. 1984).

employee, and (b) all damages and costs recovered in any suit against the employee for actions taken in the performance of official duties in matters relating to tax administration. Reimbursement under 26 U.S.C. § 7423 is discretionary. *Gilbert v. DaGrossa*, 756 F.2d 1455, 1460 (9th Cir. 1985). Reimbursement under this statute must be made from agency funds and not from the permanent judgment appropriation. 56 Comp. Gen. 615, 619–20 (1977).

Also, under 28 U.S.C. § 2006, a judgment against a “collector or other revenue officer” arising from the performance of official duty may be converted into a judgment against the government if the court certifies that probable cause existed or that the officer acted under the direction of the Secretary of the Treasury or other proper government official. The Supreme Court discussed the origin of this statute in *United States v. Kales*, 314 U.S. 186, 197–98 (1941). If a certificate of probable cause is issued and the case falls within the scope of 26 U.S.C. § 7423, payment must come from agency funds in accordance with 56 Comp. Gen. 615. However, GAO has used the judgment appropriation in a case where the certificate was issued and the case did not fall within the scope of 26 U.S.C. § 7423. In either case, it is immaterial whether the government is being asked to pay the judgment directly or to reimburse the employee. B-200431-O.M., December 31, 1981. (B-200431-O.M. traces the history and evolution of payments under 28 U.S.C. § 2006 and 26 U.S.C. § 7423.)

Since judgments to which the provisions of 26 U.S.C. § 7423 or 28 U.S.C. § 2006 apply are judgments against the individual and not the United States, restrictions on interest and costs awardable against the United States do not apply. Thus, interest and costs may be included in the reimbursement or direct payment to the extent awarded in the judgment. 12 Comp. Gen. 474 (1932); 8 Comp. Gen. 126 (1928); 21 Comp. Dec. 705, 707 (1915); B-45014, November 4, 1944; B-200431-O.M., December 31, 1981. If the judgment involves the overpayment of any internal revenue tax, interest is now allowable as a matter of statutory entitlement. 28 U.S.C. § 2411; 8 Comp. Gen. at 128.

Wholly apart from any limited statutory authority that may exist such as 26 U.S.C. § 7423 or 28 U.S.C. § 2006, both GAO and the Justice Department have often stated the proposition that where an officer or employee of the government is sued because of some official act done in the discharge of an official duty, the expense incurred by that officer or employee in the discharge of such duties should be borne by the United States. This principle has deep roots. *E.g.*, 15 Comp. Dec. 621 (1909); 9 Op. Att’y Gen.

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51 (1857); 3 Op. Att’y Gen. 306 (1838). Where payment or reimbursement is proper under this principle, it must be made from agency appropriations.

During the 1980s, largely in response to the flood of Bivens-type suits, approximately a dozen agencies issued regulations establishing programs to indemnify their employees against personal liability for actions taken within their scope of employment. The Justice Department’s Office of Legal Counsel has issued several opinions upholding the legality of these programs. 15 Op. Off. Legal Counsel 70 (1991) (preliminary print) (Treasury Department); 13 Op. Off. Legal Counsel 54 (1989) (preliminary print) (Environmental Protection Agency); 10 Op. Off. Legal Counsel 9 (1986) (preliminary print) (Justice Department).

The basis in each case is the “necessary expense” doctrine of purpose availability—that is, an agency can legitimately determine that such a program will materially contribute to the effective accomplishment of its mission. Each opinion points out that payment must come from the agency’s general operating appropriations. The agency must review each case individually, and may not indemnify for actions not within the scope of employment even though taken in the course of performing official duties. 15 Op. Off. Legal Counsel at 78. The agency must also guard against Antideficiency Act violations. Id. (This opinion, at 72 nn. 4–6, gives references for all then-existing agency programs.)

GAO has not had the occasion to address any of the formal agency programs (nor should there be any need or reason in light of the OLC opinions), but has considered a number of individual cases. For example, in Merovka v. Allen, 410 F.2d 1307 (10th Cir. 1969), personal-capacity judgments were entered against 3 federal game wardens who, in an attempt to protect waterfowl, had violated federal regulations by placing “no hunting” signs on private property. Although the court found that the agents had exceeded their authority, they had acted in accordance with agency policy and at the direction of their superiors. Accordingly, reimbursement was appropriate. B-168571-O.M., January 27, 1970.

A few years later, this case was distinguished in B-176229, October 5, 1972, affirmed by B-176229, May 1, 1973, in which an employee of the Bureau of Indian Affairs attempted to eject certain individuals from a building and was sued for assault and battery. Reimbursement was denied because the liability did not arise by reason of performance of official duties nor because of compliance with agency instructions nor pursuant to orders of superiors. See also B-182219, October 23, 1974 (National Guard technician,

dismissed for refusing to participate in a firing squad at a military funeral, sued the Adjutant General who fired him; GAO found appropriated funds unavailable, under 31 U.S.C. § 1304 or otherwise, to pay a judgment or settlement against the defendant).<sup>16</sup>

Most GAO decisions and opinions in this area have dealt with attorney's fees or court-imposed fines, and the cases are covered in the appropriate sections of Chapter 4.

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## 4. The "Otherwise Provided For" Exception

### a. Introduction

The permanent judgment appropriation is available only where payment is "not otherwise provided for." 31 U.S.C. § 1304(a)(1). Payment is otherwise provided for if some other appropriation or fund is legally available to satisfy the judgment. *E.g.*, 66 Comp. Gen. 157, 160 (1986); 62 Comp. Gen. 12, 14 (1982).

In order to understand the "otherwise provided for" concept, it is necessary to understand exactly what 31 U.S.C. § 1304 was designed to do. As we have seen, prior to 1956 (and, for judgments over \$100,000, prior to 1977), most judgments against the United States could not be paid without a specific congressional appropriation, regardless of the agency's willingness to pay or regardless of how much money the agency had available. These are the judgments section 1304 was intended to pick up. However, not all judgments required specific appropriations. There were, prior to enactment of the judgment appropriation, situations in which agency funds were available to pay judgments. The "otherwise provided for" exception in section 1304 preserved these situations and the concept generally.

Thus, the judgment appropriation was intended to eliminate the need to seek specific appropriations from Congress to pay judgments when that need resulted from the legal unavailability of funds. It was not intended to shift the payment source for items which could always have been paid from agency funds, whether the authority was expressly provided by

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<sup>16</sup>The rationale in B-182219 for the unavailability of agency appropriations was a rather summary out-of-context application of the principle that agency funds are normally not available for judgments, citing another out-of-context application which has since been overruled. The evaluation of whether indemnification is appropriate in any given case should instead be based on the factors discussed in B-176229 and the Justice Department opinions.

statute or was reasonably implied from the nature of the agency's legal status or mission.

Recognition of the “otherwise provided for” concept appears in many places in the legislative history of both the original enactment of 31 U.S.C. § 1304 and subsequent amendments. The most detailed discussion of the original 1956 legislation is a statement by the (then) Bureau of the Budget printed in the hearings of the House Appropriations Committee. The statement begins by noting that some types of judgments could be paid from existing funding sources, and that the rest of the discussion “relates solely to the general types of cases for which specific appropriations are required.”<sup>17</sup> When compromise settlements were added in 1961, the reports of both the Senate and House Judiciary Committees quoted a Justice Department statement to the effect that settlements would be payable from the permanent appropriation only “[i]f agency funds or appropriations are not available for this purpose.”<sup>18</sup> And, when certain administrative awards were added by the 1978 Supplemental Appropriations Act, the reports of both the Senate and House Appropriations Committees emphasized that the new provision “is not intended to affect claims which are payable from agency appropriations.”<sup>19</sup>

There is no single test to determine if something is “otherwise provided for.” The determination may flow from the nature of the defendant agency, the type of judgment involved, or the statutory funding scheme applicable to the particular agency or program. Types of judgments which existed prior to the availability of the judgment appropriation and which could have been paid from agency funds remain unaffected—they remain “otherwise provided for.” For types of judgments which did not exist prior to enactment of the judgment appropriation, the question usually is whether Congress has established a mechanism which is available for payment. Most situations, as we will see, involve some degree of complexity.

Before proceeding to specific situations, two key points need to be emphasized:

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<sup>17</sup>Hearings on Supplemental Appropriation Bill, 1957, Before Subcomm. of the House Comm. on Appropriations, 84th Cong., 2d Sess., pt. 2, at 883 (1956).

<sup>18</sup>S. Rep. No. 733, 87th Cong., 1st Sess. 3 (1961); H.R. Rep. No. 428, 87th Cong., 1st Sess. 3 (1961).

<sup>19</sup>S. Rep. No. 564, 95th Cong., 1st Sess. 76 (1977); H.R. Rep. No. 644, 95th Cong., 1st Sess. 53 (1977).

- The question of whether payment is “otherwise provided for” is a question of legal availability rather than actual funding status. As a general proposition, if payment of a particular judgment is “otherwise provided for” as a matter of law, the judgment appropriation is not available, and the fact that the defendant agency may have insufficient funds at that particular time does not operate to make the judgment appropriation available. 66 Comp. Gen. 157, 160 (1986); Department of Energy Request to Use the Judgment Fund for Settlement of Fernald Litigation, Op. Off. Legal Counsel, December 18, 1989. The agency’s recourse in this situation is to seek funds from Congress, the same as it would have to do in any other deficiency situation.
- There is only one proper source of funds in a given case. The very terms of 31 U.S.C. § 1304—making an appropriation for payments not otherwise provided for—require that a source-of-funds determination be made. There is no election involved, however. If agency funds are available, then the judgment appropriation is not. Conversely, if a judgment is properly payable from the judgment appropriation, then payment of that judgment from agency funds violates 31 U.S.C. § 1301(a) (restricting appropriations to the objects for which made).

If an agency inadvertently or erroneously uses agency funds to pay something which should have been charged to the judgment appropriation, GAO’s policy is to reimburse the agency upon proper request. See, e.g., B-178551, January 2, 1976 (letter to Air Force); B-52600/B-97131, May 7, 1952.

For judgments payable from agency appropriations, the rules of availability of appropriations with respect to time and amount as described in Chapters 5 and 6 of this publication apply just as they would to any other expenditure. See, e.g., 70 Comp. Gen. 225 (1991) (use of expired appropriation).

## b. Tax Judgments

The method of appropriating for tax refunds has changed several times over the decades, and along with it the method of paying tax judgments.<sup>20</sup> Prior to fiscal year 1921, appropriations for refunding internal revenue taxes were made on an annual, indefinite basis. These appropriations were not available for judgments, however, and tax refund judgments required specific appropriations. 2 Comp. Gen. 501, 502 (1923). As the result of legislation enacted in 1919 (40 Stat. 1145), tax refund appropriations starting with fiscal year 1921 became regular (definite) annual appropriations, based on budget requests submitted by the Treasury

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<sup>20</sup>Our source for much of this discussion is B-211389, July 23, 1984.

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Department. These appropriations were available for judgments. 27 Comp. Dec. 442 (1920); 2 Comp. Gen. 501 (1923); A-12287, December 31, 1925.

The tax refund appropriation was converted to a permanent indefinite appropriation in 1948,<sup>21</sup> and is now codified at 31 U.S.C. § 1324. In addition, the Commissioner of the Internal Revenue Service is specifically authorized to pay judgments “for any overpayment in respect of any internal-revenue tax.” 28 U.S.C. § 2411. Thus, judgments representing overpayments or amounts improperly collected by IRS are paid by IRS and charged to the IRS “Refunding Internal Revenue Collections” account. Judgments in this category may result from suits for refund under 26 U.S.C. § 7422 or suits for wrongful levy under 26 U.S.C. § 7426. The judgments are paid directly by IRS without the need for settlement action by GAO. A-97256, November 3, 1938.

This treatment of tax judgments makes sense from the accounting perspective as well. Amounts collected by the IRS by way of judgments are credited as internal revenue collections. 26 U.S.C. § 7406. Paying tax judgments from the IRS refund account is therefore logical and gives a more accurate picture of the net effect of the government’s tax collecting activities. Cf. 55 Comp. Gen. 625 (1976).

It can be seen from the foregoing that the major types of tax judgments are “otherwise provided for,” and their payment does not involve use of 31 U.S.C. § 1304.

However, this does not mean that the judgment appropriation is never available for judgments arising from the activities of the IRS. The distinction is illustrated in B-211389, July 23, 1984. The IRS had seized a building to enforce a delinquent tax lien against a lessee who occupied space in the building. The owner of the building, who was not a delinquent taxpayer, sued for damages it had sustained as a result of the seizure. The governing circuit recognized a cause of action in this type of situation under the Tucker Act, based on an “inverse condemnation” approach. Since the case did not involve the return of anything received by the IRS, nor was it a suit against an individual revenue officer or agent, GAO concluded that a settlement of the suit was payable from the judgment appropriation. To illustrate the difference between this type of case and “tax judgments” that are payable by IRS, the decision gave the following example:

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<sup>21</sup>Supplemental Treasury and Post Office Departments Appropriation Act, 1949, Title I, 62 Stat. 560, 561 (1948). The provision is discussed in B-137762.33, August 5, 1977.

“If, for example, an IRS agent while en route to seizing a building were involved in a motor vehicle accident and negligently injured a private citizen, the citizen would have a claim cognizable under the Federal Tort Claims Act. An adverse judgment in such a case would be payable from the permanent judgment appropriation, even though the IRS agent was in the course of performing revenue-collecting duties at the time of the accident.” B-211389 at 4.

There are other situations in which the IRS may be held liable for “damages” separate and distinct from paying back amounts it has received. The Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342 (1988), included the following new provisions:

- Section 6240, 102 Stat. 3746, added a new 26 U.S.C. § 7432. It authorizes civil actions for damages and costs if the IRS knowingly or negligently fails to release a tax lien when required to do so under 26 U.S.C. § 6325.
- Section 6241, 102 Stat. 3747, added a new 26 U.S.C. § 7433. It authorizes civil actions for damages and costs if the IRS “recklessly or intentionally disregards” any provision of the Internal Revenue Code or regulations.

Each of these sections includes a payment provision expressly directing payment under 31 U.S.C. § 1304. Since both payment provisions use the word “claims,” GAO regards 31 U.S.C. § 1304 as available for administrative settlements as well as court judgments, although the issue has not been addressed in a formal decision or opinion.

Prior to 1982, individual IRS employees could be sued for wrongful disclosure of tax returns or tax return information. As noted above, the Secretary of the Treasury could pay or reimburse any resulting judgments. (Wrongful disclosure was the precise situation involved in 56 Comp. Gen. 615.) In 1982, the statute authorizing suits against the employees (26 U.S.C. § 7217) was repealed and replaced with a new 26 U.S.C. § 7431, under which the remedy is a suit for damages against the United States. Although 26 U.S.C. § 7431 does not include a payment provision, there is no reason to charge judgments or compromise settlements under it to anything other than the permanent judgment appropriation. Administrative settlements under section 7431, however, are payable from IRS appropriations. B-238692, February 26, 1990 (internal memorandum).

With the enactment of the various provisions summarized above for damage suits against the United States, the incidence of suits against individual employees in tax matters should greatly diminish.

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c. Land Condemnation  
Judgments

The permanent judgment appropriation is, as a general proposition, not available for land condemnation judgments. Rather, these are payable from the funds of the acquiring agency. 66 Comp. Gen. 157 (1986) (GAO's most comprehensive discussion); 54 Comp. Gen. 799 (1975); B-164035, May 1, 1968; B-154988, August 21, 1964.

We noted earlier that the judgment appropriation was not intended to shift the source of funds for judgments which, prior to its enactment, were payable from agency funds. Land condemnation judgments fall into this category. 17 Comp. Gen. 664 (1937); 5 Comp. Gen. 737 (1926); A-25484, January 11, 1929; A-12979, February 10, 1926 ("Judgments in condemnation proceedings . . . are not for reporting to the Congress as are ordinary judgments of Federal courts . . ."); B-117598-O.M., December 8, 1953.

In brief, any agency with the authority to acquire land has the authority to acquire it by condemnation. 40 U.S.C. § 257. Condemnation necessarily involves litigation and a judicial determination of just compensation. There is no such thing as "administrative condemnation." Condemnation can be accomplished only through judicial process. Thus, an appropriation available for land acquisition is of necessity available for acquisition by condemnation, whether or not it actually uses the term "condemnation." Land condemnation judgments are therefore "otherwise provided for" because they can be paid from funds of the acquiring agency.

As a matter of policy, GAO's position is that the power of eminent domain should not be accompanied, in the hands of an acquiring agency, by unlimited and uncontrolled access to the general fund of the Treasury through use of the judgment appropriation. The exercise of that power, the power to take private property, should be controlled by Congress through the appropriation process. 66 Comp. Gen. at 160. In addition, condemnation judgments are different from other judgments in that condemnation is basically nothing more than the exercise of a normal program activity. *Id.* at 160–61.

Although the rule is that condemnation judgments may not be paid from the judgment appropriation, there have been a few exceptions. Congress may, of course, provide for use of the judgment appropriation in particular situations. For example, legislation providing for the expansion of the Redwood National Park made the judgment appropriation available for amounts in excess of the amount deposited with the court. 16 U.S.C. § 79g(b); B-212681(1), September 27, 1983. More recently, legislation

providing for expansion of the Manassas National Battlefield Park specified payment from the judgment appropriation. Pub. L. No. 100-647, Title X, § 10002, 102 Stat. 3342, 3810 (1988). It may be significant that both of these were legislative takings.

Another exception arose from legislation in 1977 which gave the district court in Guam jurisdiction to hear, and render judgment on, claims by Guamanians for just compensation for land taken by the United States during and shortly after World War II.<sup>22</sup> The legislative history made it clear that payment from the judgment appropriation was intended. B-212134, June 29, 1983. Given the nature of the case, there would have been no other existing appropriation to charge, and payment from the judgment appropriation would not have the effect of augmenting anyone's land acquisition funds. See also 39 Comp. Gen. 166 (1959).

Another limited exception was recognized by decision. In 1973, Congress directed the Secretary of Agriculture to acquire by condemnation certain Klamath Indian forest lands. Congress then appropriated \$49 million for the acquisition, but the judgment awarded just compensation considerably in excess of that amount. The legislative history indicated that Congress fully recognized that the \$49 million would not be sufficient. Reasoning that the authorization applied to specifically known and identified lands and conferred no discretion on the condemning agency to determine how much land or which tracts to include, and that the appropriation could not have been applied to the acquisition of any other land nor could it have been exhausted by anything but the condemnation of the Klamath forest lands, the Comptroller General concluded that no purpose would be served by requiring a specific appropriation for the deficiency portion of the judgment and that payment from the judgment appropriation would not offend the established structure of funding land acquisitions. B-198352, April 18, 1980. However, the Comptroller General once again reviewed and reaffirmed the traditional treatment of condemnation judgments in general, noting that land acquisition is a normal activity for a number of agencies for which Congress sets the desired program levels through the appropriation process.

The term "inverse condemnation" refers to a variety of claims for just compensation under the Fifth Amendment. The cases may or may not involve the acquisition of land by the government. About the only thing the judgments have in common is that they reflect a determination that there

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<sup>22</sup>Technically, these were not land condemnation suits. In a land condemnation action, the government is the plaintiff. In these cases, the condemnations had been consummated 30 years earlier.

has been a compensable taking of a property interest—some action by the government which sufficiently interferes with a private property right so as to create a right to compensation under the Fifth Amendment. One example is B-211389, July 23, 1984, discussed in our previous section on tax judgments. Another example is the so-called “regulatory taking,” in which a court finds that some government regulatory activity has infringed on a property interest in a manner deemed compensable.

GAO looks at inverse condemnation judgments on a case-by-case basis, and it is difficult to state a “rule.” As a general proposition, inverse condemnation judgments are paid from the judgment appropriation, except where an agency, intending to acquire certain property, by delay or otherwise (which may be intentional or unintentional) effectively “forces” the landowner to file an inverse condemnation action and the result would be a clear augmentation of the agency’s land acquisition appropriations. B-183692-O.M., September 28, 1982. See also 66 Comp. Gen. at 163, citing Althaus v. United States, 7 Cl. Ct. 688 (1985), as an example of an inverse condemnation judgment which would not be paid from the judgment appropriation.

A related type of suit is an action to quiet title, 28 U.S.C. § 2409a, in which someone other than the federal government brings a civil action against the United States to adjudicate a disputed title to real property in which the government claims an interest. If the government loses, it may nevertheless choose to retain possession or control of the property by paying just compensation. A judgment or settlement of this nature is analogous to a direct condemnation and is payable from funds of the acquiring agency. B-249130, February 23, 1993 (internal memorandum). See also A-25484, January 11, 1929.

#### d. Judgments for Refunds

In Eastport Steamship Corp. v. United States, 372 F.2d 1002 (Ct. Cl. 1967), the Court of Claims recognized that claims for money fall into two somewhat overlapping but nevertheless different categories: (1) claims “in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum,” and (2) “demands in which money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury.” Id. at 1007. The court went on to give examples of each type. For purposes of this discussion, we use the term “refund” to correspond roughly to the court’s first category.

Judgments directing refunds are materially different from judgments awarding damages. When a court orders a refund, it is directing the government to return money it received and which the court has determined it improperly received and/or retained. In this sense, it may be argued that a judgment directing a refund is not truly a “money judgment” within the scope of 31 U.S.C. § 1304, but is more akin to injunctive relief. Cf. 70 Comp. Gen. 225, 228 (1991). In addition, if an agency has credited the receipt to its own appropriation or fund, charging the refund to the general fund of the Treasury by paying the judgment under 31 U.S.C. § 1304 would result in an augmentation of the receiving appropriation. A refund should be charged to the general fund only where the receipt was covered into the general fund.

The rule with respect to refunds was stated in 17 Comp. Gen. 859, 860 (1938) and repeated in 29 Comp. Gen. 78, 79 (1949) as follows:

“When the amount subject to refund can be traced as having been erroneously credited to an appropriation account the refund claim is chargeable to said appropriation whether it be lapsed or current, or reimbursable or nonreimbursable.”

GAO has applied the rule regardless of whether the refund is ordered administratively or judicially.

Several more recent decisions will illustrate. In 55 Comp. Gen. 625 (1976), a court directed the refund of a fine paid to the Internal Revenue Service for violation of wagering tax provisions of the Internal Revenue Code. Since the fine had been deposited in the Treasury as an internal revenue collection, the proper account to charge with the refund was the IRS account for refunding internal revenue collections. (Augmentation was not a concern in this case because the fine had not been credited to an operating appropriation or fund.) A very similar case is B-135312, March 13, 1958.

In 61 Comp. Gen. 224 (1982), a court ordered the Department of the Interior to refund fees collected from 1975 through 1981 for right-of-way permits. For part of this time, the fees had been deposited in the general fund of the Treasury as miscellaneous receipts. For the remaining years, the fees were deposited in a special account which Congress had appropriated for use by Interior. For the years in which the fees had been deposited as miscellaneous receipts, the refund was held chargeable to the appropriation for “Refund of Moneys Erroneously Received and Covered” established by 31 U.S.C. § 1322(b)(2). However, for the years in which the

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fees had been credited to the special account, the refund was held chargeable to that special account.

Both of these decisions applied the rule set forth in 17 Comp. Gen. 859. Since there was an available source of funds in each case, there was no need to consider payment under 31 U.S.C. § 1304.

A somewhat different situation occurred in B-164766, June 1, 1979. There the Court of Claims had approved a contractor's motion to substitute a bond in lieu of money previously paid to the Department of the Army under the Renegotiation Act. The issue was the source of funds for the court-ordered refund of the money previously paid. Since the prior payment had been deposited in the Treasury as miscellaneous receipts, there was no basis to charge the refund to Army appropriations. Also, the "Moneys Erroneously Received and Covered" account could not be charged since the deposit had been proper when made, and the court order directing the refund was not based on any suggestion that the original receipt was in any way erroneous. Since there was no other appropriation or fund that could properly be charged, the refund was held payable from the judgment appropriation. (The Renegotiation Board ceased operations as of March 31, 1979.)

Thus, when a judgment or compromise settlement orders a refund, as opposed to the payment of money damages, the first question to ask is what the agency did with the money. If the agency retained the money for credit to its own appropriations, then the refund is chargeable to the agency's appropriations, and the fact that the agency may have spent the money is irrelevant.<sup>23</sup> If the money was deposited in the Treasury as miscellaneous receipts, a judicially-ordered refund may be charged to the "Erroneously Received and Covered" appropriation if applicable, or if not, to the judgment appropriation. Other cases applying these principles are B-206443, June 25, 1984; B-150624-O.M., April 18, 1963; B-140180-O.M., January 27, 1960.

A somewhat analogous situation is the action in rem in which a court directs return of the "res." The "res" may be tangible property, money, or tangible property which has been sold and converted to cash. In the

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<sup>23</sup>In *Texas State Commission for the Blind v. United States*, 796 F.2d 400, 407 (Fed. Cir. 1986), the court refused to apply the refund theory in a suit seeking a portion of vending machine income which the plaintiff alleged the Defense Department improperly diverted in violation of the Randolph-Sheppard Act, in part because Congress had apparently taken these amounts into consideration in determining DOD appropriations. The question was academic, however, as the plaintiff lost the case.

typical case, the action is brought against the property itself, and any judgment is satisfied from that property. E.g., B-75900, June 11, 1948.

The Supreme Court considered an in rem situation in Republic National Bank of Miami v. United States, 113 S. Ct. 554 (1992). The government sought forfeiture of a residence alleged to have been purchased with illegal drug money. The bank claimed a lien interest under a mortgage. Upon agreement of the parties and approval of the court, the property was sold and the proceeds held by the United States Marshal. The district court held in favor of the government and directed forfeiture of the proceeds. The bank filed a notice of appeal, but did not try to obtain a stay of execution of the judgment. The Marshal then deposited the proceeds in the Assets Forfeiture Fund (28 U.S.C. § 524(c)) in the Treasury, and the government moved to dismiss the appeal, arguing that deposit of the proceeds removed the matter from the court's jurisdiction.

The main issue before the Supreme Court was whether deposit of the proceeds in the Treasury terminated the in rem jurisdiction. The answer was no, unless deposit of the funds in the Treasury would somehow render further judgments "useless." The government argued that judgment in this case would be useless because there was no authority to refund the deposited proceeds from the Treasury. In multiple opinions, the Court rejected this argument. While the Court split over the precise nature of the authority, it was unanimous in its belief that adequate authority existed to refund the proceeds from the Treasury in the event that the bank prevailed on its appeal from the underlying forfeiture action. Some of the Justices believed that there was no need for an appropriation to authorize the refund in a case like this, while others found the requisite appropriation in 31 U.S.C. § 1304, together with 28 U.S.C. § 2465 which directs the return of seized property upon entry of judgment for the claimant. (There is no indication that the Court considered whether the Assets Forfeiture Fund itself could satisfy the requirement for an appropriation.)

e. United States Postal Service

Prior to the Postal Reorganization Act of 1970, the Post Office Department was largely a "regular" federal agency, and as such was subject to GAO's claims settlement jurisdiction. The version of 31 U.S.C. § 1304 then in effect included a permanent appropriation of the postal revenues to pay judgments. Judgments were submitted to GAO for certification, but were then forwarded to the Post Office Department (rather than the Treasury Department) for actual payment.

The Postal Reorganization Act replaced the Post Office Department with “an independent establishment of the executive branch of the Government” to be known as the United States Postal Service (USPS). 39 U.S.C. § 201. The USPS was empowered to sue and be sued, and was given its own claims settlement authority. 39 U.S.C. §§ 401(1), 401(8), 2603. It is expressly subject to the Federal Tort Claims Act. 39 U.S.C. § 409(c).

The Postal Reorganization Act addressed the payment of judgments by adding a provision now found at 39 U.S.C. § 409(e):

“A judgment against the Government of the United States arising out of activities of the Postal Service shall be paid by the Postal Service out of any funds available to the Postal Service.”

Thus, the Postal Reorganization Act changed nothing in terms of the source of funds. By virtue of 39 U.S.C. § 409(e), the judgments are explicitly “otherwise provided for.” See *Butz Engineering Corp. v. United States*, 499 F.2d 619, 625, 628 (Ct. Cl. 1974). However, the Act did result in a procedural change—USPS judgments are now paid directly by the USPS and do not require GAO certification prior to payment. B-164786, October 8, 1970.

Cases occasionally raise the issue of whether a particular judgment “arose from activities of” the Postal Service. If so, it is payable by the Postal Service; if not, it is payable from the judgment appropriation. A 1978 decision involved a compromise settlement under the Federal Tort Claims Act. A trailer owned by an independent contractor of the Postal Service had become separated from the tractor-trailer rig and struck the plaintiff’s automobile. The trailer was clearly on Postal Service business, but it was also subject to the Department of Transportation’s motor carrier safety regulations. The decision, while not reflecting any opinion on the merits of the case, concluded that the judgment did arise from Postal Service activities and was therefore properly payable by the Postal Service. B-190593, November 29, 1978.

A 1985 case which did not result in any written GAO decision or opinion provides another good illustration. A USPS employee suffering from chest pains consulted a USPS doctor. The doctor misdiagnosed the situation, but immediately sent the employee to a VA hospital and even arranged for transportation. VA personnel also misdiagnosed the situation. Several days later, the employee died. The chest pains had resulted from a non-work related heart condition. In the ensuing wrongful death action under the

Federal Tort Claims Act, the government negotiated a settlement. Even assuming that the USPS doctor was negligent, that negligence was not the proximate cause of death since the doctor sent the employee immediately to a hospital and death did not occur until more than a week later. In these circumstances, GAO did not view the claim as “arising out of the activities of” the Postal Service for purposes of 39 U.S.C. § 409(e), and certified the settlement for payment from the judgment appropriation.<sup>24</sup>

Still another useful illustration, again not the subject of any written GAO decision or opinion, resulted from the payment of the class action judgment in *Alaniz v. Office of Personnel Management*, 728 F.2d 1460 (Fed. Cir. 1984), in which the court found that OPM had improperly determined cost-of-living allowance adjustments for certain years. Postal Service employees were included in the plaintiff class. If OPM’s action had been binding on the Postal Service as it was with other executive agencies, then the judgment would have arisen from the activities of OPM, not the Postal Service, and the USPS plaintiffs could have been paid from the judgment appropriation along with the other executive branch plaintiffs. If, however, as was in fact the case, the Postal Service was not legally required to follow OPM’s action but had voluntarily chosen to do so, then the judgment arose from the Postal Service’s activities for payment purposes.

#### f. Government Corporations

For the most part, judgments against a government corporation are paid by the corporation rather than from the judgment appropriation. This result is based in part on “otherwise provided for” reasoning and in part on the legal and funding status of the typical corporation.

The theory is that a government corporation is set up to operate in a business-like manner. It is usually given considerable latitude in determining its expenditures; it is free from many of the restrictions on appropriated funds that apply to noncorporate agencies; and its statutory charter typically contains a “sue and be sued” clause. Of particular relevance to the present context, a corporation may generally retain funds it receives in the course of its operations and is not required to deposit them in the Treasury as miscellaneous receipts. Also, unlike a regular government agency, a government corporation may procure liability insurance. This being the case, it is logical that losses incurred by a government corporation, whether by judgment or otherwise, should be treated as liabilities of the corporation and charged to corporate funds.

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<sup>24</sup>*Dixie Doreen Graham v. United States*, GAO Claim No. Z-2870529.

In an early decision which predated both section 1304 and the Federal Tort Claims Act, the Virgin Islands Company, a wholly owned government corporation, sought to compromise a personal injury claim. In view of the Company's statutory power to sue and be sued, the Comptroller General concluded that, since a judgment obtained against the Company would be payable from funds derived from the operation of the Company, the compromise could be paid from the same source. 25 Comp. Gen. 685 (1946). The Attorney General had also taken the position that corporate funds could be used to pay tort judgments or to procure liability insurance. 39 Op. Att'y Gen. 559 (1938) (noting, at page 566, that to the advantages flowing from corporate status also attach responsibilities). Thus, since judgments and settlements of this type were payable from currently available funds prior to enactment of the judgment appropriation, they should be viewed as unaffected by it.<sup>25</sup>

Similarly, a court of appeals in a 1947 case said:

"A government corporation can pay costs taxed against it out of its corporate funds without an appropriation by Congress, but costs taxed against the government cannot be so paid. A government corporation engaging in business in the commercial world can deal with a judgment for costs as one of the vicissitudes of business to be charged to profit and loss . . . ."

Walling v. Norfolk Southern Ry. Co., 162 F.2d 95, 96 (4th Cir. 1947). In appropriations jargon, the court was saying that the corporation's funds were legally available to pay judgments as business expenses.

In a later decision involving the Saint Lawrence Seaway Development Corporation, the Comptroller General expressed the view that judgments against the corporation should "at least ultimately" be paid from funds of the corporation. 37 Comp. Gen. 691, 695 (1958). This seemed to contemplate that there might be circumstances in which a judgment would be paid from the permanent appropriation<sup>26</sup> with the United States seeking reimbursement from the corporation. This in fact happened several years later in a suit for tropical differential pay involving the Panama Canal Company. GAO certified the judgment for payment under section 1304 and

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<sup>25</sup>Under the Federal Tort Claims Act, which is now the exclusive remedy for tort actions against federal instrumentalities, including government corporations, suit must be brought against the United States. While this provides a uniform procedure for adjudicating tort claims, there is no indication that Congress intended to shift the payment burden from the individual corporations to the general fund of the Treasury. See 13 Op. Off. Legal Counsel 436 (1989) (preliminary print) (Commodity Credit Corporation).

<sup>26</sup>See Breitbeck v. United States, 500 F.2d 556 (Ct. Cl. 1974), for a possible example involving the St. Lawrence Corporation.

then sought reimbursement from the Panama Canal Company on the grounds that the judgment amounts were properly a cost of operation of the Company. B-164879, December 5, 1973.

Thus, judgments against a government corporation should be paid from corporate assets. The most detailed discussion of this rule is found in an opinion of the Justice Department's Office of Legal Counsel, 13 Op. Off. Legal Counsel 436 (1989) (preliminary print). See, in addition, *Far West Federal Bank v. Director, Office of Thrift Supervision*, 930 F.2d 883, 890 (Fed. Cir. 1991) (stating general rule); 45 Comp. Gen. 514 (1966);<sup>27</sup> B-142778-O.M., May 19, 1960 (Commodity Credit Corporation); B-213490, October 23, 1985 (non-decision letter) (Amtrak).

#### g. "Sue and Be Sued" Agencies

Congress has authorized a number of noncorporate agencies to conduct commercial-type programs. Examples are the various loan and insurance programs conducted by the Small Business Administration and the Department of Housing and Urban Development. The agency is usually authorized to sue and be sued and the programs are frequently financed by revolving funds. Where these three factors coincide—a business-type program conducted by a "sue and be sued" agency and financed from a revolving or other special fund—judgments arising from the program are as a general proposition payable by the agency from the fund. The theory is that a judgment of this type should be treated as a necessary expense of the program. 62 Comp. Gen. 12 (1982); B-189443, August 4, 1980 (non-decision letter). This principle is limited to judgments arising directly from the particular program and does not affect other types of judgments such as judgments in tort or discrimination suits to the extent they arise from what B-189443 called the agency's "administrative practices." 62 Comp. Gen. at 14.

This concept is closely related to, and supported by, the approach followed by a number of courts in determining district court jurisdiction under a "sue and be sued" clause. The predominant view finds a direct relationship between "sue and be sued" power and the availability of agency funds to pay a resulting judgment. For example, in *S.S. Silberblatt, Inc. v. East Harlem Pilot Block*, 608 F.2d 28, 35-36 (2d Cir. 1979), the case that generated GAO's decision at 62 Comp. Gen. 12, the court, citing *Federal Housing Administration v. Burr*, 309 U.S. 242 (1940), said that when

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<sup>27</sup>This case held that the settlement of a tort suit should be paid from assets of the corporation rather than operating appropriations of the parent agency. Since the case predated the availability of the judgment appropriation for compromises of Federal Tort Claims Act suits, the alternative of charging agency operating appropriations is obsolete. The case nevertheless remains valid for the proposition that the settlement should be paid from corporate assets.

Congress launches a federal agency into the commercial world and gives it “sue and be sued” power, “it is presumed in the absence of an express limitation on the waiver that the agency is suable for claims arising out of the commercial relationships which it enters into in pursuit of its statutory mission.” The court then found that any judgment for plaintiff in the case could be paid from funds in the control of the defendant agency, in that case the Department of Housing and Urban Development. See also C.H. Sanders Co. v. BHAP Housing Development Fund Co., 903 F.2d 114, 120 (2d Cir. 1990);<sup>28</sup> Crowell v. Administrator of Veterans’ Affairs, 699 F.2d 347, 351 n.1 (7th Cir. 1983); Industrial Indemnity, Inc. v. Landrieu, 615 F.2d 644, 646 (5th Cir. 1980) (“A judgment against the Secretary establishing plaintiff’s entitlement can be paid out of money in the General Insurance Fund . . .”).<sup>29</sup> Cf. Taylor v. Administrator of Small Business Administration, 722 F.2d 105 (5th Cir. 1983) (“sue and be sued” clause of Small Business Act).

#### h. Nonappropriated Fund Judgments

A “nonappropriated fund instrumentality” or “NAFI” is an entity or activity which does not receive its funds from congressional appropriations. E.g., United States v. Hopkins, 427 U.S. 123, 125 n.2 (1976). The most commonly known NAFIs are those which operate within the military departments—such things as base or post exchanges, open messes, and recreation clubs. The very concept of a NAFI implies an activity which raises its own operating funds through product sales, member fees, etc., in contrast to an appropriated fund activity which is supported by taxpayer dollars. Both logic and policy considerations suggest that this concept would be largely a sham if NAFIs had unlimited access to the general fund of the Treasury through use of 31 U.S.C. § 1304. Absent statutory provision to the contrary, the Supreme Court has stated that the United States “assumes none of the financial obligations” of a NAFI. Hopkins, 427 U.S. at 124, quoting Standard Oil Co. v. Johnson, 316 U.S. 481, 485 (1942).

Tort judgments arising from nonappropriated fund activities are generally paid by the activity itself. See B-204703, September 29, 1981 (non-decision letter). In the case of the Army and Air Force Exchange Service, this is specified in a joint Army-Air Force regulation (AR 60-10/AFR 147-7). See also Mignona v. Sair Aviation, Inc., 937 F.2d 37 (2d Cir. 1991) (remanding tort claim against military flying club to state court). However, exceptions are possible, depending on exactly whose negligence caused the damage.

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<sup>28</sup>The BHAP court suggested that a court need not waste its time analyzing the source of funds but “should simply direct the Secretary to satisfy the judgment out of funds that are within his control, assuming, of course, that such funds exist. It is only as to such funds that the Secretary’s immunity has been waived.” 903 F.2d at 120.

<sup>29</sup>While this is the majority view, it is not unanimous. See Marcus Garvey Square, Inc. v. Winston Burnett Construction Co., 595 F.2d 1126 (9th Cir. 1979), also purporting to apply FHA v. Burr.

For example, in a 1961 case, a person was injured on a wooden foot bridge providing access to a base exchange store. Since the negligence (defective planking) was imputable to the base engineer and not to any officer or employee of the exchange, the judgment appropriation was used. B-145762-O.M., May 19, 1961.

The treatment of NAFI contract judgments has had somewhat of a tortuous history. The earlier cases held that the United States could not be sued to enforce the contractual obligations of a NAFI. Jaeger v. United States, 394 F.2d 944 (D.C. Cir. 1968); Kyer v. United States, 369 F.2d 714 (Ct. Cl. 1966). In the Court of Claims, part of the reason was the court's position that, under 28 U.S.C. § 2517(a), its judgments could be paid only from appropriated funds. Kyer, 369 F.2d at 718. Unlike district courts, it felt that it could not direct payment from the NAFI's own funds. Id. at 719.

In 1970, Congress enacted Pub. L. No. 91-350, 84 Stat. 449, to amend the Tucker Act to include express or implied contracts by the Army and Air Force Exchange Service, Navy, Marine, and Coast Guard exchanges, and the Exchange Councils of the National Aeronautics and Space Administration. It also amended the judgment appropriation to make it available for judgments and compromise settlements in this category, and to require reimbursement by the contracting instrumentality. 31 U.S.C. § 1304(c). The amendment has been held applicable to employment contracts as well as traditional procurement contracts. United States v. Hopkins, 427 U.S. 123 (1976). However, it is limited to the entities specified and does not extend to other nonappropriated funds. Swiff-Train Co. v. United States, 443 F.2d 1140 (5th Cir. 1971).

In situations not covered by the 1970 legislation, the Court of Claims continued to apply what had now become known as the "nonappropriated funds doctrine," but refined it so as to accept Tucker Act jurisdiction unless it could be shown that appropriated funds were statutorily precluded. E.g., McCarthy v. United States, 670 F.2d 996, 1002 (Ct. Cl. 1982) (agency "has authority to use appropriated funds if and to the extent appropriated, and that is sufficient"); L'Enfant Plaza Properties, Inc. v. United States, 668 F.2d 1211, 1212 (Ct. Cl. 1982) (Congress not "statutorily prohibited from appropriating funds"). Aware of potential payment implications, the court noted that its judgments were "normally payable" from the judgment appropriation. McCarthy, 670 F.2d at 1002. In cases such as Ford, Powell & Carson, Inc. v. United States, 4 Cl. Ct. 200 (1983), and Corbino v. United States, 488 F.2d 1008 (Ct. Cl. 1973), the court clearly

recognized the inappropriateness of charging the judgments to the taxpayer.

An important 1984 case, United States v. General Electric Corp., 727 F.2d 1567 (Fed. Cir. 1984), considered the impact of the Contract Disputes Act. The case involved a somewhat newer category of “nonappropriated fund” cases—those involving the foreign military sales program or similar programs intended to operate at no cost to the government. “Nothing in the Contract Disputes Act of 1978 limits its application to appropriated funds.” Id. at 1570. Thus, under 41 U.S.C. § 612, the payment provision of the Contract Disputes Act, judgments or board of contract appeals awards involving nonappropriated fund contracts are payable from the judgment appropriation, but payment must be reimbursed by the contracting agency or activity.

The remedies provided by Title VII of the Civil Rights Act extend to nonappropriated fund employees. 42 U.S.C. § 2000e-16(a). Largely by analogy with the tort cases, a few Title VII judgments have been paid from the judgment appropriation where the alleged discriminating officials were regular federal civilian or military officials. See B-234746-O.M., March 10, 1989.

Apart from the situations noted, the rule remains that the United States does not assume the financial obligations of nonappropriated fund activities. In the absence of legislation authorizing suit against the United States, suit, at least in the district courts, must be brought against the particular activity, with any resulting judgment or settlement payable from the activity’s nonappropriated funds. E.g., Cosme Nieves v. Deshler, 786 F.2d 445 (1st Cir. 1986), cert. denied, 479 U.S. 824 (suit under Fair Labor Standards Act); Morales v. Senior Petty Officers’ Mess, 366 F. Supp. 1305 (D.P.R. 1973) (same).

Cases involving the Farm Credit Administration raise a different type of nonappropriated fund issue. The Farm Credit Administration does not receive direct congressional appropriations but derives its operating funds from assessments levied on the institutions in the system it administers. Normally, funds of that type would still be regarded as appropriated funds on the theory that the agency’s authority to retain and use the funds amounts to a continuing appropriation. However, the Administration’s governing legislation provides that its operating funds “shall not be construed to be Federal Government funds or appropriated moneys.” 12 U.S.C. § 2250(b)(2). This being the case, the funds are not encumbered by

the traditional prohibition on the use of operating appropriations for judgments. Therefore, since the Administration's operating funds are legally available to pay litigative awards, payment is "otherwise provided for." B-251061.3, September 29, 1993; B-251061.2, February 10, 1993.

i. Impoundment/Assistance  
Funds

There is a body of case law concerning the power of the courts to either enjoin the expiration of budget authority or "revive" expired budget authority, in order to preserve its availability pending the litigation of claims. The first wave of cases involved challenges to executive branch impoundments by potential recipients under various grant and entitlement programs. The suits then spread to non-impoundment contexts, such as challenges to grant funding decisions or to the application of statutory apportionment formulas. The cases are fully covered in Chapter 5 under the heading Effect of Litigation on Period of Availability.

For purposes of this chapter, the point is that these cases, while they may result in judicial awards of money, do not involve the use of 31 U.S.C. § 1304. The claimant in the typical case is trying to establish entitlement to particular budget authority under some statutory assistance program, and any resulting judgment relates to that budget authority, to the extent any of it remains. (If claims of this sort were viewed as exposing the judgment appropriation, questions as to the expiration of budget authority would be irrelevant.)

Two cases from the Court of Appeals for the District of Columbia Circuit state the principle as follows:

"[A]n equitable doctrine has been fashioned by the federal courts in recent years to permit funds to be awarded to a deserving plaintiff even after the statutory lapse date, as long as the lawsuit was instituted on or before that date. . . .

"Application of this equitable doctrine, however, assumes that funds remain after the statutory lapse date. . . .

"[T]he equitable doctrine permitting a judicial award of funds after the statutory lapse date will ordinarily, as here, have no application to a case in which all funds have properly been awarded."

*West Virginia Association of Community Health Centers v. Heckler*, 734 F.2d 1570, 1576–77 (D.C. Cir. 1984).

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“[W]e point out that the scope of that relief is limited to the amount of fiscal year 1981 funds which remain available. Indeed, at oral argument, counsel for the nine states conceded that it is undisputed that the claims in issue may only be satisfied out of whatever balance remains.”

Connecticut v. Schweiker, 684 F.2d 979, 999 (D.C. Cir. 1982), cert. denied, 459 U.S. 1207. See also Population Institute v. McPherson, 797 F.2d 1062, 1081 (D.C. Cir. 1986); Ambach v. Bell, 686 F.2d 974, 986 (D.C. Cir. 1982).

#### j. Garnishment

The wages of federal civilian and military personnel are subject to garnishment only pursuant to statutory authority. This follows from the concept of sovereign immunity, because garnishment involves the serving of legal process, usually issued by a state court, on federal agencies. Garnishment against federal wages is now permissible under two separate statutes.

##### (1) 42 U.S.C. § 659

In 1975, Congress enacted legislation to permit the garnishment of federal wages for alimony and child support. The basic provision is section 459(a) of the Social Security Act, 42 U.S.C. § 659(a), which states that “moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services” shall be subject to garnishment process for those two items. The terms “child support” and “alimony” are defined to include attorney’s fees, interest, and court costs when authorized by state law and specified in the judgment or decree. 42 U.S.C. §§ 662(b), (c).

This legislation does not create any new federal right of action. It is merely a limited waiver of sovereign immunity to permit garnishment as and to the extent specified. 55 Comp. Gen. 517, 520 (1975). A garnishment order that exceeds the extent to which the government has statutorily waived its sovereign immunity imposes no obligation on the United States. See 57 Comp. Gen. 420 (1978).

The Office of Personnel Management has issued implementing regulations for the executive branch. 5 C.F.R. Part 581 (1993). They include detailed listings of moneys which are and are not subject to garnishment. They also designate, as required by 42 U.S.C. § 661(b), agents to accept service of process for each executive branch agency.

The Merit Systems Protection Board has held that a back pay award, although not listed in the OPM regulations, is subject to garnishment. Morones v. Department of Justice, 49 M.S.P.R. 212 (1991). In the cited case, the award was part of a settlement following a remand by the Court of Appeals for the Federal Circuit. Based on the Board's reasoning in Morones and the language of the statute, a case can be made that the same result would apply to a back pay award which is part of a court judgment payable under 31 U.S.C. § 1304, although there are thus far no cases.

Payments due from the Civil Service Retirement and Disability Fund are also subject to garnishment, but only after application for benefits has been filed. Oshiver v. United States, 618 F. Supp. 172 (E.D. Pa. 1985). (The Oshiver court suggested that it might be possible for the wife of a former employee who had disappeared to file the application.) Income tax refunds are not subject to garnishment.<sup>30</sup> 5 C.F.R. § 581.104(c); Enfinger v. Enfinger, 452 F. Supp. 553 (M.D. Ga. 1978).

Garnishment traditionally has involved an order issued by a court, and this is still the prevalent form. However, some states have developed an administrative garnishment process which, if otherwise proper, may qualify as "legal process" for purposes of 42 U.S.C. § 659. 73 Comp. Gen.—(B-257000, June 14, 1994); 55 Comp. Gen. 517 (1975); B-183433, June 25, 1976.

As a general proposition, garnishment orders will be payable directly by the employing agency from agency funds. Questions have arisen, however, where the agency fails to comply with garnishment process. One such case is 56 Comp. Gen. 592 (1977). The Environmental Protection Agency had negligently failed to withhold funds from an employee's salary under a District of Columbia writ of garnishment. The error was not discovered until after the employee had resigned and his retirement account had been paid over. Under D.C. law, an employer who fails to comply with a writ of garnishment is liable to the judgment creditor, and 42 U.S.C. § 659 makes the United States subject to garnishment process the same as a private party. Here, a judgment entered by a D.C. court against EPA could not be paid from funds under the control of the agency since there were no longer any agency funds to which the garnishment could attach. Therefore, the decision concluded that the judgment could be paid from the judgment appropriation if the Attorney General certified that it was in the interest of the United States to pay, as provided in 28 U.S.C. § 2414.

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<sup>30</sup>Separate authority exists, however, to offset certain past-due child support payments against tax refunds. See 26 U.S.C. § 6402(c), 42 U.S.C. § 664.

A similar issue was considered in Young v. Young, 547 F. Supp. 1 (W.D. Tenn. 1980). That case involved state law under which an employer who failed to comply with garnishment process could be held liable for the full amount of the debt or judgment underlying the garnishment. The court held that the limited waiver of sovereign immunity in 42 U.S.C. § 659 made the United States liable only for the amounts it had failed to withhold, not for the entire amount of the underlying debt. The court also directed the government to take action to recover those amounts from the employee. The judgment itself was found payable under 31 U.S.C. § 1304. 547 F. Supp. at 5.

The case of Loftin v. Rush, 767 F.2d 800 (11th Cir. 1985), is another similar case, in which the judgment creditor had obtained a default judgment against the United States for the full amount of the underlying debt. The court held the default judgment void:

“The judgment entered against the government officer was void. Mrs. Loftin had no remedy by which she could collect the judgment of \$37,966 as a lump sum against the Navy. The federal statute involved here . . . does not waive federal immunity. It merely authorizes a federal disbursing officer to withhold funds from the future pay of a federal employee. The state court exceeded its authority in entering a judgment greater than that allowed by the statutes. The Department of Justice through the United States Attorney could have filed an original declaratory action in United States District Court to have the judgment declared void.” 767 F.2d at 805.

Then, essentially in agreement with the Young decision, the court concluded that 42 U.S.C. § 659 “evinced no intention to make the government, as employer of a debtor, wholly liable for a debt it did not incur,” i.e., the full amount of the underlying debt (767 F.2d at 809), and directed payment of the amounts the government had failed to withhold.

The Young and Loftin decisions both discuss 56 Comp. Gen. 592. Unfortunately, both overbroadly characterize the GAO decision as standing for the proposition that the United States can be held liable for the full amount of the underlying debt, an approach both courts rejected. However, the District of Columbia statute involved in 56 Comp. Gen. 592, quoted on page 594, clearly made the employer liable only for the amounts it failed to withhold, and this is all that was involved in that case. Thus, there is no inconsistency between Young, Loftin, and 56 Comp. Gen. 592. In addition, it should be noted that the OPM regulations provide:

“[W]here a governmental entity negligently fails to comply with legal process, the United States shall be liable for the amount that the governmental entity would have paid, if the legal process had been properly honored.”

5 C.F.R. § 581.305(e). In sum, if a federal agency fails to comply with garnishment process, the United States can, to the extent provided by state law, be held liable for the amounts the agency failed to withhold. If a state court judgment to this effect is obtained, the first question to ask is whether the agency has any other funds of the types described in the OPM regulations. If not, the judgment is payable from the judgment appropriation provided the Attorney General certifies that payment is “in the interest of the United States” pursuant to 28 U.S.C. § 2414.

Our discussion thus far has concerned government liability for failing to honor a garnishment writ. What about when it does honor one?

The statute, 42 U.S.C. § 659(f), provides:

“Neither the United States, any disbursing officer, nor governmental entity shall be liable with respect to any payment made from moneys due or payable from the United States to any individual pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section.”

The key phrase here is “regular on its face.” This means that the agency does not have to inquire beyond the writ itself. Employees have challenged agency compliance with garnishment process where the court which issued the writ did not have personal (as opposed to subject matter) jurisdiction over the employee-obligor. However, the Supreme Court has held that the government is not liable to the employee in this situation. United States v. Morton, 467 U.S. 822 (1984). If the writ is issued by a court with subject-matter jurisdiction and is otherwise “regular on its face,” the agency is bound to comply. The withholding does not become improper so as to make the government liable to its employee merely because the state court lacked personal jurisdiction. As the Court pointed out, the OPM regulations also mandate this result. Further, the fact that the employee may have raised the jurisdictional problem with the agency is irrelevant. Id. at 829. In a similar case in 1982, the Comptroller General had reached the same result. 61 Comp. Gen. 229, quoted in part in Morton, 467 U.S. at 829 n.10.

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(2) 5 U.S.C. § 5520a

In 1993, Congress enacted more general garnishment authority in the Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, § 9, 107 Stat. 1001, 1007, 5 U.S.C. § 5520a, to exist side-by-side with the Title 42 provisions.

The key provision is 5 U.S.C. § 5520a(b), which states that “pay from an agency to an employee is subject to legal process in the same manner and to the same extent as if the agency were a private person.” “Agency” is defined in subsection 5520a(a)(1) as including all branches of the federal government, similar to the definition in 42 U.S.C. § 662(a). “Pay” is broadly defined in subsection 5520a(a)(4). “Legal process” is defined in subsection 5520a(a)(3). Like its counterpart in 42 U.S.C. § 662(e), it encompasses administrative process where authorized by state law. However, it does not include process issued by a court of a foreign country.

Where the Title 42 authority is limited to alimony and child support, 5 U.S.C. § 5520a is much broader, applicable to “a legal debt of the employee, or recovery of attorney’s fees, interest, or court costs.” *Id.* § 5520a(a)(3)(B). Administrative costs incurred by the employing agency in executing a garnishment may be added to the garnishment and retained by the agency as offsetting collections. *Id.* § 5520a(j)(2). The law requires implementing regulations to be issued by the same authorities who issue them for the various branches of the government under 42 U.S.C. § 661(a). 5 U.S.C. § 5520a(j)(1).

“Neither the United States, an agency, nor any disbursing officer shall be liable with respect to any payment made from payments due or payable to an employee pursuant to legal process regular on its face,” as long as the payment is made in accordance with the statute and implementing regulations. *Id.* § 5520a(g). This is virtually identical to 42 U.S.C. § 659(f).

The law explicitly provides that it “shall not modify or supersede” the Title 42 provisions and that process under the Title 42 authority has priority over process under 5 U.S.C. § 5520a. 5 U.S.C. §§ 5520a(i), (h)(2).

k. Bankruptcy

In order to analyze how bankruptcy court awards are paid, it is first helpful to examine the kinds of monetary awards a bankruptcy court can make against the federal government, noting that federal bankruptcy law is evolving at a rapid and voluminous pace. Prior to the 1978 revision of the Bankruptcy Code (title 11 of the United States Code), there was no

waiver of sovereign immunity in the bankruptcy laws. E.g., United States v. Krakover, 377 F.2d 104 (10th Cir. 1967), cert. denied, 389 U.S. 845. For example, under the old Bankruptcy Code, an order of a bankruptcy court directing a federal agency to pay the unpaid compensation of a deceased employee to the employee's trustee under a Wage Earner's Plan could not be enforced in the face of a competing claim by the employee's children under 5 U.S.C. § 5582. 58 Comp. Gen. 644 (1979). However, absent such competing claims, it had been GAO's view that an agency could as a matter of policy require its finance officers to respond to such orders since they would be enforceable against the individual employee. 61 Comp. Gen. 245 (1982); 47 Comp. Gen. 522 (1968).

The 1978 Bankruptcy Code contained a limited "waiver of sovereign immunity" provision, 11 U.S.C. § 106 (1982 ed.). The Supreme Court construed 11 U.S.C. § 106 in United States v. Nordic Village, Inc., 112 S. Ct. 1011 (1992). The Court recognized that the statute explicitly waived the government's sovereign immunity in two situations—compulsory counterclaims to government claims and permissive counterclaims capped by a setoff limitation. Id. at 1015. Apart from these situations, however, Nordic Village held that section 106 waived sovereign immunity only for declaratory or injunctive relief<sup>31</sup> and not for monetary recoveries. As a lower court later noted, monetary relief includes such things as attorney's fees, actual damages, and sanctions. In re Shafer, 146 B.R. 477, 479 (D. Kans. 1992).

In late 1994, Congress revised 11 U.S.C. § 106 in the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 113. The new section 106 expressly preserves the two counterclaim situations recognized in the 1978 law and, in addition, abrogates sovereign immunity in more than 50 named sections of Title 11. Subsection 106(a)(3) authorizes courts to issue "an order or judgment awarding a money recovery, but not including an award of punitive damages." Subsection 106(a)(4) provides that a money judgment against the United States "shall be paid as if it is a judgment rendered by a district court of the United States." This means paid from the judgment appropriation if final and not otherwise provided for. The new 11 U.S.C. § 106 applies to cases commenced "before, on, and after" October 22, 1994. Pub. L. No. 103-394, § 702(b)(2)(B).

Monetary awards against the United States in bankruptcy proceedings frequently involve violations of 11 U.S.C. § 362, the automatic stay. Under

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<sup>31</sup>An example the Court cited is In re Neavear, 674 F.2d 1201 (7th Cir. 1982) (government bound by declaration that debt has been discharged). 112 S. Ct. at 1016.

this provision, the filing of a bankruptcy petition, voluntary or involuntary, operates as an automatic stay of almost all further collection efforts, including setoff, with respect to prepetition debts of the bankrupt. Even where setoff is permitted under other sections of the Code, such as 11 U.S.C. § 553, the creditor must nevertheless petition the court for relief from the automatic stay. It is now settled that 11 U.S.C. § 362 applies to federal agencies or instrumentalities. *E.g.*, In re Inslaw, Inc., 83 B.R. 89, 158 (Bankr. D.D.C. 1988); In re Haffner, 25 B.R. 882, 887 (Bankr. N.D. Ind. 1982).

Subsection (h) of 11 U.S.C. § 362 provides that “[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney’s fees, and, in appropriate circumstances, may recover punitive damages.” The term “individual” has been construed to mean any debtor, individual, corporate, or otherwise,<sup>32</sup> although some courts limit it to natural persons.<sup>33</sup> Several pre-Nordic Village cases made awards under section 362(h) against federal agencies, and a few included punitive damages.<sup>34</sup>

Under Nordic Village, the question became whether the violation occurred in the context of one of the two counterclaim situations in which the government’s sovereign immunity had unquestionably been waived. If it did, then awards under 11 U.S.C. § 362(h) could be made against the federal government.<sup>35</sup> If it did not, monetary awards were not authorized.<sup>36</sup> The 1994 legislation made the distinction irrelevant by specifying 11 U.S.C. § 362 as one of the sections with respect to which sovereign immunity has been abrogated.

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<sup>32</sup>Budget Service Co. v. Better Homes of Virginia, 804 F.2d 289 (4th Cir. 1986); In re NWFY, Inc., 81 B.R. 500 (Bankr. W.D. Ark. 1987); In re Nash Phillips/Copus, Inc., 78 B.R. 798 (Bankr. W.D. Tex. 1987); In re Tel-A-Communications Consultants, Inc., 50 B.R. 250 (Bankr. D. Conn. 1985).

<sup>33</sup>*E.g.*, In re Chateaugay Corp., 920 F.2d 183 (2d Cir. 1990); In re Abacus Broadcasting Corp., 150 B.R. 925 (Bankr. W.D. Tex. 1993).

<sup>34</sup>In re Allen, 83 B.R. 678 (Bankr. E.D. Mo. 1988); In re Advanced Professional Home Health Care, Inc., 82 B.R. 837 (Bankr. E.D. Mich. 1988); In re Ketelsen, 78 B.R. 573 (Bankr. D.S.D. 1987); In re Stucka, 77 B.R. 777 (Bankr. C.D. Cal. 1987); In re Rinehart, 76 B.R. 746 (Bankr. D.S.D. 1987), *aff’d*, United States v. Rinehart, 88 B.R. 1014 (D.S.D. 1988); In re Santa Rosa Truck Stop, Inc., 74 B.R. 641 (Bankr. N.D. Fla. 1987); Matter of Woloschak Farms, 74 B.R. 261 (Bankr. N.D. Ohio 1987). Ketelsen included an award of punitive damages. The Stucka court said it would have awarded them if the debtor had asked. The matter was left to separate proceedings in Rinehart and Santa Rosa Truck Stop.

<sup>35</sup>In re Pinkstaff, 974 F.2d 113 (9th Cir. 1992); Matter of Flynn, 169 B.R. 1007 (Bankr. S.D. Ga. 1994).

<sup>36</sup>In re Pearson, 917 F.2d 1215 (9th Cir. 1990); Small Business Administration v. Rinehart, 887 F.2d 165 (8th Cir. 1989).

Another common situation is the turnover order—an order directing a federal agency to turn over monies found to have been improperly collected or withheld from the debtor. A turnover order is clearly a form of monetary relief. (Nordic Village involved a turnover situation.)

Still another source of monetary liability is violation of the permanent injunction against attempting to collect a debt which has been discharged (11 U.S.C. § 524). One line of cases distinguished Nordic Village and found no sovereign immunity bar to awarding monetary relief for violation of the discharge injunction.<sup>37</sup> Other cases applied Nordic Village and declined to make monetary awards against the federal government.<sup>38</sup> The 1994 legislation chose the former result by including 11 U.S.C. § 524 in the “abrogation list” of the revised 11 U.S.C. § 106(a).

Awards in bankruptcy proceedings often involve attorney’s fees. Where not authorized by a provision of the Bankruptcy Code itself such as 11 U.S.C. § 362(h), it may nevertheless be possible to obtain a fee award under some other fee-shifting statute, although once again the courts are not uniform. The court in O’Connor v. U.S. Department of Energy, 942 F.2d 771 (10th Cir. 1991), held that a bankruptcy court may award attorney’s fees under the Equal Access to Justice Act. A case following O’Connor is In re Shafer, 146 B.R. 477 (D. Kans. 1992). However, In re Davis, 899 F.2d 1136 (11th Cir. 1990), reached the opposite result. The Eleventh Circuit has also applied Davis to bar bankruptcy courts from awarding fees under 26 U.S.C. § 7430. In re Bricknell Investment Corp., 922 F.2d 696 (11th Cir. 1991). Other courts have regarded 26 U.S.C. § 7430 as applicable. E.g., In re Germaine, 152 B.R. 619 (Bankr. 9th Cir. 1993); In re Southeast Stores, Inc., 156 B.R. 160 (Bankr. E.D. Va. 1993); In re Kiker, 98 B.R. 103 (Bankr. N.D. Ga. 1988); In re Hill, 71 B.R. 517 (Bankr. D. Colo. 1987). See also Taborski v. IRS, 141 B.R. 959 (N.D. Ill. 1992) (section 7430 not exclusive so as to preclude award under 11 U.S.C. § 362(h)).

Against this background, the source of funds to pay judgments and awards in bankruptcy proceedings can be determined in most cases by referring to other portions of this chapter dealing with analogous judgments in other contexts. For example, reference to the headings Judgments for Refunds and Tax Judgments should resolve most turnover situations. Punitive damages should not pose a problem as they are now expressly prohibited by 11 U.S.C. § 106(a) (3).

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<sup>37</sup>In re Cost, 161 B.R. 856 (Bankr. S.D. Fla. 1993); In re Daniels, 150 B.R. 985 (Bankr. M.D. Ga. 1992); In re Moulton, 146 B.R. 495 (Bankr. M.D. Fla. 1992).

<sup>38</sup>In re Shafer, 146 B.R. 477 (D. Kans. 1992); In re Hardy, 161 B.R. 320 (Bankr. S.D. Ga. 1993).

Attorney's fee awards are discussed in detail later in this chapter, and the general rules set out there would apply equally to fee awards in bankruptcy cases. Thus, awards under section 7430 of the Internal Revenue Code are payable from the judgment appropriation. Awards under 28 U.S.C. § 2412(d) (Equal Access to Justice Act), or under § 2412(b) where there has been a finding of bad faith, are payable from agency funds. Fees awarded under 11 U.S.C. § 362(h) would generally be payable from the judgment appropriation since nothing makes them "otherwise provided for."

Finally, there is some authority for the proposition that the Bankruptcy Code waives sovereign immunity for tort-based suits independent of the Federal Tort Claims Act. In re Town & Country Home Nursing Services, Inc., 963 F.2d 1146 (9th Cir. 1992); In re TPI International Airways, Inc., 141 B.R. 512 (Bankr. S.D. Ga. 1992). Resulting judgments would most likely be payable from the judgment appropriation, at least in non-turnover situations.

## I. Other Situations

As the categories previously described make clear, there are few absolutes in making source-of-funds determinations. Most categories involve a "mixed bag" of payments from the judgment appropriation and payments from agency funds. The same holds true for the additional areas summarized below.

### (1) Tort-based judgments

The vast majority of claims against the United States stemming from tortious government conduct are adjudicated under the Federal Tort Claims Act (FTCA), which provides for both administrative and judicial resolution. Administrative awards of \$2,500 or less are paid from agency appropriations. Administrative awards in excess of \$2,500 are paid from the judgment appropriation. Court judgments and compromise settlements by the Department of Justice are paid from the judgment appropriation regardless of amount. 28 U.S.C. §§ 2672, 2677; 31 U.S.C. § 1304(a)(3)(A).

Payments under the Federal Tort Claims Act represent the largest single source of payments under 31 U.S.C. § 1304, whether measured by numbers of cases or aggregate dollar amount, at least in most years. There are several reasons for this: every agency is exposed to tort claims; tort claims may produce very large judgments; and the judgment appropriation is available for the larger administrative awards as well as judgments and compromise settlements.

The availability of 31 U.S.C. § 1304 to pay FTCA awards is subject to the same basic requirements as other awards, including the requirement that payment be “not otherwise provided for.” We have already noted a few “otherwise provided for” situations for FTCA payments (Postal Service, government corporations, nonappropriated fund instrumentalities). Although rare, exceptions may also exist even for “regular” federal agencies. For example, in 67 Comp. Gen. 142 (1987), GAO found the judgment appropriation available for judgments and awards under the FTCA in personal injury or physical property damage cases arising from the activities of the Federal Retirement Thrift Investment Board, the same as for other agencies. However, the decision drew a distinction between the so-called “physical torts,” such as motor vehicle accidents, and “program losses” even where attributable to negligence on the part of an agency employee. The reason was that the Board’s organic legislation (Federal Employees’ Retirement System Act of 1986) contained detailed provisions to address program losses.

Maritime torts are adjudicated under the Suits in Admiralty Act, 46 U.S.C. App. §§ 741–752, or the Public Vessels Act, 46 U.S.C. App. §§ 781–790. At one time, the Suits in Admiralty Act had its own permanent appropriation. Although it is still carried in the U.S. Code at 46 U.S.C. App. § 748 (which also expressly preserves the “otherwise provided for” concept), the corresponding Treasury account was repealed in 1934 and replaced by language requiring specific congressional appropriations (48 Stat. 1226). Now, judgments and compromise settlements under the Suits in Admiralty and Public Vessels Acts are paid the same as FTCA judgments—from the judgment appropriation unless payment is otherwise provided for in a particular case. See B-199073, July 1, 1980 (non-decision letter).

A final case meriting notice is 39 Comp. Gen. 650 (1960). That decision involved a judgment under the Suits in Admiralty Act against the United States for injuries resulting from negligent performance by a Maritime Administration contractor of work under an Economy Act agreement between the Maritime Administration and the Department of the Navy. Maritime Administration paid the judgment from an available revolving fund, and then sought partial reimbursement from Navy. The decision held that the judgment had to be paid as a judgment (that is, from the judgment appropriation unless some other fund was available, as had in fact been the case), and could not be treated as a reimbursable item of direct cost under the Economy Act agreement. While the rationale seems clear enough in the context of a tort judgment, it should not be automatically

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assumed that the same result would apply to other types of judgments such as contract judgments.

(2) Pay, allowances, employment benefits

Judgments awarding compensation or benefits to present or former federal civilian employees or military personnel comprise another major category of judgments, most of which are payable under 31 U.S.C. § 1304. Thus, judgments awarding back pay under the Back Pay Act (unjustified or unwarranted personnel action) or Title VII of the Civil Rights Act of 1964 (employment discrimination) are generally paid from the judgment appropriation. 58 Comp. Gen. 311 (1979). See also 69 Comp. Gen. 40 (1989). The same rule applies to judgments under the Age Discrimination in Employment Act of 1967 (B-193509-O.M., April 19, 1979) and the Rehabilitation Act. It is irrelevant whether the judgment specifies an actual dollar amount as long as it directs the payment of back pay. 58 Comp. Gen. at 313.

Where the judgment does not specify the dollar amount, payment for the period up to the date of the judgment will be made from the permanent appropriation, while payment for any periods after the date of the judgment must be made by the employing agency from its own funds. 55 Comp. Gen. 1447 (1976). A limited exception to this was recognized in 60 Comp. Gen. 375 (1981). There, a court in a discrimination suit had awarded back pay and also ordered the payment of “front pay” until such time as a certain number of the plaintiffs were promoted. The “front pay” was an increment above the employee’s current salary and was more in the nature of damages than compensation. Since the agency’s salaries appropriation is available only for the compensation prescribed for the employee’s actual grade level, the “front pay” was held payable from the judgment appropriation.

As a general proposition, the same rules apply to other compensation-related judgments. *E.g.*, B-246958, February 14, 1992 (internal memorandum) (judgment for severance pay payable from judgment appropriation).

In a few instances, where a particular benefit is funded from a special fund rather than the employing agency’s operating appropriations, GAO has found the payment “otherwise provided for.” Examples are:

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- Judgments against the Civil Service Retirement Fund. 52 Comp. Gen. 175 (1972); B-115505, December 21, 1972.<sup>39</sup>
  - Judgments awarding benefits under the military Survivor Benefit Plan, funded from the Military Retirement Fund. B-236414, February 22, 1991.

(3) Full faith and credit

If an agency enters into an otherwise lawful contractual obligation which binds the full faith and credit of the United States under statutory contract authority which provides no other funding mechanism, and Congress fails or refuses to appropriate money to liquidate the obligation, a resulting final judgment would be payable from the judgment appropriation. B-197742, August 1, 1986; B-211190, April 5, 1983; B-168313, November 21, 1969.

This does not mean that an agency can resort to 31 U.S.C. § 1304 as an alternative to using its own funds or seeking appropriate funding from the Congress. When Congress provides contract authority, it is normally assumed, at least where the governing legislation does not provide otherwise, that liquidating appropriations will be obtained through the normal appropriations process. For example, GAO and the Department of Justice have both reviewed the nature of obligations and funding under the Price-Anderson Act, and both agree that an agency must first use current funds to the extent available. If the agency has no appropriated funds available for that purpose, or if funds available to the agency are not sufficient, the agency must then seek additional funding from Congress. Only if Congress fails or refuses to provide the necessary funds does the potential availability of 31 U.S.C. § 1304 come into play. B-197742, August 1, 1986; Department of Energy Request to Use the Judgment Fund for Settlement of Fernald Litigation, Op. Off. Legal Counsel, December 18, 1989.

Further, an agency is not authorized to force a sham lawsuit to avoid its funding obligations. As the Justice Department emphasized in its Fernald opinion at 11:

“The availability of [31 U.S.C. § 1304] assumes, of course, that there is a good faith dispute over the obligation of the United States to pay on the extant settlement obligation, and that DOE has earnestly attempted, but failed, to obtain the necessary funding from the Congress and monies remain otherwise unavailable. Payment from the judgment fund would not be

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<sup>39</sup>The Court of Claims in *Ellis v. United States*, 657 F.2d 1178, 1180 (Ct. Cl. 1981), suggested that the judgment appropriation would pay. A separate opinion (*id.* at 1182–83) questioned this assumption.

authorized were the United States now, in order to permit payment from the judgment fund, purposely to default upon its settlement obligation, were DOE to refuse to seek a special appropriation or to reprogram funds, and the United States thereafter to settle the inevitable lawsuit to enforce the indemnification agreement.” (Emphasis in original.)

Such a settlement, as the opinion goes on to point out, would not be a bona fide compromise settlement by the Attorney General within the meaning of 28 U.S.C. § 2414.

#### (4) Punitive awards

Punitive awards—those intended to punish rather than compensate—may not be made against the United States without specific statutory authority. Missouri Pacific R.R. Co. v. Ault, 256 U.S. 554 (1921); Barry v. Bowen, 884 F.2d 442 (9th Cir. 1989); Smith v. Russellville Production Credit Ass’n, 777 F.2d 1544, 1549-50 (11th Cir. 1985); Painter v. TVA, 476 F.2d 943 (5th Cir. 1973); 55 Comp. Gen. 564 (1975). Punitive awards, as we use the term here, encompass two distinct things—punitive damages (damages over and above those necessary to compensate the injured party) and certain fines or sanctions for contempt of court. Punitive awards, even though they may be viewed as “money judgments” in the sense of court directives to pay money, should not be paid from the judgment appropriation.

In the case of Giancana v. Johnson, 335 F.2d 372 (7th Cir. 1964), an FBI agent was held in criminal contempt (Rule 42, Federal Rules of Criminal Procedure) and fined for refusing to answer certain questions the court had instructed him to answer. GAO was asked if appropriated funds were available to pay the fine. Since the agent had acted in compliance with agency regulations and specific instructions from the Attorney General, the FBI’s operating appropriations were available to pay the fine. 44 Comp. Gen. 312 (1964). The reason the judgment appropriation could not be used was not because payment was otherwise provided for, but because

“while a fine imposed for a contempt of court is a judgment of the court, a fine in its nature, principle, and purpose is a very different thing from the judgments the payment of which the Congress had in view in enacting [31 U.S.C. § 1304].” Id. at 314.

More precisely, the judgment appropriation is not available to pay criminal or civil contempt sanctions intended to punish or compel compliance; however, it may be used to pay civil contempt awards, usually in the form of costs and attorney’s fees, intended to compensate the opposing party for losses arising from the government’s noncompliance. The distinction is

discussed in two internal memoranda, B-242786, January 31, 1991, and B-239556, October 12, 1990.

Note that where a sanction is assessed against an individual, the availability of agency funds to pick up the tab is a question separate and distinct from the availability of 31 U.S.C. § 1304. The unavailability of the judgment appropriation has no bearing on the availability of agency funds, which may or may not be available depending on whether the test of 44 Comp. Gen. 312 is met. For further elaboration and case citations, see the Fines and Penalties heading in Chapter 4.

Punitive damage awards against the United States are uncommon because they are mostly unauthorized. One exception is 11 U.S.C. § 362(h), which authorizes punitive damages for intentional violations of the automatic stay in bankruptcy proceedings. Although we have found no cases precisely on point, the unavailability of the judgment appropriation should follow logically from the contempt cases.

Whether we are talking about contempt sanctions or punitive damages, the policy underlying the unavailability of 31 U.S.C. § 1304 is the same. In Northwestern National Casualty Co. v. McNulty, 307 F.2d 432, 440 (5th Cir. 1962), Judge Wisdom stated:

“Where a person is able to insure himself against punishment he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct.”

Where the “insurer” is in a position to pass the financial burden on to the public, society is, in effect, “punishing itself.” Id. at 441. While Judge Wisdom was addressing coverage under a commercial insurance policy, the analogy to “insurance” by virtue of 31 U.S.C. § 1304 should be readily apparent. See also Derechin v. State University of New York, 963 F.2d 513, 519 (2d Cir. 1992), and National Railroad Passenger Corp. v. Consolidated Rail Corp., 698 F. Supp. 951, 972 (D.D.C. 1988), for similar policy expressions.

#### (5) Miscellaneous statutory provisions

There are a number of situations, not susceptible of further generalization, in which the judgment appropriation may not be used because some other statute explicitly provides for payment in a particular context. Some of them are:

- 22 U.S.C. § 3776 (Panama Canal Act of 1979, as amended): judgments against Panama Canal Commission in actions for damage or injury to vessels, cargo, crew, or passengers. By statute, these are payable from funds made available for the maintenance and operation of the Panama Canal. See B-206860-O.M., June 7, 1982.
- 33 U.S.C. §§ 1321(i) and (k), section 311 of the Federal Water Pollution Control Act: judgments in suits to recover the cost of removal of oil or hazardous substances. These are payable by the Coast Guard from the revolving fund established by section 311. An example of such a case is *Grundy Oil Co. v. United States*, 14 Cl. Ct. 759 (1988).
- 38 U.S.C. §§ 1920, 1955, and 1984 (Supp. IV 1992): United States Government Life Insurance Fund and National Service Life Insurance Fund.
- 42 U.S.C. § 405(i): Social Security benefits.
- Judgments of the Court of Federal Claims awarding compensation under the National Vaccine Injury Compensation Program. With respect to vaccines administered prior to October 1, 1988, the judgments are payable from appropriations of the Department of Health and Human Services; with respect to vaccines administered on or after October 1, 1988, judgments are payable from the Vaccine Injury Compensation Trust Fund. 42 U.S.C. § 300aa-15(i); 26 U.S.C. § 9510.

Legislation may include payment provisions which expose the judgment appropriation in certain situations but not others. An example is 7 U.S.C. § 136m, as amended by section 501 of the Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, Pub. L. No. 100-532, 102 Stat. 2654, 2674 (1988). Under this law, certain classes of persons are entitled to indemnity payments when the Environmental Protection Agency cancels a pesticide registration. Indemnity payments to end users and, under certain circumstances, to purchasers other than end users, are to be paid under 31 U.S.C. § 1304. 7 U.S.C. § 136m(b)(3). Indemnity payments to other claimants (e.g., manufacturers) require specific line-item appropriations, which EPA must request when it takes an action (cancels a registration) that will require payment of indemnification. *Id.* § 136m(a)(4).

(6) No appropriation available

It is still possible—although remote—that a court might issue a judgment with no appropriation legally available from which to pay it. For example, B-191208-O.M., June 2, 1978, concerned litigation under the Micronesian Claims Act, which established the Micronesian Claims Fund for the payment of claims. The Court of Appeals for the District of Columbia

Circuit had remanded the case to the district court with instructions to direct the Micronesian Claims Commission to grant appropriate relief. The Fund was virtually exhausted and Congress had authorized, but not yet appropriated, additional funds. While a definitive determination at the time was not possible, it appeared that the Micronesian Claims Fund was the proper source of payment, meaning that the judgment appropriation would not be available. Therefore, if the Fund were exhausted, there would be no appropriation from which to pay, and the court recognized this possibility. *Mister Ralpho v. Bell*, 569 F.2d 607, rehearing denied, 569 F.2d 636, 639 (D.C. Cir. 1977). As we noted at the outset of this chapter, the Appropriations Clause of the Constitution prohibits any payment from the Treasury, including one ordered by a court, unless there is an appropriation available for that purpose. Accordingly, if such a situation were to arise, it would be necessary to seek funds from Congress.

Cases concluding that there is no available source of funds are—as they should be—rare. One example, which apparently resulted from legislative oversight and which was later cured legislatively, is 63 Comp. Gen. 470 (1984), discussed later in this chapter in connection with attorney’s fees in tax cases.

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## C. Requirement of Finality

The three primary statutes that govern the payment of judgments against the United States—31 U.S.C. § 1304 and 28 U.S.C. §§ 2414 and 2517—all refer to the payment of “final” judgments. The term “final” in connection with judgments may mean different things in different contexts. See *McDonald v. Schweiker*, 726 F.2d 311, 313 (7th Cir. 1983); B-58540, August 12, 1946. A final judgment for purposes of taking an appeal (28 U.S.C. § 1291) and a final judgment for payment purposes are two different things.

In simple terms, a judgment against the United States is paid when the litigation is over. The basis for this position is that it is not in the government’s interest to pay money out of the Treasury while the payee’s entitlement to the money is still subject to change. In other words, the purpose of the finality requirement is to protect the government “against loss by premature payment of a judgment which might later through appeal be amended or reversed.” B-129227, December 22, 1960. As stated in B-129227, the term “final judgment” for payment purposes means “such judgments as have become conclusive by reason of loss of the right to appeal—by expiration of time or otherwise—or by determination of the appeal by the court of last resort.” See also *Campbell v. United States*, 809 F.2d 563, 574 (9th Cir. 1987); *McDonald v. Schweiker*, 726 F.2d at 313;

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Keasler v. United States, 585 F. Supp. 825, 836 (E.D. Ark. 1984); Cedar Chemical Corp. v. United States, 18 Cl. Ct. 25, 31 (1989). Thus, a judgment against the United States is final for payment purposes when the appellate process is completed. Generally speaking and subject to the occasional exception, this can happen in one of three ways: determination by the court of last resort, determination by the parties not to seek further review, or expiration of the time limit for filing appeals. E.g., 73 Comp. Gen. 46 (1993).

To better understand the meaning of “final judgment” as that term is used in 31 U.S.C. § 1304, it is useful to examine the system section 1304 replaced. As we’ve discussed earlier in this chapter, before the judgment appropriation was enacted, most judgments against the United States required specific congressional appropriations for payment. Traditionally, Congress included very precise finality language when making these appropriations. For example, a 1925 appropriation stated that “[n]one of the judgments contained herein shall be paid until the right of appeal shall have expired.” Act of March 4, 1925, 43 Stat. 1347, quoted in 4 Comp. Gen. 834, 835 (1925). A 1904 appropriation act using almost identical language may be found at 33 Stat. 422. A 1912 appropriation with this language is quoted in 20 Comp. Dec. 562 (1914). More recently, the Supplemental Appropriations Act, 1977, Pub. L. No. 95-26, 91 Stat. 61, 96, provided that “no judgment herein appropriated for shall be paid until it shall become final and conclusive against the United States by failure of the parties to appeal or otherwise.”

Thus, when Congress decided to commit the payment of most judgments to a permanent appropriation, it was not legislating on a blank slate. The finality requirement, now compressed into the simple term “final judgments,”—

“stems from the congressional determination, consistently expressed in legislation over many decades, that the United States should not be required to pay money out of the Treasury pursuant to a judgment or order of a court which is susceptible of being modified or reversed on appeal.”

B-208999, September 13, 1982 (non-decision letter). Similarly, when the Comptroller General interpreted the finality requirement in B-129227, quoted above, GAO was not treading any new ground. The interpretation in B-129227 was nothing more than the logical continuation of the situation under prior law. E.g., B-102508, April 18, 1951; B-58540, August 12, 1946.

Section 2414, 28 U.S.C., provides that “[w]henver the Attorney General determines that no appeal shall be taken from a judgment or that no further review will be sought from a decision affirming the same, he shall so certify and the judgment shall be deemed final.” The purpose of this provision is to permit a judgment to be paid before it has become final by operation of law, that is, before the time limit for taking an appeal has expired. Thus, strictly speaking, the Attorney General’s certification is not necessary in cases where the time limit for taking an appeal has expired and a notice of appeal has in fact not been filed. B-129227, December 22, 1960. However, as a practical matter, GAO cannot track the status of all pending litigation, and therefore, the Attorney General’s certification that no further review will be sought is required for all judgments. It is not required for consent judgments and compromise settlements, since no appeal can be taken from these actions. 4 Comp. Gen. 834 (1925). Once again, the concept embodied in the quoted portion of 28 U.S.C. § 2414 was nothing new; the statute in this respect was largely a codification of existing administrative interpretations. See 19 Op. Att’y Gen. 281 (1889); B-58540, August 12, 1946.

The concept of finality for payment purposes was discussed in B-164766, June 1, 1979, involving an order of the Court of Claims. The decision noted that GAO has no authority to make “intermediate” payments, and went on to summarize the situation as follows:

“[T]he refund order may still be appealed to the Supreme Court and therefore cannot be considered ‘final’ at this stage of the litigation. Therefore, payment may not lawfully be made prior to such time as the Solicitor General has determined whether to petition for certiorari from the Court of Claims’ order. If certiorari is sought, payment cannot be made prior to the time that the Supreme Court finally disposes of the issue, either by denying certiorari or, if granted, until it issues its decision. Thus, the order will become final for payment purposes when one of three things occurs—the Department of Justice determines not to seek further review, the Supreme Court denies a petition for certiorari, or if the petition is granted, the Supreme Court issues its decision.”

It follows that GAO has no authority, nor is the permanent appropriation legally available, to make a partial or “good faith” payment, even upon the stipulation of the parties, while the litigation is still in process. B-191208-O.M., June 2, 1978.

On the surface, the preceding discussion would seem to suggest that payment can never be made until the litigation is over, that there can be only one “final judgment” in a given case, and that the entire case must be

over before there can be finality for purposes of 31 U.S.C. § 1304. This, however, is often not the case. For example, in B-164766, June 1, 1979, the Court of Claims had ordered the United States to refund an amount previously paid by a contractor in return for the contractor's bond. GAO concluded that the issue of the refund was readily severable from the merits of the underlying litigation, and when the appellate process was complete with respect to it, the refund could be certified for payment without regard to the status of the balance of the litigation. In this case, different aspects of the case became final for payment purposes at different times, potentially resulting in more than one "final judgment"

In Barnes v. United States, 678 F.2d 10 (3d Cir. 1982), an appeal from a judgment under the Federal Tort Claims Act, the court held that it could, under 28 U.S.C. § 2106, grant partial summary affirmance with respect to the undisputed portion of the district court's judgment. The judgment in that case consisted of ten distinct elements, one of which was being appealed; there was no appeal on the issue of liability. The partial summary affirmance would be treated as a separate judgment, which could be paid notwithstanding the continuing appeal on the disputed item. Some months earlier, the court in Parker v. Lewis, 670 F.2d 249 (D.C. Cir. 1981), had granted summary affirmance with respect to the uncontested portion of an award of attorney's fees which was being appealed in an employment discrimination action, noting that only the amount (not the liability) was in dispute and a large portion of that was uncontestable. It follows that, in appropriate cases, the government can consent to the motion for partial summary affirmance.

The Contract Disputes Act of 1978 provides an additional situation in which there might be more than one "final judgment" in a given case. Under section 10(e), 41 U.S.C. § 609(e), "where a portion of one such claim can be divided for purposes of decision or judgment, and in any such suit where multiple parties are involved, the court, whenever such action is appropriate, may enter a judgment as to one or more but fewer than all of the claims, portions thereof, or parties." Since the Act authorizes agency boards of contract appeals to grant the same relief that would be available in the Court of Federal Claims, a board of contract appeals may make "partial awards" to the same extent the court can under section 10(e). 60 Comp. Gen. 573 (1981).

Judgments awarding back pay but not specifying the dollar amount to be paid present a somewhat different aspect of finality. On the one hand, the judgments (Back Pay Act, Title VII of the Civil Rights Act, etc.) are money

judgments and may be paid from the permanent appropriation. However, such a judgment, even though it may be “final” with respect to the plaintiff’s right to recover, is not in and of itself “final” for purposes of GAO’s certification for payment. The reason for this is that the government’s computation would not be binding on the plaintiff and would itself be subject to judicial review. Therefore, before such a judgment may be certified for payment, GAO must be furnished an agreed-upon amount, that is, the employing agency’s computation, including any required deductions, together with written indication that the plaintiff will accept the amount in satisfaction of the judgment. If the parties cannot agree, further litigation may be necessary, but this must be done before the judgment is submitted for payment. 58 Comp. Gen. 311 (1979).

Awards of interim attorney’s fees have also raised finality issues. Interim fee awards are becoming increasingly common in certain types of litigation which tend to be lengthy and complex, prime examples being employment discrimination suits under Title VII of the Civil Rights Act and suits under the Freedom of Information Act.

In B-190940, September 21, 1978, a district court awarded attorney’s fees to the plaintiff in a Title VII suit. The plaintiff filed an appeal from the underlying order denying reinstatement, but neither party appealed the order awarding attorney’s fees. Since the litigation had already lasted for several years, and since the order awarding the fees was itself final and was not a part of the order reflecting the court’s determination on the merits which was on appeal, the award of attorney’s fees could be viewed as a separate “final judgment” and therefore certified for payment. The decision followed the Supreme Court’s rationale in Bradley v. Richmond School Board, 416 U.S. 696, 721–23 (1974).

Where, as in B-190940, the government does not intend to appeal an interim fee award, the Attorney General can so certify as provided in 28 U.S.C. § 2414, and there is no payment problem. However, where the government does plan to appeal an interim fee award but cannot do so because it is interlocutory and not appealable until the end of the litigation, it is difficult to see how the award can be deemed a final judgment. Be that as it may, several courts have directed the payment of interim fee awards in situations in which the award was not “final” in the traditional sense.<sup>40</sup>

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<sup>40</sup>A comprehensive treatment by a former Justice Department attorney discussing many of the cases cited in the text is Gregory C. Sisk, Interim Attorney’s Fees Awards Against the Federal Government, 68 N.C. L. Rev. 117 (1989).

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In McKenzie v. Kennickell, 669 F. Supp. 529 (D.D.C. 1987), a Title VII case, the court directed immediate payment of what the parties had agreed was the “irreducible minimum” owed to the plaintiffs. The court emphasized that if the parties had not been able to agree on the “irreducible minimum,” fees could not be paid until the fee litigation was resolved. Id. at 533. The court went on to suggest that, in future cases, courts could satisfy the concerns of both parties by directing payment into an interest-bearing escrow account. This would preserve the value of the award while facilitating repayment if the government were successful on appeal. Id. at 535 n.7.

The McKenzie court cited with approval the case of Jurgens v. EEOC, 660 F. Supp. 1097 (N.D. Tex. 1987), another Title VII case decided several months earlier. While Jurgens did not involve the “irreducible minimum” concept, the court appears to have viewed the possibility that the fee award might be modified on appeal as sufficiently remote in that case as to remove any real substance from the finality argument. E.g., id. at 1103 n.5. The McKenzie and Jurgens courts both concluded that, to the extent of any conflict, the specific provisions governing fee awards under Title VII (42 U.S.C. § 2000e-5(k)) would prevail over the more general provisions of 28 U.S.C. § 2414. The court in Brown v. Marsh, 707 F. Supp. 21 (D.D.C. 1989), reached the same result, citing both McKenzie and Jurgens. Still another Title VII case saying essentially the same thing is Trout v. Lehman, 702 F. Supp. 3 (D.D.C. 1988), appeal dismissed, Trout v. Garrett, 891 F.2d 332 (D.C. Cir. 1989) (district court followed “irreducible minimum” approach of McKenzie). See also Parker v. Lewis, noted above.

In Rosenfeld v. United States, 859 F.2d 717 (9th Cir. 1988), the court reviewed Jurgens and McKenzie and applied their result to an interim fee award in Freedom of Information Act litigation.<sup>41</sup> Cases following Rosenfeld are Allen v. FBI, 716 F. Supp. 667 (D.D.C. 1989), and Allen v. Department of Defense, 713 F. Supp. 7 (D.D.C. 1989).

Before we leave the topic of finality, one related point deserves brief mention. A private litigant who appeals from an adverse judgment must generally post a supersedeas bond to obtain a stay of execution from the original judgment. This requirement does not apply to the United States. 28 U.S.C. § 2408; Rule 62(e), Federal Rules of Civil Procedure. See also

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<sup>41</sup>The Rosenfeld court cited two district court cases in which interim fee awards were made against the United States in FOIA suits—Powell v. United States Dept. of Justice, 569 F. Supp. 1192 (N.D. Cal. 1983), and Biberman v. FBI, 496 F. Supp. 263 (S.D.N.Y. 1980). In neither case does the finality argument appear to have been raised as it is not addressed in either opinion.

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*Lightfoot v. Walker*, 797 F.2d 505, 507 (7th Cir. 1986) (attributing the nonapplicability of Rule 62(e) to the existence of 31 U.S.C. § 1304).

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## D. Procedures

GAO does not pay judgments; it certifies them for payment. See 31 U.S.C. § 1304(a)(2). GAO does this by issuing a “Certificate of Settlement” (GAO Form 39) to the Treasury Department. The form, signed by an authorized official, specifies the amount due, the payee(s), mailing address, and a citation to the appropriation account from which payment is to be made.

The procedures currently in effect were developed jointly by GAO and the Justice Department in the 1950s after the enactment of 31 U.S.C. § 1304.<sup>42</sup> Presently, once GAO has received all necessary supporting material and assuming the payment does not raise novel legal issues, it takes GAO approximately 30 days to process a judgment, and approximately an additional week for Treasury to issue the check. Thus, adding an allowance for mailing time, a judgment check will normally be received within 6–8 weeks from the time GAO receives the necessary documents.

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### 1. Judgments of the District Courts

Under current procedures, the payment process is automatic with respect to the plaintiff. There is no need for the private litigant to make any formal request or demand on GAO for payment.<sup>43</sup>

When a district court judgment becomes final (either by determination not to seek further review or by completion of the appellate process), the judgment is submitted to GAO, either by the pertinent branch of the Justice Department or in many cases by the cognizant United States Attorney’s office. The submission should consist of:

- A copy of the judgment together with any related orders and documentation of any appellate action.
- A transmittal letter which, along with any other pertinent data, should (a) certify that no further review will be sought; (b) contain mailing instructions for the check(s); and (c) include pertinent information on any required deductions.
- An Adverse Judgment Data Sheet which, among other things, specifies the type of case and agency or agencies involved, and identifies any known

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<sup>42</sup>See, e.g., B-63622/B-90307-O.M., August 15, 1956, with respect to district court judgments.

<sup>43</sup>The only action by the plaintiff that might be desirable would be a “protective filing” of a copy of the judgment to preserve possible entitlement to post-judgment interest under 31 U.S.C. § 1304(b) in cases where it applies.

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indebtedness by the judgment creditor to the United States. (This is a format developed jointly in the early 1980s by GAO, the Justice Department, and the Office of Management and Budget, to permit GAO to record more precisely what is being paid.)

It is this payment request package from Justice (or an agency other than Justice authorized to handle the litigation) which triggers the payment process. Upon receipt by GAO, the judgment is given a file number for reference and retrieval purposes. If a judgment is transmitted by the private plaintiff or by the agency Justice is representing, GAO contacts the Justice Department (by form letter) to determine if the judgment is ready for payment. If Justice advises that the judgment is not yet ready for payment, nothing further will happen. If the judgment is ready for payment, the certification process begins.

The first and perhaps most important element in the certification process is the determination of the proper source of funds for payment, discussed in prior sections of this chapter. If it is determined that the judgment is not payable from the judgment appropriation, it is returned to the submitter with a brief explanation and advice as to the correct source of payment. Where it is determined that the judgment is payable from the judgment appropriation, the process will then take into consideration, where and to the extent applicable, the offsetting of indebtedness, the making of other required deductions, the payment of costs and/or attorney's fees, and the computation and payment of interest. Once these things are done, the next step is the preparation of the Certificate of Settlement.

The Certificate of Settlement is then sent to the Treasury Department, which prepares and issues the check(s) in accordance with the instructions on the Certificate. The check is mailed to the plaintiff in care of the cognizant U.S. Attorney or designated attorney at the Justice Department, depending on who litigated the case. This person will deliver the check to the judgment creditor in exchange for an appropriate release. As a general rule, the check will not be sent directly to the plaintiff or plaintiff's counsel. There are exceptions to this, based on the exigencies of the particular case and with the Justice Department's concurrence, but they are rare.

During the 1980s, the Treasury Department developed and refined its procedures for the use of electronic transfer ("wire transfer") in lieu of checks. Treasury calls this its Treasury Financial Communication System. Judgment payments will, upon request, be made by wire transfer. If wire

transfer is desired, the payment request must include the name, city, and state of the receiving bank, the receiving bank's 9-digit American Bankers Association identifier, and the number of the account to which the payment is to be credited. Procedures for wire transfer are found in the Treasury Financial Manual, Vol. I, part 4. (Agencies paying their own judgments should be able to follow similar procedures without problem, except that the "TFCS" instructions will, in accordance with the Treasury Manual, appear on a disbursement voucher instead of a Certificate of Settlement.)

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## 2. Judgments of the Court of Federal Claims

Current procedures for Court of Federal Claims judgments require two submissions, one from the Justice Department and one from the plaintiff. The Justice Department letter merely states that no further review will be sought and that the judgment may therefore be paid. In Contract Disputes Act cases, it also includes a billing address for agency reimbursement. The plaintiff's submission must consist of the following:

- A letter signed by the plaintiff and dated after the date of the judgment, stating that no further review will be sought, requesting payment, and indicating the address to which the check should be sent (plaintiff or plaintiff's counsel); or,
- If the letter is submitted by plaintiff's counsel and requests that the check be sent to counsel, it must be accompanied by a power of attorney dated after the date of the judgment. (A power of attorney executed prior to the date of the judgment is acceptable if it specifically authorizes transmission of payment to counsel on plaintiff's behalf.)
- The original transcript of the judgment, obtained from the Clerk of the Court, to accompany whichever of the above payment request letters is used.<sup>44</sup>

Procedures are otherwise the same as those for district court judgments, except that the check is sent directly to the plaintiff or plaintiff's counsel, in accordance with the plaintiff's instructions. An instruction sheet setting out the foregoing procedures is usually distributed by the office of the Clerk of the Court along with the judgment.

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## 3. Judgments in Favor of Indian Tribes

Judgments obtained by Indian tribes against the United States have their own payment procedure prescribed by statute. The starting point is 25

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<sup>44</sup>This is in addition to the "protective filing" necessary to preserve possible entitlement to post-judgment interest under 31 U.S.C. § 1304(b).

U.S.C. § 118, under which payments to Indians in satisfaction of court judgments must be made “under the direction of the officers of the Interior Department charged by law with the supervision of Indian affairs.” This means the Bureau of Indian Affairs. Thus, traditionally, GAO has certified payment to the Bureau of Indian Affairs, which then holds the funds in a trust capacity for ultimate use and distribution.

Initially, the Bureau made distribution from the trust funds without further congressional action. However, beginning in the early 1960s, the annual Interior Department appropriation acts began including provisions prohibiting the distribution of Indian judgment funds (including awards by the now-defunct Indian Claims Commission) until additional legislation was enacted specifying the purposes for which the funds could be used. See, for example, the Interior Department and Related Agencies Appropriation Act for 1974, Pub. L. No. 93-120, 87 Stat. 429, 432 (1973). Under this system, even after a judgment had become final and GAO had certified it for payment, the money could not be paid over to the successful plaintiff until Congress enacted further legislation dealing with that specific judgment.

The prohibition in the 1974 appropriation act was the last such provision. In 1973, Congress enacted permanent legislation, since amended several times and now found at 25 U.S.C. §§ 1401–1407, to eliminate the need for specific distribution statutes in most cases. Under this legislation, the Bureau of Indian Affairs prepares a distribution plan and submits it to the Congress. The plan becomes effective automatically unless a joint resolution of disapproval is enacted within a specified time period. Specific distribution legislation is now necessary only if the Bureau determines that the circumstances of the particular case make it desirable, or if the Bureau’s plan is disapproved. The Bureau has published implementing regulations, found at 25 C.F.R. Part 87.

The typical nonstatutory distribution plan, which the Bureau publishes in the Federal Register as a notice, will allocate part of the funds to be used in programs for the social and economic benefit of the tribe, and part for per capita distribution to individual tribal members. The plan may also include procedures for the treatment of the shares of deceased or legally incompetent beneficiaries, and minors. For an example, see 45 Fed. Reg. 57546, August 28, 1980. Examples of statutory distribution plans are Pub. L. No. 100-139, 101 Stat. 822 (1987) (Cow Creek Band of Umpqua Tribe), and Pub. L. No. 99-146, 99 Stat. 780 (1985) (Chippewas of Lake Superior).

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The 1973 legislation applies only to Court of Federal Claims judgments. As a practical matter, however, this will include the major portion of judgments resulting from monetary claims by Indian tribes against the United States. See 28 U.S.C. § 1505.

Unlike other Court of Federal Claims judgments, the judgment in an Indian case is usually transmitted to GAO directly by the Clerk of the Court. Because payment is not made directly to the plaintiff, GAO will certify the judgment for payment upon receipt of a letter from the Justice Department stating that it has no objection to payment. There is no need for any further action by the plaintiff.

Most Indian tribes remain under federal supervision (“federal trust”). Termination of federal supervision is accomplished by statute. This has been done for several tribes, although the termination policy is no longer actively pursued. An example is 25 U.S.C. § 564q(a) (Klamath Indian Tribe). For tribes whose federal trust has been terminated, the judgment procedures set forth above will no longer apply if there is other legislation authorizing the distribution of judgment funds for that tribe. 25 C.F.R. § 87.2.

There appears to be little case law involving the Indian judgment fund distribution legislation. In United States v. Dann, 706 F.2d 919 (9th Cir. 1983), the court held that, for purposes of a statutory bar against further claims arising from the same subject matter, a judgment was not “paid” until Congress had either legislated a distribution plan or permitted the Bureau’s plan to become effective. The Supreme Court reversed, holding that payment occurred when the funds were transferred from the permanent judgment appropriation and deposited in the Bureau’s trust account. 470 U.S. 39 (1985). The Court applied the common-law principle that funds “transferred from a debtor to an agent or trustee of the creditor constitute payment.” Id. at 48.

In United States v. Overlie, 730 F.2d 1159 (8th Cir. 1984), the court held that the Bureau had no authority, in implementing a particular distribution plan, to deposit per capita shares into “Individual Indian Money” accounts and thereby render them subject to garnishment for debts owed to the Farmers Home Administration and Small Business Administration. In a similar type of case involving a terminated tribe, the Comptroller General held that a per capita share was subject to a levy for delinquent federal taxes issued by the Internal Revenue Service under 26 U.S.C. § 6331. 63 Comp. Gen. 498 (1984).

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#### 4. Compromise Settlements

As we have seen, a compromise settlement is paid from the same source that would apply to a judgment in the same suit. Since most cases are settled prior to final judgment, many of the “judgments” submitted to GAO for payment are in fact compromise stipulations.

For district court cases, compromise settlements are expressly provided for in the relevant payment statute (28 U.S.C. § 2414). Under current procedures, unless otherwise required, it is not necessary for a compromise stipulation to be approved by the court in order to be paid. It will be certified for payment if it is properly executed, and if it expressly states that, in consideration of payment, the plaintiff agrees to dismiss the action and to accept the stated sum in full and final satisfaction of the claim. B-199073, July 1, 1980 (non-decision letter). Payment procedures, including submission of a Judgment Data Sheet, are the same as for district court judgments.

When Congress amended 28 U.S.C. § 2414 in 1961 to include compromise settlements, there was no corresponding amendment to the Court of Federal Claims payment provision, 28 U.S.C. § 2517. The legislative history did not explain this omission, but there was no indication of any intent that the same concept should not apply to Court of Federal Claims cases. Be that as it may, because of the difference in statutory language, it has historically been the practice to reduce Court of Federal Claims settlements to what is essentially a pro forma judgment in order to conform to the literal language of 28 U.S.C. § 2517. GAO’s view is that while the statute prescribes the procedure for the payment of judgments, it does not prohibit the payment of compromise settlements. Thus, if an otherwise sufficient compromise stipulation in a Court of Federal Claims case is submitted for payment, GAO will not decline certification merely because it has not been reduced to judgment. B-216251[-O.M.], July 25, 1988; B-217990.27-O.M., September 9, 1987. Procedures would otherwise be the same as for judgments, as and to the extent applicable.

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#### 5. Board of Contract Appeals Awards

When monetary awards by boards of contract appeals are to be paid from the permanent judgment appropriation, a “certification of finality” is required from both parties. The contractor (a) certifies that no further review of the award will be sought, (b) certifies that the amount of the award, with interest to the extent authorized by law, will be accepted in full and final satisfaction of the claim, and (c) provides an address to which the check is to be sent. The contracting agency also certifies that no further review will be sought and, in addition, provides (a) for interest

computation purposes, the date the claim was filed or, for claims greater than \$50,000, certified as required by 41 U.S.C. § 605(c); and (b) where the agency must reimburse the Treasury, an agency billing address to be used for that purpose. There is no required form for these certifications, although GAO has developed one which boards may use or adapt as they wish.

The contractor and contracting agency submit their respective certifications to the board. The board, usually through its clerk or recorder, then transmits these documents to GAO, along with a copy of the board's decision and award. GAO then issues a Certificate of Settlement to the Treasury Department, the same as for court judgments. In reimbursable cases, the Treasury Department will "bill" the contracting agency after payment has been made, using the billing address provided.

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## 6. Designation of Payee

The principle GAO follows here is very simple: GAO will do what the judgment says. If there is any conflict between requests in a transmittal letter and the language of the judgment, the judgment will be followed.

Thus, where a judgment directs that the plaintiff shall recover, the check will be drawn payable to the plaintiff and to the plaintiff only. Absent specific provision in the judgment, GAO has no authority to have a check drawn payable to the plaintiff's attorney or to include the attorney as co-payee, since the attorney is not a judgment creditor of the United States. B-150338/B-152546, April 9, 1964 (non-decision letter). See also 9 Comp. Dec. 610 (1903). The principle involved was stated in an early decision as follows:

"The primary objective [in] matters involving the disbursement of appropriated moneys, is to secure a valid acquittance to the United States and that, of course, is accomplished by payment to the individual to whom the Government is obligated."

24 Comp. Gen. 261, 262 (1944). This same principle applies to all payments of public funds. See 31 U.S.C. § 3322(a); 53 Comp. Gen. 482, 483 (1974); 14 Comp. Dec. 395 (1907); 17 Op. Att'y Gen. 675 (1884).

If it is desired to have the check drawn payable jointly to plaintiff and plaintiff's counsel, specific instructions must be included in the judgment or compromise stipulation.

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In some cases, it may be desirable to have a judgment check drawn payable to the Clerk of the Court for subsequent distribution by the Clerk's office. To have this done, appropriate instructions must be included in the judgment. See 5 Comp. Gen. 737 (1926); 27 Comp. Dec. 987 (1921); 26 Comp. Dec. 912 (1920).<sup>45</sup> However, there is no authority for the government to pay money into the registry fund of a court for ultimate distribution under a judgment which has not yet been rendered. See 14 Comp. Gen. 567 (1935).

The principle of making payment only to the judgment creditor (plaintiff of record) applies equally where the plaintiff is a business entity (corporation, partnership, etc.). In the case of a defunct business entity, GAO will need evidence of who is legally entitled to receive the assets. If such evidence is not provided, the money will sit in the Treasury pending a judicial determination. E.g., B-127545, August 6, 1957; B-127545-O.M., August 7, 1956.<sup>46</sup>

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## 7. Deceased Payee

If the payee dies before the judgment is paid (either before the check is issued or after issuance but prior to negotiation), the judgment is an asset of the decedent's estate and is therefore payable to whoever is entitled to receive those assets. Where the estate is being probated, this means the legal representative (executor or administrator). If there is no probate estate, it may be necessary to resort to the intestacy laws (laws of descent and distribution) of the state of the decedent's domicile at the time of death.

The government's interest in this situation is in making payment to the person who is legally entitled to receive it. If difficulty is encountered in negotiating a judgment check certified by GAO due to the intervening death of the payee, the check should be returned along with a claim for reissuance using Standard Form 1055 (Claim against the United States for Amounts Due in the Case of a Deceased Creditor). GAO will provide copies of the form upon request. If the estate is being probated, the claim should be submitted by the legal representative and accompanied by documentation of the appointment.

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<sup>45</sup>Comp. Gen. 737 suggests that judgments may be paid into a registry fund only in cases of "exceptional reason." As a practical matter, no problem will arise as long as the mode of payment is explicitly provided for in the judgment.

<sup>46</sup>Cases involving defunct business entities under the International Claims Settlement Act of 1949, discussed in Chapter 12, provide useful analogies for making similar determinations in the judgment context.

If there are no probate proceedings, GAO's policy is not to require appointment of a legal representative unless required under state law. See B-69787-O.M., May 2, 1979. If formal administration is not required under state law, GAO will recertify payment to the person(s) properly entitled to payment under the laws of the decedent's domicile.

The above procedures apply equally where the deceased judgment creditor was a federal employee. Since a judgment assumes its own identity irrespective of the nature of the underlying cause of action, 5 U.S.C. § 5582 (which establishes an order of precedence for certain payments due a deceased federal employee) does not apply to judgment payments. B-129994-O.M., January 29, 1957. Of course, an option always available is to return to court and have the court designate the new payee, in which event the court may choose to apply 5 U.S.C. § 5582.

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## 8. Appeal From Settlement

Occasionally, a judgment creditor may take issue with GAO's settlement action. The disagreement may be based on a legal issue or possibly a clerical error. In cases of clerical error, corrective action can frequently be taken on the basis of a telephone call. If this is not sufficient, a judgment creditor may request reconsideration under GAO's regulations for claims settlement published at 4 C.F.R. Part 32.

The regulations provide that "[u]nless otherwise directed by the Comptroller General on the presentation of proper facts in the particular case, the check issued upon a settlement must not be cashed when its amount includes any item as to which review is applied for, but should accompany the application for review." 4 C.F.R. § 32.3. In many judgment cases, this will not be applicable, for example, where the claimant is appealing the disallowance of interest but there is no dispute over the principal judgment amount. Should there be any uncertainty, GAO's policy is to waive this requirement in judgment cases upon request.

It is also possible that the federal agency involved may disagree with GAO's source-of-funds determination. Upon being advised by GAO that a particular item should be paid from agency funds, the agency should proceed to authorize payment and may then seek GAO's reconsideration. If it is determined that the item should have been paid from the judgment appropriation, GAO will authorize reimbursement to the agency.

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## E. Deductions

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### 1. Setoff

#### a. Statutory Basis

As noted previously, part of the settlement process is the offset of known indebtedness. However, since administratively uncollectible debts are no longer routinely referred to GAO, GAO relies heavily on information submitted with the payment request. If a debt exists, 31 U.S.C. § 3728 requires the Comptroller General to withhold payment of the judgment to the extent of the debt.

As the Court of Claims said in Labadie v. United States, 33 Ct. Cl. 476, 480 (1898):

“When the time of payment comes the statutes give the accounting officers . . . abundant authority to set off an indebtedness due from a claimant to the United States against a judgment in his favor.”

The statute not only establishes the requirement for setoff but also prescribes the procedures to be followed. GAO must first attempt to obtain the plaintiff’s consent to the setoff. If the plaintiff consents, the amount of the debt is deducted from the judgment payment and the debt is discharged. If the plaintiff refuses to consent or denies the indebtedness, the amount must still be withheld, together with the estimated cost of prosecuting the debt to final judgment. GAO must then immediately refer the debt to the Justice Department so that suit may be commenced, unless, as discussed below, suit has already been brought. If judgment is entered against the United States, or if the amount recovered for the debt and costs is less than the amount withheld, the balance must be paid over to the plaintiff with 6 percent interest for the time it has been withheld. 17 Comp. Gen. 503, 509 (1937); 7 Comp. Dec. 585, 588 (1901); B-130754, March 12, 1957.

GAO does not have a formula to determine the amount to withhold as the estimated cost of prosecuting the debt in cases where the plaintiff refuses to consent. The estimate is made on a case-by-case basis.

The statute which is now 31 U.S.C. § 3728 was originally enacted in 1875 (18 Stat. 481). The original version contained language that appeared to make it applicable to administrative claims as well as judgments, although its

application to administrative claims was not universally viewed as mandatory. 23 Comp. Dec. 68, 69 (1916). Congress amended the statute in 1933 to limit its application to court judgments. The legislative history of the 1933 amendment is explicit:

“The amendments eliminate from the statute the language with respect to claims, limiting the application of the statute to judgment creditors.”

S. Rep. No. 1021, 72d Cong., 2d Sess. 8 (1933), quoted in B-123811-O.M., January 14, 1959.

The original (1875) version also referred to the Secretary of the Treasury, since GAO did not then exist. When GAO was created in 1921 and inherited the Comptroller of the Treasury’s functions, no corresponding amendment was made to 31 U.S.C. § 3728. The courts got around this simply by reading the statute as if it had been amended. United States v. LaGrange Grocery Co., 31 F.2d 297 (N.D. Ga. 1929); Standard Dredging Co. v. United States, 71 Ct. Cl. 218, 249–50 (1930). The 1933 amendment solved this problem as well by substituting Comptroller General for Secretary of the Treasury. Thus, while many pre-1933 cases remain valid for various purposes, they are obsolete to the extent they purport to apply the statute to administrative claims or refer to the Secretary of the Treasury.

#### b. Current Application

The requirements of 31 U.S.C. § 3728 with respect to judgment creditors have always been viewed as mandatory. E.g., A-58266, July 29, 1941; 37 Op. Att’y Gen. 215, 217–18 (1933). As such, they may not be defeated by the agreement of the parties. Thus, an agreement purporting to consent to the entry of final judgment without regard to setoff is invalid. Eastern Transportation Co. v. United States, 159 F.2d 349, 352 (2d Cir. 1947). However, “mandatory” does not have to be synonymous with “stupid.” It is GAO’s opinion that it possesses the discretion to pay a judgment without invoking the offset statute if warranted by the circumstances of a particular case, for example, if the validity of the debt is sufficiently doubtful or if the amount of the debt is too small to justify the effort. B-131865/B-131868, February 16, 1960. Also, the debt to be collected must be a debt owed to the United States. A debt owed to a government corporation is not a debt owed to the United States for purposes of 31 U.S.C. § 3728. A-97085, June 13, 1942 (FDIC).

There is an important distinction for purposes of 31 U.S.C. § 3728 between withholding and offset, reflecting the statute’s two stages of operation. The first step is for GAO to withhold payment of the judgment. An

administrative assertion of indebtedness is sufficient to support the initial withholding. Of course, GAO must then apply the statutory procedures. If the debtor consents, or if the debt is reduced to judgment, the withholding ripens into an offset. See generally Hines v. United States ex rel. Marsh, 105 F.2d 85, 87–88 (D.C. Cir. 1939); 5 Lawrence, First Comp. Dec. 408, 411–12 (1884).

While an administrative determination of indebtedness may be sufficient to invoke the initial withholding under 31 U.S.C. § 3728, the debt must be one which would support administrative collection action at that particular time. Thus, where a purchaser of government property is paying in installments and there has been no default, the balance due, absent provision to the contrary in the purchase agreement, is not a debt for purposes of 31 U.S.C. § 3728. National Bulk Carriers, Inc. v. Warren, 82 F. Supp. 511, 512 (D.D.C. 1949).

Mere delay by the government in paying a judgment pending determination of whether the claimant is indebted to the United States does not constitute a setoff for purposes of 31 U.S.C. § 3728 so as to create an entitlement to interest. 8 Comp. Gen. 668 (1929). (While the cited decision dealt with an administrative claim under the pre-1933 version of the statute, there is no reason why the principle involved would not apply equally to a judgment.)

As noted above, the procedures established by 31 U.S.C. § 3728 do not apply to the government’s right of setoff prior to the entry of judgment on the claim against which offset is sought. See Fitzgerald v. Staats, 578 F.2d 435, 439 (D.C. Cir. 1978), cert. denied, 439 U.S. 1004; Whitbeck v. United States, 77 Ct. Cl. 309, 342–43 (1933), cert. denied, 290 U.S. 671. The right of setoff against an administrative claim is wholly independent of 31 U.S.C. § 3728, and there is no requirement to seek the debtor’s consent by virtue of that statute.<sup>47</sup> E.g., Project Map, Inc. v. United States, 486 F.2d 1375 (Ct. Cl. 1973); 14 Comp. Gen. 849 (1935); B-188473, August 3, 1977.

However, the procedures of 31 U.S.C. § 3728 have been held to apply to administrative settlements under the Federal Tort Claims Act which are payable from the permanent judgment appropriation (i.e., awards greater than \$2,500). B-135984, May 21, 1976. This is because the Federal Tort Claims Act (28 U.S.C. § 2672) provides for payment “in a manner similar to judgments and compromises in like causes.” GAO will also apply those procedures to offsets against monetary awards by boards of contract

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<sup>47</sup>Procedural requirements for setoffs may nevertheless exist under other laws. See Chapter 13.

appeals submitted to GAO for payment from the judgment appropriation. B-210316-O.M., September 16, 1983.<sup>48</sup> One court has found that the statute does not permit involuntary offset against seamen's wages protected by the admiralty statutes. Shilman v. United States, 164 F.2d 649, 652 (2d Cir. 1947), cert. denied, 333 U.S. 837.

In United States v. Cohen, 389 F.2d 689 (5th Cir. 1967), the court held that the United States may exercise its right of setoff under 31 U.S.C. § 3728 against a party claiming rights derivatively from a judgment creditor against whom the setoff would be proper, specifically, attorney's fees awarded under the Federal Tort Claims Act. Also, 31 U.S.C. § 3728 takes precedence over an attorney's lien created by state statute. Malman v. United States, 207 F.2d 897 (2d Cir. 1953); Morgan v. United States, 131 F. Supp. 783 (S.D.N.Y. 1955). See also Hornbeck Offshore Operators, Inc. v. Ocean Line of Bermuda, 849 F. Supp. 434 (E.D. Va. 1994) (maritime lien subject to setoff).

Where a judgment is obtained in a suit by one party for the use of another, i.e., "X for the use of Y v. United States," 31 U.S.C. § 3728 applies to the offset of a debt asserted against the "legal plaintiff" (X). See A-58266, July 29, 1941. Under the reasoning in United States v. Cohen, it would presumably also apply to a debt asserted against the "use plaintiff" (Y).

A 1977 decision held that a tax debt against an individual partner cannot be offset under 31 U.S.C. § 3728 against a judgment in favor of the partnership. B-188943, July 19, 1977.

If payment is withheld under 31 U.S.C. § 3728 and the debt is not already in suit, the debtor does not have to wait for the government to sue. The debtor can initiate the litigation by commencing an action for wrongful withholding of the judgment. Eastport Steamship Corp. v. United States, 130 F. Supp. 333 (Ct. Cl. 1955). If the debtor wins, interest is payable on the amount improperly set off the same as if the government had commenced the action. Eastport Steamship Co. v. United States, 140 F. Supp. 773 (Ct. Cl. 1956).

What happens if the United States has already reduced its debt claim to judgment? The statute requires that the government bring a civil action against the unconsenting debtor "if one has not already been brought." 31 U.S.C. § 3728(b)(2)(B). If the government has already prosecuted its claim

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<sup>48</sup>GAO had not applied 31 U.S.C. § 3728 to board of contract appeals awards prior to the Contract Disputes Act of 1978. See B-162526, October 9, 1967.

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to judgment, it may offset its judgment against the debtor's judgment without the need to follow 31 U.S.C. § 3728. B-140983-O.M., October 15, 1959. A court martial is not the equivalent of a judgment for this purpose. Shilman, 164 F.2d at 652.

The statute refers to judgments “presented to the Comptroller General [for payment].” 31 U.S.C. § 3728(a). An unresolved issue is how to offset against a judgment of a type which is normally paid without GAO involvement. The issue has surfaced in a number of cases involving tax judgments, but the case law has thus far not produced a clear answer.<sup>49</sup> In view of the various authorities available to the IRS such as 26 U.S.C. § 6402(a), it may be noted that the ultimate resolution in tax judgment cases, whatever it may be, would not necessarily apply to other “otherwise provided for” judgments.

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## 2. Judgments Awarding Back Pay

When an agency pays an employee's salary, it normally makes several deductions from the gross amount for such things as income tax and retirement fund contributions. The treatment of these and similar deductions may also become an issue when an employee is awarded back pay as the result of a lawsuit under statutes such as the Back Pay Act, 5 U.S.C. § 5596.

In a 1961 decision to the Commissioner of Internal Revenue, the Comptroller General concluded that GAO has no authority to withhold federal income tax from a judgment for back pay unless the judgment specifically provides for such withholding. B-124720/B-129346, August 1, 1961. See also 44 Comp. Gen. 729 (1965) (social security withholdings). The reason is that GAO has no authority to administratively and unilaterally deviate from the judgment amount by certifying less than the amount awarded (8 Comp. Gen. 603, 605 (1929)), unless the action involved is itself mandated by statute such as the setoff of indebtedness under 31 U.S.C. § 3728. GAO reaffirmed this ruling 20 years later in B-124720/B-129346, September 23, 1981. The decision states:

“The time to resolve the issue of tax withholding is before the judgment is entered. If the parties agree, this should be a simple matter. If the parties disagree, then that disagreement would have to be resolved by the court and the time to do that is when the judgment itself

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<sup>49</sup>See United States v. Rochelle, 363 F.2d 225 (5th Cir. 1966); Empire Ordnance Corp. v. Harrington, 249 F.2d 680 (D.C. Cir. 1957); Snyder v. United States, 630 F. Supp. 182 (D. Md. 1986); Chapman v. United States, 347 F. Supp. 89 (C.D. Cal. 1972), rev'd on other grounds, 485 F.2d 1194 (9th Cir. 1973); Heirich v. United States, 340 F. Supp. 283 (N.D. Ill. 1971); Pugh v. Ladner, 52 F. Supp. 604 (E.D. Pa. 1943).

is being considered, not after it has become final and has been submitted to GAO for payment.”<sup>50</sup>

It is important to distinguish what we are talking about here from the basic issue of whether a given judgment is taxable. Damages received by judgment or settlement on account of personal injuries are excluded from gross income under 26 U.S.C. § 104(a)(2). Back pay awards are excluded in some situations, taxable in others. Back pay awarded under the Age Discrimination in Employment Act is not taxable as wages. *Bennett v. United States*, 30 Fed. Cl. 396 (1994). In *United States v. Burke*, 112 S. Ct. 1867 (1992), the Supreme Court resolved a longstanding issue by holding that a monetary settlement under Title VII of the Civil Rights Act of 1964 does not constitute “damages” for purposes of section 104(a)(2) but instead is gross income for federal income tax purposes. However, the holding applies only to Title VII as it existed prior to the Civil Rights Act of 1991, and is not dispositive on the issue of taxability under the amended version. In any event, GAO’s position that it has no business unilaterally inserting the tax issue into the certification process has no bearing on whether the judgment is taxable or the recipient’s liability for any tax.

There may, of course, be cases where the parties simply do not think of the tax withholding issue until after the judgment has been rendered. In such a case, as long as the parties agree to the withholding, there is no need to have the judgment modified just to reflect the withholding. If the parties agree to the deduction of a specified amount of withholding tax, even where the judgment itself is silent, GAO will implement that agreement in making settlement. B-124720/B-129346, September 23, 1981. Documentation of the agreement should be submitted with the payment request to GAO. If the amount to be withheld is not specified, GAO will withhold a flat 20 percent as a matter of policy. See B-187777, May 30, 1979 (non-decision letter).

If it is desired that appropriate deductions be made, they must be specified in the judgment or a written agreement signed by the judgment creditor. The judgment or agreement should specify the gross amount of the award and should indicate which deductions are to be made. Typical deductions are federal income tax, state income tax, retirement fund or social security contribution, Medicare tax, and Federal Employees’ Group Life Insurance (FEGLI).<sup>51</sup> Any deductions made will be specified on the Certificate of

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<sup>50</sup>The same principles apply to judgments obtained by the Equal Employment Opportunity Commission in enforcement actions. 65 Comp. Gen. 800 (1986).

<sup>51</sup>Other adjustments may also be appropriate which do not involve payments. E.g., B-213604, May 15, 1984 (restoration of annual and sick leave in wrongful separation case).

Settlement. If the judgment or agreement does not specify the dollar amount or applicable percentage rate for each deduction to be made, the information should be obtained from the employing agency and, together with an indication that the parties are in agreement, included with the payment request.

Some deductions, such as Civil Service Retirement and Social Security, require a contribution by the government as well as by the employee. If a judgment directs the payment of the government's as well as the employee's share, it is considered part of the judgment and payable from the permanent appropriation. If a judgment directs a particular deduction but is silent with respect to the government's share, the employee's share is payable from the permanent appropriation and the government's share is payable by the employing agency from agency funds. 58 Comp. Gen. 115 (1978). This decision overruled an earlier case (B-124720, May 15, 1961) which had held that there was no appropriation legally available to pay the government's share and it therefore had to be absorbed by the appropriate fund.

The question of deductions also arises in connection with judgments awarding back pay but not specifying the dollar amount to be paid. Under 58 Comp. Gen. 311 (1979), as noted earlier, these judgments may be paid from the permanent appropriation once GAO has been furnished an agreed-upon amount, determined either administratively or judicially as the specific case may require. If the parties cannot agree and the amount is determined in further litigation, the above principles will apply—that is, deductions will be made or not made depending on the terms of the court's order. Where the amount is agreed upon administratively, the employing agency will normally include in its computation the same deductions it would have made had it paid the salary directly. In such a case, it follows from 58 Comp. Gen. 311, although the point was not specifically addressed in that decision, that GAO will follow the terms of the agreement provided the conditions specified in the decision are met, primarily that there be written indication that the designated payment will be accepted in full and final satisfaction of the judgment.

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## F. Costs and Attorney's Fees

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### 1. Costs

Costs are not taxable against the United States unless authorized by statute. 23 Comp. Gen. 805 (1944); United States v. Pacific Fruit & Produce Co., 138 F.2d 367 (9th Cir. 1943). This rule is simply another application of the doctrine of sovereign immunity. Cassata v. Federal Savings and Loan Insurance Corp., 445 F.2d 122, 125 (7th Cir. 1971). In recognition of this, Rule 54(d) of the Federal Rules of Civil Procedure states that “costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law.” Prior to 1966, there was no general authority to tax costs against the United States. Under the version of 28 U.S.C. § 2412 then in effect (see 62 Stat. 973), costs were prohibited except under express statutory authority, which existed only in limited situations. Thus, there were many cases in which the United States was not liable for costs when it lost even though it could recover costs when it was the prevailing party.

In 1966, Congress amended 28 U.S.C. § 2412 to allow the taxation of costs against the government in all civil actions unless specifically prohibited. Under section 2412(a), except as otherwise specifically provided by statute—

“costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity.”

The costs are to be “limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.” *Id.* The purpose of the 1966 amendment was “to put private litigants and the United States on an equal footing regarding cost awards.” 54 Comp. Gen. 22, 23 (1974).

Subsection 2412(c)(1) provides that costs awarded under subsection (a) shall be in addition to any relief provided in the judgment, and “shall be paid as provided in sections 2414 and 2517 of this title.” This means that

costs will be payable from the permanent judgment appropriation as long as the award is final and payment is not otherwise provided for.<sup>52</sup>

The authority to award costs under 28 U.S.C. § 2412(a) is not limited to cases involving money judgments. In other words, in order to be payable from the judgment appropriation, costs need not be incident to a money judgment which is payable from that appropriation. B-165149-O.M., September 23, 1968. In addition, the statute applies to costs on appeal to the extent authorized by law. *Super Food Services, Inc. v. United States*, 416 F.2d 1236, 1241 (7th Cir. 1969).

Costs may be included in a judgment on the merits or may be taxed separately, and may be submitted for payment after the underlying money judgment, if any, has been paid. If an award of costs is submitted after the underlying judgment is paid, it will be treated as a separate “judgment” and a separate Certificate of Settlement will be issued in accordance with the procedures previously described. If the costs are included as part of the judgment, they will be included with the judgment payment and paid in the same manner (i.e., to the plaintiff unless the judgment specifies otherwise).

Costs may be awarded against congressional litigants as well as agencies of the executive branch. However, a Member of Congress or a congressional committee or subcommittee does not have automatic access to the courts on behalf of the United States. To undertake any court action on behalf of the United States, the congressional litigant must be authorized by the appropriate body of Congress. Thus, in one case, an award of costs against a House subcommittee which had attempted to judicially enforce subpoenas without House authorization could not be paid from the permanent appropriation. B-194540-O.M., September 20, 1979.

Section 2412(a) does not authorize the awarding of all costs a party may incur, or all costs a court may feel like awarding. Rather, it authorizes only those costs “as enumerated in section 1920 of this title.” Six categories of permissible costs are listed in 28 U.S.C. § 1920.

(1) **Fees of the clerk and marshal.** The activities for which United States marshals may charge fees are specified in 28 U.S.C. § 1921. In addition, it has been held that the fees of a private process server are taxable under 28

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<sup>52</sup>For an unusual case in which a court ordered that certain costs be paid directly by counsel, see *Inecon Agricorporation v. United States*, 5 Cl. Ct. 507 (1984) (neither attorney showed up for scheduled argument).

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U.S.C. § 1920. E.g., Alflex Corp. v. Underwriters Laboratories, Inc., 914 F.2d 175 (9th Cir. 1990), cert. denied, 112 S. Ct. 61.<sup>53</sup>

Storage charges assessed against the United States in connection with property seized by the Marshals Service pursuant to the execution of a warrant in rem are payable from appropriations of the Marshals Service and not the judgment appropriation. 62 Comp. Gen. 177 (1983).

(2) Fees of the court reporter for necessary stenographic transcripts.

(3) Fees and disbursements for printing and witnesses. Allowable fees and expenses of witnesses are specified in 28 U.S.C. § 1821.

Taxation of the fees and expenses of expert witnesses has been a controversial topic. The legislative history of the 1966 amendments to 28 U.S.C. § 2412 indicates that Congress did not intend to include costs in excess of the statutory amounts authorized by 28 U.S.C. § 1821. E.g., Harrisburg Coalition Against Ruining the Environment v. Volpe, 65 F.R.D. 608 (M.D. Pa. 1974). See also 54 Comp. Gen. 22, 23 (1974). Be that as it may, the courts were not uniform. See discussion in Murphy v. International Union of Operating Engineers, 774 F.2d 114, 132–34 (6th Cir. 1985). The Supreme Court resolved the issue in 1987, holding that federal courts must observe the limits of 28 U.S.C. §§ 1821 and 1920 when taxing the expenses of litigants' expert witnesses (as distinguished from court-appointed expert witnesses, discussed below), absent explicit statutory or contractual authorization to the contrary. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). Similarly, the nontestimonial services of experts are not taxable as costs under section 1920, although they may be recoverable if expressly authorized by a fee-shifting statute. West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991). See also 69 Comp. Gen. 160 (1990).

In United States Marshals Service v. Means, 741 F.2d 1053 (8th Cir. 1984), cert. denied, 492 U.S. 910 (1989), the government sought to evict a group of individuals from federal property. The defendants were indigent and could not afford the fees and expenses of the witnesses they wanted to subpoena. The court held that it could call the witnesses, and that it had discretionary power to order the government to advance the fees and

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<sup>53</sup>We must emphasize that our discussion here is intended to provide an overview from the payment perspective, point out the pertinent statutes, and give a sampling of taxable items. There is a plethora of case law on what is or is not allowable, and, as is the case with Alflex (914 F.2d at 178 n.6), the courts are not always in agreement. Accordingly, it should not be assumed that the cases we have selected as illustrations are necessarily followed in all circuits. A useful reference is Laura B. Bartell, Taxation of Costs and Awards of Expenses in Federal Court, 101 F.R.D. 553 (1984).

expenses, later to be taxed as costs. The court emphasized that “this discretionary power is to be exercised only under compelling circumstances.” *Id.* at 1059. (In this type of situation, the agency would presumably pay in the first instance, and could later be reimbursed from the judgment appropriation if the expenses were ultimately taxed against the United States as costs.)

(4) Necessary document reproduction fees. This includes photographic materials if necessarily obtained for use in the case. *Maxwell v. Hapag-Lloyd Aktiengesellschaft*, 862 F.2d 767, 770 (9th Cir. 1988). Also, although section 1920 does not specifically mention depositions, courts have generally construed subsections (2) and (4) as authorizing the taxation of the costs of depositions necessarily obtained for use in the case.<sup>54</sup>

(5) Docket fees under 28 U.S.C. § 1923. These were traditionally viewed as a type of attorney’s fee. E.g., *North Atlantic & Gulf S.S. Co. v. United States*, 209 F.2d 487, 489–90 (2d Cir. 1954). They are now taxable as costs under 28 U.S.C. § 2412(a). 54 Comp. Gen. 22 (1974).

(6) Compensation of interpreters and expenses of special interpretation services (28 U.S.C. §§ 1827, 1828), and compensation of court-appointed experts. The inclusion of interpretation costs and expenses was not intended to authorize taxation of these items against the United States in criminal cases or civil actions brought by the United States; payment in these instances is to be made by the Administrative Office of the United States Courts from judiciary appropriations. 28 U.S.C. §§ 1827(g), 1828(c); S. Rep. No. 569, 95th Cong., 1st Sess. 13–14 (1977). The “experts” referred to are expert witnesses appointed by the court under Rule 706 of the Federal Rules of Evidence. See *National Organization for the Reform of Marijuana Laws v. Mullen*,<sup>55</sup> 828 F.2d 536, 545 n.7 (9th Cir. 1987). These are different from the expert witnesses referred to under subsection (3) above, which are the litigant’s experts.

A major issue in the area of costs has been whether, in taxing costs against the United States under 28 U.S.C. § 2412(a), courts are limited to the items specified in 28 U.S.C. § 1920. Although not all agree, the answer appears to be yes. Many courts traditionally viewed their authority as limited by

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<sup>54</sup>E.g., *West Wind Africa Line, Ltd. v. Corpus Christi Marine Services Co.*, 834 F.2d 1232, 1237–38 (5th Cir. 1988); *Ramos v. Lamm*, 713 F.2d 546, 560 (10th Cir. 1983); *Corsair Asset Management, Inc. v. Moskovitz*, 142 F.R.D. 347, 353 (N.D. Ga. 1992).

<sup>55</sup>Every cause appears to have its champion.

section 1920. E.g., Commissioners of Highways of Annawan v. United States, 653 F.2d 292, 298 (7th Cir. 1981) (cannot tax attorney’s travel expenses or witness fees in excess of amounts authorized by 28 U.S.C. § 1821); Photo Data, Inc. v. Sawyer, 533 F. Supp. 348, 353 (D.D.C. 1982) (disallowed overtime meals, car, local transportation); Norman v. United States, 74 F.R.D. 637 (D. Del. 1977) (disallowed attorney’s air fare, meals, hotel accommodations). See also Harrisburg Coalition Against Ruining the Environment v. Volpe, 65 F.R.D. 608, 612 (M.D. Pa. 1974) (“As a general rule, expenses that are incident to the preparation of a case are not recoverable as costs”).

However, this view as to the relationship between 28 U.S.C. §§ 2412(a) and 1920 was neither absolutely rigid nor universally held. Thus, for example, in Equal Employment Opportunity Commission v. Kenosha Unified School District No. 1, 620 F.2d 1220, 1227–28 (7th Cir. 1980), the court recognized the limitation of section 1920 but allowed costs of procuring statistical analyses and computer expenses based on a broad reading of subsection 1920(4), calling it an “exceptional case.” The case of Engels v. United States, 2 Cl. Ct. 166 (1983), expresses at least what was then the Claims Court’s position that it could go beyond section 1920 but must exercise that discretion sparingly. The court relied on language in Farmer v. Arabian American Oil Co., 379 U.S. 227 (1964). Finally, the court in National Organization for the Reform of Marijuana Laws v. Mullen, 828 F.2d 536, 545–46 (9th Cir. 1987), effectively wrote the phrase “as enumerated in section 1920” out of the statute, at least within that circuit, by holding that the language is not “explicitly exclusive,” and that a court may, under 28 U.S.C. § 2412(a), award against the United States any costs that it may award against a private party.

The Supreme Court’s decision in Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987), should go far to resolve the issue. The Court stated that “§ 1920 now embodies Congress’ considered choice as to the kinds of expenses that a federal court may tax as costs against the losing party” (id. at 440), and:

“If Rule 54(d) grants courts discretion to tax whatever costs may seem appropriate, then § 1920, which enumerates the costs that may be taxed, serves no role whatsoever. We think the better view is that § 1920 defines the term ‘costs’ as used in Rule 54(d).” Id. at 441.

The Court also, at pages 442–43, specifically disapproved the language in the Farmer case which the Claims Court had relied on in Engels. A few years later, the Court said with respect to Crawford, “we held that [28 U.S.C.

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§§ 1821 and 1920] define the full extent of a federal court’s power to shift litigation costs absent express statutory authority to go further,” and that Crawford held section 1920 “to be an express limitation upon the types of costs which, absent other authority, may be shifted by federal courts.” West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83, 86–87 (1991). If this is true with respect to private litigants who do not have to overcome a sovereign immunity hurdle, the case is even stronger that section 1920 is exclusive when costs are being taxed against the United States.

Thus far, it appears that the courts are adhering to the seemingly clear signals of Crawford and Casey. See, e.g., Maxwell v. Hapag-Lloyd Aktiengesellschaft, 862 F.2d 767, 770 (9th Cir. 1988), rejecting an argument that Crawford applies only to expert witness fees (Crawford “strictly limits reimbursable costs to those enumerated in § 1920”); Miller v. Cudahy Co., 858 F.2d 1449, 1461 (10th Cir. 1988); Pershern v. Fiatallis North America, Inc., 834 F.2d 136, 140 (8th Cir. 1987); Corsair Asset Management, Inc. v. Moskovitz, 142 F.R.D. 347, 351 (N.D. Ga. 1992); Bee v. Greaves, 669 F. Supp. 372, 378–79 (D. Utah 1987).

There are, however, ripples on the pond. Even after Crawford and Casey, one lower court has cited National Organization for Reform of Marijuana Laws v. Mullen for the proposition that the enumeration in 28 U.S.C. § 1920 is not exclusive. Director, Office of Thrift Supervision v. Lopez, 141 F.R.D. 165, 167 (S.D. Fla. 1992). And another court has noted Crawford and then stated that it may award costs not specified in the statute, citing the language in Farmer that the Crawford court explicitly disapproved. Commercial Credit Equipment Corp. v. Stamps, 920 F.2d 1361, 1368 n.10 (7th Cir. 1990).

An approach more likely to be followed is reflected in the statement that Crawford “limits judicial discretion with regard to the kind of expenses that may be recovered as costs; it does not, however, prevent courts from interpreting the meaning of the phrases used in § 1920.” West Wind Africa Line, Ltd. v. Corpus Christi Marine Services Co., 834 F.2d 1232, 1238 (5th Cir. 1988). See also Northbrook Excess & Surplus Ins. Co. v. Procter & Gamble Co., 924 F.2d 633, 643 (7th Cir. 1991); Alflex Corp. v. Underwriters Laboratories, Inc., 914 F.2d 175, 177 (9th Cir. 1990), cert. denied, 112 S. Ct. 61. Continuing litigation in the area seems guaranteed.

Also, it must be emphasized that the fact that an item is not specifically enumerated in 28 U.S.C. § 1920 does not necessarily mean that it may not be recoverable on some other basis. As we will see, certain otherwise

nontaxable items may be awarded as expenses under an attorney's fee statute. From GAO's perspective, if an item is taxed against the United States under 28 U.S.C. § 2412(a), the award is final and payment is not otherwise provided for, it will be certified for payment under 31 U.S.C. § 1304 regardless of GAO's views as to the propriety of the award. See 41 Comp. Gen. 583 (1962).

The topic of special masters has also generated a measure of controversy. The Department of Justice has concluded that special masters' expenses are not taxable under 28 U.S.C. § 2412(a).<sup>56</sup> Prior to the Supreme Court's decision in Crawford, several courts had held that the expenses of special masters could be taxed as costs against the United States, notwithstanding their absence from 28 U.S.C. § 1920. National Organization for the Reform of Marijuana Laws v. Mullen, 828 F.2d 536, 545–46 (9th Cir. 1987);<sup>57</sup> Young v. Pierce, 640 F. Supp. 1476 (E.D. Tex. 1986), vacated on other grounds, 822 F.2d 1368 (5th Cir. 1987); National Association of Radiation Survivors v. Turnage, 115 F.R.D. 543, 560–61 (N.D. Cal. 1987). Crawford and Casey would seem to support the Justice Department's position. However, a 1989 case followed Mullen, Pierce, and Turnage, without discussing the effect of Crawford. Trout v. Ball, 705 F. Supp. 705 (D.D.C. 1989). Stay tuned.

Finally, note that 28 U.S.C. § 2412(a) is limited to civil actions. There is no comparable statute authorizing the taxation of costs against the United States in criminal cases. B-163717, April 16, 1968; B-137681, November 19, 1958 (stating the rule without further discussion).

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<sup>56</sup>Memorandum from the Attorney General, Department Policy Regarding Special Masters, March 13, 1986; Departmental Policy on Special Masters, Op. Off. Legal Counsel, October 2, 1984. As noted in the 1984 opinion, special masters' expenses, while not taxable as costs, may nevertheless be recoverable under some fee-shifting statutes. An example is the Freedom of Information Act. Washington Post v. U.S. Department of Defense, 789 F. Supp. 423 (D.D.C. 1992). As further noted in the 1986 Attorney General memorandum and in Special Masters Project: Authority for the United States to Pay for Special Masters, Op. Off. Legal Counsel, November 8, 1984, the United States may agree to the appointment of a special master in certain cases, in which event the expenses are payable from the litigation budget of the litigating agency. See also B-234793.2, June 5, 1989.

<sup>57</sup>Mullen was decided 3 months after Crawford but makes no mention of it, most likely because it was not brought to the court's attention. Whether the Ninth Circuit would continue to follow Mullen may be questioned, especially in light of that Circuit's subsequent adherence to Crawford in Maxwell v. Hapag-Lloyd Aktiengesellschaft, cited in the text.

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## 2. Attorney's Fees

"To the old adage that death and taxes share a certain inevitable character, federal judges may be excused for adding attorneys' fees cases." Kennedy v. Whitehurst, 690 F.2d 951, 952 (D.C. Cir. 1982).<sup>58</sup>

### a. Introduction

In England, it is customary for the loser to pay the winner's attorney's fees. This is called the "English Rule." The United States follows the so-called "American Rule" that the prevailing litigant or claimant is ordinarily not entitled to recover attorney's fees from the loser absent statutory authorization. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975); Key Tronic Corp. v. United States, 114 S. Ct. 1960 (1994). Combining this with the explicit exclusion of attorney's fees from recoverable costs in 28 U.S.C. § 2412(a) and the concept of sovereign immunity, the starting point is the established principle that attorney's fees may not be awarded against the United States in the absence of express statutory authority. Statutory authority in this context means federal (not state) statutory authority. See, e.g., Knight v. United States, 982 F.2d 1573 (Fed. Cir. 1993).

These days, fee-shifting in litigation involving the United States seems to have become more the rule than the exception.<sup>59</sup> There are well over 100 federal fee-shifting statutes on the books. A comprehensive (although incomplete) listing may be found in an appendix to the dissenting opinion of Justice Brennan in Marek v. Chesny, 473 U.S. 1, 43–51 (1985). Many of these statutes apply to the United States by their own specific terms; the majority do not. The latter group is now generally applicable to the United States by virtue of the Equal Access to Justice Act, discussed later in this section.

Questions as to when fees are or are not allowable under a particular statute or how they should be calculated are beyond the scope of this work. In an often-quoted passage, the Supreme Court lamented that a

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<sup>58</sup>If you don't like this one, we could have used the quote suggesting an analogy between attorney's fees and paying tribute to Genghis Khan. See In re Four Star Terminals, Inc., 42 B.R. 419, 428 n.2 (Bankr. D. Alaska 1984).

<sup>59</sup>Everyone, so it seems, is telling lawyer jokes these days, so we might as well jump in. The following quotation is taken from Judge Wilkey's dissenting opinion in Copeland v. Marshall, 641 F.2d 880, 929–30 n.53 (D.C. Cir. 1980):

"An immediately deceased lawyer arrived at the Pearly Gates to seek admittance from St. Peter. The Keeper of the Keys was surprisingly warm in his welcome: 'We are so glad to see you, Mr. \_\_\_\_\_. We are particularly happy to have you here, not only because we get so few lawyers up here, but because you lived to the wonderful age of 165.' Mr. \_\_\_\_\_ was a bit doubtful and hesitant. 'Now, St. Peter, if there's one place I don't want to get into under false pretenses, it's Heaven. I really died at age 78.' St. Peter looked perplexed, frowned, and consulted the scroll in his hand. 'Ah, I see where we made our mistake as to your age. We just added up your time sheets!'"

“request for attorney’s fees should not result in a second major litigation.” Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). Notwithstanding this admonition, the volume of case law has become staggering. As we said in our section on costs, our objective here is a limited one—to present an overview from the payment perspective.

In a few instances, attorney’s fees are paid from the amount recovered in the underlying suit, and are allowable up to a specified maximum percentage of the recovery. Examples are the Federal Tort Claims Act (28 U.S.C. § 2678) and the Social Security Act (42 U.S.C. § 406). Statutory restrictions of this type have been upheld, even against a pre-existing contingent fee agreement. Calhoun v. Massie, 253 U.S. 170 (1920); Capital Trust Co. v. Calhoun, 250 U.S. 208 (1919); Paul v. United States, 687 F.2d 364 (Ct. Cl. 1982), cert. denied, 461 U.S. 927. In the far more common situation, however, the statute authorizes the court to award reasonable attorney’s fees to the prevailing party separate from and in addition to any monetary recovery in the underlying judgment.

As with costs, an award of attorney’s fees may be included in a judgment on the merits or (more commonly) may be made in a separate judgment or order. Like other money judgments against the United States, judgments awarding attorney’s fees are generally payable from the permanent judgment appropriation as long as the award is final and payment is not otherwise provided for. If the fee award is separate from the judgment on the merits, then the order awarding the fees must itself be final. B-190940, September 21, 1978. As discussed earlier under the Finality heading, interim awards of attorney’s fees have received slightly different treatment in the courts in a number of cases.

Fee-shifting statutes are usually designed to serve several purposes. One is to facilitate the enforcement of the public policy reflected in the underlying legislation. A law making discrimination illegal, for example, would be largely empty if the victims are unable to invoke the law because they cannot afford to go to court. Another frequent purpose is deterrence. E.g., Copeland v. Marshall, 641 F.2d 880, 895 (D.C. Cir. 1980) (Title VII of the Civil Rights Act). The existence of deterrence as an objective points up a major flaw, at least from the broader social perspective, in the unreimbursed use of the permanent judgment appropriation. We quote from Judge Wilkey’s dissenting opinion in Copeland v. Marshall:

“Attorney’s fees are meant to serve some purpose of deterring discrimination. They doubtless do in the private sector. [Footnote omitted.] But when attorney’s fees come

straight out of the United States Treasury, as in the present case, they exert no deterrent effect whatsoever against the persons responsible for the discrimination. In the private sector there is a justifiable punitive element. Attorney's fees impact on the profit picture of the corporation; the same executive management which is responsible for tolerating or encouraging discrimination are the same executives who are responsible for the profit of the corporation, so they are penalized in the pocketbook. No such deterrence applies to the Government, *i.e.*, the Labor Department budget was never touched, will never be touched, by the award . . . in this case. Both the back pay and the attorney's fee come out of the general taxpayer contributed funds of the U.S. Treasury. By their strict analogy to the private sector, the majority has validated deterrent or punitive action against the U.S. taxpayer." *Id.* at 912.

In some instances, such as subsection (d) of the Equal Access to Justice Act, Congress has recognized this by requiring payment from agency funds. Of course, agency funds also come from the taxpayer's pocket, so either way the taxpayer foots the bill. To the extent an agency can simply request and receive additional funds to budget for fee awards, deterrence may be frustrated even under a system of agency payment. Real deterrence requires not only agency payment but a requirement that the agency absorb the fee awards in its existing budget. But even here, there is the risk of the agency's funding the awards not by trimming fat or waste but by cutting back on other needed programs, perhaps even programs designed to benefit those the fee awards were intended to help. In sum, while it may be true that use of the judgment appropriation defeats deterrence, a simple requirement to use agency funds, without a consideration of complex budgetary and social issues, does not guarantee it either.

**b. Statutes Applicable by Their Terms to the United States**

Prior to the enactment of the Equal Access to Justice Act in 1980, Congress had dealt with fee-shifting on a piecemeal basis. Out of the 100-plus fee-shifting statutes on the books, approximately 30 expressly make the United States liable for attorney's fees in specific contexts. They mostly predate the Equal Access to Justice Act and operate independent of it. Prominent examples are 42 U.S.C. § 2000e-5(k) (Title VII of the Civil Rights Act of 1964) and 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act). A number of others were enacted in the 1970s in connection with various "citizen suit" provisions.<sup>60</sup>

As with judgments generally, judicial fee awards under statutes in this category are payable from the judgment appropriation if final and not

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<sup>60</sup>*E.g.*, 42 U.S.C. § 6305(d) (Energy Policy and Conservation Act); 42 U.S.C. § 4911(d) (Noise Control Act of 1972); 33 U.S.C. § 1365(d) (Water Pollution Control Act).

otherwise provided for. 63 Comp. Gen. 260, 261 (1984). Some illustrative cases in which fee awards were found payable under 31 U.S.C. § 1304 are:

- Fees awarded against the Equal Employment Opportunity Commission in enforcement actions brought by the EEOC under Title VII of the Civil Rights Act. B-167015, May 31, 1979. Since the statute authorizes awards to a “prevailing party,” it made no difference that the EEOC was the losing plaintiff rather than the losing defendant.
- Fees awarded against the government under the Freedom of Information Act. B-173761, April 6, 1976 (internal memorandum).
- Fees awarded to the subject of an independent counsel investigation under 28 U.S.C. § 593 (Ethics in Government Act). B-218727.2-O.M., June 9, 1986.
- Fees awarded against the Environmental Protection Agency in citizen suits under the Federal Water Pollution Control Act. B-193284, May 3, 1979. This question arose because section 517 of the Act authorizes appropriations to EPA “to carry out this Act” but expressly excludes several sections. It does not, however, exclude section 505 which authorizes the fee awards. By itself, a blanket authorization of appropriations applicable to an entire program statute which includes a fee-shifting provision would make no difference. However, the specific exclusions suggested the possibility that, under the maxim “expressio unius est exclusio alterius,”<sup>61</sup> Congress may have intended that the awards be paid from EPA’s appropriations. The decision reviewed pertinent legislation and legislative history, and concluded that the authorization provision was not intended to affect the source of funds for payment of the awards.

A somewhat unusual fee provision in this group is 5 U.S.C. § 552b(i), the Government in the Sunshine Act. It states that “[i]n the case of assessment of costs against an agency, the costs may be assessed by the court against the United States.” Under this language, the payment source would appear to depend on whether the award is made against the agency (agency funds) or the United States (judgment appropriation).<sup>62</sup>

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<sup>61</sup>Literally, “the expression of the one is the exclusion of the other.” Where a provision in a statute specifies A, B, and D, it is normally presumed that Congress intended not to include C, absent indications to the contrary.

<sup>62</sup>If there were no difference in payment source, it would make absolutely no difference whether the award was against the agency or the United States, and the legislative history makes clear that the quoted language was intended to give the court discretion. See, e.g., H.R. Rep. No. 880, 94th Cong., 2d Sess., pt. I at 18, reprinted at 1976 U.S. Code Cong. & Admin. News 2183, 2199.

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c. Equal Access to Justice Act

In 1980, Congress enacted a major piece of fee-shifting legislation—the Equal Access to Justice Act, affectionately known as EAJA.<sup>63</sup> EAJA did the following things:

- Created a new 5 U.S.C. § 504 to authorize fee-shifting in certain administrative situations.
- Amended 28 U.S.C. § 2412. The pre-existing provisions for costs were basically re-enacted as subsections (a) and (c)(1). The new judicial fee-shifting provisions became subsections (b), (c)(2), and (d).

In the context of judicial awards, EAJA enacted two significant fee-shifting provisions, subsections (b) and (d). Some confusion in usage has arisen from inconsistent use of the term “EAJA” to refer to all of 28 U.S.C. § 2412, subsections (b) and (d), subsection (d) alone, or any of the foregoing together with 5 U.S.C. § 504. Before jumping to conclusions, the reader should always carefully examine the specific context.

(1) Awards under 28 U.S.C. § 2412(b)

One of EAJA’s major fee-shifting provisions is subsection (b). It authorizes fee awards to prevailing parties against the United States in civil actions “to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award,” unless expressly prohibited by statute. 28 U.S.C. § 2412(b). As the quoted language clearly implies, subsection (b) covers two general situations.

First, we noted earlier that many fee-shifting statutes do not by their terms apply to the United States. Subsection (b) makes the United States liable under these statutes. Thus, if a fee-shifting statute specifically includes the United States or federal agencies, it applies of its own force; if it does not specifically include the United States or federal agencies, it nevertheless applies by virtue of EAJA subsection (b). An example of a statute now

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<sup>63</sup>The original EAJA was Pub. L. No. 96-481, Title II, 94 Stat. 2325 (1980). Portions of the original law were experimental, with a 3-year “sunset” date. Those portions were amended and made permanent by Pub. L. No. 99-80, 99 Stat. 183 (1985).

applicable to the United States under subsection (b) is the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.<sup>64</sup>

In addition, subsection (b) makes the United States liable for fee awards under Rule 37 of the Federal Rules of Civil Procedure (certain discovery violations). S. Rep. No. 253, 96th Cong., 1st Sess. 4 ("Fees may also be recovered against the United States under rule 37"), 19 (1979); M.A. Mortenson Co. v. United States, 996 F.2d 1177 ((Fed. Cir. 1993); National Lawyers Guild v. Attorney General, 94 F.R.D. 600, 615 n.32 (S.D.N.Y. 1982); B-217990.2-O.M., November 29, 1984; 6 Op. Off. Legal Counsel 525 (1982). The same result has been applied to awards under Rule 11. Adamson v. Bowen, 855 F.2d 668 (10th Cir. 1988).<sup>65</sup>

Second, although there had been exceptions, the prevailing view had been that fees could not be awarded against the United States under the various common-law (i.e., judicially-created) exceptions to the American Rule (bad faith, common benefit, common fund). See S. Rep. No. 253 at 3-4; H.R. Rep. No. 1418, 96th Cong., 2d Sess. 8-9, 17 (1980). Subsection (b) makes the United States liable under these common law exceptions as well.

Payment of subsection (b) awards is fairly straightforward. They are paid from the permanent judgment appropriation unless otherwise provided for in a particular case, except that an award based on a finding of bad faith must be paid from agency funds. 28 U.S.C. § 2412(c)(2); 63 Comp. Gen. 260 (1984); B-218504, May 10, 1985; 6 Op. Off. Legal Counsel 525 (1982).

An interesting pre-EAJA case applying the "common fund" theory is Red School House, Inc. v. Office of Economic Opportunity, 386 F. Supp. 1177 (D. Minn. 1974). The OEO had suspended funding on a grant the court found to have been previously approved. The grant funds had already been transferred to a commercial bank. The court found that OEO had acted

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<sup>64</sup>This seems to have given birth to a whole new field of litigation. For example, the United States may be liable for fees if it violates one of the provisions of law cited in 42 U.S.C. § 1988, but this does not extend to suits analogous to those brought against state officials under those provisions. E.g., Premachandra v. Mitts, 753 F.2d 635 (8th Cir. 1985); Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board, 735 F.2d 895 (5th Cir. 1984); Lauritzen v. Lehman, 736 F.2d 550 (9th Cir. 1984). Also, a suit against a federal official in his or her individual capacity cannot generate a fee award against the United States under section 1988. Kentucky v. Graham, 473 U.S. 159 (1985); Bergman v. United States, 648 F. Supp. 351 (W.D. Mich. 1986).

<sup>65</sup>Rule 11 sanctions may be assessed against the party or the attorney personally. The inclusion of Rule 11 sanctions under EAJA subsection (b) has no relevance in the latter situation. In assessing sanctions against the attorney, several courts have taken an extra step and expressly prohibited reimbursement or indemnification from any source. E.g., Derechin v. State University of New York, 963 F.2d 513, 519 (2d Cir. 1992) (citing several other cases).

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improperly and in bad faith. The court then awarded attorney's fees against OEO based in part on OEO regulations and, drawing an analogy to the "common fund" theory, held that the fees were payable from the funds allocated to the grant and on deposit in the bank. "Common fund" fee awards against the United States or a federal agency are uncommon. Limited experience suggests that payment needs to be reviewed on a case-by-case basis.

(2) Awards under 28 U.S.C. § 2412(d)

EAJA's second major fee-shifting provision in the litigation context is subsection (d). Generally speaking, it applies to any civil action brought by or against the United States except tort cases or cases subject to some other fee-shifting statute. It is thus sort of a "catch-all."

A prevailing party (other than the United States) who meets specified financial eligibility criteria may apply to the court for a fee award under subsection (d). Fees will be awarded unless the court finds that "the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). The "substantially justified" determination includes the underlying administrative action as well as the government's position in the lawsuit. Id. § 2412(d)(1)(B). Once the party makes the fee application, the burden shifts to the United States to establish that its position was substantially justified. E.g., Rawlins v. United States, 8 Cl. Ct. 355 (1985). Fees are limited to \$75 per hour, but courts may award higher amounts based on cost-of-living increases or other special factors. 28 U.S.C. § 2412(d)(2)(A). An award may be reduced or denied if the prevailing party has "unduly and unreasonably protracted" the case. Id. § 2412(d)(1)(C).

A fee award under EAJA is made to the party, not to the attorney. FDL Technologies, Inc. v. United States, 967 F.2d 1578 (Fed. Cir. 1992); Phillips v. General Services Administration, 924 F.2d 1577 (Fed. Cir. 1991). See also United States v. McPeck, 910 F.2d 509, 513 (8th Cir. 1990).

The meaning of "substantially justified" has been much litigated. The Supreme Court spoke to the issue in Pierce v. Underwood, 487 U.S. 552 (1988), defining the term to mean a position which is justified to a degree that could satisfy a reasonable person, in other words, a position having a reasonable basis in both law and fact. The same case addressed the amount of the fee and identified a number of factors that may not be used as "special factors" to justify exceeding the cap: novelty and difficulty of

issues; undesirability of the case; work and ability of counsel (except for counsel with “distinctive knowledge or specialized skill” relevant to the case); results obtained; customary fees and awards in other cases; contingent nature of the fee. *Id.* at 571–74.<sup>66</sup>

The original EAJA encompassed the Court of Claims as well as the district courts. When the Court of Claims was split in 1982 into the Claims Court and Court of Appeals for the Federal Circuit,<sup>67</sup> the applicability of EAJA to the new Claims Court came into question. The courts upheld the jurisdiction of the Claims Court, now the Court of Federal Claims, to make EAJA awards. *Essex Electro Engineers, Inc. v. United States*, 757 F.2d 247 (Fed. Cir. 1985); *Laboratory Supply Corp. v. United States*, 5 Cl. Ct. 28 (1984). The 1985 EAJA amendments codified this result (28 U.S.C. § 2412(d)(2)(F)), and added boards of contract appeals (*id.* § 2412(d)(2)(E)). Legislation in 1992 added the Court of Veterans Appeals.<sup>68</sup>

A perusal of the case annotations in the United States Code Annotated or United States Code Service will indicate the types of actions to which subsection (d) has been applied. Two may be mentioned briefly:

- Subsection (d) awards may be made in Social Security Act cases, but an attorney receiving fees under both EAJA and 42 U.S.C. § 406 must refund the smaller fee to the claimant. Pub. L. No. 99-80, § 3, 99 Stat. 186 (1985).
- Subsection (d) applies to condemnation actions, but only if the amount of the final judgment (settlements are expressly excluded), exclusive of interest, is closer to the property owner’s valuation testimony than it is to the government’s. 28 U.S.C. § 2412(d)(2)(H). (A different approach was needed to determine “prevailing party” in condemnation cases because, with rare exceptions, the government always “wins” in the sense that it gets the property.)

Prior to the 1985 amendments, the payment provisions for subsection (d) were ambiguous and confusing, indicating that awards should generally be paid from agency funds, but that the judgment appropriation might be available as a “back-up” in certain unspecified situations. By virtue of

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<sup>66</sup>A later case confirmed that a “reasonable attorney’s fee” may not include a contingency enhancement. *City of Burlington v. Dague*, 112 S. Ct. 2638 (1992). While *Dague* dealt with the fee-shifting provisions of the Solid Waste Disposal Act and Clean Water Act, the Court made clear that its holding applies to all similar statutes. *Id.* at 2641.

<sup>67</sup>Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

<sup>68</sup>Federal Courts Administration Act of 1992, § 506, 106 Stat. 4506, 4513.

other language in the original EAJA, however, GAO and the Justice Department had concluded that the judgment appropriation could not be used for subsection (d) awards without further legislative action.<sup>69</sup>

The 1985 amendments ended the uncertainty by providing that subsection (d) awards “shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.” 28 U.S.C. § 2412(d)(4). The Senate Judiciary Committee explained that this requires subsection (d) awards to be “paid from the offending agency’s budget and not from the judgment fund.” S. Rep. No. 586, 98th Cong., 2d Sess. 17 (1984).

Subsection (d) awards are thus payable from agency operating appropriations; specific, line-item, or “earmarked” appropriations are not required. *Electrical District No. 1 v. Federal Energy Regulatory Commission*, 813 F.2d 1246 (D.C. Cir. 1987); 63 Comp. Gen. 260, 263 (1984); 62 Comp. Gen. 692, 697 (1983); B-231771, December 7, 1988; B-212585, March 29, 1984; B-40342.1, May 15, 1981; 6 Op. Off. Legal Counsel 204, 209–12 (1982).

The *Electrical District* case considered the effect of an appropriation act provision that “[n]one of the funds in this Act shall be used to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings funded in this Act.” 813 F.2d at 1247 n.3. While the provision effectively precluded EAJA awards attributable to participation in agency administrative proceedings funded under that appropriation act, the court held that it did not bar a subsection (d) award for fees attributable to participation in judicial proceedings, which of course were not funded under the agency’s appropriation act. Congress rejoined by amending the appropriation restriction for the following fiscal year to state that it “bars payment to a party intervening in an administrative proceeding for expenses incurred in appealing an administrative decision to the courts.” See 67 Comp. Gen. 553, 556 (1988).

Fees reasonably incurred in pursuit of an EAJA application may also be compensable. *Brewer v. American Battle Monuments Commission*, 814 F.2d 1564, 1570 (Fed. Cir. 1987); *Rawlins v. United States*, 8 Cl. Ct. 355, 359 (1985).

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<sup>69</sup>63 Comp. Gen. 260 (1984); 62 Comp. Gen. 692 (1983); B-40342.2, October 21, 1981; 7 Op. Off. Legal Counsel 230 (1983) (preliminary print); 6 Op. Off. Legal Counsel 204 (1982).

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d. Tax Cases

Fee-shifting in tax cases has evolved through several permutations. Prior to 1976, there was no general authority to award attorney's fees against the United States in civil tax cases. In that year, Congress amended the Civil Rights Attorney's Fees Awards Act to make it applicable to the United States to the limited extent of actions to enforce, or charging violations of, the Internal Revenue Code. 42 U.S.C. § 1988 (1976 ed.). These awards were viewed as payable from the judgment appropriation. B-158810, February 22, 1977.

When Congress enacted the Equal Access to Justice Act in 1980, it was intended that subsection (d) pick up the tax cases. To that end, the original EAJA repealed that portion of 42 U.S.C. § 1988 which dealt with fee awards against the United States in tax cases. Pub. L. No. 96-481, § 205(c), 94 Stat. 2330. However, while EAJA adequately covered awards by district courts or the Court of Federal Claims, it did not apply to the Tax Court. Bowen v. Commissioner, 706 F.2d 1087 (11th Cir. 1983).

In 1982, as part of the Tax Equity and Fiscal Responsibility Act of 1982, Congress enacted a new provision to deal with fee awards in tax cases. Pub. L. No. 97-248, § 292, 96 Stat. 572 (1982). This new provision became section 7430 of the Internal Revenue Code, 26 U.S.C. § 7430. Section 7430 generally followed the EAJA subsection (d) approach, but did not include a specific payment provision. The 1982 legislation also amended EAJA to make it inapplicable to cases covered by the new IRC § 7430. 28 U.S.C. § 2412(e). Section 7430 is exclusive with respect to matters within its coverage. Smith v. Brady, 972 F.2d 1095, 1099 (9th Cir. 1992).

In 63 Comp. Gen. 470 (1984), the Comptroller General reviewed IRC § 7430 and concluded that payment of the awards was not otherwise provided for. Thus, awards made by the district courts or the Court of Federal Claims were payable from the judgment appropriation. However, there was nothing in 31 U.S.C. § 1304 that could reasonably be construed as covering the Tax Court. The decision therefore concluded that Tax Court awards under section 7430 could not be paid from any existing source of funds. GAO recommended a legislative solution. In 1986, Congress amended section 7430 to make Tax Court awards payable "in the same manner as such an award by a district court." Pub. L. No. 99-514, § 1551(f), 100 Stat. 2753 (1986), codified at 26 U.S.C. § 7430(d)(2). Thus, all awards under IRC § 7430 are now payable from the judgment appropriation.

e. Expenses

As noted above, the fact that a particular item may not be taxable as a cost under 28 U.S.C. § 2412(a) does not necessarily mean that it is not

recoverable under some other authority. Specifically, the typical attorney's fee statute permits the recovery of certain "expenses" in addition to the fee itself. Expenses authorized as part of a fee award are in addition to costs taxable under 28 U.S.C. § 2412(a).

It has been said that "costs and expenses are not synonymous but are words of art." Bennett v. Department of the Navy, 699 F.2d 1140, 1144 (Fed. Cir. 1983). The term "expenses" for purposes of a fee-shifting statute usually means "those reasonable and necessary out-of-pocket expenses of providing a lawyer's services that are not covered by the hourly rate [and] that are routinely paid by counsel and billed to the client for services rendered." Id. at 1145.<sup>70</sup> There is no uniform test for determining when expenses will qualify as part of an attorney's fee. Id. at 1143. Rather, exactly what items may be recovered will depend in large measure on the language of the particular fee statute, its legislative history, and the case law that has developed under it and similarly-worded statutes.

The characterization of a given item as a cost or an expense may determine whether it is recoverable at all. Depending on the particular case, a prevailing party may be able to recover (a) costs plus fees and expenses, (b) costs but not fees and expenses, or (c) fees and expenses but not costs. For example, in the Bennett case cited above, the court upheld a decision by the Merit Systems Protection Board that it could, as part of a fee award under 5 U.S.C. § 7701(g), include expenses such as travel of counsel, postage, and telephone tolls, but not deposition costs or witness fees. Note that each item is either a cost or an expense, but not both. The items allowed as expenses would not be taxable as costs under 28 U.S.C. § 2412(a). The items disallowed would be taxable costs, except that the MSPB, as an administrative body, does not have the authority to tax costs under section 2412(a). Thus, the deposition costs and witness fees could not be awarded.

The case of Mennor v. Fort Hood National Bank, 829 F.2d 553 (5th Cir. 1987), illustrates the relationship between costs and expenses under Title VII of the Civil Rights Act. Although the case involves private litigants, it is nevertheless relevant because Title VII's fee provision (42 U.S.C. § 2000e-5(k)) makes the United States liable the same as a private party. The plaintiff sought costs of general copying and taking depositions. These

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<sup>70</sup>Similar formulations are "incidental expenses of attorneys that are routine to all litigation and routinely billed to private clients," Save Our Cumberland Mountains, Inc. v. Hodel, 826 F.2d 43, 54 (D.C. Cir. 1987), vacated in part on other grounds, 857 F.2d 1516 (D.C. Cir. 1988); "reasonable out-of-pocket expenditures of the attorney beyond normal overhead," Allen v. Freeman, 122 F.R.D. 589, 591 (S.D. Fla. 1988).

were taxable as costs under 28 U.S.C. § 1920. The plaintiff also sought recovery of costs of attorney postage, attorney long-distance telephone use, and attorney mileage (on the attorney's car, not on the attorney). These items, said the court, were not taxable as costs under 28 U.S.C. § 1920, but could be awarded as part of the attorney's fees under the "supplemental power" of the Title VII fee provision.

Similarly, the fee provision of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(d), has been held to permit an award of otherwise nontaxable items. *Save Our Cumberland Mountains, Inc. v. Hodel*, 826 F.2d 43, 53–54 (D.C. Cir. 1987), vacated in part on other grounds, 857 F.2d 1516 (D.C. Cir. 1988).

The fees and expenses of experts have produced a minor flood of litigation. The Supreme Court has held that a fee-shifting statute does not include expert fees unless specified. *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991). The case includes an extensive listing of statutes containing the requisite authority. *Id.* at 88–89 and n.4. One of the Court's examples was EAJA subsection (d), which authorizes "fees and other expenses" and defines expenses as including the reasonable expenses of expert witnesses and of "any study, analysis, engineering report, test or project" found necessary for the preparation of the case. 28 U.S.C. § 2412(d)(2)(A).

The court considered this authority in *City of Brunswick v. United States*, 661 F. Supp. 1431 (S.D. Ga. 1987), rev'd on other grounds, 849 F.2d 501 (11th Cir. 1988). The court held that the listing of permissible expenses in subsection (d) is illustrative rather than exclusive, and, consistent with *Casey*, that expert witness expenses under that subsection are not limited by the statutory amounts specified in 28 U.S.C. § 1821, nor is an award limited to the fees of experts who actually testified as witnesses. 661 F. Supp. at 1444–45. Thus, while the fees and expenses of expert witnesses are limited by 28 U.S.C. § 1821 when they are being taxed as costs under 28 U.S.C. §§ 2412(a) and 1920, they are not so limited when they are allowable as expenses under a fee-shifting statute. In agreement that the listing is not exclusive is, e.g., *Oliveira v. United States*, 827 F.2d 735, 744 (Fed. Cir. 1987).

In 1991, Congress amended 42 U.S.C. § 1988 (the statute involved in *Casey*) and the fee-shifting provision of Title VII of the Civil Rights Act of 1964 to expressly add expert fees and thus conform to the requirements of *Casey*. Civil Rights Act of 1991, Pub. L. No. 102-166, § 113, 105 Stat. 1071, 1079

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(1991). Nevertheless, the Casey holding continues to apply to any fee-shifting statutes which do not expressly include expert fees. E.g., Gray v. Phillips Petroleum Co., 971 F.2d 591 (10th Cir. 1992) (Age Discrimination in Employment Act).

An item starting to appear with increased frequency is the expenses of computerized legal research. While not taxable as a cost, computerized legal research has been viewed as an allowable expense under fee-shifting statutes. E.g., Hirschey v. FERC, 777 F.2d 1, 6 (D.C. Cir. 1985) (EAJA subsection (d)); Allen v. Freeman, 122 F.R.D. 589, 592 (S.D. Fla. 1988) (42 U.S.C. § 1988); Keyava Construction Co. v. United States, 15 Cl. Ct. 135, 140–41 (1988) (EAJA subsection (d)). Contra Corsair Asset Management, Inc. v. Moskovitz, 142 F.R.D. 347, 353 (N.D. Ga. 1992) (court regarded research as an element of overhead, noting that lawyers do not customarily bill separately for use of the firm library).

To sum up, costs and expenses are two different things. A prevailing party may be able to recover either or both, depending on the particular statutory authorities involved. Allowable expenses may also vary under different fee statutes. A useful starting point for further exploration is the previously cited article by Laura B. Bartell, 101 F.R.D. at 589–96.

When expenses are allowed together with attorney’s fees under a fee statute, the expenses are part of the same award and will be payable from the same source as the fees.

From the payment perspective, the costs-expenses distinction will be relevant in some cases and not relevant in others. In the typical Title VII case against a federal agency, for example, the distinction is largely immaterial because both are paid from the judgment appropriation. In an EAJA subsection (d) case, however, the distinction becomes important because the costs under 28 U.S.C. § 2412(a) will be payable from the judgment appropriation whereas the fees and expenses are payable from agency funds. See, e.g., B-231771, December 7, 1988.

#### f. Summary

A prevailing party in a civil action against the United States, a federal agency, or a federal official in his or her official capacity, may be able to recover attorney’s fees under one of three mutually exclusive approaches.

First, if there is a fee-shifting statute applicable to the case which specifically includes the United States, such as Title VII of the Civil Rights Act or the Freedom of Information Act, then that statute and the standards

under it will govern. Cases in this category are wholly independent of the Equal Access to Justice Act.

Second, if there is a fee-shifting statute applicable to the case which does not specifically include the United States, or if there is an applicable common-law basis for a fee award, fees must be sought under EAJA subsection (b). The standards under subsection (b) and the particular statute or common-law exception will govern. The “substantially justified” standard of subsection (d) has no relevance to this category.

Third, if neither of the above is the case, then fees must be sought under EAJA subsection (d), alleging that the government’s position was not substantially justified.

Unless otherwise provided for in a particular case, costs taxed under 28 U.S.C. § 2412(a), and fees and expenses awarded under a statute specifically applicable to the United States or under EAJA subsection (b), except for bad faith awards, are payable from the permanent judgment appropriation. Fees and expenses under EAJA subsection (d), and bad faith awards under subsection (b), are payable from agency operating appropriations.

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## G. Interest

The computation and addition of interest, where proper, is part of GAO’s judgment certification process. Entitlement to interest has generated a degree of controversy unapproached by any other aspect of the payment of judgments. The law in this area is complex and often highly technical, as the discussion in this section will reflect.

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### 1. The No-Interest Rule

The starting point is the rule, derived essentially from the concept of sovereign immunity, that interest is not recoverable against the United States unless expressly provided by statute or contract. The Supreme Court has recognized and applied this rule on numerous occasions. E.g., Library of Congress v. Shaw, 478 U.S. 310 (1986);<sup>71</sup> United States v. Alcea Band of Tillamooks, 341 U.S. 48 (1951); United States v. N.Y. Rayon Importing Co., 329 U.S. 654 (1947); United States ex rel. Angarica v. Bayard, 127 U.S. 251 (1888).

The right to recover interest from the United States requires a waiver of sovereign immunity “separate from a general waiver of immunity to suit.”

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<sup>71</sup>The cases cited in the text are cited solely to document the no-interest rule. The right to recover interest in the specific context, as in Shaw for example, may have subsequently changed.

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Shaw, 478 U.S. at 314; Thompson v. Kennickell, 797 F.2d 1015, 1017 (D.C. Cir. 1986), cert. denied, 480 U.S. 905; Jetco, Inc. v. United States, 11 Cl. Ct. 837, 850 (1987). This does not mean that the interest waiver must be in a separate statute; what it means is that a waiver of sovereign immunity with respect to interest must itself be explicit, and will not be inferred from a general waiver of immunity to suit.

Interest may be of two types: postjudgment (interest on the judgment) or prejudgment (interest on the claim upon which the judgment was founded). As the cases cited throughout this discussion make clear, the no-interest rule applies equally to both types. Where prejudgment interest is authorized, it may, depending on the terms of the relevant statute, run to the date of payment or the date of the judgment. In the latter case, the prejudgment interest becomes part of the judgment amount to which any authorized postjudgment interest is applied. See, e.g., B-111945, November 13, 1952.

Courts are not authorized to award interest against the United States on the basis of equity or because payment has been delayed, even if the delay can be termed unreasonable. United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 660 (1947); Tillson v. United States, 100 U.S. 43, 47 (1879); Lichtman v. Office of Personnel Management, 835 F.2d 1427 (Fed. Cir. 1988); Gray v. Dukedom Bank, 216 F.2d 108, 110 (6th Cir. 1954); Muenich v. United States, 410 F. Supp. 944, 947 (N.D. Ind. 1976); United States v. James, 301 F. Supp. 107, 132 (W.D. Tex. 1969); Economy Plumbing & Heating Co. v. United States, 470 F.2d 585, 594 (Ct. Cl. 1972); Hoffman Construction Co. v. United States, 7 Cl. Ct. 518, 527–28 (1985); B-214289, October 23, 1985 (non-decision letter).

Interest is often found in masquerade but the courts will unmask the intruder. In United States v. Mescalero Apache Tribe, 518 F.2d 1309 (Ct. Cl. 1975), cert. denied, 425 U.S. 911 (1976), the Court of Claims stated:

“[The] no-interest rule applies to any incremental damages sought to be assessed against the United States, whether it be designated interest, as such, or is designated by some other terminology which has the same effect . . . . [Emphasis in original.]

“[T]he character or nature of interest cannot be changed by calling it damages, loss, earned increment, just compensation, discount, offset, or penalty, or any other term, because it is still interest and the no-interest rule applies to it.” Id. at 1321, 1322 (internal quotation marks omitted).

In Library of Congress v. Shaw, noted above, the award was not called “interest,” but was designated as an increase in a fee award to compensate for delay in payment. In invalidating the award, the Supreme Court brushed aside the designation and looked at the substance. The Shaw Court cited Mescalero Apache Tribe with approval, adding that “the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution.” 478 U.S. at 321. Similarly unauthorized is interest disguised as “liquidated damages” under the Fair Labor Standards Act. Doyle v. United States, 931 F.2d 1546 (Fed. Cir. 1991). See also United States ex rel. Angarica v. Bayard, 127 U.S. 251, 259–60 (1888); Ramsey v. United States, 101 F. Supp. 353, 356 (Ct. Cl. 1951), cert. denied, 343 U.S. 977; Moran Brothers Co. v. United States, 61 Ct. Cl. 73, 106 (1925); B-226231, October 23, 1987.

For purposes of the no-interest rule, it makes no difference whether a claimant was obliged to borrow money and pay interest on it, or merely lost the use of the money but was not forced to borrow. Komatsu Manufacturing Co. v. United States, 131 F. Supp. 949 (Ct. Cl. 1955) and cases cited.

There are two nonstatutory exceptions to the no-interest rule, noted in the Shaw decision, 478 U.S. at 317 n.5. The first is a taking of property or a property interest which entitles a claimant to just compensation under the Fifth Amendment of the Constitution. The second is “where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise.” *Id.* Each of these situations will be discussed separately later in this section.

If a judgment is silent as to interest, or if it provides for interest in general terms such as “interest as authorized by law” or “interest as provided by law,” the settlement process will include the determination of whether interest is authorized. In cases where interest is payable, the computation of that interest (i.e., the determination of the proper beginning and ending dates and the application of the proper rate of interest) is part of the settlement process. Absent some statutory provision to the contrary, GAO will use the formula traditionally employed by the accounting officers and described in Chapter 12 under the Interest heading. That formula applies to judgments as well as administrative claims. See B-60952, July 2, 1953.

As we will see, the no-interest rule has lost many of its teeth by virtue of the nonstatutory exceptions and a large number of statutory interest provisions. However, in situations not covered by either a statutory

authorization or one of the nonstatutory exceptions, it continues to apply with full force. A few examples are Doyle v. United States, 931 F.2d 1546 (Fed. Cir. 1991) (Fair Labor Standards Act); Lichtman v. Office of Personnel Management, 835 F.2d 1427 (Fed. Cir. 1988) (wrongfully denied annuity benefits); Sansom v. United States, 707 F. Supp. 1296 (N.D. Fla. 1989) (attorney’s fees under 26 U.S.C. § 7430); Ulmet v. United States, 19 Cl. Ct. 527 (1990) (back pay, allowances, and back retirement pay to military officer).

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## 2. Specific Interest Statutes

Congress has authorized the recovery of interest, subject to varying conditions, in a number of specific contexts. If one of these specific interest statutes applies to a given case, then that statute will of course govern. In some cases interest is a statutory entitlement; in others it is merely an authorization and must be affirmatively awarded. The following listing is intended to be reasonably comprehensive as of the date of this publication.

### a. Back Pay Act

The Back Pay Act, 5 U.S.C. § 5596, authorizes the payment of back pay to a federal employee who is found by “appropriate authority,” including a court, to have suffered a withdrawal or reduction of all or part of his or her pay, allowances, or differentials as the result of an unjustified or unwarranted personnel action.

Prior to late 1987, interest was not authorized on claims or judgments under the Back Pay Act. E.g., Fitzgerald v. Staats, 578 F.2d 435 (D.C. Cir. 1978), cert. denied, 439 U.S. 1004; Van Winkle v. McLucas, 537 F.2d 246 (6th Cir. 1976), cert. denied, 429 U.S. 1093.

This was changed by legislation in December 1987. Public Law 100-202, the continuing resolution for fiscal year 1988, added a new subsection (b)(2) to 5 U.S.C. § 5596 (100 Stat. 1329-430). Under subsection (b)(2), back pay under the Act “shall be payable with interest,” calculated from the effective date of the withdrawal or reduction of pay to a date not more than 30 days prior to the date of payment. The applicable interest rate is the rate for tax overpayments determined under section 6621(a)(1) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(1). Interest is payable from the same source as the back pay in a given case, and is to be compounded daily. The interest provision is limited to the back pay itself and does not apply to attorney’s fees.

Subsection (b)(2) applies to administrative awards under the Back Pay Act, which are payable from agency funds, as well as judicial awards. The Office of Personnel Management's implementing regulations are found at 5 C.F.R. § 550.806 (1992).

The Back Pay Act does not apply to military personnel. Sanders v. United States, 594 F.2d 804 (Ct. Cl. 1979). Thus, pay cases involving military personnel remain subject to the no-interest rule. Ulmet v. United States, 19 Cl. Ct. 527 (1990).

#### b. Wrongful Tax Levy

Under section 7426 of the Internal Revenue Code, 26 U.S.C. § 7426, if the Internal Revenue Service has seized money or property under a tax levy, a person claiming an interest in the property levied upon (other than the person against whom the tax was assessed) can sue to challenge the propriety of the levy.

If the court determines that the levy was improper, 26 U.S.C. § 7426(g) provides for the judgment to include interest. If the levy was executed on money, interest runs from the date the IRS received the money to the date of payment of the judgment. If the levy was executed on other property which has been sold, interest runs from the date of the sale to the date of payment of the judgment. The applicable rate of interest is the tax overpayment rate determined under 26 U.S.C. § 6621(a)(1). Interest is to be compounded daily. Id. § 6622(a).

In Hammond Co. v. United States, 568 F. Supp. 309 (S.D. Cal. 1983), the IRS issued a notice of levy on money which had been seized by the Federal Bureau of Investigation. The levy was subsequently found to be improper. The court refused to apply a theory of "constructive possession" under section 7426(g), and denied interest for the time the money had been held by the FBI. Under the statute, the court pointed out, interest runs from the date of receipt by the IRS, not the date of the levy.

#### c. Tax Refund Judgments

When a taxpayer receives a judgment "for any overpayment in respect of any internal revenue tax," 28 U.S.C. § 2411 provides that "interest shall be allowed" from the date of the payment or collection of the overpayment to a date, to be determined by the IRS, preceding the date of the refund check by not more than 30 days.

As with judgments under 26 U.S.C. § 7426, the applicable interest rate is the tax overpayment rate (26 U.S.C. § 6621(a)(1)), which, under 26 U.S.C. § 6622(a), is to be compounded daily.

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The statute also provides that a tender of payment (with interest) by check any time after the judgment becomes final will stop the running of interest, whether or not the judgment creditor accepts the check.

d. Equal Access to Justice Act

The original enactment of the Equal Access to Justice Act in 1980 made no mention of interest. This did not prevent claimants from seeking interest, but the courts held that there was no authority for interest on fee awards under either subsection (b) or subsection (d) of 28 U.S.C. § 2412. International Woodworkers of America v. Donovan, 769 F.2d 1388 (9th Cir. 1985); Arvin v. United States, 742 F.2d 1301 (11th Cir. 1984); Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board, 735 F.2d 895 (5th Cir. 1984).

When EAJA was made permanent in 1985, Congress added an interest provision, codified at 28 U.S.C. § 2412(f):

“If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.”

Note that this is a limited authorization. Interest is not automatic, but is payable only if there has been an unsuccessful appeal by the government. The rate is the 52-week Treasury bill rate determined under 28 U.S.C. § 1961(a), and the statute specifies the beginning and ending dates. An illustrative case making an award under this provision is Haitian Refugee Center v. Meese, 791 F.2d 1489, 1501 (11th Cir. 1986).

The legislative history states that this provision “was adopted at the recommendation of the Comptroller General and meets the objections found in the President’s veto message.”<sup>72</sup> A brief explanation may be helpful since the reference to the Comptroller General does not refer to any formal GAO document and this explanatory material, to our knowledge, cannot be found elsewhere.

Legislation to make EAJA permanent had passed both Houses of Congress and had been sent to the President in late 1984. It included a provision which would have required interest on all awards under 28 U.S.C. § 2412 not paid within 60 days from the date of the award. GAO found several

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<sup>72</sup>H.R. Rep. No. 120, 99th Cong., 1st Sess. 19 (1985), reprinted in 1985 U.S. Code Cong. & Admin. News 132, 147.

problems with the interest provision. In many respects, it would have had the undesirable result of giving attorneys more favorable treatment than their clients. Also, although the government's payment record in this area is generally good, payment within 60 days would be impossible in most cases since the payment process cannot begin until a determination is made with respect to appeal. The problems were outlined in a letter to the relevant congressional committees, B-40342.4, October 5, 1984.

The scheduled adjournment of Congress made consideration of these comments impossible. However, the President agreed, found other portions of the bill objectionable as well, and, while endorsing the underlying policy of EAJA, vetoed the legislation on November 8, 1984.<sup>73</sup>

Congress resumed consideration of the legislation the following year. The interest provision now found at 28 U.S.C. § 2412(f) was designed to address the problems identified by the President and the Comptroller General. The basic thrust—interest only in the case of an unsuccessful appeal by the United States—was patterned after similar provisions in 31 U.S.C. § 1304(b) and 28 U.S.C. § 2516(b), to be discussed later in this section. Unlike 31 U.S.C. § 1304(b), however, interest under 28 U.S.C. § 2412(f) is computed from the date of the award and there is no requirement for filing with GAO or with anyone else. The reason is that subsection 2412(f) applies to all awards under section 2412—costs under subsection (a) and fees under subsections (b) and (d). Since some subsection (b) awards and all subsection (d) awards are paid directly by the agency concerned and are not processed through GAO, an attempt to incorporate the filing requirement of 31 U.S.C. § 1304(b) would have produced an interest provision of unwarranted complexity. In informal consultations, GAO agreed that this new provision would adequately meet the concerns expressed in 1984.

#### e. Court of International Trade

The Court of International Trade was created by the Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727. Under 28 U.S.C. § 2644, if the plaintiff in an action under section 515 of the Tariff Act of 1930 (19 U.S.C. § 1515) obtains monetary relief by judgment or stipulation, interest “shall be allowed.” The monetary relief consists of the refunding of liquidated duties or other customs charges or exactions. Interest runs from the date of the filing of the summons to the date of the refund, at the rate established under section 6621 of the Internal Revenue Code.

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<sup>73</sup>Memorandum of Disapproval of H.R. 5479, 20 Weekly Comp. Pres. Doc. 1814 (November 8, 1984).

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Through the end of 1993, Congress has not amended 28 U.S.C. § 2644 to reflect the 1986 amendment to 26 U.S.C. § 6621 which established separate overpayment and underpayment rates.

f. Judgment Offsets

As discussed earlier in this chapter, GAO has statutory authority to withhold payment of a judgment in order to set off debts owed to the United States by the judgment creditor. 31 U.S.C. § 3728. The statute includes an interest provision, 31 U.S.C. § 3728(c). If the government ultimately recovers less than the amount withheld, the balance must be paid over to the plaintiff with 6 percent interest for the time it has been withheld.

g. Contract Disputes Act

Section 12 of the Contract Disputes Act of 1978, 41 U.S.C. § 611, directs the payment of interest on contract claims from the date the contracting officer receives the claim to the date of payment. It applies whether the claim is allowed by the contracting officer, a board of contract appeals, or a court. The statute is described and discussed further under the Interest heading in Chapter 12.

h. Reimbursement to Medicare Providers

If a Medicare provider seeks judicial review of an adverse determination by the Provider Reimbursement Review Board, the reviewing court may award interest in accordance with 42 U.S.C. § 1395oo(f)(2). A case discussing the basic statutory requirements is Tucson Medical Center v. Sullivan, 947 F.2d 971 (D.C. Cir. 1991). The courts are not in agreement as to the proper rate of interest under this provision. See Sunshine Health Systems, Inc. v. Bowen, 842 F.2d 1097 (9th Cir. 1988), cert. denied, 488 U.S. 965; St. Joseph's Hospital v. Blue Cross and Blue Shield Ass'n, 721 F. Supp. 1160 (N.D. Cal. 1989); St. Agnes Hospital v. Bowen, 707 F. Supp. 24 (D.D.C. 1989).

i. Title VII of the Civil Rights Act

In the first wave of interest litigation to arise after Title VII was made applicable to the federal government, the courts held that there was no authority to award interest.<sup>74</sup> When the Back Pay Act was amended in 1987 to include an interest provision, some courts found the requisite waiver of

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<sup>74</sup>Saunders v. Claytor, 629 F.2d 596 (9th Cir. 1980), cert. denied, 450 U.S. 980; Blake v. Califano, 626 F.2d 891 (D.C. Cir. 1980); DeWeever v. United States, 618 F.2d 685 (10th Cir. 1980); Fischer v. Adams, 572 F.2d 406 (1st Cir. 1978); Richerson v. Jones, 551 F.2d 918 (3d Cir. 1977). This result applied to attorney's fees as well as back pay awards. Library of Congress v. Shaw, 478 U.S. 310 (1986).

sovereign immunity in the amended Back Pay Act, but they were not sure how far they could stretch this approach.<sup>75</sup>

In 1991, Congress amended Title VII (specifically, 42 U.S.C. § 2000e-16) to specify that “the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.” Civil Rights Act of 1991, Pub. L. No. 102-166, § 114, 105 Stat. 1071, 1079. The legislative history makes clear that this authority is intended to apply to attorney’s fees as well as awards of back pay and other monetary damages. H.R. Rep. No. 40(I), 102d Cong., 1st Sess. 85–87 (1991), and H.R. Rep. No. 40(II), 102d Cong., 1st Sess. 33–34 (1991), reprinted in 1991 U.S. Code Cong. & Admin. News 623–25 and 727, respectively. Apart from this, precisely how the authority is to be applied is not specified.

#### j. Superfund

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was enacted in 1980 and substantially amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986).

Section 120, 42 U.S.C. § 9620, makes federal agencies liable under section 107 to the same extent as any nongovernmental entity. Section 107, 42 U.S.C. § 9607, prescribes liability for response costs and other items resulting from the release of certain hazardous substances. Under the amended section 107(a), a judgment for amounts recoverable under that section is to include interest at the rate specified for interest on investments of the Hazardous Substance Superfund determined in accordance with 26 U.S.C. § 9507(d). Section 106(b)(2), 42 U.S.C. § 9606(b)(2), includes similar language with respect to claims for reimbursement from Superfund. It appears that these provisions apply to judgments against the United States. See Santa Fe Pacific Realty Corp. v. United States, 780 F. Supp. 687, 696–97 (E.D. Cal. 1991); B-245482, April 8, 1992 (internal memorandum).<sup>76</sup>

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<sup>75</sup>Brown v. Secretary of the Army, 918 F.2d 214 (D.C. Cir. 1990), aff’g Mitchell v. Secretary of Commerce, 715 F. Supp. 409 (D.D.C. 1989), and Brown v. Marsh, 713 F. Supp. 20 (D.D.C. 1989), cert. denied, 112 S. Ct. 57; Smith v. Brady, 744 F. Supp. 925 (N.D. Cal. 1990); Lee v. Brady, 741 F. Supp. 990 (D.D.C. 1990); Parker v. Burnley, 703 F. Supp. 925 (N.D. Ga. 1988). Contra, Roepsch v. Bentsen, 846 F. Supp. 1363 (E.D. Wis. 1994).

<sup>76</sup>The CERCLA/SARA legislation is enormously complex, and federal liability may arise in different contexts. Judgments and Justice Department compromise settlements for response costs or natural resource damages under CERCLA are, as a general proposition, payable under 31 U.S.C. § 1304 since there is nothing in the Superfund legislation or legislative history to make them “otherwise provided for,” although actual determinations are made on a case-by-case basis. 73 Comp. Gen. 46 (1993).

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k. Suits in Admiralty Act and  
Public Vessels Act

A money judgment against the United States in a “libel in personam” under the Suits in Admiralty Act may include interest to the date of payment. The rate is 4 percent, except that a higher rate is allowable if stipulated in the contract, if any, upon which the suit was based. 46 U.S.C. App. § 743. Interest may not accrue prior to the filing of the suit except pursuant to an express contract stipulation. *Id.* § 745. Sample cases are Central Rivers Towing, Inc. v. City of Beardstown, 750 F.2d 565 (7th Cir. 1984); SCNO Barge Lines, Inc. v. Sun Transportation Co., 595 F. Supp. 356 (E.D. Mo. 1984).

Compound interest is not authorized. In one case, lower courts had awarded 4 percent prejudgment interest to the date of the decree, and 4 percent postjudgment interest on the sum of principal plus prejudgment interest from the date of the decree to the date of payment. “Compound interest is not presumed to run against the United States” said the Supreme Court, reversing the award of compound interest as improper. United States v. Isthmian Steamship Co., 359 U.S. 314, 325 (1959).

The Public Vessels Act incorporates the interest provisions of the Suits in Admiralty Act, except that interest may not accrue prior to the date of the judgment except pursuant to an express contract stipulation. 46 U.S.C. App. § 782. A sample case is Blevins v. United States, 769 F.2d 175 (4th Cir. 1985).

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3. Nonstatutory Exceptions

a. Fifth Amendment Takings

As noted earlier, there are two nonstatutory exceptions to the no-interest rule. The first is Fifth Amendment takings. It must be emphasized that the term “just compensation” does not in and of itself create or imply an entitlement to interest. In order for the right to interest to exist independent of statute, there must be a cognizable claim to just compensation under the Fifth Amendment. Thus, where the Fifth Amendment is not involved, a statute providing for just compensation is not sufficient to authorize interest absent an express provision for interest. United States v. Alcea Band of Tillamooks, 341 U.S. 48 (1951); United States v. 106.64 Acres of Land, 264 F. Supp. 199 (D. Neb. 1967). Similarly, if an interest provision is derived from statute in a situation where interest is not required by the Fifth Amendment, Congress can repeal the provision as long as the repeal does not affect rights which have become vested by final judgment. 5 Op. Off. Legal Counsel 235 (1981).

The taking exception is a discrete concept and cannot be used to open the back door to otherwise unauthorized interest awards. Thus, failure to pay interest on a claim or judgment, even a claim for refund of an overpayment, is not a “taking” of private property in violation of the Fifth Amendment. Getty Oil Co. v. United States, 767 F.2d 886 (Fed. Cir. 1985). Similarly, delay in paying a judgment is not a constitutional taking. Alaska Airlines, Inc. v. Johnson, 8 F.3d 791, 798 (Fed. Cir. 1993). “A party cannot be said to be deprived of his property in a judgment because at the time he is unable to collect it.” Louisiana ex rel. Folsom v. Mayor of New Orleans, 109 U.S. 285, 289 (1883). See also B-173904, February 18, 1972 (GAO rejected claim that delay in payment of judgment resulting from need to get specific congressional appropriation constituted a compensable Fifth Amendment taking).

(1) Direct condemnation

Apart from the relatively infrequent legislative taking, the United States acquires land by condemnation either by invoking the Declaration of Taking Act (40 U.S.C. § 258a), in which event title vests in the United States the moment the declaration is filed, or by following the “complaint only” procedure (authorized generally by 40 U.S.C. § 257), under which the government does not acquire title until it tenders payment.

For takings under the Declaration of Taking Act, the Fifth Amendment would require interest even if the statute were silent. However, the Declaration of Taking Act has always included a provision for interest. Prior to 1986, the rate was fixed by statute at 6 percent. See 40 U.S.C. § 258a (1982 ed.). As interest rates rose dramatically during the 1970s, the courts began to award higher rates, holding that the statutory 6 percent rate was a floor rather than a ceiling. The rationale was that interest is an element of the just compensation mandated by the Constitution, and as such, the right cannot be diminished by Congress, in this instance by failing to amend a statutory rate which had become economically obsolete. United States v. 329.73 Acres of Land, 704 F.2d 800 (5th Cir. 1983); United States v. Blankinship, 543 F.2d 1272 (9th Cir. 1976). See also Miller v. United States, 620 F.2d 812, 837 (Ct. Cl. 1980).

In 1986, Congress amended the Declaration of Taking Act to replace the 6 percent rate with a rate based on the yield of 52-week Treasury bills. 40 U.S.C. § 258e-1, added by Pub. L. No. 99-656, 100 Stat. 3668 (1986). Interest is payable on the amount of the judgment in excess of the amount previously deposited with the court, and runs from the date of taking to

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the date of payment. The rate is the same as the rate determined under 28 U.S.C. § 1961(a), discussed later in this section, and is compounded annually. The one difference is that, under 40 U.S.C. § 258e-1, the rate is adjusted at the beginning of each additional year.

The interest provision of the Declaration of Taking Act applies only in the absence of a governing contract. Albrecht v. United States, 329 U.S. 599 (1947); Oliver v. United States, 155 F.2d 73 (8th Cir. 1946).

In a “complaint only” condemnation, the judgment establishing the value of the property operates essentially as an offer which the government may choose to accept by tendering payment. The taking does not occur unless and until the government tenders payment. Kirby Forest Industries v. United States, 467 U.S. 1 (1984). The judgment does not include interest because the value of the property can rise or fall before the “taking” occurs, but there must be some procedure for modifying the award to account for material changes in value between the time of valuation and time of payment. Id. at 16–19.

## (2) Inverse condemnation

The jurisdictional basis for inverse condemnation suits is the Tucker Act—28 U.S.C. §§ 1346(a)(2) (district courts, claims under \$10,000) and 1491 (Court of Federal Claims, claims over \$10,000). The essence of the suit is a claim for a taking deemed compensable under the Fifth Amendment. Thus, inverse condemnation judgments commonly include interest. The Declaration of Taking Act, of course, does not apply.

The Court of Federal Claims uses the Contract Disputes Act rate for periods commencing January 1, 1980, in Fifth Amendment taking cases. Whitney Benefits, Inc. v. United States, 18 Cl. Ct. 394, 416 (1989), aff’d, 926 F.2d 1169 (Fed. Cir. 1991), cert. denied, 112 S. Ct. 406; Houser v. United States, 12 Cl. Ct. 454 (1987); Jones v. United States, 3 Cl. Ct. 4 (1983).<sup>77</sup> The court adopted this approach “[f]or purposes of uniformity in compensation of claims against the Government, flexibility in administration, notice to the public, and judicial efficiency.” Foster v. United States, 3 Cl. Ct. 738, 745 (1983), aff’d mem., 746 F.2d 1491 (Fed. Cir. 1984), cert. denied, 471 U.S. 1053. The interest has traditionally been simple interest. Yaist v. United States, 17 Cl. Ct. 246, 261–62 (1989). However, the Court of Federal Claims has awarded compound interest where there has been a long delay

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<sup>77</sup>See also Formanek v. United States, 26 Cl. Ct. 332, 341 n.11 (1992); Economic Development and Industrial Corp. v. United States, 13 Cl. Ct. 590 (1987); Henry v. United States, 8 Cl. Ct. 389 (1985); Cloverport Sand & Gravel Co. v. United States, 6 Cl. Ct. 178 (1984).

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between the “taking” and payment. Bowles v. United States, 31 Fed. Cl. 37 (1994); Whitney Benefits, Inc. v. United States, 30 Fed. Cl. 411 (1994).

(3) Delay compensation in patent infringement cases

The unauthorized manufacture or use of a patented device by or for the use of the United States is viewed as the taking of a property interest analogous to an eminent domain taking. Calhoun v. United States, 453 F.2d 1385, 1391 (Ct. Cl. 1972). The remedy is a suit in the Court of Federal Claims under 28 U.S.C. § 1498 for “reasonable and entire compensation.” As an application of the Fifth Amendment taking concept, patent infringement judgments against the United States may include interest. Waite v. United States, 282 U.S. 508 (1931). Interest in patent infringement cases has become known as “delay compensation.”

The rate to be applied as delay compensation in patent infringement cases has caused its share of litigation. Prior to 1977, the Court of Claims applied a flat 4 percent rate. In Pitcairn v. United States, 547 F.2d 1106 (Ct. Cl. 1977), cert. denied, 434 U.S. 1051, the court held that the 4 percent rate had become economically outmoded, and established a stepped percentage rate varying from 4 percent for the years 1947–1955 to 7.5 percent for the years 1971–1975. In Tektronix, Inc. v. United States, 552 F.2d 343, 352–53 (Ct. Cl. 1977), the court announced that it would apply the Pitcairn rates in future cases unless, for years after 1975, the claimant could affirmatively demonstrate that the rate should differ from the 7.5 percent rate set for 1971–1975.

In subsequent cases, the Court of Claims and its successors have used the rates determined under section 6621 of the Internal Revenue Code for post-1975 periods. Dynamics Corp. of America v. United States, 5 Cl. Ct. 591 (1984), aff'd in part and rev'd in part on other grounds, 766 F.2d 518 (Fed. Cir. 1985); Bendix Corp. v. United States, 676 F.2d 606 (Ct. Cl. 1982). Subsequent to the 1986 amendment to 26 U.S.C. § 6621 which established separate overpayment and underpayment rates, the court has referred to the rate for “overpayments” in Dynamics Corp., 5 Cl. Ct. at 617, and the “rate paid on tax refunds” in ITT Corp. v. United States, 17 Cl. Ct. 199, 239 (1989). (The court used the 52-week Treasury bill rate in ITT Corp., based on the agreement of the parties.)

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It is also possible that the court may some day establish a common rate for both inverse condemnation and patent infringement cases, although it has thus far declined to do so.<sup>78</sup>

As with inverse condemnation judgments, delay compensation in patent infringement cases has traditionally been limited to simple interest. Dynamics Corp., 5 Cl. Ct. at 619. However, the Court of Appeals for the Federal Circuit has suggested that compound interest may be more appropriate in certain cases. Dynamics Corp., 766 F.2d 518 at 520. Following this suggestion, the Claims Court awarded compound interest in ITT Corp., cited above.

GAO will not automatically add interest in a patent infringement case. It is viewed as a judicial function and must be expressly awarded in the judgment. 59 Comp. Gen. 380 (1980).

Delay compensation has been denied where a judgment under 28 U.S.C. § 1498 was based on a stipulation of settlement which purported to be in full satisfaction of all claims and which did not specifically provide for interest. Simmonds Precision Products, Inc. v. United States, 183 Ct. Cl. 969 (1968); Regent Jack Mfg. Co. v. United States, 179 Ct. Cl. 924 (1967); 59 Comp. Gen. 380 (1980).

## b. Commercial Ventures

The second nonstatutory exception to the no-interest rule is what we will call the “commercial venture” exception. It originated essentially with the Supreme Court’s decision in Standard Oil Co. v. United States, 267 U.S. 76 (1925). The United States, under World War I legislation, had insured a steamship against certain war risks. The steamship sunk, and the main issue in the litigation was whether the insurance policy applied to the facts of the case. The Supreme Court found the policy applicable, and also awarded interest. Speaking for the Court, Justice Holmes said:

“Some question was made as to the allowance of interest. When the United States went into the insurance business, issued policies in familiar form and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business.”

Id. at 79. Five years later, in a case often cited in tandem with Standard Oil, the Court distinguished Standard Oil and denied interest to the beneficiary

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<sup>78</sup>“This court is of the opinion that the goal of establishing a uniform policy regarding delay compensation in eminent domain cases, although desirable, must give way to the established law that there is no fixed formula for establishing compensation for fifth amendment takings.” ITT Corp., 17 Cl. Ct. at 236.

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of a soldier under a government-issued life and disability insurance policy. United States v. Worley, 281 U.S. 339 (1930).

One group of “commercial venture” cases follows fairly directly from Standard Oil. In Bituminous Casualty Corp. v. Lynn, 503 F.2d 636 (6th Cir. 1974), the court awarded interest on a recovery under a reinsurance contract issued by the Department of Housing and Urban Development. Citing the Standard Oil and Worley cases, the court noted the “well defined” exception to the no-interest rule when a federal agency “embarks on a business venture” with the power to sue and be sued. Id. at 643. The court stated three grounds for the interest award: HUD’s sue-and-be-sued clause, the “self-supporting nature” of the HUD program, and the fact that the transactions resembled those of private parties. Id. at 645.

More recently, the Court of Appeals for the Fifth Circuit analyzed Standard Oil and Worley and denied interest in R&R Farm Enterprises, Inc. v. Federal Crop Insurance Corp., 788 F.2d 1148 (5th Cir. 1986) (rice crop insurance policy issued by FCIC), and in A.L.T. Corp. v. Small Business Administration, 823 F.2d 126 (5th Cir. 1987). These cases state the test as whether the agency’s activity is primarily commercial and whether it aspires to profitability. R&R, 788 F.2d at 1153; A.L.T., 823 F.2d at 128.<sup>79</sup>

Another group of cases involves the United States Postal Service. The court in Nagy v. United States Postal Service, 773 F.2d 1190 (11th Cir. 1985), awarded interest on back pay in a Title VII discrimination case. Similar holdings are Perez v. United States, 830 F.2d 54 (5th Cir. 1987) (Federal Tort Claims Act judgment); Hall v. Bolger, 768 F.2d 1148 (9th Cir. 1985) (interest on attorney’s fees in handicap discrimination case); White v. Bloomberg, 501 F.2d 1379 (4th Cir. 1974) (interest on award under pre-1988 version of Back Pay Act). The rationale of these cases is that the Postal Service’s sue-and-be-sued clause is a waiver of sovereign immunity which subjects it to liability for interest. The nature of the Postal Service’s “business,” its funding structure, and its self-sufficiency or lack thereof do not appear to have been significant factors apart from passing mention in Perez that the Postal Service “is designed to be self-supporting and to operate very much like a commercial business.” 830 F.2d at 60.

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<sup>79</sup>Some years earlier, in Payne v. Panama Canal Company, 607 F.2d 155 (5th Cir. 1979), the court awarded prejudgment interest in a suit under the Back Pay Act. The case was decided before the Back Pay Act was amended to expressly authorize interest. At the time, the (former) Panama Canal Company was a government corporation authorized to sue and be sued, but the extent to which the sue-and-be-sued clause weighed in the court’s decision is debatable.

The courts of appeals split on whether prejudgment interest could be awarded against the Postal Service in Title VII cases under the pre-1991 version of the statute. The Eighth Circuit disagreed with Nagy and held that interest was not authorized. Loeffler v. Carlin, 780 F.2d 1365 (8th Cir. 1985), aff'd en banc, Loeffler v. Tisch, 806 F.2d 817 (8th Cir. 1986). The Supreme Court granted certiorari in the Loeffler case and agreed with the Nagy result. Loeffler v. Frank, 486 U.S. 549 (1988). For our purposes here, the crucial passage in the Court's decision is the following:

“By launching ‘the Postal Service into the commercial world,’ and including a sue-and-be-sued clause in its charter, Congress has cast off the Service’s ‘cloak of sovereignty’ and given it the ‘status of a private commercial enterprise.’ . . . It follows that Congress is presumed to have waived any otherwise existing immunity of the Postal Service from interest awards.”

Id. at 556. The Court further noted that the interest award would not be inconsistent with the Postal Service’s enabling legislation (Postal Reorganization Act), would not threaten “grave interference” with the Service’s operations, and was not contrary to anything in the legislative history of the Service’s sue-and-be-sued authority. Id. at 556–57. Thus, since prejudgment interest could be awarded against a private Title VII defendant, it could be awarded against the Postal Service. See also Maksymchuk v. Frank, 987 F.2d 1072 (4th Cir. 1993).

Based on the Supreme Court’s Loeffler formulation, it seems clear that the “commercial venture” exception to the no-interest rule requires several things. First, there must be a sue-and-be-sued clause. Second, the agency or program involved must be one that Congress has “launched into the commercial world.” A sue-and-be-sued clause alone is not enough. Pender Peanut Corp. v. United States, 21 Cl. Ct. 95 (1990). Finally, liability for interest must not be inconsistent with the relevant enabling or program legislation.

Applying the Loeffler criteria, courts have refused to apply the “commercial venture” exception to federal agencies which do not have sue-and-be-sued clauses and which are engaged in primarily governmental, as opposed to commercial, functions. McGehee v. Panama Canal Commission, 872 F.2d 1213 (5th Cir. 1989) (unlike the Panama Canal Company which it replaced, the Commission is not a corporation and was not given sue-and-be-sued authority); Wilson v. United States, 756 F. Supp. 213 (D.N.J. 1991) (former Veterans Administration).

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#### 4. 28 U.S.C. § 1961 and the Federal Courts Improvement Act

A law has been on the books since 1842 authorizing postjudgment interest on district court civil judgments against private litigants. The statute had been variously designated over the years, most recently as 28 U.S.C. § 1961 (1976 ed.). Prior to 1982, the rate was the rate allowed by state law.

The courts had uniformly held that the pre-1982 version of 28 U.S.C. § 1961 did not apply to suits against the United States. United States v. Sherman, 98 U.S. 565, 567 (1878);<sup>80</sup> Huntley v. Southern Oregon Sales, Inc., 104 F.2d 153 (9th Cir. 1939); Reed v. Howbert, 77 F.2d 227 (10th Cir. 1935); United States v. 125.71 Acres of Land, 54 F. Supp. 193, 195 (W.D. Penn. 1944). See also B-191028, March 27, 1978. The most recent and most definitive ruling on this point was Holly v. Chasen, 639 F.2d 795 (D.C. Cir. 1981), cert. denied, 454 U.S. 822, holding that 28 U.S.C. § 1961 did not authorize interest on a judgment awarding attorney's fees against the United States under the Freedom of Information Act.

In 1982, Congress amended 28 U.S.C. § 1961 by section 302 of the Federal Courts Improvement Act (FCIA), 96 Stat. 25, 55 (1982). Subsections (a) and (b) provide as follows:

“(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. . . .

“(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.”

Thus, subsection (a) replaced the former reference to rates under state law with a uniform federal rate based on the yield of 52-week Treasury bills. Subsection (b) makes interest run to the date of payment except as provided in the two referenced statutes, discussed later in this section, dealing with interest on certain judgments against the United States.

Given the cross-references in subsection (b), or perhaps even without them, it was inevitable that the applicability of 28 U.S.C. § 1961 to the United States would again come into question. It did, and with a vengeance. We cite below decisions of United States Courts of Appeals from six different circuits holding that 28 U.S.C. § 1961, as amended by the

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<sup>80</sup>While the Court referred only to “Federal legislation” and did not cite the predecessor of 28 U.S.C. § 1961, there was at the time no other “Federal legislation” providing for postjudgment interest to which the Court could possibly have been referring.

FCIA, is not a waiver of sovereign immunity and does not by itself authorize postjudgment interest against the United States:

- District of Columbia Circuit: Thompson v. Kennickell, 797 F.2d 1015 (D.C. Cir. 1986), cert. denied, 480 U.S. 905. This case includes a detailed and comprehensive analysis of the law with respect to postjudgment interest against the United States. The court concluded that if Congress had intended “the massive increase in the government’s liability for post-judgment interest” (*id.* at 1025) that would result from construing the FCIA as a waiver of sovereign immunity, it would have done so in a more explicit manner.
- Fourth Circuit: Blevins v. United States, 769 F.2d 175 (4th Cir. 1985).
- Fifth Circuit: A.L.T. Corp. v. Small Business Administration, 823 F.2d 126 (5th Cir. 1987). See also Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board, 735 F.2d 895 (5th Cir. 1984).
- Eighth Circuit: Rimmel v. Mercantile Trust Co. National Association, 774 F.2d 279 (8th Cir. 1985).
- Ninth Circuit: Bernardi v. Yeutter, 951 F.2d 971, 976 (9th Cir. 1991); International Woodworkers v. Donovan, 769 F.2d 1388 (9th Cir. 1985).
- Eleventh Circuit: Arvin v. United States, 742 F.2d 1301 (11th Cir. 1984).

Several district courts have made the same point. E.g., Wilson v. United States, 756 F. Supp. 213 (D.N.J. 1991); Easley v. United States, 719 F. Supp. 145 (W.D.N.Y. 1989); Sansom v. United States, 707 F. Supp. 1296 (N.D. Fla. 1989); Squillacote v. United States, 626 F. Supp. 127 (E.D. Wis. 1985). And see In re Tecumseh Construction Co., 157 B.R. 471 (Bankr. E.D. Cal. 1993).

It should be clear from other portions of our discussion that Congress has chosen to deal with the topic of interest against the United States on a situational basis, enacting or amending legislation in specific contexts as deemed necessary or desirable. This long-standing pattern is further evidence that Congress is not likely to have changed the fundamental premise of 28 U.S.C. § 1961 without doing so in a much more explicit manner. See, e.g., Arvin, 742 F.2d at 1304.

Thus, it would appear safe to regard the proposition as settled that 28 U.S.C. § 1961 does not waive the government’s sovereign immunity with respect to postjudgment interest. It may be relevant in other ways, such as prescribing the proper rate of interest in certain cases, but the underlying authority to award the interest must be found elsewhere.

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## 5. Judgments of the Court of Federal Claims

The Court of Claims was established in 1855<sup>81</sup> and empowered to render judgments against the United States in 1863.<sup>82</sup> In 1982, it was replaced with two new courts. The trial function (the former trial commissioners) became the United States Claims Court and the appellate function became the Court of Appeals for the Federal Circuit.<sup>83</sup> In 1992, the Claims Court was renamed the Court of Federal Claims.<sup>84</sup> Prior to 1982, there was no intermediate appellate court and appeals from Court of Claims judgments were taken directly to the Supreme Court. Since 1982, appeals go first to the Federal Circuit and then to the Supreme Court.

We address here situations not governed by any of the previously noted specific interest statutes or nonstatutory exceptions.

Prejudgment interest is governed by 28 U.S.C. § 2516(a), which essentially codifies the traditional no-interest rule:

“Interest on a claim against the United States shall be allowed in a judgment of the United States Court of Federal Claims only under a contract or Act of Congress expressly providing for payment thereof.”

The statute means exactly what it says. The authority to award interest may not be implied, nor may it be derived from some expression of intent not reflected in explicit statutory or contractual language. *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 659 (1947).

Postjudgment interest is authorized only when the United States appeals to the Supreme Court and loses, and then only from the date a copy of the judgment is filed with GAO to the mandate of affirmance. The authority is found in 3 statutes which must be read together. First is 28 U.S.C. § 2516(b), as amended in 1982 by the Federal Courts Improvement Act:

“Interest on a judgment against the United States affirmed by the Supreme Court after review on petition of the United States is paid at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately before the date of the judgment.

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<sup>81</sup>Act of February 24, 1855, ch. 122, 10 Stat. 612.

<sup>82</sup>Act of March 3, 1863, ch. 92, § 3, 12 Stat. 765.

<sup>83</sup>Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

<sup>84</sup>Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, Title IX, 106 Stat. 4506, 4516.

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Next, 31 U.S.C. § 1304(b)(1)(B) prescribes the beginning and ending dates for interest authorized under 28 U.S.C. § 2516(b) by making the judgment appropriation available for interest—

“on a judgment of the Court of Appeals for the Federal Circuit or the United States Court of Federal Claims under section 2516(b) of title 28, only from the date of filing of the transcript of the judgment with the Comptroller General through the day before the date of the mandate of affirmance.”

The third statute is 28 U.S.C. § 1961, also as amended by the Federal Courts Improvement Act. Subsection (a), quoted earlier in this section, establishes a uniform federal rate for postjudgment interest (which 28 U.S.C. § 2516(b) essentially duplicates). Subsection (b), also quoted earlier, makes section 1961 expressly subject to 28 U.S.C. § 2516(b) and 31 U.S.C. § 1304(b). Portions of subsection (c) are set forth below:

“(c)(1) This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at [the appropriate rate determined under 26 U.S.C. § 6621].

“(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal Circuit, at the rate provided in subsection (a) and as provided in subsection (b).

“(3) Interest shall be allowed, computed, and paid on judgments of the United States Court of Federal Claims only as provided in paragraph (1) of this subsection or in any other provision of law.”

“Any other provision of law” means a statute expressly authorizing interest on Court of Federal Claims judgments against the United States. Jetco, Inc. v. United States, 11 Cl. Ct. 837 (1987). See also Ulmet v. United States, 19 Cl. Ct. 527, 536–37 (1990). One such statute, of course, is 28 U.S.C. § 2516(b).

Analyzing the language of these 3 statutes together, it is possible to formulate some rules. For tax cases, the applicable rate of interest is

governed by the interest provisions of the Internal Revenue Code.<sup>85</sup> For nontax cases not subject to some other specific interest provision:<sup>86</sup>

- If the United States does not appeal from a Court of Federal Claims judgment, there is no interest.<sup>87</sup>
- If a Court of Federal Claims judgment is appealed to the Federal Circuit and affirmed, interest does not accrue during that appeal no matter who files what.
- If the United States appeals from the Federal Circuit to the Supreme Court (petition for certiorari), and the Supreme Court affirms the Federal Circuit, interest is payable, at the 52-week Treasury bill rate set forth in 28 U.S.C. § 2516(b), from the date the plaintiff files a copy of the judgment with GAO to the Supreme Court's mandate of affirmance or the end of the term at which the judgment was affirmed, whichever occurs sooner (31 U.S.C. § 1304(b)(2)).

The concept of 28 U.S.C. § 2516(b) and 31 U.S.C. § 1304(b)—interest only when the government unsuccessfully takes the case to the Supreme Court and then only between specified beginning and ending dates—goes back to 1863.<sup>88</sup> Historically, interest was not allowable during the period that determinations by trial commissioners were under review by the full Court of Claims. While some details have changed from time to time (for example, the shift in 1982 from a flat 4 percent rate to the Treasury bill rate), the basic concept has been followed ever since.

To understand the effect of the Federal Courts Improvement Act of 1982, resort to the legislative history is very helpful. The substantive changes to 28 U.S.C. §§ 1961 and 2516(b) stem from Unprinted Amendment No. 766, and the legislative history consists of comments by Senator Grassley and two letters from the Office of Management and Budget. This material, found at 127 Cong. Rec. 29865–67 (1981) and discussed in Ulmet v. United States, 19 Cl. Ct. 527 (1990), clearly establishes the intent to retain the concept of interest only in cases of an unsuccessful appeal to the Supreme Court.

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<sup>85</sup>“Tax cases” in this context does not mean any case in which the IRS happens to be involved. The term refers to refund actions by “taxpayers who have overpaid their taxes . . . and are within the administrative system providing for the recovery of overpaid taxes.” Economy Plumbing & Heating Co. v. United States, 470 F.2d 585, 592 (Ct. Cl. 1972).

<sup>86</sup>These rules also reflect the Justice Department’s interpretation. See Department of Justice, Commercial Litigation Branch Monograph, Interest on Claims By and Against the Government 7–9 (June 1984).

<sup>87</sup>Dictum to the contrary in Squillacote v. United States, 626 F. Supp. 127, 130 (E.D. Wis. 1985), apparently prompted by misunderstandings of the parties, is incorrect.

<sup>88</sup>Act of March 3, 1863, ch. 92, § 7, 12 Stat. 765, 766.

Since the essence of the old law—interest only in cases affirmed by the Supreme Court—has been retained, much of the pre-1982 case law remains relevant. Thus, the “date of the mandate of affirmance” in this context means the date the mandate is issued. 5 Comp. Gen. 832 (1926). Interest is not authorized where the Supreme Court denies the government’s petition for certiorari. 30 Comp. Gen. 238 (1950); 7 Comp. Gen. 128 (1927). However, if the Supreme Court reduces and affirms a Court of Federal Claims judgment, interest is payable on the reduced amount if the other statutory conditions are met. 4 Comp. Dec. 571 (1898).

The statutes discussed in this section do not authorize interest in cases of delay resulting from various postjudgment motions or from the government’s consideration of whether to seek further review, including any permissible extensions of time. 62 Comp. Gen. 4 (1982). Delays of this sort are compensable only if and to the extent they are included within the permissible range of interest accrual specified in the governing statutes.

What about compound interest, or interest on interest? When might prejudgment and postjudgment interest both be available on the same judgment? As noted earlier, if prejudgment interest is authorized and stops at the date of the judgment, it is considered part of the judgment and any authorized postjudgment interest would be computed on the sum of principal plus prejudgment interest. B-111945, November 13, 1952. However, the postjudgment interest statutes do not apply to a judgment, or portion thereof, which itself provides for interest beyond its entry. *Cherokee Nation v. United States*, 270 U.S. 476 (1926); 18 Comp. Gen. 873 (1939). Thus, a judgment which awards prejudgment interest to the date of payment does not earn postjudgment interest in addition, regardless of appeals or filings. (This principle would seem equally applicable to district court judgments.)

One final statute, 28 U.S.C. § 2517(b), warrants brief mention. It provides that “[p]ayment of any such judgment and of interest thereon shall be a full discharge to the United States of all claims and demands arising out of the matters involved in the case or controversy,” unless designated a partial judgment. This subsection is not an independent authorization of interest. 40 Comp. Gen. 286 (1960); B-158778, April 14, 1966. Rather, it merely states the effect that payment, including interest where authorized, shall have; that is, claims for additional amounts arising out of the same matters may not be allowed. 40 Comp. Gen. at 287; 53 Comp. Gen. 813 (1974). Although not similarly specified by statute, payment of a district court judgment will have the same effect. 59 Comp. Gen. 624 (1980).

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6. District Courts: 31 U.S.C.  
§ 1304(b)

For certain district court judgments, 31 U.S.C. § 1304(b)(1)(A) provides:

“Interest may be paid from the appropriation made by this section—(A) on a judgment of a district court, only when the judgment becomes final after review on appeal or petition by the United States Government, and then only from the date of filing of the transcript of the judgment with the Comptroller General through the day before the date of the mandate of affirmance[.]”

While this provision may at first glance appear to be an authorization, it is in reality a limitation and by itself authorizes nothing.

a. Applicability

(1) Federal Tort Claims Act

When you eliminate the cases subject to the previously noted specific interest statutes or nonstatutory exceptions, by far the largest remaining category of cases which generate money judgments against the United States are suits under the Federal Tort Claims Act (FTCA).

Prejudgment interest is expressly prohibited by the FTCA itself. Under 28 U.S.C. § 2674, the United States “shall not be liable for interest prior to judgment.” The plain meaning of this is to prohibit “compensation for the use of money damages prior to the judgment awarding those damages.” Southern Pacific Transp. Co. v. United States, 471 F. Supp. 1186, 1197 (E.D. Cal. 1979).

Prior to the enactment of the judgment appropriation, postjudgment interest was authorized on FTCA judgments, at a statutory rate of 4 percent, from the date of the judgment to a date not to exceed 30 days after enactment of an appropriation to pay the judgment. See 28 U.S.C. § 2411(b) (1976 ed.). This provision never applied to all district court judgments, only to “actions instituted under section 1346 of this title,” which included the FTCA.

When the judgment appropriation was originally enacted in 1956, one of the main objectives was “to reduce the total amount of interest paid by the government.” H.R. Rep. No. 2638, 84th Cong., 2d Sess. 72 (1956). A more detailed explanation of this purpose is found in a statement by the Office of Management and Budget,<sup>89</sup> relevant portions of which are quoted in 58 Comp. Gen. 67, 71 (1978) and 62 Comp. Gen. 4, 7–8 (1982). The interest reduction would occur by modifying the district court interest

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<sup>89</sup>Hearings on Supplemental Appropriation Bill, 1957, Before Subcomm. of the House Comm. on Appropriations, 84th Cong., 2d Sess., pt. 2, at 883–885 (1956).

provisions—the then-existing 28 U.S.C. § 2411(b)—to make them consistent with those for the Court of Claims (interest only where the government unsuccessfully appeals). Congress did not amend 28 U.S.C. § 2411(b) directly, but instead modified it by enacting 31 U.S.C. § 1304(b)(1)(A). The intent was unmistakable as the original version of subsection (b)(1)(A) explicitly referenced 28 U.S.C. § 2411(b). The very fact that judgments could now be paid promptly upon becoming final would also contribute to reducing the amount of interest the government would otherwise be required to pay.

Since the original judgment appropriation applied only to judgments not in excess of \$100,000, the larger judgments continued to be governed by 28 U.S.C. § 2411(b).<sup>90</sup> When the \$100,000 ceiling was removed in 1977, once again a stated purpose was to reduce the amount of interest payable by the United States.<sup>91</sup> This would be done by making judgments in excess of \$100,000 subject to the restrictions of 31 U.S.C. § 1304(b)(1)(A).

The rationale of subsection (b)(1)(A) is the same as the rationale of the old 28 U.S.C. § 2411(b)—to compensate a successful plaintiff for substantial government-caused delay in receiving payment. Before 1956, the delay was inherent in all cases by virtue of the need to await specific appropriations. Now, with this no longer a concern, subsection (b)(1)(A) recognizes the one situation—an appeal by the government—in which actions by the government (apart from processing delays, which have never been compensable) can still produce a significant delay in payment.

Notwithstanding the apparent clarity of the statutory language, postjudgment interest on FTCA judgments became the subject of seemingly endless litigation. The courts firmly established that interest could not be awarded except in compliance with 31 U.S.C. § 1304(b)(1)(A). E.g., Reminga v. United States, 695 F.2d 1000 (6th Cir. 1982), cert. denied, 460 U.S. 1086; Rooney v. United States, 694 F.2d 582 (9th Cir. 1982); DeLuca v. United States, 670 F.2d 843 (9th Cir. 1982); United States v. Culp, 346 F.2d 35 (5th Cir. 1965).<sup>92</sup>

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<sup>90</sup>See, e.g., Bonn v. Puerto Rico Int'l Airlines, Inc., 518 F.2d 89, 95 (1st Cir. 1975); Layne v. United States, 460 F.2d 409, 412 (9th Cir. 1972).

<sup>91</sup>S. Rep. No. 64, 95th Cong., 1st Sess. 206 (1977); H.R. Rep. No. 68, 95th Cong., 1st Sess. 184 (1977).

<sup>92</sup>See also Kelley v. United States, 568 F.2d 259, 268 (2d Cir. 1978), cert. denied, 439 U.S. 830; Black v. United States, 444 F.2d 1215, 1217 (10th Cir. 1971); United States v. Varner, 400 F.2d 369 (5th Cir. 1968); United States v. Maryland ex rel. Meyer, 349 F.2d 693 (D.C. Cir. 1965); United States v. Wells, 337 F.2d 615 (5th Cir. 1964); United States v. Jacobs, 308 F.2d 906 (5th Cir. 1962); Chicago, Rock Island & Pacific Ry. Co. v. United States, 206 F. Supp. 795 (S.D. Iowa 1962).

Similar claims were presented to the Comptroller General. In the typical case, either the government did not appeal or the judgment was not filed with GAO. The result was consistently the same: interest was not allowable unless the conditions specified in 31 U.S.C. § 1304(b) had been met. The most comprehensive discussion in the GAO decisions is found in B-191028, March 27, 1978.<sup>93</sup>

In 1982, the Federal Courts Improvement Act replaced the old 4 percent interest rate with a rate based on the yield of 52-week Treasury bills. At the same time, the 1982 legislation repealed 28 U.S.C. § 2411(b) and struck the specific reference to it in 31 U.S.C. § 1304(b)(1)(A). This made it possible to argue that Congress intended to withdraw its waiver of sovereign immunity for postjudgment interest on FTCA judgments. However, nowhere in the legislative history of the 1982 legislation is there the slightest hint of an intent to produce this result. Accordingly, although neither agency has formally addressed the point, GAO and the Justice Department continue to regard interest on FTCA judgments as payable if the conditions of subsection (b)(1)(A) are satisfied.

The courts have also continued to apply subsection (b)(1)(A) to judgments under the Federal Tort Claims Act. See, e.g., Andrulonis v. United States, 26 F.3d 1224 (2d Cir. 1994); Transco Leasing Corp. v. United States, 992 F.2d 552 (5th Cir. 1993); Desart v. United States, 947 F.2d 871 (9th Cir. 1991); Starns v. United States, 923 F.2d 34 (4th Cir. 1991); Lucas v. United States, 807 F.2d 414 (5th Cir. 1986); Cardillo v. United States, 767 F.2d 33 (2d Cir. 1985); MacDonald v. United States, 825 F. Supp. 683 (M.D. Pa. 1993).<sup>94</sup> See also Wilson v. United States, 756 F. Supp. 213 (D.N.J. 1991) (court refused to award interest under 28 U.S.C. § 1961).

As a final note, another phrase in 31 U.S.C. § 1304 has caused some confusion. The “appropriating language” found at 31 U.S.C. § 1304(a) makes the appropriation available for “interest and costs specified in the judgments or otherwise authorized by law.” On the surface, this appears to

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<sup>93</sup>A few others are 44 Comp. Gen. 421 (1965); B-180210, February 27, 1974; B-160583, January 11, 1967; B-144182, October 19, 1960.

<sup>94</sup>Also: Hull v. United States, 971 F.2d 1499, 1506–09 (10th Cir. 1992); Brooks v. United States, 757 F.2d 734 (5th Cir. 1985); Gross v. United States, 723 F.2d 609 (8th Cir. 1983); Moyer v. United States, 612 F. Supp. 239 (D. Nev. 1985); Goodkin v. United States, 600 F. Supp. 1459 (E.D.N.Y. 1985). With this many cases on the books in addition to the plain language of the statute, one might almost be tempted to regard it as negligence for a plaintiff’s attorney to fail to file a copy of the judgment with GAO. In Wolfe v. Gilreath, 699 S.W. 2d 805 (Tenn. App. 1985), clients sued their attorney for legal malpractice on precisely those grounds. While the suit turned out to be barred by the statute of limitations, the court felt that “defendant, in fact, had been guilty of negligence which had caused the loss of the interest on their judgments.” Id. at 807.

permit interest by the simple device of including it in the judgment. Such an interpretation would have the anomalous result of effectively abolishing the no-interest rule with respect to judgments through a statute intended to reduce interest costs. The only legislative history addressing this language is a brief discussion appearing on page 885 of the Hearings cited previously. It explains that the purpose of the “interest . . . specified in the judgment” language was merely to permit the payment of prejudgment interest in cases where awarding it is discretionary with the court, and this has been GAO’s consistent interpretation. B-236958, October 3, 1989 (non-decision letter); B-163682, March 18, 1968; B-141540, March 24, 1960.

(2) The “Little Tucker Act”

As noted above, prior to 1982, 31 U.S.C. § 1304(b)(1)(A) was expressly limited to judgments covered by 28 U.S.C. § 2411(b), which in turn applied to “actions instituted under” 28 U.S.C. § 1346. Section 1346 is the jurisdictional provision for three types of suits which can result in money judgments against the United States—tax cases, Federal Tort Claims Act, and the district court portion of the Tucker Act (non-tort claims not exceeding \$10,000, the so-called “Little Tucker Act”). Since tax cases were governed by other specific interest provisions, the old 28 U.S.C. § 2411(b) applied essentially to the Federal Tort Claims Act and the “Little Tucker Act.” Thus, prior to 1982, the rules for postjudgment interest on Federal Tort Claims Act judgments applied equally to “Little Tucker Act” judgments. E.g., Eastern Service Mgmt. Co. v. United States, 363 F.2d 729 (4th Cir. 1966); United States v. Mississippi Valley Barge Line Co., 285 F.2d 381 (8th Cir. 1960); B-182346, February 4, 1975.<sup>95</sup>

Under the restructuring brought about by the Federal Courts Improvement Act of 1982, Little Tucker Act judgments are now appealed to the Court of Appeals for the Federal Circuit rather than to the numbered circuits. Thus, interest on Little Tucker Act judgments is now governed by the rules applicable to the Court of Federal Claims and Federal Circuit. Zumerling v. Marsh, 783 F.2d 1032 (Fed. Cir. 1986). See also Thompson v. Kennickell, 797 F.2d 1015, 1026 n.7 (D.C. Cir. 1986), cert. denied, 480 U.S. 905.

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<sup>95</sup>One will find the occasional aberration. For example, Caola v. United States, 404 F. Supp. 1101 (D. Conn. 1975), was a “Little Tucker Act” case in which the court awarded interest under 28 U.S.C. § 2411(b). However, in a subsequent unpublished order (Civil No. H75-110, April 10, 1978), the court agreed to reconsider the propriety of the interest award. The judgments in that case were in fact paid without interest.

(3) Other situations

Prior to 1982, there could be no “other situations.” The explicit statutory language of 31 U.S.C. § 1304(b)(1)(A) precluded its application beyond the situations noted above. For example, actions under Title VII of the Civil Rights Act are not brought under the jurisdictional authority of 28 U.S.C. § 1346 but under separate jurisdictional provisions of the Civil Rights Act itself. Thus, subsection (b)(1)(A) was inapplicable by its terms, and interest was not payable on Title VII judgments regardless of appeals or filings. B-195809-O.M., March 30, 1981.

By the repeal of 28 U.S.C. § 2411(b) and the elimination of the reference to it in 31 U.S.C. § 1304(b)(1)(A), the Federal Courts Improvement Act at least changed the nature of the analysis. It is now necessary to address whether 31 U.S.C. § 1304 is a waiver of sovereign immunity. If it is, then it can be argued that subsection (b)(1)(A) applies across the board because the language that limited its application from 1956 to 1982 is no longer there. If it is not, then its application has not expanded from what it was before the 1982 amendments.

In *Thompson v. Kennickell*, 797 F.2d 1015 (D.C. Cir. 1986), cert. denied, 480 U.S. 905, the court considered this precise issue. Although the case involved interest on a Title VII judgment and its result has been presumably superseded by the Civil Rights Act of 1991, it remains important for its extensive discussion of postjudgment interest against the United States both before and after the Federal Courts Improvement Act. The plaintiff argued that, because of the repeal of 28 U.S.C. § 2411(b), postjudgment interest is now payable on all district court judgments because the alternative—the elimination of previously authorized interest on Federal Tort Claims Act and Little Tucker Act judgments—could not have been intended. The court disagreed. While declining to address the possible curtailment of previously available interest, the court found no new waiver of sovereign immunity in the 1982 legislation. Section 1304, noted the court, “refers to statutory provisions other than itself to determine when the United States must pay post-judgment interest.” *Id.* at 1021 n.1.

Similarly, *Arvin v. United States*, 742 F.2d 1301, 1305 (11th Cir. 1984), found no waiver of sovereign immunity in 31 U.S.C. § 1304.<sup>96</sup> In view of this, in conjunction with the previously cited line of cases holding that 28 U.S.C.

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<sup>96</sup>In contrast, the courts in *Andrulonis v. United States*, 26 F. 3d 1224 (2d Cir. 1994), and *MacDonald v. United States*, 825 F. Supp. 683 (M.D. Pa. 1993), did regard section 1304 as a waiver of sovereign immunity, but were applying it in the context of a Federal Tort Claims Act judgment.

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§ 1961 does not waive sovereign immunity, and the legislative history of the Federal Courts Improvement Act amendments as detailed in Kennickell, it would appear that the scope of 31 U.S.C. § 1304(b) has not expanded by virtue of the 1982 legislation.

A case we should note although its impact should be minimal is United States v. Wilson, 926 F.2d 725 (8th Cir. 1991). The United States brought a quiet title action as trustee on behalf of an Indian tribe against non-Indian defendants. The tribe prevailed on its claim, but the United States was ordered to compensate the defendants for improvements they had made while in possession of the disputed land. The district court also ordered the United States to pay postjudgment interest in accordance with 31 U.S.C. § 1304. The defendants appealed, seeking interest from the date of judgment to the date of payment. The appellate court affirmed the district court's judgment, noting that the order to pay postjudgment interest had not been appealed and therefore was the "law of the case."

## b. Implementation

### (1) Filing procedures

Interest begins to accrue from the date a "transcript of the judgment" is filed with GAO. 31 U.S.C. § 1304(b)(1)(A). The editors of this chapter confess that they have not the slightest idea what a "transcript" of a judgment is. Generally speaking, a simple photocopy of the judgment will suffice, and this in fact is what is most commonly filed. Also, an "abstract of judgment" (a form obtained from the court) will be accepted.

A judgment is considered "filed" on the earliest day it is received by any GAO employee. For example, judgments are occasionally submitted to one of GAO's regional offices and then forwarded to Washington. The date of receipt in the regional office is the date of filing.

The statute does not specify who is required to file the copy of the judgment with GAO, but it is clearly the plaintiff's responsibility. The first case to squarely address this issue was Lennon v. United States, E.D.N.Y., No. 76-C-396, mem. op. dated October 1, 1979. The plaintiff had argued that it should be the responsibility of the United States Attorney and that the U.S. Attorney's knowledge of the judgment should be "imputed" to GAO. The court disagreed and denied a motion for interest, concluding that (a) since postjudgment interest is for the plaintiff's benefit, the responsibility of taking the protective measure of filing should also rest with the plaintiff, and (b) construing the statute to place the burden on the government would render it meaningless. Subsequent published decisions

have removed all doubt, and have consistently refused to adopt a “constructive filing” approach. *Reminga v. United States*, 695 F.2d 1000 (6th Cir. 1982), cert. denied, 460 U.S. 1086; *Rooney v. United States*, 694 F.2d 582 (9th Cir. 1982); *Moyer v. United States*, 612 F. Supp. 239 (D. Nev. 1985).<sup>97</sup> As a practical matter, GAO will not disallow interest if the judgment is filed by someone other than the plaintiff, but it must nevertheless be viewed as the plaintiff’s primary responsibility.

In a class action or multiple-plaintiff suit, the statute does not require a filing by each individual plaintiff. A filing by any plaintiff or by class counsel will operate on behalf of the entire class and will satisfy the statutory requirement. See *Larionoff v. United States*, D.D.C., No. 626-73, mem. op., December 29, 1977, *aff’d per curiam*, D.C. Cir., No. 78-1010, July 17, 1978.

When filing a judgment with GAO for purposes of 31 U.S.C. § 1304(b), it is desirable for evidentiary purposes to use Certified Mail, Return Receipt Requested. A simple transmittal letter stating that the judgment is being filed in accordance with 31 U.S.C. § 1304(b) also will not hurt. Normally, correspondence received by GAO is machine-stamped with the date of receipt.

## (2) Unsuccessful government appeal

One of the essential prerequisites to interest under 31 U.S.C. § 1304(b)(1)(A) is an unsuccessful appeal by the government. If there is no appeal, there is no entitlement to interest even though there may have been substantial delay in settlement of the claim. In B-182346, February 4, 1975, interest was denied where a judgment was not appealed but was nevertheless not submitted for payment until a year after it was issued. However, in a 1978 decision, interest was paid where the plaintiff had filed the judgment with GAO and the government had filed a notice of appeal but failed to prosecute the appeal and, after considerable delay, consented to dismiss the appeal. Even though there was technically no “mandate of affirmance,” the filing of the notice of appeal effectively prevented prompt payment. Thus, the case was viewed as falling within the scope of section 1304(b) when construed in light of its purpose—to compensate a plaintiff for substantial delay in payment caused by the government’s action in filing an appeal. 58 Comp. Gen. 67 (1978). In 59 Comp. Gen. 259 (1980), this principle was applied, and interest held payable, in a case where the

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<sup>97</sup>Earlier cases in which the issue was not raised had also treated the filing as the plaintiff’s responsibility. *Varner*, 400 F.2d at 372; *Maryland ex rel. Meyer*, 349 F.2d at 694–95; *Culp*, 346 F.2d at 36. This is also supported by legislative history. *Hearings*, *supra* note 89, at 884.

appeal was unrelated to the merits of the underlying judgment, but rather was an appeal from the denial of a motion to reopen the judgment to direct the withholding of federal income tax. Thus, the appeal may be an appeal on a collateral issue, but there must be an appeal. Postjudgment motions will not suffice to trigger interest under section 1304(b). 62 Comp. Gen. 4 (1982).

In another case, the government filed a notice of appeal with the district court and subsequently changed its mind. Normally, the district court would automatically transmit the notice to the court of appeals. Before that could happen in this case, however, the area suffered an earthquake which disrupted the operation of both the courts and the Postal Service. This allowed the government to retrieve its notice of appeal before it was transmitted to the appellate court. Based on the reasoning of 62 Comp. Gen. 4 and its predecessors, interest was nevertheless allowed. B-239559, May 22, 1990 (internal memorandum).

A 1994 case found the requirement for a government appeal satisfied where the United States did not appeal directly but joined, and filed a brief in support of, an appeal filed by a co-defendant. Andrulonis v. United States, 26 F.3d 1224 (2d Cir. 1994).

### (3) Interest accrual period

Interest under section 1304(b) runs “through the day before the date of the mandate of affirmance.” Prior to the 1982 recodification of Title 31, the statute read simply “to the date of the mandate of affirmance.” An early draft of the recodification changed this to “through the date of the mandate of affirmance.” GAO pointed out that, under the interest formula traditionally used by the accounting officers, the computation included the beginning date or the ending date, but not both. E.g., B-60952, July 2, 1953. Thus, the draft would have made a substantive change in the law, which is beyond the scope of a recodification. To avoid this and also remove the perceived ambiguity of the pre-1982 language, the recodifiers settled upon the “through the day before” language.

Where the appeal is dismissed or withdrawn and there is no mandate of affirmance, interest will cease to accrue on the earlier of the date of dismissal or the date the Justice Department certifies to GAO that no further review will be sought. See 59 Comp. Gen. 259, 261 (1980); 58 Comp. Gen. 67, 73 (1978).

Multiple appeals in the same case may produce more than one mandate of affirmance. This was the case in *Transco Leasing Corp. v. United States*, 992 F.2d 552 (5th Cir. 1993), in which the appellate court had affirmed the judgment on the first appeal but remanded it for recomputation of damages. The second appeal dealt with interest. The court held that the mandate issuing from the first appeal was the operative mandate for interest accrual purposes. *Id.* at 556.

#### (4) Types of appellate action

When the appellate chain in a given case produces more than one judgment, questions may arise as to which judgment should be regarded as the final judgment for interest purposes. Under current law, the question is relevant primarily for fixing the reference point for determining the proper rate of interest under 28 U.S.C. § 1961(a). Although several of the cases noted below dealt with obsolete versions of the statutes and therefore the interest accrual dates are no longer applicable, the cases are nevertheless useful by analogy in answering this question and generally in illustrating how 31 U.S.C. § 1304(b) is applied.

Obviously, a judgment which is affirmed on appeal “qualifies” under section 1304(b). In one case, the original district court judgment was reversed by the court of appeals. The Supreme Court reversed and remanded, and the court of appeals then affirmed the original judgment but reduced the amount. Interest was held payable (under the old 28 U.S.C. § 2411(b)) on the reduced amount from the date of the original district court judgment. B-97757, October 24, 1950. In another case, the original judgment, affirmed on appeal, was lost from the court records during the appeal process, and a new judgment was signed with a later date. The first judgment was regarded as the final judgment for interest purposes. B-185455-O.M., February 9, 1976.

Under one judicial formulation, the original judgment is the operative judgment for interest purposes when it is “substantially affirmed” on appeal, including appellate modification or remand for recalculation of damages. *Transco Leasing Corp. v. United States*, cited above. Of course, if the recalculation produces a higher award, interest is applied to the original amount as that is the amount which was substantially affirmed. E.g., *Desart v. United States*, 947 F.2d 871 (9th Cir. 1991).

Where a judgment is reversed and remanded, opinions are split. What appears to be the majority view is that portions of the judgment unaffected

by the reversal should be treated as though affirmed (whether expressly affirmed or not), and that the original judgment remains the operative judgment for interest purposes, adjusted of course to reflect the results of the appeal. E.g., Brooks v. United States, 757 F.2d 734 (5th Cir. 1985); Perkins v. Standard Oil Co., 487 F.2d 672 (9th Cir. 1973). See also Mascuilli v. United States, 383 F. Supp. 50 (E.D. Pa. 1974), aff'd mem., 519 F.2d 1398 (3d Cir. 1975). Cases reaching a contrary result are Merchants Matrix Cut Syndicate, Inc. v. United States, 284 F.2d 456 (7th Cir. 1960), and Mosby v. United States, 33 Ct. Cl. 58 (1897).

Where a judgment is vacated rather than reversed, precedent is sparse. In United States v. Brooks, 176 F.2d 482 (4th Cir. 1949), a judgment was vacated and remanded with instructions to consider reducing damages. GAO concluded that the vacated judgment was not the final judgment for interest purposes. B-62830, August 31, 1950. In accord is the Mascuilli case cited above, in which the court refused to award interest on a Public Vessels Act judgment from the date of a prior judgment which had been vacated on appeal. After the vacated judgment, there were 3 subsequent judgments, 2 of which were reversed and remanded. The court awarded interest from the date of the first of the “reversed and remanded” judgments on the theory that this was the judgment “that finally settled the issue of liability between the parties.” 383 F. Supp. at 53. See also Turner v. Japan Lines, Ltd., 702 F.2d 752, 754 (9th Cir. 1983).

#### (5) Interest calculation

When interest is payable under 31 U.S.C. § 1304(b), the rate is the 52-week Treasury bill rate determined under 28 U.S.C. § 1961(a) with reference to the original judgment. It is applied on a fixed-rate basis and does not vary with respect to a particular judgment. Once the rate is determined for a given judgment, it remains the same throughout the accrual period. Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 838–39 (1990); Campbell v. United States, 809 F.2d 563, 573 (9th Cir. 1987).

Prior to the Federal Courts Improvement Act of 1982, postjudgment interest under section 1304(b) was simple interest. However, 28 U.S.C. § 1961(b) now provides for annual compounding. The plain terms of the statutes would seem to indicate that compounding against the United States can apply only where the period between the date of filing with GAO and the mandate of affirmance exceeds one year, and this is how GAO in fact applies the statute. E.g., B-219881.4, October 20, 1987 (non-decision letter).

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(6) Addressing interest in the judgment

When the conditions of 31 U.S.C. § 1304(b) are satisfied, interest attaches by force and operation of law. There is no need for the judgment to expressly award interest. *Campbell v. United States*, 809 F.2d 563, 570 (9th Cir. 1987); *United States v. Maryland ex rel. Meyer*, 349 F.2d 693, 696 (D.C. Cir. 1965). If it is desired to say something about interest in the judgment, GAO's recommendation is that general language be used, such as "interest as provided by law," which GAO reads as meaning "as and to the extent provided by law," in which event interest is added or not added, depending on compliance with the statute. Courts have viewed the phrase "as provided by law" similarly. See *Black v. United States*, 444 F.2d 1215, 1217 (10th Cir. 1971); *Higginson v. Schoeneman*, 190 F.2d 32, 34 (D.C. Cir. 1951); *Economy Plumbing & Heating Co. v. United States*, 470 F.2d 585, 593-94 (Ct. Cl. 1972).

Occasionally, a court will include an interest provision in a judgment which is clearly inconsistent with 31 U.S.C. § 1304(b) or is otherwise improper. As the many cases cited throughout this section make clear, the inclusion of a contrary interest provision is grounds for the government to seek modification of the judgment. Thus, if a judgment is submitted for payment which contains an award of interest in non-discretionary language inconsistent with existing law, it will be returned with a recommendation to seek appropriate modification. Experience has shown that frequently plaintiff's counsel, upon being confronted with the governing statutes and case law, will agree not to pursue the interest claim, in which event there is no need to go back to court. In other cases, it may be necessary to seek judicial modification by motion or appeal. If attempts at judicial modification are unsuccessful and the Justice Department then determines that judicial modification is not possible, the award will be certified for payment in accordance with its terms. See 38 Comp. Gen. 12 (1958); B-183576, August 26, 1977. In no event, however, can interest be paid for any period beyond the date the judgment itself was paid. See B-200460, November 18, 1980. Payment in these cases merely recognizes the duty to comply with a court order which can no longer be modified through established channels, and is not given precedential value.

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7. Government Interest Rates

Throughout this discussion, we have noted several different interest rates the government uses in different contexts. At one time, the congressional approach was to simply set a rate by statute. A few of these survive, examples being 4 percent under the Suits in Admiralty and Public Vessels

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Acts and 6 percent under 31 U.S.C. § 3728, the judgment offset statute. In more recent times, however, presumably in recognition of the volatility of the economy, the trend has been toward the use of fluctuating rates, with the governing statute merely prescribing the process for determining the rate. Our purpose here is simply to present some summary information on the fluctuating rates most commonly encountered in the “claims and judgments” area.

a. 52-Week Treasury Bill Rate

(1) Uses

- Postjudgment interest both in favor of and (where authorized) against the United States. 28 U.S.C. §§ 1961, 2516(b).
- Interest as part of just compensation under the Declaration of Taking Act. 40 U.S.C. § 258e-1.
- Costs and attorney’s fees under 28 U.S.C. § 2412 affirmed on appeal. Id. § 2412(f).

(2) How established

A new rate is set with each auction of 52-week Treasury bills, currently once a month. The rate is based on the equivalent coupon issue yield of the average accepted auction price. The equivalent coupon issue yield is sometimes called the “investment rate,” to be distinguished from the “discount rate” which is usually somewhat lower.

(3) How applied

The applicable rate is the rate for the last auction held immediately prior to the date of the judgment. See B-231615.2, March 1, 1990 (non-decision letter). The rate is a fixed rate and does not vary with respect to a particular judgment.

(4) How to find it

The Administrative Office of the United States Courts is responsible for notifying all federal judges. 28 U.S.C. § 1961(a). The Bureau of the Public Debt issues a press release for each auction. The Justice Department publishes listings periodically in the United States Attorneys’ Bulletin.

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b. Renegotiation Act Rate

(1) Uses

- Payment of claims and judgments under the Contract Disputes Act. 41 U.S.C. § 611.
- “Interest penalties” under the Prompt Payment Act. 31 U.S.C. § 3902(a).
- Inverse condemnation judgments in the Court of Federal Claims.

(2) How established

The Secretary of the Treasury sets a new rate each 6 months, effective January 1 and July 1 of each year, based on current private commercial interest rates for new 5-year loans. Pub. L. No. 92-41, § 2(a), 85 Stat. 97 (1971). (The provision is no longer carried in the United States Code.)

(3) How applied

For Contract Disputes Act payments, the rate is applied on a variable basis unless otherwise specified in the judgment or award. Starting with the rate for the period which includes the date on which interest begins to run (Pub. L. No. 92-41, § 2(a)(1)), the rate then rises or falls for each 6 months or fraction thereof within the accrual period. The Court of Federal Claims uses the same approach in inverse condemnation cases. For Prompt Payment Act procedures, see OMB Circular No. A-125.

(4) How to find it

The Treasury Department publishes each new rate in the Federal Register. 31 U.S.C. § 3902(a).

c. Internal Revenue Code Rate

(1) Uses

- Several uses under the Internal Revenue Code: interest on underpayments and overpayments, suits for wrongful levy, etc. E.g., 26 U.S.C. §§ 6343, 6601, 6602, 6611, 7426; 28 U.S.C. §§ 1961(c)(1), 2411.
- Certain money judgments by the Court of International Trade. 28 U.S.C. § 2644.
- Delay compensation in patent infringement judgments in the Court of Federal Claims.
- Back pay under the Back Pay Act (overpayment rate). 5 U.S.C. § 5596(b)(2)(B).

(2) How established

Prior to 1987, the Secretary of the Treasury established a single rate for both overpayments (what the IRS pays you) and underpayments (what you pay the IRS). Since January 1, 1987, there have been separate overpayment and underpayment rates. The underpayment rate is one percentage point higher (surprise). The rate is determined quarterly. See 26 U.S.C. § 6621 for details.

(3) How applied

For Internal Revenue Code uses, the relevant Code provision specifies whether to use the overpayment or underpayment rate. For interest payments pursuant to 28 U.S.C. §§ 1961(c)(1) or 2411 or any provision of the Internal Revenue Code, interest is compounded daily. 26 U.S.C. § 6622.

(4) How to find it

The Internal Revenue Service announces each new rate in the form of a Revenue Ruling, usually accompanied by a news release. The Revenue Rulings are eventually incorporated into the hardbound “Cumulative Bulletin” volumes. Current Revenue Rulings can also be found in various commercial tax services.

d. Treasury Tax and Loan  
Account Rate

(1) Uses

- Interest on debts owed to the United States unless otherwise specified in an applicable statute, statutory regulation, or contract. 31 U.S.C. §§ 3717(a)(1), (g).
- Prejudgment interest on litigated debt claims.
- Evaluation of cost-effectiveness of cash discounts. Treasury Financial Manual, Vol. I, § 6-8040.30.

(2) How established

This rate is also called the “current value of funds” rate. Treasury sets the rate by October 31 of each year, effective the following January 1, based on an average of the current value of funds to Treasury. Treasury may change the rate for a calendar quarter if the average rate at the close of the prior calendar quarter is at least 2 percentage points more or less than the existing published rate. 31 U.S.C. § 3717(a).

(3) How applied

For purposes of 31 U.S.C. § 3717, the rate is applied as a fixed rate. Once the rate is established for a given debt, it stays the same for the duration of the indebtedness unless the debtor has defaulted on a repayment agreement. 4 C.F.R. § 102.13(c). On litigated debt claims (i.e., claims by the United States, as opposed to claims against the United States), the Justice Department will normally compute interest at the “tax and loan account” rate up to the date of judgment.

(4) How to find it

Treasury publishes the annual rate and any quarterly changes in two formats—a notice in the Federal Register and a Treasury Financial Manual Bulletin.

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