

USAM (superseded)



United States Attorneys' Manual

Civil Division

Title 4

USAM (superseded)

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UNITED STATES ATTORNEYS' MANUAL
TITLE 4—CIVIL DIVISION

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MARCH 30, 1984

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FORM FOR RECORDING INSERTION
OF MANUAL TRANSMITTALS
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UNITED STATES ATTORNEYS' MANUAL TRANSMITTAL

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INSTRUCTIONS TO ADMINISTRATIVE PERSONNEL

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HIGHLIGHTS

The enclosed transmittal consists of additions and revisions to chapters USAM 4-1.000 through 4-15.000 of Title 4.

Sections containing new material are listed below.

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4-1.000 ASSIGNMENT OF RESPONSIBILITIES

4-1.100 RESPONSIBILITIES OF THE ATTORNEY GENERAL RE CIVIL LITIGATION

The Office of the Attorney General was established by the Judiciary Act of 1789. Act of September 24, 1789, 1 Stat. 73. Section 35 of that Act vested the Attorney General with plenary authority to "prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned" and to give advice and opinions upon questions of law when requested by the President or the heads of various Departments.

The Attorney General's statutory authority to conduct litigation to which the United States, its departments or agencies is a party was expanded and more fully developed by Congress in 1870 in the same legislation that provided for the creation of the Department of Justice. Act of June 22, 1870, 16 Stat. 162. That Act, Section 3, provided that certain specified "solicitors" performing legal functions within the various agencies "shall be transferred from the Departments with which they are now associated to the Department of Justice, . . . and shall exercise their functions under the supervision and control of the head of the Department of Justice." The Act, Section 5, also authorized the Attorney General to designate any officer of the Department of Justice, including him or herself, to conduct and argue any case in which the government is interested, in any court of the United States, whenever he/she deems it necessary for the interest of the United States. In addition, the Act, Section 16, gave the Attorney General supervisory authority over the conduct and proceedings of the various attorneys for the United States in the respective judicial districts, "and also of all other attorneys and counsellors employed in any cases or business in which the United States may be concerned." Finally, the Act forbade the Secretaries of the Executive Departments to employ other attorneys or outside counsel at government expense,

but shall call upon the department of justice . . . ,
and no counsel or attorney fees shall hereafter be
allowed to any person . . . , besides the respective
district attorneys . . . , for services in such
capacity to the United States, . . . unless hereafter
authorized by law, and then only on the certificate of
the Attorney-General that such services could not be
performed by the Attorney-General, . . . or the
officers of the department of justice.

(§17) 16 Stat. 162 (1870).

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The initial motivation for this legislation was the desire to centralize the conduct and supervision of all litigation in which the government was involved, as well as to eliminate the need for highly-paid outside counsel when government-trained attorneys could perform the same function. Other objectives of the legislation that were advanced in the congressional debates were to ensure the presentation of uniform positions with respect to the laws of the United States ("a unity of decision, a unity of jurisprudence . . . in the executive law of the United States"), and to provide the Attorney General with authority over lower court proceedings involving the United States, so that litigation would be better handled on appeal, and before the Supreme Court. See Cong. Globe, 41st Cong., 2d Sess., Pt. IV, 3035-39, 3065-66 (1870). See generally Bell, "The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, Or One Among Many?", 46 Fordham L. Rev. 1049 (1978); Key, "The Legal Work of the Federal Government," 25 Va. L. Rev. 165 (1938).

The Supreme Court considered this legislation in United States v. San Jacinto Tin Co., 125 U.S. 273 (1888) and concluded that the Attorney General was "undoubtedly the officer who has charge of the institution and conduct of the pleas of the United States, and of the litigation which is necessary to establish the rights of the government." Id. at 279. Emphasizing the centralizing function of the Department of Justice and the Attorney General, the Court reasoned that the power to control government litigation must lie somewhere--that there must exist some officer with authority to decide when the United States should sue, and to oversee the execution of such a decision--and that the Attorney General was designated such appropriate officer, in the Judiciary Act of 1789, by reference to the historical practice in England. Id. at 278-80. In 1921, the Court added that the Attorney General's authority to conduct such litigation could be affected only by clear legislative direction to the contrary. See Kern River Co. v. United States, 257 U.S. 147, 155 (1921). See also 21 Op. A.G. 195 (1895) (the Secretary of the Navy was not warranted in employing counsel in a foreign country to institute suit in behalf of the United States, but should have referred the matter to the Department of Justice, "which is charged with the duty of determining when the United States shall sue, for what it shall sue, and that such suits shall be brought in appropriate cases," id. at 198.) Lower courts reached similar conclusions with respect to subsequent recodifications of the 1870 legislation. See, e.g., Perry v. United States, 28 Ct. Cl. 483, 491 (1893); Sutherland v. International Insurance Co., 43 F.2d 969, 970-971 (2d Cir.), cert. denied, 282 U.S. 980 (1930).^{1/}

^{1/} In 1933, as part of a crusade to consolidate as much of the government's business as necessary to increase operating efficiency,

(FOOTNOTE CONTINUED ON NEXT PAGE)

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The present statutory authority (including but not limited to 28 U.S.C. §§516, 519 and 5 U.S.C. §3106) vesting plenary litigating authority with the Attorney General parallels that found in the 1870 Act. These provisions provide in pertinent part as follows:

A. 28 U.S.C. §516 provides:

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

B. 28 U.S.C. §519 provides:

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States

1/ (CONTINUED FROM PREVIOUS PAGE) President Roosevelt issued an Executive Order to supplement the existing legislative mandate of centralized litigation authority. Executive Order No. 6166, which requires all claims by or against the United States to be litigated by, and under the supervision of, the Department of Justice, is still in effect. The Order provides in pertinent part:

The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States and of defending claims and demands against the Government, and of supervising the work of United States Attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.

As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer is transferred to the Department of Justice.

See also 38 Ops. A.G. 124, 125.

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attorneys, and special attorneys appointed under Section 543 of this title in the discharge of their respective duties.

C. 5 U.S.C. §3106 provides:

Except as otherwise authorized by law, the head of an Executive department * * * may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested * * *, but shall refer the matter to the Department of Justice.

As is evident from these provisions and their predecessors tracing back to the 1870 Act as interpreted by the Supreme Court, the Attorney General's control over litigation is plenary. Therefore, except as otherwise authorized by law, only attorneys of the Department of Justice under the supervision of the Attorney General may represent the United States or its agencies or officers in litigation. Counsel for other government agencies may not be heard in opposition. See Confiscation Cases, 7 Wall. 454, 458; and see The Gray Jacket, 5 Wall. 370, 371 (1866). Nor, in the absence of statutes to the contrary, may any suit be brought on behalf of the United States except by the Attorney General or an attorney under his/her superintendence. Sutherland v. International Ins. Co., 43 F.2d 969, 970-971 (2d Cir. 1930), cert. denied, 282 U.S. 890; FTC v. Guignon, 390 F.2d 323 (8th Cir. 1968); ICC v. Southern Railway Co., 543 F.2d 534 (5th Cir. 1976), aff'd en banc, 551 F.2d 95 (1977). The completeness of the Attorney General's authority is further illustrated by the fact that once a matter has been referred to the Department of Justice, the referring agency ceases to have control over it. United States v. Sandstrom, 22 F. Supp. 190, 191 (N.D. Okla.).

See USAM 4-2.100, *infra*, for additional authorities with respect to the Attorney General's inherent authority to compromise and close civil cases. See also the Civil Division's Compendium on Litigation Authority, dated October, 1982 and distributed to all U.S. Attorneys in December, 1982. Presidential Reorganization Plan No. 2 of 1950, 64 Stat. 1261, effected a Hoover Commission type reorganization whereby all functions of other employees and units in the Department, including Presidential appointees, were placed in the Attorney General to be redelegated by him/her. See 28 U.S.C. §509, which is of continuing effectiveness, parallels the language of Reorganization Plan No. 2 and provides that "All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General * * *."

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4-1.200 RESPONSIBILITIES OF THE ASSISTANT ATTORNEY GENERAL FOR THE CIVIL DIVISION

The Attorney General has delegated to the Assistant Attorney General for the Civil Division authority for the conduct, handling, or supervision of the matters catalogued at 28 C.F.R. §0.45. In addition, the Assistant Attorney General for the Civil Division is delegated responsibility for the Alien property matters enumerated at 28 C.F.R. §0.47 and the international judicial assistance matters enumerated at 28 C.F.R. §0.49. Another regulation, 28 C.F.R. §0.46, provides that the Assistant Attorney General for the Civil Division "shall, in addition to litigation coming within the scope of §0.45, direct all other civil litigation including claims by or against the United States, its agencies or officers, in domestic or foreign courts, special proceedings, and similar civil matters not otherwise assigned * * *" (emphasis added). Under 28 C.F.R. §0.171(a), the Assistant Attorney General for the Civil Division is

responsible for conducting, handling, or supervising such litigation or other actions as may be appropriate to accomplish the satisfaction, collection, or recovery, as the case may be, of judgments, fines, penalties, and forfeitures (including bailbond forfeitures) arising in connection with cases under . . .

the jurisdiction of the Assistant Attorney General for the Civil Division.

4-1.210 Responsibilities of Organizational Units in the Civil Division

The majority of civil litigation in certain categories is handled in the field by U.S. Attorneys under the ultimate and overall responsibility of the Assistant Attorney General for the Civil Division. The litigation not handled by U.S. Attorneys is assigned primarily to components within the Civil Division, subject to the supervision and direction of the Assistant Attorney General. These components are the Appellate Staff, Torts Branch, the Commercial Litigation Branch, the Federal Programs Branch, Office of Immigration Litigation and Office of Consumer Litigation, each of which is directed by a Deputy Assistant Attorney General and a management team of senior supervisory attorneys. The specific matters assigned to each component, insofar as they may be significant to the U.S. Attorneys, are summarized in USAM 4-1.211 through 4-1.222, infra.

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The compromise and closing authority exercised by the Assistant Attorney General and subordinate Civil Division officials is described in USAM 4-2.100 and 4-2.120, supra.

4-1.211 Torts Branch

The Torts Branch represents the United States, its agencies, and persons sued in their individual capacities in suits sounding in tort, when government representation is appropriate. This includes not only suits under the Federal Tort Claims Act, but also litigation under the Suits in Admiralty and Public Vessels Act, as well as suits seeking money damages against individual government employees. See 28 C.F.R. §0.45.

4-1.212 Commercial Litigation Branch

The Commercial Litigation Branch is responsible for litigation arising principally from a broad variety of governmental undertakings of a "commercial" nature. The work of this Branch encompasses contract actions, whether brought by or against the government; most affirmative monetary and property claims (including foreclosures, reclamation claims, and actions to recover damages for conversion of government property), arising from government loan, grant, subsidy, and insurance programs; all non-tax bankruptcy litigation; veterans' re-employment rights litigation; and a broad variety of other monetary litigation, including patent or copyright infringement suits. The Branch is also responsible for the government's affirmative civil claims arising from fraud and bribery and other official misconduct, as well as for the collection of civil fines and penalties in the areas assigned to the Civil Division, and for the enforcement of the Division's monetary judgments. Commercial Litigation Branch attorneys handle all litigation in the U.S. Claims Court, the United States Court of Appeals for the Federal Circuit, and the United States Court of International Trade. See 28 C.F.R. §0.45.

The Office of Foreign Litigation is part of the Commercial Litigation Branch.

4-1.213 Federal Programs Branch

Much of the remaining work of the Civil Division that does not fall within the areas assigned to the Torts and Commercial Litigation Branches is handled by the Federal Programs Branch. This includes litigation

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against Cabinet officers, agencies, or litigation aimed at remedying statutory or regulatory violations, personnel actions (including Title VII), litigation relating to the disposition of government records, customs-related cases, and suits involving copyright registerability. See 28 C.F.R. §0.45.

4-1.214 Appellate Staff

In addition to the three Branches, the Civil Division also has a separate Appellate Staff. That staff, which reports directly to one of the Deputy Assistant Attorneys General, handles appellate cases and matters coming from all components of the Civil Division.

4-1.215 Regulatory and Legislative Staff

The Civil Division also has a separate Regulatory and Legislative Staff, which reports directly to one of the Deputy Assistant Attorneys General. That staff is responsible for coordinating suggestions for regulatory and legislative changes within the Civil Division and for dealing with such outside entities as the Office of Management and Budget (OMB) and Office of Legislative Affairs (OLA).

4-1.216 Office of Consumer Litigation

All functions and responsibilities formerly assigned to the Consumer Affairs Section of the Antitrust Division, including responsibility for criminal cases (48 F.R. 9522 (1983)), are now the responsibility of the Civil Division's Office of Consumer Litigation which reports directly to one of the Deputy Assistant Attorneys General.

This new Office will continue the work of the former Section in coordinating district court litigation referred to the Department by the Federal Trade Commission, the Food and Drug Administration, National Highway Traffic Safety Administration, and the Consumer Product Safety Commission. Pertinent statutes include the Federal Food, Drug and Cosmetic Act, Federal Trade Commission Act, the Disclosure of Automobile Information Act, the odometer requirements section of the Motor Vehicle Information and Costs Savings Act, the Consumer Credit Protection Act, and the Consumer Product Safety Act. See 28 C.F.R. §0.45(j).

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4-1.217 Office of Immigration Litigation

Because of the transfer from the Criminal Division (48 F.R. 9522 (1983)) of certain litigation arising under the Immigration and Nationality Act, the Civil Division has established an Office of Immigration Litigation which reports directly to one of the Deputy Assistant Attorneys General.

This new Office has assumed the normal Departmental responsibility for virtually all civil litigation arising under the immigration laws, including court of appeals petitions for review of final deportation orders. The Criminal Division, which previously had responsibility for both civil and criminal immigration matters, will retain jurisdiction over criminal cases, denaturalization cases concerning persons believed to have been involved in Nazi war crimes, civil INS forfeiture actions and remission petitions, and certain other civil matters bearing on criminal law enforcement. See 28 C.F.R. § 0.45(k).

With the transfer of functions, additional resources will be devoted to immigration cases. In keeping with normal Civil Division practice, the Office reviews each new case to determine whether it will be delegated to the appropriate U.S. Attorney, with or without supervision, or personally handled by Office attorneys.

4-1.218 Reporting of Decisions

The outcome of all civil proceedings arising under the immigration and nationality laws should be reported to the Office of Immigration Litigation. In all cases in which the decision is adverse to the government, copies of the pleadings and other documents, except insofar as previously supplied to the Office, should be promptly submitted along with an appeals recommendation. See USAM Title 2, Appeals.

U.S. Attorneys should promptly advise the appropriate District Directors of the Immigration and Naturalization Service of all decisions and interlocutory orders in litigation to which the Service is a party. Such notification should be particularly prompt in the case of an adverse decision or interlocutory rulings in which an appeal, rehearing en banc or certiorari might be taken or sought. Timely notification will enable the General Counsel to formulate the Service's recommendation to the Department with respect to any further action which might be taken in the litigation.

Similarly, prompt notification should be given to appropriate officials of the Departments of Labor and State of decisions or rulings in immigration and nationality cases whenever either Department is a party to the action.

4-1.219 Revocation of Naturalization

No suit shall be instituted by the U.S. Attorney to revoke naturalization under 8 U.S.C. §1451 without prior consultation with the Office of Immigration Litigation. Notwithstanding that under 8 U.S.C. §1421(a) jurisdiction also lies in various courts of the states, all such actions shall be filed in the federal district courts. There is no objection to the payment of the expenses of filing in state courts certified copies of judgments in accordance with 8 U.S.C. §1451(h).

4-1.220 Service of Process

In all cases involving the revocation of naturalization, service may be had upon absentees from the United States or the judicial district in which the defendant last had his/her residence by publication or by any other method permitted by the laws of the state or place where the suit is brought. If the state statute permits service upon absentees by registered mail only, no publication is necessary. If service can only be effected by publication, publication must be in strict compliance with the state statute. A consent and waiver shall not be deemed to dispense with the requirements of service, unless the consent was obtained subsequent to the institution of the action and may be treated as a confession of judgment. It is not necessary to obtain prior approval of the expense of publication where it is done pursuant to court order, either special or standing.

4-1.221 Surrender of Certificate of Naturalization

8 U.S.C. §1451(h) provides that a person holding a certificate of naturalization or citizenship which has been canceled under the provisions of that section shall, upon proper notice, surrender the certificate to the Attorney General. Since the U.S. Attorney is the logical representative of the Attorney General in the United States for receiving the certificate, all complaints for revocation of naturalization filed pursuant to Section 1451(h) should contain a demand that the certificate of naturalization be surrendered to the U.S. Attorney, and all proposed orders to be signed by the court in such cases should provide for surrender of the certificate of naturalization to the U.S. Attorney.

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Upon receipt of the certificate, the U.S. Attorney should forward it to the District Director, Immigration and Naturalization Service, who has jurisdiction over the area in which the certificate is surrendered.

Proceedings under 8 U.S.C §1451(d) generally involve persons who are outside of the United States. Accordingly, in those cases, the present practice will be continued, i.e., the United States consular officer in the area, as the representative of the Attorney General, will demand surrender of the certificate.

4-1.222 Special Litigation Counsel

From time to time, the Assistant Attorney General appoints one or more senior Civil Division attorneys to serve as Special Litigation Counsel. They are assigned important, complex, or delicate cases which are of special interest to the Assistant Attorney General and assume full responsibility for the matters which they litigate. U.S. Attorney's Offices are requested to cooperate with them fully in cases falling within their districts.

4-1.300 DIVISION OF RESPONSIBILITY BETWEEN THE CIVIL DIVISION AND THE UNITED STATES ATTORNEYS FOR THE HANDLING OF CIVIL LITIGATION

The responsibility of the Attorney General for civil litigation which has been delegated to the Assistant Attorney General for the Civil Division (USAM 4-1.200, supra), has in a great many instances been redelegated to the U.S. Attorneys (28 C.F.R. §0.168). Civil Division Directive No. 145-81, published in the Appendix to Subpart Y immediately following 28 C.F.R. §0.172, presently details this redelegation of authority to U.S. Attorneys. Where authority for direct handling has been redelegated to the U.S. Attorneys, they are authorized to take all necessary steps to protect the interests of the United States, without prior approval of the Assistant Attorney General, Civil Division, or his/her representative (see Directive 145-81 §§4(a) and 4(b)), except as may otherwise be specified in a redelegation letter. Compromise or closing of such redelegated cases is handled as set forth in USAM 4-2.000, infra.

A great number of matters not specifically delegated to the U.S. Attorney will, in fact, be handled in the field by the U.S. Attorney's office under the supervision of the Assistant Attorney General of the Civil Division. Liaison between the U.S. Attorneys and the Civil Division on such cases is discussed at USAM 4-1.513, infra.

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If an agency makes an emergency referral or request as to a nondelegated case to the U.S. Attorney's Office, and the U.S. Attorney is satisfied that the requested action is proper but time does not permit contact with the Civil Division, protective action should be taken by the U.S. Attorney. See USAM 4-1.514, *infra*. The Civil Division and U.S. Attorneys bear correlative responsibilities as to nondelegated cases, and the mutual exchange of information and cooperation on the part of both is essential to the protection of the government's best interests.

4-1.310 Delegation of Authority to United States Attorneys for Handling Civil Division Cases

4-1.311 Direct Reference Cases

Pursuant to Section 4(a) of Civil Division Directive No. 145-81 (published in the Appendix to Subpart Y immediately following 28 C.F.R. §0.172), the following civil actions under the jurisdiction of the Assistant Attorney General, Civil Division, may be referred by the agency concerned directly to the U.S. Attorney for handling in trial courts, and U.S. Attorneys have been delegated the authority to take all necessary steps to protect the interests of the United States, without prior approval of the Assistant Attorney General, Civil Division, or his/her representatives. Agencies may, however, if special handling is desired, refer these cases to the Civil Division. Also, when constitutional questions or other significant issues arise in the course of such litigation, or when an appeal is taken by any party, the Civil Division should be consulted.

A. Money claims by the United States (except penalties and forfeitures) where the gross amount of the original claim does not exceed \$100,000.

B. Single family dwelling house foreclosures arising out of loans made or insured by the Department of Housing and Urban Development, the Veterans Administration and the Farmers Home Administration.

C. Suits to enjoin violations of, and to collect penalties under the Agricultural Adjustment Act of 1938, 7 U.S.C. §1376; Packers and Stockyards Act, 7 U.S.C. §§203, 207(g), 213, 215, 216, 222, and 228a; Perishable Agricultural Commodities Act, 1930, 7 U.S.C. §§499c(a) and 499h(d); Egg Products Inspection Act, 21 U.S.C. §1031, *et seq.*; Potato Research and Promotion Act, 7 U.S.C. §2611, *et seq.*; Cotton

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Research and Promotion Act of 1966, 7 U.S.C. §2101, et seq.; Federal Meat Inspection Act, 21 U.S.C. §601, et seq.; and Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. §601, et seq.

D. Suits by social security beneficiaries under the Social Security Act, 42 U.S.C. §402, et seq.

E. Social security disability suits under 42 U.S.C. §423, et seq.

F. Black lung beneficiary suits under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §921, et seq.

G. Suits by Medicare beneficiaries under 42 U.S.C. §1395ff.

H. Garnishment actions authorized by 42 U.S.C. §659 for child support or alimony payments.

I. Judicial review of actions of the Secretary of Agriculture under the food stamp program, pursuant to the provisions of 7 U.S.C. §2022 involving retail stores.

J. Cases referred by the Department of Labor solely for the collection of penalties or for injunctive action under the Fair Labor Standards Act of 1938 and the Occupational Safety and Health Act of 1970.

K. Cases referred by the Department of Labor solely for collection of civil penalties under the Farm Labor Contractor Registration Act of 1963, 7 U.S.C. §2048(b).

L. Cases referred by the Interstate Commerce Commission to enforce orders of the Interstate Commerce Commission or to enjoin or suspend such orders pursuant to 28 U.S.C. §1336.

M. Cases referred by the United States Postal Service for injunctive relief under the non-mailable matter laws, 39 U.S.C. §3001 et seq.

4-1.312 Delegated Cases

Pursuant to Section 4(b) Civil Division Directive No. 145-81 (published in the Appendix to Subpart Y immediately following 28 C.F.R. §0.172), branch and office directors and unit chiefs of the Civil Division may delegate to U.S. Attorneys any non-monetary claims or suits, and monetary claims or suits involving amounts up to \$150,000, where the circumstances warrant such delegations. Upon the recommendation of branch

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and office directors and unit chiefs, the Assistant Attorney General, Civil Division, may delegate to U.S. Attorneys any claims or suits involving amounts up to \$750,000, where the circumstances warrant such delegations. All delegations pursuant to Section 4(b) must be in writing, and no U.S. Attorney has authority to compromise or close any such delegated case or claim except as is specified in the required written delegation or in Section 1(c) of the Directive (discussed below at USAM 4-2.120, infra).

The limitations of Section 1(d) of the Directive (discussed below at USAM 4-2.140, infra) also remain applicable in any case or claim delegated under Section 4(b).

4-1.313 Retained Cases

Pursuant to Section 4(c) of the Civil Division Directive No. 145-81, (published in the Appendix to Subpart Y immediately following 28 C.F.R. §0.172), and regardless of the amount in controversy, the following matters will normally not be referred to the U.S. Attorneys for handling but will be retained and handled by the appropriate branch within the Civil Division:

- A. Civil actions in the United States Claims Courts;
- B. Cases within the jurisdiction of the Commercial Litigation Branch involving patents, trademarks, copyrights, etc.;
- C. Cases before the United States Court of International Trade;
- D. Any case involving bribery, conflict of interest, breach of fiduciary duty, breach of employment contract, or exploitation of public office, or any False Claims Act case where the amount of single damages, plus forfeitures, exceeds \$100,000;
- E. Any case involving vessel-caused pollution in navigable waters;
- F. Cases on appeal, except as determined by the Director of the Appellate Staff;
- G. Any case involving litigation in a foreign court;
- H. Criminal proceedings arising under statutes enforced by the Food and Drug Administration, the Consumer Product Safety Commission the Federal Trade Commission, and the National Highway Traffic Safety

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Administration (relating to odometer tampering), except as determined by the Director of the Office of Consumer Litigation;

I. Non-monetary civil cases, including injunction suits, declaratory judgment actions, and applications for inspection warrants, and cases seeking civil penalties, arising under statutes enforced by the Food and Drug Administration, the Consumer Product Safety Commission, the Federal Trade Commission, and the National Highway Traffic Safety Administration (relating to odometer tampering), except as determined by the Director of the Office of Consumer Litigation.

4-1.320 Miscellaneous United States Attorney Responsibilities

4-1.321 Assistance Concerning Deposited Funds

In connection with the distribution of funds deposited in court, the U.S. Attorney may be asked to assist the court as amicus curiae. In the case of petitions for the return of funds of deceased or deserting sailors pursuant to 46 U.S.C. §§626-628, copies of the petition should be served on the U.S. Attorney, the Attorney General, and the U.S. Shipping Commissioner. In such cases the U.S. Attorney should appear as attorney for the United States as another claimant to the funds. Information for use in asserting the government's claim will be provided by the U.S. Shipping Commissioner attached to the Coast Guard at the locale.

4-1.322 Assistance to Civil Division Attorneys

From time to time, Civil Division attorneys involved in the handling of litigation, including litigation before specialized courts, may need to perform their duties at places within various judicial districts. Such attorneys are asked to apprise the U.S. Attorney in advance of their visit to his/her district. U.S. Attorneys are requested to aid such attorneys in obtaining office space, stenographic facilities, and related assistance on request, when this is feasible. Civil Division Attorneys have been instructed to give as much advance notice as possible when requesting such assistance from U.S. Attorneys.

4-1.323 Briefs Amicus Curiae

An action in a state or federal court, to which neither the United States nor one of its officers or agencies is a party, may involve an

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issue affecting the interests of the United States. When the interpretation or application of an Act of Congress or a departmental regulation or the Attorney General's authority to conduct litigation is involved, the Department may wish to file a brief amicus curiae, to inform the court of the government's position on the issue or issues involved which affect the government's interests. Cf. FTC v. Guignon, 390 F.2d 323 (8th Cir.); Faubus v. United States, 254 F.2d 797 (8th Cir.), cert. denied; 358 U.S. 829. U.S. Attorneys are requested to notify the Department promptly whenever they learn of such cases.

4-1.324 Constitutional Questions: Certification to the Attorney General

In any action, suit, or proceeding in a court of the United States, to which the United States or an agency or employee thereof is not a party, the court is required to certify to the Attorney General when the constitutionality of an Act of Congress is called into question, and the court must permit the United States to intervene to submit evidence or argument on the issue of constitutionality. See 28 U.S.C. §2403. The Department should be promptly advised of any case in which the U.S. Attorney learns that the pleadings challenge the constitutionality of an Act of Congress, a regulation or any other federal action.

The Civil Division will authorize intervention in appropriate cases within its jurisdiction. If intervention is required at the appellate level, the Civil Division will advise whether or not the Solicitor General has authorized intervention.

4-1.325 Disbarment Proceedings

U.S. Attorneys should give serious consideration to the institution of disbarment proceedings in the federal courts in all appropriate cases, including those in which a practitioner in the federal courts has (1) been convicted of a criminal offense in any court, (2) been disbarred by a state court, or (3) employed unethical tactics in federal litigation which justify disbarment. See Theard v. United States, 354 U.S. 278 (1957). See also USAM 1-10.300.

4-1.326 Judicial Assistance to Foreign Tribunals

28 U.S.C. §1782 authorizes the United States district court for the district in which a person resides or is found to order such person to give his/her testimony or to produce documents or other things for use in

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a proceeding in a foreign or international tribunal. Requests for international judicial assistance are executed either on the basis of treaty obligations assumed by the United States (see, e.g., the Convention Between the United States and other Governments on the Taking of Evidence Abroad in Civil and Commercial Matters, TIAS 7444, 23 UST 2555) or on the basis of international comity and courtesy. Requests for international judicial assistance from foreign tribunals in civil matters will be referred to U.S. Attorneys by the Office of Foreign Litigation, Civil Division. 28 C.F.R. §0.49. U.S. Attorneys should not attempt to execute foreign evidence requests in civil cases without obtaining the approval of the Office of Foreign Litigation. For instructions and guidance in executing such requests, see Civil Division Practice Manual, §§3-12.18, 3-12.19, 3-12.20.

In addition to processing evidence requests, the Office of Foreign Litigation also performs the functions of the "Central Authority" under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Cases, TIAS 6638. U.S. Attorneys' offices will only infrequently become involved in service requests, which are referred to the United States Marshals Service for execution.

4-1.327 Protection of the Government's Fiscal and Property Interests

U.S. Attorneys are requested to report any infringement of, or dereliction with respect to, the property or other interest of the United States warranting the institution of civil proceedings, when such matters have not been referred for handling. Most non-fraud claims normally should be processed for collection by the administrative agency involved, pursuant to the Federal Claims Collection Act, 31 U.S.C. §3711, and implementing joint regulations, 4 C.F.R. §§101.1-105.7. See USAM 4-6.600, infra. Please note that the Federal Claims Collection Act has been amended by the Debt Collection Act of 1982, 31 U.S.C. §§3711-3720 (1983). Amendments to the joint regulations also have been issued, 4 C.F.R., §101-105 (49 Fed. Reg. 8889, March 9, 1984).

Non-fraud claims should normally be reported to the affected administrative agency. Fraud claims are excluded from the coverage of the joint regulations implementing the Federal Claims Collection Act. See 31 U.S.C. §3711(c)(1). U.S. Attorneys should be particularly alert to report to the Civil Division all claims involving fraud against the government, bribery, and the conversion of government property.

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4-1.328 Settlement of Tort Claims Asserted Against the Department of Justice Administratively

In cases involving serious personal injuries, death, or major property damage, as to which a claim may possibly be asserted against the Department of Justice under the Federal Tort Claims Act, the Federal Bureau of Investigation should be notified as soon as possible after the accident and asked to undertake an investigation. The U.S. Attorney should advise the Federal Bureau of Investigation as to the nature and extent of the investigation required in the circumstances.

The applicable procedures to be followed in reporting such accidents and in processing administrative claims are set forth in USAM 4-11.610 and 4-11.620, infra.

4-1.400 RESPONSIBILITIES OF CLIENT AGENCIES

4-1.410 Compromise and Dismissal or Closing

Authority over the disposition of a civil matter, once it is referred to the Department of Justice, resides in the Attorney General or his/her delegate, and the client agency may not control its handling or disposition. See United States v. Sandstrom, 22 F.Supp 190, 191 (N.D. Okla.); FTC v. Guignon, 390 F.2d 323 (8th Cir.); §5, E.O. 6166, June 10, 1933, quoted in USAM 4-1.100. However, in rare cases a statute may provide continuing settlement or other authority in the referring agency. Cf. 28 U.S.C. §2348. Absent such a statute, the agency's recommendation (which may be couched in terms such as "we have accepted the offer of settlement", for example) should not be construed as an acceptance but rather only as recommendation. Such powers as other officials of the government had theretofore with respect to litigation were withdrawn by E.O. 6166, June 10, 1933, leaving the Attorney General with complete authority. See Duncan v. United States, 39 F. Supp 962, 964 (W.D. Ky.); Aviation Corp. v. United States, 46 F. Supp 490, 494 (Ct. Cl.), cert. denied, 318 U.S. 771 (1943); 38 Ops. A.G. 124, 125. Where the authority of the Attorney General has been redelegated to Attorneys, and the client agency objects to the compromise, dismissal, or closing, then the case may not be compromised, dismissed, or closed without the consent of the Assistant Attorney General of the Civil Division.

4-1.420 Court Appearances

No suit may be brought on behalf of the government, absent an unusual express statutory authorization, except by the Attorney General or an

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attorney under his/her superintendence. See Sutherland v. International Ins. Co. of N.Y., 43 F.2d 969, 70-971 (2d Cir.), cert. denied, 282 U.S. 890 (1930); §5, E.O. 6166, June 10, 1933, quoted in USAM 4-1.100, supra. Accordingly, in matters assigned to U.S. Attorneys for handling, the responsibility is that of the U.S. Attorney, and that responsibility may not be delegated to agency counsel. If such counsel wish to assist, such assistance should be under the complete supervision of the U.S. Attorney. The direction and control of the litigation must remain with the U.S. Attorney. The fact that agency counsel makes an error in judgment in handling in connection with such assistance will not relieve the U.S. Attorney of responsibility for the error.

The same principles apply when the government (through government corporations or the Maritime Administration) enjoys the benefit of insurance. Underwriters may nominate trial counsel. However, such trial attorneys are only "of counsel" to the U.S. Attorney. They do not control or direct the conduct of cases, which must remain with the U.S. Attorney. The U.S. Attorney or one of his/her assistants should sign all pleadings, and should monitor the course of such litigation carefully.

4-1.430 Litigation Reports

Agency personnel are generally in the best position to know the facts involved in a case arising in connection with the activities of their agency. Agency counsel should have a great familiarity with agency practices and the statutes and regulations of the agency which may be relevant to a particular case. Obviously, records of the agency relevant to the case can best be assembled and certifications obtained by agency counsel. Thus, it has been the practice of the Civil Division to seek litigation reports from the agencies involved, and agency recommendations as to the affirmative relief desired in litigation or the defenses which agency counsel feel should be asserted. Because of their greater emotional detachment and greater experience in the day-to-day litigation of civil cases, Justice Department attorneys are generally in a better position to evaluate the legal and factual merit of a particular case, in terms of the likelihood of success in litigation, than are agency counsel.

Agency counsel have been instructed to furnish copies of litigation reports directly to U.S. Attorneys at the same time that they are forwarded to the Department. In suits brought against the government, U.S. Attorneys are encouraged to make early contact with appropriate agency counsel following service of process, with suggestions concerning content of the litigation report. Excessive delays by government agencies

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in furnishing litigation reports should be brought to the attention of the Assistant Attorney General of the Civil Division. See Civil Division Practice Manual, §§3-11.1, et seq.

4-1.440 Pleadings and Interrogatories

Agency counsel may offer to prepare suggested pleadings and papers for civil cases. It is appropriate to receive such suggestions, or even to request agency preparation of suggested pleadings and papers, if this will facilitate the disposition of litigation rather than delay it. However, agency counsel are not required to provide this service. Pleadings and papers prepared by agency counsel should be critically examined, and rewritten as necessary, to assert the proper litigating position for the government and conform with proper practice and local rules.

Agency representatives generally should prepare the answers to interrogatories and sign such answers. See Fed. R. Civ. P. 33. Agency answers to interrogatories, if any, should not be submitted to the court pro forma, but should be critically examined, and recast if necessary, to accurately reflect the facts and the appropriate litigating position which should be taken under the circumstances. See Civil Division Practice Manual §§3-3.1, et seq.

4-1.450 Referrals

Agency referrals for litigation should be accompanied by sufficient information, whether in the form of a litigation report or otherwise, to permit an intelligent evaluation of the factual and legal merits of the case. Agency counsel should be alert to apprise the Department of anticipated defenses, their strengths, and the best rebuttal thereto. Non-fraud referrals for the recovery of money should comply with the joint regulations (see 4 C.F.R. §101.1-105.7) implementing the Federal Claims Collection Act, 31 U.S.C. §§951-953. See the topic "Civil Money Judgments" in the Civil Division Practice Manual.

Referrals for litigation should be submitted promptly, and well within the time limit for bringing a timely suit thereon. See 4 C.F.R. §105.1; and USAM 4-5.210, infra. Persistent failure of agencies to refer cases to U.S. Attorneys for action until the statute of limitations is about to expire should be brought to the attention of the Assistant Attorney General of the Civil Division.

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4-1.460 Other

Agencies desiring the prosecution or defense of cases on their behalf should be prepared to furnish the names and addresses of relevant witnesses. Files, records, and exhibits relevant to a litigation should be preserved by the agency. See 4 C.F.R. §105.5, as to claims for money. Normally, the "master account" for a monetary claim is maintained by the client agency. However, agencies should not accept and credit payments on cases in the hands of the Department without the prior approval or instructions of the Department or the U.S. Attorney, as the case may be.

An appropriate sworn statement of account should be furnished by the agency on request, which, in the case of judicial foreclosures, may include advances made by the agency recoverable in litigation. In the event the case is one in which the U.S. Attorney can obtain an updated statement of account, and he/she has been apprised of all advances which have been made, the agency should make known its practice as to the application of payments, i.e., whether payments are first credited to principal and then interest, or if the more common "U.S. Rule" is observed, to permit ready calculation of balances due. See USAM 4-4.810, infra.

4-1.500 LIAISON OF UNITED STATES ATTORNEYS WITH CIVIL DIVISION AND CLIENT AGENCIES

4-1.510 Liaison of United States Attorneys with Civil Division

The degree of liaison which should be maintained with the Civil Division varies substantially from one type of case to another. An overwhelming majority in number of civil cases, claims, and judgments have been delegated to the U.S. Attorneys for handling, though the Assistant Attorney General for the Civil Division remains responsible for their effective handling. Little liaison is required as to these cases. However, the Civil Division remains ready to advise and assist on these cases upon request.

Significant matters of policy, important questions of first impression, serious differences of views with client agencies, and adverse court decisions, should be brought to the attention of the Civil Division, regardless of the amounts involved, the method of referral, or whether the case is delegated or nondelegated. The Civil Division will communicate with client agencies to effect changes, clarification or consistency in policies, endeavor to make available the latest precedents which may not

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otherwise be available, attempt to assure reasonable uniformity of positions and procedures among U.S. Attorneys, advise whether particular cases should be used to test new propositions, and make available expertise developed in certain specialties over the years.

4-1.511 Cases Delegated to U.S. Attorneys

Although the Civil Division does not monitor the conduct of delegated cases and is not to be advised of litigation events in such cases, the Civil Division stands ready to advise and assist on these cases. Communications regarding delegated cases should be directed to the section or unit in the Civil Division bearing responsibility for the particular type of case.

Copies of pleadings and other communications on delegated cases are not to be furnished the Civil Division routinely, except that the Torts Section should always be advised of the date and method of disposition of suits under the Federal Tort Claims Act, and be furnished copies of the order, opinion, or stipulation which resulted in the disposition of the suit, and that copies of all final orders, favorable or adverse, should be forwarded to the General Litigation Section on cases which have been delegated by that section. The Division generally has no individual files on these cases. Therefore, inquiries directed to the Division on these cases should be accompanied with sufficient background, copies of pleadings, and briefs, to permit an informed appraisal of the nature and posture of the case and the problem. Disposition of delegated cases, like the disposition of nondelegated cases, must be accurately reported on the Department's machine statistical reporting system. In particular, credit should be taken for all money and property collected for the government. The Department has been criticized for failure to take credit for all recoveries.

If the U.S. Attorney has had a previous communication on a particular case or on a general problem, the file numbers and initials or names appearing in the upper corner of the Civil Division's last communication should be used when writing the Department again.

Advice (in writing) of final, appealable adverse court rulings and orders, and a recommendation as to appeal, with supporting documents and explanation, must be promptly furnished to the appropriate Branch Directors. See USAM 2-1.000 et. seq.

Cases in which an interlocutory appeal may be desirable, pursuant to 28 U.S.C. §1292, should be discussed with the Appellate Staff

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telephonically, in order that the proper certification can be obtained on a timely basis if it appears that strong consideration will likely be given to such an appeal. Final appealable orders whose review will be by the United States District Court, as in bankruptcy cases, or by trial de novo in a state tribunal, should also be reported to the Branch (other than the Appellate Staff) having cognizance of that type of litigation, preferably by telephone. Prompt determinations as to appeal will be quickly communicated to the U.S. Attorneys in these short-deadline cases.

All adverse decisions in Social Security Act review cases (including remand orders) should be forwarded to both the Social Security Administration (with a copy to Department of Health and Human Services Regional Attorney) and the Civil Division at the following addresses within two business days of their receipt by the U.S. Attorneys:

Office of the General Counsel
Social Security Division
Department of Health and Human Services
P.O. Box 1040
Baltimore, Maryland 21203

Appellate Staff
Civil Division
Department of Justice
P.O. Box 978
Washington, D.C. 20044

Unless HHS is notified, within 30 days of HHS's receipt of an order awarding attorneys' fees in a Social Security Act case, that the award exceeds statutory limits, or is excessive under the circumstances, the Social Security Administration will proceed to pay the fee award.

If there exists any conflict between these instructions and the terms of an initial letter delegating the case from the Civil Division to the U.S. Attorney, the procedures outlined in the delegation letter should be followed.

4-1.512 Cases Re-delegated by Civil Division

The liaison guidelines of USAM 4-1.510, supra, are also applicable to cases delegated to the U.S. Attorneys pursuant to Directive No. 145-81, 28 C.F.R. Appendix to Subpart Y (1982). Pleadings and other communications need not be furnished the Civil Division in such cases.

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In cases referred by the Civil Division to the U.S. Attorney for handling on a supervised basis, the U.S. Attorney is to advise the Civil Division of the ultimate disposition of the case and furnish a copy of any compromise or closing memoranda. If such a case is transferred to another judicial district, a copy of the memo transferring papers on the case should be furnished the Civil Division. Client agencies have complained of delay in judicial foreclosure cases, resulting in monetary loss before foreclosure and sale are completed. In foreclosure actions, U.S. Attorneys must promptly advise the Civil Division in writing of the dates of:

- A. The filing of the complaint;
- B. Entry of an order placing the client agency in possession as mortgagee in possession or appointing a receiver, as the case may be;
- C. The entry of a judgment or foreclosure decree;
- D. Sale of the mortgaged property; and
- E. The delivery of the marshal's deed to the client agency or other successful purchaser.

If there exists any conflict between these instructions and the terms of an initial letter referring the case from the Civil Division to the U.S. Attorney, the procedures outlined in the referral letter should be followed.

4-1.513 Cases not Delegated to United States Attorneys

Attorneys of the Civil Division will assist in obtaining data and witnesses, the discussion of legal and factual problems, briefing, and trial, to the extent that time will permit.

The Civil Division must be kept currently advised concerning developments in non-delegated cases. All complaints served upon the U.S. Attorneys in non-delegated cases must be promptly dispatched to the Civil Division. Unless the Civil Division requests a more formal or expedited means of communication because of the sensitive nature of a case or for other reasons, it is suggested that most other developments can be reported currently by mailing of a copy of communications, pleadings, briefs, orders, etc., without covering memo but with the Department of Justice file number and the name of the Civil Division branch written on an upper corner thereof. In the case of an offer in compromise or other

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written communication which should have expedited attention, a red slip reading "SPECIAL" or "IMPORTANT AND URGENT" can be stapled to the communication. If it is important that the communication bypass the Department of Justice mail room, the envelope should be clearly marked "PERSONAL--DO NOT OPEN IN MAIL ROOM."

If the complaint against the government fails to identify the government agency or agencies involved, this information should be obtained telephonically from plaintiff's counsel and relayed to the Civil Division. Care should be taken to obtain an appropriate extension of time, if a pleading date cannot be met.

In complex, major, or sensitive cases, such as medical malpractice litigation and aviation crash litigation, pre-trial agreements under Rule 16, Federal Rules of Civil Procedure, proposed stipulations of fact or findings and conclusions, and judgments, should be reviewed by the Civil Division before submission. In any event, care should be taken with respect to stipulations and pre-trial agreements that foreclose the government's assertion of an available position.

The defenses of statute of limitations in medical malpractice cases, and discretionary function and negligent misrepresentation in FTCA suits, should be discussed with the Torts Branch before they are asserted.

In Freedom of Information Act and Privacy suits, the Federal Programs Branch of the Civil Division (FTS 633-3178) must be advised of all developments. Copies of all papers filed must be promptly sent to the branch. Special contact should be made with the Assistant Branch Director in charge of the area at the above-reference telephone number if in camera inspection is demanded or considered in FOIA suits. See Civil Division Practice Manual §3-7.6. If a stay of an order couched in terms of an injunction is refused in either a FOIA or Privacy Act suit, pending a determination as to appeal, both the Branch and the Appellate Sections (FTS 633-3311) should be notified at once. For handling of such suits generally, see Civil Division Practice Manual §3-7.7.

In admiralty cases, correspondence with the Torts Branch or its field offices should include in the caption the name of the vessel involved.

4-1.514 Emergency Referrals in Nondelegated Cases

Client agencies are counselled to process cases sufficiently in advance of deadlines to avoid the necessity of "emergency referrals." Nonetheless there will be cases in which "emergency referrals" are

required from time to time, as well as injunction actions against government officials and other proceedings, in which emergency action or representation is necessary. Frequently these "emergencies" are cleared telephonically with the Civil Division by the client agency. U.S. Attorneys are authorized to take appropriate action to protect the government's interests in an emergency, without prior authorization from the Civil Division. Copies of papers filed or received in connection with such emergency action, and an explanation, should be forwarded as soon as possible. Representation should not be afforded a government officer, members of the armed forces, or employee, sued personally for money damages for acts done within the outer perimeter of his official duties, without authorization from the Civil Division. The employee must submit a written request to his/her agency for representation by the Department, and the agency must submit a written request to the Department.

4-1.520 Liaison of United States Attorneys with Client Agencies

Whenever a case involves an agency of the United States as a client of the U.S. Attorneys office it shall be the responsibility of the Division or U.S. Attorney to ensure that the client agencies are kept fully informed of case progress, developments and decisions.

The following steps are recommended as a means toward that end:

A. Promptly upon receipt of a complaint against an agency, the Division or U.S. Attorney's office, as appropriate, should mail a notification letter to the General Counsel of the agency or to his/her designee. (Where time does not permit, e.g., where a motion for a TRO has been filed, it may be necessary to notify the agency by telephone.) At the same time, or as soon thereafter as possible, the agency should be provided with the name(s) and telephone number(s) of the Justice Department attorney(s) to whom the case has been assigned. The agency should be requested, in turn, to provide the Justice Department attorney(s) with the name, direct mailing address, and telephone number of the agency attorney to whom communications with respect to the case should be directed.

B. With respect to affirmative cases, receipt of a referral from a client agency should be acknowledged promptly and names of attorneys exchanged as in Paragraph 1.

C. Unless reasons of economy indicate otherwise, copies of all significant documents filed in court in both defensive and affirmative cases should be sent, immediately upon receipt or service, to the client

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agency. If a client agency specifically requests, copies of all documents filed should be sent. (Service of a summons and complaint on the client agency may normally be assumed, and copies of exhibits forwarded by the client agency need not be reproduced and returned.)

D. In nondelegated cases, the U.S. Attorney should also send copies of all documents filed in court to the Division responsible for the case.

E. An agency should be notified in advance of any significant hearings, oral arguments, depositions, or other proceedings.

F. Appropriate steps should be taken to consult adequately with agencies in advance regarding positions we intend to urge in court. Under no circumstances should a case be compromised or settled without advance consultation with a client agency, unless the agency has clearly indicated that some other procedure would be acceptable.

4-1.521 Nondelegated Cases

Generally, the Civil Division will have primary responsibility to keep the client agency informed concerning developments in nondelegated cases and to solicit agency recommendations. U.S. Attorneys are, of course, expected to communicate with client agencies when and in the manner dictated by the needs of effective representation in litigation.

When litigation documents are transmitted by the U.S. Attorneys directly to the client agency, the Civil Division should be so informed to preclude duplication of effort.

Under DOJ Order 2110.8, all payments received on behalf of a client agency are to be sent to that agency. A copy of the USA-200 duplicate receipt form is sent to the Department.

4-1.522 Delegated Cases

In delegated cases, litigation reports, supporting documents, lists of witnesses, certified copies, statements of account, and related matters and assistance, should be obtained directly from the agency by the U.S. Attorneys, whether the case is defensive or affirmative in nature.

In the event of disagreement with the client agency as to a compromise or closing of a delegated case, Section 1(d)(3) of Civil Division Directive 145-81, 28 C.F.R., Ch. I, Part 0, Appendix to Subpart Y, requires that the matter be referred to the Civil Division for

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resolution. Similarly, matters which may involve a new point of law, or otherwise constitute a significant precedent or as to which a question of policy is or may be involved, must also be brought to the attention of the Civil Division. With these exceptions, and the situation with respect to appeal of adverse decisions, in which the Civil Division may communicate with the client agency, all other communications normally will be between the U.S. Attorney and the client agency.

USAM (superseded)

USAM (superseded)

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4-2.000 COMPROMISING AND CLOSING

4-2.100 AUTHORITY OF THE ATTORNEY GENERAL

The Attorney General has the inherent authority to dismiss any affirmative action and to abandon the defense of any action insofar as it involves the United States of America, or any of its agencies, or any of its agents who are parties in their official capacities. See Confiscation Cases, 7 Wall. 454, 458 (action brought by an informer with expectation of financial gain); Conner v. Cornell, 32 F.2d 581, 585 (8th Cir. 1929), cert. denied, 280 U.S. 583 (1929) (dismissal of suit on behalf of restricted Indian wards of the United States); Mars v. McDougal, 40 F.2d 247, 249 (10th Cir. 1930), cert. denied, 282 U.S. 850 (1930); 22 Ops. A.G. 491, 494; 38 Ops. A.G. 124, 126; and see United States v. Throckmorton, 98 U.S. 61, 70; and United States v. Newport News Shipbuilding & Dry Dock Co., 571 F.2d 1283 (4th Cir. 1978), cert. denied, 439 U.S. 875 (1978). This authority may be exercised at any time during the course of litigation.

The Attorney General also has the inherent authority to compromise any action insofar as it involves the United States of America, its agencies, or any of its agents who are parties in their official capacities. See Halbach v. Markham, 106 F. Supp. 475, 479-480 (D. N.J. 1957), affirmed 207 F.2d 503 (3rd Cir. 1953), cert. denied, 374 U.S. 933; 38 Ops. A.G. 124, 126. This authority is not dependent upon any express statutory provision. See 38 Ops. A.G. 98, 99. To the contrary, it exists to the extent that it is not expressly limited by statute. See Swift & Co. v. United States, 257 U.S. 147, 155 (1921).

Note the additional authority delegated to the Attorney General by the second paragraph of §5 within Executive Order 6166 (quoted at USAM 4-1.100).

4-2.110 Delegations of the Attorney General's Authority to Compromise and Close

The Attorney General has delegated his settlement authority in civil cases to the several Assistant Attorneys General and certain other officials. The controlling regulations, found at 28 C.F.R. §0.160, et seq., should be consulted before authorization is sought to compromise or close a case, but it may be helpful to note that generally:

A. The Assistant Attorney General for the Civil Division can compromise an affirmative claim when the difference between the gross amount of the original claim and the proposed settlement does not

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exceed \$750,000 or 10% of the original claim, whichever is greater, (see 28 C.F.R. §§0.160(a)(1), 0.169);

B. He/she can compromise (or settle administratively) a defensive claim when the principal amount of the proposed settlement does not exceed \$750,000 (28 C.F.R. §0.160(a)(3));

C. He/she can compromise all nonmonetary cases (28 C.F.R. §0.160(a)(3));

D. He/she can reject most offers (28 C.F.R. §0.162);

E. He/she can close (other than by compromise or by entry of judgment) an affirmative claim when the gross amount of the original claim does not exceed \$750,000 (28 C.F.R. §§0.164, 0.169);

F. The Solicitor General must approve compromises in all Supreme Court cases and in many other appellate matters (28 C.F.R. §0.163);

G. The compromising or closing of cases beyond these limits must be approved by the Deputy Attorney General, or in a few cases by the Associate Attorney General, (C.F.R. §§0.160(c), 0.161, 0.164(b), 0.165, 0.167); and

H. The Deputy Attorney General is further specifically authorized to exercise the settlement authority of the Attorney General as to all affirmative and defensive civil claims (28 C.F.R. §0.161(b)).

4-2.120 General Redelegation of the Attorney General's Authority to Compromise and Close

The Assistant Attorney General for the Civil Division has redelegated portions of the Attorney General's authority to U.S. Attorneys, and also to Deputy Assistant Attorneys General, Branch Directors, the Director of the Appellate Staff, the Chief of the Judgment Enforcement Unit, the Director of the Office of Foreign Litigation, the Director of the Office of Consumer Litigation, the Director of the Office of Immigration Litigation, and Attorneys-in-Charge of field offices of the Civil Division. As indicated previously, Civil Division Directive No. 145-81, published in the Appendix to Subpart Y immediately following 28 C.F.R. §0.172, presently details those redelegations.

While the U.S. Attorneys should study that published Directive before compromising, closing, or seeking authorization for the compromising or closing of a civil claim, it may be generally said that, subject to the exceptions noted in USAM 4-2.140, infra:

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A. The Deputy Assistant Attorneys General of the Civil Division are authorized to act for, and to exercise the authority of, the Assistant Attorney General with respect to the institution of suits, and acceptance or rejection of compromise offers, and the closing of claims or cases, unless any such authority is required by law to be exercised by the Assistant Attorney General personally or has been specifically delegated to another Department official (§1(a)).

B. Civil Division Branch Directors, the Director of the Appellate Staff, the Director of the Office of Foreign Litigation, the Director of the Office of Consumer Litigation, and the Director of the Office of Immigration Litigation are authorized, with respect to matters assigned to their respective components, to reject any offer in compromise and to accept offers in compromise and close claims or cases in the manner and to same extent as Deputy Assistant Attorneys General, except that they cannot accept or reject any offers in compromise of, or settle administratively any claim or case against the United States where the principal amount to be paid by the United States exceeds \$150,000, nor can they close (other than by compromise or by entry of judgment) any claim or case on behalf of the United States where the gross amount involved exceeds \$150,000, or accept or reject any offers in compromise of any such claim or case in which the difference between the gross amount of the original claim and the proposed settlement exceeds \$150,000 or 10% of the original claim, whichever is greater. Branch Directors, the Director of the Office of Foreign Litigation, the Director of the Office of Consumer Litigation, and the Director of the Office of Immigration Litigation are further authorized to file suits, counterclaims, and cross-claims, or to take any other action necessary to protect the interests of the United States in all nonmonetary cases, in all routine loan collection and foreclosure cases, and in other monetary claims or cases where the gross amount of the claim does not exceed \$150,000 (§1(b)).

C. U.S. Attorneys and Civil Division Attorneys-in-Charge of Field Offices are authorized to:

1. Reject any offer to settle a monetary claim on behalf of the United States where the amount offered is below \$100,000 or below an amount previously indicated by the appropriate Civil Division official to be an acceptable minimum, in any case for which they have primary responsibility; and

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2. Accept or reject offers to compromise cases and close claims which have been directly referred or delegated to them by the Civil Division, as set forth in Sections 4(a) and (b) of Civil Division Directive 145-81, in the same manner and to the same extent as Branch and Office Directors, except that U.S. Attorneys and Attorneys-in-Charge of field offices cannot accept or reject any offers in compromise of any claim or case against the United States where the principal amount of the proposed settlement exceeds \$100,000. Nor can U.S. Attorneys or Attorneys-in-Charge of field offices close (other than by compromise or by entry of judgment) any claim or case on behalf of the United States where the gross amount involved exceeds \$100,000, or accept or reject any offers in compromise of any such claim or case in which the difference between the gross amount of the original claim and the proposed settlement exceeds \$100,000 or 10% of the original claim, whichever is greater. U.S. Attorneys may redelegate this authority to Assistant U.S. Attorneys who supervise other Assistant U.S. States Attorneys who handle civil litigation.

4-2.130 Ad Hoc Redelegations of the Attorney General's Authority to Compromise and Close

By virtue of §4(b) of Directive 145-81, Branch and Office Directors and Unit Chiefs of the Civil Division may redelegate to U.S. Attorneys any nonmonetary claims or suits, and monetary claims or suits involving amounts up to \$150,000, where the circumstances warrant such redelegations.

Upon the recommendation of Branch and Office Directors and Unit Chiefs, the Assistant Attorney General for the Civil Division may delegate to U.S. Attorneys any claims or suits involving amounts up to \$750,000, where the circumstances warrant such delegation.

All redelegations pursuant to Section 4(b) must be in writing, and no U.S. Attorney has authority to compromise or close any such redelegated case or claim except as is specified in the required-written redelegation or in Section 1(c) of the Directive. The limitations of Section 1(d) of the Directive, discussed at USAM 4-2.140, infra, also remain applicable in any case or claim redelegated under Section 4(b).

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4-2.140 Exceptions to the Redelegations of the Attorney General's Authority

By virtue of Section 1(d) of Directive 145-81, and notwithstanding the aforesaid redelegations of authority to compromise cases, file suits, counterclaims, and cross-claims, or to take any other action necessary to protect the interests of the United States, such authority may not be exercised, and the matter must be submitted to the Assistant Attorney General for the Civil Division, when:

A. For any reason, the proposed action, as a practical matter, will control or adversely influence the disposition of other claims totalling more than the respective amounts designated;

B. Because a novel question of law or a question of policy is presented, or for any other reason, the proposed action should, in the opinion of the officer or employee concerned, receive the personal attention of the Assistant Attorney General;

C. The agency or agencies involved are opposed to the proposed action (the views of an agency must be solicited with respect to any significant proposed action if it is a party, if it has asked to be consulted with respect to any such proposed action, or if such proposed action in a case would adversely affect any of its policies); and

D. The U.S. Attorney involved is opposed to the proposed action and requests that the decision be submitted to the Assistant Attorney General for reconsideration.

4-2.200 BASES FOR THE COMPROMISING OR CLOSING OF CLAIMS INVOLVING THE UNITED STATES

A U.S. Attorney should compromise or close a claim [the term "claim" is used in its broadest sense to include, for example, a claim that arises out of a judgment entered for or against the United States] pursuant to the authority described in USAM 4-2.120, supra, only when one or more of the following bases for such action are present:

A. The U.S. Attorney believes that a claim in favor of the United States is without legal merit (see 16 Ops. A.G. 248; 23 Ops. A.G. 631; 38 Ops. A.G. 98);

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B. The U.S. Attorney believes that a claim in favor of the United States cannot be factually proven in court (see 16 Ops. A.G. 259; 23 Ops. A.G. 631; 38 Ops. A.G. 98);

C. The U.S. Attorney believes that a different claim in favor of the United States should be selected for the purpose of resolving an open issue of law;

D. The U.S. Attorney believes that the full amount of a claim in favor of the United States cannot be collected in full due to the financial condition of the debtor.

1. There must be a real doubt as to the government's ability to collect in full. See 12 Ops. A.G. 543; 16 Ops. A.G. 248; 16 Ops. A.G. 259; 36 Ops. A.G. 40.

2. Uncertainty as to the price which property will bring on execution sale may be treated as an uncertainty as to collection. See 38 Ops. A.G. 194. However, claims secured by a mortgage should not be compromised until after sale of the mortgaged property, since the government is generally entitled to both the amount the property will sell for and a deficiency judgment. In the rare instance in which such a compromise may be appropriate, a thorough appraisal by an impartial appraiser is indicated, to determine the value of the mortgaged property and avoid criticism from those who may later say they would have offered more for the property.

3. A valid and provable claim, which can be collected, cannot be voluntarily relinquished. See 16 Ops. A.G. 248; 21 Ops. A.G. 50; 36 Ops. A.G. 40.

a. Compromise requires some mutuality of concession. There must be room for the play of give and take. See 16 Ops. A.G. 248; 23 Ops. A.G. 18; 36 Ops. A.G. 40; 38 Ops. A.G. 94. The adequacy of the concession is to be determined by the exercise of sound discretion. See 38 Ops. A.G. 98.

b. Hardship, which does not involve inability to pay, is not a proper basis for settlement. See 23 Ops. A.G. 18; 38 Ops. A.G. 94.

E. The U.S. Attorney believes that the cost of collecting a claim in favor of the United States will exceed the amount recoverable (see 4 C.F.R. 103.4);

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F. The U.S. Attorney believes that compromising or closing a claim in favor of the United States is necessary to prevent injustice (see 38 Ops. A.G. 98; compare 23 Ops. A.G. 18 and 38 Ops. A.G. 94);

G. The U.S. Attorney believes that the enforcement policy underlying a claim in favor of the United States will be adequately served by a compromise (see 17 Ops. A.G. 213; 29 Ops. A.G. 217; 31 Ops. A.G. 459; as restricted by 21 Ops. A.G. 264 and 36 Ops. A.G. 40);

H. The U.S. Attorney believes that it is less costly to compromise a claim against the United States than to undertake further legal action in defense against the claim; or

I. The U.S. Attorney believes that a compromise of a claim against the United States is substantially more favorable than the verdict or judgment that would probably result from further litigation.

4-2.210 Compromising Claims Against A Going Business Concern

If compromise with a going business concern necessitates the acceptance of payments over a period of time, the U.S. Attorney should obtain adequate security for deferred payments. It is also generally advisable for the U.S. Attorney to require a waiver to any and all claims which such a business concern has against the United States, including rights under the net operating loss carry forward and carry back provisions of the Internal Revenue Code, at least insofar as these are affected by the compromise proposal. In some situations, it may be advisable to require written consent for the audit of the concern's books and records. Consideration should also be given to having an independent appraisal of business assets at "forced sale" and "fair market" values, conducted at the concern's expense by an appraiser whose selection is subject to the approval of the U.S. Attorney.

The U.S. Attorney should not accept a percentage of net profits in settlement or partial settlement of a claim. Cf. 4 C.F.R. §103.9. Such arrangements are speculative at best; policing is difficult; and there are too many ways in which the affairs of the debtor concern can be manipulated to avoid, minimize, or postpone realization of a net profit. Corporate stock should generally not be accepted in settlement or payment of a claim in favor of the United States. See cf. 4 C.F.R. §103.9. Managing such stock holdings places unusual burdens on client agencies. Letters of credit provide an excellent method for securing payment.

4-2.220 Compromising Claims in Conjunction With Bankruptcy Code Proceedings

A U.S. Attorney's acceptance of a plan for reorganization under the Bankruptcy Code amounts to the compromise of a claim in favor of the United States and is governed by the same limitations and standards. If the debtor fails to provide the information needed to consider the plan, or if adequate time is allowed to obtain any required Department of Justice approvals for the compromise, the U.S. Attorney should file an objection to the plan with the bankruptcy court.

4-2.230 Bases for Closing Claims Arising Out of Judgments in Favor of the United States by Returning Those Claims to the Client Agencies

Claims arising out of judgments in favor of the United States which cannot be permanently closed as uncollectible (see USAM 4-2.200, supra) should be returned to the referring federal agency whenever:

A. All other claims arising out of the same transaction have also been reduced to judgment;

B. All monies collectible upon the claim(s) are payable to a single referring federal agency; and

C. The claim is uncollectible except by installment payments which debtors agree to make to the referring agency, or the claim can be enforced by other means, but such enforcement is foreborne in consideration of the promise for installment payments; or the claim is presently uncollectible but has future collection potential, and the U.S. Attorney is not in a better position than the agency to keep the matter under surveillance.

Return is also subject to the following caveats:

A. The U.S. Attorney should be satisfied that, as a practical matter, the transfer will not adversely affect the chances of collection or the amount that will be collected.

B. The agency must be willing to accept the transfer and must understand that it is not authorized to undertake final settlement, reduction, or release of any unpaid balance without the specific authorization of the Department of Justice, and all judicial proceedings to enforce or release judgments are to be conducted by the U.S. Attorney; and

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C. The U.S. Attorney should consider it unlikely that the claim will be returned to him/her for further proceedings.

4-2.231 Monitoring of Payment Agreements by the Veterans Administration's Central Accounts System (CARS)

In the event a payment agreement is reached, either prior to or after judgment, in a case involving a Veterans Administration (VA) educational allowance claim, the U.S. Attorney may utilize the VA's Central Accounts System (CARS) in St. Paul, Minnesota, to monitor the payments and close the file pursuant to USAM 4-2.230, supra.

The CARS monitoring system may be used for all existing postjudgment accounts. Prejudgment accounts can be monitored provided that three consecutive timely payments have been received on existing accounts. However, prejudgment accounts which involve garnishments are not included in CARS monitoring system.

CARS must have a notification letter on all pre- and postjudgment accounts to be monitored. The letter of notification is also necessary with respect to existing postjudgment accounts. The notification should identify the account by the debtor's full name and VA file number, and state the monthly payment amount as well as the day of the month the payment will be due. Postjudgment cases will stipulate interest, U.S. Marshals' fees, and court costs. All payments must be on a monthly basis.

Your office should inform the debtor that all payments must be made payable to the VA and mailed directly to the VA, Post Office Box 1930, Federal Building, Fort Snelling, St. Paul, Minnesota 55111. CARS will furnish a receipt to the debtor. You should advise the debtor that the VA will be monitoring the account and that the VA will inform the attorney if the account becomes delinquent. Your letter should warn the debtor of the consequences of the failure to maintain payments.

The monitoring system will work as follows. The VA will generate a letter to the debtor when a payment is thirty days delinquent. If payment on the account is not received within forty days after dispatch of the delinquent letter to the debtor, the VA will notify the U.S. Attorney. If after issuance of the forty-day notice a payment is received, the VA will notify the U.S. Attorney. The account will be diaried for ninety days after notification to the U.S. Attorney of the delinquency. At the

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expiration of ninety days without action by the U.S. Attorney, the VA will notify the U.S. Attorney that the VA has ceased monitoring the case. The notification will set forth criteria for reestablishing the account under the monitoring system.

All correspondence from the debtor requesting deviation from the repay agreement will be forwarded to the U.S. Attorney's office for appropriate action. The U.S. Attorney will notify CARS of any change in the repay agreement.

Questions and problems concerning the monitoring of pre- and postjudgment accounts should be directed to Richard Troje, Chief, Justice Referral Unit, CARS, St. Paul, Minnesota, FTS 725-3024.

4-2.300 MEMORANDA BY U.S. ATTORNEY

4-2.310 Memoranda Explaining the Compromising or Closing of Claims Within the U.S. Attorney's Authority

Whenever a U.S. Attorney compromises or closes a claim involving the United States pursuant to his/her authority as described in USAM 4-2.120 and 4-2.130, *supra*, he/she should place a memorandum in his/her office file fully explaining the basis for his/her action. A copy of this memorandum should be sent to the appropriate branch of the Civil Division. This requirement is set forth at §2(a) of Civil Division Directive No. 145-81, published in the Appendix to Subpart Y immediately following 28 C.F.R. §0.172.

4-2.320 Memoranda Containing the U.S. Attorney's Recommendations for the Compromising or Closing of Claims Beyond His Authority

The compromising of cases or closing of claims which a U.S. Attorney is not authorized to approve should be referred to the Civil Division official having the requisite approval authority. The referral memorandum should contain a detailed description of the matter, the U.S. Attorney's recommendation, and a full statement of the reasons therefor. This requirement is set forth at §2(b) of Civil Division Directive No. 145-81, published in the Appendix to Subpart Y immediately following 28 C.F.R. §0.172.

As indicted in Section 1(c)(1) of that Directive and at USAM 4-2.120(c), *supra*, a U.S. Attorney can reject any offer to settle a monetary claim on behalf of the United States where the amount offered is below \$100,000 or below an amount previously indicated by the appropriate

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Civil Division official to be an acceptable minimum, in any case, for he/she has primary responsibility. If such rejection is communicated orally, an explanatory memorandum should be placed in his/her office file.

4-2.400 CONSUMMATION OF COMPROMISES OF CLAIMS ON BEHALF OF THE UNITED STATES

4-2.401 General

When a claim in favor of the United States is compromised, the compromise should be effected and evidenced in the manner provided in USAM 4-2.402, et seq. No further evidence of settlement should be required. However, if a letter acknowledging payment is requested by the debtor, that letter should be specifically limited to the immediate subject matter of the claim which was in fact compromised. In no case should a general release be issued to the debtor, since it is not possible to know whether the debtor owes debts to other agencies such as the Internal Revenue Service. If a compromise cannot be effected without the execution of a release, the release should be narrowly drawn, limited to the specific debt that is compromised, and contain a specific reservation of the United States' right to proceed against other obligors.

If the compromise is made for the purpose of clearing title to a particular property, the release executed should be limited to the release of the United States' judgment lien or right of redemption as to that specific property. No release of a lien or a right of redemption should be executed without some appropriate consideration, even if the claim is questionable. See generally, Civil Division Practice Manual §3-26.1, et seq.

If a compromise is effected with less than all obligors, care should be taken to reserve the United States' right to proceed against, or collect from, the others. A covenant not to sue, containing a specific reservation of such right, is preferable to a release (even when specifically limited) in this situation. See generally, Civil Division Practice Manual §3-26.1, et seq.

4-2-402 Issuance of a Receipt Where Suit Has Not Been Filed

When a compromise proposal has been accepted, and the consideration therefor has been received, no further action is required to consummate the compromise if suit has not been filed. The debtor should be given the USA-200 receipt, which, along with his cancelled check, should suffice for his/her records.

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4-2.403 Dismissal Where Suit Has Been Filed

If a compromise is agreed to in a case in which the United States has filed suit, dismissal of the suit with prejudice is all that is required to evidence the settlement. If the settlement is to be paid in installments, judgment may be entered, with the defendant's permission, as security for the deferred installments. However, if this procedure has not been agreed upon as part of the compromise arrangement, and it is necessary to dismiss the suit for the time, the dismissal should be without prejudice. See Rule 41(a), Fed. R. Civ. P. Tort suits brought on behalf of the United States should not be dismissed in such circumstances without a written waiver of limitations, since partial payments do not toll the running of the statute of limitations. See Civil Division Practice Manual §3-2.16.

4-2.410 Consummation of Compromise of Judgments in Favor of the United States

If the United States' claim has been reduced to judgment, and the settlement is intended by both parties to satisfy the judgment obligation in full, a satisfaction of judgment should be filed of record, and this should be sufficient to evidence the consummation of settlement. However, if more than one obligor is bound by the judgment and the settlement is only as to one obligor's debt, only a partial satisfaction of the judgment can be executed. It is appropriate to release the judgment lien as to that debtor's property, but not as to the property of the nonsettling debtors.

Compromises in judgment cases which have been re-referred to the U.S. Attorney after their return to the client agency for monitoring or surveillance pursuant to USAM 4-2.230, supra, should be treated as if those cases had not been conditionally closed.

4-2.420 Consummation of Compromise Against the United States

In a limited number of instances, the compromises of claims against the United States may be consummated by payments from an insurer, surety, title insurance company, or indemnitor. In such cases, the client agency should be asked to arrange for payment, or, with the agency's acquiescence, arrangements for payment can be made directly with the insurer, surety, or indemnitor. Some "sue and be sued" officials or agencies can pay claims from appropriations or revolving funds. In such cases, payment

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should be obtained from the client agency. It is preferable that compromises of claims arising out of the operations of certain government corporations and the shipping operations of the Maritime Administration be handled in the same manner as claims in favor of the government. Should circumstances warrant, these claims may be compromised by entry of an order approving the compromise.

Compromises of suits against the United States under the Tucker Act (28 U.S.C. §1346(a)(2)) and the Admiralty Claims Acts (46 U.S.C. §741, et seq., and §781, et seq.) may in unusual circumstances be payable from appropriated funds of the client agency. However, generally it will be necessary to enter a consent judgment upon the compromise, in order to obtain payment. Compromises in suits under the Federal Tort Claims Act involving minors and other persons under legal disability, or by executors or administrators, should be approved by the local probate, orphan's, surrogate's, or other court of competent jurisdiction, where such approval is required by applicable state law. It is preferable that the amount of proper attorneys' fees which are to be paid from the settlement proceeds be specified in the settlement agreement. If this is not done, a separate check cannot be issued payable to the attorney. Arrangements should be made for all payments of compromises to be made through the U.S. Attorney's office, in order that a check may be exchanged for dismissal of a given suit with prejudice, or an appropriate release or covenant not to sue.

In all other circumstances, the U.S. Attorney should obtain the entry of a consent judgment embodying the terms of an authorized compromise, in order to effect the payment of the compromise obligation by the United States. Care should be taken to arrange for the payment of such judgments through the U.S. Attorney, in order that he may exchange the check in payment of the judgment for an appropriate satisfaction of the judgment.

4-2.430 Payment of Compromises

4-2.431 Compromises Payable by Client Agency or Insurer

In a limited number of instances, compromises may be payable by an insurer, surety, title insurance company, or indemnitor. In such cases, the client agency should be asked to arrange for payment, or, with the agency's acquiescence, arrangements for payment can be made directly with the insurer, surety, or indemnitor. Some "sue and be sued" officials or agencies can pay claims from appropriations or revolving funds. In such cases, payment should be obtained from the client agency. It is preferable that compromises of claims arising out of the operations of

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certain government corporations and the shipping operations of the Maritime Administration be handled in the same manner as claims in favor of the government. Should circumstances warrant, these claims may be compromised by entry of an order approving the compromise.

Compromises of suits under the Tucker Act (28 U.S.C. §1346(a)(2)) and the Admiralty Claims Acts (46 U.S.C. §741, et seq.) may in unusual circumstances be payable from appropriated funds of the client agency. However, generally it will be necessary to enter a consent judgment upon compromise, in order to obtain payment. Compromise of suits involving minors and other persons under legal disability, or by executors or administrators, should be approved by the local probate, orphan's surrogate's, or other court of competent jurisdiction, where such approval is required by applicable state law. It is preferable that the amount of proper attorneys' fees which are to be paid from the settlement proceeds be specified in the settlement agreement. If this is not done, a separate check cannot be issued payable to the attorney. Arrangements should be made for all payments of compromises to be made through the U.S. Attorney's office, in order that the check may be exchanged for dismissal of suit with prejudice, or an appropriate release or covenant not to sue.

4-2.432 Payment of Compromises Through Entry of Judgment

When compromises cannot be paid in the manner set forth in USAM 4-2.431, supra, it will be necessary to enter a consent judgment embodying the terms of the settlement. Court approvals of settlements on behalf of minors and other persons under disability, or executors and administrators, should be obtained, as pointed out in USAM 4-2.420, supra, prior to entry of consent judgment embodying the terms of the settlement. The amount of proper attorneys' fees which are to be paid from the settlement proceeds should be specified in the judgment. Unless the attorney's fee is expressly provided for in the judgment, a separate check cannot be issued payable to the attorney. If the client agency or insurer, surety or indemnitor cannot make payment directly, the judgment should be processed for payment as provided in USAM 4-3.200 and 4-3.210, infra.

Care should be taken to arrange for the payment of such judgments through the U.S. Attorney, in order that he/she may exchange the check in payment of the judgment for an appropriate satisfaction of the judgment.

4-2.433 Payment of Compromises - Federal Tort Claims Act Suits

Compromises of suits in excess of the U.S. Attorneys' delegated authority must receive explicit and advance approval through the Civil

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Division of the Department of Justice, regardless of whether or not the case otherwise has been delegated for direct handling to the U.S. Attorney's office. A memorandum setting forth the basis for the compromise should be forwarded to the Civil Division along with all material, including pleadings, necessary to understand the litigation and the basis for the settlement. Thereafter, the U.S. Attorney's office will be advised of the action taken on the recommendation for settlement.

After approval, the settlement agreement may be forwarded by the U.S. Attorney directly to the General Accounting Office (or, in Postal Service cases, to the Postal Service). Compromises in suits under the Federal Tort Claims Act are payable in the same manner as judgments. In no event should the settlement be forwarded to GAO or the Postal Service prior to approval from the Justice Department, except when cases are settled within the U.S. Attorneys' delegated authority.

See Section USAM 4-3.210, infra, of this manual for the revised letters and forms to be used when sending compromises or settlements to the GAO or Postal Service for payment.

USAM (superseded)

4 3 000
JUDGMENTS VS GOV'T

USAM (superseded)

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4-3.000 JUDGMENTS AGAINST THE GOVERNMENT

To prevent difficulties in payment and unnecessary appeals due to the irregularity of form or the inclusion of items of recovery which are improper, the U.S. Attorney should arrange to prepare the form of judgment to be entered whenever possible, or for his/her review of a proposed judgment before its entry. See USAM 4-4.820, as to the allowance of interest. USAM 4-4.510 discusses the limited circumstances in which court costs may be included in judgments. See USAM 4-4.220 et seq., as to attorneys' fees for plaintiff's counsel.

Except when a judgment is entered by consent in order to provide for the payment of an agreed compromise, all adverse judgments should be brought to the attention of the Civil Division immediately, with the U.S. Attorney's reasoned recommendation for or against appeal. See USAM Title 2, for appeals generally.

The Comptroller General has repeatedly held that GAO is without authority to offset or withhold tax claims from "backpay" judgments rendered against the United States, unless the judgment specifically provides for such withholding. The Internal Revenue Service, which views such awards as taxable income, has requested that appropriate steps be taken to ensure that applicable taxes are collected therefrom. Accordingly, whenever a judgment for back pay (or for any other amount deemed to be taxable income) is being entered, the attorney handling the case for the government should either request the court to specify that applicable taxes may be withheld, or separately agree with the plaintiff (in writing) concerning an appropriate offset.

4-3.100 POST-JUDGMENT MOTIONS BY THE UNITED STATES

Utilization of post-judgment motions should be carefully considered in the light of relief available under Rules 52(b), 59, and 60, Federal Rules of Civil Procedures. Relief under Rule 60(b) is only available as to "final" judgments, and thus Rule 60(b) will not be used as frequently by the government as Rules 52 and 59.

Since many court-made findings of fact cannot be set aside because of the "clearly erroneous" provision of Rule 52(a), and because even as to erroneous conclusions of law and inconsistent findings of fact the court of appeals will be favorably impressed by the basic fairness of giving the trial court an opportunity to correct its own error (United States v. Fotopulos, 180 F.2d 631, 639 (9th Cir.); Hutches v. Renfroe, 200 F.2d 337, 340-341 (5th Cir.); United States v. Pendergrast, 241 F. 2d 687, 689

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(4th Cir.)), the filing of post-judgment motions under Rules 52(b) and 59 is to be encouraged. A motion under either of those rules must be made not later than ten days after the formal entry of judgment, as provided in Rule 58.

When more than one claim is asserted in an action, a decision which adjudicates less than all of the claims does not result in an appealable judgment, unless the court expressly directs the entry of judgment and determines that there is no just reason for delay. See Rule 54(b), Fed. R. Civ. P. If such direction and determination are not included, the court's order is interlocutory "and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." See Rule 54(b), Fed. R. Civ. P.

Although Rules 52(b) and 59 of the Federal Rules of Civil Procedure both require a motion within ten days, there is nothing to prevent the filing of a motion to amend findings or make additional findings prior to judgment. See 5A Moore's Federal Practice, ¶52.11[1], p. 2749 (2d ed., 1971); see, e.g., Cohn v. United States, 259 F. 2d 371, 376 (6th Cir.). The same is true of a motion for new trial under subsection (a) of Rule 59, since the rule uses the language "the court may open the judgment if one has been entered". (Emphasis added)

A motion to amend findings or to make additional findings under Rule 52(b) may be joined with a motion for new trial under Rule 59. See Rule 52(b).

A further advantage of motions to amend findings or make additional findings under Rule 52(b) or for new trial under Rule 59, is that timely motion under either rule stops the running of the appeal period. The government's full 60-day appeal period will run from district court disposition of such motions. See Rule 4(a), Fed. R. App. P.

No error in the admission or exclusion of evidence, or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, may be the basis for relief under Rules 52(b) and 59, of the Federal Rules of Civil Procedure unless refusal to take such action appears to the court to be inconsistent with substantial justice.

4-3.110 Motion to Amend Findings

A motion under Rule 52(b) of the Federal Rules of Civil Procedure to amend findings, or for the court to make additional findings, should be

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addressed to matters of substance by seeking reconsideration of material findings of fact or conclusions of law. See Wright & Miller, Federal Practice and Procedure, Civil §2582 (1971). Such a motion, if granted, may require amendment of the judgment as well. See Rule 52(b) Federal Rules of Civil Procedure. However, such a motion may be filed even if favorable action thereon will not require amendment of the judgment. See 5A Moore's Federal Practice, ¶52.11[2], pp. 2754-2755 (2d ed., 1982); see, e.g., Vennell v. United States, 38 F. Supp. 381 (E.D. Pa.), aff'd., 122 F.2d 936 (3rd Cir.).

4-3.120 Motion for New Trial

A motion for new trial generally should be based upon manifest error of law or mistake of fact, or upon newly discovered evidence. See 6A Moore's Federal Practice, ¶59.07, pp. 59-94 and 59-95 (2d ed., 1971); Wright & Miller, Federal Practice and Procedure, Civil §2805 (1971).

In practice, the trial court has greater freedom of action under a motion for new trial in a non-jury as against a jury case. Relief may be afforded by something less than a complete new trial, by the taking of additional testimony, the amendment of findings or conclusions, or by amendment of the judgment itself. See 6A Moore's Federal Practice, ¶59.07, p. 59-97 (2d ed., 1971).

Common bases for granting a new trial include the following:

A. The decision is against the weight of evidence. See 6A Moore's Federal Practice, ¶59.08[5], pp. 59-154 and 59-155 (2d ed., 1971); Wright & Miller, Federal Practice and Procedure, Civil §2806 (1971). The burden of the moving party on such a motion is substantially less than that on a litigant moving for judgment notwithstanding the verdict, or for a directed verdict.

B. There is newly discovered evidence, i.e., evidence discovered subsequent to trial, which could not have been discovered in time for trial by diligent search, which is admissible and credible and would probably have produced a different result. See 6A Moore's Federal Practice, ¶59.08[3], pp. 59-112 through 59-123 (2d ed., 1971); Wright & Miller, Federal Practice and Procedure, Civil §2802 (1971).

C. Damages were excessive. See United States v. Fotopulos, 180 F.2d 631, 639 (9th Cir.). The judgment includes items of damage which were improperly allowed, or the court may have exceeded the statutory maximum in a death case.

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D. There is an inconsistency in the findings', or inconsistency between findings and the conclusions or judgment. See cf. 6A Moore's Federal Practice, ¶59.08[4], p. 59-141 (2d ed., 1971).

E. There was legal error by the court, as where a controlling decision was not called to the court's attention because it was unknown through mistake, inadvertence, or excusable neglect.

F. There was biased conduct on the part of the trier of fact.

G. There was prejudicial misconduct on the part of the counsel, witnesses, or third persons.

H. There was substantially prejudicial surprise. The surprise must be genuine and without fault on the part of movant, as for a claim not asserted at pre-trial.

I. Evidence was admitted or rejected, if such is truly prejudicial. See 6A Moore's Federal Practice, ¶59.08[2], p. 59-104 (2d ed., 1971).

In rare cases, a new trial may be ordered because of the absence of a material witness, if such absence was beyond movant's control, the testimony is material, and the witness' presence for a new trial is reasonably assured. See 6A Moore's Federal v. Practice, ¶59.08[2], pp. 59-111 and 59-112 (2d ed., 1971).

Federal Rules of Civil Procedure Rule 59(e) was added in 1946 to confirm the power of district courts to alter and amend judgments. See 6A Moore's Federal Practice, ¶59.12[1], pp. 59-241 (2d ed., 1971). A timely motion under that Rule can be directed to such matters as inclusion of a provision for attorneys' fees, inclusion or modification of conclusions of law, and so on. 6A Moore's Federal Practice, ¶59.12[1], pp. 59-241 through 59-251 (2d ed., 1971).

4-3.130 Relief from Clerical Errors

Federal Rules of Civil Procedure Rule 60(a) deals with clerical mistakes in judgments, orders, and other parts of the record, and with errors therein arising from oversight or omission. Errors of a more substantial nature are dealt with by Rule 60(b) of the Federal Rules of Civil Procedure.

A motion under Rule 60(a) may be filed at any time, including during the pendency of an appeal. Corrections may include mathematical

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computations and the misnomer or misdescription of a party or executor. See Wright & Miller, Federal Practice and Procedure, Civil §2854 (1971). Erroneous dates may be corrected along with clerical mistakes of the court, clerk, or a party. See 6A Moore's Federal Practice, ¶60.06[1], pp. 4054-4056, and ¶60.06[2], pp. 4056-4057 (2d ed., 1982).

4-3.140 Relief from Final Judgment for Mistakes, Inadvertence, etc.

Federal Rules of Civil Procedure 60(b) permits relief from a final judgment or order upon six grounds:

- A. Mistake, inadvertence, surprise, or excusable neglect;
- B. Newly discovered evidence;
- C. Fraud, misrepresentation, or other misconduct of a adverse party;
- D. A void judgment
- E. Judgment has been satisfied, released, or discharged; or
- F. Any other reason justifying relief from the judgment.

When a rule 60(b) motion is filed, consider also staying execution of the judgment or order under Federal Rules of Civil Procedure 62.

Pursuant to Rule 60(b)(1), a judgment will be set aside upon a showing of mistake, inadvertence, surprise, or excusable neglect. Generally, ignorance of the law is an insufficient grounding for a Rule 60(b)(1) motion. See United States v. Erdoss, 440 F.2d 1221, 1223 (2d Cir.), cert. denied, 404 U.S. 849 (1971). A rule 60(b)(1) motion must be made within one year of the judgment or order.

Under Rule 60(b)(2), a judgment may be set aside because of newly-discovered evidence which by "due diligence" could not have been discovered in time to move for a new trial under Federal Rules of Civil Procedure 59(b). Rule 60(b)(2) requires the evidence to have been in existence at the time of a trial and not in the possession of the moving party before the judgment was rendered. See C. Wright and A. Miller, 11 Federal Practice and Procedure: Civil §2859 at 183 (1973). A Rule 60(b)(2) motion must be made within one year of the judgment or order.

Federal Rules of Civil Procedure Rule 60(b)(3) provides that a judgment may be set aside due to fraud, misrepresentation, or other

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misconduct by an adverse party. Because this rule provides a procedure for raising a question of fraud in the trial court, the question must first be brought before the trial court rather than raising it for the first time on appeal. See Rohauer v. Friedman, 306 F.2d 933, 937 (9th Cir. 1962). The burden of proof of fraud is on the moving party, and the fraud must be established by clear and convincing evidence. See Wilkin v. Sunbeam Corp., 466 F.2d 714, 717 (10th Cir. 1972), cert. denied, 409 U.S. 1126 (1973). A Rule 60(b)(3) motion must be made in within one year of the judgment or order.

Federal Rules of Civil Procedure Rule 60(b)(4) permits the court to set aside a void final judgment or order. A judgment is not void merely because it is erroneous. In re Texlon Corp., 596 F.2d 1092, 1099 (2d Cir. 1979). Rather, a judgment is void only if the court lacked jurisdiction of the subject matter or of the parties or if the court acted in a manner inconsistent with due process. See C. Wright and A. Miller, 11 Federal Practice and Procedure: Civil §2862 at 200 (1973). There is no time limit for filing a Rule 60(b)(4) motion.

Under the Rule 60(b)(5) of the Federal Rules of Civil Procedure, the court may grant relief from judgment on three grounds:

- A. The judgment has been satisfied, released, or discharged;
- B. A prior judgment upon which the final judgment is based upon has been revised or otherwise vacated; or
- C. Where it is no longer equitable that the judgment have prospective appreciation.

The first two grounds are self-explanatory and are rarely applied by the courts. The third ground is based upon the power of a court of equity to modify its decree in light of changed circumstances and is principally used to modify injunctions. See United States v. Swift & Co., 286 U.S. 106, 114 (1932). A Rule 60(b)(5) motion must be made within a "reasonable time" after the judgment or order has been entered.

Regarding Rule 60(b)(6), a judgment may be vacated for "any other reason justifying relief from the operation of the judgment". Generally, rule 60(b) gives the court power to vacate judgments whenever that action is "appropriate to accomplish justice" or is in "the interest of justice". Case law seems to establish that relief under Rule 60(b)(6) and the other five clauses under Rule 60(b) are mutually exclusive. See C. Wright and A. Miller, 11 Federal Practice and Procedure: Civil §2864 (1973). Thus, relief cannot be had under Rule 60(b)(6) if such relief would have been

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available under any of the other clauses. See United States v. Erdoss, 440 F.2d 1221, 1223 (2d Cir.), cert. denied, 404 U.S. (1971). Generally, a change in the law is not enough to permit reopening a judgment under Rule 60(b)(6). The Supreme Court, however, in Polites v. United States, 364 U.S. 426 (1960), stated that "[w]e need not go so far here as to decide that when an appeal has been abandoned or not taken because of a clearly applicable adverse rule of law, relief under Rule 60(b) is inflexibly to be withheld when there has later been a clear and authoritative change in governing law". Id. at 433. See Pierce v. Cook & Co., F.2d 720, 723 (10th Cir. 1975) cert. denied, 423 U.S. 1079 (1976). A Rule 60(b)(6) motion must be made within a "reasonable time" after the judgment or order has been entered.

An application for relief from a judgment under Rule 60(b)(6) does not extend the time for taking an appeal. Where a case is on appeal, a district court may entertain a Rule 60(b) motion without leave by the appellate court. Standard Oil Co. v. United States, 429 U.S. 17, 18-19 (1976) (per curiam).

4-3.200 PAYMENT AND SATISFACTION OF JUDGMENTS AGAINST THE GOVERNMENT

A check in payment of an adverse judgment may be obtained in some cases from the client agency, if it has an appropriation available. Government corporations and "sue and be sued" officials and agencies may have such an appropriation, or a revolving fund, from which payment can be made. Adverse National Service Life Insurance (NSLI) judgments (as distinguished from those which are entered as a result of compromise) are payable by the Veterans Administration from insurance trust funds. However, if the loss is due to the extra hazards of war, the VA will pay the NSLI judgment from appropriations. Some judgments entered as the result of the compromise of NSLI cases can be paid as set forth in USAM 4-3.210, infra. Judgments in Federal Tort Claims Act cases, with one exception, are paid with treasury funds after certification by the General Accounting Office. If the FTCA judgment is based upon the activities of a Postal Service employee, the judgment is paid by the Postal Service rather than by the Treasury. In a few instances, funds for the payment of a judgment may be provided by an insurer, surety, or indemnitor. Normally, the Civil Division's communication advising that further appellate review will not be sought will provide information as to the method of payment. If payment cannot be obtained from the sources indicated above, payment of final judgments will be made by the General Accounting Office pursuant to 31 U.S.C. §1304; see USAM 4-3.210, infra.

In tort actions, parties in addition to the injured plaintiff may have a legal interest in the funds generated by a judgment or settlement.

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See United States v. Aetna Casualty Co., 338 U.S. 366 (1949). For example, a workers' compensation carrier may have a lien for insurance payments it has already sent to the injured plaintiff. Any party which is subrogated to an interest of a party plaintiff can separately assert its rights. If the government pays the injured plaintiff the full amount of damages, it may still be liable for payment to the subrogated party for the amount the subrogated party paid out. Therefore, U.S. Attorneys should design settlement documents and documents for release of judgment so as to extinguish all claims arising from the subject matter of the lawsuit, including not only claims of the primary plaintiff but also of all parties having a subrogated interest. If necessary, GAO should be requested to issue separate checks to insure extinguishment of separate interest.

National Service Life Insurance judgments are frequently payable in installments over a long period. In such cases, the installments payable to the beneficiary and beneficiary's attorney will be paid directly (and separately) to them by the Veterans Administration. See 38 U.S.C. §3020.

4-3.210 Payment of Judgments by General Accounting Office and Postal Service

Final judgments adverse to the United States ^{1/} can sometimes be paid by the client agency, or an insurer, surety, or indemnitor. If payment cannot be effected in that manner, payment can usually be made from the funds appropriated pursuant to 31 U.S.C. §1304. Thus, judgments (and certain compromise settlements - see USAM 4-3.200, supra) payable in accordance with 28 U.S.C. §§2414 or 2517, which are final or of which further appellate review will not be sought, may be paid by the General Accounting Office (GAO) or the Postal Service, as appropriate. All such final judgments or compromises, with the exception of the Swine Flu settlements, may be sent directly to GAO or the Postal Service by the U.S. Attorney. Unique payment procedures make it necessary to forward Swine Flu settlements through the Civil Division for distribution to GAO. GAO will route checks in payment of final judgments through the U.S. Attorneys or Civil Division attorneys, so that proper satisfaction can be entered.

^{1/} Judgments adverse to the United States are not "final" until the Solicitor General has determined that no further appellate review will be sought and no judgments should be sent to the GAO or Postal Service for payment until such a determination has been made. (See USAM Title 2, §2-2.120).

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In cases delegated to them by the Civil Division, U.S. Attorneys should submit adverse final money judgments or compromises which cannot be paid by the client agency, insurer, surety, or indemnitor, to GAO or the Postal Service as appropriate. The Civil Division at Justice will request payment of final judgments and settlements in cases for which it retains primary responsibility. In order to facilitate prompt payment of such judgments or compromises, we have proposed the following sample transmittal letters and forms to be used whenever you forward final judgments or settlements to the General Accounting Office (GAO) or the Postal Service for payment. These new forms will also be used by other Divisions of the Department so that GAO will receive the same basic data whenever payments are requested.

Note that a different letter is to be used in cases forwarding backpay awards for payment because deductions for certain items to be withheld from such awards must be made and we should let GAO know what they are and to whom they should be sent.

There is also a separate data sheet required for awards of attorneys' fees to enable GAO and OMB to gather specific data on the number and amounts of such fees being paid by the government.

4-3.211 Sample Letters - Judgments and Stipulations; Backpay Judgments

A. Sample No. 1 - Judgments and Stipulations

U.S. General Accounting Office
Payment Branch
AFMD/Claims Grout
441 G Street, N.W.
Washington, D.C. 20548

[or]

U.S. Postal Service
Law Department
Claims Division
Washington, D.C. 20260

Re: (Case Name and Court Docket No.)

Gentlemen:

Enclosed for payment is a copy of a [judgment*/, stipulation for compromise, bill of cost, settlement, etc.] in this case. All necessary approvals have been obtained and no further review of this matter will be taken. Therefore, payment may now be made in accordance with the provisions of 31 U.S.C. §1304.

All of the pertinent information to enable you to process this matter for payment is included on the attached Adverse Judgment Data Sheet.

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Please send the check(s) in payment of this [judgment, stipulation for compromise, etc.] settlement to me. I shall arrange for the delivery of the check(s) to the payee(s) upon the entry of a satisfaction of judgment or an appropriate release. If you have any questions concerning this matter, please call me on [telephone number]. Thank you for your cooperation.

Sincerely,

[Name
Title, and Branch, Section or District]

Enclosure

cc: [Agency]

Branch or Section, Division
U.S. Department of Justice
Washington, D.C. 20530

*/ NOTE: Adverse district court orders should not be forwarded for payment until the Solicitor General has determined that we not appeal them. When there has been an unsuccessful appeal by the government, both the adverse district court decision and the final decision of the court of appeals or the Supreme Court, as appropriate, should accompany this request for payment to enable GAO to calculate any interest due.

B. Sample No. 2 - Backpay Judgments

U.S. General Accounting Office
Payment Branch
AFMD/Claims Group
441 G Street, N.W.
Washington, D.C. 20548

[or]

U.S. Postal Service
Law Department
Claims Division
Washington, D.C. 20260

Re: (Case Name and Court Docket No.)

Gentlemen:

Enclosed for payment is a copy of a [judgment or settlement agreement] for back pay in this case in the amount of _____. All necessary approvals have been obtained and no further review of this matter will be taken. Therefore, payment may now be made in accordance with the provisions of 31 U.S.C. §1304.

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*Deductions for sums to be withheld for federal taxes, retirement benefits, state taxes, life insurance, etc. are as follows:

Federal taxes \$ _____	Social Security number
State taxes \$ _____	and State Address
	(where deduction for
	state taxes is to be
	sent)
Retirement benefits \$ _____	Birthdate

All other pertinent information to enable you to process this matter for payment is included on the attached Adverse Judgment Data Sheet.

Please send the check(s) in payment of this settlement to me. I shall arrange for the delivery of the check(s) to the payee(s) upon the entry of a dismissal or an appropriate release.

If you have any questions concerning this matter, please call me on [telephone number]. Thank you for your cooperation.

Sincerely,

[Name
Title, and Branch, Section or District]

Enclosure

cc: [Agency]

U.S. Department of Justice
Washington, D.C. 20530

Branch or Section, _____ Division

* Note that for any deductions to be withheld by GAO, the amount(s) thereof must either be set forth in the judgment, settlement stipulation or other appropriate court order accompanying this letter or be contained in a separate letter from plaintiff or plaintiffs counsel to GAO.

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4-3.212 Adverse Judgment Data Sheet.

A. CASE CAPTION & CIVIL ACTION NO. _____

B. PAYEES(S) 1/ _____

C. AMOUNT TO BE PAID 2/ \$ _____

D. AMOUNT ORIGINALLY CLAIMED 3/ \$ _____

E. AGENCY INVOLVED 4/ _____

F. LEGAL BASIS FOR CLAIM (STATUTE, CONTRACT NO. & APPROPRIATION NO. OR
OTHER AUTHORITY) 5/ _____

G. CITY & STATE WHERE CLAIM AROSE 6/ _____

H. ATTORNEY'S FEES AMOUNT 7/ _____

I. DEBTS PAYEE OWES U.S. (IF KNOWN) 8/ _____

1/ Names(s) of payee(s) must be exactly as set forth in the court's order
or stipulation of settlement.

2/ The gross amount before any appropriate deductions.

3/ Amount sought by plaintiff(s) originally or by amended complaint.

4/ Federal department or agency involved in the lawsuit.

5/ Cite to statute, contract number and appropriation number or other
authority relied upon by the court in ruling for plaintiff on plaintiff's
main cause of action. If Federal Tort Claims Act suit, put FTCA in blank

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followed by most appropriate one of the following: Medical Malpractice; Traffic Accident; Air Crash; Property Maintenance Accident; Fires and Floods; or Misc. (e.g., wrongful arrest).

6/ Place where tort occurred, contract was or was to be performed, alleged discrimination occurred, etc.

7/ Enter amount of attorney's fees is determined. If further litigation over attorney's fees, submit separate sheet for attorney's fees when finally determined. Note that attorneys' fees awarded pursuant to the Equal Access to Justice Act, 28 U.S.C. §2412(d), are to be paid by the defendant agency and should NOT be sent to GAO for payment from the judgment fund.

8/ List any known debts of payee to U.S. so that offset can be made if appropriate.

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4-3.213 Adverse Judgment Data Sheet (Attorney's Fees)

A. CASE CAPTION & CIVIL ACTION NO. _____

B. PAYEES(S) 1/ _____

C. AMOUNT TO BE PAID \$ _____

D. AMOUNT ORIGINALLY CLAIMED 2/ _____

E. AGENCY INVOLVED 3/ _____

F. LEGAL BASIS FOR CLAIM (STATUTE OR OTHER AUTHORITY) 4/ _____

G. DEBTS PAYEE OWES U.S. (IF KNOWN) 5/ _____

1/ Names(s) of payee(s) must be exactly as set forth in the court's order or stipulation of settlement.

2/ Amount of fees sought by attorney(s) if not identical to amount to be paid in Item C above.

3/ Federal department or agency involved in the lawsuit.

4/ Cite to statute or other authority supporting entitlement to fees. Fees awarded pursuant to the Equal Access to Justice Act, 28 U.S.C. §2412(d), are to paid by the defendant agency and claims for payment of such fees should NOT be sent to GAO for payment from the judgment fund.

5/ List any known debts of payee to U.S. so that offset can be made if appropriate.

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4-3.214 Responsibilities of Litigating Attorney

It is particularly important that all requests for payment be consistent with the compromise stipulation or judgment. The litigating attorney is responsible for ensuring this conformity or requesting the judgment be modified by the court accordingly. For example, if it is desired to designate plaintiff's counsel as payee or co-payee, express language to this effect should be included in the judgment or stipulation. Without such express language, checks may be drawn payable only to the plaintiff(s).

In federal civilian or military employment cases where all or part of the judgment consists of backpay, the Comptroller General has held that GAO lacks authority to withhold deductions for applicable taxes, retirement and the like unless the judgment so specifies (Opinions of the Comptroller General, B-12470 and B-12936, September 23, 1981). Accordingly, whenever a judgment for backpay (or any other money judgment involving taxable income) is entered, the attorney should either request the court to specify in the judgment that applicable taxes or any other deductibles, (e.g., retirement benefits) may be withheld or, if possible, enter into an agreement with the plaintiff as to the amount to be withheld.

If the court enters a judgment for backpay without dollar amounts, such a judgment cannot be considered "final" for purposes of certification for payment by GAO until GAO has been furnished by the litigating attorney (1) the agency computation including amounts to be deducted for sums withheld for federal taxes, retirement benefits, life insurance, etc., and (2) a written indication that plaintiff will accept the amount which has been computed in satisfaction of the judgment. The "written indication" may be a letter from the plaintiff or from plaintiff's counsel. The responsible attorney should, therefore, seek to have included in any judgment for backpay either the specific amount of money, or the percentage or rate to be withheld for federal taxes, retirement benefits, life insurance, etc. The social security number of a payee should be furnished to GAO where federal tax deductions are involved; the birthday of the payee where retirement benefits are to be withheld; and the address to which state taxes are to be sent where a deduction for state taxes is to be made.

When considering a settlement which includes a provision for backpay which will be sent to GAO for payment, the attorney should not execute the final agreement until he/she has received the agency's computation of the specific sum of backpay (including deductions) which the plaintiff is willing to accept in satisfaction of backpay claims. No backpay settlement agreement will be approved for payment unless it includes a specified sum for backpay.

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Although certified copies of judgments and compromises are not required, both GAO and the Postal Service do need official copies with signatures, dates, amounts, etc. With the exception of Swine Flu settlements, judgments or compromises which qualify for payment under 31 U.S.C. §1304 should be sent directly to GAO or to the Postal Service by the U.S. Attorney. Swine Flu settlements should be forwarded through the Civil Division for dispersion to GAO.

GAO reports that once a request for payment is received a search is made of their records to determine whether the payee is obligated to the United States for some other incident or occurrence. Once the payment has been approved, GAO forwards the approval to the Department of Treasury for the printing of a check to specifications. This process may take anywhere from two to eight weeks.

If you need to contact GAO about payment of judgments, telephone inquiries should be directed to the office to which the letter is addressed, on FTS 275-3218. The comparable telephone number for the Postal Service is FTS 245-4581.

The pertinent statute, 31 U.S.C. §1304, was enacted to help expedite the payment of certain judgments, and, as a corollary, to effect savings in interest payable on such judgments. If no appeal is taken, no post-judgment interest is to be paid. United States v. Jacobs, 308 F.2d 906 (5th Cir. 1962). When payment is effected under 31 U.S.C. §1304 and there is an appeal, interest on the judgment is only payable from the date of the filing of a copy of the judgment with GAO to the date of the mandate of affirmance. United States v. Wells, 337 F.2d 615 (5th Cir. 1964). Unless an appeal is taken and the judgment is filed with GAO, no interest is payable. United States v. State of Maryland for the use of Meyer, 349 F.2d 693, 694 (D.C. Cir. 1965); DeLucca v. United States, 670 F.2d 843 (9th Cir. 1982); Kelley v. United States, 568 F.2d 259 (2d Cir. 1978). There can be no estoppel against the government to compel payment of interest because the government did not raise the interest issue before appeal. United States v. Varner, 400 F.2d 369 (5th Cir. 1968). Thus, the judgment must be modified to conform to the statute. United States v. Jacobs, 308 F.2d 906 (5th Cir. 1952) cf. Georgetown R. Co. v. Harmon, 147 U.S. 571 (1893).

USAM (superseded)

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4-4.000 COMMON LITIGATION ISSUES I

The following are common issues confronted in the litigation of suits by and against the government. Additional issues are discussed under USAM 4-5.920 through 4-5.925, infra, and under headings covering specific subject matter elsewhere in this title.

4-4.010 Actions by the Government

Suit should be brought in the name of the United States, even when the client agency is a department official or a corporation with sue-and-be-sued powers. The United States is the real party in interest, and advantages are gained in defending counterclaims. See, e.g., Waylyn Corp. v. United States, 231 F.2d 544, 546 (1st Cir.), cert. denied, 352 U.S. 827 (1956). The complaint need only rely upon 28 U.S.C. §1345 as the jurisdictional basis for the suit.

Absent compelling reasons, suit should be filed in the United States district court rather than in a state or local court. Exceptions to this practice should be cleared with the Civil Division. Of course, proofs of claim in probate or state court insolvency proceedings are necessarily filed with those courts, unless it seems preferable to give the fiduciary notice of the government claim and priority under 31 U.S.C. §3713(a) and his/her personal liability under 31 U.S.C. §3713(b) if he/she fails to honor that priority. See USAM 4-7.200, infra.

The recovery of interest, costs, and attorneys' fees is discussed in USAM 4-4.810, 4-4.520, and 4-4.210, infra, respectively. Normally, it is desirable to include in the prayer to a complaint a general prayer for "such other and further relief as may be appropriate in the circumstances." See other matters discussed with respect to specific types of affirmative cases in USAM 4-6.000 et seq., and USAM 4-10.000 et seq.

4-4.020 Actions Against the Government

State courts have no jurisdiction over suits against the United States, absent an express statute such as 28 U.S.C. §2410 (discussed in USAM 4-12.200 et seq.). See United States v. Shaw, 309 U.S. 495 (1939). See USAM 4-11.000 et seq., as to statutes which authorize suit against the United States in the United States district courts. See USAM 4-11.010 et seq., as to suits against government corporations and sue-and-be-sued officers and agencies.

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Jurisdictional defenses cannot be waived. See USAM 4-5.921, infra. However, affirmative defenses enumerated in Rule 12(b), Federal Rules of Civil Procedure, should be specifically pleaded, since some of these are subject to waiver under Rule 12(b) if not properly raised. Gormley v. Bunyan, 138 U.S. 623, 635 (1890). See the Topic Answers, sections 3-3.1 through 3-3.34, in the Civil Division Practice Manual, for a listing of affirmative defenses available to the government and for suggested forms of answer.

When a complaint naming the United States or a federal officer or instrumentality as defendant is served, and the wrong party defendant is named, counsel should be advised informally that unless a proper substitution is promptly effected, and within any applicable statutory period, a motion to dismiss will be filed. This warning procedure should not be employed if an applicable statutory period has already run, or if there is no clearly correct party defendant that can be named.

4-4.200 ATTORNEYS' FEES

Under the "American Rule," attorneys' fees are not recoverable by the prevailing litigant in federal courts in the absence of specific statutory authorization. See Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). There are numerous federal statutes providing for attorney's fee award in specific types of cases, including suits where the United States or a federal agency or official is the defendant, e.g., section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k), supra. For a partial listing see Alyeska Pipeline Co. v. Wilderness Society, supra, at 260-61 n.33. In 1980, Congress enacted the Equal Access to Justice Act, Pub. L. 96-481 (Oct. 21, 1980), which inter alia, amended 28 U.S.C. §2412 to make the federal government liable for fees where

- (1) any other party would be liable under common law or under the terms of any state which specifically provides for such an award, and
- (2) in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that actions, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

See 28 U.S.C. §2412(b), (d)(1). Please refer to the Department of Justice's publication entitled "Award of Attorney Fees and Other Expenses

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in Judicial proceeding Under the Equal Access to Justice Act," (EAJA) for a more detailed discussion of the statute.

In the absence of specific statutory authorization, the court has inherent power, unless forbidden by Congress, to:

A. Permit the trustee of a fund or property, or a party who recovers or preserves a fund for the benefit of others in addition to himself/herself, to recover attorney's fees from the fund or property itself or directly from the other parties who enjoy the benefit;

B. Assess attorney's fees for willful disobedience of a court order as part of a fine levied on the offender; and

C. Assess attorney's fees when the losing party acts in bad faith, vexatiously, wantonly, or for oppressive reasons.

See Alyeska Pipeline Service Co. v. Wilderness Society, *supra* at 257-259; see National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir.), National Council of Community Mental Health Centers v. Mathews, 546 F.2d 1003 (D.C. Cir. 1976), cert. denied, 431 U.S. 959 (1977), and Association of Regional Medical Programs v. Mathews, 551 F.2d 340 (D.C. Cir. 1976), cert. denied, 431 U.S. 930 (1977) concerning the possible recovery of party's costs, including attorney's fees, from the fund created for others benefited by the successful prosecution of a suit against the United States, and Pealo v. Farmers Home Administration, 562 F.2d 744 (D.C. Cir. 1977), concerning unavailability of fees under "common benefit" theory in suits against federal government.

See succeeding sections, as to the award of attorneys' fees in specific contexts. See also Pub. L. 94-559, signed October 19, 1976, concerning attorney's fees in certain civil rights actions.

4-4.210 Recoverable by the Government

The government may recover attorneys' fees, as when a mortgage authorizes the recovery of such fees in the event foreclosure becomes necessary. The United States may recover the attorney's docket fee provided in 28 U.S.C. §1923, when taxed as costs under 28 U.S.C. §1920. See USAM 4-4.500 et seq., as to the taxation of such items as costs.

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4-4.220 Recoverable in Suits Against the Government

In non EAJA cases or where no statute specifically allow for the recovery of fees, 28 U.S.C. §2412(a) would apply. That provision states that in those situations costs assessed against the United States may not include "the fees and expenses of attorneys." A number of statutes allowing for attorney's fees provide limits upon the fees that may be recovered in an action against the United States. See, e.g., 38 U.S.C. §784(g) (National Service Life Insurance); 29 U.S.C. §2678 (Federal Tort Claims Act); cf. Nesbit v. Frederick Snare Corp., 96 F.2d 535, 537-539 (D.C. Cir. 1938), cert. denied, 305 U.S. 608 (1938). Fee restrictions imposed by the Congress are constitutional. See Hines v. Lowrey, 305 U.S. 85, 91 (1938); Nebbia v. New York, 291 U.S. 502, 535-536 (1934); Margolin v. United States, 269 U.S. 93, 101 (1925). The purpose of such statutory restrictions is to forestall champertous contracts, defeat contracts for exorbitant contingent fees, and protect litigants from imposition and extortion. See Nesbit v. Frederick Snare Corp., *supra*; cf. Aetna Casualty & Surety Co. v. United States, 170 F.2d 469, 472 (2d Cir. 1948), aff'd, 338 U.S. 366 (1949).

The maximum fee permitted by statute is not automatically to be allowed. Rather, when the court is to set the fee, the court should determine and allow reasonable fees within the limits set by Congress. In the face of the clear language of the statute, an agreement between plaintiff and his/her attorney as to the amount of fees to be paid the attorney is not controlling on the court. Cf. In re War Risk Insurance, Attorneys' Fees, 52 F.2d 187, 188-189 (D. Mont. 1931). Criminal sanctions established for collecting fees other than as authorized in the relevant federal statutes cannot be avoided by contract. See Lopez v. United States, 17 F.2d 462, 464 (1st Cir. 1926); Purvis v. United States, 61 F.2d 992, 998 (8th Cir. 1932).

4-4.230 Federal Employment Discrimination Cases

This section sets a standard of practice for occasions when the government might move for attorneys' fees as the prevailing defendant in Title VII cases. The language of Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k), which was made applicable to federal employment discrimination cases by Section 717(d) of the Equal Employment Act of 1972, 42 U.S.C. §2000e-16(d), bars the United States from recovering attorneys' fees as the prevailing defendant in a Title VII suit, under the same standards that a private employer would be entitled to recover fees. Compare Copeland v. Martinez, 603 F.2d 981 (D.C. Cir. 1979) with Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978). However, in Copeland v. Martinez, *supra*, the D.C. Circuit ruled that the

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Title VII provision did not bar the federal government from recovering attorney's fees under the "bad faith exception to the American Rule."

Henceforth, the prevailing governmental defendant should move for attorneys' fees only in cases where there is sufficient evidence of vexatiousness, bad faith, abusive conduct, or harassment on the plaintiff's part. Because of the importance of ensuring uniformity, all attorneys intending to move for attorneys' fees on the standard as outlined should clear the decision with the Assistant Attorney General, Civil Division, before filing.

4-4.240 FOIA and Privacy Act Suits

As part of an overall monitoring of attorney fee and costs settlements in FOIA and Privacy Act cases, all settlements must be reported to the Civil Division to satisfy record keeping requirements. U.S. Attorneys are authorized to compromise attorney fees and costs claims in Freedom of Information Act and Privacy Act cases pursuant to the delegation of authority set forth in Section 2 of Directive No. 110-78, 28 C.F.R. Chapter I, Part 0, Appendix to Subpart Y, except where the aggregate amount to be paid exceeds \$25,000 or an hourly rate of \$75. Those proposed settlements which involve an aggregate amount exceeding \$25,000 or an hourly rate of \$75 require the approval of the Assistant Attorney General for the Civil Division.

5 U.S.C. §552(a)(4)(E) authorizes the assessment of "reasonable attorney fees" against the United States in any case in which the complainant has substantially prevailed in a Freedom of Information Act suit. 5 U.S.C. §§552a(g)(2)(B), 552a(g)(3)(B), and 552a(g)(4)(B) contain authorization for the recovery of such fees in Privacy Act litigation. Contact the Federal Programs Branch of the Civil Division for additional assistance.

4-4.250 Federal Tort Claims Act Suits

In Federal Tort Claims Act cases, attorneys' fees are a matter of agreement between the attorney and his/her client but are subject to the statutory limit of 20 percent of awards, compromises, and settlements effected administratively, and 25 percent of judgments entered under 28 U.S.C. §1346 (b) and settlements effected after the commencement of litigation. See 28 U.S.C. §2678.

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4-4.260 Social Security Act Review Cases

42 U.S.C. §406(b) authorizes the award of an attorney's fee in Social Security Act review cases. The fee awarded under that statute is not restricted to a percentage of the disabled claimant's benefits; it may include as well a percentage of the benefits accrued to claimant's dependents because of the disability. See Hopkins v. Cohen 390 U.S. 530 (1968). The majority rule followed in all but the Sixth Circuit in that the court can award fees only for services rendered in connection with proceedings before the court and may not award fees for services before the Social Security Administration. See Gardner v. Mendez, 373 F.2d 488, 490 (1st Cir. 1967); Chernock v. Gardner, 360 F.2d 257, 259 (3rd Cir. 1966); Ray v. Gardner, 387 F.2d 165 (4th Cir. 1967); Gardner v. Mitchell, 391 F.2d 582, 583 (5th Cir. 1968); Fenix v. Finch, 436 F.2d 831, 838 (8th Cir. 1971); and MacDonald v. Weinberger, 512 F.2d 144, 146 (9th Cir. 1975). (See USAM 4-13.220, infra as to the fees which the Secretary of Health and Human Services may award the proceedings before the Secretary.) In the Sixth Circuit, an attorney who has successfully represented a claimant for disability benefits applied for attorney's fees to the tribunal that ultimately made the award of benefits, whether the court or the agency, and this tribunal will make a single award covering services before both the agency and the court. See Webb v. Richardson, 472 F.2d 529, 536 (6th Cir. 1972).

The statute authorizes award of a "reasonable fee...not in excess of 25 percent of the total of past-due benefits" (emphasis supplied). The fee is paid not by the United States in addition to the benefits, but is subtracted from the claimant's award. Several courts of appeals have roundly condemned the practice of routinely awarding the 25 percent statutory maximum without examination of what fee is reasonable in the particular case. See, e.g., MacDonald v. Weinberger, 512 F.2d 144 (9th Cir. 1975); Webb v. Richardson, 472 F.2d 529 (6th Cir. 1972); McKittrick v. Gardner, 378 F.2d 872 (4th Cir. 1967).

All applications for awards should, as a routine matter, be forwarded to the General Counsel's office in the Social Security Administration for review. Although it should not be necessary to oppose most applications for awards, the U.S. Attorney should file for the assistance of the court a short memorandum setting forth the principles elucidated in the above cases, at least in situations where the judge is not likely to have been previously made aware of them through prior experience with Social Security cases or otherwise.

When the court enters an order awarding attorney's fees in a Social Security Act review case, HHS will release the fees to plaintiff's

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attorney unless the U.S. Attorney advises the Civil Division within thirty days of HHS's receipt of the fee award that the award exceeds statutory limits or is excessive under the circumstances.

A setoff of the government takes priority over an attorney's lien.

4-4.270 Veterans' Insurance Litigation

Counsel fees in National Service Life Insurance suits (see USAM 4-11.840, infra) are governed by 38 U.S.C. §784(g), which limits fees to 10 percent "of the amount recovered" and further requires that they be paid by the Veterans Administration "out of the payments to be made under the judgment." Fees must be deducted from the proceeds and cannot be awarded in addition thereto. See Moss v. United States, 311 F.2d 462 (2d Cir. 1962); Jules v. United States, 333 F. Supp. 838 (E.D. Pa. 1971); Lewis v. United States, 327 F. Supp. 561 (S.D. Cal. 1971).

As an exception, the governing statute also provides "that, in a suit brought by or on behalf of an insured during his lifetime for waiver of premiums on account of total disability, the court, as part of its judgment or decree, shall determine and allow a reasonable fee to be paid by the insured to his attorney." See United States v. Myers, 213 F.2d 223 (8th Cir. 1954).

In the absence of an award under 38 U.S.C. §784(g), collection of any fee in NSLI cases is illegal by virtue of 38 U.S.C. §§3101 and 3405. See Purvis v. United States, 61 F.2d 992 (8th Cir. 1932).

For the separate payment of guardian ad litem fees from NSLI proceeds, see Brown v. United States, 84 F. Supp. 489 (N.D. Iowa 1949), and Strunk v. United States, 80 F. Supp. 432 (E.D. Ky. 1948).

For Servicemen's Group Life Insurance, see USAM 4-11.500, infra. The provisions of 38 U.S.C. §784 do not apply to SGLI cases, which are governed by 39 U.S.C. §§765-779.

A discussion of counsel fees in National Service Life Insurance cases can be found at §3-27.25 of the Civil Division Practice Manual. For advice, contact the Commercial Litigation Branch, Civil Division (FTS 724-7296).

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4-4.280 Right to Financial Privacy Act Suits

12 U.S.C. §§3417(a)(4) and §3418 authorize the assessment of "reasonable attorney's fees" in "any successful action" under the Right To Financial Privacy Act of 1978 (Pub. L. 95-630, Title XI, 92 Stat. 3697-3710).

See the suggestions contained in USAM 4-4.230 and 4-4.240, supra for limiting the amount of such fees and for the necessary review by the Assistant Attorney General for the Civil Division of proposed fee settlements in excess of a certain aggregate amount of hourly rate. Contact the Federal Programs Branch of the Civil Division (FTS 633-3178) or (FTS 633-3693) for any additional assistance required.

4-4.300 CASES WITH INTERNATIONAL OR FOREIGN LAW ASPECTS

4-4.310 Assistance on Questions of Foreign Law

The Office of Foreign Litigation of the Civil Division (FTS 724-7455) is often able to render assistance to U.S. Attorneys with respect to the trial in this country of civil cases having international aspects or with respect to questions of foreign law. Such assistance should be requested as far in advance of trial as possible. See Civil Division Practice Manual, §3-12.17.

4-4.320 Extraterritorial Service

For steps to be taken in effecting extraterritorial service of process (including subpoenas directed to United States nationals or residents abroad under 28 U.S.C. §1783), see Civil Division Practice Manual, §§3-12.2 through 3-12.4, and §3-12.8. See also D. J. Memo No. 386, Rev. 2, June 15, 1977, "Instructions for serving judicial documents in the United States and for processing requests by litigants in this country for service of American judicial documents abroad." Additional guidance may be obtained from the Office of Foreign Litigation (FTS 724-7455). (The text of Memo 386 is presently being further revised, and it is expected that the forthcoming revision will soon be published in the United States Marshals Service Directive System.)

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4-4.330 Obtaining Testimony and Documents Abroad

See §§3-12.9 through 3-12.17 of the Civil Division Practice Manual for steps to be taken in obtaining testimony and documents from abroad. Additional guidance may be obtained from the Office of Foreign Litigation (FTS 724-7455).

4-4.340 Foreign Official and Business Records

For guidance in obtaining foreign official and business records in admissible form, see §3-12.17 of the Civil Division Practice Manual.

4-4.350 Collateral Assistance

The Office of Foreign Litigation is able in many instances to provide collateral assistance to U.S. Attorneys by instituting suits in foreign courts to enforce judgments entered in this country and to attach foreign bank accounts. See Civil Division Practice Manual, §3-12.17.

4-4.400 COUNTERCLAIMS AGAINST THE UNITED STATES

The court in United States v. Shaw, 309 U.S. 495 (1940), ruled that a counterclaim could not be asserted against the United States in a state court. See also United States v. Sherwood, 312 U.S. 584, 586 (1941). The same rule obtains in the federal courts in certain circuits. See United States v. Nipissing Mines Co., 206 Fed. 431 (2d Cir.) cert. denied, 234 U.S. 765 (1914); United States v. Agner, 423 F.2d 513 (9th Cir., 1970); United States v. Ameco Electronic Corp., 224 F. Supp. 783 (E.D. N.Y., 1963); United States v. Wilson, 523 F. Supp. 874, 901 (N.D. Iowa 1981).

Certain other circuits recognize the right of counterclaim against the United States in the federal courts, if there is a specific statutory jurisdictional basis for suit against the United States for the same cause of action. See United States v. Silverton, 200 F.2d 824 (1st Cir. 1952); United States v. Acres of Land, 483 F.2d 927, 928 (9th Cir. 1973); United States v. Springfield, 276 F.2d 798 (5th Cir. 1960); and see Thompson v. United States, 250 F.2d 43 (4th Cir. 1957); Landow v. Carmen, 555 F. Supp. 195, 196 (D. Md. 1983); and United States v. Martin, 267 F.2d 764 (10th Cir. 1959). However, such a counterclaim cannot be asserted in the context of a suit brought by the United States in a federal court, absent such an express statutory consent. See United States v. Silverton, supra

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at 927-928 (9th Cir. 1973); Lacy v. United States ex rel and for the use of TVA, 216 F.2d 223 (5th Cir.); United States v. Longo, 464 F.2d 913 (8th Cir. 1972); Marcus Garvey Square, Inc. v. Winston Burnett Construction Co. of Cal., Inc., 595 F.2d 1126, 1130 (9th Cir.), reh'g denied, (April 18, 1979); and see Rule 13(d), Fed. R. Civ. P. A counterclaim cannot be asserted even in such circuits, except in the manner and in the court in which the United States has consented to be sued. See Oyster Shell Products Corp. v. United States, 197 F.2d 1022 (5th Cir.), cert. denied, 344 U.S. 885 (1952); Thompson v. United States, supra; Landow v. Carmen, supra. A statute permitting suit against an agency or its head does not authorize a counterclaim in a suit brought by the government in the name of the United States. See Waylyn Corp. v. United States, 231 F.2d 544 (1st Cir.), cert. denied, 352 U.S. 827 (1956). This immunity cannot be waived by any government official. See Munro v. United States, 303 U.S. 36, 41 (1938); United States v. United States Fidelity Co., 309 U.S. 506, 514-515 (1940); Jackson, Attorney General, on Behalf of the United States, 311 U.S. 494, 500 (1941).

It should be kept in mind that, if a counterclaim exceeds \$10,000 in amount, jurisdiction over it would not be conferred by the Tucker Act, 28 U.S.C. §1346(a)(2). Thus, unless some other statutory basis for jurisdiction exists, such a counterclaim is subject to dismissal. See, e.g., United States v. Aleutian Homes, Inc., 193 F. Supp. 571 (D. Alaska 1961).

This subject is discussed in the Civil Division Practice Manual, section 3-29.1 et seq. See also section 3-3.3 of that Manual.

4-4.410 Counterclaims in Suits on Notes and Mortgages

Frequently, counterclaims are filed in suits on notes and mortgages, arguing that the United States or one of its agencies through its appraisal of the property or the business prospects of a venture has in effect guaranteed success. The function of a government appraisal in such circumstances is to protect the government and its funds. United States v. Longo, 464 F.2d 913 (8th Cir. 1972). The government does not guarantee the economic feasibility of a project, or that it will not shift personnel from an area or make loans to competing concerns. See Deseret Apts. v. United States, 250 F.2d 457 (10th Cir. 1957); Henry Barracks Housing Corp. v. United States, 281 F.2d 196 (Ct. Cls. 1960); A. M. Gross v. United States, 357 F.2d 368, 372 (Ct. Cls. 1966); Marcus Garvey Square, Inc. v. Winston Burnett Construction Co. of Cal., Inc., 595 F.2d 1126, 1130 (9th Cir.), reh'g denied, (April 18, 1979). Counterclaimants' allegations of government misrepresentation of the feasibility of a project falls within

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the express exception to the Federal Tort Claims Act, so that the court lacks jurisdiction to review the merits of such an allegation. See United States v. Sheehan Properties, 285 F. Supp. 608 (D. Minn. 1968); Lloyd v. Cessna Aircraft Co., 429 F. Supp. 181, 186 (E.D. Tenn. 1977); Redmond v. United States, 518 F.2d 811, 824 (7th Cir. 1975); United States v. Thompson, 293 F.Supp. 1307, 1312 (E.D. Ark.), aff'd, 408 F.2d 1075 (8th Cir. 1969).

Under loan insurance programs, the government only guarantees the repayment of loans insured by it and not the condition of the property. See United States v. Neustadt, 366 U.S. 696 (1961); Ware v. United States, 626 F.2d 1278, 1281 (5th Cir. 1980).

See USAM 4-5.600 through 4-5.620, infra as to recoupment and setoff. See also Civil Division Practice Manual §3-29.1 et seq.

4-4.500 COSTS

4-4.510 Court Costs

Rule 54(d), Federal Rules of Civil Procedure, provides:

Except when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs * * *. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Federal Rules of Civil Procedure 58 provides that "[e]ntry of the judgment shall not be delayed for the taxing of costs." 28 U.S.C. §1924 requires the party claiming costs to attach an affidavit, either by himself/herself or his/her duly authorized attorney or agent having knowledge of the facts, that the items claimed are correct, have necessarily been incurred in the case, and that the services for which fees have been charged were actually and necessarily performed. Other statutes relevant to costs in the district courts include 28 U.S.C. §1914 (filing and miscellaneous fees); 28 U.S.C. §1920 (taxation of costs); 28 U.S.C. §1921 (United States Marshal's fees); 28 U.S.C. §1923 (attorneys' docket fees and costs of briefs); and 28 U.S.C. §2412(a) (costs against the United States). As to appellate costs, see 28 U.S.C. §1911 (Supreme Court); 28 U.S.C. §1913 (courts of appeal); 28 U.S.C. §1912 (damages and

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costs on affirmance); Rule 39, Fed. R. App. P. The allowance of costs to the prevailing party is not a rigid rule, and under Federal Rules of Civil Procedure 54(d) the court can direct otherwise. See Fishgold v. Sullivan Drydock and Repair Corp., 328 U.S. 275, 284 (1945).

See USAM 4-4.520 through 4-4.530, infra for specific applications in practice. (Rule 71A(1), Federal Rules of Civil Procedure, provides that, in actions for condemnation of real and personal property under the power of eminent domain, "[c]osts are not subject to Rule 54(d).")

4-4.520 Costs Recoverable by the United States

The United States can recover costs in litigation on the same basis as any private party. 28 U.S.C. §2412(a); Pine River Logging Co. v. United States, 186 U.S. 279, 296 (1909). Costs are recoverable by the United States as a matter of course, unless the court exercises discretion under 28 U.S.C. §1923 ("may be taxed") and Federal Rules of Civil Procedure 54(d) ("unless the court otherwise directs") and denies recovery. See United States v. Bowden, 182 F.2d 251, 252 (10th Cir.) (remand to permit trial court to consider allowance in exercise of its discretion); see Farmer v. Arabian Am. Oil Co., 379 U.S. 227 (1969). While a government employee may not collect a witness fee when testifying on behalf of the United States, his/her travel and subsistence expenses, provided for in 28 U.S.C. §1923(a), may be recovered by the United States as a part of its costs. See 6 Moore's Federal Practice, ¶54.77[5.-1], p. 1726 (2d ed., 1974). If adverse counsel multiplies the proceedings, or increases costs unreasonably and vexatiously, the excess costs may be taxed against him/her personally. See 28 U.S.C. §1927; Weiss v. United States, 227 F.2d 72, 73 (2d Cir.), cert. denied, 350 U.S. 936; 12 A.L.R. Fed. 910. See Rule 30(b), Fed. R. App. P. and United States v. Deaton, 207 F.2d 726, 727 (5th Cir.) (as to recovery of the costs of unnecessarily encumbering the record on appeal).

When considering moving for costs as the prevailing defendant in litigation, discretion should be exercised in determining whether a request for the assessment of costs or a reduction in the amount of costs is appropriate. Although it is difficult to establish any set rules for determining under what circumstances costs should not be sought, there may be cases, for example, when the plaintiff's financial situation at the time the litigation was initiated or as a result of the litigation, warrants a request for a reduction in costs or a waiver of costs.

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4-4.521 Fees of United States Marshal and Clerk, Charges of Court
Stenographer, Printing Expenses

The fees of the United States Marshal in effecting service are taxable as costs. See 28 U.S.C. §1920(1). His/her fees for the service of subpoenas are also taxable as costs, as are the United States Marshal's necessary travel expenses. See 28 U.S.C. §1921. The allowance of the fees of the clerk of the court are specifically covered by 28 U.S.C. §1920(1). See the Judicial Conference Schedule of Additional Fees, following 28 U.S.C. §1914. See also 28 U.S.C. §1917.

28 U.S.C. §1920(2) permits taxation of the fees of the court reporter for all or any part of the stenographic transcript "necessarily obtained for use in the case." This does not cover the court's ordering a transcript for its own use, since the statutory salary of the reporter compensates him/her for this copy. See Texas City Tort Claims v. United States, 188 F.2d 900, 902 (5th Cir.); cf. Miller v. United States, 317 U.S. 192. If opposing counsel orders a copy of the transcript for his/her own use, the cost is not recoverable. See Firtag v. Gendleman, 152 F. Supp. 226 (D. D.C.). However, if the court advises counsel that it will be necessary for counsel to furnish a transcript before a decision can be rendered because of the length and complexity of the trial, and certifies that the transcript was "necessarily obtained for use in the case", the costs may be recoverable. See Wax v. United States, 183 F. Supp. 163, 164 (E.D. N.Y.). Printing expenses necessarily incurred may be taxed as costs under 28 U.S.C. §1920(3).

Federal Rules of Civil Procedure 41(d) authorizes the recovery from a plaintiff of the costs of a prior dismissed action, as a condition of maintaining a second suit based on the same claim. Federal Rules of Civil Procedure 68 provides a ready means of avoiding the payment of costs incurred by a plaintiff subsequent to the government's tender of an offer of judgment. 28 U.S.C. §1919 permits the government's collection of just costs, whenever an action or suit is dismissed for want of jurisdiction. See USAM 4-4.522 and 4-4.523, supra, as to other specific items of costs which may be recoverable.

4-4.522 Witness Fees and Expenses, Deposition Expenses, Exemplification
of Papers

See 28 U.S.C. §1821, as to witness fees and expenses. Wages lost by a witness may not be taxed as costs. See Andresen v. Clear Ridge Aviation, Inc., 9 F.R.D. 50, 52 (D. Nebr.). Nor is the real party in interest entitled to a witness fee for his/her own testimony. Nominal parties or witnesses who have only an incidental interest in the suit are entitled to attendance fees and allowances, and these items may be taxed

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See 6 Moore's Federal Practice, ¶55.77[5.-1], p. 1732 (2d ed., 1974). Witness fees and subsistence may be taxable as costs in some instances in which the witness did not testify, as where last minute admissions made the testimony unnecessary. Mueller v. Powell, 115 F. Supp. 744, 746 (W.D. Mo.). Witness fees and subsistence are not restricted to the actual day the witness testifies, but are allowable for each day the witness necessarily attends. Bennett Chemical Co. v. Atlantic Commodities, Ltd., 24 F.R.D. 200, 204 (S.D. N.Y.). Additional sums paid as fees or compensation to expert witnesses, over and above the statutory fees applicable with respect to fact witnesses, may not be recovered. See Henkel v. Chicago, St. Paul, Minn. & Omaha Ry. Co., 284 U.S. 444, 447 (1931).

Deposition expenses are not taxable as costs, where the depositions were taken essentially for purpose of investigation or preparation. When the taking of a deposition was reasonably necessary, even though it may not have been actually used at trial, the costs recoverable by the prevailing party may include the reasonable fee of the officer before whom the deposition was taken, the cost of notarial certificate and postage if the deposition was mailed, reasonable stenographic expense in taking and transcribing the deposition (but not the cost of an extra copy), fees and mileage allowances of witnesses, and, in a proper case, an interpreter's fee. See 6 Moore's Federal Practice, ¶54.77 [4], pp. 1722-1724 (2d ed., 1982). The party's attorney's fee in connection with the taking of a deposition is not recoverable. 6 Moore's Federal Practice, ¶54.77[2], p. 1715 (2d ed., 1974). The expenses of counsel in attending a deposition at a distant point may be imposed on the opposition as a condition of taking a deposition, rather than as a court cost. See North Atlantic & Gulf S.S. Co. v. United States, 209 F.2d 487, 489-490 (2d Cir.). For other cost items recoverable see USAM 4-4.521 and 4-4.523, infra.

4-4.523 Expenses of Investigation, Consultants, etc.

The expenses of investigation, including trial preparation and travel expenses of counsel, are not chargeable as costs. See 6 Moore's Federal Practice, ¶54.77[4], p. 1723; ¶54.77[6], p. 1738; and ¶54.77 [8], p. 1751 (2d ed., 1982). The same is true with respect to long distance calls, costs of preparing lists of exhibits, and other items of overhead. See Brookside Theatre Corp. v. Twentieth Century-Fox Film Corp. 11 F.R.D. 259, 265-266 (W.D. Mo.), modified & aff'd, 194 F.2d 846 (8th Cir.), cert. denied, 343 U.S. 942. The moving party under Rule 34, Federal Rules of Civil Procedure, generally must bear the cost of copying or photographing. See 76 A.L.R. 2d 953, 972. The expense of using experts as consultants at the trial cannot be charged as costs. See Braun v. Hassenstein Steel Co.,

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23 F.R.D. 163, 168 (D. S.D.); American Steel Works v. Hurley Constr. Co., 46 F.R.D.465, 468 (D. Minn.). Costs of models are generally not taxable as costs, even though the models are introduced in evidence. See 6 Moore's Federal Practice, ¶54.77[6], pp. 1738-1739 (2d ed., 1982). For other cost items recoverable, see USAM 4-4.521 and 4-4.522, supra.

4-4.530 Costs Recoverable From the United States

Prior to the July 18, 1966, amendment to 28 U.S.C. §2412 (1976), costs were not recoverable against the United States (United States v. Chemical Foundation, Inc., 272 U.S. 1, 20 (1926); United States v. Worley, 281 U.S. 339 (1953)), or against government officers sued in their official capacity. See Ewing v. Gardner, 346 U.S. 321. The 1966 amendment applies "only to judgments entered in actions filed subsequent to "July 18, 1966." The amendment permitted costs enumerated in 28 U.S.C. §1920, but not including fees and expenses of attorneys, to be awarded to the prevailing party and against the United States, or any agency thereof or an officer thereof acting in an official capacity. Reimbursable costs are limited by the statute to those actually incurred in the litigation. The government's remaining immunity from costs cannot be waived by any government official. Cf. Munro v. United States, 303 U.S. 36, 41 (1939); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 514. "Congress alone has power to waive or qualify that immunity." See United States v. Chemical Foundation, Inc., supra.

The Equal Access to Justice Act ("EAJA"), Title II of Pub. L. No. 96-481, 94 Stat. 2325 (1980), which became effective October 1, 1981, amended the former 28 U.S.C. §2412 (1976), but preserves that former law in a new section 2412(a), which provides for costs as did the former law. The EAJA adds section 2412(b) which modifies in some situations the traditional statutory prohibition against award of attorney fees by or against the United States in civil actions.

28 U.S.C. §1923(a) enumerates attorneys' docket fees which may be taxed as costs, e.g., the docket fee for each deposition admitted in evidence. 28 U.S.C. §2412, as amended, however, provides that a judgment for costs against the United States shall not include attorneys' fees. The attorneys' docket fees which are usually taxable as costs under 28 U.S.C. §1923(a), therefore, are not taxable against the United States. See North Atlantic & Gulf S.S. Co. v. United States, 209 F.2d 487, 489-490 (2d Cir.), sustaining the action of the district court under a local rule which required the party taking a deposition at a point more than 150 miles from the court to pay the expense of opposing counsel in attending the taking of the deposition. The court there treated the expense as a

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condition for the taking of the deposition, rather than as an item of court costs. When the court attempts to impose the expenses of adversary's counsel in attending a deposition scheduled by the government at a distant point, it should be borne in mind the United States has no funds available for the prepayment of such items. "Such orders for the advancement of expenses do not constitute the taxing of costs, and are not conclusive as to who shall ultimately be taxed, if at all, with the expenses involved." See 6 Moore's Federal Practice, §54.77[2], P. 1715 (2d ed., 1974). In view of the foregoing, applications of opposing counsel for the allowance of their expenses as a condition for the taking of depositions should be vigorously opposed, so that such orders may be avoided if possible and such expenses, when absolutely required, can be kept to a minimum. While such expenses are reimburseable and will be paid, the U.S. Attorney should submit a DJ-25 Form accompanied by the court's order for authorization to incur expense. The claimant must complete a voucher, Form DJ-94, to be reimbursed, as such expenses cannot lawfully be prepaid. If the allowance of such expenses by the court may be anticipated as a condition of our taking depositions, serious consideration should be given to obtaining the information sought by alternative means, such as written interrogatories, requests for admissions, stipulations, etc. Of course, when the government is the prevailing party, every effort should be made to recoup these expenses by having them taxed as costs against the adversary.

The 1966 amendment to 28 U.S.C. §2412 did not affect costs awarded against government corporations, which are treated as private persons. RFC v. J.G. Menihan Corp., 312 U.S. 81, 84 (1940). Costs are also recoverable against the United States in certain civil rights suits the same as any other party. 42 U.S.C. §§1971(c), 2000c-7 and 20003-5(k).

28 U.S.C. §2498 excuses the United States, and its departments, agencies, and employees, from posting security for damages or costs.

For the recovery of attorneys' fees and "other litigation costs reasonably incurred" in any case in which a complainant has substantially prevailed in a Freedom of Information Act or Privacy Act suit, see 5 U.S.C. §552 (a)(4)(E) and 5 U.S.C. §§552 a(g)(2)(B), and 552 a(g)(3)(B), and 552 a(g)(4)(B). For the recovery of "the costs of the action together with reasonable attorney's fees as determined by the court" in a complainant's successful action to enforce government liability under the Right to Financial Privacy Act of 1978 (Pub. L. 95-630, Title XI, 92 Stat. 3697-3710), see 12 U.S.C. §3417(a)(4); see also 12 U.S.C. §3418. For recovery of attorney fees under the Equal Access to Justice Act, see 5 U.S.C. §504 and 28 U.S.C. §2411(b)-(e) and consult the Office of Legal Policy Monograph Award of Attorney Fees and Other Expenses in Judicial Proceedings under the Equal Access to Justice Act.

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4-4.600 ESTOPPEL

The general rule is that the federal government may not be equitably estopped from enforcing public laws, even though private parties may as a result suffer hardship in particular cases. See Heckler v. Community Health Services, 104 S. Ct. 2218 (1984); INS v. Miranda, 459 U.S. 14 (1982); Schweiker v. Hansen, 450 U.S. 785 (1981); FCIC v. Merrill, 322 U.S. 380 (1947). No decision of the Supreme Court holds that equitable estoppel lies against the government in any circumstance. However, in several instances the court has expressly declined to determine whether the government could be estopped in a case involving serious affirmative misconduct by government employees. See, e.g., Heckler v. Community Health Services, supra; INS v. Miranda, supra.

The Supreme Court has made it clear that before an estoppel will lie against the government a private party must at a minimum demonstrate that all the traditional elements of an estoppel are present. Heckler v. Community Health Services, supra: 104 S. Ct. at 2224. An estoppel cannot be erected against the government on the basis of oral advice Heckler v. Community Health Services, supra; nor can the government be estopped merely because it is engaging in "commerical undertakings," see FCIC v. Merrill, 322 U.S. at 383 n.l. The rule against estopping the government does not depend upon a showing of impact on the federal treasury, Ins v. Miranda, supra, Montana v. Kennedy, 366 U.S. 308 (1961), nor does it depend on whether a single agent of the government, or an entire agency, has engaged in misconduct. See, e.g., INS v. Miranda, supra, Schweiker v. Hansen, supra.

4-4.700 FEDERAL LAW OR STATE LAW

Federal statutory law, enacted pursuant to constitutional authority, is clearly controlling over state statutory and decisional law. U.S. Const. Art. VI, Cl. 2. Frequently, the federal law dealt with in government litigation is decisional rather than statutory. See, e.g., Clearfield Trust Co. v. United States, 318 U.S. 363 (1942); United States v. Little Lake Misere Land Co., 412 U.S. 580, 590-594 (1972); United States v. View Crest Gdn. Apts., Inc., 268 F.2d 380 (9th Cir.). Thus, the rights of parties to government contracts and negotiable instruments are to be determined by federal rather than state law. See Clearfield Trust Co. v. United States, supra; United States v. Allegheny County, 322 U.S. 174 (1943); United States v. First National Bank of Atlanta, 441 F.2d 906 (5th Cir.); cf. Free v. Bland, 369 U.S. 663 (1943). The rationale for this rule is found in the necessity for uniform construction and

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application of such contracts and instruments throughout the United States. Clearfield Trust Co. v. United States, supra; T.H. Rogers Lumber Co. v. Apel, 468 F.2d 14 (10th Cir.).

A narrow exception to the usual rule obtains with respect to "hand-tailored" contracts not for general usage, or which expressly refer to, or adopt, state law as to one or more issues. Cf. United States v. Yazell, 382 U.S. 341 (1965); United States v. MacKenzie, 510 F.2d 39 (9th Cir.). Government notes, mortgages, or contracts may be modified in language or qualified by regulation, to overcome court holdings or forestall possible court rulings as to the application of state law. Compare 13 C.F.R. §101.1(d), providing that federal law shall be applicable in construing and enforcing SBA drafted notes, mortgages, guaranties, and other documents. See also Par. 19 in most Farmers Home Administration mortgages which provides:

As against the debt evidenced by the note and any indebtedness to the Government thereby secured, with respect to the property, Borrower (a) hereby relinquishes, waives, and conveys all rights, inchoate or consummate, of descent, dower, curtesy, homestead, valuation, appraisal, and exemption, to which Borrower is or becomes entitled under the laws and constitution of the jurisdiction where the property lies, and (b) hereby agrees that any right provided by laws or constitution for redemption of possession following foreclosure sale shall not apply, and that no right of redemption or possession shall exist after foreclosure sale.

For specific application of court-made federal law in the construction of government instruments, see the following provisions of this title. The priority of federal liens is governed by federal rather than state law. See USAM 4-12.250, infra. In judicial foreclosure cases, federal law controls the government's right to the appointment of a receiver pursuant to the terms of a government mortgage, its right to have property sold free and clear of state-set post-sale redemption rights, and its right to deficiency judgment. See USAM 4-7.400, infra. For the application of federal law in suits on a bank's warranty of prior endorsements on government checks, see USAM 4-9.630, infra.

When the government has paid out funds under authority of federal law and in the exercise of a constitutional function, there is a right to recover such funds as for money had and received, restitution, or unjust enrichment, and state law cannot defeat or condition that right of

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recovery. See United States v. Independent School District No. 1 of Okmulgee County, Okla., 209 F.2d 578 (10th Cir.); but cf. United States v. Standard Oil Co., 332 U.S. 301; 305 (1947). For the application of federal law in suits seeking recovery from converters of property mortgaged to the government, see USAM 4-6.900, infra. For the mixed application of state and federal law in the context of Federal Tort Claims Act litigation, see USAM 4-11.690, infra. Methods employed for the enforced collection of money judgments are referable to state law. See 28 U.S.C. §2005; Fed. R. Civ. P. 69; cf. Travelers Ins. Co. v. Lawrence, 509 F.2d 83 (9th Cir.). Recordation of judgment liens is also dependent on state law. See 28 U.S.C. §1962.

The relationship between federal and state law was significantly affected by the Supreme Court's decision in United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979). See Commercial Litigation Branch Monograph "Choice of Laws Decisions in Federal Courts after Kimbell Foods" (November 1983).

4-4.800 INTEREST

4-4.810 Interest Recoverable by the Government

The United States is entitled to recover pre-judgment interest. See Royal Indemnity Co. v. United States, 313 U.S. 289 (1940); Billings v. United States, 232 U.S. 261, 284-288 (1913); United States v. Eastern Airlines, Inc., 366 F.2d 316, 321 (2d Cir.). Interest should be demanded in every case in which the collection of interest is appropriate. When the government prevails in a suit where there is no contract or instrument which contains no provision for interest, the rate of the interest to be recovered for delayed payment of the obligation to the United States should be determined by the interest provisions of the Debt Collection Act of 1982, 31 U.S.C. §3717, and the Federal Claims Collection Standards, 4 C.F.R. §102.13. See also Commercial Litigation Branch Monograph "Interest on Claims By and Against the Government" (June 1984).

When interest is provided for by note or contract, the complaint should pray for pre-judgment interest at the rate specified therein. When money is paid out or property is delivered as a result of fraud or deceit, interest should be demanded from the date the debtor received the benefit of the funds or property. See §3-6.45 of the Civil Division Practice Manual. In other cases, interest should be collected from the date of notice of overpayment, or the first demand for repayment, as the case may be. See RFC v. Service Pipe Line Co., 206 F.2d 814 (10th Cir.). GAO certificates of indebtedness will normally reflect the date of first demand for repayment. In suits for the recovery of balances due, the Postal Service interest may be recovered at the rate of six per cent from

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the time of default. See 28 U.S.C. §2718. Interest is also expressly recoverable in suits to recover moneys paid or credits granted by the Postal Service as a result of mistake, fraudulent representations, collusion, or misconduct of a Postal Service officer or employee. See 39 U.S.C. §2605.

Post-judgment interest should be affirmatively and specifically provided for in the judgment, at the 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. However, civil judgments in favor of the United States bear interest as allowed by law, whether or not interest has been expressly provided for in the judgment. See 28 U.S.C. §1961. See also the Commercial Litigation Branch Monograph referred to above. Under that statute, the government is entitled to post-judgment interest on the entire judgment as rendered, including any pre-judgment interest included therein. See United States v. Briggs, Manufacturing Company, 460 F.2d 1195, 1196 (9th Cir. 1972) A judgment obtained in one district court may be registered in another district under 28 U.S.C. §1963 and may be entered in like manner.

4-4.820 Interest Recoverable from the Government

Neither pre-judgment nor post-judgment interest is recoverable against the United States, except where the liability is imposed by statute or assumed by contract. See United States v. Worley, 281 U.S. 339, 341 (1929); United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 659 (1944); United States v. Thayer-West Point Hotel Co., 329 U.S. 585 (1946); Jacobs v. United States, 290 U.S. 13; 28 U.S.C. §2516(a).

In cases brought under the Suits in Admiralty Act, no pre-judgment interest may be allowed prior to judgment, unless on a contract expressly stipulating for the payment of interest. 46 U.S.C. §§741-742, 745. In suits under the Public Vessels Act, no pre-judgment interest may be allowed prior to judgment, unless in a contract expressly stipulating for the payment of interest. 46 U.S.C. §§781-782. Interest prior to judgment is expressly denied by the Federal Tort Claims Act. 28 U.S.C. §2674. See Southern Pacific Transportation Company v. United States, 471 F. Supp. 1186, 1199 (S.D. Cal. 1979).

The award of post judgment interest is governed in district courts by 28 U.S.C. §1961, 2414 and 31 U.S.C. §1304. The rate of interest is set forth in 28 U.S.C. §1961(a). No interest is allowed on any judgment where the government does not appeal. Where the government appeals a judgment of a district court or a regional court of appeals, interest is allowed from the date the opposing party files the district court judgment with the Comptroller General through the day before the date of the mandate of affirmance by the court of appeals.

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For additional information, and particularly where an appeal is taken from a district court judgment to the court of appeals for the federal circuit, see the Commercial Branch Monograph "Interest on Claims By and Against the Government" (June 1984).

4-4.830 Interest Computations

Interest computations can be greatly simplified by the use of monthly-daily interest factors. Following, are factors for 365-day and 360-day interest years.

Also following are regular and leap-year "Julian date" calendars, which show the number of days elapsed on any given date during the year. These can assist in making calculations based upon the 365-day interest factor table.

There is no established rule as to which interest year should be used. In the absence of an express agreement on the subject, the 360-day interest year table is ordinarily more appropriate for the computation of interest on pre-judgment installment payments. The 365-day year is ordinarily used for post-judgment interest, unless state law (presently applicable by virtue of 28 U.S.C. §1961) provides otherwise.

Interest is earned and accrues through the day of payment. Payments received on or prior to a mutually agreed upon monthly payment date are credited as of the scheduled date (use monthly interest factor). Occasional payments and scheduled payments received after scheduled dates are credited as of the date received.

Example 1: Given a judgment which bears interest at an 8.00 percent annual rate (use 365-day year interest factor table) upon which all fees

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and costs have been paid, an unpaid principal balance of \$1,500, a payment of \$100 and 31 lapsed days from the last payment, what is the interest portion of the payment?

Answer: By referring to the 365-day year table, you will find the 8.00 percent daily interest factor to be .000219. Then, $.000219 \times 31 \times \$1,500 = \$10.18$ (interest portion of payment).

Example 2: Given a pre-judgment claim with an unpaid principal balance of \$1,500 at 8.00 percent annual interest rate, an installment due each month (use 360-day year interest factor table) on or before the 10th day, and a \$100 payment received on the 8th day of the month, what is the interest portion of the payment?

Answer: By referring to the 360-day year table, you will find the 8.00 percent monthly interest factor to be .006667. Then, $.006667 \times \$1,500 = \10 (interest portion of payment).

Example 3: The same example as 2, but the payment is received on the 13th day of the month, what is the interest portion of the payment?

Answer: By referring to the 360-day year table, you will find the 8.00 percent daily interest factor to be .000222. Then, $.000222 \times 33 \times \$1,500 = \$10.99$.

Some points to remember:

The "U.S. Rule" is ordinarily followed in making interest calculations. Under that rule, a partial payment is credited first to court costs and fees, next to accrued interest, and the balance (if any) to principal; subsequent interest then accrues on the remaining principal, computed from the date of the partial payment. See Woodward v. Jewell, 140 U.S. 247, 248 (1891); 45 Am.Jur.2d, Interest and Usury, §99; 47 C.J.S. Interest §66.

That rule, as it applies to principal and interest, should be followed in pre-judgment collection matters unless the debtor's obligation (or the program legislation under which it arises) expressly provides otherwise. See 4 C.F.R. 102.11. Most jurisdictions also follow the U.S. Rule in computing post-judgment interest.

Post-judgment interest accrues on the entire amount of a judgment from the date of entry (see 28 U.S.C. §1961), including awards of accrued pre-judgment interest on the original obligation, even though such items have been specifically identified and separately set forth. See United States v. Briggs Manufacturing Company, 460 F.2d 1195, 1196 (9th Cir. 1972); 45 Am.Jur.2d, Interest and Usury, §78; 47 C.J.S. Interest §21.

Annual Interest	Monthly Interest	Daily Interest	Annual Interest	Monthly Interest	Daily Interest	Annual Interest	Monthly Interest	Daily Interest
5.00%	.004167	.000137	12.00%	.010000	.000329	19.00%	.015833	.000521
5.25	.004375	.000144	12.25	.010208	.000336	19.25	.016042	.000527
5.50	.004583	.000151	12.50	.010417	.000342	19.50	.016250	.000534
5.75	.004792	.000158	12.75	.010625	.000349	19.75	.016458	.000541
6.00	.005000	.000164	13.00	.010833	.000356	20.00	.016667	.000548
6.25	.005208	.000171	13.25	.011042	.000363	20.25	.016875	.000555
6.50	.005417	.000178	13.50	.011250	.000370	20.50	.017083	.000562
6.75	.005625	.000185	13.75	.011458	.000377	20.75	.017292	.000568
7.00	.005833	.000192	14.00	.011667	.000384	21.00	.017500	.000575
7.25	.006042	.000199	14.25	.011875	.000390	21.25	.017708	.000582
7.50	.006250	.000205	14.50	.012083	.000397	21.50	.017917	.000589
7.75	.006458	.000212	14.75	.012292	.000404	21.75	.018125	.000596
8.00	.006667	.000219	15.00	.012500	.000411	22.00	.018333	.000603
8.25	.006875	.000226	15.25	.012708	.000418	22.25	.018542	.000610
8.50	.007083	.000233	15.50	.012917	.000425	22.50	.018750	.000616
8.75	.007292	.000240	15.75	.013125	.000432	22.75	.018958	.000623
9.00	.007500	.000247	16.00	.013333	.000438	23.00	.019167	.000630
9.25	.007708	.000253	16.25	.013542	.000445	23.25	.019375	.000637
9.50	.007917	.000260	16.50	.013750	.000452	23.50	.019583	.000644
9.75	.008125	.000267	16.75	.013958	.000459	23.75	.019792	.000651
10.00	.008333	.000274	17.00	.014167	.000466	24.00	.020000	.000658
10.25	.008542	.000281	17.25	.014375	.000473	24.25	.020208	.000664
10.50	.008750	.000288	17.50	.014583	.000479	24.50	.020417	.000671
10.75	.008958	.000295	17.75	.014792	.000486	24.75	.020625	.000678
11.00	.009167	.000301	18.00	.015000	.000493	25.00	.020833	.000685
11.25	.009375	.000308	18.25	.015208	.000500	25.25	.021042	.000692
11.50	.009583	.000315	18.50	.015417	.000507	25.50	.021250	.000699
11.75	.009792	.000322	18.75	.015625	.000514	25.75	.021458	.000705

MONTHLY-DAILY INTEREST FACTORS (360-DAY YEAR)

Annual Interest	Monthly Interest	Daily Interest	Annual Interest	Monthly Interest	Daily Interest	Annual Interest	Monthly Interest	Daily Interest
5.00%	.004167	.000139	12.00%	.010000	.000333	19.00%	.015833	.000528
5.25	.004375	.000146	12.25	.010208	.000340	19.25	.016042	.000535
5.50	.004583	.000153	12.50	.010417	.000347	19.50	.016250	.000542
5.75	.004792	.000160	12.75	.010625	.000354	19.75	.016458	.000549
6.00	.005000	.000157	13.00	.010833	.000361	20.00	.016667	.000556
6.25	.005208	.000174	13.25	.011042	.000368	20.25	.016875	.000563
6.50	.005417	.000181	13.50	.011250	.000375	20.50	.017083	.000569
6.75	.005625	.000188	13.75	.011458	.000382	20.75	.017292	.000576
7.00	.005833	.000194	14.00	.011667	.000389	21.00	.017500	.000583
7.25	.006042	.000201	14.25	.011875	.000396	21.25	.017708	.000590
7.50	.006250	.000208	14.50	.012083	.000403	21.50	.017917	.000597
7.75	.006458	.000215	14.75	.012292	.000410	21.75	.018125	.000604
8.00	.006667	.000222	15.00	.012500	.000417	22.00	.018333	.000611
8.25	.006875	.000229	15.25	.012708	.000424	22.25	.018542	.000618
8.50	.007083	.000236	15.50	.012917	.000431	22.50	.018750	.000625
8.75	.007292	.000243	15.75	.013125	.000438	22.75	.018958	.000632
9.00	.007500	.000250	16.00	.013333	.000444	23.00	.019167	.000639
9.25	.007708	.000257	16.25	.013542	.000451	23.25	.019375	.000646
9.50	.007917	.000264	16.50	.013750	.000458	23.50	.019583	.000653
9.75	.008125	.000271	16.75	.013958	.000465	23.75	.019792	.000660
10.00	.008333	.000278	17.00	.014167	.000472	24.00	.020000	.000667
10.25	.008542	.000285	17.25	.014375	.000479	24.25	.020208	.000674
10.50	.008750	.000292	17.50	.014583	.000486	24.50	.020417	.000681
10.75	.008958	.000299	17.75	.014792	.000493	24.75	.020625	.000688
11.00	.009167	.000306	18.00	.015000	.000500	25.00	.020833	.000694
11.25	.009375	.000313	18.25	.015208	.000507	25.25	.021042	.000701
11.50	.009583	.000319	18.50	.015417	.000514	25.50	.021250	.000708
11.75	.009792	.000326	18.75	.015625	.000521	25.75	.021458	.000715

JULIAN DATE CALENDAR

(PERPETUAL)

Day	Jan	Feb	Mar	Apr	May	June	July	Aug	Sep	Oct	Nov	Dec	Day
1	001	032	060	091	121	152	182	213	244	274	305	335	1
2	002	033	061	092	122	153	183	214	245	275	306	336	2
3	003	034	062	093	123	154	184	215	246	276	307	337	3
4	004	035	063	094	124	155	185	216	247	277	308	338	4
5	005	036	064	095	125	156	186	217	248	278	309	339	5
6	006	037	065	096	126	157	187	218	249	279	310	340	6
7	007	038	066	097	127	158	188	219	250	280	311	341	7
8	008	039	067	098	128	159	189	220	251	281	312	342	8
9	009	040	068	099	129	160	190	221	252	282	313	343	9
10	010	041	069	100	130	161	191	222	253	283	314	344	10
11	011	042	070	101	131	162	192	223	254	284	315	345	11
12	012	043	071	102	132	163	193	224	255	285	316	346	12
13	013	044	072	103	133	164	194	225	256	286	317	347	13
14	014	045	073	104	134	165	195	226	257	287	318	348	14
15	015	046	074	105	135	166	196	227	258	288	319	349	15
16	016	047	075	106	136	167	197	228	259	289	320	350	16
17	017	048	076	107	137	168	198	229	260	290	321	351	17
18	018	049	077	108	138	169	199	230	261	291	322	352	18
19	019	050	078	109	139	170	200	231	262	292	323	353	19
20	020	051	079	110	140	171	201	232	263	293	324	354	20
21	021	052	080	111	141	172	202	233	264	294	325	355	21
22	022	053	081	112	142	173	203	234	265	295	326	356	22
23	023	054	082	113	143	174	204	235	266	296	327	357	23
24	024	055	083	114	144	175	205	236	267	297	328	358	24
25	025	056	084	115	145	176	206	237	268	298	329	359	25
26	026	057	085	116	146	177	207	238	269	299	330	360	26
27	027	058	086	117	147	178	208	239	270	300	331	361	27
28	028	059	087	118	148	179	209	240	271	301	332	362	28
29	029		088	119	149	180	210	241	272	302	333	363	29
30	030		089	120	150	181	211	242	273	303	334	364	30
31	031		090		151		212	243		304		365	31

FOR LEAP YEAR USE REVERSE SIDE

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JULIAN DATE CALENDAR

FOR LEAP YEARS ONLY

Day	Jan	Feb	Mar	Apr	May	June	July	Aug	Sep	Oct	Nov	Dec	Day
1	001	032	061	092	122	153	183	214	245	275	306	336	1
2	002	033	062	093	123	154	184	215	246	276	307	337	2
3	003	034	063	094	124	155	185	216	247	277	308	338	3
4	004	035	064	095	125	156	186	217	248	278	309	339	4
5	005	036	065	096	126	157	187	218	249	279	310	340	5
6	006	037	066	097	127	158	188	219	250	280	311	341	6
7	007	038	067	098	128	159	189	220	251	281	312	342	7
8	008	039	068	099	129	160	190	221	252	282	313	343	8
9	009	040	069	100	130	161	191	222	253	283	314	344	9
10	010	041	070	101	131	162	192	223	254	284	315	345	10
11	011	042	071	102	132	163	193	224	255	285	316	346	11
12	012	043	072	103	133	164	194	225	256	286	317	347	12
13	013	044	073	104	134	165	195	226	257	287	318	348	13
14	014	045	074	105	135	166	196	227	258	288	319	349	14
15	015	046	075	106	136	167	197	228	259	289	320	350	15
16	016	047	076	107	137	168	198	229	260	290	321	351	16
17	017	048	077	108	138	169	199	230	261	291	322	352	17
18	018	049	078	109	139	170	200	231	262	292	323	353	18
19	019	050	079	110	140	171	201	232	263	293	324	354	19
20	020	051	080	111	141	172	202	233	264	294	325	355	20
21	021	052	081	112	142	173	203	234	265	295	326	356	21
22	022	053	082	113	143	174	204	235	266	296	327	357	22
23	023	054	083	114	144	175	205	236	267	297	328	358	23
24	024	055	084	115	145	176	206	237	268	298	329	359	24
25	025	056	085	116	146	177	207	238	269	299	330	360	25
26	026	057	086	117	147	178	208	239	270	300	331	361	26
27	027	058	087	118	148	179	209	240	271	301	332	362	27
28	028	059	088	119	149	180	210	241	272	302	333	363	28
29	029	060	089	120	150	181	211	242	273	303	334	364	29
30	030		090	121	151	182	212	243	274	304	335	365	30
31	031		091		152		213	244		305		366	31

(USE IN 1980, 1984, 1988, etc.)

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4-4.900 INTERVENTION BY THE UNITED STATES

Not only may the United States initiate litigation in its own right, it may also intervene in litigation initiated by others. Cf. New York v. New Jersey, 256 U.S. 296. As to intervention in actions filed in the United States district courts, see Fed. R. Civ. P. 24, and 28 U.S.C. §§2403, 2348, and 2323; cf. Fed. R. Civ. P. 25(c)(2). See also USAM 4-1.323, supra. With respect to intervention pursuant to court certificate under 28 U.S.C. §2403, see Wallach v. Lieberman, 366 F.2d 254, 257 (2d Cir.). The Medical Care Recovery Act permits intervention of right to assert government claims under that Act. See 42 U.S.C. §2651(b), discussed in USAM 4-8.200, infra. 15 U.S.C. §714b(c) permits the Commodity Credit Corporation to intervene in any suit, action, or proceeding, in which it has an interest.

When an action, as to which no statute provides jurisdiction, is brought against the United States in state court, the United States can move to dismiss, and, if dismissal is granted, it can then move to intervene to assert the position which it wishes vindicated. However, intervention is subject to the discretion of the court in such circumstances.

The filing of a brief amicus curiae, with court permission, may be desirable in some situations in which intervention is not clearly authorized. See, e.g., Faubus v. United States, 254 F.2d 797, 804-805 (8th Cir.), cert. denied, 358 U.S. 829 (1958). See also Rule 29, Fed. R. App. P.

USAM (superseded)

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4-5.000 COMMON LITIGATION ISSUES II

4-5.100 JURY TRIALS IN CIVIL CASES

Rule 38, Federal Rules of Civil Procedure, recognizes the Seventh Amendment right to trial by jury, and provides for demand of jury; but, failing such a demand, jury trial is waived. See also Rule 39, and 28 U.S.C. §§1861-1874. Government suits for money are commonly tried to a jury, if demanded. Suits for civil penalties are triable to a jury. See Hepner v. United States, 213 U.S. 103, 115 (1909); United States v. Regan, 232 U.S. 27, 47 (1914); United States v. J. B. Williams Inc., 498 F.2d 414 (2d Cir.). United States Government Life and National Service Life Insurance litigation has been held subject to trial by jury. See, e.g., United States v. Pfitsch, 256 U.S. 547 (1921); United States v. Law, 266 U.S. 494; Prouty v. United States, 94 F. Supp. 320 (1925) (D. N.H.). Actions which seek equitable relief are not triable to a jury. See 5 Moore's Federal Practice, §38.31[1] (2d ed.); United States v. Louisiana, 339 U.S. 699, 706 (1950).

Suits brought against the Commodity Credit Corporation are to be tried without a jury. See 15 U.S.C. §714b(c); Cargill, Inc. v. CCC, 275 F.2d 745, 748-751 (2d Cir.). Tucker Act (28 U.S.C. §1346(a)(2)) and Federal Tort Claims Act (28 U.S.C. §1346(b)) suits are to be tried without a jury. See 28 U.S.C. §2402; United States v. Sherwood, 312 U.S. 584 (1941); O'Connor v. United States, 269 F.2d 578, 585 (2d Cir.). The statutory language is mandatory and not permissive. See Honeycutt v. United States, 19 F.R.D. 229 (W.D. La.). The government's counterclaim or setoff, asserted in a Tucker Act or Tort Claims Act suit, is also to be tried without a jury. See McElrath v. United States, 102 U.S. 426, 440 (1880); Cargill, Inc. v. CCC, *supra* at 745, 749 (2d Cir.); Terminal Warehouse of N.J. v. United States, 91 F. Supp. 327 (D. N.J.). Denial of jury trial in such circumstances does not contravene the Seventh Amendment. "It hardly can be maintained that under the common law in 1791 jury trial was a matter of right for persons asserting claims against the sovereign." See Galloway v. United States, 319 U.S. 372, 388 (1943); United States v. Sherwood, *supra* at 584, 587 (1941).

Government sue-and-be-sued officers and agencies are considered to be the United States for the purpose of the no-jury trial provisions of 28 U.S.C. §2402. See 3A Moore's Federal Practice, ¶17.23 (2d ed., 1982); *cf.* SBA v. McClellan, 364 U.S. 446 (1960).

Because of the possible impleader of third parties in actions under the Federal Tort Claims Act, simultaneous trials to court and jury can sometimes result. Indeed, in some cases the court and jury may reach

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contradictory findings. Cf. Eastern Airlines v. Union Trust Co., cert. denied, 353 U.S. 942. In other cases, courts and juries have disagreed substantially in assessing damages against joint tortfeasors. See, e.g., Benbow v. Wold, 217 F.2d 203, 204 (9th Cir.); D.C. Transit System, Inc. v. Slingland, 266 F.2d 465 (D.C. Cir.), cert. denied, 361 U.S. 819 (1959).

A jury trial may be advantageous to the government in some situations, for such a trial enables counsel to better protect the record for appeal. On the other hand, in O'Donnell v. Watson Bros. Transp. Co., 183 F. Supp. 577, 582 (N.D. Ill.), the court noted that non-jury trials require forty percent less time than jury trials, and jury awards are twenty to forty percent higher than comparable awards in non-jury cases. Because of these considerations and the fact that cases on non-jury calendars can generally be reached for trial more rapidly, it is usually preferable to forego a jury trial in civil cases, absent some compelling reason to the contrary. Obviously, consideration should be given to the nature of juries in the U.S. Attorney's district, past comparative records or awards in that district, and the records of the judges who will try the non-jury cases.

4-5.200 LACHES AND LIMITATIONS

As Mr. Justice Story said:

The general principle is, that laches in not imputable to the government; and this maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy. The government can transact its business only through its agents; and its fiscal operations are so various, and its agents so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions. United States v. Kirkpatrick, 9 Wheat 720, 725.

See also Gausson v. United States, 97 U.S. 584, 590 (1878); German Bank v. United States, 148 U.S. 573, 579 (1893); United States v. Verdier, 164 U.S. 213, 219 (1896); United States v. Mack, 295 U.S. 480, 489 (1935). Similarly, the United States is not bound by state statutes of limitation. See United States v. Summerlin, 310 U.S. 414; United States v. Merrick Sponsor Corp., 421 F.2d 1076 (2d Cir.).

Limitations applicable to non-tax suits by the government are discussed in USAM 4-5.210, infra and in section 3-2.1 through 3-2.31 of

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the Civil Division Practice Manual. Limitation statutes applicable in non-tax suits against the government are discussed in USAM 4-5.220 through 4-5.228, infra.

4-5.210 Limitations Statutes Applicable to Suits by the Government

Non-tax statutes of limitation applicable to suits by the United States are referred to in section 3-2.1 through 3-2.31 of the Civil Division Practice Manual, with particular emphases on 28 U.S.C. §§2415-2416. The government may counterclaim and assert a cause of action that would otherwise be time barred by 28 U.S.C. §2415, if the cause of action arises out of the same transaction and extraordinary relief are not covered by 28 U.S.C. §2415. See 3-2.12 of the Civil Division Practice Manual. Of course, early assertion of such requests for relief will avoid the argument of untimely action.

For a discussion of the application of the six year statute of limitations contained in 31 U.S.C. §3731 to False Claims Act suits and the application of 28 U.S.C. §§2415-2416 to actions for common law fraud or fraud actions under certain other statutes, see Civil Division Practice Manual §§3-6.13 through 3-6.15.

See USAM 4-6.211, infra, as to the time limited for filing of proofs of claim in bankruptcy proceedings. For the alternatives available when the government has a claim against an insolvent estate, see USAM 4-5.440, infra. Limitations and laches with respect to the assertion of veteran's reemployment rights in private industry will be discussed in the Civil Division Practice Manual. Execution on a judgment must issue within the time required by state law. See rule 69, Fed. R. Civ. P.; cf. 28 U.S.C. §2005. See 50 U.S.C. App 525, as to the tolling of statutes of limitation while defendant is in the military service.

Other statutes affecting the time within which particular suits must be brought by the United States include the following:

A. 15 U.S.C. §714b(c)--Commodity Credit Corporation claims must be sued on in six years.

B. 28 U.S.C. §2462--actions for the enforcement of any civil "fine" penalty, or forfeiture must be brought within five years. This includes civil monetary penalties and "forfeitures", as well as actions for the physical forfeiture of specific property. Some civil penalty statutes may have their own controlling limitations provisions. See, e.g., 19 U.S.C. §1621 (customs).

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C. 31 U.S.C. §3712 actions against endorsers, transferors, etc., of forged checks must be brought in six years, unless written notice of claim is given within that period. However, if there was a fraudulent concealment, suit may be brought within two years after discovery thereof.

D. 31 U.S.C. §3731 action for double damages and "penalties" under the civil false claims statute must be brought within six years. (However, a common law fraud count would require suit within three years. See 28 U.S.C. §2415(b). But see section 3-2.20 of the Civil Division Practice Manual, as to suit on an equitable or quasi-contractual theory).

E. 41 U.S.C. §§35-45 and 29 U.S.C. §255 require suits under the Walsh-Healy Act (for overtime and child labor violations) to be brought within two years of the violation.

F. Interstate Commerce Act.

1. Enforcement of an ICC order for the payment of money--one year. See 49 U.S.C. §16(3)(f); 49 U.S.C. §908(f)(3).

2. Reparation actions--three years. See 49 U.S.C. §§16(3)(b) and 16(3)(i); 49 U.S.C. §§304a(2) and 304a(8); 49 U.S.C. §§908(f)(1)(B) and 908(f)(5); 49 U.S.C. §§1006a(2) and 1006a(8).

3. Transportation overcharges (both government and carrier)--three years from the date the cause of action accrues (date of delivery or tender of delivery) (49 U.S.C. §16(3)(a)), or three years from the date of payment by the government of such overcharges, refund (by carrier), or deduction (by government), whichever is later. See 49 U.S.C. §§16(3)(c) and 16(3)(i); 49 U.S.C. §§304a(2) and 304a(8); 49 U.S.C. §§908(f)(1)(c) and 908(f)(5); 49 U.S.C. §§1006a(2) and 1006a(8); Erie Lackawanna Railway Co. v. United States, 439 F.2d 194 (Ct. Cls.). (Government can only collect by deduction or offset within three years from its payment of overcharges, not including any "time of war".)

4. Loss, damage, or injury to property--three years. See 49 U.S.C. §16(3)(i); 49 U.S.C. §304a(2); 49 U.S.C. §908(f)(5); 49 U.S.C. §1006a(8). See §3-2.2 of the Civil Division Practice Manual, for establishment of shorter periods by contract. In this regard, 49 U.S.C. §20(11) states that a carrier cannot provide by rule, contract, regulation, or otherwise, for a claim to be submitted in less than nine months, or for suit to be brought in less than two years from the disallowance of the claim.

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G. Other. The foregoing list is not exhaustive, and each statute should be examined for its own limitations provisions. In addition, other statutes may prescribe preconditions for suit. Thus, for example, actions against disbursing, accountable, or certifying officers may fail if GAO has not settled accounts within three years of their receipt by GAO. See 31 U.S.C. §821.

4-5.220 Limitations Statutes Applicable to Suits Against the Government

When Congress has created rights of action against the government in the courts, it has generally included a time limit within which suit must be brought. In such situations the statute is one of creation, and passage of time extinguishes the right and not just the remedy.

The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. * * * Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right.

The Harrisburg, 119 U.S. 199, 214 (1886).

While a private litigant may waive the running of the statute of limitations as to a suit against himself/herself (51 Am. Jur. 2d, "Limitation of Actions," §422), statutes of limitation on suits against the government are jurisdictional and may not be waived except by Congress. See Munro v. United States, 303 U.S. 36 (1938); United States v. Trollinger, 81 F.2d 167 (4th Cir.), cert. dismissed, 299 U.S. 617 (1936); 51 Am. Jur. 2d, "Limitation of Actions," §424. Nor may the time limitation be waived or abrogated by estoppel. See Lynch v. United States, 80 F.2d 418 (5th Cir.), cert. denied, 298 U.S. 658 (1936); Roskos v. United States, 130 F.2d 751 (3d Cir.), cert. denied, 317 U.S. 696 (1942). The question of lack of jurisdiction by reason of an untimely suit against the government may be raised for the first time on appeal after entry of judgment. See United States v. Mills, 91 F.2d 487 (6th Cir.). While the running of a period of limitations may be tolled during

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hostilities as between private litigants (Hanger v. Abbott, 6 Wall, no such exception will be read into a statute limiting the time for suit against the government, see (73 U.S. 532). Soriano v. United States, 352 U.S. 270 (1886).

The limitations provisions applicable to specific consent-to-be-sued statutes involving the government and its agencies and officials, are discussed in USAM 4-5.221 through 4-5.228, *infra*, as well as in the Civil Division Practice Manual, §3-37.1, *et seq.*

4-5.221 Admiralty Claims Acts Suits

The Suits in Admiralty Act requires that an action thereunder be brought within two years after the cause of action arises. See 46 U.S.C. §745. The same limitations period is read into, or incorporated by reference in, the Public Vessels Act. See 46 U.S.C. §782; Phalen v. United States, 32 F.2d 687 (2d Cir.). Suit within two years is a jurisdictional requirement. See Roberts v. United States, 498 F.2d 520 (9th Cir.), cert. denied, 419 U.S. 998 (1974). Thus, the statute is not tolled by reason of infancy or any other disability. See Sgambati v. United States, 172 F.2d 297 (2d Cir.), cert. denied, 337 U.S. 938. See Roberts v. United States, *supra*.

The statute runs from the date of physical injury, rather than from the date of the denial of an administrative claim. See Kindrew v. United States, 479 F.2d 49 (5th Cir.); *cf.* A.H. Bull S.S. Co. v. United States, 235 F.2d 1 (2d Cir.). However, the statute has been held to be tolled as to a contract cause of action, until mandatory disputes proceedings before the contracting officer and the Armed Forces Board of Contract Appeals are complete. See Crown Coat Front Co. v. United States, 386 U.S. 503 (1967).

The parties may contract for a shorter period of limitations. See Schnell v. United States, 30 F.2d 676 (2nd Cir.). A shorter limitations period which is part of a substantive right governs; the two-year period is a maximum, not a minimum. See Mejia v. United States, 152 F.2d 686 (5th Cir. 1945), cert. denied, 328 U.S. 862 (1946). Similarly, the courts will look to an analogous shorter state statute of limitations in invoking laches. Prejudice is presumed in actions filed after the state period; plaintiffs have the burden of showing no prejudice. See McMahon v. Pan American World Airways, 297 F.2d 268 (5th Cir. 1962).

4-5.222 FOIA and Privacy Act Suits

Privacy Act suits must be brought "within two years from the date on which the cause of action arises." If the agency has, materially and willfully, misrepresented any information required to be disclosed, and the information is material to the establishment of civil liability under the Act, the action may be brought "within two years after discovery of the misrepresentation." See 5 U.S.C. §552(g)(5).

4-5.223 Judicial Review of Administrative Decisions

Care should be taken to determine the time-for-suit requirements of specific statutes providing for the judicial review of administrative determinations. (See USAM 4-9.700, infra, as to the review of such determinations in Walsh-Healey Act and Service Contract Act suits brought by the government.) Social Security Act review cases, for example, must be commenced within sixty days after the mailing to the claimant of notice of the Secretary's decision, or "within such further time as the Secretary may allow." See 42 U.S.C. §405(g); Tate v. United States, 437 F.2d 88 (9th Cir.). This requirement is jurisdictional. See Robinson v. Celebrezze, 237 F. Supp. 115 (E.D. Tenn.); Zeller v. Folsom, 150 F. Supp. 615 (N.D. N.Y.); cf. USAM 4-5.220 supra.

A claimant cannot avoid this limitation by mandamus or by suit for money judgment, because the administrative review remedy is exclusive and the Secretary's determinations are final except to the extent they are reversed or modified in a timely review proceeding. See 42 U.S.C. §405(h); Wellens v. Dillon, 302 F.2d 442 (9th Cir.), appeal dismissed, 371 U.S. 11. An exchange of communications subsequent to dismissal of an action does not extend the time for bringing suit. See Bomer v. Ribicoff, 304 F.2d 427 (6th Cir.). Suit on the 61st day is untimely. Satterfield v. Celebrezze, 244 F. Supp. 190 (D. S.C.). However, if the 60th day after mailing of the notice to claimant falls on a Sunday, suit on the 61st day has been held to be timely. See Johnson v. Flemming, 264 F.2d 322 (10th Cir.).

If the statute applicable to the particular administrative review proceeding does not contain a limitations provision, suit may be dismissed on the basis of laches. See Chiriaco v. United States, 339 F.2d 588 (5th Cir.).

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4-5.224 National Service Life Insurance Suits

Timely suit under 38 U.S.C. §784 is a jurisdictional prerequisite, as in other statutes involving suit against the United States. See Munro v. United States, 303 U.S. 36; USAM 4-5.220; supra. The plaintiff must allege, among other jurisdictional facts, the timely institution of suit, and, if necessary, the suspension of the limitations period. See United States v. Valndza, 81 F.2d 615 (6th Cir.); Bono v. United States, 113 F.2d 724 (2nd Cir.). No government official can waive the conditions and limitations imposed in the statute. See Munro v. United States, supra. No suit shall be allowed unless brought "within six years after the right accrued for which the claim is made." See 38 U.S.C. §784(b). The contingencies on which the claim is founded are either the death of the insured, or his/her continuous total disability occurring while his insurance remains in force under premium paying conditions. See Riley v. United States, 212 F.2d 692 (4th Cir.); cf. United States v. Towery, 306 U.S. 324. The statute runs from the date of death, and not from the date on which the beneficiary received notification of death. See Riley v. United States, supra. The statute does not run from the date each installment of insurance becomes due. See United States v. Towery, supra. The running of the statute is not stayed pending the appointment of an administrator. See Moskowitz v. United States, 145 F.2d 196 (5th Cir.).

"The limitation of six years is suspended for the period elapsing between the filing in the Veterans' Administration of the claim sued upon and the denial of said claim." See 38 U.S.C. §784(b). The suspension begins when a claim is filed in the VA and not when it is deposited in the mails. See Tyson v. United States, 76 F.2d 533 (4th Cir.), aff'd., 297 U.S. 121. Although the VA has the authority to consider claims upon which the right to sue is lost, such consideration will not operate to raise the fallen bar of the limitations statute. See Roskos v. United States, 130 F.2d 751 (3rd Cir.), cert. denied., 317 U.S. 696; Maxwell v. United States, 141 F.2d 139 (7th Cir.). If one or more interested parties bring suit, all other persons having an interest may be joined under 38 U.S.C. §784(a), even though they have not previously filed claim for insurance. See Coffey v. United States, 97 F.2d 762 (7th Cir.). The statute provides that if a timely claim is filed with the VA the claimant has 90 days from the date of mailing the notice of denial within which to file suit. See United States v. Pastell, 91 F.2d 575, 112 A.L.R. 1125 (4th Cir.). Infants, insane persons, or persons under other legal disability, or persons rated as incompetent or insane by the VA have three years in which to bring suit after the removal of their disabilities. See 38 U.S.C. §784(b). Of course, such a person may sue through a guardian or other fiduciary without awaiting the lifting of disability. See Johnson v.

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United States, 87 F. 2d 940 (8th Cir.). The disability of insanity is removed by death. See Coleman v. United States, 100 F.2d 903 (6th Cir.).

4-5.225 Patent and Copyright Infringement Suits

The time limit for bringing suit for patent infringement against the United States is six years. See 28 U.S.C. §2501. The six-year period of limitations is tolled during the time the administrative claim for patent infringement is pending with the using agency of the government. See 35 U.S.C. §286; Calhoun v. United States, 453 F.2d 1385 (Ct. Cl.).

The time limit for bringing actions for copyright infringement is three years, and the limitations period is tolled during the pendency of an administrative claim for such infringement. See 28 U.S.C. §1498.

4-5.226 Sue-and-Be-Sued Government Agencies and Officials

Suit must be brought against the Commodity Credit Corporation within six years. See 15 U.S.C. §714b(c). See United States v. Hicks, 137 F. Supp. 564, 565 (N.D. Tex.). There is no statutory provision for tolling or extending this period of time. Absent a similar limitation provision as to sue-and-be-sued agencies or officials, or a contractual provision limiting the time for suit, the courts will look to the limitations statutes applicable in the forum. Cf. Foote v. Public Housing Commissioner of United States, 107 F. Supp. 270, 273 (W.D. Mich.).

4-5.227 Tort Claims Act Suits

The statute of limitations governing Federal Tort Claims Act suits, set out at 28 U.S.C. §2401(b), requires that

A. An administrative claim must be filed within two years of the accrual of the cause of action, and

B. Suit must be filed within six months of the date of mailing of the agency's notice of final denial by registered or certified mail.

Compliance with the two-year statute of limitations is a jurisdictional requirement. See United States v. Sherwood, 312 U.S. 584 (1941); Casias v. United States, 532 F.2d 1339 (10th Cir. 1976); Caton v. United States, 495 F.2d 635 (9th Cir. 1976). A suit which is commenced within two years of the accrual of the cause of action, but more than six months after

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notice was sent of the denial of the claim, is barred. See Childers v. United States, 442 F.2d 1299 (5th Cir.); Claremont Aircraft, Inc. v. United States, 420 F.2d 896 (9th Cir.). The claimant may treat as a denial the failure of an agency to make a final disposition of the claim within six months after it is filed, and file suit at any time thereafter. See 28 U.S.C. §2675(a).

The two-year statute of limitations is not tolled by reason of infancy (Pittman v. United States, 341 F.2d 739 (9th Cir.), cert. denied, 382 U.S. 941 (1965)), incompetency (Jackson v. United States, 234 F. Supp. 586 (D.S.C.)), or any other disability. See Mann v. United States, 399 F.2d 672 (9th Cir.). However, if a party has an action for contribution of indemnity against the United States, the cause of action does not accrue at least until suit is filed against the indemnitee, if not until entry of the judgment. See Keleket X-ray Corp. v. United States, 275 F.2d 167 (D.C. Cir.).

There is no doubt that federal law determines when a claim "accrues", whereas state law determines the existence of a cause of action. See Tyminski v. United States, 481 F.2d 257 (Cir. 1973); Hungerford v. United States, 307 F.2d 99 (9th Cir.); Quinton v. United States, 304 F.2d 234 (5th Cir. 1962). In medical malpractice actions under the Federal Tort Claims Act, the Supreme Court has held that a claim accrues within the meaning of Section §2401(b) when the plaintiff knows both the existence and the cause of his/her injury, and not at a later time when he/she also knows that the acts inflicting the injury may constitute medical malpractice. See United States, v. Kubrick, 444 U.S. 111 (1979).

4-5.228 Tucker Act Suits

28 U.S.C. §2401(a) requires that suits against the United States under the Tucker Act, except those brought under the Contract Disputes Act of 1978, be commenced within six years after the right of action first accrues. See Erceg v. United States, 179 F.2d 510 (9th Cir.). A person who is under a legal disability or "beyond the seas" when the cause of action accrues may commence suit within three years after the disability ceases. This tolling provision cannot be evoked by one whose disability arose after the cause of action accrued. See De Arnaud v. United States, 151 U.S. 483 (1894). Also, failure to file within three years after removal of the disability is fatal. See Soriano v. United States, 352 U.S. 270 (1957). The limitations period contained in 28 U.S.C. §2401 is also tolled by the Soldiers and Sailors Civil Relief Act of 1940, 50 U.S.C. App. §525 (1976), during the time an individual is engaged in military service. See generally Deering v. United States, 620 F.2d 242 (Ct. Cl.).

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Section 2401 is jurisdictional, a waiver of sovereign immunity, and must be strictly construed. See United States v. Wardwell, 172 U.S. 48 (1898); Todd v. United States, 292 F.2d 841 (Ct. Cl.); Beacon v. United States, 322 F.2d 512 (3rd Cir.). Under very limited circumstances, each successive failure to make a periodic payment which the claimant contends was not made constitutes a "continuing claim" and the limitations period begins to run with each successive failure. See Swift Company v. United States, 111 U.S. 22 (1884); Friedman v. United States, 310 F.2d 381 (Ct. Cl.).

Contract claims subject to the Contract Disputes Act of 1978 must be submitted in writing for a final decision of the contracting officer. See 41 U.S.C. §605(a). Within 90 days of receipt of the final decision, review may be sought before the agency board of contract appeals. See 41 U.S.C. §606. Alternatively, judicial review may be obtained exclusively in the claims court within 12 months of receipt of the contracting officer's decision. See 41 U.S.C. §609(a)(3); USAM 4-11.830, *infra*.

The 6-year statute of limitations contained in 28 U.S.C. §2401(a) is still applicable to contract actions not subject to the Contract Disputes Act. In those cases, if the contract contains, or is subject to, the Disputes clause, the right of action for limitation purposes first accrues when administrative action under that clause is final. See Crown Coat Front Company v. United States, 386 U.S. 503 (1967). When a government contract provides opportunity for redress through the Disputes clause, the contractor must seek relief under the clause or be barred from judicial relief. Id. However, the limitations period is not tolled while Permissive administrative remedies are pursued. See Schiffman v. United States, 319 F.2d 886 (Ct. Cl.); Baggett Transportation Company v. United States, 319 F.2d 864 (Ct. Cl.).

4-5.229 Right To Financial Privacy Act Suits

Actions to enforce the provisions of the Right To Financial Privacy Act of 1978 (P.L. 95-630, Title XI, 92 Stat. 3697-3710) generally must be brought "within three years from the date on which the violation occurs or the date of discovery of such violations, whichever is later." See 12 U.S.C. §3416. Any "customer challenge" to intended government access to a customer's financial records under 12 U.S.C. §3410, however, must be filed within 10 days of delivery (or within 14 days of mailing) to the customer of a notice of such intended access. See 12 U.S.C. §3410(a); see also 12 U.S.C. §§3405(3), 3407(3), and 3408(4)(B).

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The remedies and sanctions expressly provided by the Act are the only authorized judicial remedies for violations of its provisions. See 12 U.S.C. §3417(d); see also 12 U.S.C. §3410(e).

4-5.300 OFFSET

The government possesses the same self-help right of recovery through offset, against funds of the debtor in its hands, which any other creditor has. See United States v. Munsey Trust Co., 332 U.S. 234, 239 (1947); United States v. Cohen, 389 F.2d 689 (5th Cir.); Aetna Ins. Co. v. United States, 456 F.2d 773 (Ct. Cl.); Burlington Northern Inc. v. United States, 462 F.2d 526 (Ct. Cl.); Hilburn v. Butz, 463 F.2d 1207 (5th Cir.), cert. denied, 410 U.S. 942 (1973). That right was not abrogated by the Medicare Act. See Mt. Sinai Hospital of Greater Miami, Inc. v. Weinberger, 517 F.2d 329 (5th Cir.).

For collection of loss or damage claims against carriers by offset, see Riss & Co. v. United States, 213 F. Supp. 791 (W.D. Mo.); but see United States v. Isthmian S. S. Co., 359 U.S. 314 (1959), on the admiralty side.

See 4 C.F.R. §102.3, as to the responsibility of client agencies to effect collection by offset. It should be noted that the Debt Collection Act of 1982, 31 U.S.C. §3716, greatly altered federal agencies' procedures in effecting administrative offsets. This statute, the Federal Claims Collections Standards, and, if necessary, the Commercial Litigation Branch should be consulted before advising agencies concerning administrative offset. See also Civil Division Practice Manual, §3-6.8. See USAM 4-5.610, infra, as to setoff in litigation. See USAM 4-6.220, infra, as to setoff in bankruptcy.

When a claimant has obtained a final judgment against the United States and the judgment is presented to GAO for payment, the Comptroller General may withhold payment of so much thereof as is sufficient to offset any debt claim which the United States has against the claimant, and such further amount as in the CG's opinion will cover the government's legal charges and costs in pursuing the government's claim to judgment if the claimant does not assent to a setoff. See 31 U.S.C. §3728. The policy of that statute is that claims against the United States are always to be subject to setoff. See Ozanic v. United States, 188 F.2d 228, 231 (2d Cir.); but see Northern Metal Co. v. United States, 350 F.2d 833, 835 (3d Cir.) (admiralty rule permits setoff only if claim arises out of the same transaction).

When the government's right of setoff has been effected or asserted, the attorney for the person against whom the right of setoff is asserted sometimes holds an attorney's lien, which, he/she urges, is entitled to priority over the government's setoff under the state law. See, e.g., Morgan

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v. United States, 131 F. Supp. 783 (S.D. N.Y.). Clearly, the state statute cannot control over federal law. See Malman v. United States, 207 F.2d 897,898 (2d Cir.). The attorney's rights are derivative only, and the government's setoff destroys any recovery of the plaintiff, to that extent, and there is nothing to which an attorney's lien can attach. Malman v. United States, 202 F.2d 483, 485 (2d Cir.); Madden v. United States, 371 F.2d 469 (Ct. Cls.); United States v. Cohen, 389 F.2d 689 (5th Cir.); Morgan v. United States, 131 F. Supp. 783 (S.D. N.Y.); cf. United States v. Transocean Air Lines, Inc., 386 F.2d 79, 82 (5th Cir.), cert. denied, 389 U.S. 1047.

31 U.S.C. §3727 and 41 U.S.C. §15 forbid contractors with the government to assign rights or payments under contracts, except as provided therein. Provision is made for certain assignments to financing institutions which provide working funds for the performance of such contract. If the statute is followed as to such assignments, including proper notice to the government, the disbursing officer, and surety, government payments cannot be reduced or setoff for any government claim independent of the contract. Of course, an assignment which does not follow the statute is void, (see Nat'l. Bank of Commerce v. Downie, 218 U.S. 345), and setoff can continue to be effected. If opposing counsel asserts that an assignment precludes offset, please notify the Civil Division at once.

4-5.400 PRIORITY FOR THE PAYMENT OF CLAIMS DUE THE GOVERNMENT

The priority to be accorded federal liens is discussed in USAM 4-12.250, infra. Government priorities in bankruptcy proceedings are discussed in USAM 4-6.212, infra. The priorities discussed herein are applicable in decedents' estate cases, discussed in USAM 4-7.200, infra. Such priorities apply even though no decedent's estate or state court insolvency proceeding has been opened. See, e.g., Lakeshore Apts., Inc. v. United States, 351 F.2d 349, 353 (9th Cir. 1965). Pub. L. No. 97-258, Sept. 13, 1982, 96 Stat. 972, codified in 31 U.S.C. provides:

§3713. Priority of Government claims

(a)(1) A claim of the United States Government shall be paid first when:

(A) a person indebted to the government is insolvent;
and

(i) the debtor without enough property to pay all debts makes a voluntary assignment of property;

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(ii) property of the debtor, if absent, is attached; or

(iii) an act of bankruptcy is committed; or

(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.

(2) This subsection does not apply to a case under title 11.

(b) A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the government is liable to the extent of the payment for unpaid claims of the government.

This statute was previously R.S. §§3466 and 3467, codified at 31 U.S.C. §§191 and 192. The revision of the statute has not changed the intent or meaning of the law. See United States v. Alan Henry Culbert, et al., 709 F.2d 32 (9th Cir. 1983),

The Statute applies to all claims of the United States. See Bramwell v. United States Fidelity Co., 269 U.S. 483, 487 (1926) (U.S. deposit of funds on behalf of Indians). See the variety of claims enumerated in Mass v. United States, 333 U.S. 611, 625-626 (1948) fn. 24. The priority statute attaches whether or not the government also holds a lien on property of the debtor. See United States v. Vermont, 377 U.S. 351, 357-358 (1967). Bond debts payable in futuro are covered by the statute. See United States v. State Bank, 6 Pet. (31 U.S.) 29, 35-36 (1832). Criminal fines are included, after imposition of the criminal fine by the court. See United States v. Alan Henry Culbert, supra. Claims which are unliquidated in amount are covered by the statute. See United States v. Moore, 44 L.W. 4007. The method of acquisition of a claim is immaterial, and assigned claims are covered. See Lakeshore Apt., Inc. v. United States, 351 F.2d 349, 353 (9th Cir. 1965). The fact that the government's loan which gave rise to a claim was made in participation with a bank is immaterial. See SBA v. McClellan, 364 U.S. 446 (1960).

4-5.410 No Implied Exceptions to the Priority Statute

Generally there is no exception to the priority statute. There is no exception for city taxes. See United States v. Wadill Co., 323 U.S. 353.

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The priority of debts due the United States cannot be impaired or superseded by state law. See United States v. Oklahoma, 261 U.S. 253, 260, Illinois v. Campbell, 329 U.S. 362, 375 (1983). The priority statute will take precedence over state claims, attorneys fees, and unperfected judgment liens. See Community Progress, Inc. v. White, 44 A.2d 1369 (Conn.1982).

4-5.420 Debts Subject to the Priority Statute

The statute covers "any person indebted to the United States" if the remaining conditions of the statute are met. The word "person" includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals. Obviously, a different level of priority can be provided for by a special statute controlling over the general. Compare the Rail Passenger Service Act of 1970, 45 U.S.C. §621(c)(2), which would give the government a priority ahead of secured creditors.

The debts entitled to priority of payment are those of the United States, in the circumstances outlined in the statute. These are summarized in United States v. Emery, 314 U.S. 423, 426 (1941), as follows:

The section applies in terms to cases '[1] in which the debtor, not having sufficient property to pay all debts, makes a voluntary assignment thereof, or [2] in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, ...[or] [3] in which an act of bankruptcy is committed.'

Insolvency is required. United States v. Alan Henry Culbert, et al., supra. Mere inability of the debtor to pay all of his/her debts in the ordinary course of business is not insolvency within the meaning of the statute. See United States v. Oklahoma, 261 U.S. 253, 260. Thus, the statute contemplates insolvency in the bankruptcy sense, rather than in the equity sense or as state courts generally define insolvency. See United States v. Dyna-Tex, Incorporated, 372 F. Supp. 280 (E.D. Tenn. 1973). The statute covers every voluntary assignment or transfer of possession and control of the debtor's estate, to any person charged with applying the estate to the payment of the debts of the estate. See Bramwell v. United States Fidelity Co., 269 U.S. 483, 489-490. Wing v. United States, 208 F. Supp. 5 (D. Mass. 1962). A debtor's admission of

allegations in a creditor's suit, which prayed for the appointment of a receiver to sell the debtor's property and apply the proceeds, was held to amount to a voluntary assignment within the terms of the statute in United States v. Butterworth Corp., 269 U.S. 504. That an attachment situation described in the statute triggers priority, is clear from the statute. The same is true of the commission of one of the acts of bankruptcy enumerated in 11 U.S.C. §21a. See Community Progress, Inc. v. White, 444 A. 2d 1369, 1374. The fourth act of bankruptcy duplicates the voluntary assignment ground state in the statute. The fifth act of bankruptcy, viz., that the debtor, while insolvent or unable to pay his/her debts as they mature, has "procured, permitted or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property" (§3(5) of the Act, 11 U.S.C. §21(5)), is illustrated by Illinois v. Campbell, 329 U.S. 362 (1946).

The government sometimes hold claims by assignment. In SBA v. McClellan, 364 U.S. 446, the government was the beneficial owner of the claim prior to bankruptcy, and the government was allowed priority in bankruptcy even though the formal assignment of the claim to the government did not take place until after the filing of the bankruptcy petition. [Note, under the Bankruptcy Act of 1978, the government no longer is allowed a priority for unsecured claims. See 11 U.S.C. §507. It can be argued that the same result should occur in an insolvency proceeding or a decedent's estate case. However, when the government does not become the owner of a claim until after insolvency, a different result may be expected. In re Woods, 12 N.Y.S. 2d 501 (Sup. Ct.) (date of death of decedent controls in fixing relative priorities of claimants).

4-5.430 Property Subject to Priority Claims

The debtor's property, which is subject to the government's priority claims, is that which he/she owned at the time of insolvency, and once priority attaches it is not relinquished. See Mass. v. United States, 333 U.S. 611, 625 (1948).

The Civil Division has not asserted priority over lien claimants whose claims were choate and perfected prior to the date of insolvency, though any surplus from such property after satisfaction of the lien claim would be subject to the government's priority. The effect and operation of a lien in relation to a priority claim of the United States is always a federal question. See Illinois v. Campbell, 329 U.S. 362, 371 (1946). To be effective against and prime the government's priority claim, the lien must be (1) certain as to the identity of the lienor, (2) definite as to amount (not merely ascertainable as to amount at some future time), and

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(3) be specific as to the property to which it attaches. See Illinois v. Campbell, *supra*. State statutory liens are generally inchoate, and thus not perfected on the date of the debtor's insolvency. See, e.g., New York v. Maclay, 288 U.S. 290 (1933). Such liens are merely a caveat of a more perfect lien to come, and do not prime the government's priority claim. See United States v. Texas, 314 U.S. 480, 487 (1941); Durham v. United States, by CIR, 545 F. Supp. 1093 (D. N.J. 1982).

4-5.440 Enforcement of Priority Claims

31 U.S.C. §3713 does not create a lien. See United States v. Oklahoma, 261 U.S. 253, 259 (1926); Bramwell v. United States Fidelity Co., 269 U.S. 483, 487. Of course, if the government's priority claim is asserted in an estate of insolvency proceeding and is disallowed, the United States must appeal or be bound by that determination. See United States v. Pate, 47 F. Supp. 965 (W.D. Ark.); United States v. Muntzing, 69 F. Supp. 503 (N.D. W.Va.). However, the United States may hold itself aloof from the estate or insolvency proceeding and give notice to the fiduciary of its claim and its priority and his/her own personal liability under 31 U.S.C. §3713. If this is done, the paying or disbursing agent is made a trustee for the United States and is bound to pay its debt from the debtor's property. See United States v. Oklahoma, 261 U.S. 253, 260. Notice to the paying agent, actual or constructive, is needed. 41 A.L.R. 446, 450; United States v. Vibradamp, 257 F. Supp. 931 (S.D. Cal.). If such notice is given and the fiduciary does not honor the government's priority, the government can proceed directly against him/her. See Viles v. Commissioner, 233 F.2d 376, 381(6th Cir.); United States v. Weisburn, 48 F. Supp. 393 (E.D. Pa.); United States v. Munroe, 65 F. Supp. 393 (W.D. Pa.); United States v. Luce, 78 F. Supp. 241 (D. Minn.).

31 U.S.C. §3713(b) expressly covers the liability of "a representative of a person or an estate" and makes such person liable in his/her own person and estate. The term "other person" is significant, and that term covers any person in possession and control of an estate and charged with effecting its distribution. See Bramwell v. United States Fidelity Co., *supra* at 490. The term "other person" has been held to include a receiver (see United States v. Crocker, 313 F.2d 946 (9th Cir.)), a state official in charge of liquidation of a bank (see Bramwell v. United States Fidelity Co., *supra*, a shareholder-manager of a company (see Lakeshore Apts., Inc. v. United States, 351 F.2d 349, 353 (9th Cir.)), an officer and stockholder of a corporation (see United States v. Sullivan, 214 F. Supp. 701 (W.D. Pa.); United States v. Coyne, 540 F. Supp. 175 (D.D.C. 1981); or an officer and director of a corporation (see United States v. Spitzer, 262 F. Supp. 754 (S.D. N.Y.); In Re Gottheiner,

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3 B.R. 404, aff'd. 703 F.2d 1136 (9th Cir. 1983). If no probate, insolvency, or other court proceeding is involved, the government can proceed directly against the corporate officer or other person responsible, without the initiation of such a proceeding. See, e.g., Lakeshore Apts., Inc. v. United States, 351 F.2d 349, 353 (9th Cir. 1965); United States v. Gotwals, et al., 156 F.2d 692, 169 ALR 619 (10th Cir. 1946), cert. denied, 329 U.S. 781 (1946).

4-5.500 PRODUCTION OF GOVERNMENT MATERIALS AND INFORMATION

4-5.510 Production of Documents of Other Departments and Agencies in Non-FOIA Litigation

On occasion, litigants may issue a subpoena duces tecum for, or move for the production of, government documents which a client agency deems confidential. A privilege against the compulsory disclosure of such documents is recognized in certain circumstances. See 5 U.S.C. §301 (formerly 5 U.S.C. 22); Jencks v. United States, 353 U.S. 657 (1957); United States v. Reynolds, 345 U.S. 1 (1953); Touhy v. Ragen, 340 U.S. 462 (1951); Bowman Dairy Co. v. United States, 341 U.S. 214 (1951); Saunders v. Great Western Sugar Co., 396 F.2d 794 (10th Cir. 1968).

If a government employee served with such a subpoena seeks advice from the U.S. Attorney, he/she should be told to contact his/her own agency for instructions, because, if the agency does not object to compliance, the Department of Justice usually will not. If the agency wishes to object, however, it usually will have pertinent regulations (promulgated under 5 U.S.C. §301, similar to Department of Justice regulations at 28 C.F.R. §16.21 et seq.) instructing employees not to produce or testify unless authorized by the head of the agency. Such regulations are ordinarily honored as grounds for refusal to produce. See Touhy v. Ragen, supra; Saunders v. Great Western Sugar Co., supra. State courts also usually honor such regulations. See People v. Parham, 60 Cal. 2d 378, 384 P.2d 1001, cert. denied, 377 U.S. 945, reh'g denied, 379 U.S. 873 (1964). For the procedure to be followed in the event of an adverse ruling, see North Carolina v. Carr, 264 F. Supp. 75 (W.D. N.C.), app. disp. 386 F.2d 129 (4th Cir. 1967).

Compliance with such regulations is not considered to be a claim of "privilege". Claims of "privilege" can only be made by a department or agency head, and this is usually done only when a subpoena has been served directly upon such an official. See United States v. Reynolds, 345 U.S. 1, 7-8 (1953); Carl Zeiss Siftung v. V.E.B. Carl Zeiss Jena, (D.D.C.), 40 F.R.D. 318 (1966), aff'd., 384 F.2d 979 (D.C. Cir. 1967), cert. denied, 389 U.S. 952. U.S. Attorneys should not assert privilege in any case, without approval from the Civil Division.

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In litigation involving the Department of Energy, the Temporary Emergency Court of Appeals, which has exclusive appellate jurisdiction over issues arising under the Emergency Petroleum Allocation Act, as amended. 15 U.S.C. §753 et seq., has held that deliberative process privilege claims need not be asserted by the head of the agency. The court also held that a detailed affidavit by an agency official setting forth the privilege is necessary only if the agency wishes to avoid in camera inspection of the "privileged" documents by the trial court. See U.S. Department of Energy v. Brett, 659 F.2d 154 (1981).

Where a government employee is served with a subpoena duces tecum in private litigation and the interested agency wishes to resist production, the U.S. Attorney should advise the employee to have his/her General Counsel ask the Federal Programs Branch of the Civil Division to authorize representation of the employee. If time does not permit that procedure, the U.S. Attorney should telephone the Federal Programs Branch directly (202-633-3354). Subpoenas should never be formally resisted, without such prior consultation and authorization.

4-5.520 Justice Department Materials and Witnesses.

28 C.F.R. §§16.21 through 16.28 regulate the production or disclosure of Justice Department records or information pursuant to subpoena or court demands whether or not the United States is a party to the lawsuit.

[N]o employee or former employee of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official status without prior approval of the proper Department official in accordance with §§16.24 and 16.25 of this part.

A detailed analysis of the procedures to be followed in responding to such demands appears in the USAM 1-7.000, supra.

4-5.530 Freedom of Information Act Demands

See 28 C.F.R. §§16.1 through 16.10, for detailed instructions for responding to pre-litigation Freedom of Information Act requests. See

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also 5 U.S.C. §552, as amended, and §§3-7.1 through 3-7.12 of the Civil Division Practice Manual. Nine categories of government records are exempt from disclosure under the FOIA. See 5 U.S.C. §552(b); §§3-7.5, 3-7.11 of the Civil Practice Manual. See 28 C.F.R. §16.10(b)(3), as to the necessity for referring requests for information classified by another agency to that agency.

If you receive a request for your documents, the request should be forwarded to the Executive Office for United States Attorneys (see USAM 1-5.130 supra) pursuant to 28 C.F.R. Part 16.3(a). The Federal Programs Branch of the Civil Division is responsible for litigation and does not have any responsibilities relating to the administrative processing of FOIA or Privacy Act requests for documents in U.S. Attorneys' Offices.

4-5.540 Freedom of Information Act Suits

Expedited handling is essential in FOIA suits, inasmuch as the Act provides that such litigation is to take precedence. See 5 U.S.C. §§552(a)(4)(D); the Civil Practice Division Manual, §3-7.2. Since the time for serving an Answer or Motion to Dismiss is reduced to thirty days, care should be taken to ensure that the government's time to respond is protected. The Federal Programs Branch of the Civil Division will provide advice and assistance. Since interim relief is generally not permitted under the FOIA, in the event an emergency hearing is scheduled on a basis which does not permit prior contact with that Branch, the relief requested should ordinarily be opposed. See Civil Division Practice Manual, §3-7.3. The Branch should also be contacted if there is any request for, or judicial consideration of, in camera inspection. See Civil Division Practice Manual, §3-7.6.

Civil Division attorneys directly handle a number of FOIA cases. However, U.S. Attorneys should anticipate that the majority of FOIA cases filed in their respective districts will be assigned to the U.S. Attorneys for handling. This responsibility contemplates that the Assistant assigned to the case will conduct a full review of the withheld documents to determine whether withholding is justified in terms of applicable law. The Assistant U.S. Attorney is also responsible, in conjunction with the agency General Counsel, for the drafting and review of affidavits, preparing responses to interrogatories, preparation of pleadings, and oral argument. In cases assigned for handling to a U.S. Attorney in which the Department of Justice is a defendant, a Civil Division attorney will also be assigned to provide a coordinating role for the defense of all components involved.

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The relevant addresses and telephone numbers for FOIA suits are as follows:

Barbara L. Gordan
Assistant Director for Government Information
Federal Programs Branch, Civil Division
U.S. Department of Justice, Room 3646
Washington, D.C. 20530
Telephone: FTS 633-3178

David J. Anderson, Director
Federal Programs Branch, Civil Division
U.S. Department of Justice, Room 3641
Washington, D.C. 20530
Telephone: FTS 633-3354

Orders for disclosure in FOIA suits will ordinarily be phrased as injunctions. Thus, it is necessary to seek a stay from such an adverse order to preserve the right of appeal. See Civil Division Practice Manual §3-7.7. If a stay is denied, telephonic notice should be given the Federal Programs Branch. It is important to furnish immediately to the Branch a copy of all opinions and orders entered. This is essential to assure appropriate appellate consideration and to enable the Department to satisfy its statutory reporting requirements. See 5 U.S.C. §552(d).

4-5.550 Privacy Act

The Privacy Act imposes stringent requirements affecting the maintenance of records concerning individuals. See 5 U.S.C. §552a. Subsection (b) sets forth eleven circumstances under which records concerning an individual can be disclosed without the individual's prior written consent. Subsection (e)(8) requires that there be "reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record." Subsection (g) establishes civil remedies available to persons aggrieved under the Act. These remedies, and the application of the Act generally in the litigation context, are discussed in the Civil Division Practice Manual.

OMB guidelines are published at 40 F.R. 28948, et seq. Those guidelines are included in the Civil Division Practice Manual.

Close liaison on Privacy Act litigation should be maintained with the Federal Programs Branch of the Civil Division. Exhaustion of

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administrative remedies is required. Civil remedies are covered at 5 U.S.C. §552(g). If a court order is adverse and phrased as an injunction, a stay should be timely sought to preserve the right of appeal. It is important to furnish immediately to the Branch a copy of all opinions and orders entered.

The relevant addresses and telephone numbers for Privacy Act suits are as follows:

Barbara L. Gordon
Assistant Director for Government Information
Federal Programs Branch, Civil Division
U.S. Department of Justice, Room 3642
Washington, D.C. 20530
Telephone: FTS 633-3178

David J. Anderson, Director
Federal Programs Branch, Civil Division
U.S. Department of Justice, Room 3641
Washington, D.C. 20530
Telephone: FTS 633-3354

See also the topic on Privacy Act cases in the Civil Division Practice Manual, §§3-10.1 through 3-10.19, and USAM 1-5.200, et seq.

4-5.560 Sunshine Act

The Sunshine Act, 5 U.S.C. §552b, sets forth specific requirements pertaining to notices of agency meetings and requirements for record keeping of such meetings. In the event that suit is filed under the Sunshine Act, immediately contact the Federal Programs Branch (FTS 633-3178). Sunshine Act litigation is discussed in the Civil Division Practice Manual, §§3-46.1, et seq.

4-5.600 RECOUPMENT AND SETOFF

Jurisdictional impediments to the assertion of counterclaims against the United States are discussed in USAM 4-4.400, supra. Even though a counterclaim may not be authorized in the circumstances of a particular case, a defendant may seek to reduce the government's recovery by way of setoff or recoupment. In turn, the government should be alert to assert setoff and recoupment when this is possible. See also Civil Division Practice Manual, §3-29.1, et seq.

4-5.610 Setoff

Frequently, a claim which a defendant wishes to assert by way of setoff to reduce the plaintiff's recovery will be barred by limitations. 28 U.S.C. §2415, limiting the time for suit with respect to certain monetary suits by the United States, expressly recognizes the government's right to assert claims by way of setoff, notwithstanding the running of the period of limitations. See Civil Division Practice Manual, §3-2.7. 28 U.S.C. §2406 provides that evidence supporting a defendant's claim for credit shall not be admitted in an action by the United States, unless the defendant first proves that the claim has been disallowed in whole or in part by the General Accounting Office. As the reviser's note indicates, this is a rule of evidence. Application of the statute has been upheld in cases such as Wheat Growers' Ass'n. v. United States, 66 F.2d 573 (8th Cir. 1933)(annot. 92 A.L.R. 1484), cert. denied, 291 U.S. 672 (1934), and Deseret Apts., Inc. v. United States, 250 F.2d 457 (10th Cir. 1957); but cf. Frederick v. United States, 386 F.2d 481 (5th Cir. 1967) (recoupment).

See USAM 4-6.220 infra, as to offset in bankruptcy proceedings. See USAM 5-3.00 supra, as to government's inherent right of setoff, and as to the effect of certain assignments on offset.

4-5.620 Recoupment

As noted in USAM 4-5.610 supra, a setoff which is time barred may not be asserted against an affirmative monetary suit by the government. Even when this is the situation, a defendant may seek to reduce the government's recovery by the assertion of a claim under the equitable doctrine of recoupment. See Bull v. United States, 295 U.S. 247, 258-263 (1935). However, application of the doctrine of recoupment is only permissible if the defendant's claim arises out of the same transaction as that sued upon by the United States. See Rothensies v. Electric Storage Battery Co., 329 U.S. 269 (1946). See also Frederick v. United States, 386 F.2d 481 (5th Cir. 1967).

4-5.700 REMOVAL

When suit has been brought against the government, or an officer or agency thereof, in a state or local court, an important threshold question

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is that of whether the action should be removed to the United States district court. In suits brought against the United States under 28 U.S.C. §2410 (see USAM 4-12.230 *infra*), removal will be left to the discretion of the U.S. Attorney, absent a specific request from the Civil Division for removal. In determining whether or not to remove such cases or to recommend the removal of other cases, the U.S. Attorney should consider:

- A. The likelihood of a fair disposition in the state or local court;
- B. Whether federal statutes, regulation or decisional law may be challenged in the litigation;
- C. The preference for taking appeals through the federal court system particularly when an open legal issue is involved; and
- D. The relative convenience of handling the case for the U.S. Attorney.

As noted in USAM 4-4.020 *supra*, the United States may not be sued in state court at all, absent express statutory consent. Removal of such an unconsented suit to the federal court will not cure the jurisdictional deficiency, even in a situation in which the federal court would have jurisdiction if the action had originally been instituted there. See Minnesota v. United States, 305 U.S. 382, 388-389 (1939); Gleason v. United States, 458 F.2d 171, 174-174 (3d Cir. 1972).

In other civil suits against government officers, employees, service personnel, and agencies, and particularly in cases in which personal injury, death, a significant federal interest, or property damage is involved, care should be taken to remove to the United States district court. Most of these actions will have to be removed within the thirty days specified in 28 U.S.C. §1446(b). However, removal of "Drivers' Act" suits under the provisions of 28 U.S.C. §2679(d) may be effected at any time prior to trial. Medical malpractice suits against the medical and paramedical employees of the Veterans Administration (38 U.S.C. §4116), the Public Health Service (42 U.S.C. §233), the Department of State (22 U.S.C. §817), the Department of Defense, the Central Intelligence Agency, and the United States Coast Guard (10 U.S.C. §1089), and the National Aeronautics and Space Administration (42 U.S.C. §2458a), also may be removed to federal court at any time prior to trial, as may most suits against a member of the armed forces on account of an act done under color of office or status. See 28 U.S.C. §1442a. Garnishment actions against the government seeking child support or alimony payments pursuant to 42 U.S.C. §659 ordinarily should be removed unless the client agency will honor the garnishment writ or order.

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When legal representation is authorized for government officers, employees, and servicemen who are charged with criminal violations as a result of their performance of their official duties (see USAM 4-13.320 infra, as to when such representation may be provided), removal should be effected. In such a case, removal should be undertaken within thirty days after arraignment or at any time before trial, whichever is earlier. For good cause shown, however, the court may grant removal at a later time. See 28 U.S.C. §1446(c)(1). The cost of the removal bond may be paid as a litigation expense.

4-5.800 SERVICE OF PROCESS

An action is commenced in a United States district court by the filing of a complaint. See Rule 3, Fed. R. Civ. P. In an action involving a federal question--as opposed to diversity actions--the courts of appeals have generally held that the filing of the complaint tolls the statute of limitations. See United States v. Wahl, 583 F.2d 285 (6th Cir. 1978); Windbrooke Development Co. v. Environmental Enterprises of Fla., 524 F. 2d 461 (5th Cir. 1975); Moore Company of Sikeston, Mo. v. Sid Richardson Carbon & Gasoline Co., 347 F.2d 921 (8th Cir. 1965), cert. denied, 383 U.S. 925, reh'g. den., 384 U.S. 914 (196). Some courts have held that the tolling of the statute of limitations by compliance with Rule 3 is conditional, and that if failure to complete service of process until after the period of limitations has run is due to lack of diligence in obtaining service, then the suit is subject to the bar of limitations. See, e.g., Smith v. Skakel, 444 F. 2d 526 (6th Cir. 1971); Murphy v. Citizens Bank of Clovis, 244 F. 2d 511 (10th Cir. 1957). Other courts have disagreed, holding that, "for limitations purposes, a civil action is commenced upon the filing of a complaint, and 'remains pending in an inchoate state until service is completed unless and until an action is dismissed for failure to prosecute under Rule 41(b).'" See United States v. Wahl, supra, 583 F.2d at 289, quoting from Messenger v. United States, 231 F.2d 328, 329 (2d Cir. 1956).

Recent amendments to Rule 4, Federal Rules of Civil Procedure, regarding service of process may well impact on the issue of tolling of the statute of limitations. Pursuant to the Federal Rules of Civil Procedure Amendments Act of 1982, P.L. 97-462, 96 Stat. 2527, effective February 26, 1983, Rule 4(j) now requires dismissal of the complaint, without prejudice, "[i]f a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that time period."

4-5.810 Service on the United States

Service upon the United States requires (1) service upon the U.S. Attorney, as specified by Fed. R. Civ. P. 4(d)(4), and by "sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia." In any action attacking the validity of an order of an officer or agency of the United States not made a party to the suit, service must also be made by "sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency." See Fed. R. Civ. P. 4(d)(4).

In a suit against the United States, service on the U.S. Attorney and on the Attorney General are both mandatory requirements. See Messenger v. United States, supra. Of course, if the jurisdictional statute contains its own service requirements, these must be followed. The Attorney General has designated the Assistant Attorney General for Administration, Justice Management Division, to accept service of process and pleadings for him. See 28 C.F.R. §0.77(j). U.S. Attorneys have no authority to accept service on behalf of the Attorney General.

4-5.820 Service on Government Officers, Agencies, and Corporations

Service of process and pleadings upon an officer or agency of the United States is accomplished by serving the United States (see USAM 4-5.810, supra), and by sending a copy of the summons and of the complaint by registered or certified mail to the officer or agency. See Fed. R. Civ. P. 4(d)(5), as amended; 28 U.S.C. §1319(e). In addition, 28 U.S.C. §1391(e) permits service on the officer or agency by certified mail beyond the territorial limits of the jurisdiction in which the action is brought, notwithstanding Fed. R. Civ. P. 4(f), if the official is suable in the District of Columbia. Natural Resources Defense Council, Inv. v. TVA, 459 F.2d 255 (2d Cir. 1972); Rimar v. McCowan, 374 F. Supp. 1179 (E.D. Mich. 1974). The suit must also be against the employee in his/her official rather than individual capacity. See Blackburn v. Goodwin, 608 F.2d 919 (2d Cir. 1974); Relf v. Gash, 511 F.2d 804, 808 n. 18 (D.C. Cir. 1975). The court lacks jurisdiction if the plaintiff does not serve the officer, the U.S. Attorney, and the Attorney General. Smith v. McNamara, 395 F.2d 896 (10th Cir. 1968), cert. denied, 394 U.S. 934, reh'g denied, 394 U.S. 995 (1969). The provisions of the rule as to service are mandatory. See Wallach v. Cannon, 357 F.2d 557 (8th Cir. 1966).

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If a government corporation is to be served, Fed. R. Civ. P. 4(d)(5) requires that the corporation be served as provided in Fed. R. Civ. P. 4(d)(3). Government corporations are agencies of the United States within the meaning of 28 U.S.C. §1391(e). See S. Rep. 1992, 87th Cong., 2d Sess., p. 4; H. Rep. 536, 87th Cong., 1st Sess., p. 4; cf. Fed. R. Civ. P. 4(d)(5). Thus, service outside the territorial limits of the district court may also be made upon such corporations by certified mail. See the last paragraph of 28 U.S.C. §1391(e).

4-5.830 Service by Publication

If service of process cannot be had on the defendant in conformity with Rule 4(3), Federal Rules Civil Procedure, and foreclosure of property or other in rem action is desired, service can be had by publication in accordance with 28 U.S.C. §1655. In order to avoid unnecessary loss of time, client agencies should have complied with 4 C.F.R. §105.2 and have taken reasonable and appropriate steps to locate missing parties. Requiring the client agency to furnish information on the steps which it has taken to locate the missing defendant should permit a prompt showing which will convince the court that personal service "is not practical," so that service by publication can be started as soon as possible.

4-5.840 Service Pursuant to Long-Arm Statute and in Foreign Countries

Fed. R. Civ. P. 4(e) permits service upon defendant "not an inhabitant of or found within the state" in the manner provided by a statute of the United States or an order of court thereunder. Illustrative of such a statute is 38 U.S.C. §784(a), which permits joinder of an individual in a suit against the United States under the National Service Life Insurance Act, with process running throughout the United States. Cf. Moreno v. United States, 120 F.2d 128 (1st Cir.).

Fed. R. Civ. P. 4(e) also permits service upon a defendant "not an inhabitant of or found within the state" in the manner provided by statute or rule of court of the state in which the United States district court is held. Service in such manner is encouraged, consistent with conformity with minimum requirements of procedural due process, in order that relief may be obtained against those who may otherwise escape their responsibilities to the United States.

Fed. R. Civ. P. 4(i) contains alternative provisions for service of process in a foreign country. The necessity for service of judicial

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process in foreign countries is increasing. See USAM 4-4.320, supra, and §§3-12.2 through 3-12.4 of the Civil Division Practice Manual, as to effecting service abroad.

4-5.900 VENUE AND JURISDICTION

4-5.910 Venue

Venue "is primarily a matter of convenience of litigants and witnesses. See Denver & R.G.W.R. Co. v. Trainmen, 387 U.S. 556, 560 (1967); Leroy v. Great Western United Corp., 443 U.S. 173, 180 (1979). The primary purpose of venue statutes is to "save defendants from inconveniences to which they might be subjected if they could be compelled to answer in any district, or wherever found." See Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 168 (1939); Hoiness v. United States, 335 U.S. 297, 302. Venue is a personal privilege which may be lost, unless improper venue is seasonably challenged. See Leroy, supra, 443 U.S. at 180; 28 U.S.C. §1406(b); See Neirbo Co., supra, 308 U.S. at 168; Freeman v. Bee Machine Co., 319 U.S. 448. "The government may waive objections to venue, just as any other litigant may * * *." See Industrial Assn. v. Commissioner, 323 U.S. 310, 314; Panhandle Eastern Pipe Line Co. v. F.P.C., 324 U.S. 635, 639 (1945). Objection to venue will "be deemed to be waived in the absence of specific objection upon this ground before pleading to the merits." United States v. Hvoslef, 237 U.S. 1, 12 (1915); Thomas & Mersey Ins. Co. v. United States, 237 U.S. 19. A specific objection to venue may be made by a separate motion under Rule 12(b), Fed. R. Civ. P., joined as a specific ground in a motion raising several arguments under Fed. R. Civ. P. 12(b) or, in the absence of a Fed. R. Civ. P. 12(b) motion, in the answer.

The Federal Rules of Civil Procedure neither extend nor limit the jurisdiction of the courts, nor affect the venue of actions filed therein. See Rule 82, Fed. R. Civ. P.

4-5.911 Government as Plaintiff

Generally, in personam actions by the government against individual defendants will be brought in the district where the individual defendants reside. See 28 U.S.C. §1391(b). If different defendants, who can be joined as defendants in one suit, reside in different districts in the same state, all may be sued in any judicial district in which any one of the defendants resides in such state. See 28 U.S.C. §1392(a). Judicial economy and consistency of results suggest joinder of all defendants in one suit, when possible. See 28 U.S.C. §1393, as to actions involving defendants in different divisions of the same district.

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Actions for judicial foreclosure, and similar in rem actions involving property in different districts in the same state, may be brought in any one of the districts where such property is located. See 28 U.S.C. §1392; 28 U.S.C. §1655, third paragraph.

Suit may be brought against a corporation in any judicial district where it is incorporated or licensed to do business or is doing business. See 28 U.S.C. §1391(c). The Civil Division may refer a case involving suit against a corporation to a district other than its state of incorporation or principal place of business, in order to secure speedier disposition or to place the litigation closer to the locale of witnesses or the scene of the incident or facts giving rise to suit. In delegated cases, the U.S. Attorney, may wish to ask the Civil Division to consider referring a claim against a corporation to another district, for one of the reasons indicated.

Civil penalty actions, and actions for civil monetary forfeitures, must be brought in the district where the cause of action accrues or in which the defendant is found. See 28 U.S.C. §1395(a). Civil proceedings for the physical forfeiture of property may be brought in any district where the property is found or into which the property is brought. See 28 U.S.C. §§1395(b) and (c). For venue as to admiralty penalties and forfeitures, see 28 U.S.C. §1395.

Care should be taken to check relevant statutes for peculiar venue provisions, before filing suit. See, e.g., 49 U.S.C. §11707, requiring that certain actions against delivering rail carriers for loss, damage, or injury to property carried by them, must be brought in a district in which the carrier operates a line of railroad. A surety company providing a surety bond pursuant to 31 U.S.C. §9304 must be sued in the district where its principal office is located, or in which the bond was provided. See 31 U.S.C. §9307.

4-5.913 United States as a Defendant

Tucker Act suits, brought against the United States pursuant to 28 U.S.C. §1346(a)(2), must be filed in the jurisdiction where the plaintiff resides. See 28 U.S.C. §1402. In the case of a corporation, its residence is the state of its incorporation. See Suttle v. Reich Bros. Co., 333 U.S. 163, 166 (1948). Tort Claims Act suits are to be brought in the judicial district in which the plaintiff resides, or wherein the act or omission complained of occurred. See 28 U.S.C. §1402(b); USAM 4-11.670, infra.

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The power of the court to transfer is limited to those districts or divisions where the case "might have been brought," see 28 U.S.C. §1404(a).

A district or division is one where the action 'might have been brought' if, when the action began, (a) the proposed transferee district court would have had subject matter jurisdiction over the action, (b) venue would have been proper there, and (c) the defendant would have been amenable to process issuing out of the transferee district court.

See American Standard, supra, at 261 and authorities there cited. The transferee district must be one in which the plaintiff could have sued and maintained the action independent of the defendant's wishes. See Hoffman v. Blaski, 363 U.S. 335, 343-44 (1960). Thus, a transfer would be denied where some defendants would not be subject to jurisdiction or where the venue would be improper in the transferee forum as to any defendant. See Hoffman, supra, at 344; In Re Fine Paper Antitrust Litigation, 685 F.2d 810, 819 (3d Cir. 1982). See Security State Bank v. Baty, 439 F.2d 910, 912 (10th Cir. 1971); Lamont v. Haig, 590 F.2d 1124, 1131 n.45 (D.C. Cir. 1978).

The factors to be considered generally on a motion to transfer are those set out in the statute ("convenience of parties and witnesses" and the "interest of justice") and those cited by the Supreme Court in Gulf Oil Corporation v. Gilbert, 330 U.S. 501, 508 (1947) relating to forum non conveniens:

Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of the premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

While all courts agree that the plaintiff's choice of forum is a factor to be considered in deciding a transfer motion, the opinions vary on the degree of weight to be accorded this factor. See 15 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §3848 (1976). Generally, since transfers are intended to result in a more convenient forum, courts should not grant a transfer to a forum that is "equally convenient or inconvenient," see Van Dusen, supra, at 646.

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One of, if not, the most important factors to be considered is that of convenience of the witnesses. See American Standard, supra, §3851. In this regard, the inquiry is directed not at the numbers, but rather at the nature and quality of the witnesses' testimony and the question of whether they can be compelled to testify. See Hotel Construction, Inc. v. Seagrave Corporation, 543 F. Supp. 1048, 1051 (N.D. Ill. 1982); Schmidt v. Leader Dogs for the Blind, Inc., 544 F. Supp. 42, 48 (E.D. Pa. 1982); Capitol Cabinet Corp. v. Interior Dynamics, Ltd., 541 F. Supp. 588, 591 (S.D. N.Y. 1982). Courts favor live presentation of testimony from material non-party witnesses, whenever possible. See Hotel Construction, supra, at 1051 and cases there cited; American Standard, supra, at 262 n.7; see also, Gulf Oil Corp., supra, at 511.

Another of the very important factors is the "interest of justice" --a factor susceptible to a wide variety of definitions. For example, a court might properly consider the degree "of uncertainty in transferor state law." See Van Dusen, supra, at (1964). Other examples if matters considered under rubric of "interest of justice" are: efficient use of judicial resources and avoidance of unnecessary waste and expense, Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 26-27 (1959); Smithkline Corporation v. Sterling Drug, Inc., 406 F. Supp. 52, 55 (D. Del. 1975); avoidance of inconsistent adjudications and "possibility of prejudice to the plaintiffs flowing from that transfer," Amoco Production Co. v. U.S. Dept. of Energy, 469 F. Supp. 236, 244 (D. Del. 1979); "familiarity of the court with the state law to be applied and the desirability of having localized controversies decided at home," Mutual of Omaha Insurance Co. v. Dolby, 531 F. Supp. 511, 514 (E.D. Pa. 1982) and cases there cited and permitting the transferee judge to interpret his outstanding protective order and familiarity of transferor judge with relevant documents. See Mobil Corporation, supra, at 71. "The factor of the convenience of parties and witnesses must also be measured in terms of the interest of justice." See American Standard, supra, at 264. The level of congestion of the respective courts, dockets and the speed with which the dispute can be resolved are also proper matters to be considered. See S.E.C. v. Savoy Industries, 587 F.2d 1149, 1156 (D.C. Cir. 1978).

The remaining factors enumerated in Gulf Oil are so dependent on the facts of a given case that one's time is better spent reviewing the particular fact situations of the reported cases. Compilations of such cases are found in: 15 Wright, Miller & Cooper, supra, at §§3851-54; 1 Moore's Federal Practice, ¶0.145[5]; 37A West's Federal Practice Digest, 2d ¶104.

4-5.920 Jurisdiction

Jurisdictional principles commonly encountered in government litigation will be discussed at USAM 4-5.921, et seq. Specific jurisdictional principles are also discussed at other points in this title, under various subject headings. While an effort has been made here to set forth certain basic principles, care should be taken to refer to reported cases for exceptions, ancillary principles, splits of authority, and important subtleties which the stated principles may not suggest.

4-5.921 Sovereign Immunity

A. Immunity of the United States from Suit, Absent Express Consent

No action lies against the United States unless Congress has authorized it. See United States v. Testan, 424 U.S. 392 (1976); Reid v. United States, 211 U.S. 529, 538 (1909); Munro v. United States, 303 U.S. 36, 41; United States v. Sherwood 312 U.S. 584 (1976); Dalehite v. United States, 346 U.S. 15 (1953); United States v. Shaw, 309 U.S. 495, 500 (1940); Feres v. United States, 340 U.S. 135 (1950); 139; United States v. King, 395 U.S. 1 (1964). The immunity of the United States from suit is all embracing, and obtains without regard to the character of the proceedings or the source of the right sought to be enforced. See Lynch v. United States, 292 U.S. 571, 582 (1934).

See the recently enacted amendments to 5 U.S.C. §§702 and 703, Pub. L. 94-574, Act of October 21, 1976, 90 Stat. 2721. In the amended 5 U.S.C. §702, Congress waived the sovereign immunity defense as to actions for specific relief brought pursuant to the Administrative Procedure Act, 5 U.S.C. §701, et seq. See USAM 4-5.924.

B. Consent to Sue is no Broader than the Limitations which Condition it

The terms of a statute waiving immunity from suit define the courts' jurisdiction to entertain suit, and the consent is no broader than the limitations which condition it. See United States v. Sherwood, supra. Inasmuch as the United States may not be sued in the absence of consent legislation, the claimant's right to sue is necessarily subject to such conditions as Congress has seen fit to impose, including restrictions as to time, place, and manner of suit. See Reid v. United States, supra, at

538; Munro v. United States, supra; Dalehite v. United States, supra, at 31. No representative of the United States has the power to waive jurisdictional conditions or limitations. See United States v. Fitch, 185 F.2d 471 (10th Cir.); and see Finn v. United States, 123 U.S. 227, 233 (1887).

C. Jurisdiction Cannot be Extended by Implication

Jurisdiction cannot be extended by implication beyond the plain language of the statute. See United States v. Michel, 282 U.S. 656 (1931); Lynch v. United States, supra; Klamath and Moadoc Tribes v. United States, supra; United States v. Sherwood, supra; Dalehite v. United States, supra.

Courts will examine into their lack of jurisdiction on their own motion. See Reid v. United States, supra. It is their duty to dismiss whether a jurisdictional deficiency, such as limitations, is pleaded or not. See Finn v. United States, supra, at 232-233.

D. Consent to Sue may be Withdrawn at Any Time

Consent to sue is a privilege and not a property right and may be withdrawn at any time. See Lynch v. United States, supra. Repeal of a jurisdictional statute effectively withdraws jurisdiction, even as to suits previously filed and still pending on the date of repeal. See Bruner v. United States, 343 U.S. 112 (1952); Hallowell v. Commons, 239 U.S. 506. It makes no difference which party was successful in the district court, for, if timely appeal is taken, the case remains a "pending suit" which must be dismissed upon withdrawal of jurisdiction. See Gulf Refining Co. v. United States, 269 U.S. 125 (1925); Gulf, Co. & S.F. Ry. v. Dennis, 224 U.S. 503; The Peggy, 1 Cranch (5 U.S.) 103, 110 (1809).

E. Government Agencies are not Subject to Suit, Absent Statutory Waiver of Immunity

A government department or agency (as distinguished from a government official or employee) is not subject to suit in either federal or state court, unless Congress has waived sovereign immunity with respect to that department or agency. See Blackmar v. Guerre, 342 U.S. 512 (1952); United States Department of Agriculture v. Redmund, 330 U.S. 539 (1947); Keifer & Keifer v. RFC, 306 U.S. 381 (1939). In the amended 5 U.S.C. §702, Congress waived the sovereign immunity defense as to equitable suits for specific relief brought against federal agencies pursuant to the Administrative Procedure Act, 5 U.S.C. §701, et seq. Under the amended 5

U.S.C. §703, an action seeking judicial review of administrative action may be brought against the agency by its official title, in cases where no special statutory review proceeding is applicable. See also USAM 4-5.924, infra.

F. Immunity of Government Officers Sued as Individuals for Official Acts

The general rule is that a government official sued for common law torts is protected by absolute immunity when the acts complained of were taken by him/her within the outer perimeter of his/her official duties. See Barr v. Matteo, 360 U.S. 564 (1956); Howard v. Lyons, 360 U.S. 593 (1959). This privilege not only affords immunity from liability for damages, but also protects the official from having to stand trial. See Barr v. Matteo, supra; Berndtson v. Lewis, 465 F.2d 706 (4th Cir.). However, the same government officials sued for constitutional torts, generally are only protected by a qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800 (1982); Butz v. Economou, 438 U.S. 478 (1978). Where applicable, qualified immunity also protects an official from trial and the burdens of litigation. Mitchell v. Forsyth, 53 U.S.L.W. 4798 (U.S. June 19, 1985). No general rule governs the immunity that protects executive officials sued on statutory theories. See USAM 4-13.362, infra; Torts Branch Representation Monograph III.

G. Specific Relief Against Officer Beyond Court Jurisdiction, if Relief Would Actually be Against the United States

A suit for specific relief against a government officer is an unconsented suit against the United States and is beyond the jurisdiction of the court, where the relief sought, although nominally against the officer, would actually be against the United States, as where it affects the government's property rights or functions. See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1948); Mine Safety Appliances Co. v. Forrester, 326 U.S. 371 (1948); Malone v. Bowdoin, 369 U.S. 643. The jurisdiction of the district courts over such suits is limited to cases in which the plaintiff alleges that the government officer's action is unauthorized by law, or that he/she is proceeding under an unconstitutional statute. See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1948). However, this defense is no longer available in equitable actions for specific relief against federal officers brought pursuant to the Administrative Procedure Act, 5 U.S.C. §701, et seq. Under the amended 5 U.S.C. §703, a suit seeking judicial review of agency action may be brought against the appropriate federal officer where no special statutory review proceeding is available. In addition, 5 U.S.C. §702 now

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provides that mandatory and injunctive decrees must specify, by name or title, the federal officer or officers personally responsible for compliance. See also USAM 4-5.924, infra.

4-5.922 Exhaustion of Administrative Remedies

Generally, the plaintiff suing a government officer may not obtain judicial relief if he has not first exhausted his/her administrative remedies. See Allen v. Grand Central Aircraft Co., 347 U.S. 535 (1954); Aircraft & Diesel Corp. v. Hirsch, 331 U.S. 752 (1947); see also McKart v. United States, 395 U.S. 187 (1969). As to this defense in Freedom of Information Act suits, see Civil Division Practice Manual §3-7.4. Exhaustion is also required in Privacy Act suits, 5 U.S.C. §552(a), in suits challenging adverse personnel actions, and in many other contexts.

4-5.923 Standing to Sue

The "case or controversy" clause of Article III of the Constitution imposes a minimal constitutional standing requirement on all litigants attempting to bring suit in federal court. In order to invoke the court's jurisdiction, the plaintiff must demonstrate, at an "irreducible minimum," that (1) he/she has suffered a distinct and palpable injury as a result of the putatively illegal conduct of the defendant; (2) the injury is fairly traceable to the challenged conduct; and (3) it is likely to be redressed if the requested relief is granted. See Valley Forge Christian College v. Americans United For Separation of Church and State, Inc., 454 U.S. 464, 472 (1982); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976). In addition to the constitutional requirements of Article III, courts have developed a set of prudential considerations to limit standing in federal court to prevent a plaintiff "from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances' pervasively shared and most appropriately addressed in the representative branches." See Valley Forge, supra, at 473, quoting Warth v. Seldin, 422 U.S. 490, 499-500 (1975). Speculative claims that a proposed governmental action may result in injury to a plaintiff are insufficient to confer standing. See O'Shea v. Littleton, 414 U.S. 488 (1974). The required injury must be both real and immediate, not conjectural or hypothetical. See Golden v. Zwickler, 394 U.S. 103, 109-110 (1969).

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4-5.924 Effect of Declaratory Judgment Act and Administrative Procedure Act

The Congress has enacted a partial waiver of the sovereign immunity defense as to judicial review of federal administrative action otherwise subject to judicial review under the Administrative Procedure Act, 5 U.S.C. §701, et seq. By Pub. L. 94-574, Act of October 21, 1976, 90 Stat. 2721, 5 U.S.C. §702 was amended to provide that an "action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party."

The amendment authorizes the entry of a judgment against the United States itself, but any mandatory or injunctive decree must also specify, by name or title, the federal officer or offices personally responsible for compliance. In addition, 5 U.S.C. §703 has been amended to allow suit to be brought against the United States or any of its agencies or officers.

The sovereign immunity defense has been withdrawn only with respect to actions seeking specific relief other than money damages, such as an injunction, a declaratory judgment, or a writ of mandamus. Specific statutory provisions for the recovery of money damages, such as the Tucker Act and the Federal Tort Claims Act, are unaffected. See H. Rep. 94-1656, p.13, 1976 U.S. Code Cong. & Adm. News 6133.

All defenses other than sovereign immunity remain unchanged. The amended 5 U.S.C. §702 specifically provides that other limitations on judicial review remain in effect, and that the reviewing court retains whatever pre-existing power or duty it had to dismiss any action or deny relief on any other appropriate legal or equitable ground. Since 5 U.S.C. §701 has not been amended, judicial review continues to be unavailable where another statute precludes review, or where the agency action is committed to agency discretion by law. Other defenses which may be asserted include adequate remedy at law, standing, ripeness, failure to exhaust administrative remedies, and available exclusive alternative remedy.

Moreover, the amendment to 5 U.S.C. §702 does not confer authority to grant relief where another statute provides a form of relief which is expressly or impliedly exclusive. For example, the Court of Claims Act creates a damage remedy for contract claims, which impliedly forecloses other remedies such as specific performance. Therefore, the partial waiver of sovereign immunity does not affect existing limitations on

specific relief contained in other statutes governing areas such as government contracts, patent infringement, tort claims, and tax claims. See H. Rep. 94-1656, p. 13, 1976 U.S. Code Cong. & Adm. News 6133.

Another barrier to judicial review of administrative action was removed by §2 of Pub. L. 94-574, which amended 28 U.S.C. §1331(a) so as to eliminate the \$10,000 amount-in-controversy requirement in actions against the United States, any agency thereof, or any officer or employee thereof in his official capacity. This provision persuaded the Supreme Court to conclude that, subject to preclusion-of-review statutes, jurisdiction to review agency action is conferred by 28 U.S.C. §1331, and that the Administrative Procedure Act is not an independent grant of jurisdiction. See Califano v. Sanders, 430 U.S. 99, 105-107 (1977).

Similarly, the Declaratory Judgment Act, 28 U.S.C. §2201, is not an independent source of federal jurisdiction. The purpose of that Act is merely to provide an additional remedy, once jurisdiction is found to exist on another ground. See Benson v. State Board of Parole and Probation, 384 F.2d 238 (9th Cir. 1967), cert. denied, 391 U.S. 954 (1968); Schilling v. Rogers 363 U.S. 666 (1960). Therefore, where jurisdiction to review a particular agency action under 28 U.S.C. §1331 has been precluded by another statute, the Declaratory Judgment Act does not provide an independent basis for granting relief.

4-5.925 Indispensable Party

In a suit against a subordinate officer, the head of a department or other superior officer is an indispensable party if the relief sought would require the superior officer to take action, either directly or through a subordinate. See Williams v. Fanning, 332 U.S. 490 (1947); Hynes v. Grimes Packing Co., 337 U.S. 86 (1949). See also USAM 4-13.433, infra.

USAM (superseded)

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4-6.000 GOVERNMENT ACTIONS FOR MONETARY RELIEF I

Numerically speaking, the largest category of cases requiring the attention of the U.S. Attorneys is that involving the recovery of money on behalf of the United States. Many of the matters discussed in USAM 4-4.000 and 4-5.000, supra, are applicable in the litigation of these affirmative monetary suits. USAM 4-6.000 through 4-9.000, infra, will deal with affirmative monetary claims and suits on behalf of the government which fall within certain specified categories. If suit is necessary, the complaint should pray for the recovery of court costs (USAM 4-4.510, supra) and interest as appropriate. See USAM 4-4.810, supra. In some cases, it may be possible to allege entitlement to the recovery of attorneys' fees. See USAM 4-4.210, supra. Suit should always be brought in the name of the United States and in the United States district court. See USAM 4-4.010, supra.

Time is money. The prompt recovery of money owed the United States will help avoid borrowings at high interest rates, as well as the risk of dissipation of the assets of the defendant which otherwise may render recovery impossible. See USAM 4-5.210, supra, as to the bar of limitations. Generally, all obligors should be joined in one suit if possible. See Fed. R. Civ. P. 20. See also 28 U.S.C. §§1392 and 1393(b), as to suing all obligors in one district in the same state. Default judgments should be taken as soon as possible. Even if an answer is filed, it is often possible to obtain early dispositions without the delays and costs of trial, if a motion for summary judgment is filed promptly pursuant to Fed. R. Civ. P. 56, supported by an appropriate affidavit. See USAM 4-6.600, as to collection of the resulting civil judgment.

4-6.001 Accountable and Disbursing Officers

"The obligation to keep safely the public money is absolute, without any condition, express or implied * * *. * * * Public policy requires that every depository of the public money should be held to a strict accountability. * * * Any relaxation of this condition would open the door to frauds, which might be practiced with impunity." See United States v. Prescott, 44 U.S. 577, 588 (1845); accord Smythe v. United States, 188 U.S. 156 (1903); and see 63 Am. Jur. 2d, (Public Officers and Employees) §§328-334. The defense that the money was embezzled by another employee was held unavailing in Bryan v. United States, 90 F. 473 (9th Cir.). Payment of such money with humanitarian motives but contrary to law cannot be sanctioned. See Fidelity & Deposit Co. of Md. v. United States, 55 F.2d 100 (4th Cir.). The burden is on the accountable or

disbursing officer, to show circumstances which will exonerate him/her from liability. See Boggs v. United States, 44 Ct. Cl. 367. See also USAM 4-9.300, infra, as to claims against sureties of suit officers. See USAM 4-5.210, supra, as to the applicable limitations period. As to the administrative relief for accountable officers, see 31 U.S.C. §82a(1).

4-6.100 AFFIRMATIVE TORT SUITS

"The Government * * * for the protection of its property rights * * * may resort to the same remedies as a private person." See Rex Trailer Co. v. United States, 350 U.S. 148, 151; Cotton v. United States, 52 U.S. 228 (1850). Thus, the government can sue to recover damages for loss, damage, destruction, or conversion of government property. However, when the government has sought to recover damages consequent of injury to government personnel, the court has declined to permit recovery absent Congressional authorization. See United States v. Standard Oil Co., 332 U.S. 301. Such an authorization is found in the Medical Care Recovery Act, discussed in USAM 4-8.200, infra. See USAM 4-10.820, infra, as to the recover of the property itself.

U.S. Attorneys should not overlook the opportunity to bring actions for contribution against joint tortfeasors or for common law indemnity. While these actions arise by virtue of the government's own tort liability, the right of contribution is equitable in nature, while common law indemnity is contractual or quasi-contractual in nature. See Civil Division Practice Manual §3-2.25. See also Civil Division Practice Manual §3-2.24, 3-2.32, as to the applicable statute of limitations.

When an action is brought to recover the value of government property which has been stolen or otherwise converted, it is clear that ignorance of the government's title in the property is not a valid defense, and one acquiring the property from the converter acquires no greater interest than the converter had. See United Naval Stores v. United States, 240 U.S. 284 (1916). (This rule is varied as to certain fungible agricultural commodities by 15 U.S.C. §714p.) Nor is the United States required to comply with state recording statutes. United States v. Ansonia Brass & Copper Co., 218 U.S. 452 (1910); United States v. Allegheny County, 322 U.S. 174; In re Double H Products, 462 F.2d 52 (3d Cir.); In the Matter of American Boiler Works, Inc., 220 F.2d 319 (3d Cir.). No lien may be acquired or assented against the government property without its consent. See United States v. Ameco Electronics Corp., 224 F. Supp. 783 (E.D. N.Y.).

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4-6.200 BANKRUPTCY PROCEEDINGS

The United States is frequently a creditor in bankruptcy proceedings. Because of the technical rules which obtain in bankruptcy, and the short deadlines for action and appeals, U.S. Attorneys should take unusual care to see that no rights of the United States are lost by default. This subject is fully discussed in the Civil Division Practice Manual §§3-33.1, et seq.

4-6.211 Proof of Claim

A. Preparation. Normally, the client agency prepares the proof of claim. However, if necessary to avoid a time bar, the U.S. Attorney should prepare and file the proof of claim. Even if the exact amount of the claim is not known or has not been determined pursuant to required administrative proceedings, as per the disputes clause in a government contract, a proof of claim should be filed; it can be amended later.

B. Filing. File the proof of claim before time deadlines. Time deadlines are discussed in the Civil Division Practice Manual at §§3-33.25, 3-33.69 and 3-33.73. The U.S. Attorney's signature should be added to the proof of claim, as counsel for the claimant. Appearing in the proceeding enables the U.S. Attorney to receive notices which may affect the rights of the client agencies. Also deadlines for action in bankruptcies are so short that the U.S. Attorney must receive notices directly, in order to have time to comply.

4-6.212 Priority of Government Claims

See Civil Division Practice Manual §3-33.29.

4-6.213 Allowance of Claims

See Civil Division Practice Manual §3-33.26.

4-6.214 Secured Claims

See Civil Division Practice Manual §§3-33.28 and 3-33.20.

4-6.215 Discharge of Debtor

See Civil Division Practice Manual §3-33.34.

4-6.220 Offset in Bankruptcy

See Civil Division Practice Manual §3-33.44.

4-6.230 Plans of Reorganization as Compromises

The purpose of "chapter proceedings" is to work out a compromise or extension of indebtedness. Thus, a proposed plan under Chapter 11 or Chapter 13 amounts to a compromise offer or request for extension, as the case may be. If the plan proposes payment of the government's claim over a longer period of time than was originally called for, but there will be no reduction in the amount of the government's claim, and no release of security is required, no compromise is deemed involved. In some instances, plans provide for a cash deposit to pay the government's claims in full. Such proposals do not require the Civil Division's approval as a compromise of the government's claims.

Proposed plans which call for the government to accept less than the full amount due it, or for the release or substitution of security, amount to compromise proposals, and should be processed as any other compromise offer. If the offeror insists on an answer before necessary financial data, proper recommendations, and clearances can be obtained, the U.S. Attorney should object to the plan. The amount that would be realized by the government in the event of liquidation is a relevant consideration in judging the adequacy of an offer of compromise by way of a plan. Plans which call for the government to accept stock in a debtor or successor corporation in payment or partial payment of its claims, or which call for the government to accept a percentage of net profits, should be avoided. See also Civil Division Practice Manual §3-33.67.

4-6.250 Procedures in Bankruptcy

4-6.251 Bankruptcy Appeals

Notice of appeal from an adverse ruling of the bankruptcy judge must be filed with the bankruptcy court within ten days of the entry of the judgment appealed from, or within such extended time, not exceeding twenty days, as the bankruptcy judge may allow upon timely application. See Bankr. Rule 802. In any supervised case or in any case with precedent setting potential, the Civil Division should be advised immediately of

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adverse rulings, with the U.S. Attorney's recommendation. As to adverse rulings of the district court, as distinguished from adverse rulings by a bankruptcy judge, see USAM 9-2.000 et seq.

4-6.252 Constitutional Challenges and Other Representation

The Civil Division should be promptly notified of constitutional challenges and of requests for intervention or for the filing of briefs amicus curiae. See USAM 4-1.324 and 4-1.325, supra.

4-6.253 Property of Co-Debtors

A special problem is presented in jurisdictions where tenancy by the entirety is recognized in all its incidents, the United States has an unsecured claim against the co-tenants, only one co-tenant files in bankruptcy, and 11 U.S.C. §363(h) is inapplicable because the state exemptions are chosen. If a discharge in bankruptcy is permitted as to the co-tenant in bankruptcy, the requisite "jointness" of the co-tenants' liability is destroyed, and the United States cannot impress a lien upon the entirety property for the joint debt. See Fetter v. United States, 269 F.2d 467 (6th Cir.). Thus, endeavor to stay discharge to permit entry of a judgment against both co-tenants. In re Phillos, 14 B.R. 781 (Bankr. W.D. Va. 1981).

After the government's judgment is perfected as a lien against the entirety property, the bankruptcy can proceed without affecting the government's lien against the entirety property unless the government's claim is disallowed in the bankruptcy. See 11 U.S.C. §506(d).

4-6.300 CARRIERS

The liability of carriers for loss, damage, or destruction of property may be fixed or affected by the terms of the contract of carriage, usually a bill of lading, or by statute, depending upon the mode of transportation. By the general government bill of lading, the carrier agrees to deliver goods to an indicated destination and consignee "in like good order and condition." Care should be taken to examine the contract of carriage employed and applicable statute, to ascertain the exact liability of the carrier and the time within which suit must be brought. See Civil Division Practice Manual, §3-2.2, as to the latter. The bill of lading is the contract of carriage and serves as a receipt by the carrier at origin and the consignee at destination. See The Delaware, 81 U.S.C. 579; Am. Rw. Express Co. v. Lindenber, 260 U.S. 584 (1923). If the household goods of servicemen (see 31 U.S.C. §§240-243) or civilian personnel (see 5 U.S.C. §§5724(a)(2)) are involved, and suit is brought

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because of assignment of or subrogation to their rights, additional variations may be involved.

In the case of goods or commodities shipment of which is subject to the Interstate Commerce Act, proof of delivery in good condition and receipt at destination in damaged condition or non-receipt at designation makes out a prima facie case for the shipper. See Johnson & Johnson v. Chief Freight Lines Co., 679 F.2d 421 (5th Cir. 1982); Gulf Mobile & Ohio R. Co., 391 F.2d 545 (5th Cir.), cert. denied sub. nom., Denver & Rio Grand Western Co. v. United States, 391 U.S. 919 (1968). Once a shipper has established the prima facie case of loss or damage in transit, the carrier must show freedom from negligence, and that the damage or loss was caused by (1) an act of God, (2) the public enemy, (3) public authority, or (4) the inherent vice or nature of the goods. See Mo. Pac. R. Co. v. Elmore & Stahl, 377 U.S. 144 (1964); Pillsbury Co. v. Illinois Cent. Gulf R.R., 687 F.2d 241 (8th Cir. 1982). An originating carrier remains liable for loss of or damage to property (49 U.S.C. §11707), so the shipper may sue the originating carrier or it may sue the connecting or delivering carrier responsible for the loss or damage. If lading is "shipper's load and count," the shipper rather than the carrier is liable to the consignee, and some independent act of negligence must be shown on the part of the carrier to impose liability. The bill of lading is not sufficient to establish delivery to the carrier. See Johnson & Johnson, supra; Minneapolis, St. Paul & S.S. M.R. Co. v. Metal-Matic, 323 F.2d 903 (8th Cir.).

The measure of damages for loss of commercial shipments is ordinary market value at destination, less freight charges to destination. Cf. Chicago, N. & St. Paul R. Co. v. McCaull-Dinsmore, 253 U.S. 97 (1920). However, the carrier's tariff should be reviewed to see if a limitation of value to shipper's declaration is applicable. See 49 U.S.C. §10730. When the loss of household goods is involved, the measure of damages is the value at destination without deduction of freight charges. Matter of Sparks, 114 M.C.C. 176.

The Government Losses in Shipment Act, 40 U.S.C. §§721 et seq., precludes government expenditures for insurance coverage, except as authorized by the Secretary of the Treasury. Acceptance of goods for shipment conditioned on a low released value, i.e., limiting the carriers liability for loss or damage to a specific figure per pound, was held to preclude recovery at a larger value in L. & N. Ry. Co. v. United States, 106 F. Supp. 999 (W.D. Ky.), aff'd., 221 F.2d 698 (6th Cir.).

Section 11707 of the Interstate Commerce Act provides that a carrier may not require a claim to be filed with the carrier in less than nine

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months. Also Section 11707 mandates a minimum statute of limitations for filing a civil action of two years after written disallowance of any claim by the carrier.

An air carrier's valid federal tariffs govern both the nature and extent of the carrier's liability as well as the shipper's right of recovery. See North American Phillips Corp. v. Emery Freight Corp., 579 F.2d 229 (1st Cir. 1978). Air carrier's tariffs usually require negligence to be proved and usually specify the time limits for filing loss and damage claims. Id., Alco Gravure Div. of Publications Corp. v. American Airlines, Inc., 173 F. Supp. 752 (D. Md.).

4-6.400 CIVIL FRAUD CASES

Civil statutory remedies available to cope with frauds against the government include the False Claims Act (Civil Division Practice Manual §§3-6.1 through 3-6.56, the Contract Settlement Act of 1944, as amended (41 U.S.C. §119), the Anti-Kickback Act (41 U.S.C. §§51-54), and the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. §489(b) and Section 5 of the Contracts Disputes Act (41 U.S.C. §604)). Bribery and conflict of interest are not to be condoned. The government is entitled to the fruits of an employee's dereliction, if there has been a betrayal of trust. See United States v. Carter, 217 U.S. 286 (1910). If such an employee takes any gift, gratuity, or benefit in violation of his/her duty, accepts employment or acquires any interest adverse to his/her principal without a full disclosure, this is a betrayal of his/her trust and a breach of confidence for which the employee must account. See United States v. Drumm, 329 F.2d 109 (1st Cir. 1964); States v. Drisko, 303 F. Supp. 858 (E.D. Va. 1969).

Complaints alleging a statutory cause of action under one of the foregoing statutes should include counts based on common law fraud, bribery, conflict of interest, or unjust enrichment, in appropriate circumstances. See Civil Division Practice Manual §3-6.57. There should be vigorous enforcement of civil sanctions against fraud. Expeditious enforcement of civil sanctions should be undertaken to make the government whole, if possible, and to provide a strong deterrent to fraudulent conduct in similar circumstances. Such enforcement is important to the promotion of the highest ethical standards among those who have dealings with the government or who are employed by it. Flagrant frauds, justifying the initiation of suits for double damages and penalties under relevant statutes generally, should not be compromised for less than double damages and some forfeitures. See Civil Division Practice Manual §3-6.6. See 28 C.F.R. Subpart Y and Appendix, for current delegations of compromise authority to U.S. Attorneys. Criminal and civil fraud

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investigations by the FBI should be carried out concurrently, including investigations as to the extent of the government's damage. See Civil Division Practice Manual §3-6.9. We should be taken not to utilize Grand Jury materials in connection with civil actions. United States v. Sells Engineering, Inc., 463 U.S. 418 (1983). See §3-6.9 of the Civil Division Practice Manual. See Civil Division Practice Manual §§3-6.14, 3-6.15, as to the applicable statute of limitations and the need for prompt enforcement action. See also USAM 9-42.000, infra (Fraud Against the Government).

4-6.500 CIVIL PENALTIES AND CIVIL MONETARY FORFEITURES

Congress has provided by statute for a myriad of civil penalties and civil monetary forfeitures. Responsibility as to particular penalties and forfeitures may be assigned to one of several divisions in the Department of Justice, including the Criminal Division (General Litigation and Legal Advice Section), since such sanctions are often an alternative to criminal sanctions. Civil penalty and forfeiture cases, which are not specially assigned to other divisions, are generally assigned to the Commercial Litigation Branch of the Civil Division, though in a few instances penalty cases may be assigned to the Federal Programs or Torts Branches of the Civil Division. Care should be taken to examine the statute under which the penalty or forfeiture is assessed, to ascertain whether enforcement requires a trial de novo and whether any other special conditions attach. If a trial de novo is required, the defendant may demand a jury trial. See USAM 4-5.100, supra. Either party may demand a jury. See Union Ins. Co. v. United States, 6 Wall. 73 U.S. 759 (1868). Some statutes may provide an administrative review procedure, with limited review in a court of competent jurisdiction. In such cases, jury trial can be avoided if the procedure is properly structured. See, e.g., Weir v. United States, 310 F.2d 149 (8th Cir.); United States v. Sykes, 310 F.2d 417 (5th Cir.). Even in such cases, the courts will inquire as to whether the action taken was within the agency official's statutory authority, whether there was evidence before him/her in support of his/her determination satisfy elementary standards of fairness and reasonableness. See Lloyd Sabaudo Societa v. Elting, 287 U.S. 329 (1932).

Civil penalties and civil monetary forfeitures abate with the death of the defendant. See Bowles v. Farmers National Bank of Lebanon, Ky., 147 F.2d 425 (6th Cir.). Suit thereon must be commenced within five years. See 28 U.S.C. 2462; USAM 4-5.210. For the disallowance in bankruptcy proceedings of so much of penalty and monetary forfeiture claims as does not constitute pecuniary loss sustained by the United States, see Bankruptcy Code §726(a)(4) (11 U.S.C. §726(a)(4)). The non-dischargeability of fine, penalty or forfeiture claims is governed by Bankruptcy Code §23(a)(7) (11 U.S.C. §53(a)(7)). Absent express statutory provision, pre-judgment interest is not recoverable. See Rodgers v. United States, 332 U.S. 371 (1947).

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Civil penalties are assessed to vindicate agency enforcement policy, or to compel compliance with agency orders, etc. Cf. 4 C.F.R. §103.5. Thus, the views of the client agency should always be sought before considering the compromise or closing of such cases, and if the client agency disagrees, the matter should be referred to the Civil Division. In addition, fines and penalties often represent one of a very limited number of compliance tools available to an agency. Thus enforcement of these claims frequently deserves a greater priority than the actual dollar amount of the claim might otherwise indicate.

Forms for the enforcement of civil penalties and forfeitures in cases involving violations of the navigation and shipping laws, will be found in the Civil Division Practice Manual §3-13.1, et seq.

4-6.600 COLLECTIONS

A major responsibility of the Attorney General, the Civil Division, and the U.S. Attorneys is that of recovering sums owed the United States. Prompt action should be taken to collect such debts, including the filing of suits, obtaining judgments, and enforcing such judgments. Prompt and effective action is necessary if debtors are to respect the Department's ability and will to collect these debts and know that it means business. Prompt and effective action is also important to public confidence in the institutions of government, and to avoid the necessity of the government borrowing additional sums at high rates of interest, the bar of limitations as to claims, and debtors paying off debts with much depreciated currency due to inflation.

The importance attached to collections by the Attorney General is reflected in the requirement of 28 C.F.R. §0.171, which reads:

Each U.S. Attorney shall designate an Assistant U.S. Attorney, and such other employees as may be necessary, or shall establish an appropriate unit within his office, to be responsible for activities related to the satisfaction, collection, or recovery, as the case may be, of judgments, fines, penalties, and forfeitures (including bail-bond forfeitures).

Form and instructions for the handling of collection matters will be included in the Civil Division Practice Manual. It is important that agency referrals be screened, pursuant to the joint regulations

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implementing the Federal Claims Collection Act, to be sure the administrative agencies are discharging their responsibilities to collect sums due the government, and that they are not unloading unprocessed claims on the Department, thus causing unnecessary work and litigation for the Department. See 4 C.F.R. §101.1 et seq., and the Civil Division Practice Manual. Please note that the Federal Claims Collection Act has been amended by the Dept Collection Act of 1982, 31 U.S.C §§3711-3720 (1983). Amendments to the joint regulations also have been issued. 4 C.F.R. Parts 101-105 (49 Fed. Reg. 8889, March 9, 1984).

An appropriate supersedes bond should be required in every case of appeal by a defendant in a collection case. Much care will be required to see that no claim is barred by limitations. In no case should there be an assignment of any interest of the government in any money judgment, lien, or chose in action, involved in any case or matter within the general jurisdiction of the Civil Division, without express approval from the Civil Division. Appropriate action should be taken to perfect judgment liens and to renew such liens before their expiration, as will be more fully set forth in the Civil Division Practice Manual. In no event should a debtor be advised that a claim or judgment is being closed or inactivated. Commercial Litigation Branch of the Civil Division should be consulted with respect to the collection of judgments against states and other governmental bodies. As to exemptions available to individual debtors, see Civil Division Practice Manual §3-17.1 et seq.

4-6.700 CONTRACTS

Government contract claims are greatly varied and numerous. Federal law controls the construction of such contracts, absent written expression of the intention of the parties to the contrary. See USAM 4-4.700, supra. Suits against the government on contracts are discussed in USAM 4-11.830 infra. Additional references to specific contract actions may be found in USAM 4-6.300 (carriers), USAM 4-7.400, infra (foreclosure of government-held mortgages), USAM 4-7.700, infra (guaranty claims), USAM 4-7.800, infra (HUD regulatory agreements), USAM 4-8.400, infra (non-appropriated fund instrumentality cases), USAM 4-8.500, infra (planning advance cases), USAM 4-8.600, infra (promissory note cases), USAM 4-9.300, infra (sureties), USAM 4-9.400, infra (transportation matters), USAM 4-9.500, infra, (VA loan claims), and USAM 4-9.600, infra (warranties).

Government claims arising out a contract subject to the Contract Disputes Acts of 1978, 41 U.S.C. §601 et seq. (CDA) should ordinarily be presented to the contracting officer for a decision. If no appeal is taken an affirmative CDA suit should be filed. Whenever such a suit is contemplated, the Commercial Litigation Branch should be contacted prior to a suit being filed.

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4-6.710 Standard Contract Dispute Clause

Prior to the contract Disputes Act's codification of the procedure for making contract claims against the United States, such actions were generally governed by the standard Disputes clause contained in the contract itself. The Disputes clause has been amended since the passage of the Contract Disputes Act, but contract actions not subject to the Act will still be governed by the procedures set forth in the Disputes clause. It generally requires that all disputes concerning questions of fact be determined by the contracting officer initially, with a right to appeal to an administrative board. The administrative determination of these disputes is final unless it is "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." See 41 U.S.C. §§321-22. See generally United States v. Utah Construction Company, 384 U.S. 394, 419.

[A]part from questions of fraud, determinations of the finality to be attached to a departmental decision on a question arising under a 'disputes' clause must rest solely on consideration of the record before the department.

See United States v. Bianchi and Company, 373 U.S. 709; United States v. Grace & Sons, 384 U.S. 424; United States v. Utah Construction Company, 384 U.S. 394. Thus, no trial de novo is permitted on factual issues. While administrative determinations under the Disputes clause of claims for breach of contract and of decisions on questions of law are excluded from finality, a claimant cannot avoid the finality of the administrative factual findings by relabeling the denial of relief as a breach of contract or a question of law. See United States v. Utah Construction Company, 384 U.S. 394, 419-120. In the case of a claim brought by the United States, the contractor-defendant who fails to appeal from the contracting officer's determination will be foreclosed from challenging that decision in litigation. See United States v. Ulvedal, 372 F.2d 31 (8th Cir. 1967). See Zideel v. United States, 427 F.2d 735, 739 (Ct. Cl.). Questions concerning Disputes clause matters should be directed to the Commercial Litigation Branch.

4-6.720 Use of Liquidated Damages Provisions

Liquidated damage clauses have been inserted in government contracts for a variety of purposes. Specific applications include:

A. Delay damages (United States v. Bethlehem Steel Co., 205 U.S. 105; Wise v. United States, 249 U.S. 361);

B. 'Penalty' for overgrazing under lease of government land (Fraser v. United States, 261 F.2d 282 (9th Cir.);

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C. Restrictions on disposition of surplus agricultural commodities (Kirkland Distributing Co. of Columbia, S.C. v. United States, 276 F.2d 138 (4th Cir.); Southern Milling Co. v. United States, 270 F.2d 80 (5th Cir.)).

D. Restrictions on dealer purchases of agricultural commodities to eligible growers (United States v. Leroy Dyal Co., 186 F.2d 460 (3d Cir.), cert. denied., 341 U.S. 926), and LeRoy Dyal Co. v. United States, 341 U.S. 926 (1951); and

E. Restrictions on the purchase or disposition of surplus property (Rex Trailer Co. v. United States, 350 U.S. 148; Fonq v. United States, 300 F.2d 400 (9th Cir.)).

4-6.721 Validity and Construction of Liquidated Damages Provisions.

Liquidated damages provisions are no longer viewed with disfavor. See United States v. Bethlehem Steel Co., 205 U.S. 105, 119 (1907); Priebe & Sons v. United States, supra; Broderick Wood Products Co. v. United States, 341 F.2d 998, 1001 (8th Cir.), cert. denied 382 U.S. 819 (1965). Rather, the courts are strongly inclined to allow the parties to make their own contracts and to carry out their intentions. See United States v. Bethlehem Steel Co., supra. The fact that there is no specific statutory authority for the inclusion of such a provision does not defeat its application. See J.D. Streett & Co. v. United States, 256 F.2d 557, 560 (8th Cir.).

The validity of a liquidated damages clause is to be judged as of the time the contract is made, and not by subsequent events. See United States v. Bethlehem Steel Co., supra, at 105; Priebe & Sons v. United States, 332 U.S. 407, 412 (1943); Southwest Engineering Co. v. United States, 333 U.S. 407, 412; Southwest Engineering Co. v. United States, 341 F.2d 998, 1003 (8th Cir.), cert. denied 382 U.S. 819. The fact that damages may be uncertain in nature and amount, or are difficult of ascertainment, is a major reason for sustaining liquidated damage clauses. See Wise v. United States 249 U.S. 361 (1919); United States v. Bethlehem Steel Co., supra; Priebe & Sons v. United States, supra at 422; cf. Rex Trailer Co. v. United States, 350 U.S. 148, 153 (1956). The parties to the contract are much more competent to justly determine the amount of damages to be anticipated than the court or jury. See Wise v. United States, supra. The fact that the actual damages may prove to be less, or greater, than the sum specified in the clause for liquidated damages is not controlling, and recovery will be given in the agreed

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amount. See Printing & Publishing Assn. v. Moore, 183 U.S. 642 (1902); Ely v. Wickham, 158 F.2d 233, 235 (10th Cir.); TWA v. Travelers Indemnity Co., 262 F.2d 321 (7th Cir.).

4-6.722 Actual Damages Need Not Be Proved To Recover Liquidated Damages

Recovery of liquidated damages may be had even though actual damages are not proved. See United States v. Bethlehem Steel Co., *supra*, (war ended and importance of time disappeared); United States v. LeRoy Dyal Co. 186 F.2d 460 (3d Cir.), *cert. denied*, 341 U.S. 926 (1961); Fraser v. United States, 261 F.2d 282 (9th Cir.); Southwest Engineering Co. v. United States, 341 F.2d 998, 1000 (8th Cir.), *cert. denied*, 382 U.S. 819; Bethlehem Steel Corp. v. City of Chicago, 350 F.2d 649 (7th Cir.); *cf.* Rex Trailer Co. v. United States, *supra*, (no evidence defendant made any gain on surplus property bought from government--"And the fact no damages are shown is not fatal.")

4-6.730 Title to Government Furnished Property and to Property Acquired After Progress Payments are Made

A frequent issue in litigation, often in a bankruptcy context, is that relating to title to property furnished in conjunction with the performance of defense contracts, and to property acquired by the contractor in conjunction therewith. The standard contract provision applicable provides in substance that title to all parts, materials, inventories, work in progress, etc., which is allocable to the contract pursuant to which progress payments were made to the contractor by the government, shall forthwith vest in the government upon acquisition, production or allocation. See 32 C.F.R. §7.104-32(d).

Title to such property has been sustained in the government in numerous cases. See United States v. Ansonia Brass & Copper Co., 218 U.S. 452 (1910); Shepard Engineering Co. v. United States, 287 F.2d 737 (8th Cir.); In the Matter of American Boiler Works, Inc., 220 F.2d 319 (3d Cir.); In re Read-York, 152 F.2d 313 (7th Cir.); Boeing Co. v. United States, 338 F.2d 342 (Ct.Cl.), *cert. denied*, 380 U.S. 972; United States v. Double H Products, 462 F.2d 52 (3d Cir.); United States v. Ameco Electronics Corp., 224 F. Supp. 783 (E.D. N.Y.).

The Tenth Circuit in In Re Murdock Machine & Engineering Co., 620 F.2d 767 (10th Cir. 1980) held that a reclaiming seller under U.S.C. §2-702 had an interest superior to that of the government. The decision was based largely on United States v. Kimbell Foods, Inc., 440 U.S. 715

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(1979) discussed elsewhere. Several cases decided after Murdock have upheld the government's claim of title. See Verco Industries, Inc. v. United States, 10 B.C.D. 320 (BAP 9th Cir. 1982); United States v. American Pouch Foods, Inc., Civ. No. C1616 (N.D. Ill., filed June 20, 1983); In Re Pamlico Canvas Products, Inc., No. 82-01464-4 (Bankr. E.D. N.C., filed May 19, 1983). The Court of Claims, now the Court of Appeals for the Federal Circuit, in Marine Midland Bank v. United States, 687 F.2d 395 (Ct. Cl. 1982) held that the government's title under the title vesting clause was not actual title, but an interest in the nature of a purchase money security created by federal law and not subject to state recording or filing requirements. Although the court's decision in Marine Midland rejects the government's title theory, the creation of a purchase money security interest will usually lead to the same favorable result for the government. The court also indicated in Marine Midland that, notwithstanding questions of title, the government is always entitled to possession of the materials acquired in connection with the contract.

4-6.740 Entitlement to Advance Payments in Special Account

From time to time, disputes arise over funds advanced by the Defense Department to defense contractors which have been deposited in a special account in accordance with the terms of the contract. Government entitlement to such funds has been upheld in cases such as United States v. Butterworth-Judson Corp., 267 U.S. 387; Lawrence v. United States, 378 F.2d 452 (5th Cir.).

4-6.750 Claims of Mistakes in Bids

If the government knew or should have known of a mistake in a contractor's bid, and failed to request adequate verification of the bid price before award, the bidder may obtain the equitable remedy of reformation to correct a unilateral mistake. See United States v. Hamilton Enterprises, Inc., No. 37-82 (Fed. Cir. June 6, 1983); Burnett Electronics Laboratory, Inc. v. United States, 479 F.2d 1329 (Ct. Cls.); Alabama Shirt & Trouser Company v. United States, 121 Ct. Cl. 313 (Ct. Cl.); Ruggiero v. United States, 420 F.2d 713 (Ct. Cl.). When the contracting officer reasonably suspects or should suspect that a mistake has been made, he/she must request the bidder to verify the bid. And, in so doing, he/she must inform the bidder of why the request for the verification is being made. See 41 C.F.R. §1-2.406-3(d)(1); United States v. Hamilton Enterprises, Inc., *supra*, United States v. Metro Novelty Manufacturing Company, 125 F. Supp. 713 (S.D. N.Y. 1954).

The government may obtain recovery against a contractor who defaults without attempting performance and contends that performance is excused because of a mistake in bid. See, e.g., Burtz-Durham Construction Company v. United States, 384 F.2d 913 (5th Cir.), cert. denied 390 U.S. 953; Saligman v. United States, 56 F. Supp. 505 (E.D. Pa.).

4-6.760 Recovery of Amount of Fee Paid to Obtain Contract

Government contracts generally prohibit the payment of a fee to an agency or intermediary for the purpose of obtaining a government contract. Such clauses are designed to eliminate the "five percenters" who purport to peddle influence while collecting such fees. Recovery on such contract clauses has been sustained in Webber v. United States, 396 F.2d 381 (3d Cir.); United States v. Paddock, 178 F.2d 394 (5th Cir.), reh'g denied, 180 F.2d 121 (5th Cir.), cert. denied, 340 U.S. 813.

4-6.770 Contracts for the Storage of Commodities

The government has been a major storer of agricultural commodities. Thus, there has been considerable litigation involving the uniform grain storage agreements and similar agreements (including Uniform Rice Storage Agreement, Processed Commodities Storage Agreement, and Uniform Cotton Storage Agreement) utilized by the Department of Agriculture. Recovery for shortages and deterioration of the commodity stored was upheld in St. Paul Mercury Indemnity Co. v. United States, 201 F. 2d 57 (10th Cir.). Shrinkage of grain is the responsibility of the warehouseman under the uniform agreement and similar agreements. See Tulsa Grain Storage Co. v. CCC, 231 F. Supp. 432 (N.D. Okla.). That the government is entitled to the refund of unearned storage charges, see United States v. Wagner, 390 F.2d 13 (10th Cir.). Federal, rather than state law, applies to provisions of the uniform agreements and similar agreements. See 25 U.S.C. §714b(g).

4-6.780 Construction and Other Performance Deficiencies

Vast sums are spent by the government on construction and procurement contracts. Performance of deficiencies, in failing to build or deliver structures or products or perform services according to plans and specifications on agreement, are often the subject of disputes. Recovery for such deficiencies has been sustained in cases such as United States v. Walsh, 115 F. 697 (2d Cir.), and United States v. Hammer Contracting Corp., 216 F. Supp. 948 (E.D. N.Y.), aff'd., 331 F. 2d 173 (2d Cir.).

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Each potential case should be reviewed to determine whether the Contract Disputes Act of 1978, 41 U.S.C. §§601 et seq., is applicable to the contract under which the claim arose. If applicable, the Commercial Litigation Branch of the Civil Division should be contacted before filing suit. The rights of the government and the procedures to be followed for affirmative claims under the Contract Disputes Act of 1978 are unsettled areas in which case law is expected to develop.

4-6.790 Liability of Architects and Engineers

An increasing number of cases involve allegations that a structure or project has been misdesigned, or that the architect-engineer failed to properly superintend or inspect construction work. See United States v. Rogers & Rogers, 161 F. Supp. 132 (S.D. Cal.); Pastorelli v. Associated Engineers, Inc., 176 F. Supp. 159 (D. R.I.); and see 25 A.L.R.2d 1085.

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4-6.800 CONTRACTS (CONT'D)

4-6.810 Contracts to Supply Equipment

United States v. Wegematic Corp., 360 F.2d 674 (2d Cir.); Hoffman v. United States, 276 F.2d 199 (10th Cir.); and Silverman Brothers, Inc. v. United States, 324 F.2d 287 (1st Cir.), illustrate cases in which recovery has been had for default on contracts for the fabrication and delivery of specific items of equipment.

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4-6.820 Default of Purchaser Under a Sales Contract

The United States is not always the purchaser under a contract for specified items. Its surplus sales have been the source of numerous suits. The United States may recover if the purchaser fails to accept and pay for the items or materials sold. See United States v. Sabin Metals Corp., 151 F. Supp. 683 (S.D. N.Y.), aff'd., 253 F.2d 956 (2d Cir.); Wender Presses, Inc. v. United States, 343 F.2d 961 (Ct. Cl.).

Each potential case should be reviewed to determine whether the Contract Disputes Act of 1978, 41 U.S.C. §601 et seq., is applicable to the contract under which the claim arose. If applicable, the Commercial Litigation Branch of the Civil Division should be contacted before filing suit. The rights of the government and the procedures to be followed for affirmative claims under the Contract Disputes Act of 1978 are unsettled areas in which case law is expected to develop.

4-6.830 Reformation Incident to Suit for Monetary Recovery

In some instances, a successful suit to recover money damages under a contract cannot be maintained without reformation of the contract to reflect the intendment of the parties. See United States v. Hanna Nickel Smelting Co., 253 F. Supp. 784, 795 (D. Ore.), aff'd., 400 F.2d 944 (9th Cir.), for a case in which reformation was awarded as a predicate for the recovery of damages.

4-6.840 Contractual Indemnity

Common law indemnity is discussed under USAM 4-11.680, infra. Contractual indemnity clauses are to be found in a variety of government contracts. See e.g., United States v. Huff, 165 F.2d 720,723 (5th Cir.) (lease of private lands for military purposes); United States v. Starks, 239 F.2d 544,545 (7th Cir.) (lease of government property for agricultural purposes); United States v. Arrow Stevedoring Co., 175 F.2d 329, 331-332 (9th Cir.) cert. denied 338 U.S. 904 (1949), (stevedoring contract); Johnson v. United States, 133 F. Supp. 613, 614 (E.D. N.C.) (construction contract). Federal law controls the construction of such contracts. See USAM 4-4.700, supra.

Such indemnity contracts may provide in effect that the United States is to be indemnified for the negligence of its own employees. See, e.g., Rice v. Penn. R. Co., 202 F.2d 861 (2d Cir.); Porello v. United States, 153 F.2d 605 (2d Cir.), on cert., 330 U.S. 446, on remand, 94 F. Supp. 952; United States v. Arrow Stevedoring Co., supra; and see 175 A.L.R.8;

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42 C.J.S. §7 (Indemnity); 17 C.J.S. §262 (Contracts). While a contractor may not be liable in tort to its employee who is entitled to workmen's compensation benefits, this does not prevent the government's recovery against such an employer under an indemnity clause in the contract. Workmen's compensation statutes do not abolish the right of a third party, such as the United States, to be indemnified for the employee's negligence, when the right of indemnity is provided by express contract. See Johnson v. United States, 133 F. Supp. 613, 615 (E.D. N.C.).

The decision in United States v. Seckinger, 397 U.S. 203, effected a change in the handling of contribution and indemnity claims by the United States against its contractors under standard form construction contracts, by substituting a comparative negligence basis. In any case where the United States may have a claim under such a contract, the contract should be reviewed to determine if Seckinger, supra, is applicable. If so, the Torts Section should be contacted, to secure prior approval of any proposed action against the contractor. However, Seckinger, supra, is not to be treated as altering the traditional active-passive indemnity concepts.

4-6.900 CONVERSION OF PROPERTY MORTGAGED TO THE GOVERNMENT

Frequently, livestock and chattels subject to a recorded lien of the government are sold by commission merchants or auctioneers and purchased by others. When the government's borrower who owned the livestock or chattels is impecunious, the client agency may ask that suit be brought against the commission merchant, auctioneer, or purchaser, to recover the value of the property on the theory of conversion. For the liability of such "converters", see United States v. Sommerville, 324 F.2d 712 (3d Cir.), cert. denied, 376 U.S. 909 (1964); United States v. Mathews, 244 F.2d 626 (9th Cir.); United States v. Carson, 372 F.2d 429 (6th Cir.); Cassidy Commission Co. v. United States, 387 F.2d 875 (10th Cir.); United States v. Union Livestock Sales Co., 298 F.2d 755 (4th Cir.); Duval-Wheeler Livestock Barn v. United States, 415 F.2d 226 (8th Cir. Year 8); United States v. Gallatin Livestock Auction, 589 F.2d 353 (8th Cir.).

Sommerville, supra; Mathews, supra; Carson, supra; Cassidy, supra; and United States v. Hext, 444 F.2d 804 (5th Cir.), hold that liability for conversion in such circumstances is determinable by federal rather than state law. See also USAM 4-4.7000, supra; but see United States v. E.W. Savage & Sons, 475 F.2d 305 (8th Cir.). For the applicable statute of limitations, see Civil Division Practice Manual §3-2.31.

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4-7.000 GOVERNMENT ACTIONS FOR MONETARY RELIEF II

4-7.100 CUSTOMS DUTIES

The importer's duty to pay becomes final if he/she fails to file a written protest to the liquidation of the entry with the Customs Service within 90 days of the liquidation. Such failure renders the entry final and conclusive on all parties, including the United States. See 19 U.S.C. §1514. Suit should be brought against the surety, under the terms of its bond guaranteeing payment of all duties incurred upon the importation. See St. Paul Fire and Marine Ins. Co. v. United States, 370 F.2d 870 (5th Cir.).

Since the surety has no defense on the merits as to the importer's liability and the surety is well able to pay, such cases should not be compromised without the express approval of the Customs Service. Do not sue or join the principal as an accommodation to the surety. When liquidated damages on importations are involved, the District Director of Customs can mitigate such damages under applicable regulations.

Since many of these claims are for relatively small sums, the Customs Service has been instructed to aggregate numerous claims against a given surety, to reduce the number of suits required. The Treasury Department can suspend sureties if they fail to pay their just obligations. Accordingly, the Customs Service should not be referring any significant numbers of such claims.

If a proof of claim against a bankrupt or insolvent importer is forwarded by the Customs Service, the Service should be advised to demand immediate payment from the surety, which, on payment, can become the claimant in the bankruptcy or insolvency proceeding. See 31 U.S.C. §193.

4-7.200 DECEDENT'S ESTATE

For the priority of the government's debt claims against decedent's estates, see USAM 4-5.400 through 4-5.440, supra. For VA escheat and vesting claims, see USAM 4-7.220 and 4-7.230, infra. Devises and bequests are dealt with in USAM 4-7.210, infra.

The United States may hold itself aloof from the state court proceedings, and simply give the executor or administrator notice of its claim and its priority under 31 U.S.C. §3713. The fiduciary will be bound to see that the rights of the United States

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are fully protected. See Viles v. CIR, 233 F.2d 376, 380 (6th Cir.). Failure of the fiduciary to protect the rights of the United States will result in his own personal liability to the United States. See 31 U.S.C. §3713; cf. King v. United States, 379 U.S. 329 (1964).

In most instances, however, the claim of the United States is filed directly in the probate or administration proceeding. In that event, the government, having submitted to the jurisdiction of the court, will be bound by the court's eventual decision as to the government's claim. See United States v. Pate, 47 F. Supp. 965 (W.D. Ark.); United States v. Muntzing, 69 F. Supp. 503 (N.D. W. Va.). While State statutes limiting the time within which creditors may file claims do not apply to the United States (United States v. Summerlin, 310 U.S. 414 (1940)), it is always wise to present a timely claim if possible.

For suit to impose a trust on funds in the hands of distributee of such an estate, see United States v. Anderson, 66 F. Supp. 870 (D. Minn.); United States v. Snyder, 207 F. Supp. 189 (E.D. Va.). When an inordinate amount of time elapses and no action is taken to file a final accounting and pay just obligations, it may be necessary to file a petition to compel accounting, if this is permitted under State practice. See also Civil Division Practice Manual §§3-24.1, et seq..

4-7.210 Devises and Bequests to the Government

The United States may receive both testamentary and intervivos donations of either real or personal property, if such are unconditional. See United States v. Burnison, 339 U.S. 87 (1950). Gifts or donations to specific departments, agencies, and instrumentalities of the United States, can only be accepted if that entity has specific statutory authority to receive them. Notice of a devise or bequest should be forwarded to the Commercial Litigation Section, which will ascertain the authority of the beneficiary agency, and its wishes in the matter as to acceptance or rejection. If acceptance is desired, the U.S. Attorney will be asked to enter an appropriate appearance in the probate proceeding.

Two questions frequently arise in these cases, viz, (1) did the testator have testamentary capacity, and (2) is the donation to the United States subject to a state-imposed inheritance tax. While a devise or bequest to the federal government may be taxed under state

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law (see United States v. Perkins, 163 U.S. 625 (1896); Snyder v. Bettman, 190 U.S. 249 (1903); cf. United States v. Fox, 94 U.S. 315), the statute by which the state seeks to impose the tax must clearly encompass a devise or bequest to the United States. In re McLaughlin's Estate, 17 Ohio Op. 2d 498, 179 N.E. 2d 106 (Ct. Apps. Ohio). Will contest cases, tried in state courts, are governed by state law.

4-7.220 VA Escheat Claims

Funds in the hands of a guardian for an incompetent veteran, derived from VA benefit payments, will escheat to the United States if the veteran dies intestate and under the laws of the state where he/she died resident the funds would otherwise escheat to the state. See 38 U.S. 3202(e); In re Linguist's Estate, 25 Cal. 2d 697, 154 P.2d 879, cert. denied, 325 U.S. 869 (1944); In re Hammond's Estate, 154 N.Y.S.2d 820, aff'd, 170 N.Y.S.2d 505, 147 N.E. 2d 777. Recoveries under the escheat statute are credited to current VA appropriations. These cases sometimes involve contests involving alleged heirs from Iron Curtain countries. The burden of proof is on the person claiming heirship, to prove his/her claim by a preponderance of the evidence. See In re Link's Estate, 319 Pa. 513, 180 Atl.1. A state enacting an abandoned personal property law cannot thereby defeat the escheat claim of the United States. See In re Hammond's Estate, supra; and Civil Division Practice Manual §§3-24.1, et seq.

4-7.230 VA Vesting Claims

The personal estates of veterans who die intestate and without heirs or next of kin in government facilities, while being furnished care and treatment by the VA, vest in the United States for the benefit of the General Post Fund, regardless of the source of such personalty. See 38 U.S.C. §§5220-5228. The veteran's application for care under such circumstances includes a contractual provision consonant with the statute.

The acceptance of care or treatment in a government facility constitutes an acceptance of the conditions of the statute, and effects an assignment to the United States of the undisposed estate of the veteran as trustee for the General Post Fund. The statute is self-executing as to veterans incapable of contracting, and such is not an invasion of the powers reserved to the states. See United

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States v. Oregon, 366 U.S. 643; Civil Division Practice Manual, §§3-24.1, et seq.

4-7.300 ELKINS ACT CASES

The Interstate Commerce Act seeks to ensure a single standard for all shippers and prevent shippers from obtaining preferences in the form of rebates. See 49 U.S.C. §11902. The shipper who receives an unlawful rebate is liable for treble damages. See United States v. Food Fair Stores, 417 F.2d 62 (5th Cir.). Care needs to be taken in proving the value of the rebate received. Cf. United States v. Michael Schiavene & Sons, Inc., 430 F.2d 231 (1st Cir.).

The Interstate Commerce Act has been substantially amended and recodified since the body of case law under the Elkins Act developed. As a result of the amendments, which, in part, deregulated the industry, common carriers have more pricing flexibility than under the old act. Consequently, careful analysis of the facts and the new statutes is necessary for the discrimination and rebate issues present in every Elkins Act suit.

4-7.400 FORECLOSURE OF GOVERNMENT-HELD MORTGAGES

Judicial foreclosures will be discussed in detail in the Civil Division Practice Manual. Agencies which can safely foreclose security instruments nonjudicially under state law, or pursuant to a power of sale in a deed of trust, should do so without referring such matters to the Department of Justice or the U.S. Attorneys for handling.

The Department of Housing and Urban Development may also foreclose nonjudicially pursuant to the Multi-Family Foreclosure Act of 1981. See 12 U.S.C. §3701 et seq.

If judicial foreclosure is required, suit should be brought in the name of the United States and filed in the United States district court, unless, for exceptional reasons, the Civil Division has authorized utilization of the state courts. An officer or agency of the United States should not be joined as a defendant. Rather, the respective claims and liens of the federal agencies affected should be set forth as claims of the United States. If difficulty is encountered in obtaining the prompt agreement of another agency to have its lien foreclosed in the same proceeding as that requested by the referring agency, contact the Commercial Litigation Section.

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Judicial foreclosure should be given priority attention. Client agencies claim a substantial dollar loss for each month of delay in completing foreclosure through the delivery of the Marshal's deed. Suit should be filed immediately, without making further demand on the mortgagor. If the agency desires an order placing it in possession of the mortgaged property as "mortgagee in possession," or the appointment of a receiver, prompt action should be taken. The form for such orders will be included in the Civil Division Practice Manual. Motions for summary judgment should be utilized when appropriate, to expedite the entry of foreclosure decrees. No compromise should be entered into with the mortgagor prior to liquidation of the security property, without the express approval of the Civil Division.

4-7.500 FRAUDULENT TRANSFERS AND CONVEYANCES

The U.S. Attorney should be ever alert to identify, and pursue to recovery, fraudulent transfers and conveyances which have the effect of depriving the government of resources from which it can satisfy its claim or judgment. It is not necessary to reduce a claim to judgment, before seeking to set aside fraudulent transfers and conveyances. See Rule 18(b), Fed. R. Civ. P.

4-7.600 GRANTS - BREACH OF CONDITIONS

An increasingly large portion of federal disbursements are made through grant rather than contractual arrangements. The distinctions between grants, contracts, and hybrids generally known as cooperative agreements are not always clear. The Federal Grant and Cooperative Agreement Act of 1977, 41 U.S.C. §501 et seq., delineates distinctions between funding arrangements.

The United States is entitled to recover for breaches of grant conditions much as it would recover for breaches of contractual provisions. Grant-in-aid arrangements are much like contracts. Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1980), 17 (1982). Some statutory schemes explicitly provide for recoveries of grant overpayments, and some further provide for administrative determinations of grant overpayments that are reviewable only on a

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substantial evidence basis. See Bell v. New Jersey, 51 U.S.L.W. 4647 (U.S. May 31, 1983). Even in the absence of such statutory schemes, a right to recover damages or restitutionary awards exists as a matter of common law, on the theory that the government possesses a right to recover funds illegally or erroneously paid out. See United States v. Wurts, 303 U.S. 414, 416 (1938); United States v. Bank of Metropolis, 40 U.S. 377, 401 (1841); Weinberger v. Mount Sinai Hospital, 517 F.2d 329, 337 (5th Cir. 1975), cert. denied, 425 U.S. 935 (1976); West Virginia v. Secretary of Education, 667 F.2d 417, 419 (4th Cir. 1981).

Payments made by mistake--e.g., under the misapprehension that grant conditions are being observed--are recoverable. See United States v. Meade, 426 F.2d 118 (9th Cir. 1970). A failure to observe record-keeping requirements can support recovery of unsupported disbursements. See United States v. Independent School District No. 1, 209 F.2d 578 (10th Cir. 1954). In determining contractual or grant obligations, the terms of existing statutes and regulations are read into the agreement. See Thorpe v. Housing Authority, 393 U.S. 268, 279 (1969); Summer v. United States, 670 F.2d 202, 204 (Fed Cir 1982); Maryland-National Capital Park & Planning Commission v. Lynn, 514 F.2d 829, 833 (D.C. Cir. 1975); Rehart v. Clark, 448 F.2d 170, 173 (9th Cir. 1970). The continuing interest of the United States in grant funds can create an equitable lien on funds or property purchased with them. See Henry v. First National Bank of Clarksdale, 595 F.2d 291, 309 (5th Cir. 1979), cert. denied, 444 U.S. 1074 (1980).

4-7.700 GUARANTY AGREEMENTS

The SBA, in connection with its loan program, commonly exacts a guaranty agreement from individuals as part of its security. Its standard-form guaranty agreement is totally unconditional. Thus, liquidation of collateral or proceeding against the primary obligor is not required, prior to suit on the SBA guaranty agreement. See Austad v. United States, 386 F.2d 147 (9th Cir.); Feldstein v. United States, 352 F.2d 74 (9th Cir.); United States v. Newton Livestock Market, Inc., 336 F.2d 673, 677 (10th Cir.); United States v. Vince, 270 F. Supp. 591 (E.D. La.), aff'd, 394 F.2d 462 (5th Cir.), cert. denied, 383 U.S. 827; United States v. Houff, 202 F. Supp. 471 (W.D. Va.), aff'd., 312 F.2d 6 (4th Cir.); United States v. Dubrin, 373 F. Supp. 1123, 1126 (W.D. Tex.).

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"Guarantor" is used as a synonym for surety." (Restatement of Security Section 82, comment g.) An unconditional guaranty is a collateral agreement to pay a debt or perform a duty for another in case of default, which can be enforced separately from the primary obligation and without the necessity of proceeding against the primary debtor. See Joe Heaston Tractor & Implement Co. v. Securities Acceptance Corp., 243 F.2d 196, 199 (10th Cir.); 38 Am. Jr. 2d, "Guaranty" §21. "Mere default on the part of the principal fixes the liability of the promisor." See A. Stearns, The Law of Suretyship §4.5 (5th ed. J. Elder, 1951).

Settlement with other parties will not release the unconditional guarantor. See Commercial Credit Corp. v. Sorgal, 274 F.2d 449, 466-467 (5th Cir.), cert. denied 364 U.S. 834; United States v. Dubrin 273 F. Supp. 1123 (W.D. Tex.); Restatement of Security §121(1)(b) Reporter's Note §121, comment a (Tent. Draft No. 2 1965); 9B Uniform Laws Ann., Model Joint Obligations Act (1966).

The rule, as applied by the Federal courts, is that the release of those defendants who contributed to the payment of the judgment, with reservation of plaintiff's right as to those defendants who did not contribute to such partial payment, does not release the uncontributing defendants from liability for the remainder of the judgment.

See United States ex rel. Marcus v. Hess, 60 F. Supp. 333, 334 (W.D. Pa.), Aff'd., 154 F.2d 291 (3d Cir.) Cf. McKenna v. Austin, 134 F.2d 659, 665 (D.C. Cir.)(tort).

It is desirable to join guarantors in any judicial foreclosure, to avoid a multiplicity of actions. In addition, certain defenses they may attempt to raise, based on alleged inadequacy of the collateral, etc., will be disposed of by the court's confirmation of sale in the foreclosure action. A few guaranty agreements are limited to a percentage of the obligation.

4-7.800 HUD REGULATORY AGREEMENTS

Formerly, HUD took preferred stock in mortgagor corporations as a control device, when loans on apartment projects were insured. Currently, incorporation is not required. Rather, HUD enters into a regulatory agreement with the mortgagor. The mortgagor is generally excused from liability for a deficiency judgment, thus attaining limited liability to that extent. However, under the regulatory agreement the mortgagor cannot, without the prior written consent of HUD, "assign, transfer, dispose of, or encumber any personal property of the project, including

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rents, or pay out any funds except from 'surplus cash', except for reasonable operating expenses and necessary repairs," or "make, or receive and retain, any distribution of assets or any income of any kind of the project except 'surplus cash' ***." Violations of a regulatory agreement can be the basis for criminal charges. See 12 U.S.C. §1715z-4(b).

Recovery on the basis of the regulatory agreement's provisions is clearly exemplified by Thompson v. United States, 272 F. Supp. 774 (E.D. Ark.), aff'd., 408 F.2d 1075 (8th Cir.). Exceptions taken to payments or distributions in HUD audit reports should be carefully reviewed against the consents granted by HUD and the total facts of the case. Cf. United States v. Gilman, 360 F. Supp. 828 (D. Md.). See also United States v. Gregory Park Sec. II, Inc., 373 F. Supp. 317 (D. N.J.). For further discussion of HUD regulatory agreement actions, consult the section on Affirmative Multi-Family Foreclosure Litigation.

4-7.900 INSOLVENCY PROCEEDINGS

Infrequently, a debtor may invoke state insolvency proceedings rather than the protection of the Bankruptcy Act. In such a case, or in the case of an insolvent decedent's estate, the procedures outlined in USAM 4-5.440, supra, for the enforcement of priority claims are applicable. See USAM 4-5.400 through 4-5.430, supra, for the applicable priority in such cases.

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4-8.000 GOVERNMENT ACTIONS FOR MONETARY RELIEF III

4-8.100 INSURER'S LIABILITY UNDER LOSS PAYABLE CLAUSE

The extensive nationwide lending programs operated by such agencies as the Small Business Administration, frequently require vindication of the government's security rights. Many states have statutes which protect all mortgagees (including the United States) from the invalidation of fire insurance on security property, due to prejudicial acts by mortgagors such as failure to pay premiums. The same result can be achieved, if there is no such enactment, by including a Standard Loss Payable Clause in the policy.

In either case, the result is that a mortgagee's interest cannot be terminated until some kind of protective step has first occurred. Examples are the affording of an opportunity to pay premiums on behalf of the mortgagor, and the furnishing of a prior written cancellation notice directly to the mortgagee.

For an illustrative case involving SBA, see Standard First Ins. Co. v. United States, 407 F.2d 1295 (5th Cir.).

For SBA cases generally, see Civil Division Practice Manual §§3-16.1, et. seq.

4-8.200 MEDICAL CARE RECOVERY ACT CASES

42 U.S.C. §§2651-2653 authorizes the recovery of the reasonable value of hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) which the United States is authorized or required by law to furnish or has furnished to a person who is injured or suffers a disease under circumstances creating tort liability upon some third party. Standard charges established by the Director of OMB are not subject to challenge as unreasonable or arbitrary; however, the reasonableness of the case rendered may be questioned. See Phillips v. Trame, 252 F. Supp. 948 (E.D. Ill.); United States v. Jones, 264 F. Supp. 11 (E.D. Va.). The government's right of recovery is independent of the injured person's cause of action. See United States v. Merrigan, 389 F.2d 21 (3d Cir.); United States v. York, 398 F.2d 582 (6th Cir.). The government qualifies as an additional insured, within the language of the standard uninsured motorist clause of a liability insurance contract. See GEICO v. United States, 376 F.2d 836 (4th Cir.).

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Administrative agencies are bound by regulations promulgated by the Attorney General (28 C.F.R. §43.1-43.4) and generally will prevail upon the insured person to assert the government's claim in his/her own name for the use and benefit of the United States. See Palmer v. Sterling Drugs, Inc., 343 F. Supp. 692 (E.D. Pa.). 42 U.S.C. §2651(b)(1) authorizes the government to intervene in the insured person's tort suit as of absolute right. If intervention is necessary, the injured person can normally be counted on to establish the defendant's basic tort liability. When possible, stipulate to the reasonable value of the care and treatment.

If necessary, the government can bring an independent suit against the tortfeasor, pursuant to 42 U.S.C. §2651(b)(2). Care should be taken to take appropriate action within three years. See Civil Division Practice Manual §3-2.5. Forms and additional data concerning these cases are included in the Civil Division Practice Manual, §3-14.1, et seq. See also 7 A.L.R. Fed. 289.

4-8.300 MEDICARE OVERPAYMENT CASES

Providers of Medicare services, usually nursing homes, are advanced funds by HHS for medically necessary services based on estimates of costs. If cost data furnished by a provider at the end of the cost reporting year shows the provider has received more funds than reasonable costs or if the provider has been paid for medically unnecessary services, HHS will collect the resulting overpayments by offset. See Mt. Sinai Hospital of Greater Miami v. Weinberger, 517 F.2d 329 (5th Cir. 1975). However, if the provider has dropped out of the Medicare Program, suit may be necessary to recover the overpayments. United States v. Upper Valley Clinic Hospital, Inc., 615 F.2d 302, 306 N. 8 (5th Cir. 1980), a suit by the United States to recover excessive Medicare payments made to the defendant hospital, the court held that a failure of the hospital to submit complete accurate cost reports within designated time would create a conclusive presumption that all Medicare payments during the relevant time period are overpayments. Initially, there was no provision for administrative review of overpayment determinations. Provision has now been made for review. For accounting periods ending on or after December 31, 1971, and before June 30, 1973, see 20 C.F.R. §§405.1801-33, formerly 20 C.F.R. §§405.490-99(i). For accounting periods ending on or after June 30, 1973, see 42 U.S.C. §11395oo, and 20 C.F.R. §§405.1801-89. The provider should be encouraged to seek administrative review of the overpayment claims against it even for earlier periods if such review has not already been had.

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The statute of limitations is a serious factor in many of these cases. Thus, it will often be necessary or desirable to obtain a waiver of the statute of limitations from the provider if there is to be further delay for administrative consideration of the overpayment determination. See form of waiver in the Civil Division Practice Manual §3-2.13. HHS's master files in these cases are at Social Security Headquarters in Baltimore. When an administrative hearing is completed, HHS will prepare an updated record, which will be certified as the official administrative record, and an affidavit giving the history of the case and the reasons for the overpayment. It will also prepare a list of potential witnesses and technical advisers and provide such documents as may be needed.

HHS wishes to be consulted with respect to all compromise proposals and to be advised of developments in these cases. Forms and more detailed instructions concerning these cases will be included in the Civil Division Practice Manual. U.S. Attorneys should contact HHS Regional Counsel on most support requests. In emergencies, contact Social Security Headquarters at the following address:

Evelyn Bradford
Office of General Counsel (Social Security Div.)
Department of Health and Human Services
Room 654, Altmeyer Building
6401 Security Boulevard
Baltimore, Maryland 21235
Telephone: 301-594-3327

4-8.400 NONAPPROPRIATED FUND INSTRUMENTALITY CLAIMS

Post exchanges and other nonappropriated activities are instrumentalities of the United States. See Standard Oil Co. v. Johnson, 316 U.S. 481 (1942). Such unincorporated instrumentalities have proliferated, so that today there are post exchanges, post theatres, ship stores, messes, NCO and aero clubs, etc. Suits on claims of such entities should be brought in the name of the United States, pursuant to 28 U.S.C. §1345. However, checks in payment of such claims should be forwarded to the Army and Air Force Exchange Service, or, if one of its facilities is not involved, to the particular club or instrumentality involved.

See USAM 4-11.830, infra, for jurisdiction under the Tucker Act for suits against the United States on contract obligations of nonappropriated fund instrumentalities.

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4-8.500 PLANNING ADVANCES

HUD and its predecessor agencies have advanced moneys, pursuant to 40 U.S.C. §462 and prior legislation, to counties, cities, school districts, and other local governmental bodies, to be used in obtaining plans to be stockpiled for later use for public-works type projects. A governmental body receiving such a planning advance is required to sign an agreement that it will repay the advance when construction is undertaken or started on the public works so planned. See City of Greeley, Kansas v. United States, 335 F.2d 896 (10th Cir. 1964). Liability also may be based on a separate agreement to repay the advance if HUD terminates the agreement. See also 40 U.S.C. §462(h)(2).

If the local body agreeing to reimburse the government has ceased to exist, liability may be imposed upon the governmental body exercising authority in the same geographical area. See Mt. Pleasant v. Beckwith, 100 U.S. 514 (1869); Mobile v. Watson, 116 U.S. 289 (1886); Graham v. Folsom, 200 U.S. 249 (1905). The local body cannot refuse repayment on the ground that its officials lacked authority to obligate it. See United States v. Independent School District No. 1, 209 F.2d 578 (10th Cir. 1954); United States v. San Diego County, 75 F. Supp. 619 (S.D. Cal. 1947).

If construction of only a part of the planned public work is undertaken, HUD is authorized to require repayment of only such part of the planning costs as it may determine to be equitable. See 40 U.S.C. §462(h). Of course, that statute only provides for administrative relief and is not the basis for denial of recovery by the courts. Cf. United States v. Kelley, 192 F. Supp. 511, 513 (D. MA 1961).

Additional cases sustaining the government's right of recovery include United States v. City of Wendell, 237 F.2d 51 (9th Cir. 1956), cert. denied, 352 U.S. 1005 (1956); United States v. City of Bismark, 126 F. Supp. 338 (D. N.D. 1956); United States v. City of Charleston, 149 F. Supp. 866 (S.D. W. Va. 1957); United States v. City of Willis, 164 F. Supp. 324 (S.D. Tex. 1958), aff'd., 264 F.2d 672 (5th Cir. 1959); and United States v. City of Rossville, 249 F. Supp. 701 (N.D. Ga. 1966). HUD will make an engineer available to serve as technical adviser and witness, if given sufficient advance notice.

4-8.600 PROMISSORY NOTES

A large number of claims referred to the U.S. Attorneys will involve the collection of amounts due on promissory notes. A threshold question

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is that of whether the note is to be construed and enforced by federal or state law.

In light of the Supreme Court's decision in Kimbell Foods most courts will probably look to state law as the federal rule of decision in interpreting and construing promissory notes used by government lending agencies such as SBA or FmHA. In cases decided since Kimbell Foods courts have adopted state law as the federal rule of decision in construing SBA's uniform guaranty agreement. See United States v. Kurtz, 525 F. Supp. 734 (E.D. Pa. 1981), aff'd, 688 F.2d 827 (3d Cir. 1982). In cases involving enforcement of promissory notes acquired by the FDIC, courts have rejected states law defenses. See Gunter v. Hutcheson, 492 F. Supp. 546 (N.D. Ga. 1980).

4-8.700 QUASI-CONTRACTUAL CLAIMS

Moneys illegally or improperly disbursed, including those disbursed on an erroneous understanding of facts, may be recovered in a quasi-contractual suit for unjust enrichment. See United States v. Bentley, 107 F.2d 382 (2d Cir.); United States v. Independent School District No. 1, 209 F.2d 578 (10th Cir.); Kingman Water Co. v. United States, 253 F.2d 588 (9th Cir.); J.W. Bateson Co., Inc. v. United States, 308 F.2d 510, 514-515 (5th Cir.); Mt. Sinai Hospital of Greater Miami v. Weinberger, 517 F.2d 329 (5th Cir.). Similarly, the United States may recover the value of government services, provided under a mistake as to the recipient's eligibility for such services. See United States v. Shanks, 384 F.2d 721 (10th Cir.). No statutory authority is necessary to sustain a suit for public moneys which have been erroneously, wrongfully, or illegally disbursed. See United States v. Wurts, 303 U.S. 414, 415 (1938).

Overpayments of (1) government civilian pay, (2) pay and allowances for members and former members of the uniformed services, and (3) pay and allowances of members and former members of the National Guard, may be subject to waiver under 5 U.S.C. §5584, 10 U.S.C. §2774, and 32 U.S.C. §716 respectively, as interpreted in 4 C.F.R. §91.1 et seq. Such a statute, which provides only for administrative relief, is not the proper basis for denial of judicial relief. Cf. United States v. Kelley, 192 F.Supp. 511, 513 (D. Mass.). See Civil Division Practice Manual §3-2.4 for the applicable six-year limitations statute.

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4-8.800 RAILROAD RETIREMENT BOARD CLAIMS

On occasion, the Railroad Retirement Board may refer claims for the recovery of benefit payments which have been erroneously paid out. See 45 U.S.C. §231i. Pertinent regulations are found at 20 C.F.R. §255.1 et seq.

In addition, the Board is entitled to reimbursement for certain benefit payments from the settlements and recoveries payable to its beneficiaries by third parties. A statute, 45 U.S.C. §362(o), gives the Board a lien on such settlements and recoveries, and the U.S. Attorneys may be asked to enforce such liens from time to time. Assistance in substantiating these claims can be obtained from:

General Counsel
Railroad Retirement Board
844 Rush Street
Chicago, Illinois 60611
Telephone 312-751-4935 (FTS 387-4935)

The Board should give notice to the third party, although no particular form of notice is required. See United States v. Luquire Funeral Chapel, 199 F.2d 429 (5th Cir.). As to enforcement of the lien, see United Pacific Ins. Co. v. United States, 176 Ct. Cl. 176, 362 F.2d 805; United States v. Atlantic Coast Line R. Co., 237 F.2d 137 (4th Cir.); United States v. Hall, 116 F. Supp. 47 (W.D. Wis.); and regulations at 20 C.F.R. §340.1 et seq. As to the applicable statute of limitations, see Civil Division Practice Manual §3-2.34. Responsibility for these matters is assigned to the Commercial Litigation Branch of the Civil Division.

4-8.900 RENEGOTIATION ACT CLAIMS

The Renegotiation Act of 1951, 50 U.S.C. App. §§1211-1233, authorizes the recoupment of excessive profits realized on defense contracts. Such legislation is constitutional. See Lichter v. United States, 334 U.S. 742 (1948). Initial determinations of excessive profits are made by the Renegotiation Board or on authority delegated by the Board. See 50 U.S.C. App. §1217. "Bilateral determinations" of excess profits involve the agreement of the defense contractor or subcontractor and the government as to the sums which should be refunded by the contractor or subcontractor. "Bilateral determinations" are not open to challenge except on the grounds of fraud, malfeasance, or willful misrepresentations. See 50 U.S.C. app. §1215 (d).

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"Unilateral determinations" of excess profits involve the formal determination by the Board (or its delegate) of the amount of excess profits to be refunded. The contractor or subcontractor involved may petition the Court of Claims for review of the "unilateral determination" within ninety days of final administrative action and obtain a trial de novo. See 50 U.S.C. app. §1218, as amended. However, the filing of such a petition does not stay collection of the Renegotiation Act claim unless the petitioner posts a bond in the Court of Claims within ten days after the filing of the petition. The Court of Claims has held that failure to file a 100% bond gives the government the right to immediately move in that court for judgment in aid of execution. See Manufacturers Service Co. v. United States, 518 F.2d 1202 (Ct. Cl. 1975). Absent unusual or mitigating circumstances, such as a clear showing that the granting of the judgment might "chill" the de novo redetermination litigation (Sandnes' Sons, Inc. v. United States, 462 F.2d 1388 (Ct. Cl. 1972)), that judgment will be granted. Judgment will include provision for interest as provided by 50 U.S.C. app. §1215(b)(2), and will also include credit, if any, for any state and/or federal income taxes applicable to the excessive profits. A collection suit on the Court of Claims judgment in the United States district court should be brought in the name of the United States and should pray for the full relief, including interest, as provided for in the judgment.

Once judgment is entered by the Court of Claims, 28 U.S.C. §§1961 and 2508 would indicate that judgment interest thereafter would be that provided by state law. A defendant in the district court cannot contest in that forum the merits of the Board's determination or the Court of Claims' entering of judgment.

However, Congress terminated the activities of the Renegotiation Board as of March 31, 1979, although applicable statutes were not otherwise repealed or altered. Thus, pending renegotiation suits in the Court of Claims are still actively litigated, and judgments already obtained remain fully effective. Since determinations of excessive profits are no longer made by the Board, new cases arising under those statutes are not anticipated.

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4-9.000 GOVERNMENT ACTIONS FOR MONETARY RELIEF IV

4-9.100 (RESERVED)

4-9.200 SERVICE CONTRACT ACT CASES

The McNamara-O'Hara Service Contract Act of 1965, 41 U.S.C. §§351-358, was enacted to provide labor standards for the protection of employees of contractors performing maintenance service for federal agencies. Masters v. Maryland Management Company, 493 F.2d 1329, 1332 (4th Cir. 1974). The Act authorizes recovery by the government of an amount equal to the underpayment of wages or fringe benefits due an employee under a contract subject to the Act.

Pursuant to 41 U.S.C. §353, the administrative hearing provisions (41 U.S.C. §§38 and 39) of the similar Walsh-Healey Act (see USAM 4-9.700, infra) are incorporated by reference. Thus, administrative findings of fact are conclusive on the court if supported by a preponderance of the evidence, United States v. Deluxe Cleaners and Laundry, Inc., 511 F.2d 926, 927 (4th Cir. 1975), and bind the contractor's surety even if the latter is not a party to the proceeding, see United States v. Bowers Building Maintenance Company, 336 F. Supp. 819, 823-824 (W.D. Okla. 1972).

However, the general six-year statute of limitations, 28 U.S.C. §2415, and not the two-year period provided under the Portal-to-Portal Act (which applies in Walsh-Healey cases, see USAM 4-5.210 and 4-9.700), is applicable to Service Contract Act suits. See United States v. Deluxe Cleaners and Laundry, Inc., supra.

For analysis and full discussion of the Service Contract Act, see 4 Public Cont. L.J. 25-76 (April 1971), and Note, 34 Fed. Bar J. 240-248 (1975).

4-9.300 SURETIES

A surety seeking to write bonds payable to the government must be approved by the Treasury Department, which receives financial reports from the surety and sets maximum limits for the bonds that may be written if the surety is approved. See 6 U.S.C. §§8-9. If a surety fails to make payment, in certain circumstances, its privilege of writing bonds may be suspended or revoked by the Treasury Department. Whenever the Federal

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Rules of Civil Procedure, including the Supplementary Rules for Certain Admiralty and Maritime Claims, require or permit the giving of security, each surety on such an undertaking submits himself/herself to the jurisdiction of the court, and his/her liability may be enforced on motion without the necessity of an independent action. See Rule 65.1, Fed. R. Civ. P.

When suit against a surety is required on an undertaking other than one provided for or permitted under the Rules, suit should be filed against the surety in the district in which the bond was entered into, or in the district in which is located the principal office of the surety. See 6 U.S.C. §10. If a series of small claims are aggregated for suit to avoid a multiplicity of actions, suit in the district of the surety's principal office is indicated. A surety completing performance for a contractor is subrogated to the contractor's rights as to any remaining payments due under the contract. See American Surety Co. v. Bethlehem National Bank, 314 U.S. 134 (1941); Pearlman v. Reliance Insurance Co., 371 U.S. 132 (1962); Home Indemnity Co. v. United States, 433 F.2d 764 (Ct. Cls.). A surety must pay all of an obligation before it is entitled to enforce its principal's rights by way of subrogation. See Jenkins v. National Surety Co., 277 U.S. 258, 266 (1928); United States v. National Surety Co., 254 U.S. 73, 76 (1920); American Surety Co. v. Westinghouse Electric Mfg. Co., 296 U.S. 133 (1935).

That the United States is not required to withhold progress payments from the contractor on the mere request of the surety without opportunity for its own independent appraisal of the financial condition of the contractor, see United States v. Continental Casualty Co., 346 F. Supp. 1239 (N.D. Ill.); but cf. United States v. Continental Casualty Co., 512 F.2d 475 (5th Cir.), and American Fidelity Fire Insurance Co. v. United States, 513 F.2d 1375 (Ct. Cls.), as to actions which may prejudice the surety. A surety is not released from liability on its bond for lack of notice, when neither the bond nor the contract to which it relates required notice to the surety of the contractor's default or of the administrative proceedings. See United States v. Powers Bldg. & Maint. Corp., 336 F. Supp. 819 (W.D. Okla.).

The administrative determination is prima facie evidence that the surety is liable, and the surety must rebut it by showing that it was obtained by fraud and collusion or that the liability arose from acts other than those indemnified under the conditions of the bond. See Seaboard Surety Co. v. Westwood Lake, Inc., 277 F.2d 397, 403 (5th Cir.) If the surety participates in the proceeding against his/her principal, he/she is concluded as to the issue therein decided against his/her principal. See Mass. Bonding & Ins. Co. v. Denike, 92 F.2d 657, 658 (3d

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Cir.); see generally, 20 Appleman, Insurance Law & Practice, §11523 (1963).

4-9.400 TRANSPORTATION MATTERS

The liability of carriers for the loss, damage, or destruction of property entrusted to them for carriage is discussed in USAM 4-6.300, supra. Elkins Act treble damage suits are discussed in USAM 4-7.300, supra. The Department of Transportation or the ICC may refer civil penalty actions for enforcement of transportation policy. For civil penalties generally, see USAM 4.6-500, supra.

The transportation laws were substantially revised and recodified in Title 49 of the United States Code during 1978-1982. As a result, certain types of transportation-related litigation decreased. An example includes suits by the United States to recover excessive rates charged by carriers under rate tariffs declared unjust and unreasonable by ICC orders. See Middlewest Motor Freight Bureau v. U.S., 433 F.2d 212 (8th Cir.), cert. denied, 402 U.S. 999 (1971). Suits by carriers to set aside ICC reparation orders in which the United States is a statutory defendant (28 U.S.C. §§2321-2322) constitute another example.

Within the Department of Justice, actions to enforce, suspend, enjoin, annul, or set aside ICC orders, where the regulatory functions of the ICC are challenged, generally fall within the jurisdiction of the Antitrust Division. The Commercial Litigation Section of the Civil Division is involved when the United States as shipper supports or opposes an ICC order or seeks a money judgment.

Enforcement actions on behalf of the government in the transportation field include the following. Suits are brought to enforce car service orders to alleviate the nationwide shortage of railcars. See United States v. Southern Ry. Co., 364 F.2d 86 (5th Cir.), cert. denied, 386 U.S. 1031 (1966). Actions are also brought to enforce credit regulations. See United States v. Western Pac. R.R. Co., 385 F.2d 161 (10th Cir.), cert. denied, sub nom.; Denver & Rio Grande Western R. Co. v. United States, 391 U.S. 919 (1968); United States v. Penn. R. Co., 308 F. Supp. 292 (E.D. Pa.).

The Attorney General shall, upon request of ICC, bring appropriate enforcement proceedings. See 49 U.S.C. §11703. Enforcement proceedings include numerous statutory civil penalties. See 49 U.S.C. §§11901-11917.

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A. The government assured the plaintiff of the existence of a fact;

B. The government intended that plaintiff be relieved of the duty to ascertain the existence of the fact for itself; and

C. The government's assurance of that fact proved untrue. See Kolar, Inc. v. United States, 650 F.2d 256 (Ct. Cls). All implied warranty claims should be viewed in light of the accepted proposition that the government does not normally guarantee the success of a contractor's operation. See Kolar, Inc. v. United States, *supra*. For a warranty to exist, there must be either an affirmation of fact or a promise which relates to performance under the contract. See American Ship Building Company v. United States, 654 F.2d 75 (Ct. Cls.). A requirement in a government contract that performance be completed within a specified time, is not a guarantee that performance can, in fact, be completed within that time. Id.

4-9.630 Warranty of Prior Endorsements on Checks

Treasury regulations provide that a bank presenting a check for payment is deemed to have guaranteed prior endorsements. See 31 C.F.R. §240.4. Suit should be brought against the presenting bank, which is liable on its warranty of the prior endorsements. See National Metropolitan Bank v. United States, 323 U.S. 454 (1945); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); United States v. National Exchange Bank, 214 U.S. 302 (1909). The UCC does not control in such situations. See United States v. First National Bank of Atlanta, 441 F.2d 906 (5th Cir.). Rather, federal law controls the rights and duties of the United States on its commercial paper. See Clearfield Trust Co. v. United States, *supra*.

The presenting bank must be given written notice of forgery, or suit must be filed thereon, within six years of the presentment of the check, except where the forgery has been fraudulently concealed. See 31 U.S.C. §129. In the event of fraudulent concealment, suit may be commenced within two years after discovery of the cause of action, see 31 U.S.C. §131. Mere delay in giving notice of a forged endorsement will not preclude recovery. Rather, the presenting bank must make a clear showing of its damage due to delay. See Clearfield Trust Co. v. United States, *supra*. Any attempt by the bank to invoke the so-called "imposter rule" should be brought to the attention of the Commercial Litigation Section of the Civil Division. See United States v. Continental-American Bank & Trust Co., 175 F.2d 271 (5th Cir.), *cert. denied*, 338 U.S. 770 (1949); Atlantic Nat'l Bank of Jacksonville v. United States, 250 F.2d 114 (5th

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Cir.); United States v. Bank of America Nat'l Trust and Savings Assn., 274 F.2d 366 (9th Cir.).

4-9.700 WALSH-HEALEY ACT CASES

Claims for liquidated damages for an employer's underpayment of wages, employment of child labor, etc., contrary to the provisions included in government contracts pursuant to the Walsh-Healey Act, 41 U.S.C. §§35-45, are submitted for suit following administrative hearings. Suits should be filed at once on Walsh-Healey Act claims, since the applicable two-year statute of limitations in Section 6 of the Portal-to-Portal Act of 1947, 29 U.S.C. §255, runs from the date of the violation, and not from the conclusion of the administrative proceedings. See Unexcelled Chemical Corp. v. United States, 345 U.S. 59 (1953). If the administrative proceeding has not been concluded when suit is filed, a motion to stay the suit should be sought, pending completion of the administrative proceeding. Cf. Unexcelled Chemical Corp. v. United States, *supra*. The government's legal action may not be dismissed as premature under such circumstances. United States v. Winegar, 254 F.2d 693 (10th Cir.); United States v. Pine Township Coal Co., 201 F. Supp. 441 (W.D. Pa.). Suit should be brought in the name of the United States. See 41 U.S.C. §36. Liability can usually be enforced upon motion for summary judgment, based on the entire administrative record. The administrative finding is final if supported by a preponderance of the evidence. See 41 U.S.C. §39.

The contractor cannot escape liability under the Walsh-Healey Act by shifting to others the work which it contracted to perform itself. See United States v. Davison Fuel & Dock Co., 371 F.2d 705 (4th Cir.). In United States v. Sancolmar Industries, Inc., 347 F. Supp. 404 (E.D. N.Y.), the president and general manager of the contractor was held jointly and severally liable with the contractor. In that case, relevant records of the contractor had been destroyed.

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4-10.000 GOVERNMENT ACTIONS FOR NON-MONETARY RELIEF

28 U.S.C. §1345 provides a jurisdictional basis for all suits by the United States in the United States district courts. The judicial power extends to all controversies to which the United States is a party. See Art. 8, §2, Constitution of the United States. The government may sue in state or federal courts. See United States v. Summerlin, 310 U.S. 414 (1940); United States v. Bank of New York & Trust Co., 296 U.S. 463. The government has broad powers to enforce the laws and to seek injunctive relief, e.g., for interferences with commerce and navigation. It also has broad powers to bring suits to protect its interests. See USAM 4-1.100, and 4-6.000, et seq., and the sections immediately following this section. It may proceed under specific federal statutes, or it may pursue common law remedies. See e.g., the topic on Civil Frauds in the Civil Division Practice Manual, §§3-6.1 et seq.

4-10.010 Administrative Subpoenas

Administrative agencies may obtain needed information in various ways. By statute, Congress has given many agencies the authority to

- A. Require reports;
- B. Inspect books, records, and premises;
- C. Subpoena witnesses and documents; or
- D. Some combination of the foregoing.

See the Report of the Attorney General's Committee on Administrative Procedure, S. Doc. 8, 88th Cong., 1st Sess., p. 414. U.S. Attorneys may be asked to seek court enforcement of administrative subpoenas from time to time. Rule 43, Federal Rules of Civil Procedure, relating to the issuance and enforcement of court subpoenas, has no application to administrative subpoenas. See Bowles v. Bay of N.Y. Coal & Supply Co., 152 F.2d 330 (2nd Cir.). It is not necessary that a charge or complaint be pending in order to justify the issuance of an administrative subpoena, or that there be a showing of "probable cause". See Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946). It is sufficient that the investigation or inquiry is one which the demanding agency is authorized by law to make. See Oklahoma Press Publishing Co. v. Walling, supra; Sec v. Vacuum Can Co., 157 F.2d 530 (7th Cir.), cert. denied, 330 U.S. 820 (1947).

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F.2d 548 (10th Cir.). It is not available for the resolution of hypothetical, academic, or theoretical problems. See Wirtz v. Fowler, 372 F.2d 315 (5th Cir.). The federal courts do not render advisory opinions. See Golden v. Zwickler, 399 U.S. 103 (1969).

However, assuming the requisite case or controversy is present, the United States, suing under 28 U.S.C. §1345, can invoke the Declaratory Judgment Act to obtain a declaration of rights or other legal relationships. See, e.g., Wyandotte Transportation Co. v. United States, 389 U.S. 191, 201, 204 (1969); State of Wyoming v. United States, 310 F.2d 566 (10th Cir.), cert. denied, 372 U.S. 953 (1969); Universal Fiberglass Corp. v. United States, 400 F.2d 926 (8th Cir.). Normally, a complaint seeking such a declaration will also pray for an injunction, a money recovery, or other relief as well. See, e.g., Wyandotte Transportation Co., v. United States, supra.

See USAM 4-5.924, supra, as to attempts to invoke the Declaratory Judgment Act when the United States is a defendant.

4-10.300 FORFEITURE OF PHYSICAL PROPERTY

Forfeitures of property seized on the high seas or on navigable waters for violation of non-criminal statutes, are within the jurisdiction of, and will be handled by or under the supervision of, the Admiralty and Shipping Section. See USAM §4-1.211. Actions for the forfeiture of property seized on land for violations of an Act of Congress, except as may otherwise be expressly provided, are not admiralty actions, even though forfeitures are to be accomplished by the filing of an in rem complaint. See 28 U.S.C. §2461. The government need only prove the allegations in its complaint by a preponderance of evidence. See Compton v. United States, 377 F.2d 408 (8th Cir.).

28 U.S.C. §2465 provides that if the claimant to property seized by the government prevails, a certificate of reasonable cause for the seizure may be issued, in which case the claimant cannot recover costs, and neither the person who made the seizure nor the U.S. Attorney is liable to suit or judgment. This provision applies as well to a forfeiture action dismissed upon motion as to one disposed of on the merits, and its purpose is to protect against liability for costs or damages where there was reasonable cause for the institution of the forfeiture action. See United States v. Tito Campanella Societa Di Navigazione, 217 F.2d 751 (8th Cir.). "Reasonable cause" and "probable cause" are synonymous. See Carroll v. United States, 267 U.S. 132, 39 A.L.R. 790. Return of the property without bringing a forfeiture proceeding is not conclusive as to the

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seizure being tortious. See Hammel v. Little, 87 F.2d 907 (D.C. Cir.). Proof of probable cause, shown by a certificate of the court, is a good defense in a separate action brought by the claimant. See Averill v. Smith, 17 Wall, 84 U.S. 82 (1877). The court has a duty to issue such a certificate if there was probable cause. See Stacey v. Emery, 97 U.S. 642 (1878).

Unreasonable delay in instituting a forfeiture action may defeat an otherwise valid cause for forfeiture. See United States v. Thirty-Seven (37) Photographs, 402 U.S. 363; Sarkisian v. United States, 472 F.2d 468 (10th Cir.). Accordingly, every effort should be made to file a forfeiture action at once. Care should be taken to check the specific provisions of law, and the procedures applicable to forfeitures, in the statutes under which the forfeitures are authorized.

The forfeiture of bail bonds is not covered by 28 U.S.C. §2461. See Rule 46(f), Federal Rules of Criminal Procedure, for the enforcement of such bonds. See USAM 4-10.700, infra, as to prize cases. That seizures forfeiture may be constitutionally effected in appropriate cases without prior notice and opportunity for a hearing, see Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663.

For a discussion of procedure for enforcement of civil penalties and forfeitures in cases involving vessels, see §§3-13.1 et seq., Civil Division Practice Manual.

4-10.400 INJUNCTIONS

Affirmative relief by way of injunction is sought from time to time, often to advance major public interests or enforce governmental functions. Such injunction actions may be specifically provided for by statute. See, e.g., United Steel Workers of America v. United States, 361 U.S. 39 (1959) (injunction under the Taft-Hartley Act). Injunction actions may also be maintained to enforce statutes which do not specifically provide for such a remedy. See, e.g., In re Debs, 158 U.S. 564 (1894); United States v. United Mine Workers, 330 U.S. 158. Injunctive relief may also be sought from an appellate tribunal under the All Writs Act, 28 U.S.C. §1651(a). See, e.g., FTC v. Dean Foods Co., 384 U.S. 597 (1966). The defense of injunction actions is discussed in USAM 4-13.400 through 4-13.413, infra.

Allegation of court jurisdiction pursuant to 28 U.S.C. §1345 is sufficient.

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A TRO which is continued beyond the time prescribed in Rule 65(b) of the Federal Rules of Civil Procedure ceases to be a TRO and becomes a preliminary injunction, which cannot be maintained unless the court sets out findings of fact and conclusions of law constituting grounds for the issuance of a preliminary injunction under Rule. See Sims v. Greene, 160 F. 2d 512, 517 (3d Cir.); Telex Corp. v. IBM Corp., 464 F.2d 1025 (8th Cir.). The court cannot simply label a TRO as a preliminary injunction without following the requirements of the Rule, as this would give the court virtually unlimited authority. See Sampson v. Murray, 415 U.S. 61, 87 (1940). Rather, the preliminary injunction must conform to the standards set forth in the Rule. See Sampson v. Murray, 415 U.S. 61, 86.

A showing on affidavits may be sufficient if the right to relief is clear, but, if there are controversial factual issues, it will be necessary to produce oral testimony in support of the request for relief. See Industrial Electronics Corp. v. Cline, 330 F.2d 480, 483 (3d Cir.); Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1204 (2d Cir.). If affidavits are used, these should not be based on information and belief, but on facts. Cf. Bowles v. Montgomery Ward & Co., 143 F.2d 38 (7th Cir.). As Rule 65(d) requires, it is mandatory that the court set forth the reasons for issuance of the preliminary injunction. See Mayflower Industries v. Thor Corp., 182 F.2d 800 (3d Cir.). No preliminary or other injunction should issue without the filing of findings of fact and conclusions of law with the court's decision. See United States v. Ingersoll-Rand Co., 320 F.2d 509 (3d Cir.). Fact findings may not be necessary if there are no factual disputes. See First-Citizens Bank & Trust Co. v. Camp, 432 F.2d 481 (4th Cir.).

4-10.440 Notice and Security

No preliminary injunction can be issued without notice to the adverse party. See Rule 65(a), Fed. R. Civ. P. A fortiorari, an injunction does not stay action by an entity which is not a party to the proceeding or an aider or abettor of the defendant. Cf. Commercial Security Bank v. Walker Bank & Trust Co., 456 F.2d 1352 (10th Cir.); but cf. Environmental Defense Fund v. EPA, 485 F.2d 780, 784, fn. 2 (D.C. Cir.) (parties with actual notice). The injunction must be worded in such specific terms, and in such detail, as to put the party enjoined on notice of precisely what he is being called upon to do or refrain from doing. See Brumby Metals, Inc. v. Bargan, 275 F.2d 46 (7th Cir.) and Williams v. United States, 402 F.2d 47 (10th Cir.). Such an order is binding on the parties to the action, "their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." See

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Rule 65(d); Regal Knitwear Co. v. NLRB, 324 U.S. 9 (1944); Reich v. United States, 239 F.2d 134 (1st Cir.), cert. denied, 352 U.S. 1004 (1955).

"No security is required of the United States or an officer or agency thereof." See Rule 65(c) Fed. R. Civ. P. See USAM 4-13.412, infra, as to security required of the private petitioner.

4-10.450 Permanent Injunction

Before or after the commencement of hearing on an application for a preliminary injunction, the court may order that the trial of the action on the merits of the request for a permanent injunction be advanced and consolidated with the hearing on the preliminary injunction. See Rule 65(a) Fed. R. Civ. P. A permanent injunction is not available through ex parte proceedings. See United States v. Crusco, 464 F.2d 1060 (3d Cir.). An appeal from the denial or grant of a temporary injunction should not ordinarily delay final trial of the case on the merits. See Nalco Chemical Co. v. Hall, 347 F.2d 90 (5th Cir.). The basis of injunctive relief has always been irreparable harm and an inadequate legal remedy. See Sampson v. Murray, 415 U.S. 61, 88.

Of course, when there is direct statutory authority for the issuance of an injunction, traditional equity concepts give way to the authorization of the statute. See Bowles v. Swift & Co., 56 F. Supp. 679 (D. Del.). Thus, in such instances the government may not have to show irreparable injury, or that there is an inadequate remedy at law. See Bradford v. SEC, 278 F.2d 566 (9th Cir.); Bowles v. Huff, 146 F.2d 428 (9th Cir.).

4-10.500 INTERPLEADER

Affirmative statutory interpleader proceedings in the federal courts are governed by 28 U.S.C. §§1335, 1397 and 2361. However, the United States has been held ineligible to sue under those provisions, since it is not a "person, firm, or corporation, association, or society" within the meaning of 28 U.S.C. §1335. See United States v. Coumantaros, 146 F. Supp. 51 (S.D. N.Y.). Under this interpretation, interpleader suits brought by the United States are considered "non-statutory"; jurisdiction is based upon 28 U.S.C. §1345; there are no minimum amount or diversity requirements (as is the case under 28 U.S.C. §1335); and funds are ordinarily not deposited with the court. See United States v. Coumantaros, 146 F. Supp. 111 (S.D. N.Y.). However, service of process

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available to the government by way of a defense. See, e.g., Sutcliffe Storage & Warehouse Co. v. United States, 112 F. Supp. 590 (Ct. Cls.).

4-10.820 Replevin

"The government * * * for the protection of its property rights * * * may resort to the same remedies as a private person." Rex Trailer Co. v. United States, 350 U.S. 148, 151 (1951); Cotton v. United States, 52 U.S. 228 (1950). Ignorance of the government's title in property is no defense, and one acquiring the property from the converter acquires no greater interest than the converter had. United Naval Stores v. United States 240 U.S. 284 (1915). This rule is varied as to certain fungible agricultural commodities by 15 U.S.C. §714p. The United States is not required to record its title under state recording statutes. See United States v. Allegheny County, 322 U.S. 174 (1943); In re Double H. Products, 462 F.2d 52 (3d Cir.); In the Matter of American Boiler Works, Inc., 220 F.2d 319 (3d Cir.). No lien can be asserted against government property without its consent. See United States v. Ansonia Brass & Copper Co., 218 U.S. 452 (1909); United States v. Ameco Electronics Coprp., 224 F. Supp. 783 (E.D. N.Y.).

Replevin is a possessory action. See Kelley v. Dunne, 369 F. 2d 627 (1st Cir.). Title and right of possession at the time of suit are generally sufficient to permit recovery of possession of property. Cf. Hager v. Gordon, 171 F.2d 90, 93 (9th Cir.). The defendant's denial of ownership and right of possession has been held to constitute a waiver of demand for the return of replevied items. See Allen B. Wisley Distributing Co. v. Serewicz, 145 F.2d 169 (7th Cir.).

See USAM 4-6.900, supra, as to the conversion of property which is mortgaged to the United States. See USAM 4-6.730, supra, as to the government's title to property acquired pursuant to contracts under which progress payments have been made. For an example of the title provision in a progress payments clause, see Par. (d) of 32 C.F.R. §7.104-35(a). See USAM 4-1.328, supra, as to the protection of the government's property interests generally. On occasion, a client agency, wishing to foreclose under the UCC on chattels as to which it cannot obtain peaceable possession, may ask that a replevin action be brought to obtain possession for this purpose. See U.C.C. §9-503 for the agency's right of possession. See Fuentes v. Shevin, 407 U.S. 67, as to the need to provide the defendant a hearing in a pre-judgment replevin attempt. But cf. Mitchell v. W.T. Grant Co., 416 U.S. 600 (1973).

4-10.830 Rescission

It is sometimes said that the objective of rescission or cancellation is to restore the status quo, and not to punish the transgressor or reward the victim. See Ehrlich v. United States, 252 F.2d 772 (5th Cir.) (rescission granted due to use of strawmen to acquire the benefits of veterans' housing). When the United States is a party to a transaction, public policy considerations may be such as to justify rescission, without need for an offer to return the other party's consideration. See Causey v. United States, 240 U.S. 399 (1916) (false affidavit executed, to obtain preliminary entry on public lands looking to acquisition of a patent thereto). Public policy justifies the cancellation of contracts even if there is no express provision for cancellation in the law relied on, as setting the policy justifying cancellation. See United States v. Acme Process Co., 385 U.S. 138 (1966) (kickbacks). Thus, in United States v. Mississippi Valley Co., 364 U.S. 520, 565 (1960) (conflict of interest), the policy expressed in the criminal statute relied on by the court was said to leave no room for equitable considerations on behalf of the offending party. Similarly, in Pan American Co. v. United States, 273 U.S. 453, 506 (1926) (conspiracy to defraud), the Court declined to apply equitable principles to frustrate the purpose of the government's laws or thwart public policy. Relief was not conditioned on the return of the consideration (Id., p. 510), nor would the court allow the offending party the cost of improvements made by it. See Id., p. 509.

4-10.840 Specific Performance

The United States may obtain specific performance. See, e.g., Bastian v. United States, 118 F. 2d 777 (6th Cir. 1941), enforcing a contract to purchase land notwithstanding the available legal remedy of eminent domain. See also United States v. Harrison County, 399 F. 2d 485 (5th Cir. 1968), reh. denied, 414 F.2d 784 (1969), cert. denied, 397 U.S. 918 (1970), granting specific performance of a contract to insure maintenance of a beach as a public beach.

USAM (superseded)



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4-11.000 ACTIONS AGAINST THE GOVERNMENT SEEKING MONETARY RELIEF

Succeeding sections will deal with suits against the United States and sue-and-be-sued corporations, agencies, and officers, for the recovery of money judgments. That an action against the United States for specific relief will not lie, see USAM 4-12.100, infra. See USAM 4-5.921, supra, as to the immunity of the United States from suit, even for a money judgment, except to the extent Congress has provided express statutory consent. Succeeding sections in this chapter deal with statutes providing statutory consent for suits to recover money judgments against the United States, or against certain government corporations, agencies, and sue-and-be-sued officials.

4-11.010 Government Corporations and Sue-and-be-Sued Officers and Agencies

From time to time, Congress has established government corporations with sue-and-be-sued powers, or has invested certain officers and agencies with express authority to sue or be sued. Early decisions as to the breadth of the waiver of sovereign immunity from suits in such instances indicated that such waivers would be generously construed. See Keifer & Keifer v. RFC, 306 U.S. 381 (suit in tort against a regional agriculture credit corporation chartered by RFC); FHA v. Burr, 309 U.S. 242 (garnishment, but writ could only be satisfied from funds severed from the Treasury); RFC v. Menihan, 312 U.S. 81 (liability for court costs). However, the early practice of chartering corporations under state law has been discontinued by the Government Corporation Control Act, 31 U.S.C. §841 et seq., and the Federal Tort Claims Act has immunized government corporations and agencies from suit in tort. See 28 U.S.C. §2679.

Today, it is necessary to examine the specific statute conferring authority for suit, the nature of the cause of action asserted and the areas or activities which the sue-and-be-sued clause covers. Thus, e.g., the Administrator of VA is suable, but only with respect to matters arising under Chapter 37 of Title 38, U.S.C., relating to loan guaranty and insurance. See 38 U.S.C. §1820(a)(1). The Administrator of SBA is suable without regard to the amount in controversy, but "no attachment, injunction, garnishment or other similar process, mesne or final, shall be issued against the Administrator or his property." See 15 U.S.C. §634; United States v. Mel's Lockers, 346 F.2d 168 (10th Cir.); Romeo v. United States, 462 F.2d 1036 (5th Cir.), cert. denied 410 U.S. 928; but cf. United States v. Holloway, 446 F.2d 437 (5th Cir.). The Commodity Credit Corporation may sue and be sued in United States district court without regard to the amount in controversy, but again "no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued

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against the corporation or its property." See 15 U.S.C. §714b(c). While the Secretary of HUD is suable regarding matters arising under certain subchapters mentioned in 12 U.S.C. §1702, in Akin Mobil Homes, Inc. v. Secretary of HUD, 475 F.2d 1261 (5th Cir.), a contract dispute involving more than \$10,000 which did not arise out of one of the applicable subchapters was involved, and 12 U.S.C. §1702 was held not to provide a basis for concurrent jurisdiction of the district court with the court of claims, so that the action was dismissed without prejudice to the bringing of a contract action in the court of claims. Courts have held that a sue and be sued clause is insufficient to waive sovereign immunity with regard to monetary claims. See Marcus Garvey Square v. Winston Burnett, 595 F.2d 1126 (9th Cir.); Industrial Indemnity, Inc. v. Landrieu, 615 F.2d 644 (5th Cir.). But see Silberblatt v. East Harlem Pilot Block, 608 F.2d 28 (2d Cir.).

In sum, care should be taken to examine the sue-and-be-sued statutes and the annotations thereunder, before filing a responsive pleading. The Federal Programs Branch of the Civil Division will, upon request, furnish the latest precedents which have been gleaned nationwide for use in defense of such suits.

Frequently, suits will be filed naming government agencies as defendants when there has been no waiver of their immunity from suit. Actions against non-suable entities should be dismissed, except insofar as the review sought is limited to that provided for by the Administrative Procedure Act, 5 U.S.C. §706. See Blackmar v. Guerre, 342 U.S. 512 (Civil Service Commission); New Haven Schools v. GSA, 214 F.2d 592 (7th Cir.); Taft Hotel v. HHFA, 262 F.2d 275 (2d Cir.); Gnotta v. United States, 415 F.2d 1271, 1277 (8th Cir.) (CSC and Department of the Army); Jones v. FBI, 139 F. Supp. 38 (D. Md.); Winneshiek Mutual Ins. Assn. v. Farmers Home Administration, 223 F. Supp. 521 (D.P.R.) (U.S. Department of Agriculture and Farmers Home Administration); Hartke v. FAA, 369 F. Supp. 741 (E.D. N.Y.); Finch v. SBA, 252 N.C. 50, 112 S.E. 2d 737. See also the discussion at §§3-28.1 et seq., Civil Division Practice Manual.

Operation of the Veterans Administration finality statute, 38 U.S.C. §211(a), is discussed in the Civil Division Practice Manual at §§3-8.1, et seq. See particularly De Rodulfa v. United States, 461 F.2d 1240 (D.C. Cir. 1972); cert. denied 409 U.S. 949 (1972), and Johnson v. Robinson, 415 U.S. 361 (1974). Because of the finality statute, most administrative decisions relating to gratuitous VA benefits are not judicially reviewable.

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4-11.100 ADMIRALTY CLAIMS ACT SUITS

There is an important national interest in uniformity of law affecting waterborne transportation. See Kelly v. Smith, 485 F.2d 520 (5th Cir.), reh'g denied, 486 F.2d 1403 (5th Cir.), cert. denied, 416 U.S. 969; Peytavin v. Government Employees Ins. Co., 453 F.2d 1121 (5th Cir.). Operation of a boat on navigable waters, no matter what its size or activity, is a matter within the admiralty jurisdiction of the United States district courts. See St. Hilaire Moye v. Henderson, 496 F.2d 973 (8th Cir.), cert. denied, 419 U.S. 884. There is no distinction between torts committed by a ship, and torts committed by the ship's personnel while operating it. See Gutierrez v. Waterman S.S. Corp., 373 U.S. 206. Admiralty jurisdiction extends to shore-based workers injured by a ship or an appurtenance to a ship. See 46 U.S.C. §740; Canadian Aviator v. United States, 324 U.S. 215. A longshoreman's injury, incurred in a ship's service by ship equipment, is in the maritime jurisdiction. See Gebhard v. S.S. Hawaiian Legislator, 425 F.2d 1303 (9th Cir.).

Admiralty jurisdiction is exclusive, and only legislation can change this. See Amell v. United States, 384 U.S. 158. Jurisdiction over such cases lies only in the United States district courts. See Alaska Barge & Transport Inc. v. United States, 373 F.2d 967 (Ct. Cl.). The suits in Admiralty Act, 46 U.S.C. §742, and the Public Vessels Act, 46 U.S.C. §781, provide the jurisdictional bases for suit against the government in such cases. 46 U.S.C. §740 provides that as to damage or injury done or consummated on land by a vessel on navigable waters, the foregoing Acts provide the exclusive remedy. The requirement of 46 U.S.C. §740, that no suits shall be filed until six months has expired after presentation of the claim in writing to the federal agency owning or operating the vessel causing the injury or damage, is jurisdictional. See Department of Highways, State of Louisiana v. United States, 204 F.2d 630 (5th Cir.).

All matters involving these jurisdictional statutes will generally be handled by attorneys in the Torts Branch of the Civil Division, and such matters should be brought to the attention of that Branch or one of its field offices. Director Mark A. Dombroff (FTS 724-6833) is responsible for this area.

4-11.200 COPYRIGHT AND PATENT

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4-11.210 Copyright Infringement Actions

The exclusive remedy of the owner of material protected by statutory copyright (17 U.S.C. §101, et seq.) against the government for unauthorized use of such material by it or its contractors, is by action against the United States in the claims court. See 28 U.S.C. §1498(b). However, the unauthorized use by the contractor must have been with the "authorization or consent of the Government." See 28 U.S.C. §1498(b).

Suits for copyright infringement against the United States Postal Service may be brought in the district courts. See 39 U.S.C. §409(a). Such suits are defended by the Department of Justice on behalf of the Postal Service. See 39 U.S.C. §409(d).

Any suit for copyright infringement brought against the government in a United States district court should be brought to the attention of the Commercial Litigation Branch of the Civil Division. Such a suit will be handled by that Branch or under its supervision.

4-11.220 Patent Infringement Suits

The remedy of the owner of a patent for infringement of his/her patent by a private party is by civil action for damages, and possibly for an injunction, in a United States district court. Jurisdiction under 28 U.S.C. §1338(a) is exclusive, and venue is provided by 28 U.S.C. §1400(b).

When a government contractor infringes a patent in connection with performance of work for the government, the patent owner's remedy is usually restricted to an action for reasonable compensation against the United States in the claims court. See 28 U.S.C. §1498(a). Whether the action is brought against the government in the claims court, or against its contractor in the district court, depends upon whether use of the patent without the owner's authorization is with the "authorization and consent of the Government." See 28 U.S.C. §1498(a). Whether such "authorization and consent" has been given may be difficult to determine, particularly if no specific provision on the matter appears in the contract or if a limited type of clause is used. See, e.g., Roberts v. Herbert Cooper Co., 236 F. Supp. 428 (M.D. Pa.).

Government agencies have in general prescribed "authorization and consent" clauses by regulation. The Armed Service Procurement Regulations (now superseded by the Defense Acquisition Regulations) prescribe a broad clause for use in research and development contracts and a more limited clause for use in procurement contracts.

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In two instances, concurrent jurisdiction is provided for as between the district courts and the claims court. 22 U.S.C. §2356 provides such jurisdiction with respect to infringement actions arising out of the furnishing of equipment to foreign governments in connection with mutual security. 35 U.S.C. §183, the Patent Secrecy Act, provides a similar grant of jurisdiction with respect to inventions which the government insists remain secret for military reasons.

By 39 U.S.C. §409(a), the district courts are given original but not exclusive jurisdiction over all suits involving the United States Postal Service. Suits for patent infringement against the Postal Service are defended by the Department of Justice. See 39 U.S.C. §409(d).

Any suit for patent infringement brought against the government in a United States district court should be brought to the attention of the Commercial Litigation Branch of the Civil Division. Such a suit will be handled by that Branch or under its supervision.

4-11.230 Suits Involving Trademarks, Trade Secrets, or Technical Data

Suits may be brought from time to time, charging the government with infringement of a trademark or with misappropriation of trade secrets or technical data. There is no express jurisdictional statute for such suits, and they may be brought in the district courts as either contract or tort actions. The district courts have, under 39 U.S.C. §409(a), original jurisdiction of such suits involving the United States Postal Service; the Department of Justice defends on behalf of that Service. See 39 U.S.C. §409(d).

Any suit brought against the government, involving trademarks, trade secrets, or technical data, should be brought to the attention of the Commercial Litigation Branch of the Civil Division. Such suits will be handled by that Branch, or under its supervision.

4-11.300 GARNISHMENT PROCEEDINGS

A. Substantive Law. Garnishment is a legal proceeding which is instituted by a party who seeks to attach property, funds and credits or another which are in the possession and/or control of a third person. Frank J. Fasi Supply Co. v. Wigwam Inv. Co., 308 F. Supp. 59 (D. Hawaii 1969). Plaintiff is referred to as garnishee.^{1/} This is because a garnishment proceeding is normally an ancillary proceeding, arising out

^{1/} In a few jurisdictions, the garnishee is considered a defendant.

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of, and dependent on, another action or proceeding brought by the garnishor. Thus, generally the remedy of garnishment does not give plaintiff/garnishor a direct cause of action against the garnishee. See 38 C.J.S. Garnishment §§1 and 2. Garnishment is a purely statutory action unknown at common law. See Huron Holding Corp. v. Lincoln Mine Operating Co., *supra*; Frank F. Fasi Supply Co. v. Wigwam Inv. Co., *supra*; General Electric Corp. v. Waukesha Building Corp. 259 F. Supp. 958 (D. Ark. 1966).

The government's posture in these proceedings is usually that of a garnishee. Plaintiff will seek to satisfy his/her claim (judicial or otherwise) against a defendant by garnishing the latter's: (1) property which is in the possession or control of the government; (2) funds which are due and owing to defendant by the government. More often than not, the garnishment action is brought pursuant to 42 U.S.C. §659 *et seq.* Less frequently, the garnishment action arises out of a contract dispute involving a federal contractor or subcontractor. The garnishor seeks to attach the contractor's funds, property or credits in the possession or control of the government.

While the primary action may have been based on state law, federal law governs the rights and obligations of the government as garnishee. This is because federal law controls by virtue of the Supremacy Clause of the United States Constitution. See U.S. Const. Art. VI, cl. 2; Hisquierdo v. Hisquierdo, 99 S. Ct. 802 (1979); Franchise Tax Board v. U.S.P.S., Cv No. 78-4746-HP (Px), (D. Cal., August 5, 1980). Thus, it is axiomatic that the government may not be summoned as garnishee in any proceeding in the absence of federal statutory law. See FHA v. Burr, 309 U.S. 242 (1940).

Usually, the government's role is limited to that of a transferee of property to the garnishor. However, garnishment actions can adversely impact on important government interests and can require the government to play a more active role in the litigation. It is these cases which the government litigates.^{2/}

^{2/} For example, a court can ordinarily determine whether the garnishee is indebted to the defendant notwithstanding the garnishee's denial of indebtedness. E.g., Shaw v. Botens, 403 F.2d 150 (3d Cir. 1968). A court--usually a state court--might determine the underlying issue of the government's liability to the defendant and enter an order against the government, even though a direct action by either plaintiff or defendant, if allowed at all, could only be brought in the United States Court of Claims. See Tucker Act. In this case, we would be compelled to challenge the garnishment on jurisdictional grounds.

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The government may assert that an action in which the United States, a federal agency, or a federal disbursing officer is named as garnishee is an action against the sovereign which is barred, absent an applicable waiver of sovereign immunity. See Buchanan v. Alexander, 45 U.S. (4 How.) 20 (1846). See FHA v. Burr, supra; Allen v. Allen, 291 F. Supp. 312 (D. Iowa 1968).

Congress has enacted several statutes which embody waivers of sovereign immunity. First, "the sue-and-be-sued" clauses of several statutes are sufficiently broad to permit garnishment actions against certain federal agencies. See 39 U.S.C.A. §401(1); FHA v. Burr, supra. Second, Congress has waived the government's immunity to garnishment actions brought to enforce alimony and child support obligations. See 42 U.S.C.A. §659.

Many statutes which authorize an agency or agency official to "sue-and-be-sued" explicitly exclude garnishment actions from their scope. E.g., 15 U.S.C. §634(b)(1) (Small Business Administration). Other "sue-and-be-sued" clauses are limited to a class of actions which clearly excludes garnishment. See May Department Stores v. Smith, Nos. 77-1847, 77-1848 (8th Cir., March 31, 1978) (Veterans Administration). However, general authority to "sue-and-be-sued" normally embraces all civil proceedings, including garnishment. See Reconstruction Finance Corp. v. J.G. Menihan Corp., 312 U.S. 82, 85 (1941); Federal Housing Administration v. Burr, supra, at 245-46 (1940); Standard Oil v. Starks, 528 F.2d 201 (7th Cir. 1976). This rule arguably applies with respect to garnishment only if the agency involved is similar to a modern federal corporation "launched into the commercial world" to perform activities of a type performed by private enterprises. E.g., United States Postal Service. See Federal Housing Administration v. Burr, supra; Standard Oil v. Starks, supra; Chewing v. District of Columbia, 119 F.2d 459, cert. denied, 314 U.S. 639 (1941).

Garnishment is also excluded from the scope of an ostensibly general "sue-and-be-sued" clause if it is clear

that garnishment suits are not consistent with the statutory scheme . . . that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons, it was plainly the purpose of Congress to use the "sue-and-be-sued" clause in a narrow sense.

See FHA v. Burr, supra.

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Most prominent among the "sue-and-be-sued" agencies generally subject to judicial garnishment is the Postal Service. See Goodman's Furniture Co. v. United States Postal Service, 561 F.2d 462 (3d Cir. 1977); Standard Oil Division, American Oil Co. v. Starks, *supra*. The Postal Service and other agencies subject to garnishment are able to administratively process the great bulk of garnishment actions without assistance from the U.S. Attorney.^{3/}

Most of the garnishment actions brought against the government arise under 42 U.S.C.A. §659 *et seq.* Prior to 1975, the sovereign immunity of the United States precluded garnishment of wages of federal employees who defaulted in payment of their obligations of child support and alimony. See Applegate v. Applegate, 39 F. Supp. 887 (D. Va. 1941).^{4/} This barrier to enforcement of these obligations was removed by Public L. No. 93-647, now codified as 42 U.S.C.A. §659(a). See United States v. Morton, 467 U.S. ____, 81 L. Ed. F.2d 680 (1984); Calhoun v. United States, 557 F.2d 401 (4th Cir.); Overman v. United States, 562 F.2d 1287 (8th Cir. 1977).

B. Role of the U.S. Attorney. In most instances, the U.S. Attorney need not become actively involved in garnishment matters. The U.S. Attorney plays principal roles only where the governmental entity wishes to contest the garnishment. This is because the Department of Justice does not represent those individuals whose monies are being garnished. See 5 C.F.R. §581.302(b)(2). Moreover, we do not offer legal advice to such individuals or their counsel. Questions regarding representation should be directed to J. Christopher Kohn, Director, Commercial Litigation Branch, Civil Division.

Garnishment actions are removable pursuant to 28 U.S.C. §1442. This is because a garnishment action is by its nature a suit by the principal defendant against the garnishee for the use of the garnishor. As such, it

^{3/} Note: The Department of Justice no longer defends on sovereign immunity grounds valid court ordered commercial wage garnishments in light of adverse circuit court decisions. See Postal Service Bulletin No. 21143, 4-20-78 at p.3.

^{4/} Since sovereign immunity was only a barrier to one method of judgment enforcement and is a right of the sovereign and not of any individual, judgments may be enforced through other methods even if the judgments were obtained prior to 1975. See Pellerin v. Pellerin, 534 S.W. 2d 767 (D. Ark. 1976).

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is "(a) civil action . . . against (an) officer of the United States or any agency thereof," and thus properly removable pursuant to §1441. See Young v. United States; see generally, Clarise Sportswear Company, Inc. v. U. & W. Manufacturing Co., 223 F. Supp. 42 (D. Pa. 1973).

Several courts have held that garnishment actions under the statute are not within the original jurisdiction of the federal courts. Hence, such cases may not be removed pursuant to 28 U.S.C. §1441. See Diaz v. Diaz, 568 F.2d 1061 (4th Cir. 1977); Overman v. United States, *supra*; Wilhelm v. U.S. Department of Air Force, 418 F. Supp. 162 (D. Tex. 1976); West v. West, 402 F. Supp. 1189 (D. Ga. 1975); Morrison v. Morrison, 408 F. Supp. 315 (D. Tex. 1975).

Not every garnishment action should be removed to federal court. Federal courts were not intended to be flooded with domestic relation actions. See Overman v. United States, *supra*. Actions which are considered appropriate for removal are those which raise difficult, significant, recurring issues concerning the interpretation and the scope of 42 U.S.C.A. §659 itself. Additionally, the U.S. Attorney should remove actions in which the extent or existence of the government's liability to the principal defendant is contested, or actions in which the constitutionality of federal or state law is contested.

C. Sovereign Immunity. The defense of sovereign immunity is made in cases where plaintiff seeks to hold the government liable for its failure to properly garnish monies which were attached pursuant to 42 U.S.C.A. §659. As held in Green v. Green, Cv No. 79-2435 (W.D. Tenn., February 7, 1980) the United States may not be held liable for the entire underlying debt owed by the principal debtor to plaintiff/garnishor. The United States is only liable for the garnished amount. See 5 C.F.R. §581.305(d). But see Young v. United States, *supra*.

D. Supremacy. The supremacy defense has been used by us on a less frequent basis than the sovereign immunity defense. The supremacy defense is based on Article VI of the United States Constitution. See U.S. Const., Art. IV, cl. 2. This defense is appropriate where government officials would be compelled to act pursuant to state law in clear contravention of federal law. For example the supremacy defense is appropriate where a state court order would compel garnishment of 100% of an employee's wages in contravention of 15 U.S.C.A. §1673 as amended.

E. Exemptions.

1. Federal Exemption. The Federal Exemption Statute is codified at 15 U.S.C. §1673 et seq. Congress' constitutional

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authority to enact this exemption is based on its manifest authority to place limitations on waivers of sovereign immunity and on the Supremacy Clause of the United States Constitution. See U.S. Const., Art. IV, cl. 2; and United States v. Sherwood, 312 U.S. 584 (1941).

2. State Exemptions. Exemptions provided by state law which are greater than those provided by federal law are not preempted by federal law. See 15 U.S.C. §1677. Such state exemptions fully apply to garnishment of federal monies. In most states, the exemptions to be applied are those of the forum. Restatement (Second), Conflict of Laws §99 (1969). It should be possible and desirable for the agency to assert applicable exemptions in its Answer to Interrogatories. Litigation is necessary only where the application of the exemption is contested by the garnisher.

F. Want of Subject Matter Jurisdiction. We do frequently challenge actions on the ground of want of subject matter jurisdiction where the principal defendant in the garnishment action institutes a separate suit against the United States to restrain enforcement of the garnishment or to collect the underlying debt owed to him/her by the United States. The method of handling such suits varies with the type of relief sought. Such suits should be removed to federal courts in any event. See Overman v. United States, 563 F.2d 1287 (8th Cir. 1977).

Federal courts lack subject matter jurisdiction to determine the underlying "support" debt. This is because federal courts do not have original jurisdiction over domestic relations matters. Accordingly, decrees which establish the debt of support may not be challenged in federal court, notwithstanding defendant's institution of a separate action brought against the government. See Overman v. United States, supra.

G. Indispensable Party. In cases in which the garnisher has not been joined, it should be asserted that he/she is an indispensable party to the garnishment action for in his/her absence the United States may be "subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations." See Fed. R. Civ. P. 19. See Morthon v. United States, No. 290-77, slip. op. (Fed. Cir. 1983).

4-11.310 Garnishment for the Payment of Child Support and Alimony Obligations

An express waiver of sovereign immunity for the garnishment of the "remuneration for employment," of those persons receiving such

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remuneration directly from the government, is provided by 42 U.S.C. §659 for the limited purpose of satisfying child support and alimony obligations.

The statute makes the United States suable "as if the United States were a private person," thus subjecting it to suit in state courts. However, if a private person would not be subject to "legal process" in such an action, an action will not lie against the United States either. If the client agency is willing to honor "legal process," or to respond to interrogatories properly propounded under state law, no action should be required of the U.S. Attorney.

As amended by Title V of Pub. L. No. 95-30, 91 Stat. 157-162, the Act now provides for service of process to be made solely upon the head of the agency or his/her designated agent by certified or registered mail. Thus, the U.S. Attorneys need not become involved, unless the agency feels there is a real need for legal representation.

In the case of active duty, reserve, or retired military personnel, the following activities have been designated by the services to receive service or process in garnishment proceedings:

Army

Commander
US Army Finance and Accounting Center
Attn: FINCL-G
Indianapolis, IN 46249

Air Force

Air Force Accounting and Finance Center
(AFAFC/AJQ)
Denver, CO 80279

Navy

Director
Navy Family Allowance Activity
Anthony J. Celebreeze Federal Building
Cleveland, OH 44199

Marine Corps

Commanding Officer
Marine Corps Finance Center
Kansas City, MO 64197

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Coast Guard
Commandant (FPS-5)
U.S. Coast Guard Headquarters
Washington, D.C. 20590

In order to expedite payment, service should continue to be made upon the agent designated by the military service of which a debtor is or was a member.

A Civil Division Practice Manual monograph, §§3-23.1 *et seq.*, written by Brian Kennedy (FTS 633-2071), deals generally with garnishments against the government and includes a full discussion of 42 U.S.C. §659. Pertinent regulations were recently published and will appear at 5 C.F.R. Part 581 (§§581.101 *et seq.*). The Commercial Litigation Branch of the Civil Division is now responsible for cases arising under that statute. Advice can be obtained from Alfred Bennett (FTS 724-8418).

4-11.400 PRIVACY ACT LITIGATION

The exhaustion of administrative remedies in Privacy Act litigation is discussed in USAM 4-5.922, *supra*. Limitations in such suits is discussed in USAM 4-5.222, *supra*. The assessment of attorney fees and court costs against the government in such litigation is discussed in USAM 4-4.240 and 4-4.530, *supra*.

Jurisdiction for Privacy Act suits covers suits for both money and specific relief. Access to government records of an individual, and the amendment of such records, is provided for by 5 U.S.C. §552a(g). Plaintiff is entitled to a trial *de novo*. Jurisdiction includes express authorization for an injunction action, to prevent a government agency from withholding records and to compel their production. *See* 5 U.S.C. §552a(g)(3). In an action brought for failure to maintain with accuracy, the record on an individual, or for failure to comply with any other provision of the section or any rule promulgated thereunder in such a way as to have an adverse effect on the individual, the individual can recover actual damages but in no cases less than \$1,000, if the agency acted intentionally or willfully, together with costs and reasonable attorney fees. Venue is set forth in 5 U.S.C. §552a(g)(5), as is the limitations provision of the statute requiring most actions to be brought within two years. A fuller exposition of this Act, and litigation under it, may be found in the Civil Division Practice Manual at §§3-10.1 through 3-10.19.

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4-11.500 SERVICEMEN'S GROUP LIFE INSURANCE SUITS

The Civil Division Practice Manual, §§3-9.1 et seq., contains a full discussion of this topic. Pertinent statutes are found at 38 U.S.C. §765-779.

SGLI has replaced NSLI coverage (USAM 4-11.840, infra) for present members of the armed forces. The primary SGLI insurer is a private company, The Prudential Insurance Company of America, which administers this group program through the Office of Servicemen's Group Life Insurance, 212 Washington Street, Newark, New Jersey 07102 (Tel. 201-336-5151). Actions for SGLI proceeds are ordinarily brought directly against Prudential.

Under limited circumstances, the United States, by virtue of 38 U.S.C. §775, is also subject to suit in federal court in SGLI cases. However, it has been uniformly held that a plaintiff's cause of action will not lie against the United States unless a breach of legal duty or obligation is shown. See Ross v. United States, 444 F.2d 568 (Ct. Cls.); Stribling v. United States, 419 F.2d 1350 (8th Cir.); Shannon v. United States, 417 F.2d 256 (5th Cir.).

Thus, whenever the government is included as defendant in a SGLI suit, dismissal should be sought if the complaint fails to allege a specific breach of a statutory legal duty or obligation of the United States. The Civil Division Practice Manual discussion, §3-9.22, includes a sample dismissal motion.

All SGLI cases are within the jurisdiction of the Commercial Litigation Branch of the Civil Division.

4-11.600 TORT CLAIMS ACT CLAIMS AND SUITS

The government has very substantial exposure in claims and litigation arising under the Federal Tort Claims Act. Some of the salient concerns involved in the handling of such claims and litigation are discussed in succeeding sections. The sections of the statute as codified appear as follows:

28 U.S.C. §1346(b) - jurisdiction - see USAM 4-11.670.

28 U.S.C. §1402(b) - venue - see USAM 4-5.913, 4-11.670.

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28 U.S.C. §2401(b) - limitations - see USAM 4-5.227, 4-11.710.

28 U.S.C. §2671 - definitions.

28 U.S.C. §2672 - administrative adjustment of claims - see USAM 4-11.610, 4-11.620.

28 U.S.C. §2674 - liability of the United States - see USAM 4-11.630.

28 U.S.C. §2675 - disposition by Federal agency as prerequisite - see USAM 4-11.610.

28 U.S.C. §2676 - judgment as bar - see USAM 4-11.660.

28 U.S.C. §2677 - compromise - see USAM 4-11.720.

28 U.S.C. §2678 - attorneys' fees - see USAM 4-4.220.

28 U.S.C. §2679 - exclusiveness of remedy - see USAM 4-11.660.

28 U.S.C. §2680 - exceptions to jurisdiction - see USAM 4-11.650, et seq.

Each U.S. Attorney has been furnished with the two-volume set of Jayson, Handling Federal Tort Claims (1974-1975), which will be supplemented by the author periodically. References will be made to that work herein, for additional discussion and authorities on certain matters.

In addition the Torts Branch has published a series of monographs on various subjects. Each U.S. Attorney has been furnished with this series.

4-11.610 Administrative Claim Requirements of the Act

Prior to institution of suit under the Federal Tort Claims Act, the claimant must have filed an administrative claim with the appropriate federal agency, and the claim must have been finally denied by the agency, with advice of denial being transmitted to the claimant by certified or registered mail. See 28 U.S.C. §2675(a). The failure of the agency to make final the disposition of a claim within six months after it is filed may, at the option of the claimant at any time thereafter, be deemed a

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final denial of the claim. See 28 U.S.C. §2675(a). Claims which may be asserted under the Federal Rules of Civil Procedure by way of the third party complaint, cross-claim, or counterclaim, are not required to be presented administratively. See 28 U.S.C. §2675(a).

The filing of an administrative claim is a jurisdictional prerequisite to suit, and failure to comply with the statute renders the suit subject to dismissal for lack of jurisdiction. See Meeker v. United States, 435 F.2d 1219 (8th Cir. 1970). In order to be valid, a claim must be in writing, signed by the proper claimant or his/her authorized representative, and be for money damages in a sum certain. See Caton v. United States, 495 F.2d 635 (9th Cir. 1974); Bialowas v. United States, 443 F.2d 1047 (3d Cir. 1971); Rosario v. American Export-Isbrandtsen Lines, Inc., 531 F.2d 1227 (3d Cir. 1976). The implementing Justice Department regulations are to be found at 28 C.F.R. §§14.1 through 14.11.

Where the facts disclose that an administrative claim should have been filed but has not been filed or has not been finally acted upon, the U.S. Attorney should advise plaintiff's counsel in writing of the jurisdictional defect. Plaintiff's counsel should be asked to enter a voluntary dismissal. He/she should be advised that if this is not done within ten days, the U.S. Attorney will be obliged to move to dismiss for failure to pursue and exhaust the required administrative remedy. In those cases where a voluntary dismissal might give rise to a question as to the application of the statute of limitations contained in 28 U.S.C. §2401(b), it is suggested that the U.S. Attorney consult with the Torts Section of the Civil Division, before taking final action. See in addition 2 Jayson, Handling Federal Tort Claims, §§315-326 (1975), Torts Branch Monograph, Administrative Claims.

4-11.620 Administrative Claims Asserted Against the Justice Department

Any officer or employee of the Department of Justice involved in an incident resulting in damage to or loss of property, or personal injury or death, which may give rise to a claim for money damages against the United States, should immediately report the facts to his/her superior, using the standard forms that are prescribed for that type of accident. Standard Form 91 Revised should be completed at the time, and on the scene, of accidents involving motor vehicles. Standard Form 92A should be used if no motor vehicle was involved. In addition, each witness should be asked to complete Standard Form 94 Revised, describing the accident, or a signed statement concerning the incident.

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The head of the Justice Department office concerned should have the incident investigated without delay, and a written report should be prepared, including the completed forms cited above. Photographs should be obtained, when possible, showing the scene of the incident, the manner in which the accident happened, and the resulting damage. In cases of serious personal injury, death, or major property damage, the FBI should be notified immediately and given the opportunity to undertake the required investigation. The U.S. Attorney for the district in which the incident occurred may be asked to advise as to the nature and scope of the investigation required in such cases.

The record of the accident thus established should be retained in the files of the Division or Bureau concerned, for use if a formal claim is filed under 28 U.S.C. §2675. If a formal claim is filed, the claimant should be required to furnish the detailed information specified in 28 C.F.R. §14.4. Officials of the Department designed in 28 C.F.R. §0.172 may compromise for or pay up to \$2,500 in satisfaction of an administrative tort claim. If the responsible official determines that more than \$2,500 should be paid in compromise or satisfaction of a claim, or if the responsible official has not been delegated authority pursuant to 28 C.F.R. §0.172, the matter should be referred to the Director of the Torts Branch for final determination by the Civil Division.

Department of Justice regulations promulgated pursuant to 28 U.S.C. §2672, pertinent to administrative claims, may be found at 28 C.F.R. §§14.1 through 14.11. See 2 Jayson, Handling Federal Tort Claims, §§40-1 through 40-13.1 (1975), for implementing agency regulations.

4-11.630 Basis of Liability

28 U.S.C. §1346(b) confers jurisdiction on the United States district courts over civil action on claims against the United States for money damages,

for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The United States is liable "in the same manner and to the same extent as a private individual under like circumstances, with limited circumstances," with limited exceptions. See 28 U.S.C. §2674.

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In view of the express language of 28 U.S.C. §1346(b) quoted above, the United States is not liable on any absolute liability theory. See United States v. Dalehite, 346 U.S. 15, 44-45; Laird v. Nelms, 406 U.S. 797. Similarly, the United States is ordinarily not liable for the negligence of an independent contractor under the nondelegable duty theory. Neither is the United States liable for negligence on the part of its safety inspectors in failing to discover or stop dangerous activities of an independent contractor. See United States v. Page, 350 F.2d 28 (10th Cir.); Roberson v. United States, 382 F.2d 714 (9th Cir.). See however, Thorne v. United States, 479 F.2d 804 (9th Cir.), and United States v. Babbs, 483 F.2d 308 (9th Cir.).

For additional discussion of the phrase "negligent or wrongful act or omission," see 1 Jayson, Handling Federal Tort Claims, §§214 through 214.05 (1974). The phrase "employee of the Government * * * acting within the scope of his office or employment," used in 28 U.S.C. §1346(b), is discussed in 1 Jayson, Handling Federal Tort Claims, §§216 through 216.04 (1974).

4-11.640 Damages

As noted in USAM 4-11.630, supra, liability under the Federal Tort Claims Act is in accordance with the law of the place where the act or omission giving rise to suit took place. Thus, in most respects, the amount of damages recoverable is that which would be recoverable in accordance with the law of that state. See 1 Jayson, Handling Federal Tort Claims, §§218 through 218.02 (1974). In Richards v. United States, 369 U.S. 1, the court concluded that applying the law of the state in which the negligent act or omission took place, as distinguished from the law of the state in which the accident or death occurred, meant the whole law of the state, including its conflict-of-laws rule, since this would permit the court to treat the United States as a "private individual under like circumstances" in most cases.

28 U.S.C. §2674 does not permit the recovery of punitive damages. Rather, the United States is liable for "actual or compensatory damages, measured by the pecuniary injuries resulting from such death * * * in lieu thereof." See 28 U.S.C. §2674; 2 Jayson, Handling Federal Tort Claims, §§227 through 227.03 (1975).

The amount of the recovery may also be limited by the amount of the administrative claim submitted to the agency involved. See 28 U.S.C. §2675 limits recovery to no more than the amount of the claim presented to the agency, except where the increased amount is based on newly discovered evidence not reasonably discoverable at the time of presenting the claim, or upon allegation and proof of intervening facts, relating to the amount of the claim. See 2 Jayson, Handling Federal Tort Claims, §228.07 (1975).

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Compensatory benefits awarded by the federal government, such as veterans' benefits and military benefits, are ordinarily deductible from any recovery against the United States. See 12 A.L.R. 3d 1245; 2 Jayson, Handling Federal Tort Claims, §228.05 (1975); Torts Branch Monograph Damages Under The Federal Tort Claims Act.

4-11.650 Exceptions to Jurisdiction Under the Act

4-11.651 Express Exceptions

28 U.S.C. §2860 enumerates a series of express exceptions to the Federal Tort Claims Act. Particular attention should be paid to any case in which one of these jurisdictional exceptions may be applicable, because of the possible precedential value of the case. The "discretionary function" exception (see 28 U.S.C. §2680(a)) should not be raised without prior consultation with the Torts Section of the Civil Division. The same is true of the "negligent misrepresentation" exception. See, e.g., Torts Branch Monographs Discretionary Function, The Exception for Misrepresentation and the Exception for Interference with Contract Rights Under the Federal Tort Claims Act, FTCA Exception: Claims Arising in a Foreign Country.

The express exception contained in 28 U.S.C. §2680(h) has now been modified by the addition of a provision which makes the Tort Claims Act remedy available with regard to acts or omission of "investigative or law enforcement officers of the United States Government" on or after March 16, 1974, for claims arising out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. "Investigative or law enforcement officer" is defined to mean any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." See USAM 4-13.362, *infra*, for the defense of actions brought against investigative or law enforcement officers rather than the United States.

Because of the need to take a uniform position and to foster reasoned development of the law, you should always contact and obtain the approval of the Torts Branch prior to raising any defense to an FTCA action predicated upon the discretionary function exemption, 28 U.S.C. §2680(a) or on the Feres doctrine articulated in Feres v. United States, 340 U.S. §135 (1950).

4-11.652 Implied Exceptions

A member of the military service, acting incident to his/her military service, is limited to his/her compensation remedy under other federal

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statutes and is precluded from suing the United States for personal injuries under the Federal Tort Claims Act. See Feres v. United States, 340 U.S. 135; 1 Jayson, Handling Federal Tort Claims, §§155 through 155.08(4)(h) (1974); Torts Branch Monograph, The Feres Doctrine and Servicemen's Immunity From Suit. However, such a person can sue under the Act if he/she is on leave or was not acting incident to service at the time of his/her injury. See United States v. Brown, 348 U.S. 110. The "incident-to-service" test employed in Feres, although generally comparable to the "scope-of-employment" test in other cases, is clearly broader than the "scope-of-employment" test. National Guardsmen are precluded from suing the United States under the Act under the Feres doctrine, even though their units have not been federalized. See Layne v. United States, 295 F.2d 433 (7th Cir.). (See 32 U.S.C. §715 for the authority of the military agencies to settle tort claims arising from the noncombatant activities of National Guard employees, even though their units have not been federalized.)

An employee of the United States receiving compensation under the Federal Employees Compensation Act is precluded from suing the United States under the Federal Tort Claims Act. See 5 U.S.C. §816(c); Johansen v. United States, 343 U.S. 427; see 1 Jayson, Handling Federal Tort Claims §154.02 (1974). An employee of a nonappropriated fund instrumentality is similarly limited to his/her claim under the Longshoremen's and Harbor Workers' Compensation Act. See United States v. Forfari, 268 F.2d (9th Cir.); see 1 Jayson, Handling Federal Tort Claims, §154.03(2) (1974).

A federal prisoner may sue the United States under the Federal Tort Claims Act, United States v. Muniz, 374 U.S. 150 (1963), but if the injury occurs in prison industries, the compensation remedy provided is exclusive. See also 1 Jayson, Handling Federal Tort Claims, §8.03 (1974).

4-11.660 Exclusiveness of Remedy

28 U.S.C. §2679(a) provides that the authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agencies on claims which are cognizable under the Federal Tort Claims Act. Thus, an Executive Department, independent establishment, or corporation of the United States is not suable eo nomine in tort. See 1 Jayson, Handling Federal Tort Claims, §175.02 (1974). This is true whether the agency is one created since the enactment of the Federal Tort Claims Act (Handley v. Tecon Corp., 172 F. Supp. 565 (N.D. N.Y. 1959) (St. Lawrence Seaway Development Corp.)), or one that has been

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granted sue-and-be-sued powers since the enactment of the statute. See Kornbluth v. Savannah, 398 F. Supp. 1266 (E.D.N.Y. 1975) (Postal Service).

28 U.S.C. §2679(b) makes the Federal Tort Claims Act the exclusive remedy for tort claims resulting from the operation by any employee of the government of any motor vehicle while acting within the scope of his/her office or employment, i.e., exclusive of recovery against the employee, the so-called "Drivers Act." See 4-13.363; 1 Jayson, Handling Federal Tort Claims, §175.03 (1974). Similarly, the Tort Claims Act remedy is the exclusive avenue of redress for the negligent or wrongful acts or omissions of doctors and paramedical employees of the Public Health Service (42 U.S.C. §233), the Veterans Administration (38 U.S.C. §4116), the Department of State (22 U.S.C. §817), the Department of Defense, the Central Intelligence Agency, and the United States Coast Guard (10 U.S.C. §1089), and the National Aeronautics and Space Administration (42 U.S.C. §2458a). See 1 Jayson, Handling Federal Tort Claims, §175.04 (1974). See USAM 4-11.820, infra, regarding malpractice actions generally.

4-11.670 Jurisdiction and Venue

28 U.S.C. §1346(b) places exclusive jurisdiction over Federal Tort Claims Act suits in the United States district courts. The United States has not consented to be sued in state courts. Cf. United States v. Shaw, 309 U.S. 495 (1940). Nor can the United States be made party to, or be bound by, tort litigation in a state court, and a "vouching in" letter in state court litigation is ineffective against the United States. See United States v. City of Pittsburgh, 359 F.2d 564 (3d Cir.); cf. Brown & Root, Inc. v. United States, 198 F.2d 138, 142 (5th Cir.). Even removal of such actions to the federal court will not cure this jurisdictional defect of the state court proceeding. See Minnesota v. United States, 305 U.S. 382, 389; Gleason v. United States, 458 F.2d 191 (3d Cir.).

28 U.S.C. §1402(b) limits venue to the judicial district in which the plaintiff resides, or wherein the act or omission complained of occurred. See 1 Jayson, Handling Federal Tort Claims, §§191.01 through 101.02 (1974).

4-11.680 Indemnity and Contribution

The subjects of contribution and indemnity are not mentioned in the Federal Tort Claims Act. However, in United States v. Yellow Cab Co., 340

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U.S. 543, the court sustained the right of recovery of contribution as against the United States. State law controls the right to contribution. United States v. State of Arizona, 216 F.2d 248 (9th Cir. 1954). See however, Kohr v. Allegheny Airlines, 504 F.2d 400 (7th Cir.), cert. denied sub nom., Forth Corp. v. United States, 421 U.S. 978. Thus, if the relevant state law does not recognize a right of contribution, contribution cannot be recovered from the United States. However, contribution is usually denied when the government's injured employee has a compensation remedy which is exclusive of his/her right of recovery of the United States. See 12 A.L.R. Fed. 646.

The United States may also be liable under the Federal Tort Claims Act for common law indemnity, i.e., a complete shifting of the burden of loss from another held liable under the circumstances. See, e.g., Chicago, Rock Island & Pacific R. Co. v. United States, 220 F.2d 939, 940-41 (7th Cir.), see Torts Branch Monograph, Contribution and Indemnity.

For the statute of limitations as to the government's assertion of claims for contribution or indemnity, see §3-2.25 of the Civil Division Practice Manual.

4-11.690 Law Applicable

The Tort Claims Act adopts state substantive law. See 28 U.S.C. §§1346(b) and 2674; and see 2 Jayson, Handling Federal Tort Claims, §218.01 (1975). This includes questions of liability, damages (except as noted in USAM 4-11.640, supra), limitations on recovery, and the like. However the Federal Rules of Civil Procedure govern as to procedural matters. In a conflict of laws situation, the Tort Claims Act adopts the whole law of the state where the negligent act or omission occurred, including its conflict-of-laws rule. See USAM 4-11.640, supra, and see 2 Jayson, Handling Federal Tort Claims, §218.02 (1975). Certain questions involving the interpretation of the Tort Claims Act itself are decided as a matter of federal law. Cf. USAM 4-4.700, supra. Thus, the determination of whether a particular person is a federal employee for purposes of the Federal Tort Claims Act is to be determined as a matter of federal law. See Pattno v. United States, 311 F.2d 604 (10th Cir.); Fisher v. United States, 356 F.2d 706 (6th Cir.). Obviously, the interpretation of a federal contract is a matter of federal law. See United States v. Allegheny County 322 U.S. 174, 183; United States v. Starks, 239 F.2d 544, 547 (7th Cir.). Similarly, the date of accrual of a cause of action under the federal statute is a question of federal law. See Hungerford v. United States, 307 F.2d 99 (9th Cir.). Evidence questions are governed by the Federal Rules of Evidence.

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While the status of a federal employee as an employee is to be determined by federal law, scope-of-employment issues are to be determined by state law, even in such distinctly federal areas as the transfer of members of the service. See Williams v. United States, 350 U.S. 857.

4-11.700 TORT CLAIMS ACT CLAIMS AND SUITS

4-11.710 Limitations

For a discussion of limitations, see USAM 4-5.227, supra. See also 2 Jayson, Handling Federal Tort Claims, §§275 through 281 (1975).

4-11.720 Settlements and Judgments

The authority and bases for compromise are discussed in USAM 4-2.000, et seq. The consummation and payment of compromises is discussed at USAM 4-2.420, et seq.

Post-judgment motions are discussed at USAM 4-3.100 through 4-3.140, supra. Attorneys' fees and court costs are discussed respectively at USAM 4-4.250 and 4-4.530, supra. The payment and satisfaction of judgments is covered in USAM 4-3.200 through 4-3.220, supra.

4-11.730 Trial Preparation

Obviously, the first step to be taken in preparation for trial in a Federal Tort Claims Act Suit is to obtain the litigation report of the client agency. Since an administrative claim will almost always have been filed with the client agency, which should have investigated the incident giving rise to suit whether a claim was presented or not, the agency's litigation report and other files should be of substantial assistance in preparing for trial. While there is a natural tendency of the employee to put his/her conduct in the best light possible, care should be taken to learn as much about the unfavorable facts in the case as soon as possible, in order not to be caught by surprise and to permit timely action to counter these difficulties if possible. See 28 C.F.R. §14.4, as to the types of information which the agency may require from the claimant in connection with its consideration of his/her administrative claim.

The investigative facilities of the FBI should be utilized when necessary, for the proper defense of suits filed against the United States

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under the Federal Tort Claims Act. However, every effort should be made to avoid duplication of effort and reinvestigation of phases of cases, when the agency has provided sufficient information to permit a proper defense of the action. When only the question of liability is involved, only that aspect of the case should be investigated. This is not to suggest that a reinvestigation should never be requested. If the case is of sufficient importance, or if the information furnished by the agency is inadequate to enable the U.S. Attorney to properly represent the interests of the United States, he/she should have a reinvestigation made. Requests for such reinvestigations should only be made after thorough consideration of the necessity therefore.

When personal injuries are involved, it is important that the claimant be examined by a government or other doctor, or specialist of the government's choice. This should be accomplished at an early date to get an insight into the cause and severity of claimant's condition for trial preparation purposes, and to avoid the risk that the press of other work may result in being faced with firm trial date without a thorough examination by the government's doctor having been accomplished. In addition, the impartial examination of the claimant and review of his/her condition and its likely cause is highly important in settlement negotiations. Settlement should not be effected without such an examination, except in the most minor cases. Early use of fact and contention interrogatories, requests for admissions, and depositions for discovery and perpetuation of testimony is important to a proper preparation for trial or for settlement, as the circumstances may indicate. Furnishing a copy of the results of such discovery to the Torts Section, in cases which require departmental approval of a settlement proposal, will assist the Department in reaching a realistic decision at an early date. See also the discussion in Civil Division Practice Manual §§3-30.1 et seq.

4-11.800 SPECIAL GROUPS OF CASES

Groups of cases which deserve special attention are noted below. See USAM 4-13.363, infra, for cases under the so-called "Drivers Act". See USAM 4-5.921, infra, as to the immunity of government officers sued as individuals for official acts.

4-11.810 Aviation Litigation

The Torts Section of the Civil Division maintains an Aviation Unit, specializing in the defense of aviation cases arising primarily out of the

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activities of the FAA, ESS (formerly the Weather Bureau), and the military services.

Primary responsibility for the defense of aviation litigation, including preparation and trial, will normally be retained in the Aviation Unit if questions of broad national import with particular precedential significance are involved, or if the litigation will raise questions concerning the propriety of air traffic control, the certification of aircraft, or the dissemination of weather and in-flight information to operators of commercial and private aircraft. The U.S. Attorney will be advised as to the staffing of these cases as quickly as a determination can be made. In all such cases, there is a need for very close cooperation between the U.S. Attorneys and the Aviation Unit.

4-11.820 Medical Malpractice Actions

Very close liaison should be maintained with the Torts Section of the Civil Division through all phases of medical malpractice litigation, since these cases usually involve large sums of money and complex factual questions requiring the use of expert medical and scientific witnesses.

Several defenses which are available in other tort litigation may either not be available, or may be limited in their application in medical malpractice litigation. See, e.g., USAM 4-5.227, supra, concerning the special problem presented as to the application of the limitations statute in malpractice actions. Because of the difficult questions involved in the application for the statute of limitations defense, as well as the discretionary function and negligent misrepresentation defenses, it is requested that these defenses not be asserted in the context of medical malpractice litigation without prior consultation with the Torts Section of the Civil Division. A member of the military is precluded from suing for malpractice committed in military hospitals other than to a dependent. See 4-11.652, supra.

Preparation for the trial of a medical malpractice case will normally require the close cooperation and assistance of one or more physicians. It is essential that qualified physicians be available, both to serve as consultants in preparation for trial and to serve as expert witnesses at the trial. When possible, physicians at government medical facilities in the vicinity of the U.S. Attorney's office should be used as sources for assistance and consultation in pre-trial preparation. Consultation with medical personnel at such facilities may also provide names of potential expert witnesses, either from government hospitals or from the civilian

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community. The Torts Section of the Civil Division will also assist in securing the services of a physician to serve as consultant or expert witness. See USAM 4-13.364, infra, as to malpractice suits against government doctors.

4-11.830 Tucker Act Suits

Concurrent with the Claims Court, United States district courts have jurisdiction under the Tucker Act over claims against the United States, "not exceeding \$10,000 in amount, founded upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sound in tort." However, the district courts do not have jurisdiction to review the merits of claims subject to the Contract Disputes Act. 28 U.S.C. §1346(a)(2).

The Tucker Act was amended in 1970 to permit suit against the United States on express contracts of named nonappropriated fund instrumentalities. Such instrumentalities had previously been held to be instrumentalities of the United States (see USAM 4-8.200, supra), but there had been no prior waiver of immunity from suit.

28 U.S.C. §1346(a)(2) was amended in 1978 to include a specific reference to the exclusive jurisdiction conferred upon the Claims Court by the Contract Disputes Act to afford contractors de novo review of a final decision of a contracting officer under 41 U.S.C. §605. The Contract Disputes Act is applicable to all contracts entered into after March 1, 1979. See 41 U.S.C. §601 note. For contracts executed prior to that date, the contractor may elect to proceed under the act with respect to claims pending before the contracting officer on March 1, 1979, or initiated thereafter. Id.

All claims subject to the Contract Disputes Act must be the subject of a decision of the contracting officer. See 41 U.S.C. §605. All claims by a contractor against the government must be in writing, 41 U.S.C. §605(a), and, if the claim exceeds \$50,000, the contractor must certify that the claim is made in good faith, that the supporting data are accurate and complete and that the amount requested accurately reflects the amount to which the contractor believes it is entitled. See 41 U.S.C. §605(c)(1). All of these requirements are jurisdictional, and may not be waived. See Warchol Construction Company v. United States, 6 USCCR No. 28 (April 21, 1983); W. H. Mosely Company v. United States, 677 F.2d 850 (Ct. Cls), cert. denied 103 S. Ct. 81 (1982). De novo review of a final decision of a contracting officer may be obtained either before a board of

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contract appeals, 41 U.S.C. §606, or in the United States Claims Court. See 41 U.S.C. §609. The Court of Appeals for the Federal Circuit has exclusive jurisdiction to entertain appeals under the Contract Disputes Act from both the boards of contract appeals and the Claims Court. See 28 U.S.C. §§1295(a)(3) and 1295(a)(10). Questions concerning the Contract Disputes Act should be directed to the Commercial Litigation Branch.

The Tucker Act, as a relinquishment of sovereign immunity, must be strictly construed. See United States v. Sherwood, 312 U.S. 584 (1940). The United States has not consented to be sued by implication. See Leyerly v. United States, 162 F.2d 79 (10th Cir.). Tucker Act consent does not extend to suits in courts, such as that for the Canal Zone, which are not created under Article II of the Constitution, Wells et al. v. United States, 214 F.2d 380 (5th Cir.), cert. denied, 348 U.S. (1954). Jurisdiction under 28 U.S.C. §1346(a)(2) does not extend to any suit which could not be brought in the Claims Court pursuant to 28 U.S.C. §1491. United States v. Sherwood, supra at 589-591. Thus, the Act only authorizes actions for money, and not suits for equitable relief. See Richardson v. Morris, 409 U.S. 464, 465 (1973).

Suit may not be maintained for more than the jurisdictional amount of \$10,000. See United States v. Sherwood, supra; Murray v. United States, 405 F.2d 1361 (D.C. Cir.); Putnam Mills Corp. v. United States, 432 F.2d 553 (2d Cir.); In re Greenstreet, Inc., 209 F.2d 660 (7th Cir.) (counterclaim). The plaintiff may not split his/her cause of action in an attempt to stay within the \$10,000 jurisdictional limit. See Thompson v. United States, 215 F.2d 744 (9th Cir.). However, the plaintiff can waive the excess of his/her claim over \$10,000, in order to stay in the United States District Court rather than sue in the Claims Court. See United States v. Johnson, 153 F.2d 846 (9th Cir.). Contracts of carriage evidenced by separate bills of lading, each of which is for less than \$10,000, may be joined in one suit without loss of jurisdiction. See United States v. Louisville & N.R. Co., 221 F.2d 698 (6th Cir.). The court may dismiss an action that seeks in excess of the \$10,000 limit (Carter v. Seamens, 411 F.2d 767 (5th Cir.), cert. denied, 397 U.S. 941 (1970)), or, if the court finds a want of jurisdiction, the court may transfer the case to any other court in which the action could have been filed originally if it is determined that such a transfer would be in the interest of justice. See 28 U.S.C. §1631. The Commercial Litigation Branch monograph entitled Transfer of Cases to the Court of Claims (Claims Court) should be consulted in advance of filing a motion to transfer.

While suit may be maintained on contracts implied in fact, jurisdiction does not obtain for suits on contracts implied in law, i.e., quasi-contractual obligations. See United States v. Minnesota Mut. Inv. Co., 271 U.S. 212 (1926); Goodyear Tire & Rubber Co. v. United States, 276

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U.S. 287, 293 (1928); Southern Pacific Co. v. United States, 192 F.2d 438 (D.C. Cir.); Alliance Assur. Co. v. United States, 252 F.2d 529 (2d Cir.); Knight Newspapers, Inc. v. United States, 395 F.2d 353 (6th Cir.).

Noncontractual Tucker Act claims are of two varieties:

A. Those in which the plaintiff seeks money paid over to the government, directly or in effect, and seeks return of all or part of that sum; and

B. Those in which money has not been paid, but plaintiff asserts that it is entitled to payment from the Treasury nonetheless. In the latter category, plaintiff must allege that the particular provision of law relied upon grants it, expressly or by implication, a right to be paid a certain sum. See Eastport Steamship Corp. v. United States, 372 F.2d 1002 (Ct. Cl.); see also United States v. Testan, 424 U.S. 392 (1976).

Suits on an "Act of Congress" are illustrated by United States v. Hvoslef, 237 U.S. 1 (1914); and Dismuke v. United States, 297 U.S. 167 (1936). A Fifth Amendment "taking" of property requiring just compensation under the Constitution falls within the Tucker Act. See United States v. Causby, 328 U.S. 256 (1946). Such suits are within the jurisdiction of the Land and Natural Resources Division. Carriers' suits involving freight charges disallowed by GAO, and tariff constructions by ICC, are illustrated by United States v. New York, N.H. & H.R.R., 355 U.S. 253 (1957); United States v. Western Pac. R.R., 352 U.S. 59 (1956); and Northern Pac. Ry. v. United States, 330 U.S. 248 (1947).

Under the Tucker Act, federal regulations may form the basis of jurisdiction only if they are regulations of an "executive department." The United States Claims Court has held that only those agencies listed in 5 U.S.C. 101 are executive departments. See Nanfelt v. United States, 2 USCCR No. 40 (Dec. 28, 1982); Connolly v. United States, 716 F.2d 882 (Fed. Cir. 1983). In Nanfelt, the court held that neither the Atomic Energy Commission nor the Energy Research and Development Administration is an executive department; in Connolly, the court found that the Postal Service is not an executive department.

Assistance on questions arising under the Tucker Act may be obtained from the Commercial Litigation Branch of the Civil Division. See USAM 4-1.221, supra.

4-11.840 Veterans' Insurance Litigation

38 U.S.C. §784 authorizes suits against the United States on National Service Life Insurance policies issued during or after World War II (38

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U.S.C. §§701-724), and on U.S. Government Life Insurance policies issued during and after World War I (38 U.S.C. §§740-760), as well as insurance interpleader actions brought by the United States. All persons having or claiming to have an interest in such insurance may be made parties to such a suit, and those not inhabitant of or found within the district in which suit is properly brought may be served personally, by publication, or in such manner as the court specifies. See 38 U.S.C. §784(a). Trial by jury is authorized. See Galloway v. United States, 319 U.S. 372; United States v. Pfitsch, 256 U.S. 547.

The statute of limitations, which is discussed in USAM 4-5.224, supra, is jurisdictional. See Munro v. United States, 303 U.S. 36. That the statute provides no jurisdiction to compel reinstatement of a policy of insurance, see James v. United States, 185 F.2d 115 (4th Cir.). With the court's permission, a witness may be subpoenaed even though he/she resides more than 100 miles from the court. See 38 U.S.C. §784(c).

A policy of insurance will lapse for failure to pay the premium due within the grace period. See Sawyer v. United States, 211 F.2d 476 (6th Cir.) However, NSLI policies may be continued in force where there has been a waiver of premium payments because of continuous total disability of six or more months duration, commencing while the policy is in force under premium paying conditions. See United States v. Parnell, 199 F.2d 654 (4th Cir.), as to the standards for establishing continuous total disability. See Scott v. United States, 189 F.2d 863 (5th Cir.), cert. denied, 342 U.S. 878, for the necessity of a timely application for waiver of premiums. For the forfeiture of insurance benefits because of insured's misconduct, see Smith v. United States, 32 F. Supp. 657 (D. Mont.). For the forfeiture of entitlement to insurance benefits by a beneficiary who has intentionally and feloniously killed the insured, see United States v. Foster, 238 F. Supp. 867 (E.D. Mich.). A successor beneficiary who intentionally and feloniously kills the primary beneficiary is similarly barred from taking insurance benefits. See United States v. Kwasniewski, 91 F. Supp. 847 (E.D. Mich.).

Beneficiary disputes under NSLI policies can often be settled by a partial assignment of benefits pursuant to 38 U.S.C. §718, if the assignment runs from the person determined by the VA as the last designated beneficiary to a person eligible under 38 U.S.C. §718. An assignment to a person intentionally and feloniously killing an insured or a beneficiary should not be sanctioned. The Commercial Litigation Branch of the Civil Division can suggest forms of assignment and judgment to effect a proper disposition of insurance proceeds. Judgments in favor of claimants should be stated in the findings of fact or judgment, as, e.g.,

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A. The date of death or the occurrence of total disability, as the case may be;

B. The date of submission of due proof, in a case involving the payment of total disability benefits under a policy of U.S. Government Life Insurance;

C. Dates determinative of the apportionment of benefits among several claimants, such as the date of death of a particular beneficiary; and

D. The percentage of the recovery allowed as an attorney's fee. See USAM 4-4.270, supra, as to the ten percent restriction on attorneys' fees, payable from the amount awarded in the judgment and not in addition thereto. If the court insists on a judgment containing exact computations showing the amounts payable, the VA "XC" file will have to be returned to permit such computations.

The veteran-insured's "C" or "XC" file is normally furnished by the VA, for use in the defense of insurance litigation. Relevant portions may be viewed by opposing counsel, provided disclosure does not affect the rights of a living third party under the Privacy Act, 5 U.S.C. §§552a(b) & (c). If such a person's permission for disclosure is not readily forthcoming, disclosure can be made pursuant to order of court. See 5 U.S.C. §552a(b)(11). Great care should be taken to prevent the loss or alteration of any portion of the VA "C" or "XC" file, inasmuch as the grant of other benefits, often of great importance to claimants, depends on the integrity thereof. The VA has to have its file, before it can pay any judgment entered in the pending insurance suit.

A more detailed discussion of NSLI is included in the Civil Division Practice Manual, §§3-27.1, et seq. Veterans' insurance litigation now comes within the jurisdiction of the Commercial Litigation Branch of the Civil Division.

Servicemen's Group Life Insurance suits are discussed separately, at USAM 4-11.500, supra. See Civil Division Practice Manual §§3-9.1 et seq.

4-11.850 Right To Financial Privacy Act Litigation

There are no administrative remedies to be exhausted as a prerequisite to litigation under the Right To Financial Privacy Act of

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1978 (P.L. 95-630, Title XI, 92 Stat. 3697-3710). Limitations in such suits are discussed in USAM 4-5.229, supra. The assessment of attorney fees and court costs against the government in such litigation is discussed in USAM 4-4.280 and 4-4.530, supra.

Jurisdiction for Right to Financial Privacy Act suits covers actions for both money damages and specific injunctive relief. The Act prohibits any agency or department of the United States from obtaining (or any private "financial institution," as defined in 12 U.S.C. §3401(1), from disclosing) the financial records of a financial institution's "customer," as defined in 12 U.S.C. §3401(5), except where access is authorized by one of the express exceptions to the Act or is accomplished through one of the five access mechanisms mandated by the Act:

- A. Customer authorization;
- B. Administrative summons or subpoena;
- C. Search warrant;
- D. Judicial subpoena; or
- E. Formal written request.

Additionally, restrictions on the interagency transfer of financial records once obtained by the government under the Act are established in 12 U.S.C. §3412.

The Act provides for injunctive actions challenging intended government access to financial records (see 12 U.S.C. §3410) and also provides for injunctive relief to enforce compliance with any of its provisions for procedures (see 12 U.S.C. §§3416 and 3418). The Act also provides for the assessment of money damages against any agency or department of the United States or private financial institution obtaining or disclosing financial records in violation of the Act's provisions, at a statutory minimum amount of \$100 regardless of the volume of records involved. See 12 U.S.C. §3417(a)(1). Beyond this statutory minimum, both actual damages sustained by the customer as the result of a disclosure, as well as discretionary punitive damages where a violation is found to have been "willful or intentional," are also allowed, together with costs and reasonable attorney fees. See 12 U.S.C. §3417(a)(2)(3)(4). Venue is set forth in 12 U.S.C. §3416, as is the limitations provision of the Act requiring actions to be brought within three years. But see 12 U.S.C. §3410(a) for the 10/14-day limitation on actions to enjoin intended government access. A fuller exposition of the Act, and related litigation suggestions, may be found in the Civil Division Practice Manual at §§3-53.1, et seq. See also USAM 9-4.800 et seq.

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In the event of the litigation under the Right To Financial Privacy Act, contact Barbara L. Gordon (FTS 633-3178) or Thomas Peebles (FTS 633-3693) of the Federal Programs Branch of the Civil Division immediately for any assistance required.

4-11.860 Federal Employees Group Life Insurance Suits

The Civil Division Practice Manual, §§3-54.1, et seq., contains a full discussion of this topic. Pertinent statutes are found at 5 U.S.C. §§8701-8716.

The primary FEGLI insurer is a private company, the Metropolitan Life Insurance Company, which administers this group program through the nongovernmental Office of Federal Employees Group Life Insurance, 4 East 24th Street, New York, N.Y. 10010 (tel. 212-578-2975). Actions for FEGLI proceeds are ordinarily brought directly against Metropolitan.

Under limited circumstances, the United States, by virtue of 5 U.S.C. §8715, is also subject to suit (in federal court) in FEGLI cases. However, a cause of action will not lie against the United States under that statute unless a breach of legal duty or obligation is shown. See Kimble v. United States, 345 F.2d 951 (D.C. Cir. 1965); Barnes v. United States, 307 F.2d 655 (D.C. Cir. 1962); Railsback v. United States, 181 F. Supp. 765 (D. Neb. 1960).

Thus, whenever the government is included as defendant in a FEGLI suit, dismissal should be sought if the complaint fails to allege a specific breach of a statutory legal duty or obligation on the United States. A sample dismissal motion can be found at Civil Division Practice Manual §3-54.19.

Telephonic advice concerning FEGLI suits can be obtained either from David Seaman of the Civil Division (FTS 724-7296) or Randolph Sim of the Office of Personnel Management (FTS 254-6586).

4-11.870 Mass Tort Litigation

There has been a dramatic increase in the number of mass tort claims filed against the United States. The Torts Branch of the Civil Division is currently defending thousands of suits involving allegations of personal injury caused by toxic substances, including asbestos, dioxin, radiation, herbicides, pesticides and chemical solvents. This litigation involves both direct personal injury actions and third-party claims by manufacturers for contribution and indemnity. These cases frequently rest on the Federal Tort Claims Act and the Tucker Act.

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Mass tort situations pose special case management problems. Toxic tort cases typically involve long latency periods, meaning that the injuries do not become apparent, and the litigation is not filed, until as long as 30 years after the exposure. These cases involve massive and prolonged discovery activities, often involving millions of documents. Further, claims arising from exposures to toxic substances require familiarity with specialized scientific and medical issues. This type of litigation also holds the potential for fundamental policy conflicts with the federal government's environmental and occupational enforcement activities.

The Torts Branch of the Civil Division has developed considerable expertise in the management of mass tort litigation, including the use of computerized litigation support. U.S. Attorneys confronted with the prospect of large-scale tort claims against the United States should contact the Torts Branch as early as possible, preferably before suit is filed. The Torts Branch is prepared to assume direct responsibility for mass tort litigation, including hazardous substance and product liability litigation, in appropriate cases.

4 12 000
ACTIONS VS GOV'T FOR
NON-MONETARY RELIEF

USAM (superseded)

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4-12.000 ACTIONS AGAINST THE GOVERNMENT SEEKING NON-MONETARY RELIEF

While lack of jurisdiction can be raised by the government at any stage of court proceedings (see USAM 4-5.921 and 4-5.220, supra), it is important that lack of jurisdiction be raised, in each case where this defense is available, with the first motion or answer filed.

4-12.100 NO SPECIFIC RELIEF AGAINST THE UNITED STATES

The Supreme Court long ago held that specific performance would not lie in a suit against the United States. See United States v. Jones, 131 U.S. 1 (year). Other actions for specific relief against the United States have been held to be without the consent to sue. See Identification Devices, Inc. v. United States, 121 F.2d 895 (D.C. Cir.), cert. denied, 314 U.S. 615 (1941) (injunction); Clay v. United States, 210 F.2d 686 (D.C. Cir.), cert. denied, 347 U.S. 927 (1953) (action to void an assignment of patents to the United States); Jackson v. United States, 27 Ct. Cl. 74 (year) (action to set aside a conveyance to the United States by a third party, as fraudulent as to plaintiff); Leather v. United States, 61 Ct. Cl. 388, cert. denied, 271 U.S. 660 (1952) (derivative stockholders' action to set aside corporate conveyance to the United States); Blanc v. United States, 244 F.2d 708 (2d Cir.), cert. denied, 355 U.S. 874 (1957) (equitable relief to compel reversal of denial of compensation benefits); but cf. United States v. Milliken Imprinting Co., 202 U.S. 168, 173-174 (1915) and Ackerlind v. United States, 240 U.S. 531 (1915) (reformation incident to an action for money judgment). While mandamus is a legal remedy, its issuance is governed by equitable principles. See United States v. Olds, 426 F.2d 562 (2d Cir.). It will not issue against the United States eo nomine. See McCune v. United States, 374 F. Supp. 946 (S.D. N.Y.).

Statutes permitting suit against certain corporations and sue-or-be-sued agencies and officials may expressly preclude specific relief. See USAM 4-11.010, supra.

4-12.200 DEFENSE OF FORECLOSURE, QUIET TITLE, AND PARTITION ACTIONS:
28 U.S.C. §2410

28 U.S.C. §2410 waives the government's immunity from suit in five types of action, as to real and personal property on which the United States has a lien. The nature of the lien determines which unit of the Department may be looked to by the U.S. Attorney for support, coordination and supervision. This title of the Manual does not deal with the cases supervised by the Criminal, Land and Natural Resources, and Tax Divisions.

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If the government's lien is for federal taxes, the Lien Unit of the Tax Division will supervise the case. If the government's lien is for a criminal fine or bond forfeiture, the Fine Enforcement Unit of the Criminal Division supervises. If the government holds a non-tax, non-criminal lien, such as a mortgage, judgment, lien, or merchant's lein, the Commercial Litigation Branch of the Civil Division supervises. It also supervises the defense of the type of condemnation action in which a public body seeks to demolish a deteriorated building. But the Land and Natural Resources Division (General Litigation Section) supervises defense of the type of condemnation action in which a public body seeks to take over a property and use it (e.g., for a road or a courthouse). See USAM 5-7.120, infra.

If the nature of the government's lien is not disclosed by the complaint, its nature should be ascertained by an informal inquiry to the plaintiff's attorney. If that fails, formal discovery should be used. 28 U.S.C. §2410 requires that the interest of the United States be set forth in the complaint "with particularity." See City Bank of Anchorage v. Eagleston, 110 F. Supp. 429 (D. Alaska, 1953).

4-12.210 Actions Not Within 28 U.S.C. §2410

28 U.S.C. §2410 does not apply if the plaintiff seeks an injunction, see Shaw v. Rippel, 224 F. Supp. 77 (E.D. Ill.), or a money judgment. Such relief must be sought, if at all, under other "consent statutes." If the relief sought is foreclosure, 28 U.S.C. §2410 requires that the plaintiff ask for a judicial sale. Such a sale is not required in the other four types of action permitted by 28 U.S.C. §2410.

If the interest of the United States is not a lien but rather a fee title or a leasehold, 28 U.S.C. §2410 does not apply, but the plaintiff may be able to invoke 28 U.S.C. §2409 or §2409a.

United States v. Brosnan, 363 U.S. 237 (1959), held that, in states which permit judicial or nonjudicial foreclosure of mortgages without actual notice to junior lienors (giving notice merely by advertising or by posting notices), such foreclosures can also destroy government junior liens without the service of process prescribed by 28 U.S.C. §2410. Senior liens are not affected by such foreclosure, see 59 C.J.S. 1030, Mortgages §596(a). Mennonite Board of Missions v. Adams, 51 U.S.L.W. 4872 (June 21, 1983), held that in tax foreclosures by state and local bodies, advertising and posting are not constitutionally adequate and that notice by mail was the minimum required. The federal government was not a

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party to this case and may not have constitutional safeguards enjoyed by private parties; but presumably local taxing bodies will change their procedures for tax foreclosures which should also benefit the federal government.

Kasdon v. G.W. Zierden Landscaping, Inc., 541 F. Supp. 991 (D. Md., 1982), held that if there has been a foreclosure by a local taxing authority, the purchaser of a title in that proceeding cannot bring an action under Section 2410 to clear title and remove a federal lien unless the state tax foreclosure included a "judicial sale," that is, a sale ordered by a court judgment. If the state tax foreclosure did not include a judicial sale, the plaintiff who seeks to clear off a federal lien must describe his/her action as a foreclosure and seek in that action the judicial sale which was lacking in the previous foreclosure by the taxing authority. See Civil Division Practice Manual, §3-32.1, et seq.

4-12.220 Screening New Actions Under 28 U.S.C. §2410

The following items should be checked before filing a responsive pleading in an action brought under 28 U.S.C. §2410:

- A. Has the Attorney General been served by certified or registered mail?
- B. Has the U.S. Attorney been served?
- C. Does the summons allow 60 days to file a response?
- D. Does the complaint set forth the interest of the United States with particularity?
- E. If the action is a foreclosure, does the complaint seek a judicial sale?

All these are required by 28 U.S.C. §2410; the requirements are jurisdictional. See Messenger v. United States, 231 F.2d 328 (2d Cir.). There are no rulings as to exactly what detail will meet the requirement of "particularity," but usually the U.S. Attorney's prime need is to know the agency involved in order to secure a litigation report.

4-12.230 Removal of Actions Brought in State Courts

For removal generally, see "Removal of Cases," Civil Division Practice Manual §§3-1.1 through 3-1.9. Usually the Commercial Litigation

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Branch of the Civil Division will leave the decision as to removal of actions brought under 28 U.S.C. §2410 to the U.S. Attorney.

Removal of actions brought in state courts under 28 U.S.C. §2410 is authorized by 28 U.S.C. §1444. Removal is an absolute right and there is no right of remand in these cases. See Vincent v. P.R. Matthews Co., 126 F. Supp. 102 (N.D. N.Y.); Hamlin v. Hamlin, 237 F. Supp. 299 (N.D. Miss.). Removal should be accomplished within thirty days of receipt of a copy of the initial pleading, whether by service of process or otherwise.

As to the removal of interpleader actions, see 1A Moore's Federal Practice, ¶0.164[1], n. 18 (2d ed., 1974) criticizing Fountain Park Coop, Inc. v. Bank of America National Trust & Savings Assn., 289 F. Supp. 150 (C.D. Cal.).

4-12.240 Responsive Pleadings

Informal requests to opposing counsel to correct deficiencies, such as those cited in USAM 4-12.220, supra, will often obviate filing a preliminary motion. Answers should assert the interests of the United States and claim priority in accordance with the federal rule of "first in time, first in right." See USAM 4-12.250, infra. If the government holds a first lien position and the client agency does not wish foreclosure of that lien, the answer should pray that the sale on plaintiff's lien foreclosure should be "subject to" the prior lien of the government. If the client agency desires a sale free and clear, the prayer in the answer should so state.

In some instances, the client agency may advise that it can find no identifiable interest in the property described in the complaint. Any disclaimer filed on this account should be carefully limited to the particular property described in the complaint and to the government agency referred to in the complaint. The government could have other liens or interests of which you are not aware. No disclaimer should be filed merely because the government's lien interest is subordinate to that of the plaintiff. See also Civil Division Practice Manual, §3-3.1, et seq.

4-12.250 Priority of Liens

Until the Supreme Court decided United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979), there was a conflict of authority as to:

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A. Whether a lien of the United States should be subordinated to a later rival lien, solely because state law affords priority to the rival lien; and

B. Whether a rival lien, prior in time to a lien of the United States and entitled to priority under state law, should be denied priority if inchoate.

Kimbell Foods applies state priority law to consensual liens securing claims of the Farmers Home Administration and the Small Business Administration.

In determining whether state priorities apply to liens arising from other programs, particular attention should be paid to the Court's three inquiries in Section III of the Kimbell Foods opinion:

A. Whether the federal program at issue necessarily requires uniform federal rules.

B. Whether adopting state substantive law would frustrate specific objectives of the federal programs at issue.

C. A court must consider the extent of disruption in normal commercial relationships caused by a uniform federal rule. If not persuaded that a special federal rule is required, the court may adopt as federal law the relevant state rule.

In the case of loans made by HUD the court in Chicago Title Insurance Co. v. Sherred Village Assoc., Nos. 82-1657 and 82-1658 (1st Cir., filed May 17, 1983) held that mechanic's liens recorded under state law have priority over a prior recorded federal mortgage. Thus, HUD mortgages would appear to be in the same situation viz-a-viz priority of liens as SBA and FmHA.

Courts have also applied the Kimbell Foods criteria in several cases involving local tax liens that have priority under state law and existing federal mortgages. In United States v. Dansby, 509 F. Supp. 188 (N.D. Ohio 1980) the court held that although the tax lien was senior under Florida law it could not operate "so as to destroy the pre-existing federal lien." See United States of America v. David Friedland, et al 502 F. Supp. at 611 (1980).

In cases involving Federal National Mortgage Association mortgages, courts have held that notwithstanding priorities under local law, liens created by state law cannot extinguish the rights of the United States. See Rust v. Johnson, 597 F. 2d 174 (9th Cir. 1979); United States v. County of Richland, 500 F. Supp. 312 (D. S.C. 1980).

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In the Marine Midland Bank v. United States, 687 F. 2d 395 (Ct. Cl. 1982) the court held that a federal lien created automatically by the title vesting clause in government procurements contracts is in the nature of a purchase money security interest superior to the general liens of creditors. The court held that under Kimbell Foods state law was not the federal rule of decision to be applied in procurement cases.

Where the consensual lien arises pursuant to a federal statute that prescribes a particular priority, that priority will be honored.

The Kimbell Foods court also suggested limits on its decision:

Adopting state law as an appropriate federal rule does not preclude federal courts from excepting local laws that prejudice federal interests . . . (citing cases). The issue here, however, involves commercial rules of general applicability, based on codes that are remarkably uniform throughout the Nation. Footnote 137.

This discussion does not undertake to cover the subject of tax liens. Guidance as to them should be sought from the Tax Division. Questions pertaining to non-tax, non-consensual liens (e.g., those based upon judgments, criminal fines, and statutory civil penalties) remain unresolved. For a further discussion, see Civil Division Practice Manual, §§3-32.7 through 3-32.11b.

4-12.253 Statutory Exceptions to Rule of "First in Time, First in Right"

The federal departments and agencies which make loans secured by liens on real and personal property will often pay state and local ad valorem taxes on the mortgaged property, if the borrower fails to pay them. Such payments by the government are sometimes required by statute and at other times are made as a matter of policy. For a fuller discussion, see Civil Division Practice Manual §3-32.11.

In light of Kimbell Foods it is not clear whether or not taxes which are not ad valorem have this priority. Prior to Kimbell Foods cases such as In re Lehigh Valley Mills, Inc., 341 F.2d 398 (3d Cir. 1965); United States v. Clover Spinning Mills Co., 373 F.2d 274 (4th Cir. 1966); Director of Revenue, State of Colo. v. United States, 392 F.2d 307 (10th Cir. 1968), held that taxes which are not ad valorem do not have this priority.

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Similar cases held that interest and penalties on state and local ad valorem taxes likewise do not have priority. See United States v. Consumers Scrap Iron Corp., 384 F.2d 62 (6th Cir. 1967); United States v. Christensen, 218 F. Supp. 722 (D. Mont. 1963); United States v. City of Albuquerque, 465 F.2d 776 (10th Cir. 1972). In United States v. Cambria County, 532 F. Supp. 634 (W.D. Pa. 1982) the Court held that under Kimbell Foods Pennsylvania law should be applied and the lien for taxes due included interest, fee penalty and cost assessments. It stated that United States v. Consumers Scrap Iron Corp., 384 F.2d 62 (6th Cir. 1967) relied on by the government was no longer good authority in light of Kimbell Foods.

4-12.260 Decree and Sale

Limit judgments and decrees entered in proceedings filed under 28 U.S.C. §2410 to affect only interest of the government set forth in the complaint. If the foreclosure action is filed by a lienor whose lien is junior to that of the government, the decree should provide for the sale of the property "subject to" the prior lien of the United States as required by 28 U.S.C. §2410(c). If the client agency so authorizes, the U.S. Attorney may consent to a sale free and clear.

The government's right of redemption should be recognized in the foreclosure decree. See USAM 4-12.270, infra.

The client agency should be informed of the time and place set for the sale of the property being foreclosed, so that it may attend and enter a protective bid if it so wishes. If the foreclosure sale yields more than enough to cover prior liens, seek payment from any surplus monies for any subordinate liens of the government.

4-12.270 Redemption Rights

The government has one year from the date of sale in which to redeem the property sold at judicial foreclosure, if its lien is a non-tax lien. See 28 U.S.C. §2410(c); United States v. John Hancock Mutual Life Ins. Co., 364 U.S. 301 (1960). The agency should be reminded of its right to redeem, absent a need for court action to enforce its redemption rights. Do not claim this right of redemption if the agency so requests.

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On occasion, owners or lienors of property on which the United States holds a lien may ask for release of the lien or of the government's right of post-sale redemption. No release should be executed without the receipt of some consideration. The agency's view should be requested in each case. (Of course, if no judicial proceeding is pending, the release of the agency's mortgage lien would be a matter for the client agency, absent a referral to the Department for some judicial action.) The dollar amount of the authority delegated to the U.S. Attorneys compromise lien claims in actions under 28 U.S.C. §2410 is equally applicable to the compromise of post-sale redemption rights of the United States under 28 U.S.C. §2410(c). Cases involving tax liens, liens on a vessel or other maritime property, and liens arising from a criminal fine judgment or a judgment on an appearance bond, are expressly excluded from the Civil Division delegation of authority to U.S. Attorneys. If a release of a lien or right of redemption is executed, expressly limit the release to the precise property which is the subject of the plaintiff's suit and to the particular lien or right of redemption of which release was requested.

USAM (superseded)

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4-13.000 ACTIONS AGAINST GOVERNMENT OFFICERS, MEMBERS OF THE ARMED SERVICE
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The Department will afford counsel and representation to government officers, service personnel, and employees of the Executive Branch, when suits for injunctions, mandamus, and similar relief are brought against them in connection with the performance of their official duties. No special form of request for representation is required in such cases. It is obviously in the interest of the government and the Department to provide representation. Any case seeking such relief, which is proceeding without the Department's participation, should be brought to the attention of the Civil Division immediately, so that intervention can be considered.

A government officer, members of the armed service or employee who is sued personally for money damages always has the right to retain private counsel at his/her own expense, to represent him/her in his/her individual capacity. However, such an individual, sued in his/her individual capacity, may qualify for Department of Justice representation so long as his/her actions were performed within the scope of employment and it is in the interest of the United States to provide representation. 28 U.S.C. §50.15(a). A written request for representation must be made and endorsed by the employing agency. These requests should be sent directly to the Civil Division, which must approve all such requests. Where time does not permit written communications with the Division, U.S. Attorneys may telephonically request conditional authority to preserve the defendant's rights, pending written confirmation. The defendant should be informed of the conditional nature of such representation.

Each defendant should be advised that approval of his/her request for representation by the Department of Justice does not entitle him/her to indemnification from the government for any money judgment entered against him/her in his/her individual capacity, as there is presently no statutory provision for such indemnification.

Exceptions and qualifications to providing representation in suits for money damages against government personnel are discussed in succeeding sections.

See Torts Branch Representation Monograph I; USAM 4-13.320, infra, for suits against officers and employees when they are sued for money in tort. See the topic on Removal (§§3-1.1 through 3-1.9) in the Civil Division Practice Manual, as to policy and procedure for removal of such cases to the federal courts.

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When representation is provided in accordance with Department policy, U.S. Attorneys are authorized to incur litigation expenses necessary for a proper defense. Rule 25(d), Federal Rules of Civil Procedure, provides for the automatic substitution of successor officials, so that federal court actions against officers in their official capacity no longer abate. See, e.g., Barnett v. Rodger, 410 F.2d 995 (D.C. Cir.). Aside from administrative review cases sanctioned by statute, certain defenses should be considered in each case, depending upon the facts that are developed. For the immunity of government officers see USAM 4-5.921, 4-13.310, and 4-13.360 through 4-13.364, infra. See Torts Branch Representation Monograph III.

For the requirement of exhaustion of administrative remedies applicable in many cases, see USAM 4-5.922, supra and USAM 4-13.434, infra. For the requirement of a violation of plaintiff's legal right and his/her standing to sue, see USAM 4-5.923, supra and 4-13.431, infra. For circumstances in which failure to join an indispensable party may be a defense, see USAM 4-5.925, supra and USAM 4-13.431, infra and USAM 4-13.433, infra. That specific relief against an officer is beyond the court's jurisdiction if relief would actually be against the United States, see USAM 4-5.921, supra. The effect of the Declaratory Judgment Act and the Administrative Procedure Act is discussed in USAM 4-5.924, supra.

4-13.100 ADMINISTRATIVE REVIEW PROCEEDINGS IN GENERAL

A substantial number of administrative review cases will require the attention of the U.S. Attorneys. For relevant provisions of the Administrative Procedure Act, see 5 U.S.C. §§551-559. The judicial review of such proceedings is covered by 5 U.S.C. §§701-706. The following sections deal with such review.

4-13.110 Bases for Setting Aside Agency Action--Aside from Lack of Substantial Evidence

5 U.S.C. §706 provides that the court may hold unlawful and set aside agency action, findings, and conclusions, in certain circumstances. For such action with respect to lack of substantial evidence in the record, see USAM 4-13.120, infra. The remaining bases are briefly summarized or illustrated hereinafter. 5 U.S.C. §702 deals with standing to challenge agency action. See Data Processing Service v. Camp, 397 U.S. 150 (1970) as

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to those who may be "aggrieved" by agency action. 5 U.S.C. §704 recognizes that there may be other or special provisions for judicial review which are necessarily controlling over the more generalized provisions of the Administrative Procedure Act. See 5 U.S.C. §§553, 554(a), as to certain agency rule making and adjudications excepted from the Administrative Procedure Act. 5 U.S.C. §701(a) excludes the application of the judicial review provisions of the Administrative Procedure Act when "statutes preclude judicial review." See, e.g., 38 U.S.C. §211(a) discussed at §3-8.1 through 3-8.6 in the Civil Division Practice Manual. Review is also excluded to the extent "agency action is committed to agency discretion by law." See 5 U.S.C. §701(a)(2) (1971); Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309; cf. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410-413 (1959).

5 U.S.C. §706(2)(F) permits a court to set aside agency action which is "unwarranted on the facts to the extent that the facts are subject to trial de novo by the reviewing court." However, de novo review is appropriate only where there are inadequate factfinding procedures in an adjudicatory proceeding. Camp v. Pitts, 411 U.S. 138, 143 (1972). See USAM4-6.500, supra, for certain civil penalty cases triable de novo pursuant to 28 U.S.C. §2461(a), setting aside agency action taken "without observance of procedure required by law," is illustrated by personnel discharge cases in which agencies have failed to follow their own regulations or the command of statutes, if any. See USAM 4-13.350, infra. The bases for setting aside agency action, enumerated at 5 U.S.C. §706(2)(B) and (C) as contrary to constitutional right, in excess of statutory jurisdiction, etc., need no explanation. In determining if agency action is arbitrary, capricious, or an abuse of discretion (5 U.S.C. §706(2)(A)), the court must determine whether the decision was based on a consideration of relevant factors and if a clear error of judgment was made. See Citizens to Preserve Overton Park v. Volpe, supra, at 416. In such circumstances, as noted in Overton, the court is not empowered to substitute its judgment for that of the agency and should remand the case for further agency consideration.

4-13.120 Agency Actions to be Sustained if Supported by Substantial Evidence in the Record as a Whole

Review under the substantial evidence rule is authorized when agency action is based on the adjudication of matters under 5 U.S.C. §§556-557, including rules required by statute to be made on the record after opportunity for an agency hearing (see 5 U.S.C. §553(c)). See Citizens to Preserve Overton Park v. Volpe, supra at 414. Review is to be made in such cases, and those under other statutes calling for "review on the

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record" (5 U.S.C. §706(2)(F)), on the record made before the agency. See the last sentence of 5 U.S.C. §706; United States v. Branchi & Co., 373 U.S. 709, 715 (1962). That Congress has not expressly provided that such a procedure is to be exclusive does not justify an attempt to bypass the procedure. See Whitney Bank v. New Orleans Bank, 379 U.S. 411 (1965).

Agency action should be sustained if there is substantial evidence in the record to sustain the agency's action when the record is viewed as a whole. See Universal Camera Corp. v. Labor Board, 340 U.S. 474 (1951). The court cannot substitute its discretion for that of the agency. See Burlington Truck Lines v. United States, 371 U.S. 167, 168 (1963). It can only affirm agency action or vacate and remand for further proceedings. See FTC v. Sperry & Hutchinson Co., 405 U.S. 223, 249 (1972). The orderly functioning of the procedure for review requires that the grounds upon which agency action is based, as shown in its findings and analysis, be clearly disclosed, for the court cannot supply missing findings. See FTC v. Sperry & Hutchinson Co., *supra* at 248-249; Burlington Truck Lines v. United States, *supra*. The court cannot displace the agency's choice between two conflicting views, even though the court could justifiably have made a different choice had the matter been before it *de novo*. See Labor Board v. Walton Mfg. Co., 369 U.S. 404, 405 (1912). Substantial deference is to be given the expertise of agencies which Congress has entrusted with particular matters, thus achieving uniformity and consistency of treatment in the areas of their expertise. See Whitney Bank v. New Orleans Bank, 379 U.S. 411, 420-421 (1972); FPC v. Florida Power & Light Co., 404 U.S. 453, 469 (1933); Weinberger v. Bentex Pharmaceuticals, Inc., 412 U.S. 645, 654-654 (1973); Zenith Radio Corp. v. United States, 437 U.S. 443 (1978).

4-13.200 SOCIAL SECURITY ACT REVIEW PROCEDURES

A larger number of actions are brought each year involving the review of administrative determinations of the Secretary of HHS under the Social Security Act, 42 U.S.C. §§401-431. See in particular 42 U.S.C. §405 as to judicial review, 42 U.S.C. §§409-11 and 416 as to definitions, and 42 U.S.C. §423 as to disability cases. Regulations promulgated under the authority of 42 U.S.C. §405(a) appear in 20 C.F.R. §§404.1 through 404.1610. See in particular 20 C.F.R. §§404.701 through 404.780 concerning evidence; 20 C.F.R. §§404.901 through 404.995 dealing with procedures; 20 C.F.R. §§404.1002 through 404.1077 as to employment, wages and self-employment; 20 C.F.R. §§404.1080 through 404.1096 dealing with self-employment income; and 20 C.F.R. §§404.1501 through 404.1598 concerning rights and benefits based on disability.

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42 U.S.C. §405(g) clearly contemplates an administrative review type of proceeding, and not an action for a money judgment. Consistent with this type of proceeding, 42 U.S.C. §405(b) imposes on the Secretary the duty of making findings of fact and a decision as to the rights of any individual applying for payments. 42 U.S.C. §405(g) requires that a certified copy of the transcript of record before the Secretary, including the evidence upon which the findings and decision of the Secretary is based, be filed with the government's answer (or motion for summary judgment) in the review proceeding. Provision is made for remand to the Secretary for the taking of additional evidence, with opportunity for the Secretary to modify or affirm his/her previous findings and decision. Decisions of the Secretary of HHS which are not timely appealed are accorded finality by 42 U.S.C. §405(h). Judicial review must be sought within sixty days, unless the Secretary exercises his/her discretion to allow further time. See 20 C.F.R. §§404.911 and 4-5.223. If plaintiff's action is untimely under these criteria, the court lacks jurisdiction, and a motion to dismiss should be filed. The Chairman of the Appeals Council can provide an affidavit reciting the facts relevant to a showing of untimely suit, upon request. The administrative review type of proceeding is the only one provided for, and no other type of judicial review is authorized. Wellens v. Dillon, 302 F.2d 442 (9th Cir.), app. disp., 371 U.S. 11.

For the standards to be applied by the Secretary in adjudicating disability claims, see 42 U.S.C. §423; 20 C.F.R. §§404.1501 through 404.1598; Kerner v. Celebrezze, 340 F.2d 736 (2d Cir.), cert. denied, 382 U.S. 861; Rodriguez v. Celebrezze, 349 F.2d 494 (1st Cir.); David v. Gardner 395 F.2d 681 (6th Cir.); and Know v. Finch, 427 F.2d 919 (5th Cir.). That family employment may not constitute a bona fide employment relationship, see Foss v. Gardner, 363 F.2d 25 (8th Cir.). See USAM 4-13.210, infra as to the standard of review applicable. See USAM 4-13.220, infra as to the judgment authorized in such cases.

See also Civil Division Practice Manual §§3-38.1 et seq.

4-13.210 Standard of Review

The findings of the Secretary as to any fact, "if supported by substantial evidence, shall be conclusive". See 42 U.S.C. §405(g); Eastman v. Gardner, 373 F.2d 481 (6th Cir.). For a definition of "substantial evidence", see Universal Corp. v. Labor Board, 340 U.S. 474 (1951); and Celebrezze v. Bolas, 316 F.2d 498 (8th Cir.). Deference is to be accorded the Secretary's decision. See Reyes v. Secretary of HEW, 476 F.2d 910 (D.C. Cir.). The reviewing court cannot hear the matter de novo, and review is solely on the record made before the Secretary. See Paul v.

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authorized to award fees for work performed by counsel in the administrative proceeding. See 42 U.S.C. §406(a). The Secretary's award of such fees is not reviewable by the court and the court cannot award fees for work that was done before the Secretary. See Chernock v. Gardner, 360 F.2d 257 (3d Cir.); Mendez v. Gardner, 373 F.2d 488 (1st Cir.); Ray v. Gardner, 387 F.2d 162 (4th Cir.); McDonald v. Weinberger, 512 F.2d 144 (9th Cir.); but see Webb v. Richardson, 472 F.2d 529 (6th Cir.), as to the special rule now applied in the Sixth Circuit. The attorney's fees awarded by the court under 42 U.S.C. §406(b) may include an allowance based on past-due installments payable to other dependent members of the family. See Hopkins v. Cohen, 390 U.S. 530 (1968).

4-13.230 Regulations Governing Social Security Act Disability Benefits

20 C.F.R. §404, Subpart P, pertains to claims for disability benefits in which vocational factors (age, education, and work experience) must be considered. The regulations govern those cases in which an individual has an exertional impairment (i.e., a problem limiting a claimant's strength) which is not severe enough to warrant a finding of disability on medical considerations alone, but which is asserted to be severe enough so that the individual can no longer perform his/her past work. To determine disability in these cases, the vocational factors of age, education, and work experience must be considered with the claimant's residual functional capacity (i.e., ability to do light work, sedentary work, or medium work). Appendix 2 to the regulations contains tables on medical-vocational factors, that interrelate a claimant's residual functional capacity with his/her age, education, and prior work history. (The prior existing listing of purely medical criteria that establish disability without reference to vocational factors is Appendix 1.) A recent Supreme Court decision in Heckler v. Campbell, 51 U.S.L.W. 4561 (May 17, 1983), upheld the use of the medical-vocational guidelines to determine a claimant's right to disability benefits.

The decision columns of the tables in Appendix 2 constitute findings by the Social Security Administration as to whether a claimant, whose medical condition alone is not severe enough to warrant a finding of disability, is disabled within the meaning of the Social Security Act. In cases in which the regulations dictate a determination of disability, the conclusion is based on the implicit finding that significant numbers of jobs do not exist in the national economy for persons with the given residual functional capacity and particular vocational factors. Conversely, a conclusion of no disability is based on an implicit finding that significant numbers of jobs do exist for persons with the indicated vocational factors. For example, the regulations mandate a conclusion of disability if a claimant has been determined to be unable to do his/her

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past work, to be limited to sedentary work, to be of advanced age, to have only limited education and to have previous work experience in only unskilled jobs. See Table 1, line 1, Rule 201.01. This conclusion rests upon the Secretary's taking administrative notice that a significant number of jobs do not exist in the national economy for such a person. The results indicated in the decision columns of the tables are conclusive on the issue of disability.

The regulations apply only to those cases in which vocational factors are to be considered. In certain categories of cases, vocational factors may not be considered. For example, the Social Security Act provides that some categories of disability claimants must establish disability by meeting the strict standard of the purely medical criteria listed in Appendix 1. This strict standard applied to claimants for benefits based on statutory blindness (Titles II and XVI), claimants for widows' or widowers' disability benefits (Title II), and claimants for child's disability benefits (Title XVI). In these cases, vocational factors are not a relevant consideration. The regulations do not apply in these cases.

4-13.231 Federal Disability Programs

There are two federal disability programs authorized by the Social Security Act:

A. Title II of the Act provides for disability benefits for all workers and dependents covered by the Old-Age, Survivors, Disability Insurance Program (OASDI), 42 U.S.C. §401 et seq. These benefits are financed by a tax paid by all covered workers. To a certain extent, the amount of benefits paid to a covered worker depends on that person's contribution while working. The benefits are paid to covered persons who are no longer working regardless of any other unearned income they may have, in other words, the program is not "needs-based." For these reasons, the program is generally considered a "social insurance" program. Title II benefits are referred to by most people as "Social Security."

B. Title XVI of the Act established the Supplemental Security Income Program (SSI). See 42 U.S.C. §1381 et seq. The SS payments provided to old, blind and disabled persons who are poor are based on an income standard. The Social Security program and the SSI program provide virtually universal coverage of all disabled persons.

The distinction between the social insurance character of the Social Security program under Title II and the needs-based or welfare nature of

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the SSI program under Title XVI is not, however, all that hard and fast. Many persons who receive social security benefits under Title II also receive SSI basic benefit. At the same time, the Social Security Program itself functions as a form of income redistribution in that social security benefits for many persons are greater than the "insurance value" of their OASDI contributions during their working lives. Other covered workers receive less than the insurance value of their OASDI contributions.

The definition or standard of disability is the same under both Titles II and XVI:

. . . [T]he term 'disability' means . . . inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. . . .

[A]n individual shall be determined to be under a disability only if his physical or mental impairments are of such severity that he is not only unable to do this previous work but cannot, considering his age, education and work experience, engage in any kind of substantial gainful work which exists in the national economy. . . .

See 42 U.S.C. §423(d)(1). See also 42 U.S.C. §1382c(a)(3).

Pursuant to the statutory definition, claimants may establish disability in either of two ways. They may show that they have such severe impairments that they are disabled based on medical considerations alone (strict standard). Or they may show that given their medical condition and their age, education and work experience (vocational factors) they are unable to engage in any kind of substantial gainful work which exists in the national economy (combined medical-vocational standard).

4-13.300 OTHER SUBJECT AREAS

4-13.310 Contract Actions

A contracting officer who signs a government contract, signs only as an authorized representative of the United States. He/she cannot be held

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liable for a breach of that contract by the United States. See Ove Gustavsson Contracting Co. v. Floete, 278 F.2d 912 (2d Cir.), cert. denied, 364 U.S. 894. Accord, see Romeo v. United States, 462 F.2d 1036 (5th Cir.), cert. denied, 410 U.S. 928, involving the withholding of loan disbursements by the Administrator of SBA. Compare Kuentzler v. Occidental Life Insurance Co., 292 F. Supp. 532 (C.D. Cal.) and Allen v. Allen, 291 F. Supp. 312 (S.D. Iowa), as to the immunity of the "fiscal intermediary" acting as agent for HHS in the Medicare program.

4-13.320 Criminal Proceedings

The policy of affording representation to government officers, members of the armed services and employees, extends to providing counsel and representation when such persons have been charged with the violation of state or local criminal laws as a result of the performance of their official duties. The criteria for such representation are: (1) that the official was acting in the scope of employment and (2) that representation is in the interest of the United States. See 28 C.F.R. §50.15. Representation is justified if a substantial federal interest is involved. A substantial federal interest is likely to be involved when a federal official is charged with murder in conjunction with the performance of his/her official duties. See, e.g., In re Neagle, 135 U.S. 1 (1889); Colorado v. Symes, 286 U.S. 510 (1932). Similarly, state licensing and regulatory requirements may in some cases result in prosecutions that merit defense because of the potential impact of such requirements on the federal government or if such requirements are unnecessarily in derogation of federal authority. Cf. Johnson v. Maryland, 254 U.S. 51 (1921). In some cases, defense of a prosecution may be justified as a protective measure, to avoid guilty pleas or other actions which might seriously prejudice the government in the defense of other potential or pending Federal Tort Claims Act litigation in which there is substantial exposure as in the case of death, or serious personal injuries or very substantial property damage. While the Department of Justice has ultimate authority to grant or deny employee representation, the decision with regard to minor traffic violations and other small matters requires an analysis of the interest of the United States giving heavy weight to the position of the U.S. Attorney as to whether representation would impact unduly on available staff and resources. The other primary factors are whether the incident involved personal or property injury that may result in a tort claim against the United States or its individual employee and whether the Supremacy Clause of the Constitution or similar federal concepts may be implicated. Representation in such cases may be considered and denied at the Torts Branch level. See Torts Branch Representation Monograph I.

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It is generally advisable to remove criminal prosecutions to federal court. See, e.g., Norfolk v. McFarland, 143 F. Supp. 587 (E.D. Va.) and the subsequent disposition in that case at 145 F. Supp. 258. This must usually be done within thirty days after arraignment except for good cause shown. See 28 U.S.C. §1446 (c)(1). See the topic on Removal in the Civil Division Practice Manual, §§3-1.1, et seq., for forms and a discussion of removal.

4-13.330 Customs Matters

19 U.S.C. §1513, immunizing customs officers from liability, is very broad and should provide an adequate defense to any customs-related action likely to be asserted against customs employees. The determinations of customs officers, unless timely protest is filed under 19 U.S.C. §1514 or judicial review is timely sought under 28 U.S.C. §2632, are "final and conclusive upon all persons." See 19 U.S.C. §1514(a).

Exclusive jurisdiction over customs matters and import-related international trade matters (antidumping duty and countervailing duty cases) is vested in the Court of International Trade. See 28 U.S.C. §§1581 and 1582. Any suit involving matters potentially falling within those statutory provisions should be brought to the attention of the Commercial Litigation Branch of the Civil Division (Branch Director, FTS 724-7691) immediately.

4-13.335 Energy Cases

Effective April 20, 1978, the Department of Justice and the Department of Energy entered into a Memorandum of Understanding concerning the handling of litigation involving the newly-created latter agency. That Memorandum (a copy of which will be included in Title 1 of this Manual, at Chapter 9) relates principally to "civil regulatory cases" and provides for the division between the two Departments of primary litigation responsibility for cases arising primarily or exclusively under the Emergency Petroleum Allocation Act of 1973 (EPAA; see Memorandum, Par. 3), and for other civil regulatory litigation (see Memorandum, Par. 7). These cases are both defensive and affirmative, although up to now defensive litigation has predominated.

Prior to issuance of that Memorandum, the former Economic Litigation Section of the Civil Division handled virtually all of the petroleum

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pricing and allocation litigation arising from the EPAA and other statutes. Primary litigation responsibility for these pending cases is now divided between the Federal Programs Branch of the Civil Division and the DOE Office of General Counsel, Division of Regulatory Litigation. Thus, in a number of pending and future actions, DOE attorneys will be primarily responsible for the conduct of the litigation. The assignment of primary and secondary litigation responsibility is ordinarily to be carried out by the Civil Division, in communication with the DOE Office of General Counsel. Federal Programs Branch attorneys have been instructed upon receipt for a case assignment or other matter to send a letter to that office setting forth all available information, including a statement as to where the primary litigation responsibility is being assigned. A copy of that letter is to be sent to the relevant U.S. Attorney's office, so it can be determined whether DOJ or DOE has such responsibility. The U.S. Attorney will also be advised of any change in that assignment.

The Civil Division particularly requests that the U.S. Attorneys' offices continue to assist with the filing and service of papers and, on request, assist the federal government with status calls and court conferences, whether Justice or Energy exercises primary responsibility. Additionally, particularly in those cases in which Energy is exercising primary litigation responsibility, the U.S. Attorneys should be designated as the government's local counsel and be served (together with DOE and DOJ) with copies of papers. The U.S. Attorneys should also advise both DOJ and DOE of significant developments in such cases. Both Energy and Justice attorneys have been instructed that they should not (except in extreme emergency) request the U.S. Attorneys' offices to prepare papers when the litigation is not being handled directly by the U.S. Attorney.

The Civil Division appreciates the cooperation of U.S. Attorneys in these cases and welcomes comments and suggestions for improvement of this system of litigation handling. Questions dealing with the handling of energy litigation should be directed to Max Vassanelli (FTS 633-3313), or to Dennis G. Linder (FTS 633-3314), Director, Federal Programs Branch, Civil Division, Department of Justice, Room 3744, Washington, D.C. 20530.

4-13.340 Equal Employment Opportunity Cases

Please refer to Civil Division Practice Manual, §§3-37.1, et seq., for a complete discussion of these cases.

All cases arising under §717 of Title VII, Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-16, fall within the jurisdiction of the Federal Programs Branch for the Civil Division.

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4-13.350 Personnel Actions

See Civil Division Practice Manual §§3-22.1, et seq.

4-13.360 Tort Actions

Suits against government drivers are discussed at USAM 4-13.363, infra. Suits against certain medical personnel who are immunized by statute from personal liability are discussed at USAM 4-10.364, supra. The limited circumstances in which certain law enforcement officers may be personally liable for constitutional violations are discussed at USAM 4-13.362, infra.

It has been the practice of the Department of Justice to afford counsel and representation to government employees and members of the armed services who are sued civilly, when a money judgment is sought. See cases collected in Booth v. Fletcher, 101 F.2d 676, 682, fn. 20 (D.C. Cir.), cert. denied, 307 U.S. 628 (1961). Representation will ordinarily be authorized if the employee is sued as a result of his/her performance of official duties, i.e., in tort suits if he/she was acting within the scope of his/her employment. If there is serious doubt as to whether the employee was acting within the scope of his/her employment in tort suits, representation may be declined, since "scope of employment" will probably be an issue in a subsequent Federal Tort Claims Act suit. See USAM 4-13.000, supra, as to Civil Division authorization and emergency requests. If the matter is de minimis and representation is not required under the Drivers' Act USAM 4-13.363, infra, representation will be declined. If the employee carries liability insurance and is sued civilly in tort under circumstances not covered by the Drivers' Act, the defense of the litigation should be left to insurance counsel, unless the coverage of the policy appears inadequate to meet the damage award anticipated. In the latter situation, the U.S. Attorney should monitor the preparation and defense of the action and participate to the extent he/she feels is necessary to see that adequate representation is afforded the employee. See Torts Branch Representation Monograph I.

The cost of removal of civil actions in which representation is provided, including a removal bond when required, the cost of summoning witnesses, taking depositions, procuring transcripts of testimony at the trial, and similar related litigation expenses, may be defrayed from Justice Department appropriations. See 31 Comp. Gen. 661, 662. See the topic on Removal in the Civil Division Practice Manual, §3-1.1, et seq. The government cannot pay judgments entered against its employees, or

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amounts agreed upon by them in settlement of civil litigation. Accordingly, all settlement offers should be submitted to the employee for acceptance or rejection.

4-13.361 Generally

Authority for making the certification that an officer, members of the armed services or employee was acting within the scope of his/her employment for purpose of the Drivers Act and VA and PHS related Acts, has been delegated to the U.S. Attorneys. See 28 C.F.R. §15.3, and see USAM 4-13.363, 4-13.364, infra. Representation may be afforded in such cases when scope of employment has been certified by the U.S. Attorney, without prior consultation with the Civil Division, subject to the instructions and supervision of the Civil Division which may include withdrawal of certification. See 28 C.F.R. §15.3. In all other cases in which officers, members of the armed services and employees are sued civilly, the person seeking representation should be advised to submit a written request for representation through his/her agency head to the Department of Justice. Determinations as to representation are made on a case-by-case basis. It is particularly important that representation not be provided, nor should an appearance be entered on behalf of, nonfederal law enforcement officers without the very explicit approval of the Department. A person seeking representation should understand, of course, that he is free to retain private counsel of his choice at his own expense, but that, in any event, payment of any judgment or settlement, with the exceptions noted in USAM 4-13.363 and 4-13.364, infra, will be his own responsibility. The Torts Branch of the Civil Division (USAM 4-1.226, supra) should be consulted in negligence cases and in actions asserting a violation of constitutional rights. See Torts Branch Representation Monograph I.

The Department of Justice position is that all federal employees who are sued for money damages are entitled to 60 days within which to respond to a complaint. Therefore, even prior to the authorization of representation, Assistant U.S. Attorneys are authorized without further communication from the Department to provide federal employees with representation for the limited purpose of assuring they receive 60 days. However, the issue is far from settled and prudence dictates that care be taken to protect individuals, who are served with a summons which appears to require an answer or responsive pleading in less than 60 days. See, e.g., Dickens v. Lewis, (5th Cir., No. 84-2134, November 5, 1984); Wallace v. Chappell, 637 F.2d 1345 (9th Cir. 1981); Williams v. Collins, 728 F.2d 721 (5th Cir. 1984); See Torts Branch Representation Monograph I.

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4-13.362 Bivens Cases

The general rules regarding the immunity of federal officials sued for violations of constitutional rights are as follows: 1) Absolute immunity is available when federal officials perform special functions where the public interest, as determined by reference to the common law and our constitutional heritage and structure, demands a full exception from liability, *i.e.*, performance of adjudicative and prosecutive functions; (See, USAM 1-6.300 through 1-6.311; 1-10.140); 2) Where absolute immunity is not available, qualified immunity protects the federal official as long as he/she does not violate clearly established constitutional standards; 3) As a corollary to number two above, even where the law is clearly established, an official pleading the defense of qualified immunity may show any "extraordinary circumstances" in which he/she acted and that he/she neither knew nor should have known of the relevant legal standard, in which case qualified immunity would also be available.

In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court, for the first time, ruled that a federal official may be sued for violations of certain constitutional rights. Bivens itself only addressed the question of remedy and provided no guidance as to what, if any, immunity might protect an official from a constitutional tort action. Shortly thereafter, the Supreme Court decided Scheuer v. Rhodes, 416 U.S. 232 (1974), limiting state executive officials to a qualified immunity in 42 U.S.C. §1983 damages actions. Although distinguishable, lower courts began applying Scheuer to Bivens actions. This approach was more or less approved when the Supreme Court decided Butz v. Economou, 438 U.S. 478 (1978). In Butz, the Supreme Court established the principle that most federal executive employees sued for constitutional torts are entitled only to a qualified, rather than an absolute immunity from suit although some officials performing special functions still would be protected by absolute immunity. Subsequently, the qualified immunity standard was significantly recast in Harlow v. Fitzgerald, 457 U.S. 800 (1982), by abolishing the subjective branch of the two-part objective-subjective test for qualified immunity put forth in Wood v. Strickland, 420 U.S. 308, reh'g denied, 421 U.S. 921 (1975), and Butz v. Economou, *supra*. Under the reformulated qualified immunity standard "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." See Harlow v. Fitzgerald, *supra*, at 818. As a corollary to this rule, the Court went on to hold that even where the law was clearly established, an in which he acted and that he/she neither knew nor should have known of the relevant legal standard, in which case he/she would be protected by immunity. *Id.* at 819.

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Harlow represents a dramatic change in the qualified immunity doctrine. Under the standard established in Butz, an official would have to establish that his/her actions were both objectively reasonable and subjectively undertaken in good faith in order to avoid liability. In Harlow, the Supreme Court dispensed with the requirement that an official demonstrates subjective good faith finding that the cost of implementing that requirement in the lower courts unacceptably high, noting the distraction of officials from their governmental duties, inhibition of discretionary action, and deterrents of able people from public service. (Id. at 8167). The Court also found that the requirement was being applied in the lower courts in a manner incompatible with its exhortation in Butz, supra, 507-508, that insubstantial suits against officials having discretionary authority should be resolved at the preliminary motion stage under firm application of the Federal Rules of Civil Procedure. See Harlow v. Fitzgerald, supra at 815-16. In view of these problems, the Supreme Court ruled that immunity questions should be decided at the threshold, without discovery, on the basis of whether the applicable law was clearly established at the time the defendant acted. Id. at 818. Accordingly, Harlow places beyond judicial scrutiny matters going to a defendant official's subjective motivation or intention underlying the acts on which the suit is based. With respect to the operation of Rule 56, Federal Rules of Civil Procedure, therefore factual matters pertaining to a defendant official's motivation or intent are no longer "material" under Rule 56(c). See Krohn v. United States, 742 F.2d 24 (1st Cir. 1984). Whether an official may prevail in his/her qualified immunity defense depends solely on the "objective reasonableness of his [conduct], as measured by reference to clearly established law." Harlow supra at 818. See also Davis v. Scherer, _____ U.S. _____ 104 S. Ct. 3012 (1984).

While the full impact of the Harlow standard remains unclear, some general principles have emerged: 1) Although the Supreme Court limited the immunity to "government officials performing discretionary functions" (Harlow, supra at 818) and although Harlow, itself, involves senior presidential assistants, lower courts have not restricted the immunity to officials of policy making rank but have deemed it applicable to lower level officials exercising limited discretion as well. See, e.g., Trejo v. Perez, 693 F.2d 482, 487, n. 9 (5th Cir. 1982), Saldana v. Garza, 693 F.2d 1159, 1163-64, (5th Cir. 1982), cert. denied, 460 U.S. 1012 (1983); 2) To receive the immunity's protection from Bivens liability, an official only must show that his/her conduct did not transgress clearly established constitutional rights. "Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." See Davis v. Scherer, supra, at 320; 3) The Supreme Court has made it abundantly clear that the qualified immunity inquiry is a limited one--whether an official may prevail in his/her qualified immunity defense depends upon the objective reasonableness of his/her conduct as measured by reference to clearly established law.

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No other circumstances are relevant to the issue of qualified immunity; 4) Qualified immunity is an affirmative defense that must be pleaded, or the defense is waived. See Gomez v. Toledo, 446 U.S. 635 (1980). However, once qualified immunity is pleaded, the circuits differ as to which party bears the burden of persuasion. See Saldana v. Garza, *supra*, and cases there cited.

Although the Supreme Court did not define just how a right becomes "clearly established" the Court's earlier opinions in the immunity area provide guidance on this point. The right at issue should not be defined "so broadly as to parrot the language in the Bill of Rights" for such a reading would "undermine the premise of qualified immunity that the government actors reasonably should know that their conduct is problematic;" See Hobson v. Wilson, 737 F.2d 1, 26 (D.C. Cir. 1984), *cert. denied sub nom. Brennan v. Hobson*, 53 U.S.L.W. 3678 (U.S. March 25, 1985). [Emphasis in original]. Indeed, it seems clear that something more is required than that the unconstitutionality of the challenged conduct was "clearly foreshadowed" by earlier decisions; See Zweibon v. Mitchell, 720 F.2d 162, 172 (D.C. Cir. 1963) (Zweibon IV), *cert. denied*, 53 U.S.L.W. 3269 (U.S. October 9, 1984). As the Court of Appeals reasoned in Zweibon IV, "the content of the [Harlow] standard is identical to that for establishing the "objective" element of the old two-pronged test for qualified immunity" which the Supreme Court had defined in terms of "'of disputable law and unquestioned rights'" Zweibon v. Mitchell, *supra* at 172-73). Emphasis in original, quoting Wood v. Strickland, 420 U.S. 308, 321 (1975). See also Capoeman v. Reed, 754 F.2d 1512, (9th Cir. 1985).

Before any immunity is asserted, several precautionary measures must be taken when reviewing a complaint seeking damages under a constitutional tort theory: 1) determine whether some factually viable claim has been asserted against the defendant official; 2) assuming a sufficient claim has been stated, it is important to categorize that claim (i.e., Bivens, common law or statutory); 3) even if a viable constitutional claim has been alleged, plaintiff does not automatically have a Bivens remedy since Bivens specifically recognized that a damages remedy may not be appropriate where an equally effective remedy had already been provided by Congress or where "special factors counsel [] hesitation in the absence of affirmative action by Congress." (Bivens, *supra*, at 396-97). See Torts Branch Representation Monograph III.

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4-13.362A Appealability of Immunity Claims

The current immunity doctrines not only are designed to protect officials from liability but from the burdens of litigation as well. Harlow v. Fitzgerald, 457 U.S. 800 (1982); Supreme Court of Virginia v. Consumers Union of the United States, Inc., 446 U.S. 719 (1980). Clearly this protection will be lost irretrievably if the immunity claim is not resolved until after discovery and trial. Accordingly, in order to protect the federal official from the burdens of trial and discovery, a denial of an immunity claim must be immediately appealable as a collateral order under 28 U.S.C. §1291. The Supreme Court has long since concluded that an order denying an absolute immunity defense is immediately appealable. See, e.g., Nixon v. Fitzgerald, 457 U.S. 731 (1982); Helstoski v. Meanor, 442 U.S. 500 (1979). Until recently, however, the circuits have been divided on this question as it relates to a denial of qualified immunity. The Supreme Court has now resolved the question holding that a "district court's denial of a claim of law, is an appealable 'final decision', within the meaning of 28 U.S.C. §1291 notwithstanding the absence of a final judgment." Mitchell v. Forsyth, 53 U.S.L.W. 4798 (U.S. June 19, 1985). However, not every denial of an immunity claim merits an appeal and very close contact should be maintained with the Department's Civil Division and Appellate Staff. See Torts Branch Representative Monograph III.

4-13.363 Drivers Act Cases

Congress amended the Federal Tort Claims Act in 1961, to provide that the remedy by suit against the United States under the Federal Tort Claims Act, for damage to property or personal injury or death resulting from the operation of any motor vehicle by any employee of the government while acting within the scope of his/her office or employment, is to be exclusive of any other civil action or proceeding against the employee or his/her estate. See 28 U.S.C. §2679(b). This action was taken to relieve such employees of the burden of liability for certain torts, and from the need to pay for private insurance to cover their personal liability in tort while driving on government business. See Vantrease v. United States, 400 F.2d 853 (6th Cir. 1968). The motor vehicle can be privately owned, if in fact it was being driven by an employee acting within the scope of his/her employment. See 28 U.S.C. §2679(c), which requires the Attorney General to defend such suits brought in any court against such employees. Upon the Attorney General's certification that the employee was acting within the scope of his/her employment at the time of the incident giving rise to suit and removal, when a state court action is involved, the action is "deemed a tort action brought against the United States" under the Federal Tort Claims Act. See 28 U.S.C. §2679(d).

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The authority to certify "scope of employment" has been delegated to the U.S. Attorneys. See 28 C.F.R. 15.3; and see USAM 4-13.361, supra. The question of scope of employment is to be determined by reference to the applicable state law having regard for all of the facts, including those bearing on the driver's duties, his/her authorized destination, his/her instructions, whether he/she has engaged in furtherance of his/her own personal interests, and any other relevant data. The employee's employing agency is required to submit a report containing all data bearing on this issue. See 28 C.F.R. §15.2. Certification should be made and the case removed, if brought in state court, even though the claim may be time barred (cf. Carr v. United States, 422 F.2d 1007 (4th Cir.)), or the plaintiff is barred from recovery against the United States because of one of the implied exceptions to the Act discussed in USAM 4-11.652, supra. See Vantrease v. United States, supra. Gilliam v. United States, 407 F.2d 818 (6th Cir.); Van Houten v. Ralls, 411 F.2d 940 (9th Cir.); Carr v. United States, supra.

If the U.S. Attorney is satisfied that the Drivers Act applies, there has been no administrative claim filed with the employee's department or agency, and time remains for such action, plaintiff's attorney should be advised in writing that the exclusive remedy of the plaintiff is against the United States under the Federal Tort Claims Act, and that the Act requires as a prerequisite to suit that an administrative claim be filed with the government agency concerned. If counsel does not voluntarily dismiss the action within ten days, the U.S. Attorney should proceed with certification of scope of employment and with removal to federal court, or, if the action was filed in federal court initially, with substitution of the United States as defendant. If the U.S. Attorney is uncertain as to scope of employment, the application of the statute of limitations, or one of the implied exceptions he/she should consult with the Torts Section of the Civil Division. See USAM 4-1.226, supra.

Removal without bond is expressly authorized by 28 U.S.C. §2679(d). Remand is appropriate only if the employee was in fact acting outside the scope of employment. See Vantrease v. United States, supra; Van Houten v. Ralls, supra. Under the statute, removal may be effected any time prior to trial. If the driver has personal insurance which covers the United States as an additional insured. GEICO v. United States, 349 F.2d 83 (10th Cir. 1965); Taggart v. United States, 262 F. Supp. 572 (M.D. Pa. 1967), and the insurance company prefers to assume defense of the action, this may be permitted if the U.S. Attorney is satisfied that the interests of the driver-employee will be fully protected under the circumstances. In the event of doubt, the Torts Section should be consulted.

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its discretion may deny injunctive relief. Establishing the fallacy of plaintiff's contentions of illegal, unconstitutional, or arbitrary action, is desirable in every case. Additional defensive suggestions are discussed below.

Frequently, requests for injunctive relief can be defeated by showing a failure to exhaust administrative remedies. See in this connection USAM 4-5.922, supra, and USAM 4-13.434, infra. Clearly, injunctive relief should be denied if there is an adequate remedy at law. See USAM 4-13.435 and 4-13.411, infra.

There must be a violation of plaintiff's legal interests for him to have standing to maintain an action for injunctive relief. See USAM 4-5.923, supra and 4-13.431, infra. Government officials should be allowed wide latitude in ordering the internal affairs of the government and the discretion which this entails. See Sampson v. Murray, 415 U.S. 61; Panama Canal Co. v. Grace Lines, Inc., 356 U.S. 309 (1939); Cf. USAM 4-13.420. Of course, there must be an actual case or controversy to invoke the court's authority to hear cases. See City of Los Angeles v. Lyons, _____ U.S. _____, 51 U.S.L.W. 4424, 4426 (1983); United Public Workers v. Mitchell, 330 U.S. 75, 89-91 (1946); Laird v. Tatum, 408 U.S. 1, 14-13 (1972); and see USAM 4-13.432. Even then, the controversy may not be "ripe" for adjudication in an injunction action. Longshoreman's Union v. Boyd, 347 U.S. 222, 224 (1948); Youner v. Harris, 401 U.S. 37 (1971).

A district court may vacate or modify an injunction or consent decree where, in light of changed circumstances, the order no longer accomplishes the purposes for which it was intended. See System Federation No. 91, Railway Employee's Department, AFL-CIO v. Wright, 364 U.S. 642, 647 (1961); United States v. Swift & Co., 286 U.S. 106, 114-15 (1932); Consolidated Edison Co. of New York v. FPC, 511 F.2d 372, 378 (D.C. Cir. 1974); Luevano v. Campbell, 93 F.R.D. 68, 92-93 (D.D.C. 1981).

"Changed circumstances" may result from a variety of factors. For example, there can be an alteration in the surrounding factual circumstances, as a result of which the decree threatens to do more harm than good. See, e.g., Consolidated Edison Co. v. FPC, supra, at 378. Alternatively, when the parties' experience with the decree shows that the decree is not realistically achievable or is not adaptable properly to accomplishing its purpose, this is a sufficient demonstration of changed circumstances. See Philadelphia Welfare Rights Org. v. Shapp, 602 F.2d 1114, 1120-21 (3d Cir. 1979); King-Seeley Thermos Co. v. Alladin Industries, Inc., 418 F.2d 31, 35 (2d Cir. 1969). Finally, changes in the law applicable to the subject matter area covered by the decree may

obviate the necessity of that decree or compel its modification. See, e.g., System Federation 91 v. Wright, supra, at 647-653 (1961).

4-13.411 Restraining Orders and Preliminary Injunctions

TROs and preliminary injunctions may only issue to maintain the status quo or the best approximation of the past positions of the parties and prevent irreparable harm, just for so long as it is necessary to hold a hearing on the issuance of an injunction and no longer. See USAM 4-10.430, supra. See USAM 4-10.420, supra, specifically, for the issuance of TROs, which may be issued for ten days and then renewed for an additional ten days upon a showing of good cause. See Rule 65(b), Fed. R. Civ. P. Four criteria which must be considered by the court in determining whether a preliminary injunction will issue are discussed in USAM 4-10.420, viz., (1) a strong likelihood of plaintiffs prevailing on the merits, (2) a showing that irreparable harm will ensue if the preliminary injunction does not issue, (3) a balancing of the harm to plaintiff and other parties, and (4) a determination that granting the injunction is in the public interest. See Virginia Petroleum Jobbers Assn v. FPC, 259 F.2d 921 (D.C. Cir. 1958); Washington Metro Area Transit Comm. v. Holiday Tours, 559 F.2d 841 (D.C. Cir. 1977). The court may weigh the various factors to determine whether the balance tips in plaintiff's favor. See Washington Metro Area Transit Comm., supra. See USAM 4-13.350, infra, for additional criteria to be considered in government personnel cases.

A preliminary injunction is an extraordinary and drastic remedy. See Canal Authority of State of Florida v. Callaway, 489 F.2d 567, 572-573 (5th Cir. 1974). It should never be indulged except in cases clearly warranting it. See Sierra Club v. Hickel, 433 F.2d 24 (9th Cir.), aff'd., sub nom., Sierra Club v. Morton, 405 U.S. 727 (1972). Rule 63, Federal Rules of Civil Procedure, must be strictly complied with. See Commercial Security Bank v. Walker Bank & Trust Co., 456 F.2d 1352 (10th Cir.).

The requirement that there be a substantial likelihood of plaintiff's success on the merits of his prayer for permanent injunctive relief. (Sierra Club v. Hickel, 433 F.2d 24 (9th Cir.); aff'd., sub nom., Sierra Club v. Morton, supra; Creamer v. United States, 469 F.2d 1387 (3d Cir.)), necessarily requires a sufficient consideration of the merits of the dispute to permit a judgment as to the probable outcome of plaintiff's attempt to show irreparable harm, and the lack or clear inadequacy of any legal remedy. Thus, an important threshold inquiry in defense against a request for a temporary restraining order or injunction should be whether or not there has in fact been an exhaustion of administrative remedies.

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order must conform to the Rule 65(b) standards applicable to preliminary injunctions, and it is then appealable. See Sampson v. Murray, 415 U.S. 61 (1973); Telex Corp. v. IBM Corp., 464 F.2d 1025 (8th Cir.); Sims v. Greene, 160 F.2d 512 (3d Cir.); National Mediation Board v. Air Line Pilots Assn., Int'l., 323 F.2d 305 (D.C. Cir.).

4-13.420 Mandamus

Mandamus is an extraordinary legal remedy, brought to coerce official action. See USAM 4-10.600, supra. Though originally at law, its allowance is controlled by equitable principles, and mandamus may be refused even though plaintiff had an undoubted legal right. See Greathouse v. Dern, 289 U.S. 352. See USAM 4-10.600, supra, for instances in which the government may seek mandamus. The following sections discuss mandamus in further detail and as an aid in the defense of mandamus actions against government officials.

In Hammond v. Hull, 131 F.2d 23 (D.C. Cir.), cert. denied, 318 U.S. 777, the court summarized the principles applicable to actions in the nature of mandamus, by stating that:

- A. Mandamus is only available if the duty to act is clearly established and the obligation to act peremptory;
- B. There is a presumption of validity attending official actions;
- C. The courts have no general supervisory power over the Executive Branch of the government by mandamus;
- D. The interpretation given a law by administrative officials will not be interfered with unless it is clearly wrong and the official action taken is arbitrary and capricious;
- E. Only in a clear case of illegality will the courts intervene and displace the judgment of administrative officers or bodies; and
- F. Administrative remedies must be exhausted before judicial relief can be obtained by mandamus or otherwise.

4-13.421 Mandamus is Not Available Against the United States

The district courts have no jurisdiction of a suit seeking mandamus against the United States. See United States v. Jones, 131 U.S. 1 (1889); Minnesota v. United States, 305 U.S. 382 (1939); United States v. United

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States Fidelity Co., 309 U.S. 506 (1940); United States v. Sherwood, 312 U.S. 584 (1941); McCune v. United States, 374 F. Supp. 946 (S.D. N.Y.).

28 U.S.C. §1361, giving the United States district courts jurisdiction of "an action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff," speaks only of compelling an officer or employee. The committee reports accompanying this enactment make clear that the legislation did not create new liabilities or new causes of action against the United States. See S. Rept. 1992, 87th Cong., 2d Sess., p. 2; H. Rept. 536, 87th Cong., 2d Sess., p. 1.

(Note, however, that 5 U.S.C. §703 and 28 U.S.C. §1311 permit a plaintiff to name the United States or its agency as a defendant and obtain a "mandatory injunction" in a proper action under the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §701 et seq.)

4-13.422 Jurisdiction and Venue

Prior to the enactment of 28 U.S.C. §1361 in 1962, the courts of the District of Columbia, possessing the entire common law jurisdiction of the courts of Maryland (D.C. Code 49-301), were held to have exclusive jurisdiction to issue mandamus to require a government official to take affirmative action in the performance of his/her official duties, and district courts outside the District of Columbia had no such authority. See Kendall v. United States, 12 Pet. (37 U.S.) 524 (1838); United States v. Shurz, 102 U.S. 378 (1829); Marshall v. Crotty, 185 F.2d 622, 626-627 (1st Cir.); Updegraff v. Talbott, 221 F.2d 342, 346 (4th Cir.). The sole effect of 28 U.S.C. §1361 is to extend to all United States district courts the same jurisdiction theretofore enjoyed only by the D.C. courts, and no substantive change in the law of mandamus was effected. See Carter v. Seamans, 411 F.2d 767 (5th Cir.), cert. denied, 397 U.S. 941. At the same time, Congress amended 28 U.S.C. §1391 by adding a new subsection (e) thereto, thus enabling plaintiffs to effect service of process on defendant officers and employees of the United States, or any agency thereof, beyond the territorial limits of the district in which suit was brought. Suit was authorized to be brought in any judicial district in which (1) a defendant in the action resides, (2) the cause of action arose, (3) any real property involved in the action is situated, or (4) the plaintiff resides, if no real property is involved in the action.

28 U.S.C. §1391(e) only applies in suits against federal defendants who are suable in the District of Columbia. See Natural Resources Defense

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legal remedy aside from mandamus, such as a suit for monetary judgment or the opportunity to raise the legal issues involved in a suit brought by the government. See Girard Co. v. Helvering, 301 U.S. 540, 544 (1937); Spielman Motor Co. v. Dodge, 295 U.S. 89 (1935); Whittier v. Emmet, 281 F.2d 24, 28-29 (D.C. Cir.); Nixon v. Sirica, 487 F.2d 700 (D.C. Cir.); Lovullo v. Froehlke, 468 F.1d 340 (2d Cir.), cert. denied, 411 U.S. 918. Mandamus is not available, if a statutory method of review is authorized. Wellens v. Dillon, 302 F.2d 442 (9th Cir.), app. dismissed, 371 U.S. 90 (1967). Mandamus does not supersede other remedies; it only comes into play when there is a want of such remedies. See Carter v. Seamans, 411 F.2d 767 (5th Cir.), cert. denied 397 U.S. 941.

4-13.436 Nondiscretionary Ministerial Duties Affected

The power of a district court to compel official action by mandatory order is limited to the enforcement of nondiscretionary, plainly defined, and purely ministerial duties. See Decatur v. Paulding, 14 Pet. (39 U.S.) 497, 514-517; Work v. Rives, 267 U.S. 175, 177 (1925); Wilbur v. Kadrie, 281 U.S. 206, 218 (1840); Girard Trust Co. v. Helvering, supra, at 543; Smith v. United States, 333 F.2d 70 (10th Cir.); Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364 (10th Cir.), cert. denied, 411 U.S. 918. An official action is not ministerial unless "the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command." See Wilbur v. Kadrie, supra; McLennan v. Wilbur, 283 U.S. 414, 420; ICC v. New York, N.H. & H.R. Co., 287 U.S. 178, 204; Girard Trust Co. v. Helvering, supra; Will v. United States, 389 U.S. 90 (1967); Donnelly v. Parker, 486 F.2d 402 (D.C. Cir.). "But where there is discretion *** even though its conclusion be disputable, it is impregnable to mandamus." See Alaska Smokeless Coal Co. v. Lane, 250 U.S. 549, 555 (1919).

Where the scope of an official's duty depends upon an interpretation of a statute, the duty is not a ministerial one, enforceable by mandamus, unless the construction or application of the statute is so plain as to be free from doubt. See Hall v. Payne, 254 U.S. 343 (1920); Work v. Rives, 267 U.S. 175 (1925); Wilbur v. Kadrie, supra, at 218-219; ICC v. New York, N.H. & H.R. Co., supra; Chicago Great Western R. Co. v. ICC, 294 U.S. 50, 63 (1935); see also Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309; Decatur v. Paulding, 14 Pet. (39 U.S.) 497; Adams v. Nagle, 303 U.S. 532, 542 (1938). The courts have no general supervisory power over the actions of administrative departments of the government by mandamus. See Keim v. United States, 177 U.S. 290 (1900); Hammond v. Hull, 131 F.2d 23 (D.C.

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Cir.), cert. denied, 318 U.S. 777. "The interference of the courts with performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied, that such a power was never intended to be granted to them." Decatur v. Paulding, supra at 515.

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4-14.000 ACTIONS BY THE UNITED STATES ON BEHALF OF PERSONS OUTSIDE THE GOVERNMENT

4-14.100 REEMPLOYMENT RIGHTS

The reemployment statute, 38 U.S.C. §2021-2026 (predecessor provisions include the former 50 U.S.C. App. 459), confers upon each returning serviceperson the right of restoration to his/her pre-sevice employment, or placement in a like position, with the same seniority, status, and pay he/she would have enjoyed had he/she remained employed throughout the time he/she was in service. See Fishgold v. Sullivan Corp., 328 U.S. 275 (1946). A reemployed veteran is also protected for one year against discharge without cause. See 38 U.S.C. §2021(b)(1); Carter v. United States, 407 F.2d 1238 (D.C. Cir.).

Time spent in the military may be counted in computing the length of employment, for purposes of severance pay (Accardi v. Pennsylvania R. Co., 383 U.S. 225 (1966)), and vacations (Morton v. Gulf, Mobile and Ohio R. Co., 405 F.2d 415 (8th Cir. 1966)), when such benefits, for practical purposes, are based on length of employment or seniority. If eligibility for them arises from some kind of "actual work" requirement, however, periods of military service are excluded. See Foster v. Dravo Corp., 420 U.S. 92 (1975).

If the veteran subsequently elects not to insist upon reinstatement, he/she can still recover the wages he/she would have earned, running from the date of his/her application for reinstatement until he/she is reinstated or he/she is given a better offer which he/she refuses, less mitigation. See O'Mara v. Peterson Sand & Gravel Company, Inc., 77 CCH Labor Cases ¶11, 152 (N.D. Ill.) following remand ordered at 498 F.2d 896 (7th Cir.). Reinstatement in the pre-service position, if desired, should be with augmented seniority, status, and pay, together with amounts lost due to the employer's failure to honor the veteran's statutory rights. See Teamster's Local v. Helton, 413 F.2d 1380 (5th Cir.).

The Office of Personnel Management enforces the reemployment rights of federal government employees. See 38 U.S.C. §2023. Employees in private industry, and (following recodification of the applicable statutes in Title 38, U.S.C., as of December 3, 1974) employees of states or political subdivisions thereof, can enforce their own reemployment rights by suit in a U.S. district court. See 38 U.S.C. §2022.

The statute calls for the court to order speedy hearings in such cases, and to advance them on the calendar; no fees or court costs can be taxed against the veteran; and state limitations statutes are expressly rendered

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inapplicable. See 38 U.S.C. §2022. That same section requires the U.S. Attorney, if "reasonably satisfied" that the veteran is entitled to reemployment benefits, to represent him/her.

If a veteran applies directly to a U.S. Attorney for such representation, however, he/she should be initially referred to the appropriate Area Office of the Department of Labor's Office of Veterans' Reemployment Rights, for an investigation of the facts and attempts to effect an amicable adjustment of the claim. If necessary, such claim will eventually be referred to the Department of Justice (through the Commercial Litigation Section of the Civil Division), for possible litigation.

If representation is declined after such referral, the veteran should be notified in writing of his/her continuing statutory right to pursue the claim through private counsel. If representation is accepted and suit is brought, the U.S. Attorney is not fully successful in obtaining the relief sought, and the Solicitor General declines to authorize appeal, care should nevertheless be taken to protect the veteran's appellate right, since he/she can pursue an appeal through other counsel if he/she so desires. Notice of appeal must be filed within 30 days after entry of judgment (Rule 4(a), Fed. R. App. P.), since reemployment litigation is "private" in nature.

If an accommodation or settlement of the claim, acceptable to the veteran, is worked out either before or after suit is filed, it can be consummated without approval from the Civil Division.

Veteran's reemployment cases should be given expedited attention. This subject will be treated in the Civil Division Practice Manual, §§3-31.1, et seq. See also the Labor Department's "Legal Guide and Case Digest, Veterans' Reemployment Rights" (each U.S. Attorney has a copy in his/her library), and the comprehensive annotation at 29 A.L.R. 2d 1279-1341.

4-14.200 DEFENSE OF GOVERNMENT COST-PLUS CONTRACTORS

On infrequent occasions, the Department may be asked to defend suits brought against cost-plus-a-fixed-fee contractors with the government. The policy of providing representation stems from the fact that in most instances it will be necessary for the government to reimburse the contractor, not only for any recoveries obtained against it in suits arising out of the performance of the government contract, but also for fees paid to private counsel in defense of that litigation. Thus, it is to the government's interest to furnish legal representation, to save legal expenses and make certain that the defense of the litigation is vigorously pursued. The U.S. Attorney is responsible for representation

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of the contractor, whenever requested to do so by the local officer representing the contracting agency. For coordination purposes, the Civil Division should be advised when such a request is made.

4-14.300 OTHER

Infrequently, the Attorney General may be called upon to bring an action in which the United States is cast in the role of parens patriae ("father of the country"), an inheritance of royal prerogative from England. See Stanley v. Schwalby, 147 U.S. 508, 516 (1893). A state may be cast in this role in litigation, usually in protecting the health, comfort, and welfare of its citizens, as in protecting the rights of persons under legal disability who are unable to act for themselves. In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 131 (9th Cir.), cert. denied., 414 U.S. 1045; Gibbs v. Titelman, 369 F. Supp. 38, 54 (E.D. Pa.); and see Hawaii v. Standard Oil Co., 405 U.S. 251 (1972). However, when federal legislation is involved, it is the United States, not the state, which occupies the relationship of parens patriae. State of Minnesota v. Benson, 274 F.2d 764 (D.C. Cir.).

For an action in which the United States sued on behalf of the beneficiaries of a charitable trust, see United States v. Mt. Vernon Mortgage Corp., 128 F. Supp. 629 (D. D.C.), aff'd., 236 F.2d 724 (D.C. Cir.), cert. denied., 352 U.S. 988 (1957). Requests for such representation should be cleared with the Civil Division.

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