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Debt Collection

"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).

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."[1] (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.

[1]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.[2] 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."[3] 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

[2]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.

[3]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).

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.[4]

B. Legal Foundation

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

[4]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.[5] 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

[5]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).

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.

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).

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[6].

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.[7] 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.

[6]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).

[7]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.[8] 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.[9] 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

[8]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).

[9]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).

collection legislation, the Debt Collection Act of 1982, Pub. L. No. 97–365, 96 Stat. 1749.[10] 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.[11]

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.[12] 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.

[10]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).

[11]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).

[12]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.

- The Debt Collection Process (December 1987).[13]

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).[14] 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

[13]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.

[14]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.

duties. 15 U.S.C. § 1692a(6)(C).[15] 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.[16] While GAO has not addressed the point formally, this strikes the editors as sound guidance for all federal debt collectors.

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.[17] 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).

[15]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).

[16]United States Attorneys' Manual, title 11, § 11-10-1.120 (April 1986).

[17]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.[18]

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

[18]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."[19]

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

[19]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.

§ 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.[20]

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

[20]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

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.

(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).

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.[21] 31 U.S.C. § 3716(b). See 4 C.F.R. § 102.3(b) for additional requirements.

[21]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.

- 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).

C. Elements of a Debt Collection Program: Agency Collection Action

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(l) (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

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.

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

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).

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.[22] 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."

[22]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).

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.

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.

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.

(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.

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).[23]

[23]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 x .09 = $90,000, the amount of interest for a full year.
- Step 2: 90,000 divided by 365 = $246.58, the amount of interest accruing each day.
- Step 3: 246.58 x 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).

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

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).[24] 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

[24]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

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).[25]

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

[25]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[26]—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[27]) 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).

[26]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.

[27]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.

- 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.

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.

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

Administration[28] and the Department of Education.[29] GAO supported extending legislation of this type to all government agencies.[30]

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."

[28]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).

[29]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.

[30]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.

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

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.[31]

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.

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.

[31]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).

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[32] 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).[33]

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

[32]See Managing Government Credit: A Supplement to the Treasury Financial Manual at 4–15.

[33]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.

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.

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.[34] The statute says merely "excluding interest." The Standards added penalties and administrative costs to reflect the new authorities of the

[34]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

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.[35]

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,

[35]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).

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).[36] 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

[36]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.

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.[37]

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

[37]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.

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.[38] 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.[39]

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.

[38]Only the Justice Department may compromise claims involving fraud. 4 C.F.R. § 101.3(a).

[39]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.

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.

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[40] 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

[40]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.

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.

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.[41]

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

[41]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.

§ 104.1(b). If there is room for reasonable disagreement, Justice should be consulted.[42]

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[43]—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

[42]Letter dated March 11, 1969, from Assistant Attorney General William D. Ruckelshaus to Agency for International Development (copy on file with editors).

[43]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.[44]

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.

[44]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.

(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,

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

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.

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).

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

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."[45]

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

[45]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.[46]

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

[46]As this example shows, resort to the original source statute is often helpful in understanding a recodified statute.

exceeding $1,500,[47] 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.[48]
- 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,

[47]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).

[48]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"

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.

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

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.

(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.[49] 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.

[49]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.

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

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

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,

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.

D. Elements of a Debt Collection Program: Referrals to GAO and Justice Department

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.[50] 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.[51] 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.[52]

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,

[50]U.S. General Accounting Office, Annual Report 1979 at 37 (1980).

[51]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.

[52]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.[53]

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.

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.

[53]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

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

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.[54] 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,

[54]GAO report, Justice Department: Impediments Faced in Litigating and Collecting Debts Owed the Government, GAO/GGD-87-7BR (October 1986), at 23.

§§ 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.[55] 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."[56]

[55]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.

[56]Compare 31 U.S.C. § 3715 (1988) with 31 U.S.C. § 195 (1976).

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.

E. Government's Right of Setoff

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,[57] the Comptroller General,[58] and the Attorney General.[59]

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.[60] 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.[61]

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

[57]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); Gratiot v. United States, 40 U.S. (15 Pet.) 336 (1841).

[58]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.

[59]E.g., 37 Op. Att'y Gen. 215, 216 (1933).

[60]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); Bonnafon v. United States, 14 Ct. Cl. 484 (1878).

[61]E.g., 14 Comp. Gen. 849 (1935); 1 Comp. Gen. 605 (1922); B-143573, July 5, 1963.

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.

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

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

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.

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

"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.[62]

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.

[62]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.[63] 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 [64]

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

[63]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).

[64]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.

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

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.[65] 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

[65]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).

"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

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.[66] 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.[67] 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.

[66]17 Comp. Gen. 923 (1938); 14 Comp. Gen. 430 (1934).

[67]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.

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 reprocurement 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.[68] 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:

[68]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, pretermitting the question of whether the Debt Collection Act applies to

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

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

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,

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).[69] 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).

[69]The debtor's right to offset against allowed government claims is found in 11 U.S.C. § 106(b).

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 reprocurement 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.

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.[70]

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).[71]

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

[70]Most of these cases are the result of the farm crisis of the 1980s.

[71]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.

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

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 reprocurement 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).[72] 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).[73]

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

[72]The De Laurentiis court noted that courts have reached a different result under Chapter 13. 963 F.2d at 1275.

[73]This is clearly the majority view although it is not unanimous. De Laurentiis, 963 F.2d at 1276.

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.[74] 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).

[74]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.

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

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).[75] 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.[76]

(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.

[75]Executive Order No. 11609, § 8 (1971); Executive Order No. 12107, § 2-101 (1978).

[76]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,[77] 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?

[77]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).

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.[78] 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:

[78]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[79] and the Administrative Conference of the United States[80] 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.[81]

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.

[79]Debt Collection: Billions Are Owed While Collection and Accounting Problems Are Unresolved, GAO/AFMD-86-39 (May 1986), at 48–51.

[80]ACUS Recommendation No. 87-9, 1 C.F.R. § 305.87-9.

[81]37 U.S.C. § 1007(c), discussed later in the text.

(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

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.[82]

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.

[82]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.

(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).

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,"[83] 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(l).

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:

[83]64 Comp. Gen. 142, 146 (1984); 5 C.F.R. § 550.1102(b).

"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).[84] 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,

[84]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.[85] 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.[86]

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.

[85]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).

[86]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.

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.[87] The rationale of the postal employee

[87]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).

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.

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

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,[88] and the program made permanent in 1991.[89] 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

[88]Family Support Act of 1988, Pub. L. No. 100-485, § 701(a), 102 Stat. 2343, 2425 (1988).

[89]Emergency Unemployment Compensation Act of 1991, Pub. L. No. 102-164, § 401, 105 Stat. 1049, 1061 (1991).

to Exceed Costs, GAO/GGD-91-64 (May 1991).[90] 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.[91] 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.[92]

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

[90]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).

[91]OMB, Management of the United States Government - Fiscal Year 1990, page 3-12.

[92]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., Expoimpe 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 depositary 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).

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.[93]

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

[93]A tax lien under 26 U.S.C. § 6321 survives as long as the underlying tax liability is enforceable. Id. § 6322.

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).

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.

F. Statutes of Limitations

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. Tilleraas, 709 F.2d 1088 (6th Cir. 1983); United States v. Frisk, 675 F.2d 1079 (9th Cir. 1982); United States v. Bellard, 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

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.

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

not preclude subsequent administrative setoff.[94] The Department of Justice and another district court concluded that offset was barred.[95]

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."[96]

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

[94]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.").

[95]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).

[96]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,[97] there is no logical reason why the 10-year period, like the due process procedures of section 3716,[98] 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[99] 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);[100] 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).[101] 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).

[97]E.g., 64 Comp. Gen. 142 (1984); 5 C.F.R. § 550.1102(b).

[98]64 Comp. Gen. 142 (1984).

[99]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.

[100]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.

[101]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).

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.[102] 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

[102]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.

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).

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

Wisconsin probate court, but did 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.

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

discussing or applying the rule, see 52 Comp. Gen. 964, 967 (1973); 32 Comp. Gen. 332 (1953); A-31814, May 29, 1930.[103]

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.

[103]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.

I. Right of Redemption and Release of Lien

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.

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

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

because the applicant was the owner of the property rather than a senior lienholder.[104]

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

[104]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.

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,[105] 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

[105]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.[106]
- 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.

[106]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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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[1] 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.[2] 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.[3] Congress may attach conditions to the waiver.[4] And, what Congress gives, Congress can take away. Although it happens infrequently, Congress can at any time withdraw the consent to be sued.[5]

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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[1]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.

[2]E.g., United States v. Sherwood, 312 U.S. 584 (1941); United States v. Mescalero Apache Tribe, 518 F.2d 1309 (Ct. Cl. 1975).

[3]United States v. Mitchell, 445 U.S. 535, 538 (1980).

[4]Sherwood, 312 U.S. at 587; Federal Housing Administration v. Burr, 309 U.S. 242, 251 (1940).

[5]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

other sources, and no centralized mechanism exists for the collection of data on judgments which do not pass through GAO.

B. Source of Funds

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).

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.[6] 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,[7] which it was then estimated would cover 98–99 percent of all judgments against the United States.[8]

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

[6]Occasionally called the Automatic Payment of Judgments Act, 31 U.S.C. § 1304 is more commonly referred to as the "Judgment Fund."

[7]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.

[8]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.

§ 1304.[9] 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

[9]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.[10] 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.

[10]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.

(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[11] 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

[11]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).

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).[12]

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

[12]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.

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."[13] 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

[13]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.)[14]

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

[14]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).

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.

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

"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

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

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.[15] 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

[15]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.

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).[16]

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.

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

[16]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."[17] 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."[18] 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."[19]

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:

[17]Hearings on Supplemental Appropriation Bill, 1957, Before Subcomm. of the House Comm. on Appropriations, 84th Cong., 2d Sess., pt. 2, at 883 (1956).

[18]S. Rep. No. 733, 87th Cong., 1st Sess. 3 (1961); H.R. Rep. No. 428, 87th Cong., 1st Sess. 3 (1961).

[19]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.[20] 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

[20]Our source for much of this discussion is B-211389, July 23, 1984.

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,[21] 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:

[21]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.

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.[22] 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

[22]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

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.[23] 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

[23]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.[24]

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.

[24]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.[25]

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[26] 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

[25]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).

[26]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);[27] 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

[27]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);[28] 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 . . . .").[29] 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.

[28]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.

[29]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).

"[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.[30] 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.

[30]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.

(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[31] 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

[31]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,[32] although some courts limit it to natural persons.[33] Several pre-Nordic Village cases made awards under section 362(h) against federal agencies, and a few included punitive damages.[34]

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.[35] If it did not, monetary awards were not authorized.[36] 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.

[32]Budget Service Co. v. Better Homes of Virginia, 804 F.2d 289 (4th Cir. 1986); In re NWFX, 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).

[33]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).

[34]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.

[35]In re Pinkstaff, 974 F.2d 113 (9th Cir. 1992); Matter of Flynn, 169 B.R. 1007 (Bankr. S.D. Ga. 1994).

[36]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 discharage injunction.[37] Other cases applied Nordic Village and declined to make monetary awards against the federal government.[38] 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).

[37]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).

[38]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.

l. 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

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:

- Judgments against the Civil Service Retirement Fund. 52 Comp. Gen. 175 (1972); B-115505, December 21, 1972.[39]
- 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

[39]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.

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;

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]henever 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.[40]

[40]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).

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.[41] 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

[41]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.

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).

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.[42] 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.

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.[43]

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

[42]See, e.g., B-63622/B-90307-O.M., August 15, 1956, with respect to district court judgments.

[43]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.

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

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).

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).

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.

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.

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.

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).[45] 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.[46]

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.

[45]5 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.

[46]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.

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.

E. Deductions

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.[47] 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

[47]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.[48] 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

[48]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.

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.[49] 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.

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

[49]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."[50]

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).[51] Any deductions made will be specified on the Certificate of

[50]The same principles apply to judgments obtained by the Equal Employment Opportunity Commission in enforcement actions. 65 Comp. Gen. 800 (1986).

[51]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.

F. Costs and Attorney's Fees

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.[52]

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

[52]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).

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.[53]

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

[53]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.[54]

(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,[55] 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

[54]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).

[55]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.

§§ 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).[56] 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);[57] 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).

[56]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.

[57]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.

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).[58]

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.[59] 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

[58]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).

[59]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.[60]

As with judgments generally, judicial fee awards under statutes in this category are payable from the judgment appropriation if final and not

[60]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,"[61] 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).[62]

[61]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.

[62]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.

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.[63] 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

[63]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.[64]

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).[65]

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

[64]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).

[65]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).

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.[66]

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,[67] 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.[68]

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

[66]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.

[67]Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

[68]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.[69]

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).

[69]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).

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.[70] 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

[70]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

(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.

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.

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);[71] 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."

[71]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.

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).

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.

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."[72] 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

[72]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.[73]

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.

[73]Memorandum of Disapproval of H.R. 5479, 20 Weekly Comp. Pres. Doc. 1814 (November 8, 1984).

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.[74] When the Back Pay Act was amended in 1987 to include an interest provision, some courts found the requisite waiver of

[74]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.[75]

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).[76]

[75]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).

[76]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).

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).

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

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).[77] 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

[77]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).

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.)

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.[78]

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

[78]"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.

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.[79]

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.

[79]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).

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);[80] 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

[80]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.

5. Judgments of the Court of Federal Claims

The Court of Claims was established in 1855[81] and empowered to render judgments against the United States in 1863.[82] 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.[83] In 1992, the Claims Court was renamed the Court of Federal Claims.[84] 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.

[81]Act of February 24, 1855, ch. 122, 10 Stat. 612.

[82]Act of March 3, 1863, ch. 92, § 3, 12 Stat. 765.

[83]Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

[84]Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, Title IX, 106 Stat. 4506, 4516.

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.[85] For nontax cases not subject to some other specific interest provision:[86]

- If the United States does not appeal from a Court of Federal Claims judgment, there is no interest.[87]
- 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.[88] 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.

[85]"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).

[86]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).

[87]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.

[88]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).

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,[89] 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

[89]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).[90] 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.[91] 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); DeLucca v. United States, 670 F.2d 843 (9th Cir. 1982); United States v. Culp, 346 F.2d 35 (5th Cir. 1965).[92]

[90]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).

[91]S. Rep. No. 64, 95th Cong., 1st Sess. 206 (1977); H.R. Rep. No. 68, 95th Cong., 1st Sess. 184 (1977).

[92]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.[93]

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).[94] 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

[93]A few others are 44 Comp. Gen. 421 (1965); B-180210, February 27, 1974; B-160583, January 11, 1967; B-144182, October 19, 1960.

[94]Also: Hull by 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.[95]

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.

[95]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.[96] In view of this, in conjunction with the previously cited line of cases holding that 28 U.S.C.

[96]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.

§ 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).[97] 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

[97]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).

(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.

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

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.

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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